REPORT OF THE CIVIL JUSTICE ADVISORY GROUP SOUTHERN DISTRICT OF INDIANA

APPOINTED UNDER THE
CIVIL JUSTICE REFORM ACT OF 1990

CIVIL JUSTICE REFORM ACT OF 1990

REPORT AND PROPOSED PLAN OF THE CIVIL JUSTICE ADVISORY GROUP SOUTHERN DISTRICT OF INDIANA

December 1991

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
FOR THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA

Joe C. Emerson, Chair

Lauren Robel, Reporter

Honorable Sarah Evans Barker
James E. Bourne
Honorable Deborah Daniels
Stanley C. Fickle
Eric A. Frey
Honorable John Paul Godich
Martha S. Hollingsworth
Steven L. Huddleston
Honorable Larry J. McKinney
Debra McVicker Lynch
Robert Martin
James G. McIntire
Craig M. McKee
Lee J. McNeely
David W. Mernitz
Norman P. Metzger
Alan K. Mills
Edward W. Najam, Jr.
John A. O'Neal
Henry J. Price
David J. Ryan
Scott E. Shockley
Patrick A. Shoulders
Philip A. Whistler
Bradley L. Williams
Elizabeth A. Young

TABLE OF CONTENTS

Dispute Resolution Procedures in the Northern District of California

REPORT OF THE CIVIL JUSTICE ADVISORY GROUP
SOUTHERN DISTRICT OF INDIANA

Introduction

Congress passed the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 et seq., to address the issue of unnecessary costs and delays in civil litigation in the federal courts. The Act requires the appointment of a Civil Justice Advisory Group in each judicial district. In the Southern District of Indiana, the Advisory Group includes twenty-eight attorneys and others from throughout the geographical area served by the court.

The legislation requires the Advisory Group to assess the court's docket, the litigation practices and procedures in the district, and the impact of new legislation, in order to identify causes of cost and delay in civil litigation. It also requires the Group to prepare a report recommending measures, rules and programs for adoption by the court as a "Civil Justice Expense and Delay Reduction Plan."

In assessing the performance of the court and the attorneys in the district, and in considering what measures, if any, should be adopted to combat costs and delays, the Group was required to consider a number of principles, guidelines and techniques of litigation management and cost and delay reduction set out in the legislation.[1]

---

[1] 28 U.S.C. § 473(a) and (b). Those principles, guidelines and techniques include:

(continued...)

The Group began meeting in June, 1991, and met thereafter on

---

[1](...continued)

. . . "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management" to specified criteria;

. . . "early and ongoing control of the pretrial process through involvement of a judicial officer in . . . assessing and planning the progress of a case; . . . setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint . . .;"

. . . "controlling the extent of discovery . . . and ensuring compliances with appropriate requested discovery in a timely fashion;"

. . . "setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;"

. . . "voluntary exchange of information . . . and . . . use of cooperative discovery devices;"

. . . prohibitions on consideration of discovery motions unless accompanied by a certification "that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel . . .;"

. . . authorization to refer cases when appropriate to alternative dispute resolution;

. . . a requirement that opposing counsel create a case management plan before the initial pretrial conference;

. . . a requirement that each party be represented at each pretrial conference by an attorney who has the authority to "bind that party regarding all matters previously identified by the court for discussion at the conference . . .";

. . . a requirement that requests for extensions of deadlines for discovery or trial be signed by both the attorney and the party making the request;

. . . a neutral evaluation program; and

. . . a requirement that, upon notice, representatives of the parties with settlement authority be present or available during settlement conferences.

a regular basis. In order to complete its review of civil litigation in the district, and to evaluate the principles and guidelines outlined in the legislation, the Group created six subcommittees: Differentiated Case Management; Discovery; Settlement and ADR; Court Personnel and Facilities; Effect of the Criminal Docket; Trial Procedures; and Docket Assessment. Most of the subcommittees prepared written reports and recommendations.

In assessing civil litigation in the Southern District of Indiana and in developing its recommendations, members of the Advisory Group interviewed most of the judges and magistrates in the district, the court clerk and members of his staff, and members of the judges' staffs. The Group also spoke to attorneys during a presentation on its work at the Fall 1991 meeting of the Indiana State Bar Association. In addition, the Group conducted a random survey of attorneys who had litigated cases in the Southern District within the last year. Further, each Group member brought his or her experiences in the district to our deliberations, as well as the views of their many professional colleagues in law firms and academia.

The report is divided into two sections. The first part contains the Advisory Group's assessment of the present state of civil litigation in the Southern District. The second part provides the Group's identification of the principle causes of cost and delay in the district and recommendations to the court and others.

The Southern District of Indiana has elected to become an "Early Implementation District" under the Act.

I. Assessment of Civil Litigation

A. Description of the Court

The Southern District of Indiana includes four divisions: Indianapolis, Evansville, New Albany and Terre Haute. The court sits continuously in Indianapolis and Evansville and the judges hear cases during March, June, and October in New Albany and Terre Haute.

The district consists of five active judges and two senior judges.[2] In addition, the district has four full-time and two part-time magistrate judges.[3] One active judge and one full-time magistrate judge sit in the Evansville division. Four active judges, two senior judges, and three full-time magistrate judges sit in the Indianapolis division. All of the active judges and one of the senior judges also hear cases in Terre Haute and New Albany. In addition, one part-time magistrate judge sits in Terre Haute and one part-time magistrate judge sits in New Albany. Both part-time magistrate judges work exclusively

---

2 Active judges are Chief Judge Gene E. Brooks and Judges S. Hugh Dillin, Sarah Evans Barker, Larry J. McKinney, and John D. Tinder. Senior judges are Judges William E. Steckler and James E. Noland.

3 The full-time magistrate judges are Chief Magistrate Judge John Paul Godich and Magistrate Judges J. Patrick Endsley, Kennard P. Foster and William G. Hussmann. The part-time magistrate judges are Jordan Lewis, who hears cases in Terre Haute, and John Cody, who hears cases in New Albany.

on the criminal docket. The district does not have any judicial vacancies at this time.

Indianapolis is the state capital, as well as a significant commercial center. It thus sees a large number of political and other civil rights cases. In addition, the population centers in each of the other divisions are located on borders with other states, contributing to a fairly large diversity caseload.

Two of the divisions include military installations which generate criminal caseloads. The Indianapolis division includes Fort Benjamin Harrison and the Terre Haute division includes the Crane Naval Weapons Support Center. Two of the magistrate judges devote some time to criminal matters that arise from the presence of these installations.[4] In addition, the Terre Haute division contains a federal penitentiary which generates a substantial number of cases filed by prisoners. Finally, there are five state penal institutions within the district, all of which contribute to the prisoner caseload.

The district employs a very effective "pro se" law clerk to evaluate civil cases filed by prisoners and other pro se litigants. The law clerk's efforts are instrumental in keeping this aspect of the docket manageable. In this district, nearly three out of ten civil cases are filed pro se. The pro se law clerk assesses civil cases filed by non-lawyers at the time they are filed, and often at later stages for interim or dispositive

---

[4] Magistrate Judge Endsley sits at Fort Benjamin Harrison; Magistrate Judge Cody sits at Crane Naval Installation.

rulings. Of the 263 pro se cases filed in the first half of 1991, the court was able to reach an almost immediate disposition of 173, in large part because of the work of the pro se clerk. In 1990, the pro se clerk made recommendations to the court at various stages of 1172 cases.[5] Seventy-five percent of these cases are filed by state prisoners, and most of the rest are filed by federal prisoners. The pro se clerk's work in evaluating these cases, and helping the court determine when early dismissal is appropriate, allows the court to expand the judicial resources available for potentially meritorious pro se cases and other litigation.

B. Condition of the Docket

The Act requires the Advisory Group to make "a thorough assessment of the state of the court's civil and criminal dockets."[6]

---

[5] 1991 Annual Report of the Clerk, Southern District of Indiana, p. 7.

[6] 28 U.S.C. § 472(c)(1). In making this assessment, the statute directs the Group to:

(1) "determine the condition of the civil and criminal dockets;"

(2) "identify trends in case filings and in the demands being placed on the court's resources;"

(3) "identify the principal causes of cost and delay in civil litigation . . .;" and

(4) "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."

1. Civil Cases

a. Civil Cases Generally

Throughout the United States, civil cases filed in federal district courts declined 7 percent in 1990. Filings per judge fell from 406 to 379, the lowest total since 1981.[7] At first glance, the Southern District of Indiana appears to have bucked this national trend, with an increase in filings of 38.1 percent

---

[7] Annual Report of the Director of the Administrative Office of the United States Courts: 1990 (hereafter "Report"), p. 6. The Report continues:

> Since 1980, the predominant trends in the civil workload of the U.S. district courts have been in actions filed by the United States to recover overpayment of veterans' benefits and defaulted student loans (referred to as recovery cases), and actions filed against the United States regarding social security benefits. Filings of recovery cases have declined each year since 1986, and Social Security filings have decreased since 1985, with the exception of a 14 percent increase from 1987-1988. These two types of cases have had such a dramatic effect on the change in total civil filings from year to year that the direction and rate of change has been dependent on the number of recovery and social security cases filed. Exclusive of these two categories, civil filings increased each year during the 1980's. In 1990, however, civil filings exclusive of recovery and social security cases declined by 4 percent . . . . This resulted from a substantial drop in diversity of citizenship cases . . . . Civil filings involving the United States decreased 9 percent . . . in 1990.
>
> Id. at 6-7.
>
> Diversity case filings declined nationwide by 15% in 1990. Id. at 8. The Director's office attributes the decline to the increase in jurisdictional amount, and suggests that the increase in amount would have produced an even more dramatic decline in the filing rate for private civil cases were it not for a substantial increase in the number of asbestos filings.

in the period ended June 30, 1990.[8] During that period, 2907 civil cases were commenced in the district, as compared to 2,104 in 1989.[9] However, 854 of those cases were attributable to one litigant and were ultimately remanded to the Interstate Commerce Commission. If these cases are excluded, the Southern District was squarely within the national trend, having experienced a slight (2%) decrease in civil case filings. Moreover, 180 of the cases filed during that same period were asbestos personal injury cases.[10] These cases have been transferred to the Eastern District of Pennsylvania, and they no longer pose a present burden for the court.[11]

Civil filings for the period ended June 30, 1991, were 2080, a decrease from the previous year of about 29%, but a slight increase from the prior year's total if adjusted for the 854 cases last year attributable to a single litigant.[12] With the

---

8 Id. at 134 (Table C, U.S. District Courts, Civil Cases Commenced, Terminated, and Pending During the Twelve Month Periods Ended June 30, 1989 and June 30, 1990).

9 Id.

10 "Guidance to Advisory Groups Appointed under the Civil Justice Reform Act of 1990," Feb. 1991 (hereafter "Guidance"), at 12, Table 1.

11 Interview with Rosie Rusler, Clerk's office. See In re Asbestos Products Liability Litigation (No. VI), Order of the Judicial Panel on Multidistrict Litigation (July 29, 1991)(ordering cases transferred to Eastern District of Pennsylvania). It remains possible that cases that have been transferred may be returned.

12 Interview with John O'Neal, Clerk of the Court.

exception of 1990, the total number civil filings has steadily decreased in the past five years.

b. Nature of Cases in District; Particular Case Populations

In addition to the ICC and asbestos cases discussed above, the district has at least one other large case population: cases filed by prisoners account for almost 23 percent of the cases filed during the period SY89-91.[13] Prisoners filed 534 cases in 1990.[14] Land condemnation, foreclosure and student loan and veterans' cases account for another 288 cases filed during 1990; these cases, however, do not pose a significant burden for the court.[15] Distribution of case filings in the past three years is illustrated by the following chart.

---

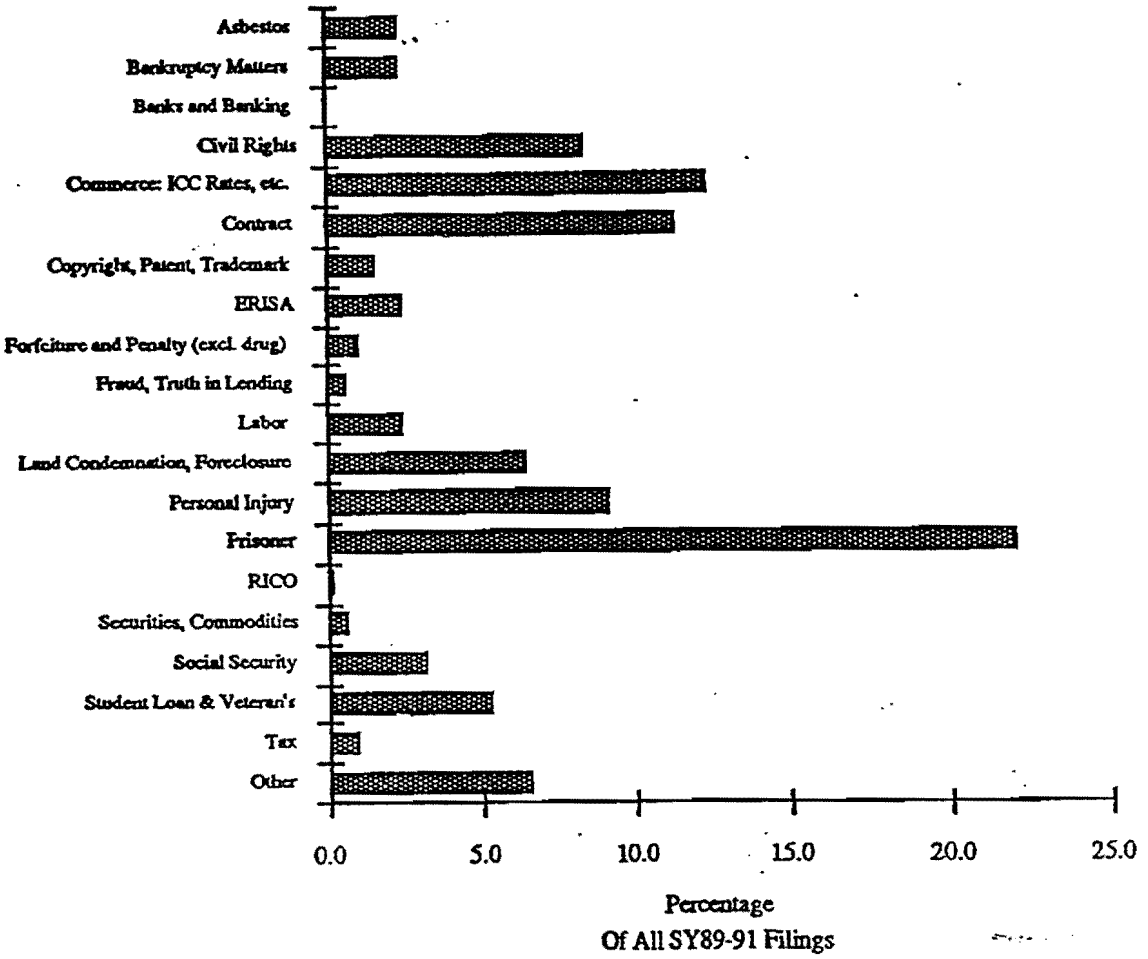
[13] Guidance to Advisory Groups Appointed under the Civil Justice Reform Act of 1990: SY91 Statistics Supplement, Oct. 1991, Chart 8.

[14] Guidance at 12, Table 1.

[15] Id. The assertion that these cases are not burdensome rests on the weights assigned them by the Judicial Conference. See id. at 13.

Chart 1: Distribution of Case Filings, SY89-91

Southern District of Indiana



c. Civil Cases by Divisions

Civil case filings, as one would expect, are concentrated in Indianapolis. Of the 2911 civil cases filed during the 1990 calendar year, 2312 were filed in Indianapolis, 225 were filed in

Terre Haute, 197 were filed in Evansville, and 177 were filed in New Albany.[16]

There are significant differences among the dockets. The following chart illustrates the distribution of cases pending in each of the divisions.[17]

Chart 2: Distribution of Cases Pending by Division, Cases pending on Oct. 31, 1991, By Total and Percentage of Docket

	Indianapolis		Evansville		Terre Haute		New Albany	
Contracts	295	(74%)	43	(11%)	17	(4%)	42	(11%)
Torts	236	(66%)	41	(11%)	27	(8%)	55	(15%)
Real Property	11	(46%)	5	(21%)	4	(17&)	4	(17%)
Civil Rights	269	(76%)	49	(14%)	15	(4%)	22	(6%)
Prisoner	175	(70%)	14	(6%)	52	(20%)	9	(4%)
Forfeiture	14	(58%)	4	(17%)	2	(8%)	4	(17%)
Labor	103	(60%)	29	(17%)	33	(19%)	8	(5%)
Social Security	62	(77%)	7	(9%)	0		12	(14%)
Bankruptcy Appeals	19	(45%)	7	(17%)	12	(29%)	4	(9%)
Foreclosures	53	(55%)	10	(10%)	12	(12%)	22	(23%)
FELA	22	(35%)	39	(63%)	0		1	(2%)
Antitrust	9	(90%)	1	(10%)	0		0	
Copyright, Patent, Trademark	40	(85%)	7	(15%)	0		0	
Securities	26	(84%)	5	(16%)	0		0	
Tax	24	(75%)	5	(16%)	1	(3%)	2	(6%)
Other[18]	99	(73%)	21	(16%)	2	(1%)	13	(10%)
Totals	1457		287		177		198	

As the totals indicate, Indianapolis has a docket heavy in federal statutory and civil rights cases, as well as the majority of the commercial disputes. In addition, Indianapolis carries 70% of the prisoner cases. Most of the remaining prisoner cases

---

16 Clerk's Annual Statistical Report to the Court for the Calendar Year 1990, Southern District of Indiana.

17 Created from Statistics generated by Clerk's Office.

18 This category includes primarily other federal statutory actions.

are filed in Terre Haute, making prisoner cases the single largest category of cases in that division. Thus Terre Haute, with 8% of the district's overall caseload, has 21% of the prisoner cases.

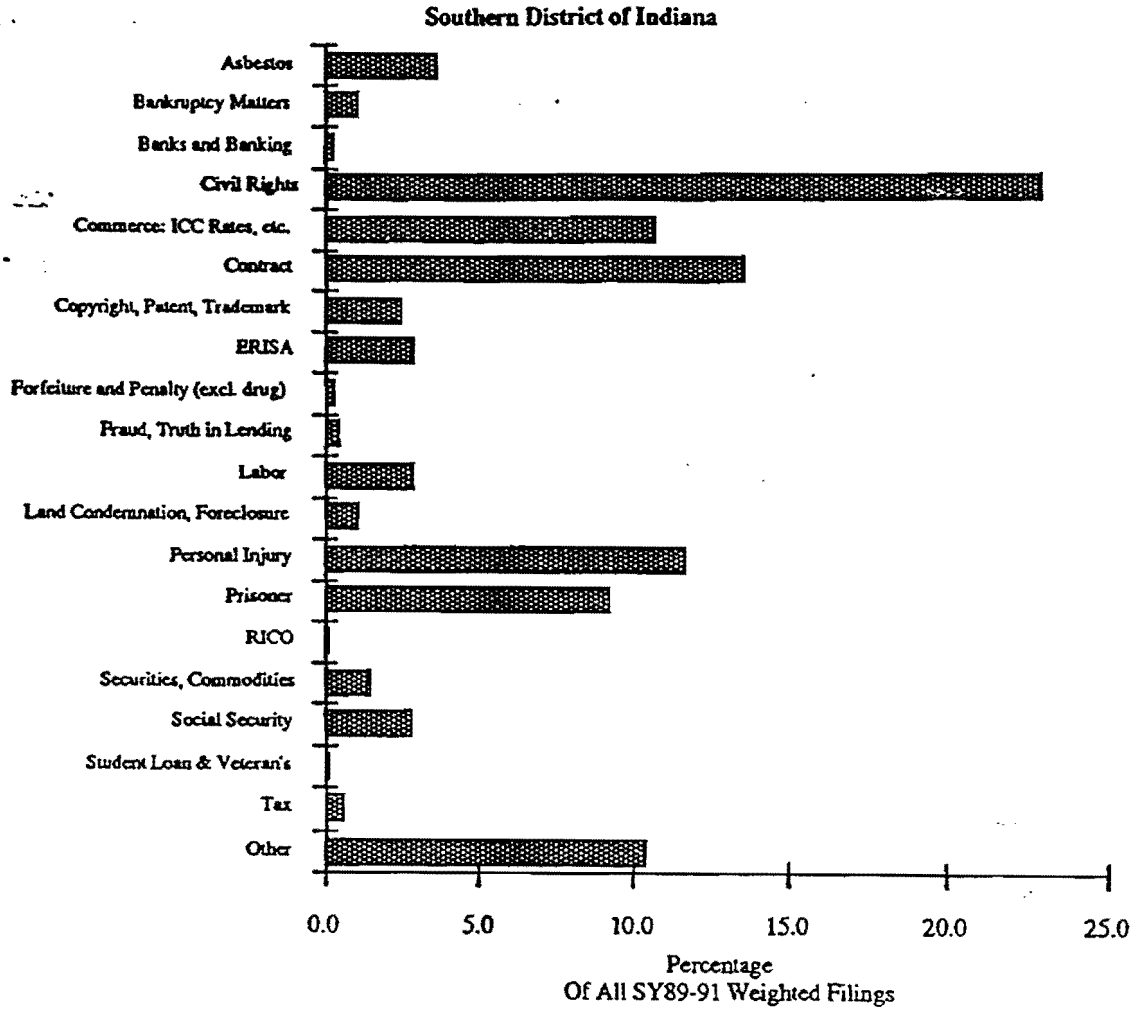
d. Weighted Filings

"Weighted filings" refers to the number of actions per judge adjusted for case difficulty. The figure includes both civil and criminal filings. It should also be noted that the contributions of the senior judges to the civil caseload are not reflected in the statistics on weighted filings, which are calculated based on the number of active judges authorized for a district. The senior judges do not hear criminal cases, however.

Weighted filings per judge dropped from 584 in 1990 to 442 in 1991. However, as noted above, 1990 figures included over 850 cases filed by a single litigant that are no longer on the docket. The 1991 figure is still higher than that of three of the past five years.

The largest percentage of weighted filings are civil rights cases, accounting for almost 25% of all weighted filings.

Chart 3: Distribution of Weighted Civil Case Filings, SY89-91



2. Criminal Cases

During the period ending in June 1990, criminal cases rose nationwide by 6 percent.[19] The Southern District saw a 26.6 percent increase in criminal cases commenced in the twelve month period ending June 1990.[20] However, the most recent figures for

---

19 Report at 10.

20 Report at 175, Table D.

the period ending June 30, 1991 show a decrease in criminal filings by 16%.[21]

A better indication of the burden that a criminal caseload presents to a court than the number of criminal cases is the number of criminal defendants.[22] Using this measure, the Southern District in 1990 approached its previous record in 1988: in 1990, cases involving 534 criminal defendants were commenced.[23] Following the national trend, drug cases accounted for the largest number of felony defendants (165).[24] The past year saw a sharp increase in the number of drug defendants convicted after a trial (from 3 in 1990 to 17 in 1991). The United States Attorney reports that the Organized Crime and Drug Enforcement Task Force has increased its number of personnel; thus, the district may experience further increases in the numbers of drug defendants.

Presently, the district judges spend approximately 38% of their time in the courtroom on criminal hearings or trials. In

---

21 Conversation with John O'Neal, Clerk of the Court.

22 Guidance at 18 ("[E]arly results from the current FJC time study indicate that the burden of a criminal case is proportional to the number of defendants").

23 Report at 182, Table D-1. Of these, 262 were felony defendants, 257 were misdemeanor defendants, and 1 was classified "other." See also Guidance, p.18 (table comparing criminal defendants over 10 year period). Comparable figures for 1991 are not yet available.

24 Report at 194-195 ("Table D-3, Defendants, U.S. District Courts, Criminal Defendants Commenced (excludes transfers) during the Twelve Month Period Ended June 30, 1990.) Traffic cases accounted for 169 defendants; fraud cases for 74.

addition, the two part-time magistrate judges spend all of their time on criminal matters; however, these magistrate judges are located in low-volume courts in Terre Haute and New Albany. The three full-time magistrate judges in Indianapolis spend, we estimate, less than 25% of their time on criminal matters. The full-time magistrate judge in Evansville is involved in both civil and criminal work, but the caseload in Evansville is lower than that of any single Indianapolis Division judge (see below) and lower yet than that of any of the three magistrate judges in Indianapolis. Therefore, it may be assumed that the Evansville magistrate judge spends less than 10-15% of his time on criminal matters.

Again, the Indianapolis division has by far the heaviest criminal caseload. Of the 293 criminal defendants in calendar year 1990, 218 were in Indianapolis, 19 were in Terre Haute, 41 were in Evansville, 15 were in New Albany.[25]

3. Trials

During the one-year period ending June 30, 1990, 2,395 civil cases were terminated in the Southern District. Of those, 125 ended without court action. Of the cases remaining, 2,034 terminated before the final pretrial conference, 174 terminated during or after the final pretrial conference but before the trial, and 62 terminated during or after trial. Of those cases that went to trial, 24 involved juries and 38 were bench trials. Thus, during the last statistical year, only 2.6 percent of all

---

[25] Clerk's Statistical Report.

case terminations were through trials. In the year ending June 30, 1990, the Southern District was 64th out of 94 district courts in number of trials completed (civil and criminal).[26]

A measure of the relative burden of trials on the court is the length of civil trials. In the same twelve-month period, 63 trials were completed in one day, 21 in two days, 8 in three days, 13 in four-to-nine days, and 2 in ten-to-nineteen days.[27] Of the 41 criminal trials reported during the same period, 21 were completed in one day, 7 in two days, 8 in three days, and 5 in four-to-nine days.[28]

In the Southern District in 1990, criminal trials accounted for about 28 percent of total number of trials, down from around 31 percent the previous year.

4. Length of Time to Disposition

In 1990, the median time from issue to trial in civil cases in the Southern District was 19 months.[29] When the trial was by

---

26 Guidance at 8.

27 Report at 164 (Table C-8, U.S. District Courts, Length of Civil and Criminal Trials Completed, By District, for the Twelve Month Period Ending June 30, 1990). While this table shows 107 civil trials, as opposed to the 62 shown in Table C4-A, noted above, this difference presumably is due to the inclusion in Table C-8 of miscellaneous and condemnation cases.

28 Id.

29 Report at 173 (Table C-10, U.S. District Courts, Time Intervals from Issue to Trial of Civil Cases in which a Trial was Completed, By District During the Twelve Month Period Ended June 30, 1990). Note that the periods were computed using only cases in which trials were actually completed. Trials conducted by magistrates were excluded.

jury, the median time from issue to trial was significantly increased, to 31 months.[30] Nationally, the median for all trials was 14 months; for jury trials, the figure was 15 months. Those were also the medians within the circuit.

The most recent judicial workload profile indicates that the time from issue to trial has remained relatively constant over the past five years.[31] The Southern District is last in the circuit in time from issue to trial, and 63rd out of 94 districts in the country.[32]

Data for a single year (or even several years) cannot, however, give a reliable indication of the "pace" of case dispositions, and may actually be misleading.[33] In order to give

---

30 Id. The comparable figure for non-jury trials is 18 months.

31 The figures are:

1991: 20 months
1990: 19 months
1989: 21 months
1988: 21 months
1987: 19 months
1986: 22 months

Judicial Workload Profile, Twelve Month Period Ended June 30, 1991.

32 Judicial Workload Profile, 1991.

33 The reason why this is so is explained in Guidance, p. 14:

> An obvious example . . . arises in a year when a court terminates an unusually small portion of its oldest cases. Both average and median time to disposition in that year will show a decrease. The tempting conclusion is that the court is getting

(continued...)

a more accurate picture of the pace of the court, the Administrative Office has created a measure called the "Indexed Average Lifespan," which compares the characteristic lifespan of the court's civil cases to that of all district courts over the past decade.[34] The Indexed Average Lifespan is indexed at 12, since the national average for time from filing to disposition is about twelve months; thus, a value of twelve would indicate an average speed of case disposition. In the Southern District, the indexed average lifespan was 10 in 1990, down significantly from 17 in 1989. In fact, during the past decade, 1990 was the first year when the indexed average lifespan of the cases in the district fell below 12.[35] The drop during 1990 may be due to closing an unusual number of cases through transfer to other districts or to an agency.[36]

When only "Type II"[37] civil cases are considered, however,

---

[33](...continued)
faster when the opposite is actually the case. Conversely, when a court succeeds in a major effort to clean up a backlog of difficult-to-move cases, the age of cases terminated in that year may suggest that the court is losing ground rather than gaining.

[34] Guidance at 14-15.

[35] Guidance at 15.

[36] As noted earlier, over 850 cases were sent to the Interstate Commerce Commission and 180 asbestos cases were transferred to the Eastern District of Pennsylvania.

[37] The FJC divides cases into two types. Type I cases "are distinctive because within each case type the vast majority of the cases are handled the same way; for example, most Social Security cases are disposed of by (continued...)

the indexed average lifespan is around 16 in 1991.[38] Thus, in that more complicated category of cases, the Southern District disposes of its cases more slowly than the average.

Another measure of some usefulness is the percentage of the court's docket that is over three years old. In 1991, 8.1 percent of the court's cases were three years old, the smallest percentage of three-year-old cases in the past five years.[39] This statistic places the Southern District 55th out of 94 in the country in number of old civil cases.

5. Motions, Bench Trials

The Act requires all judicial officers to complete forms listing all of their submitted motions and bench trials over 6 months old. The judges and magistrate judges in the Southern District reported the following figures:

---

[37](...continued)
summary judgment. Type II cases, in contrast, are disposed of by a greater variety of methods and follow more varied paths to disposition; for example, one contract action may settle, another go to trial, another end in summary judgment, and so on." Guidance at 10.

[38] Statistical Supplement at 15, Chart 6 Corrected.

[39] Judicial Workload Profile, 1991.

			Year Pending						
Judicial Officer	Motions	Bench Trials	85	86	87	88	89	90	91
Endsley	0	0							
Foster	2	0			1				1
Hussmann	3							2	1
Godich	30	3				1	2	25	5
Barker	22	0				1	4	12	4
Brooks	16	0						8	5
Dillin	2	0					1	1	
McKinney	1	0						1	
Noland	40	0	84-3				1	28	7
Steckler	10	0	1					4	5
Tinder	63	3		1	1	7	10	33	12

The figures indicate that the court has little difficulty in issuing decisions in completed bench trials. However, submitted motions pose some difficulty for the court. Almost all of the judges suggested in interviews that motions were a source of significant delay in the disposition of cases.

6. Perceptions of Docket

In addition to the statistical materials described above, the Advisory Group also surveyed attorneys who represented clients in a random sample of cases litigated in the district in the past year.[40] The attorneys were asked to answer each question with respect to the individual case, rather than based

---

[40] The sample was randomly chosen with the help of John Shapard of the Federal Judicial Center. Forty percent of the attorneys surveyed responded. We determined from the experiences of other Advisory Groups that an effort to survey the actual litigants would be probably be fruitless. The questions and a summary of the results are included in the Appendix.

on that attorney's impression of the court's performance in general.

Of the respondents, 52 percent believed that the time from filing to disposition was reasonable in their case; 39 percent believed that the time was too long.[41] Those respondents who believed their cases took too long cited "dilatory actions by counsel" as the principal reason (56%). The second most-cited reason for undue delay was "dilatory actions by litigants" (23%). The court's failure to rule on motions was third, cited by 18 percent of respondents.[42]

Only 44 percent of the respondents believed that the time for discovery was generally reasonable; 39 percent found it too long. Half of those who felt that discovery took too long again cited actions by counsel; 35 percent blamed actions taken or not taken by the court.

Responses to the questions above were significantly different depending on fee arrangement.[43] While 65 percent of the hourly attorneys believed that the time to disposition in the case was reasonable, only 39 percent of the contingency attorneys thought so. Fifty-six percent of contingency attorneys believed

---

41 The remaining attorneys responded "I can't say."

42 The 18% represents only 13 respondents.

43 Fifty-eight percent of the respondents reported that their fee arrangement in the case was hourly rate; only 32 percent reported being paid on a contingency basis. The remainder were government or other salaried employees.

the time to disposition was too long as compared to 26 percent of the hourly attorneys.

The same pattern continued with responses to the question about discovery. While 23 percent of the hourly attorneys believed time taken for discovery was too long, 56 percent of the contingency attorneys believed discovery took too long.

When asked about case management practices currently at use in the court, the respondents overwhelmingly agreed that the court established a schedule for pretrial discovery, motions, and disclosures in their cases. However, significant numbers noted that the court did not monitor and enforce the schedule it established, or enforce the limits that it set.

C. Description of Current Pretrial Practices in the Southern District

There is considerable variation in pretrial practices among the chambers in the Southern District. Currently, only Judge McKinney regularly supervises pretrial activities personally. In the other chambers, the practice is to assign cases to pretrial supervision by magistrate judges.

1. Assignment of Cases

In the Southern District of Indiana, all cases are assigned upon filing as follows:

a. All cases filed in Evansville are assigned to Judge Brooks.

b. Indianapolis cases are randomly assigned to the Indianapolis judges.

c. Judges Tinder, McKinney and Brooks split the docket in Terre Haute, while Judges Dillin, Barker, and Noland split the New Albany docket.

Neither Judge Noland nor Judge Steckler, both of whom have taken senior status, currently draw criminal cases. Judge Noland draws civil cases at a rate of 60% of those drawn by an active judge; Judge Steckler is at 50%. Thus, the senior judges continue to be a significant resource to the court in managing its civil docket.

In Indianapolis and Evansville, each judge is responsible for the management and trial of the cases pending on his or her docket. Cases on the Terre Haute and New Albany dockets, by way of contrast, are tried by the judges depending upon which judge is presiding when the case is ready to be heard.

2. Monitoring of Process, Filings

All of the judges employ one person in chambers, usually the room deputy, to monitor service of process, filing of answers, reply briefs, and other papers. None of the judges believe that delay is an issue in the early stages of the cases. All follow the practice, formalized through local rule, of allowing an automatic extension on first request for filing of answers and most reply briefs. Most of the judges reported that they do not seriously restrain attorneys who request time extensions unless the trial date is approaching or the attorney has a reputation with the judge for dilatoriness. One judge noted that some cases profit from "delay."

3. Initial Scheduling Orders and Conferences

Judge McKinney's practice is to issue a scheduling order on the basis of his evaluation of the complaint and answer. The scheduling order includes a trial date, set either six, nine or twelve months later depending on his assessment of the difficulty of the case. The scheduling order also sets deadlines for the completion of discovery, the filing of motions, and the filing of witness lists and contentions.

Among the magistrates, there is considerable diversity in pretrial practice. Two of the magistrates routinely issue scheduling orders on the basis of their assessment of the complaint and answer, sometimes accompanied by a telephone conference with all counsel. The other two magistrate judges routinely hold initial pretrial scheduling conferences followed by entries that schedule deadlines.

4. Interim Conferences

Judge McKinney does not routinely hold interim status conferences, although he is available (often by telephone) to resolve discovery disputes. In the other chambers, once a magistrate judge become responsible for a case, none of the district judges reported any regular involvement in the case again until the date of trial approaches. One judge noted early involvement in only a few cases that "raised simple issues" and in which the judge believed early judicial involvement might lead to a quick settlement. However, the judge was not completely satisfied with the results of this involvement, believing that

the attorneys resented it and that it did not accomplish much. The same judge said that initial judge involvement that is not lawyer-initiated in complex cases is also pointless because the lawyers are non-responsive and engage in posturing.

All of the judges who assign cases to the magistrate judges for pretrial management reported that they sometimes are required to resolve discovery disputes. Most judges described this as a rare occurrence. One estimated that he has had only five discovery disputes come to him in four years.

The magistrate judges all hold status conferences at the close of discovery. The purpose of these conferences is to assure that the parties have completed their discovery, and to negotiate new deadlines if that became necessary.

5. Final Pretrial Conferences

All of the magistrate judges hold a "final" pretrial conference (in addition to the status conference noted above) before the final pretrial conference held by the trial judge. All of the magistrate judges reported using the final pretrial conference to assure that the parties were, in fact, ready to go to trial and to discuss settlement, although they differed in their approach to settlement. While two of the magistrate judges reported substantial settlement activity at the final pretrial conference, two said they raise settlement but do not press the issue.

All of the judges also routinely hold their own final pretrial conferences. All use the pretrial conference as a forum

for deciding pending trial-related motions. Three of the judges described the primary purpose of the pretrial conference as settlement. These judges actively work towards settlement at the pretrial conference, using all sorts of techniques including "shuttle diplomacy." In one chambers, the deputy clerk is actively engaged in facilitating settlements throughout the pretrial period, and the judge and the clerk work together during pretrial conferences to help achieve settlements. The two judges who do not view pretrial conferences as primarily for talking about settlement both raise settlement at that time. One of the judges said he would at least ask, but that the only legitimate tool judges have in this regard is a firm trial date.

One of the judges asks attorneys to prepare instructions before the final pretrial conference as a method of focusing the case. Several of the judges issue detailed final pretrial orders.

All of the judges are receptive to bifurcation motions, and several said they are using bifurcation more often. One judge reserves the right to bifurcate a trial himself up until the time it begins. All believe that bifurcation can be a helpful practice if used sensitively. One judge noted that it is inappropriate when the trial would be short anyway.

6. Setting Trial Dates

All of the judges scheduled an average of five civil trials for each available trial date. None of the judges found that conflicts between two trial-ready cases occurred more than once

or twice a year; in each case in which it had occurred, the "bumped" case was set at the next available trial date. None of the judges would object to having other judges try cases that are "bumped," but none thought that this was enough of a problem to make a ready-judge system necessary. Once trial has begun, all of the judges stated that they minimize interruptions, especially when juries are involved.

All but one of the judges (Judge McKinney) rely on the magistrate judges' estimation of when a case will be ready to try. Most of the magistrate judges reported their estimates of when a case could be set for trial at the time the initial scheduling order is issued, although one of the magistrate judges waits until after the status conference at the close of discovery to send that information to the judges. According to the magistrate judges, what the district judges then do with these estimates varies. Some judges send out notices of trial dates, in at least some cases, almost immediately. Others set trials every few months. However, most cases are not set for trial until the pretrial process is well advanced.

C. Conclusions

The Advisory Group concludes that civil litigation in the Southern District of Indiana is generally well-managed. Neither attorneys nor judicial officers interviewed or otherwise consulted during our assessment mentioned systemic problems with the flow of cases through the court. The criminal docket, while substantial, does not threaten to overwhelm the civil docket.

Judicial officers did not report having to delay civil trials because of the demands of the criminal docket. The court is about in the middle nationally on time to disposition for most cases. Civil case filings have been declining, and we have identified no specific area of cases in which filings are growing.

Nevertheless, the Advisory Group has identified two areas in which the state of the docket suggests that delay or cost-reduction measures are appropriate. The time to trial for more complicated cases is significantly longer in the Southern District than in many other districts, a fact that may be associated with a general perception that pretrial deadlines and trial settings are not firm. In addition, our review of the docket confirmed a backlog of pending motions in several chambers.

Moreover, regardless of the overall state of the docket, it is clear to the Advisory Group that unnecessary cost and delay exist in civil litigation in the Southern District. We now turn to our conclusions concerning causes of cost and delay in this district and our recommendations for improvement.

II. Identification of Causes of Cost and Delay; Recommendations

The Advisory Group has identified four areas that contribute to unnecessary cost and delay in the Southern District of Indiana: (1) a need for better pretrial planning and a reluctance to adhere to pretrial deadlines; (2) delays associated

with pretrial motions; (3) inefficiencies in discovery practice; and (4) underuse of alternatives to litigation.

A. Pretrial Management and Practice

1. Assessing Delay in Pretrial Practice

The Civil Justice Reform Act requires consideration of various pretrial management strategies including early judicial involvement in cases, the setting of an early, firm trial date and the use of differing "tracks" for cases based on an assessment of their complexity. The Advisory Group evaluated the current practices of the court in light of these suggestions.

Despite significant differences in pretrial management strategies among the chambers, we are unable to conclude that mandating increased involvement by judges in the pretrial period would result in cost savings or reduce delay. First, we are reluctant to encourage increased judge involvement without evidence that it would increase an already-high settlement rate or lead to other efficiencies. Second, because we have identified delay in rulings on pretrial motions as a significant cause of cost and delay in the district, we are unwilling to recommend that the judges' time and attention be diverted from that task.[44]

---

[44] We do, however, recommend that in connection with interim and final pretrial conferences conducted by magistrate judges, the parties consider whether involvement by the district judge in any aspect of the pretrial process would be desirable and advise the court if they so believe. See Proposed Revised LR 16.1(e), infra.

We were also unconvinced that a formal system of tracks would significantly aid efficiency. The district already exempts a number of categories of routine cases from the requirements of Fed. R. Civ. P. 16(b) (see Local Rule 16.1(b)) and has an efficient system for handling pro se and prisoner cases through the use of a pro se law clerk. In addition, the district already has experienced some success in tailoring pretrial procedures to the needs of each case through individualized scheduling orders and the requirement that attorneys meet before pretrial conferences and create a pretrial "agenda." See Local Rule 16.1 (g). Unfortunately the "agenda" rule--a variant of the "case management plan" commended by the Act--is adhered to by attorneys only about 50% of the time.[45] We believe that expanding, improving and enforcing these existing procedures would produce a more realistic and individualized pretrial schedule than requiring that a case be placed on a "track" early in its life.

There are other ways in which pretrial practices in the district can be improved. First, attorneys surveyed by the Advisory Group indicated that pretrial deadlines are usually not strictly enforced. This may be due in part to the practice of issuing some scheduling orders without consultation with the attorneys, with the result that the deadlines are not realistic. Interviews with the magistrate judges suggested that attorneys do not often take advantage of the opportunity to request a

---

[45] This estimate was provided by the magistrate judges we interviewed.

scheduling conference, relying instead on the belief that deadlines are negotiable--which they nearly always are. The Advisory Group recommends, therefore, that a local rule be adopted to require preparation by the attorneys of a realistic schedule early in the case, and that the new local rule against routine enlargements of pretrial deadlines (LR 16.1(i)) be enforced.

Second, as suggested by the Act,[46] the Advisory Group has concluded that setting early, firm trial dates would reduce cost and delay in the pretrial process in this district. Currently, the judges' procedures for setting trial dates vary considerably, with one judge setting the date with the first scheduling order and others waiting until discovery is substantially complete. Lack of consistency in setting trial dates, coupled with a laissez-faire attitude on the part of some members of the bar with respect to pretrial deadlines, contributes to the relatively long wait for trials in the district.

2. Recommendations

a. Proposed New Local Rule 40.3: Trial Settings. The Advisory Group recommends that the court adopt a local rule requiring that trials normally be commenced within eighteen months of the filing of the complaint. We recommend the following text:

---

[46] 28 U.S.C. § 473(a)(2)(B).

Proposed New LR 40.3

> All trials shall commence within six to eighteen months after the filing of the complaint unless the court determines that, because of the complexity of the case, staging provided by the case management plan, or the demands of the court's docket, the trial cannot reasonably be held within such time.

The Advisory Group believes that setting an early and firm trial date is the best way to focus the attention of attorneys and the court on a case. We believe that early, firm trial settings will encourage cooperation in discovery and adherence to deadlines established in the case management plan contemplated by the following recommendation. We recognize, however, that early and firm trial dates without the other steps recommended in this Report would be a step backwards and, accordingly, should be implemented only in conjunction with those other measures (e.g., adherence to case management plan deadlines, prompt rulings on motions). We also recognize that in specific cases the presumptive deadline could produce injustice and increase costs if woodenly implemented. We encourage judicial officers and attorneys to pay special attention to the demands of an early trial setting in the case management plan recommended below.

b. Case Management Plan; Scheduling Orders. The Advisory Group makes the following recommendation for the pre-trial administration of all cases that are not exempted by local rule from Fed. R. Civ. P. 16(b).

1. Following the appearance of counsel for all defendants, and in any event no later than sixty days after the filing of the complaint, the court should issue an order requiring counsel for

all parties (or parties appearing pro se) to confer, prepare and file a case management plan within thirty days of the date of the order. The matters to be covered by the plan shall be prescribed by a revised Local Rule 16.1. The plan should be premised on a trial setting between six and eighteen months after the filing of the complaint. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan should state in detail the basis for that conclusion. The plan should incorporate the scheduling and other agreements of the parties as well as advise the court of any substantial disagreements among the parties on the matters covered by the conference.

2. The order described in paragraph 1 should set the case for an initial pretrial conference approximately fifteen days after the due date of the plan (i.e., approximately forty-five days after the order). It should also advise the parties that, if the plan is timely filed and approved by the court, the pretrial conference setting may be vacated, thereby providing counsel an additional incentive to produce an adequate plan.

3. If the parties file an acceptable case management plan in compliance with the order, within seven days the court should issue an order adopting the plan and ordering it performed, vacating the initial pretrial conference, and setting a firm trial date.

4. If the case management plan is not filed or, if filed, is materially incomplete or inadequate or reflects material disagreements among counsel, the court should either:

(a) Proceed with the pretrial conference on the noticed date, to be followed by an entry reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(b) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting, and setting a firm trial date. The court may choose to conduct a telephone conference with counsel prior to entering such an order.

5. As an inducement to the parties to consent to a magistrate judge where the magistrate's duties permit the handling of more cases,[47] orders setting trial dates may offer an alternative, earlier trial date in the event the parties consent to refer the case to the magistrate judge.

6. Local Rule 16.1 should be reorganized and expanded consistent with this recommendation. Items to be covered in the initial attorneys' conference that are not already required by the rule include (1) the voluntary disclosure of discovery information without the necessity of formal discovery requests,[48]

---

[47] Our interviews with the magistrate judges suggest that there may be some capacity for the magistrates to handle additional referrals of entire cases. All of the magistrate judges were enthusiastic about trying more cases. However, once cases are fully prepared, getting them tried does not appear to be a significant problem in the district.

[48] See 28 U.S.C. § 473(a)(4).

(2) staged discovery and/or issues as appropriate to facilitate early resolution,[49] (3) contentions, (4) possible stipulations, (5) whether the parties will consent to a referral of the case to a magistrate judge with approval of the court, (6) a schedule for the filing of dispositive motions,[50] (7) time limits on the joinder of additional parties and for amendments to pleadings, (8) whether one or more interim pretrial conferences would be beneficial, and (9) a recommended trial date (by month and year). Lawyers should have a continuing obligation to amend the case management plan, with court approval, in connection with any subsequent pretrial conferences or as otherwise appropriate. In cases in which pretrial case management is assigned to a magistrate judge, the agenda for subsequent pretrial conferences also should include the question whether the parties believe involvement by the district judge would materially advance the case.

c. Proposed Revised Local Rule 16.1. To implement the above recommendations, the Advisory Group recommends reorganization and expansion of Local Rule 16.1 as follows:

Proposed Revised LR 16.1
Pretrial Procedures

(a) [Unchanged]

(b) [Unchanged]

(c) Initial pretrial conference.

---

49 See 28 U.S.C. § 473(a)(3)(C)(ii).

50 See 28 U.S.C. § 473(a)(2)(D); (a)(3)(D).

(1) In all cases not exempted pursuant to subsection (b) of this rule, the court shall order the parties to appear for an initial pretrial conference no more than 120 days after the filing of the complaint. The order setting the conference shall issue promptly following the appearance of counsel for all defendants and in any event no later than sixty days after the filing of the complaint.

(2) The order setting the initial pretrial conference, in addition to such other matters as the court may direct, shall require counsel for all parties to confer and prepare a case management plan and to file such plan by a date specified in the order, which date shall be at least fifteen days before the pretrial conference setting. The order may provide that the pretrial conference setting shall be vacated upon the filing of a case management plan that complies with this rule and upon the approval of such plan by the court.

(3) Upon the filing of an acceptable case management plan in compliance with the order and this rule, the court may issue an order adopting the plan, ordering it performed, and vacating the initial pretrial conference setting. Any such order shall also set a firm trial date.

(4) If the parties do not file a case management plan, or file a plan that fails materially to comply with the order and this rule, or file a plan that reflects material disagreements among the parties, the court may:

(A) Conduct the initial pretrial conference and, following such conference, enter an order reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(B) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting and setting a firm trial date. The court may conduct a telephone conference with counsel prior to entering such an order.

(5) To the extent permitted by statute and rule, orders entered under subparagraphs (c)(3) and (c)(4)

may offer an alternative trial date in the event the parties thereafter consent to referral of the case to a magistrate judge.

(d) Contents of case management plan.

(1) The objective of the case management plan is to promote the ends of justice by providing for the timely and efficient resolution of the case by trial, settlement or pretrial adjudication. In preparing the plan, counsel shall confer in good faith concerning the matters set forth below and any other matters tending to accomplish the objective of this rule. The plan shall incorporate matters covered by the conference on which the parties have agreed as well as advise the court of any substantial disagreements on such matters.

(2) The conference and case management plan shall address the following matters:

-- Trial date. The plan should be premised on a trial setting between six and eighteen months after the filing of the complaint and should recommend a trial date by month and year. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan shall state in detail the basis for that conclusion. The plan shall also state the estimated time required for trial.

-- Contentions. The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses.

-- Discovery schedule. The plan shall provide for the timely and efficient completion of discovery, taking into account the desirability of phased discovery where discovery in stages might materially advance the expeditious and efficient resolution of the case. The plan should also provide a schedule for the taking of the depositions of expert witnesses, together with a designation whether the deposition is for discovery purposes only or is to be offered in evidence at trial.

-- Witnesses and exhibits. The plan shall incorporate a schedule for the preliminary and final disclosure of witnesses and exhibits.

-- Accelerated discovery. The parties shall discuss and seek agreement on the prompt disclosure of relevant documents, things and written information

without prior service of requests pursuant to Fed. R. Civ. P. 33 and 34.

-- Limits on depositions. The parties shall discuss whether limits on the number or length of depositions should be imposed.

-- Motions. The plan will identify any motions which the parties have filed or intend to file. The parties shall discuss whether any case-dispositive or other motions should be scheduled in relation to discovery or other trial preparation so as to promote the efficient resolution of the case and, if so, the plan shall provide a schedule for the filing and briefing of such motions.

-- Stipulations. The parties shall discuss possible stipulations and, where stipulations would promote the efficient resolution of the case, the plan shall provide a schedule for the filing of stipulations.

-- Bifurcation. The parties shall discuss whether a separation of claims, defenses or issues would be desirable; and if so, whether discovery should be limited to the claims, defenses or issues to be tried first.

-- Alternative dispute resolution. The parties shall discuss the desirability of employing alternative dispute resolution methods in the case, including mediation, neutral evaluation, arbitration, mini-trials or mini-hearings, and summary jury trials.

-- Settlement. The parties shall discuss the possibility of settlement both presently and at future stages of the case. The plan may provide a schedule for the exchange of settlement demands and offers, and may schedule particular discovery or motions in order to facilitate settlement.

-- Referral to a magistrate judge. The parties shall discuss whether they consent to the referral of the case to a magistrate judge.

-- Amendments to the pleadings; joinder of additional parties. The parties shall discuss whether amendments to the pleadings, third party complaints or impleading petitions, or other joinder of additional parties are contemplated. The plan shall impose time limits on the joinder of additional parties and for amendments to the pleadings.

-- Other matters. The parties shall discuss (1) whether there is any question regarding jurisdiction over the person or of the subject matter of the action, (2) whether all parties have been correctly designated and properly served, (3) whether there is any question of appointment of a guardian ad litem, next friend, administrator, executor, receiver or trustee, (4) whether trial by jury has been timely demanded, and (5) whether related actions are pending or contemplated in any court.

-- Interim pretrial conferences. The parties shall discuss whether interim pretrial conferences prior to the final pretrial conference should be scheduled.

(e) Additional pretrial conferences. Additional pretrial conferences shall be held as ordered by the court. Prior to each such pretrial conference, counsel for all parties will confer, in person or by telephone, to prepare for the conference. Such conference shall include a review of the case management plan and shall address whether the plan should be supplemented or amended. In cases in which pretrial case management is assigned to a magistrate judge, counsel shall also discuss whether direct involvement by the district judge prior to trial might materially advance the case. The discussions of counsel shall be summarized by one of counsel who shall prepare an agenda for the pretrial conference which shall reflect the agreements reached among or between counsel, including any proposed supplements or amendments to the case management plan. It shall be the responsibility of all counsel that an agenda be presented to the court at the pretrial conference. Failure to present an agenda and failure to confer as required may be grounds for the imposition of sanctions.

(f) Contents of final pretrial order. In addition to such other provisions as the court may direct, the final pretrial order may direct each party to file and serve the following:

(1) to (7) - [unchanged]

(g) Preparation of pretrial entry. [unchanged]

(h) Settlement. [unchanged except for noted deletion:]

Counsel should anticipate that the subject of settlement will be discussed at any pretrial conference. Accordingly, counsel should be prepared to state his or her

client's present position on settlement. In particular, prior to any conference ~~after the initial conference~~, counsel should have ascertained his or her settlement authority and be prepared to enter into negotiations in good faith. Details of such discussions at the pretrial conference should not appear in the pretrial entry.

(i) Deadlines. [unchanged except as noted]

Deadlines established ~~at the pretrial conference~~ in any order or pretrial entry under this rule shall not be altered except by agreement of the parties and the court, or for good cause shown.

(j) [unchanged]

B. Pretrial Motions

1. Assessing Delay in Ruling on Pretrial Motions

The Advisory Group concludes that there is a serious problem with delay in court rulings on pretrial motions in the Southern District. This conclusion is supported by each of the sources of information available: (1) The interviews with many of the Southern District judges conducted by members of the Advisory Group; (2) the results of the attorney survey conducted by the Advisory Group; (3) statistics in Part I of this Report[51]; (4) conversations with attorneys practicing in the Southern District; and (5) personal experiences of members of the Advisory Group. Many believe that delay in resolving pretrial motions is the most serious problem of cost and delay in the district.

To keep cases moving at reasonable speed and avoid the difficulties noted below, motions should ordinarily be ruled upon within 30 days after completion of briefing. More complex

---

[51] See this Report at 20 (which lists only pending motions at least six months old).

motions (e.g., summary judgment motions involving extensive facts and/or several difficult legal issues) should ordinarily be ruled upon within 60 days after completion of briefing. Although we do not have precise statistical information, we believe there would be little, if any, dissent from the view that these standards are frequently not met in the Southern District, and far longer periods are not uncommon.

2. Increased Cost and Delay in Case Disposition Caused by Delayed Rulings on Motions

Delay in rulings on pretrial motions may prompt attorneys, often at the urging of clients, to postpone other work in the case (e.g., conducting discovery, seriously evaluating case for settlement purposes) in an effort to decrease litigation costs. This is particularly likely to occur when motions are addressed to whether the court is the proper forum (e.g., venue, personal and subject matter jurisdiction).

Delay in rulings on pretrial motions also may, and frequently does, increase costs to the litigants (e.g., discovery is done that turns out to have been unnecessary when a motion to dismiss is belatedly granted). The problem of increased costs to the litigants is particularly exacerbated when a ruling that disposes of a case, or a significant portion of a case, has been delayed past the point that trial preparation has already begun because of an imminent trial setting.

An additional point, implicit in the preceding discussion, should also be noted. When delay in ruling on a pretrial motion cannot be avoided, a conflict often results between the goals of

(1) reducing delay in the ultimate disposition of the case, and (2) avoiding unnecessary costs to litigants. That is, continuing other work in the case pending a ruling causes unnecessary costs to be incurred if the motion is eventually granted. On the other hand, postponing that other work pending a ruling on the motion may cause delay in the ultimate disposition of the case if the motion is eventually denied.

Finally, there are adverse effects that should not be ignored even when cases are eventually settled in the face of long-pending and potentially dispositive, but unresolved, motions. First, both litigants will likely have incurred unnecessary attorneys' fees and other costs and expenses while the motion was pending.[52] Second, the quality of justice suffers where settlements must reflect substantive uncertainties and future litigation costs that could be clarified by a ruling on the motion. Third, respect for the judicial system may suffer: It is difficult for attorneys to explain to clients why courts do not decide important issues where a ruling would save them large costs in settlements and litigation expenses, or at least allow a more realistic evaluation of their position.

3. Causes of Delay in Ruling on Motions

The Advisory Group has identified four potential causes for delay in deciding pretrial motions:

---

[52] Client time and attention that has to be devoted to a pending case is a large and very real, but frequently overlooked, cost of litigation.

a. Workload and staffing. Each active judge employs two law clerks except the Chief Judge, who is entitled to three clerks. Senior judges normally have only one law clerk but, due to the caseload maintained by our senior judges, Judge Steckler employs two law clerks and Judge Noland has a third law clerk. Each magistrate judge employs one law clerk.

Limits on the numbers of clerks assigned to each judge result from restrictions on aggregate amounts for employees' salaries in each chambers. In extraordinary circumstances, such as appointment to a judicial commission or special projects, a judge may be able to obtain authority to hire an extra law clerk on a temporary basis. Judge Noland is currently authorized to maintain three law clerks due to a backlog of cases. No other judge is currently authorized to hire additional personnel.

One of the law clerk's main functions is to assist the judge in disposing of motions. Law clerks are particularly instrumental in processing the more complex motions that require substantial research and careful review of the record. Therefore, an additional law clerk for each judge and magistrate judge would benefit the court. The court's experience with the Chief Judge's three law clerks illustrates the benefit. Having a third law clerk has resulted in the reduction or elimination of the Chief Judge's motions backlog. Likewise, magistrate judges might benefit from having a second law clerk. With only one clerk, the magistrate judges are hampered in dealing with a difficult or complicated matter which requires extended

concentration on one file while also managing more urgent matters that arise.

Despite the apparent benefits of hiring extra help, it should be noted that some judges and magistrate judges do not have a significant backlog of motions, and others might be able to improve the efficiency of their existing clerks without hiring additional personnel. In addition, the cost of hiring additional clerks is significant.

The Advisory Group considered a number of alternatives to additional clerks, including keeping permanent clerks, employing lawyers as room clerks, employing lawyers as secretaries, employing staff or floating law clerks, and relaxing the guidelines used to authorize employment of additional, temporary law clerks on an as-needed basis. We have concluded that additional staff would be useful in reducing the delays associated with motions practice in the Southern District. We are reluctant, however, to make a recommendation with respect to the form that additional staff should take. We urge the Judicial Conference and the Judicial Council of the Seventh Circuit to consider how best to increase staffing in the district court.

b. Length and style of written rulings. There apparently is a perception by Southern District judges that written rulings on pretrial motions should be detailed and thoroughly crafted. This perception apparently has been fueled by certain decisions of the Court of Appeals for the Seventh Circuit and by informal conversations with members of the appellate court. This is a

legitimate and serious concern of the district court. In the Advisory Group's view, it is also unfortunate.

Crafting lengthy, scholarly and carefully written opinions consumes large amounts of judicial and law clerk time. This is ordinarily unnecessary when a trial court rules on a motion. A short statement of the basis for the court's ruling, perhaps citing a legal authority or two, is ordinarily sufficient. This is particularly true when the issue is one that may be reviewed de novo on appeal. The district court's primary task is to administer justice, which requires moving the docket and resolving issues fairly and promptly, not writing lengthy opinions of publishable quality.

c. Frivolous, trivial, inartfully drafted or unnecessary motions. Many motions should not be filed at all. These include, among other examples, discovery motions that reflect unreasonable positions, motions for summary judgment in cases in which material issues of fact plainly exist, and motions that would have been reasonably compromised had the parties undertaken good faith discussions prior to filing the motion. All such motions unnecessarily contribute to the court's workload. In addition, the pendency of a meritless motion can delay and interfere with other trial preparation--for example, it can reinforce the taking of unreasonable positions by lawyers on other similar issues ("We presented our position that this type of discovery is irrelevant in our motion filed six months ago--If it's so unreasonable, why hasn't the judge denied it?

Obviously this is a matter on which reasonable minds can differ. If you disagree, you are free to file another motion." . . . etc. ad nauseam). Meritless but unresolved motions can also affect settlement value.

Magistrate judges in the Southern District sometimes discuss in interim pretrial conferences proposed motions before they are filed. This discussion can give attorneys the initial reaction of a judicial officer to a proposed motion and valuable information bearing on whether it should be filed at all. Such "prescreening" of motions may help in avoiding the filing of frivolous and marginal motions. We encourage more extensive use of the practice.

When such motions are filed, however, it is best to rule on them promptly. Even less should be required for a trial court opinion ruling on an obviously meritless motion. In many instances, a one sentence "Motion Denied" is adequate.

In addition, lawyers frequently contribute to motion delays by the form of their motions and accompanying papers. Briefs always should be clear and concise and should adhere to reasonable page limitations, whether or not they are within the presumptive 35-page limit imposed by Local Rule 7.1. Requests to exceed the 35-page limit should be made only when absolutely necessary; lawyers should realize that, under the new local rule, such requests will not be automatically granted. Where proposed orders are required to accompany motions, they should be correct and substantively complete. Lawyers also should observe the

provisions of Local Rule 7.1 requiring a table of cases and contents and a statement of the issues whenever the brief exceeds 35 pages. Indeed, a concise, up-front statement of the issues will often advance the clear presentation of the motion regardless of the length of the brief.

d. Settlement pressure. Many lawyers practicing in the district believe that the court sometimes delays ruling on dispositive motions until the eve of the trial with the purpose of pressuring settlement. Uncertainty inspires settlement, and settlements eliminate trials and appeals. Settlements also usually provide a plaintiff more or less than the all-or-nothing that the law in any give case may allow. The Advisory Group is not critical of these motives, and is aware that justice as between any two parties may be as likely to reside somewhere in the middle as at either end.

However, we believe this approach ignores or discounts costs that are less readily visible to the court than the obvious benefits of a settlement. These include the sometimes enormous expenditure of attorneys' fees and client and witness time required to prepare for a trial that should be rendered unnecessary by a dispositive motion, and that may eat up most or all of the benefits of any eve-of-trial settlement. Respect of litigants for the judicial process also may suffer. Considering the costs and delays that parties incur in fully preparing cases for trial that, under the law, should not be tried, we disapprove of the practice. At the least, a judge who is considering

withholding a prompt rule in an effort to stimulate settlement should carefully consider the very real costs, as well as the possible benefits, of that approach.

4. Recommendations

The Advisory Group recommends the following measures to address the issue of delay in rulings on pretrial motions:

a. Staffing. The Advisory Group recommends that the Judicial Conference and the Judicial Council of the Seventh Circuit make available to the district court additional staff specifically to aid the court in deciding motions.

b. Summary Judgment Motions.

(1) Case management plans and scheduling orders should set summary judgment motions to be filed and briefed as soon as reasonably feasible in the circumstances of the particular case. For example, where the summary judgment motion will present a dispositive issue of law that is apparent from the outset of the case, the motion should be scheduled early, before the expenditure of substantial time and money on discovery. If a limited amount of discovery is required to present the motion properly, the plan and order may provide for the prompt completion of that "first phase" discovery and the subsequent filing of the motion. As an outer limit in complex cases, scheduling orders should set summary judgment motions to be filed and completely briefed no less than 90 days before any scheduled trial date. As an outer limit in other cases, scheduling orders should set summary judgment motions to be filed and completely

briefed no less than 60 days before any scheduled trial date. Motions to extend earlier deadlines in scheduling orders should be granted only for good cause shown. Motions to extend the outer limit deadlines should be granted only for extraordinary cause.

(2) In ruling on motions, the Court should give first priority to summary judgment motions in cases scheduled for trial within 60 days.

(3) If a summary judgment motion has not been resolved in a case scheduled for trial within 30 days, the motion should be decided by that scheduled trial date and the trial should be rescheduled to a date at least 30 days from the date of the decision on that motion and no more than 90 days after the previously scheduled trial date, unless the parties stipulate to an earlier date.

c. Other Dispositive Motions. The same principles and guidelines that govern summary judgment motions and decisions should apply with respect to all other dispositive motions.

d. Motions Addressing Jurisdiction and Venue. In ruling on motions, the Court should give second priority to motions addressed to whether the court is the proper forum (e.g., venue, personal and subject matter jurisdiction, transfer to another district, remand of removed cases).

e. Notification of Anticipated Settlement. The parties should immediately notify the Court of any reasonably anticipated settlement of a case where there is any pending motion. A local

rule imposing this requirement should be adopted. Absent such a notification by the parties, the Court should not delay ruling on a pending motion in the hope of settlement or to try to induce the parties to settle.

f. Meet and Confer Requirement; Proposed Local Rule. The Advisory Group considered enlarging the scope of Local Rule 37.1, which already requires an attorneys' conference prior to the filing of discovery motions, to include other kinds of motions that may be amenable to compromise. The Advisory Group was unable to conclude at this time that the requirement should be imposed across the board with respect to all motions. Instead, we recommend that the attorneys' conference procedure be extended to include three additional kinds of motions that may be particularly susceptible to reasonable compromise: motions for the award of attorney's fees (including motions to fix the amount of attorney's fees where fees are recoverable by statute), motions for sanctions, and motions for attorney disqualification. Experience under such a procedure should be accumulated in order to permit evaluation of the results and the advisability of a broader or narrower rule.

Accordingly, recommend that the following new Local Rule be adopted, patterned after existing Local Rule 37.1:

Informal Conference to Discuss Certain Motions

> The court may deny any motion for the award of attorney's fees, motion for sanctions, or motion for attorney disqualification (except those motions brought by a person appearing pro se) unless counsel for the moving party files with the court, at the time of filing the motion, a separate statement showing that the attorney making the

motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion. This statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the matters covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay.

g. Length of Opinions. Ordinarily, written rulings on motions should not be lengthy. It is not necessary to describe fully the parties, the nature and background of a case, or the parties' opposing arguments. A ruling briefly stating the issue(s), the basis for the Court's ruling, and the main legal authority relied upon is sufficient.

h. Appellate Review. The Court of Appeals for the Seventh Circuit should recognize that a district court's primary task is to move the docket and resolve issues promptly and fairly, not to write lengthy and scholarly opinions. The Court of Appeals should not encourage or require such opinions. In ruling on any issue reviewable de novo on appeal, it is sufficient that the district court briefly state the reason(s) for its decision. In other situations, it is sufficient that the district court also set forth any necessary factual determinations. Beyond such requirements, appellate decisions should not be influenced at all by the form, length or style of district court opinions.

C. Discovery Practice

1. Assessing Cost and Delay in Discovery Practice

The Act requires the Advisory Group to consider whether additional controls of discovery are necessary to prevent

discovery abuses or excessive delays. It was the almost universal consensus of attorneys and judicial officers interviewed by the Advisory Group that the district does not experience plainly excessive discovery or other serious discovery abuses except in rare instances. The generally satisfactory nature of discovery in this district is facilitated by the willingness of the judicial officers to be available by telephone to resolve discovery disputes. We believe that this is a helpful practice that should be more widely publicized.

We also note that the Southern District already requires, through Local Rule 37.1, that attorneys filing discovery motions file "a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion."[53]

Problems expressed to the Advisory Group were confined to case-specific instances and did not show a pattern or trend of serious abuse. Some of the problems specifically identified included:

(a) problems with depositions of experts, including timely disclosure of experts, who pays experts' fees and

---

53 See 28 U.S.C. § 473(a)(5). Local Rule 37.1 also requires that the statement "recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the problems covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay."

whether expert depositions are evidentiary or for discovery purposes only;

(b) unnecessarily lengthy depositions;

(c) inappropriate instructions to deponents not to answer questions or speaking objections for the purpose of coaching the witness;

(d) excessive objecting on the record during depositions;

(e) overly broad interrogatories;

(f) inappropriate assertions of privilege;

(g) reluctance of the judicial officer to impose sanctions when appropriate.

Attorneys responding to our survey expressed concern over the length of discovery. Thirty-nine percent of the respondents thought discovery took too long in their case. They blamed the delay on failure of the court to enforce deadlines as well as counsel's failure to act efficiently. Respondents also suggested that discovery deadlines were often not enforced.

While we do not face severe problems in this district with discovery practices, the Advisory Group believes that there are measures that could be adopted to facilitate discovery. First, the requirement that attorneys construct a case management plan in compliance with revised L.R. 16.1, described above, will encourage attorneys to use staged discovery where appropriate, to cooperate in devising an efficient discovery schedule within the

discipline of an early, firm trial date, and to discuss possible limitations on the number of depositions.[54]

The Act suggests the consideration of procedures to encourage the voluntary exchange of discovery information.[55] In this connection, the Advisory Group considered the effect and utility of proposed amendments to Rule 26(a) of the Federal Rules of Civil Procedure that would require mandatory disclosures of certain standardized information early in the life of the case.[56]

---

54 See 28 U.S.C. § 473(a)(3)(C)(i). The local rules already limit the number of interrogatories and requests for admissions that may be served without leave of court. See Local Rule 26.1(b).

55 28 U.S.C. § 473(a)(4).

56 Subsection (a)(1) would require (i) a plaintiff within 30 days of service of any party's answer to the complaint, or (ii) a defendant within 30 days after service of its answer, or (iii) any other party within 30 days of receipt of a written demand for accelerated disclosure accompanied by the demanding party's disclosures, to provide:

(a) names, addresses and telephone numbers of "each individual likely to have information that bears significantly on any claim or defense. . .";

(b) a copy or a description by category and location of all documents in the possession, custody or control of the party "likely to bear significantly on any claim or defense";

(c) a computation of each category of claimed damages; and

(d) insurance agreements.

Subsection (a)(2) would require, on the same schedule, the production of the written reports of expert witnesses, exhibits to be used as a summary or support for expert opinion, the qualifications of the witness, and a list of other cases in which the witness has (continued...)

The Advisory Group has serious reservations about several of the provisions for mandatory disclosure in the proposed Federal Rule and we decline to recommend routine mandatory disclosure by local rule for the following reasons:

a. Required local rule disclosures may conflict with or duplicate those called for by the proposed amendments to the Federal Rules.

b. If local disclosure requirements proliferate, they may differ in many respects. Necessary research into local requirements would add expense and further Balkanize federal practice.

c. Depending upon the timing of required disclosures, the requirements may be viewed as pro-defendant if they require early production of information possessed only by the plaintiff who by virtue of the requirements of Fed.R.Civ.P. 11 must inquire into the facts supporting the allegations of the complaint before bringing suit. The proposed Federal Rule attempts to balance these concerns by keying plaintiffs' disclosure requirements to the filing of <u>any</u> answer to the complaint, and defendants' disclosure requirements to the filing of <u>its</u> answer. Whether or

---

[56](...continued)
testified over the previous five years.

Subsection (a)(3) would require the parties to produce, at least 30 days before trial, names, addresses and telephone numbers of witnesses (apparently without distinction between case-in-chief and rebuttal), a designation of witnesses whose testimony will be presented by deposition, and an identification of exhibits.

not this arrangement will be workable and perceived as fair has not yet been tested through experience.

d. Rule-mandated disclosures will inevitably lack the flexibility which comes from case-by-case consideration of the desirability and scope of cooperative disclosures.

e. Mandatory disclosures of information are time-consuming and may add to the expense of litigation in some instances. The Advisory Group believes they should be implemented only where there is a demonstrated need for them.

Thus, while we considered recommending mandatory disclosures of the type included in the proposed Rule 26(a), we concluded that the better course would be to include cooperative, accelerated disclosures as an item to be considered in the preparation of the case management plan.[57] If there is substantial disagreement among the parties concerning the desirability or scope of such disclosures, the court may resolve those differences in the process of its review of the case management plan and order appropriate disclosures. Because the procedure would be a flexible one based upon the demands of the particular case, it would encourage the early, cooperative exchange of information essential to an informed evaluation of settlement possibilities, but would not be required where the nature of the case being litigated did not justify it.

2. Recommendations

---

[57] See proposed revised Local Rule 16.1 at subsection II-A(2)(c) of this Report.

a. The Advisory Group recommends that the court adopt a local rule to facilitate discovery in civil cases concerning certain aspects of the conduct of depositions, the timing of disclosure of expert witnesses, and procedures governing a claim of privilege. As noted above, these are the areas in which attorneys suggested that disputes sometimes arise. The Advisory Group recommends that a local rule along the lines of the Standing Orders of the United States District Court, Eastern District of New York, on Effective Discovery in Civil Cases, included in the appendix to this report, be considered by the Local Rules Committee.

b. The Advisory Group recommends that the court publicize, perhaps through a local rule, the willingness of the magistrate judges to hear and resolve discovery disputes telephonically.

c. The Advisory Group recommends adoption of Revised Local Rule 16.1, discussed above.

D. Alternative Dispute Resolution

1. Assessing Use of Alternative Dispute Resolution

The Act requires the Advisory Group to consider the use of Alternative Dispute Resolution (ADR) as a means to reduce costs and delays in the resolution of civil cases.[58] The Advisory Group considered the statistical materials analyzed in Part I, case filing trends noted there, the current practices of the

---

[58] See 28 U.S.C. § 473(a)(3)(A); 473(a)(6); 473(b)(4).

bench and bar in the district,[59] the concurrent activities of the Indiana State Bar Association and the Indiana Supreme Court in establishing ADR mechanisms at the state court level, current federal civil trial rules, Seventh Circuit case law applicable to ADR, local rules on ADR in other districts,[60] and many published articles on ADR and settlement techniques.

Judicial officers in the Southern District actively explore and encourage settlement in pretrial conferences. To encourage settlement discussions among the litigants, new Local Rule 16.1 (former Local Rule 21) requires counsel to be prepared to discuss at the initial pretrial conference "whether there is a probability of disposing of the case through settlement, pretrial adjudication, involuntary dismissal, mediation or alternative dispute resolution methods." Local Rule 16.1(d)(12).[61] Our proposed revised LR 16.1 continues this requirement. Judicial officers presently encourage settlement through many techniques, including the magistrate judges' use of informal "neutral evaluations" based on their estimates of the value of the claim.

---

59 Judicial officers were asked about their views of ADR in interviews. Attorneys were surveyed, and their views were also solicited at the State Bar Association meeting.

60 See, e.g., the mandatory arbitration rule in the Western District of Wisconsin.

61 The existing local rule also already requires counsel to determine their settlement authority prior to pretrial conferences and to "be prepared to enter into negotiations in good faith." Local Rule 16.1(i); see 28 U.S.C. § 473(b)(2).

Other than generally encouraging settlement, however, the court does not frequently use ADR methods. Arbitration, early neutral evaluations, mini-trials, and mediation have little track record in the district, and only one judge has used summary jury trials. No formal rules, practices or procedures are currently available for the initiation or utilization of any ADR method. If any method is used, it is by the consent of the parties on an ad hoc basis and without established guidelines.

2. Causes of Resistance to ADR

ADR may be infrequently used in this district because judges, attorneys and litigants do not believe such methods result in significant savings of cost or time. Attorneys may also not be as familiar or comfortable with ADR techniques as with the procedural regularity of the courtroom. Some cases, particularly those involving important public law issues, may not be appropriate for resolution through ADR. Finally, judges may be hesitant to mandate participation in alternative programs because of the Seventh Circuit's decision in Strandell v. Jackson County, Ill., 838 F. 2d 884 (7th Cir. 1987), in which the court held that an unwilling litigant could not be compelled to participate in a summary jury trial. Courts in other circuits have held that, under Rule 16 and the court's inherent powers, a party can be compelled to participate in a nonbinding summary jury trial, and the general counsel for the Administrative Office of the United States Courts recently opined that, because the Civil Justice Reform Act refers to such techniques as mediation,

summary jury trials and mini-trials, federal courts have the authority to mandate participation in nonbinding settlement techniques. However, the existence of Strandell continues to constrain the court to seek consent of the parties. Moreover, the effectiveness of ADR techniques in this district will depend upon the willingness and motivation of the attorneys and litigants to participate. So long as judges and attorneys are uncomfortable with ADR methods, or believe such methods will not result in significant savings of cost or time, they will remain little used.

The Indiana Supreme Court has recently adopted new ADR rules at the state court level. The new state-court rules establish mechanisms for voluntary (and in some instances court-mandated) participation in mediation, arbitration, mini-hearings, summary jury trials and use of "private" judges. As Indiana judges, attorneys, and litigants become more familiar and comfortable with these techniques, and as Indiana develops an established group of trained professionals who can provide ADR services, increased use of ADR should follow at the federal level as well.

3. Recommendations

Given the constraints of Seventh Circuit precedent, the Advisory Group does not recommend that participation in ADR be required. However, the Advisory Group believes that established guidelines for the implementation and use of ADR programs would facilitate the incorporation of ADR techniques into the

settlement process already pursued as a matter of course by the judges and magistrate judges.

a. Action by the Court.

(1) Settlement. The court should continue actively to encourage settlement. Efforts should include discussion of settlement possibilities at every pretrial conference, solicitation of settlement offers from the parties, early neutral evaluation by magistrate judges in non-consent cases, "shuttle diplomacy" and other techniques.

(2) ADR Methods. The court should promulgate a local rule patterned on the new Indiana ADR rules, but without mandatory provisions, to establish guidelines for the initiation and implementation of ADR methods. The Advisory Group believes that ADR would thus be fostered in the district by establishing a framework for its use and by clearly defining some of the more significant ADR methods.

(3) Publicity. The court should include a description of ADR mechanisms and a discussion of their potential benefits in (1) the Practitioner's Handbook for Southern District attorneys currently being prepared, and (2) a brochure, similar to that used in the Northern District of California and elsewhere, designed to educate litigants as well as attorneys regarding ADR. A copy of the excellent Northern District of California publication is included in the Appendix.

b. Action by Attorneys and Litigants. Attorneys should familiarize themselves and their clients with alternative

means of dispute resolution and should encourage settlement and use of ADR methods in appropriate cases. Attorneys should not rely solely on the court to initiate settlement discussions or propose alternative means to enhance the possibility of settlement. Rather, attorneys should take the initiative to encourage early resolution of the litigation and to seek court involvement as appropriate in these efforts.

c. Proposed Local Rule on ADR. Local Rule 53.2 should be amended to provide procedures for implementing the more frequently used alternative dispute resolution methods. Our proposed text is as follows:

> Revised Local Rule 53.2: Arbitration/Alternative Dispute Resolution
>
> The court, in its discretion with the consent of the parties, may set any appropriate civil case for nonbinding alternative dispute resolution. The parties may agree to be bound by the result of any such proceeding. Such proceedings may include any of the following procedures, any variations thereof, or any other method agreed upon by the parties and approved by the court.
>
> (a) Early Neutral Evaluation and Mediation.
>
> (1) The court may, upon its own motion with the consent of the parties, or upon the agreement of all parties filed of record, refer the case to early neutral evaluation or mediation.
>
> (2) A qualified evaluator or mediator (hereafter collectively referred to as "mediator") may be selected by the mutual agreement of the parties or by the court in the absence of such agreement. The mediator shall be an attorney in good standing admitted to practice law in the U.S. District Court for the Southern District of Indiana, and be knowledgeable about the subject matter of the dispute, but have no

specific knowledge about the case. The mediator shall be compensated as agreed by the parties with the mediator, subject to the approval of the court.

(3) The mediator shall notify the parties, at least ten (10) days in advance, of the time, date and location of the early neutral evaluation or mediation conference and direct the presence at such conference of all persons necessary for facilitating settlement of the dispute.

(4) Prior to the conference, the attorney for each of the parties may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, which shall include:

(a) the legal and factual contentions of the respective parties as to both liability and damages;

(b) the factors considered in arriving at the current settlement posture; and

(c) the status of the settlement negotiations to date.

This confidential statement may be supplemented by damage brochures, videos, and other exhibits or evidence which shall be made available to opposing counsel at least five (5) days prior to the conference. The confidential statement of the case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator. At the conference, the mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives. If the early neutral evaluation or

mediation process does not result in settlement, any submitted confidential statement of the case shall be returned to the submitting attorney or party.

(5) Within three (3) business days after the early neutral evaluation conference, the mediator shall report to the court that the process has been completed. Within three (3) business days after any mediation conference, or the completion or termination of the mediation process, the mediator shall report to the court that the mediation process has been extended, completed or terminated. The mediator shall terminate mediation whenever the mediator believes that continuation of the mediation would harm or prejudice one or more of the parties, or that further mediation would be unlikely to result in settlement. At any time after two mediation conference have been completed, any party may terminate mediation. The mediator shall not state the reason for termination except when the termination is due to conflict of interest or bias on the part of the mediator, in which case another mediator may be assigned by the court.

(6) At the conclusion of the early neutral evaluation or mediation process:

(a) If the parties do not reach any agreement as to any matter as a result of the early neutral evaluation or mediation, the mediator shall report the lack of any agreement to the court without any comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(b) If an agreement is reached, it shall be reduced to writing and signed by the parties and their

counsel. The agreement shall then be filed with the court. If the agreement is complete on all issues, it shall be accompanied by a joint stipulation of disposition.

(7) With the exception of privileged communications, the rules of evidence do not apply in early neutral evaluation or mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.

(8) Early neutral evaluation and mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the early neutral evaluation or mediation by any participant, mediator, or any other person present at the conference shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(b) Arbitration.

(1) The court may, upon its own motion with the consent of the parties, or upon agreement of all parties filed of record, refer the case to arbitration.

(2) An arbitrator may be selected by the mutual agreement of the parties or by the court in the absence of such agreement. The arbitrator shall be an attorney in good standing, admitted to practice law before the U.S. District Court for the Southern Distract of Indiana, and be knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The arbitrator shall be compensated as agreed by the parties with the arbitrator, subject to the approval of the court.

(3) The arbitrator shall notify the parties, within ten (10) days after his or her selection, of the time, date and location of the pre-arbitration conference to be attended by all attorneys of record. At such conference, the arbitrator shall establish with counsel dates for completion of all discovery, for submission and service of pre-arbitration briefs, and for the arbitration hearing.

(4) Unless otherwise agreed, all documents the parties desire to be considered in the arbitration process shall be filed with the arbitrator and served on all parties no later than fifteen days prior to the arbitration hearing. In the event of binding arbitration, any party may object to the admissibility of any documentary matters under the Federal Rules of Evidence. In addition, no later than five days prior to the arbitration hearing each party may file with the arbitrator and serve upon all parties a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated.

(5) Rules of discovery shall apply. Thirty days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall be binding upon the parties for purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report.

(6) The Federal Rules of Evidence need not apply with regard to the presentation of testimony. As permitted by the arbitrator, witnesses may be called. Attorneys may make oral presentation of the facts supporting a party's position and the arbitrator is permitted to engage in critical questioning or dialogue with representatives of the parties. In this presentation, the

representatives of the respective parties must be able to substantiate their statements or representations to the arbitrator.

(7) Arbitration proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the arbitration by any participant, arbitrator, or any other person present at the arbitration shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(8) Within twenty days after the hearing, the arbitrator shall file a written determination of the arbitration proceeding in the pending litigation and serve a copy of this determination on all parties participating in the arbitration. If the parties had submitted the matter to binding arbitration on all issues, the court shall enter judgment on the determination. If the parties had submitted the matter to binding arbitration on fewer than all issues, the court shall accept the determination as a joint stipulation by the parties and proceed with the litigation. If the parties had submitted the matter to nonbinding arbitration on any or all issues, they shall have twenty days from the filing of the written determination to affirmatively reject in writing the arbitration determination. If a nonbinding arbitration determination is not rejected, the determination shall be entered as the judgment or accepted as a joint stipulation as appropriate. In the event a nonbinding arbitration determination is rejected, all documentary evidence, the determination and all acceptances and rejections will be returned to the parties.

(c) Mini-Hearing.

(1) The court may, upon its own motion with the consent of the parties, or upon the agreement of all parties filed of record, convene a mini-hearing.

(2) The court will set a time and place for hearing and direct representatives with settlement authority to meet and allow attorneys for the parties to present their respective positions with regard to the litigation in an effort to settle the litigation. The parties may fashion the procedure as they deem appropriate. The procedure may be conducted before an impartial third party.

(3) Within ten days after the mini-hearing, the attorneys of record shall report to the court the results of the hearing and the possibility of settlement of the issues.

(4) Mini-hearing proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mini-hearing by any participant, impartial third party, or any other person present at the mini-hearing shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(d) Summary jury trials.

(1) The court may, upon its own motion with the consent of the partes, or upon the agreement of all parties filed of record, convene a summary jury trial.

(2) The court shall enter an order establishing the completion dates for:

(A) providing notice to opposing counsel of witnesses whose testimony will be summarized and/or

introduced at the summary jury trial, proposed issues for consideration at summary jury trial, proposed jury instructions, and verdict forms;

(B) hearing pretrial motions; and

(C) conducting a final pre-summary jury trial conference.

(3) Such entry shall also establish the procedure to be followed in the presentation of the case in the summary jury trial, including:

(A) abbreviated opening statements;

(B) summarization of anticipated testimony by counsel;

(C) the presentation of documents and demonstrative evidence;

(D) the requisite base upon which the parties can assert evidence; and

(E) abbreviated closing statements.

(4) The Federal Rules of Civil Procedure and Federal Rules of Evidence shall apply, except to the extent otherwise provided in the court's entry or agreed by the parties with the approval of the court.

(5) Jurors for a summary jury trial will be summoned and compensated in normal fashion. Six jurors will be selected in an expedited fashion. The jurors will be advised on the importance of their decision and their participation in an expedited proceeding. Following instruction, the jurors will retire and be requested to return a unanimous verdict. If a decision is not reached in a predetermined period of time not to exceed two hours, the jurors will then be instructed to return as many separate verdicts as necessary, with an indication of juror support for each verdict. The jury may issue a verdict regarding liability, damages or both.

Unless the parties agree otherwise, the verdict is not binding and it shall not be appealable.

(6) After the verdict has been rendered, the jury will be advised of the advisory nature of the decision and counsel for each side will be permitted to ask general questions to the jury regarding the decisions reached which would aid in the settlement of the controversy. Counsel should not be permitted to ask specific questions of the jury relative to the persuasiveness of the form of evidence which would be offered by particular witnesses at trial, the effectiveness of particular exhibits, or other inquiries as could convert summary jury trials from a settlement procedure to a trial rehearsal.

(7) Neither the panel's advisory opinion nor its verdict, nor the presentations of the parties, shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the Federal Rules of Evidence.

E. Personnel

1. Pro Se Law Clerk

a. Effect of Clerk on Pro Se Caseload

The Southern District currently has a large pro se caseload, with cases filed by pro se litigants accounting for three out of every ten cases in the district. The district employs a very effective pro se law clerk. Largely due to his efforts, the pro se caseload has not been a significant source of cost and delay. However, the position currently does not allow for advances in grade beyond the level of JSP 14. Thus, it may not be possible to retain efficient and experienced pro se clerks permanently.

b. Recommendation

The Advisory Group recommends to the Administrative Office of the United States Courts and to the Judicial Conference that the pro se law clerk be made a career position with advancing salary grade.

2. Other Personnel

a. Flexible Job Descriptions

In investigating the current work of the court, the Advisory Group became aware that some judges were using personnel creatively to reduce cost and delay. One chambers, for instance, makes effective use of the deputy clerk for settlement negotiations with attorneys. However, the judges are hindered in their ability to use personnel effectively or recognize work that contributes to the reduction of cost and delay by rigid and inflexible job descriptions and pay scales. Even if an employee is capable and willing to perform job functions over and above that employee's job description, there is no ability to reward extraordinary performance by a change in job title or pay scale. Allowing a judge or magistrate to redefine job descriptions and adjust pay scales within the court's or clerk's office aggregate salary adjustment would provide needed flexibility and promote the most efficient use of all court personnel.

b. Recommendation

The Advisory Group recommends to the Administrative Office of the United States Courts and the Judicial Conference that each judge and magistrate judge have the ability to capitalize on the

strengths of his or her employees by redefining job descriptions and pay scales as appropriate.

F. Legislation Regarding Prejudgment Interest

There is substantial, but not unanimous, support in the Advisory Group for a recommendation that Congress consider authorizing payment of prejudgment interest on civil judgments, to accrue from the date of the filing of the complaint, in those cases for which no such provision is made under state law. Many members of the Advisory Group believe that such a provision would eliminate economic incentives for delay in litigation.

APPENDIX

MEMBERS OF ADVISORY GROUP

MEMBERS
CIVIL JUSTICE ADVISORY GROUP

The Hon. Sarah Evans Barker
210 U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204

James E. Bourne, Attorney
Wyatt, Tarrant, Combs & Orbison
Elsby Building
117 East Spring Street
P.O. Box 649
New Albany, IN 47150

Joe C. Emerson, Attorney
Baker & Daniels
300 N. Meridian St.
Indianapolis, In. 46206

Stanley C. Fickle, Attorney
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204

Eric A. Frey, Attorney
Frey, Hunt, Hassler & Lorenz
100 Cherry Street
P.O. Box 1527
Terre Haute, IN 47808-1527

Martha S. Hollingsworth, Attorney
Bingham, Summers, Welsh & Spilman
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-2982

Steven L. Huddleston, Attorney
Clarke House
98 West Jefferson Street
P.O. Box 9
Franklin, IN 46131-0009

The Hon. Larry J. McKinney
United States District Court
Room 330, United States Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Debra McVicker Lynch, Attorney
Sommer and Barnard
4000 Bank One Tower
111 Monument Circle
Indianapolis, IN 46244-0363

James G. McIntire, Attorney
Krieg, DeVault, Alexander
& Capehart
One Indiana Square, Suite 2800
Indianapolis, IN 46204

Craig M. McKee, Attorney
Wilkinson, Goeller, Modesitt,
Wilkinson & Drummy
333 Ohio Street
P.O. Box 800
Terre Haute, IN 47808-0800

Lee J. McNeely, Attorney
McNeely, Sanders & Stephenson
611 South Harrison Street
P.O. Box 457
Shelbyville, IN 46176

David W. Mernitz, Attorney
Office of Linda Pence
134 N. Pennsylvania Street
Suite 2300
Indianapolis, IN 46204

Alan K. Mills, Attorney
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204

Edward W. Najam, Jr., Attorney
Najam & Wilson
645 North Walnut Street
Bloomington, IN 47401-2887

Robert Martin, Vice Chancellor
IUPUI
355 North Lansing Street, Room 120
Indianapolis, IN 46202-2896

Henry J. Price, Attorney
Price & Shula
301 Massachusetts Avenue
The Hammond Block Building
Indianapolis, IN 46204

Philip A. Whistler, Attorney
Ice, Miller, Donadio & Ryan
One American Square
Box 82001
Indianapolis, IN 46282

Scott E. Shockley, Attorney
DeFur, Voran, Hanley,
Radcliff & Reed
210 East Jackson Street
Suite 400
Muncie, IN 47305-2847

Elizabeth A. Young, Attorney
Bose McKinney & Evans
8888 Keystone Crossing
Suite 1201
Indianapolis, IN 46240

Patrick A. Shoulders, Attorney
Ziemer, Stayman, Weitzel
& Shoulders
1507 Old National Bank Bldg.
P.O. Box 916
Evansville, IN 47706-0916

The Hon. Deborah Daniels
United States Attorney
500 United States Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Professor Lauren Robel, Reporter
Indiana University
School of Law - Bloomington
Third Street and Indiana Avenue
Bloomington, IN 47405

The Hon. John Paul Godich
United States District Court
232 United States Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Norman P. Metzger,
Exec. Director
Legal Services Organization
151 North Delaware Street
Indianapolis, IN 46204

John A. O'Neal,
Clerk, United States District Court
Room 105, United States Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Bradley L. Williams, Attorney
Ice, Miller, Donadio & Ryan
One American Square
Box 82001
Indianapolis, IN 46282

David J. Ryan, Attorney
Steckler, Perry, & Ryan
601 Chamber of Commerce Bldg.
Indianapolis, IN 46204

PROPOSED CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

TABLE OF CONTENTS

1. PRETRIAL MANAGEMENT AND PRACTICE

The Court refers to the Local Rules Committee the following recommendations of the Advisory Group:

A. New Local Rule 40.3; Trial Settings.

All trials shall commence within six to eighteen months after the filing of the complaint unless the Court determines that, because of the complexity of the case, staging provided by the case management plan, or the demands of the Court's docket, the trial cannot reasonably be held within such time.

B. Revised Local Rule 16.1: Pretrial Procedures; Case Management Plan.

(a) [Unchanged]

(b) [Unchanged]

(c) Initial pretrial conference

(1) In all cases not exempted pursuant to subsection (b) of this rule, the Court shall order the parties to appear for an initial pretrial conference no more than 120 days after the filing of the complaint. The order setting the conference shall issue promptly following the appearance of counsel for all defendants and in any event no later than sixty days after the filing of the complaint.

(2) The order setting the initial pretrial conference, in addition to such other matters as the Court may direct, shall require counsel for all parties to confer and prepare a case management plan and to file such plan by a date specified in the order, which date shall be at least fifteen days before the pretrial conference setting. The order may provide

that the pretrial conference setting shall be vacated upon the filing of a case management plan that complies with this rule and upon the approval of such plan by the Court.

(3) Upon the filing of an acceptable case management plan in compliance with the order and this rule, the Court may issue an order adopting the plan, ordering it performed, and vacating the initial pretrial conference setting. Any such order shall also set a firm trial date.

(4) If the parties do not file a case management plan, or file a plan that fails materially to comply with the order and this rule, or file a plan that reflects material disagreements among the parties, the Court may:

(A) Conduct the initial pretrial conference and, following such conference, enter an order reflecting the matters ordered and agreed to at the conference and setting a firm trial date; or

(B) Issue an order without further hearing adopting the acceptable portions of the plan, omitting unacceptable portions, supplying omitted matters, resolving disputed matters, vacating the pretrial conference setting and setting a firm trial date. The Court may conduct a telephone conference with counsel prior to entering such an order.

(5) To the extent permitted by statute and rule, orders entered under subparagraphs (c)(3) and (c)(4) may offer an alternative trial date in the event the parties thereafter consent to referral of the case to a magistrate judge.

(d) Contents of case management plan

(1) The objective of the case management plan is to promote the ends of justice by providing for the timely and efficient resolution of the case by trial, settlement or pretrial adjudication. In preparing the plan, counsel shall confer in good faith concerning the matters set forth below and any other matters tending to accomplish the objective of this rule. The plan shall incorporate matters covered by the conference on which the parties have agreed as well as advise the Court of any substantial disagreements on such matters.

(2) The conference and case management plan shall address the following matters:

-- Trial date. The plan should be premised on a trial setting between six and eighteen months after the filing of the complaint and should recommend a trial date by month and year. If counsel agree that the case cannot reasonably be ready for trial within eighteen months, the plan shall state in detail the basis for that conclusion. The plan shall also state the estimated time required for trial.

-- Contentions. The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses.

-- Discovery schedule. The plan shall provide for the timely and efficient completion of discovery, taking into account the desirability of phased discovery where discovery in stages might materially advance the expeditious and efficient resolution

of the case. The plan should also provide a schedule for the taking of the depositions of expert witnesses, together with a designation whether the deposition is for discovery purposes only or is to be offered in evidence at trial.

-- Witnesses and exhibits. The plan shall incorporate a schedule for the preliminary and final disclosure of witnesses and exhibits.

-- Accelerated discovery. The parties shall discuss and seek agreement on the prompt disclosure of relevant documents, things and written information without prior service of requests pursuant to Fed. R. Civ. P. 33 and 34.

-- Limits on depositions. The parties shall discuss whether limits on the number or length of depositions should be imposed.

-- Motions. The plan will identify any motions which the parties have filed or intend to file. The parties shall discuss whether any case-dispositive or other motions should be scheduled in relation to discovery or other trial preparation so as to promote the efficient resolution of the case and, if so, the plan shall provide a schedule for the filing and briefing of such motions.

-- Stipulations. The parties shall discuss possible stipulations and, where stipulations would promote the efficient resolution of the case, the plan shall provide a schedule for the filing of stipulations.

-- Bifurcation. The parties shall discuss whether a separation of claims, defenses or issues would be desirable; and if so, whether discovery should be limited to the claims, defenses or issues to be tried first.

-- Alternative dispute resolution. The parties shall discuss the desirability of employing alternative dispute resolution methods in the case, including mediation, neutral evaluation, arbitration, mini-trials or mini-hearings, and summary jury trials.

-- Settlement. The parties shall discuss the possibility of settlement both presently and at future stages of the case. The plan may provide a schedule for the exchange of settlement demands and offers, and may schedule particular discovery or motions in order to facilitate settlement.

-- Referral to a magistrate judge. The parties shall discuss whether they consent to the referral of the case to a magistrate judge.

-- Amendments to the pleadings; joinder of additional parties. The parties shall discuss whether amendments to the pleadings, third party complaints or impleading petitions, or other joinder of additional parties are contemplated. The plan shall impose time limits on the joinder of additional parties and for amendments to the pleadings.

-- Other matters. The parties shall discuss (1) whether there is any question regarding jurisdiction over the person or of the subject matter of the action, (2) whether all

parties have been correctly designated and properly served, (3) whether there is any question of appointment of a guardian ad litem, next friend, administrator, executor, receiver or trustee, (4) whether trial by jury has been timely demanded, and (5) whether related actions are pending or contemplated in any Court.

-- Interim pretrial conferences. The parties shall discuss whether interim pretrial conferences prior to the final pretrial conference should be scheduled.

(e) Additional pretrial conferences. Additional pretrial conferences shall be held as ordered by the Court. Prior to each such pretrial conference, counsel for all parties will confer, in person or by telephone, to prepare for the conference. Such conference shall include a review of the case management plan and shall address whether the plan should be supplemented or amended. In cases in which pretrial case management is assigned to a magistrate judge, counsel shall also discuss whether direct involvement by the district judge prior to trial might materially advance the case. The discussions of counsel shall be summarized by one of counsel who shall prepare an agenda for the pretrial conference which shall reflect the agreements reached among or between counsel, including any proposed supplements or amendments to the case management plan. It shall be the responsibility of all counsel that an agenda be presented to the Court at the pretrial conference. Failure to present an agenda and failure to confer as required may be grounds for the imposition of sanctions.

(f) Contents of final pretrial order. In addition to such other provisions as the Court may direct, the final pretrial order may direct each party to file and serve the following:

(1) to (7) - [unchanged]

(g) Preparation of pretrial entry. [unchanged]

(h) Settlement. [unchanged except for noted deletion:]

Counsel should anticipate that the subject of settlement will be discussed at any pretrial conference. Accordingly, counsel should be prepared to state his or her client's present position on settlement. In particular, prior to any conference ~~after the initial conference~~, counsel should have ascertained his or her settlement authority and be prepared to enter into negotiations in good faith. Details of such discussions at the pretrial conference should not appear in the pretrial entry.

(i) Deadlines. [unchanged except as noted]

Deadlines established ~~at the pretrial conference~~ in any order or pretrial entry under this rule shall not be altered except by agreement of the parties and the Court, or for good cause shown.

(j) [unchanged]

2. PRETRIAL MOTIONS

The Court adopts the following procedures and guidelines concerning motion practice, and refers the following recommended local rules to the Local Rules Committee:

A. Summary Judgment Motions: Procedures.

(1) Case management plans and scheduling orders should set summary judgment motions to be filed and briefed as soon as reasonably feasible in the circumstances of the particular case. For example, where the summary judgment motion will present a dispositive issue of law that is apparent from the outset of the case, the motion should be scheduled early, before the expenditure of substantial time and money on discovery. If a limited amount of discovery is required to present the motion properly, the plan and order may provide for the prompt completion of that "first phase" discovery and the subsequent filing of the motion. As an outer limit in complex cases, scheduling orders should set summary judgment motions to be filed and completely briefed no less than 90 days before any scheduled trial date. As an outer limit in other cases, scheduling orders should set summary judgment motions to be filed and completely briefed no less than 60 days before any scheduled trial date. Motions to extend earlier deadlines in scheduling orders should be granted only for good cause shown. Motions to extend the outer limit deadline should be granted only for extraordinary cause.

(2) In ruling on motions, the Court should give high priority to summary judgment motions in cases scheduled for trial within 60 days.

(3) If a summary judgment motion has not been resolved in a case scheduled for trial within 30 days, the motion shall be

decided by that scheduled trial date, and the trial should be rescheduled to a date at least 30 days from the date of the decision on that motion and no more than 90 days after the previously scheduled trial date, unless the parties stipulate to an earlier trial date.

B. Other Dispositive Motions: Procedures.

The same principles and guidelines that govern summary judgment motions and decisions shall apply with respect to all other dispositive motions.

C. Priorities on Motions.

In ruling on motions, the Court should also give high priority to motions addressed to whether the Court is the proper forum (e.g., venue, personal and subject matter jurisdiction, transfer to another district, remand of removed cases).

D. New Local Rule 7.1(d): Duty to Report Settlement Possibility.

The parties shall immediately notify the Court of any reasonably anticipated settlement of a case where there is any pending motion.

E. No Delay in Anticipation of Settlement.

Absent notification by the parties that settlement is reasonably anticipated, the Court should not delay ruling on a pending motion in the hope of settlement or to try to induce the parties to settle.

F. New Local Rule 7.1(c): Attorneys' Conferences to Discuss Certain Motions.

Informal Conference to Discuss Certain Motions

The Court may deny any motion for the award of attorney's fees, motion for sanctions, or motion for attorney disqualification (except those motions brought by a person appearing pro se) unless counsel for the moving party files with the Court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion. This statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the Court in writing that opposing counsel has refused or delayed meeting and discussing the matters covered in this Rule, the Court may take such action as is appropriate to avoid unreasonable delay.

G. Decisions on Motions: Form.

Ordinarily, written rulings on motions should not be lengthy. It is not necessary to describe fully the parties, the nature and background of a case, or the parties' opposing arguments. A ruling briefly stating the issue(s), the basis for the Court's ruling, and the main legal authority relied upon is sufficient.

3. DISCOVERY

The Court refers to the Local Rules Committee the following recommendations of the Advisory Group:

A. Rule on Certain Aspects of Discovery Practice.

The Advisory Group recommends the adoption of a local rule to facilitate discovery in civil cases concerning certain aspects of the conduct of depositions, the timing of disclosure of expert witnesses, and procedures governing a claim of privilege. As noted in the Advisory Group report, these are the areas in which attorneys suggested that disputes sometimes arise. The Advisory Group recommends that a local rule be considered along the lines of the Standing Orders of the United States District Court, Eastern District of New York, on Effective Discovery in Civil Cases, included in the appendix to the Advisory Group report.

B. Rule Publicizing Availability of Magistrates.

The Advisory Group recommends that the Court publicize, perhaps through a local rule, the willingness of the magistrate judges to hear and resolve discovery disputes telephonically.

4. ALTERNATIVE DISPUTE RESOLUTION

The Court adopts the following measures concerning settlement and alternative dispute resolution and refers the following recommended local rule to the Local Rules Committee:

A. Settlement.

The Court should continue actively to encourage settlement. Efforts should include discussion of settlement possibilities at every appropriate pretrial conference, solicitation of settlement offers from the parties, early neutral evaluation by magistrates in non-consent cases, "shuttle diplomacy," and other techniques.

B. Publicity.

The Court directs the Clerk of the Court for the Southern District of Indiana to include in the Practitioner's Handbook descriptions of the following Alternative Dispute Resolution mechanisms: (1) Early Neutral Evaluation and Mediation; (2) Arbitration; (3) Mini-Hearings; (4) Summary Jury Trials. The Court also directs the Clerk for the Southern District of Indiana to prepare and promulgate a brochure, for litigants as well as attorneys, describing these Alternative Dispute Resolution mechanisms.

C. Revised Local Rule 53.2: Arbitration/Alternative Dispute Resolution.

The court, in its discretion with the consent of the parties, may set any appropriate civil case for nonbinding alternative dispute resolution. The parties may agree to be bound by the result of any such proceeding. Such proceedings may include any of the following procedures, any variations thereof, or any other method agreed upon by the parties and approved by the court.

(a) Early Neutral Evaluation and Mediation

(1) The court may, upon its own motion with the consent of the parties, or upon the agreement of all parties filed of record, refer the case to early neutral evaluation or mediation.

(2) A qualified evaluator or mediator (hereafter collectively referred to as "mediator") may be selected by the mutual agreement of the parties or by the court in the absence of

such agreement. The mediator shall be an attorney in good standing admitted to practice law in the U.S. District Court for the Southern District of Indiana, and be knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The mediator shall be compensated as agreed by the parties with the mediator, subject to the approval of the court.

(3) The mediator shall notify the parties, at least ten (10) days in advance, of the time, date and location of the early neutral evaluation or mediation conference and direct the presence at such conference of all persons necessary for facilitating settlement of the dispute.

(4) Prior to the conference, the attorney for each of the parties may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, which shall include:

(a) the legal and factual contentions of the respective parties as to both liability and damages;

(b) the factors considered in arriving at the current settlement posture; and

(c) the status of the settlement negotiations to date.

This confidential statement may be supplemented by damage brochures, videos, and other exhibits or evidence which shall be made available to opposing counsel at least five (5) days prior to the conference. The confidential statement of the

case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator. At the conference, the mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives. If the early neutral evaluation or mediation process does not result in settlement, any submitted confidential statement of the case shall be returned to the submitting attorney or party.

(5) Within three (3) business days after the early neutral evaluation conference, the mediator shall report to the court that the process has been completed. Within three (3) business days after any mediation conference, or the completion or termination of the mediation process, the mediator shall report to the court that the mediation process has been extended, completed or terminated. The mediator shall terminate mediation whenever the mediator believes that continuation of the mediation would harm or prejudice one or more of the parties, or that further mediation would be unlikely to result in settlement. At any time after two mediation conference have been completed, any party may terminate mediation. The mediator shall not state the reason for termination except when the termination is due to conflict of interest or bias on the part of the mediator, in which case another mediator may be assigned by the court.

(6) At the conclusion of the early neutral evaluation or mediation process:

(a) If the parties do not reach any agreement as to any matter as a result of the early neutral evaluation or mediation, the mediator shall report the lack of any agreement to the court without any comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(b) If an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel. The agreement shall then be filed with the court. If the agreement is complete on all issues, it shall be accompanied by a joint stipulation of disposition.

(7) With the exception of privileged communications, the rules of evidence do not apply in early neutral evaluation or mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.

(8) Early neutral evaluation and mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the early neutral evaluation or mediation by any participant, mediator, or any other person present at the conference shall be a confidential communication. No admission,

representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(b) Arbitration

(1) The court may, upon its own motion with the consent of the parties, or upon agreement of all parties filed of record, refer the case to arbitration.

(2) An arbitrator may be selected by the mutual agreement of the parties or by the court in the absence of such agreement. The arbitrator shall be an attorney in good standing, admitted to practice law before the U.S. District Court for the Southern Distract of Indiana, and be knowledgeable about the subject matter of the dispute, but have no specific knowledge about the case. The arbitrator shall be compensated as agreed by the parties with the arbitrator, subject to the approval of the court.

(3) The arbitrator shall notify the parties, within ten (10) days after his or her selection, of the time, date and location of the pre-arbitration conference to be attended by all attorneys of record. At such conference, the arbitrator shall establish with counsel dates for completion of all discovery, for submission and service of pre-arbitration briefs, and for the arbitration hearing.

(4) Unless otherwise agreed, all documents the parties desire to be considered in the arbitration process shall

be filed with the arbitrator and served on all parties no later than fifteen days prior to the arbitration hearing. In the event of binding arbitration, any party may object to the admissibility of any documentary matters under the Federal Rules of Evidence. In addition, no later than five days prior to the arbitration hearing each party may file with the arbitrator and serve upon all parties a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated.

(5) Rules of discovery shall apply. Thirty days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall be binding upon the parties for purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report.

(6) The Federal Rules of Evidence need not apply with regard to the presentation of testimony. As permitted by the arbitrator, witnesses may be called. Attorneys may make oral presentation of the facts supporting a party's position and the arbitrator is permitted to engage in critical questioning or dialogue with representatives of the parties. In this presentation, the representatives of the respective parties must be able to substantiate their statements or representations to the arbitrator.

(7) Arbitration proceedings shall be regarded as settlement proceedings and any communication related to the

subject matter of the dispute made during the arbitration by any participant, arbitrator, or any other person present at the arbitration shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(8) Within twenty days after the hearing, the arbitrator shall file a written determination of the arbitration proceeding in the pending litigation and serve a copy of this determination on all parties participating in the arbitration. If the parties had submitted the matter to binding arbitration on all issues, the court shall enter judgment on the determination. If the parties had submitted the matter to binding arbitration on fewer than all issues, the court shall accept the determination as a joint stipulation by the parties and proceed with the litigation. If the parties had submitted the matter to nonbinding arbitration on any or all issues, they shall have twenty days from the filing of the written determination to affirmatively reject in writing the arbitration determination. If a nonbinding arbitration determination is not rejected, the determination shall be entered as the judgment or accepted as a joint stipulation as appropriate. In the event a nonbinding arbitration determination is rejected, all documentary evidence, the determination and all acceptances and rejections will be returned to the parties.

(c) Mini-Hearing

(1) The court may, upon its own motion with the consent of the parties, or upon the agreement of all parties filed of record, convene a mini-hearing.

(2) The court will set a time and place for hearing and direct representatives with settlement authority to meet and allow attorneys for the parties to present their respective positions with regard to the litigation in an effort to settle the litigation. The parties may fashion the procedure as they deem appropriate. The procedure may be conducted before an impartial third party.

(3) Within ten days after the mini-hearing, the attorneys of record shall report to the court the results of the hearing and the possibility of settlement of the issues.

(4) Mini-hearing proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mini-hearing by any participant, impartial third party, or any other person present at the mini-hearing shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

(d) Summary jury trials

(1) The court may, upon its own motion with the consent of the partes, or upon the agreement of all parties filed of record, convene a summary jury trial.

(2) The court shall enter an order establishing the completion dates for:

(A) providing notice to opposing counsel of witnesses whose testimony will be summarized and/or introduced at the summary jury trial, proposed issues for consideration at summary jury trial, proposed jury instructions, and verdict forms;

(B) hearing pretrial motions; and

(C) conducting a final pre-summary jury trial conference.

(3) Such entry shall also establish the procedure to be followed in the presentation of the case in the summary jury trial, including:

(A) abbreviated opening statements;

(B) summarization of anticipated testimony by counsel;

(C) the presentation of documents and demonstrative evidence;

(D) the requisite base upon which the parties can assert evidence; and

(E) abbreviated closing statements.

(4) The Federal Rules of Civil Procedure and Federal Rules of Evidence shall apply, except to the extent

otherwise provided in the court's entry or agreed by the parties with the approval of the court.

(5) Jurors for a summary jury trial will be summoned and compensated in normal fashion. Six jurors will be selected in an expedited fashion. The jurors will be advised on the importance of their decision and their participation in an expedited proceeding. Following instruction, the jurors will retire and be requested to return a unanimous verdict. If a decision is not reached in a predetermined period of time not to exceed two hours, the jurors will then be instructed to return as many separate verdicts as necessary, with an indication of juror support for each verdict. The jury may issue a verdict regarding liability, damages or both. Unless the parties agree otherwise, the verdict is not binding and it shall not be appealable.

(6) After the verdict has been rendered, the jury will be advised of the advisory nature of the decision and counsel for each side will be permitted to ask general questions to the jury regarding the decisions reached which would aid in the settlement of the controversy. Counsel should not be permitted to ask specific questions of the jury relative to the persuasiveness of the form of evidence which would be offered by particular witnesses at trial, the effectiveness of particular exhibits, or other inquiries as could convert summary jury trials from a settlement procedure to a trial rehearsal.

(7) Neither the panel's advisory opinion nor its verdict, nor the presentations of the parties, shall be

admissible as evidence in any subsequent proceeding, unless otherwise admissible under the Federal Rules of Evidence.

APPENDIX
RECOMMENDATIONS TO AGENCIES OTHER THAN THE DISTRICT COURT

A. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Decisions on Motions. The Court of Appeals for the Seventh Circuit should recognize that a district court's primary task is to move the docket and resolve issues promptly and fairly, not to write unnecessarily lengthy and "scholarly" opinions. The Court of Appeals should not encourage or require such opinions. In ruling on any issue reviewable de novo on appeal, it is sufficient that the district court briefly state the reason(s) for its decision. In other situations, it is sufficient that the district court also set forth any necessary factual determinations. Beyond such requirements, appellate decisions should not be influenced at all by the form, length or style of district court opinions.

B. JUDICIAL CONFERENCE, ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

1. Pro Se Law Clerk. The Advisory Group recommends to the Administrative Office of the United States Courts and to the Judicial Conference that the pro se law clerk be made a career position with advancing salary grade.

2. Flexible Job Descriptions. The Advisory Group recommends to the Administrative Office of the United States Courts and the Judicial Conference that each judge or magistrate judge should have the ability to capitalize on the strengths of his or her employees by redefining job descriptions and pay scales as appropriate.

C. CONGRESS

Legislation Regarding Prejudgment Interest. There is substantial, but not unanimous, support in the Advisory Group for a recommendation that Congress consider authorizing payment of prejudgment interest on civil judgments, to accrue from the date of the filing of the complaint, in those cases for which no such provision is made under state law. Many members of the Advisory Group believe that such a provision would eliminate economic incentives for delay in litigation.

SURVEY RESULTS

QUESTIONS FOR ATTORNEYS

A. MANAGEMENT OF THIS LITIGATION

137 1. "Case Management" refers to oversight and supervision of litigation by a judge or magistrate judge or by routine court procedures such as standard scheduling orders. Some civil cases are intensively managed through such actions as detailed scheduling orders, frequent monitoring of discovery and motions practice, substantial court effort to settle the case or to narrow issues, or by requiring rapid progress to trial. Some cases may be largely unmanaged, with the pace and course of litigation left to counsel and with court intervention only when requested.

How would you characterize the level of case management by the court in this case? Please circle one.

3 (1) Intensive

25 (2) High

61 (3) Moderate

22 (4) Low

22 (5) Minimal

2 (6) None

2 (7) I'm not sure

136 2. Do you believe that the level of case management in this case was: (circle one)

115 (1) Appropriate to this particular case.

0 (2) Too intensive.

21 (3) Not intensive enough.

If you circled "2" or "3", please explain your answer on the last page of this questionnaire.

3. Listed below are several case management actions that could have been taken by the court in the litigation of this case. For each listed action, please circle one to indicate whether or not the court took such action in this case.

			WAS TAKEN	WAS NOT	NOT	NOT
131	a.	Establish a schedule for pretrial discovery, disclosure & motions	109	14	3	5
130	b.	Monitor & enforce the schedule established	54	38	16	21
131	c.	Establish time limits for allowable discovery	106	12	5	8
128	d.	Enforce limits set	40	43	12	33
131	e.	Narrow issues through conferences or other methods	82	31	4	14
129	f.	Rule promplty on discovery motions	45	10	10	64
129	g.	Rule promptly on appeals of Magistrate Judge's ruling	7	4	3	116
130	h.	Refer the case to alternative dispute resolution, such as mediation or arbitration	10	42	4	74
130	i.	Set an early trial date	39	53	12	26
128	j.	Exert firm control over trial	19	6	6	97
130	k.	Conduct or facilitate settlement discussions	68	36	5	21
125	l.	Exert firm control over trial	14	3	5	103
11	m	Other (qualitative responses)				

133 4. Are there case management techniques that you believe should have been used in this case that were not?

29 (1) Yes.

104 (2) No.

29 If you answered "yes" to this question, please enter the letter or letters of each technique that you believe should have been used from the listing of these techniques in question 3 or write out the name of the technique._____.

133 5. Are there case management techniques that were actually used in this case that you believe should not have been used?

5 (1) Yes.

128 (2) No.

If you answered "yes" to this question, please enter the letter or letters of each technique that you believe should not have been used from the listing of these techniques in question 3 or write out the name of the technique._____

133 6. In some courts, cases are referred to lawyers for pretrial evaluation and conferences or for initial factual determinations. The lawyers utilized in these programs have been specially trained and are experienced in the subject area of the cases that are referred to them.

a. Had such a referral been an option, would you have seriously considered requesting that this case be referred to a lawyer who was not a judge for settlement evaluation and discussions with counsel? (circle one)

50 (1) Yes.

67 (2) No.

16 (3) I'm not sure.

131 b. Had such a referral been an option, would you have seriously considered requesting that this case be referred to a lawyer who was not a judge for the purpose of making preliminary factual findings (which would have been appealable to the judge)? (circle one)

37 (1) Yes.

79 (2) No.

15 (3) I'm not sure.

B. TIMELINESS OF DISPOSITION OF THIS CASE

119 7. How long should this case have taken from filing to disposition under circumstances in which the court, all counsel, and all parties acted reasonably and expeditiously, and there were no obstacles such as a backlog of cases in the court?____(months)

132 8. Please consider the time that actually elapsed from filing to disposition for your client in this case compared to what it might have been under ideal circumstances. Circle one of the following answers that pertains to your client in this case.

69 (1) The time from filing to disposition was reasonable.

52 (2) The time from filing to disposition was too long.

0 (3) The time from filing to disposition was too short.

11 (4) I can't say.

74 9. If the case actually took longer than you believed reasonable, please indicate what factors contributed to the delay: (Circle one or more). (If you check more than one please assign a ranking by significance - i.e. 1 most significant cause of delay - 2 next most and so forth.

0 (1) Excessive case management by the court.

15 (2) Inadequate case management by the court.

42 (3) Dilatory actions by counsel.

17 (4) Dilatory actions by the litigants.

13 (5) Court's failure to rule promptly on motions.

2 (6) Actions by the court, other than failure to rule promptly on motions.

31 (7) Other. (Please specify.)_____

117 10. How many months should discovery in this case have taken under circumstances in which the court, all counsel, and all parties acted reasonably, expeditiously, and cooperatively?
_____(months)

124 11. Please consider the time that discovery actually took compared to the time it might have taken under ideal circumstances. Circle one of the following answers that pertains to your case.

54 (1) The time taken by discovery was reasonable in this case.

48 (2) The time taken by discovery was too long in this case.

1 (3) The time taken by discovery was too short in this case.

21 (4) I can't say.

12. If you believe that discovery took too long in this case (you circled answer "2" to question 11), please indicate the reason(s) for the delay by circling <u>each</u> of the following reasons that apply.

2 (1) I undertook too much discovery.

12 (2) Opposing counsel took too much discovery.

15 (3) The discovery that I took was not as efficient as it might have been.

20 (4) The discovery taken by opposing counsel was not as efficient as it might have been.

21 (5) The court did not set as early a discovery cut-off date as it might have.

10 (6) The court did not require adherence to the discovery cut-off date that it initially set.

4 (7) The court did not limit the scope of discovery to the extent that it might have.

15 (8) Other reasons. (Please specify.)_____

89 13. What, if anything, was the most significant action taken by the Court (Judge, Magistrate Judge or Court employee) to minimize delay in this case. (Please write your answer on the last page of this questionnaire.)

77 14. What if any action(s) by the Court contributed to delay in this case. (Please write your answer on the last page of this questionnaire.)

66 15. If delay is a problem in this district for disposing of civil cases, what suggestions or comments do you have for reducing those delays. (Please make any suggestions on the last page of this questionnaire.)

C. COSTS OF LITIGATION IN THIS CASE

This section seeks information about litigation costs in federal district court. When answering these questions please consider only activity that was in direct preparation for or occurred subsequent to filing the case in federal court, up until the time of final disposition in the district court. Do not take into account activity related to state court or administrative proceedings, settlement efforts that took place prior to federal court filing, or appellate litigation.

106 16. Please estimate what was at stake for your client in this case. Please answer "1," "2," or both "1" and "2" to reflect the stakes for your client in this litigation.

(1) The amount of money at stake for my client in this case was approximately _____.

83 (2) The following "stakes" were of interest to my client but were not susceptible to monetary valuation. (List here items such as concern about future litigation or the possibility of a legal precedent of significant consequence to your client.)_____

131 17. What type of fee arrangement did you have in this case? (circle one)

76 (1) Hourly rate.

0 (2) Hourly rate with a maximum.

1 (3) Set fee

41 (4) Contingency.

10 (6) Government or other salaried attorney.

1 (5) Other. (Please describe.)_____

18. Please indicate the costs spent on behalf of your client on this case for each of the categories listed below. If you are unable to categorize the costs, pleas indicate the <u>total</u> cost only.

67 (1) Attorneys' fees _____

65 (2) Attorneys' expenses (for copying, postage, travel, etc.) _____

8 (3) Consultants and investigators _____

15 (4) Expert witnesses _____

52 (5) Other (please describe): _____

_____

107 (6) Total cost of litigation _____

122 19. Were the fees and costs incurred in this case by your client (circle one)

11 (1) Much too high.

21 (2) Slightly too high.

69 (3) About right.

14 (4) Slightly too low.

7 (5) Much too low.

31 20. If you believe the total litigation costs in this case were too high (you circled answers 19(1) or 19(2), please circle <u>each</u> of the following reasons for the excessive costs.

1 (1) Excessive case management by the court.

6 (2) Inadequate case management by the court.

3 (3) The court's failure to rule promptly on motions.

2 (4) Actions by the court, other than failure to rule promptly on motions.

18 (5) Dilatory actions by counsel.

10 (6) Dilatory actions by the parties.

2 (7) Backlog of other cases on the court's docket.

8 (8) Unnecessary discovery.

13 (9) Inefficient discovery.

9 (10) Other reasons. (Please specify.)_____

32 21. If costs associated with civil litigation in this district are too high, what suggestions or comments do you have for reducing the costs? (Please make any suggestions on the last page of this questionnaire.)

D. <u>ATTORNEY PROFILE</u>

131 22. How many years have you been engaged in the practice of law?

_____ years

132 23. Do you, personally, specialize in any area of the law? (circle one)

99 (1) Yes.

33 (2) No.

99 If you circled "yes," please list your specialty.

_____

131 24. What percentage of your practice has been devoted to federal district court litigation during the past five years (or during the time you have been in practice, if less than five years)?

_____% of my practice has been devoted to federal district court litigation.

132 25. Concerning your civil federal district court cases: (circle one)

101 (1) The great majority of my federal civil cases are in the Southern District of Indiana.

10 (2) The great majority of my federal civil cases are in a federal district court other than the Southern District of Indiana.

19 (3) I litigate civil cases in a number of federal district courts, including the Southern District of Indiana.

2 (4) Other (Please specify.) _____

E. FEDERAL JURISDICTION

129 26. Many of the civil cases heard by federal district courts also could have been heard by state courts.

(a) My preference was for this case to be heard in: (circle one)

92 (1) federal court

24 (2) state court

13 (3) no preference

(b) The reason for my preference expressed in answer to question 26(a) was: (circle all that apply)

(1) a preference for the likely judge who would hear the case

(2) a preference for the likely jury that would hear the case

(3) a desire for a speedier case resolution

(4) a desire for a more delayed case resolution

(5) a desire for a less costly case resolution

(6) a desire for more favorable judicial rules of procedure and evidence

(7) other (please explain):_____

_____

27. If federal diversity jurisdiction was invoked in this case, please circle as many of the following statements about this case as are correct.

(1) Although there was diversity of jurisdiction between the parties, a federal jurisdictional basis other than diversity existed in this case.

(2) The court was asked to resolve a dispute between the parties concerning whether diversity jurisdiction was properly invoked in this case (due to a question about the parties' citizenship, the jurisdictional amount in controversy, or other federal diversity requirement).

(3) Federal diversity jurisdiction led to a faster and less expensive resolution of this case than would have been possible in state court.

F. ALTERNATIVE DISPUTE RESOLUTION

47 28. a. Did you consider or use any of the following forms of alternative dispute resolution (ADR)? (circle the forms used)

38 (1) Settlement Conferences

2 (2) Arbitration

1 (3) Mediation

1 (4) Early Neutral Evaluation

5 (5) Case Valuation (settlement value)

0 (6) Summary Jury Trial

0 (7) Mini-trial

8 (8) Other methods (please specify)_____

31 b. If you considered or used any form of ADR, why?_____

81 c. If you did not consider or use any form of ADR, why not?_____

34* d. If you considered or used any form of alternative dispute resolution, was your and/or your client's participation: (circle one)

24 (1) voluntary

6 (2) mandated by the judge

*=4

47 e. At what stage of this case was ADR considered or used?

_____

32 f. What was good about the process?_____

33 g. What would have made the process more effective?

_____

60 h. Do you plan to consider, recommend or use ADR again?

51 (1) Yes

9 (2) No

62 i. From the list in 6a, which form(s) of ADR would you consider, recommend or use in the future?

_____

47 Why? _____

101* j. Do you think the use of any form of ADR should be mandatory on attorneys or their clients either by rule or by judicial order?

40 (1) Yes

60 (2) No

*=1

39 If you answered "yes," which form of ADR and why?

_____

42 29. Please use this page to make any additional comments about litigation management in this case or in the federal courts generally.

EASTERN DISTRICT OF NEW YORK
STANDING ORDERS ON
EFFECTIVE DISCOVERY

Copies of these rules are available at the following locations:

Clerk's Office
U.S. District Court
Eastern District of NY

BROOKLYN OFFICE
225 Cadman Plaza East
Brooklyn, New York 11201

UNIONDALE OFFICE
Uniondale Avenue At
Hempstead Turnpike
Uniondale, New York 11553

HAUPPAUGE OFFICE
300 Rabro Drive
Hauppauge, New York 11788

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

STANDING ORDERS OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES

AMENDED FEBRUARY 27, 1987
EFFECTIVE UNTIL MARCH 1, 1991

MARCH, 1987 Edition

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STANDING ORDERS OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES

Subject to the power of any judge or magistrate to rule otherwise for good cause shown, the following are adopted as Standing Orders of this Court:

GENERAL PROVISIONS

1. **Cooperation Among Counsel.** Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

2. **Stipulations.** Unless contrary to a prior order of the court entered specifically in the action, the parties and when appropriate a non-party witness may stipulate in any suitable writing to alter, amend or modify any practice with respect to discovery.

II.

JUDICIAL INTERVENTION

3. (a) **Scheduling Conference.** Promptly after joinder of issue, but in any event as soon as practicable and reasonably before the expiration of the 120 day period provided by Fed. R. Civ. P. 16(b), the judge shall determine whether the judge or the magistrate shall deal with the scheduling order, and if the magistrate, the judge shall make a suitable reference.

(b) **Scheduling Order.** Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. The court may for any reason convene a conference with counsel by telephone or otherwise to clarify or modify the scheduling order agreed to by counsel. If the attorneys for the parties cannot agree on a scheduling order, they shall promptly advise the court.

4. **Reference to Magistrate.**

(a) **Selection of Magistrate.** A magistrate shall be assigned to each case at random on a rotating basis upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this Court. A magistrate so assigned shall take no action with respect to any matter until a suitable order of reference is received.

(b) **Scope of Reference.** At the time the judge determines whether the judge or the magistrate shall deal with the scheduling order, the judge shall determine whether discovery matters shall be referred to the magistrate and the scope of such reference. The judge may at any time enlarge or diminish the scope of any reference to the magistrate.

(c) **Orders of Reference.** The attorneys for the parties shall be provided with copies of all orders referring a matter to the magistrate, the scope of such reference, and any enlargement or diminution thereof.

5. **Review of Magistrate's Rulings.**

(a) **Procedure.** A party may make application to the judge to review a ruling of the magistrate on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

(b) **Timing.** An application for review of a magistrate's order shall be made to the judge within ten days after the entry of such order.

(c) **Written Exposition of Magistrate's Rulings.** The magistrate shall enter into the record a written order setting forth the disposition of the matter within such ten-day period if requested to do so by the judge or a party considering review. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

6. **Mode of Raising Discovery Disputes with the Court.**

(a) **Premotion Conference.** Prior to seeking judicial resolution of a discovery dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute.

(b) **Resort to the Court.**

(i) **Depositions.** Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of a discovery dispute that arises during

the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(ii) **Other Discovery.** Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(iii) Where a ruling is made exclusively as a result of a telephone conference it may be the subject of *de novo* reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

(iv) Where papers are filed or a letter submitted, the attorneys shall set forth in appropriate detail the efforts they have made to resolve the dispute prior to raising it with the court.

(c) **Decision of the Court.** The Court shall record or arrange for the recording of the Court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a hand-written memorandum, a hand-written marginal notation on a letter or other document, or any other form the Court deems appropriate.

(d) **Timing.** The court shall deal with all applications for rulings respecting discovery disputes as promptly and expeditiously as the business of the court permits.

III.

DEPOSITIONS

7. **Non-Stenographic Recording of Depositions.** Motions in accordance with Fed. R. Civ. P. 30(b) (4) for leave to record the deposition of an adverse party or of a non-party witness by means other than stenographic recording, including tape recording or videotaping, shall presumptively be granted. If requested by one of the parties, the recording or videotaping shall be transcribed.

8. **Telephonic Depositions.** The motion of a party to take the deposition of an adverse party by telephone will presumptively be granted. Where the opposing party is a corporation, the term "adverse party" means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b) (6).

9. **Persons Attending Depositions.** A person who is a party, witness or potential witness in the action may attend the deposition of a party or witness.

10. **Depositions of Witnesses Who Have No Knowledge of the Facts.**

(a) Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.

(b) The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness' right to seek a protective order.

11. **Directions Not To Answer.**

(a) Repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should.

(b) Where a direction not to answer such a question is given and honored by the witness, either party may seek a ruling as to the validity of such direction.

(c) If a prompt ruling cannot be obtained, the direction not to answer may stand and the deposition should continue until (1) a ruling is obtained or (2) the problem resolves itself.

12. **Suggestive Objections.** If the objection to a question is one that can be obviated or removed if presented at the time, the proper objection is "objection to the form of the question." If the objection is on the ground of privilege, the privilege shall be stated and established as provided in Standing Order 21. If the objection is on another ground, the objection is "objection." Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.

13. **Conferences Between Deponent and Defending Attorney.** An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.

14. **Document Production At Depositions.** Consistent with the requirements of Fed. R. Civ. P. 30 and 34, a party seeking production of documents of another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents, may proceed with the deposition.

IV.

INTERROGATORIES

15. **Form Interrogatories.** Attorneys serving interrogatories shall have reviewed them to ascertain that they are applicable to the facts and contentions of the particular case. Interrogatories which are not directed to the facts and contentions of the particular case shall not be used.

16. **Interrogatories Shall Be Drafted and Read Reasonably.**

(a) Interrogatories shall be drafted reasonably, clearly and concisely, be limited to matters discoverable pursuant to Fed. R. Civ. P. 26(b), and shall not be duplicative or repetitious.

(b) Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney

receiving them generally does have such information or can obtain it from the client.

17. **Responses To Interrogatories.** Each interrogatory and each part thereof shall be answered separately and fully to the extent no objection is made. No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of that interrogatory.

V.

REQUESTS FOR DOCUMENTS

18. **Form Requests For Documents.** Attorneys requesting documents pursuant to Fed. R. Civ. P. 34 and 45 shall have reviewed the request or subpoena to ascertain that it is applicable to the facts and contentions of the particular case. A request or subpoena which is not directed to the facts and contentions of the particular case shall not be used.

19. **Requests For Documents and Subpoenas Duces Tecum Shall Be Drafted and Read Reasonably.**

(a) Requests for documents and subpoenas *duces tecum* shall be drafted reasonably, clearly and concisely and be limited to documents discoverable pursuant to Fed. R. Civ. P. 26(b).

(b) A request for documents or subpoena *duces tecum* shall be read reasonably in the recognition that the attorney serving it generally does not have knowledge of the documents being sought and the attorney receiving the request or subpoena generally does have such knowledge or can obtain it from the client.

VI.

OTHER

20. **Discovery of Experts.** After completion of fact discovery and within a reasonable period but in no event less than thirty days prior to the time for completion of all discovery, each party, if requested pursuant to Fed. R. Civ. P. 26(b)(4), shall identify each person the party expects to call as an expert witness at

trial and shall state the subject matter and the substance of the facts and opinions on which the expert is expected to testify and a summary of the grounds for each opinion.

21. Privilege.

(a) Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion,

(1) the attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(2) the following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of privileged information:

(i) for documents, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document, *e.g.*, letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(iii) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the objection.

(3) After a claim of privilege has been asserted, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exemption to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

(b) Where a claim of privilege is asserted in responding or objecting to other discovery devices, including interrogatories, requests for documents and requests for admissions, and information is not provided on the basis of such assertion,

(1) the attorney asserting the privilege shall in the response or objection to the discovery request identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(2) the following information shall be provided in the response or objection, unless divulgence of such information would cause disclosure of privileged information:

(i) for documents: (1) the type of document, *e.g.*, letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

(3) The attorney seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, serve interrogatories or notice the depositions of appropriate witnesses to establish other relevant information concerning the assertion of the privilege, including (i) the applicability of the privilege being asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

VII.

TRANSITION AND TERMINATION PROVISIONS

22. These Standing Orders, as amended, become effective on March 1, 1987, and shall apply both to cases filed before and after that date. Unless otherwise ordered by the court, these Standing Orders, as amended, shall be effective until March 1, 1991.

BROCHURE: DISPUTE RESOLUTION PROCEDURES IN THE NORTHERN DISTRICT OF CALIFORNIA

ISPUTE RESOLUTION PROCEDURES IN THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

For more information contact:

Arbitration/ENE Unit
(415) 556-5742

Table of Contents

Dispute Resolution Procedures Available in the Northern District

A Introduction

The United States District Court for the Northern District of California provides in this pamphlet an overview of court-sponsored processes which may result in faster and less costly civil dispute resolution than full-scale, formal litigation. The court urges counsel to share this material with their clients so that together they can explore the full range of dispute resolution and case management methods available.

Traditional litigation may impose substantial costs long before the trial commences. Further, the current congestion of trial calendars in federal courts, caused in part by the substantial criminal docket, contributes significantly to that congestion. In this environment, alternative processes for dispute resolution offer many advantages, including the following:

- Reduced time to disposition;
- Streamlined and less costly discovery;
- More effective case management (for pre- and post-trial matters);
- Increased confidentiality;
- Facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute;
- Preservation of ongoing party relations;
- Savings in trial expenses;
- Providing qualified, neutral experts to hear complex matters (with the parties having a role in selecting them under some processes).

While this pamphlet describes only the programs that the court sponsors, there are other dispute resolution procedures that have been developed in the private sector and that have proven effective in a wide range of cases. A list of some of the private organizations

and individuals who provide alternative dispute resolution services is available from the clerk's office in San Francisco or San Jose.

Even though two of the court-sponsored options (court-annexed arbitration and early neutral evaluation) are mandatory for cases which fit the requisite criteria, the parties to *any* type of case may *voluntarily* refer their matter to any of the court programs. Many of these programs have been designed by members of the private bar. They have been endorsed as cost-effective and fair by the vast majority of lawyers and clients whose cases have been submitted to them. All the court-sponsored procedures except consent trials before magistrates are *not binding*, meaning that if they fail to resolve the case, the parties retain their full rights to a trial, with no penalties. Of course, if the parties agree, all these procedures can be binding and appeals can be waived.

Parties and counsel who are considering voluntary participation in alternative dispute resoluton should weigh the comparative benefits of each dispute resolution process before deciding which is most appropriate for their particular case. For example, court-annexed arbitration can be effective for many contract and tort cases, especially when outcome is likely to turn on credibility of witnesses. In contrast, the court appointment of a special master may be warranted for technical or complicated matters involving multiple parties and substantially greater sums. With the consent of the parties, a United States Magistrate may preside over any civil trial, jury or non-jury, in the same manner as an Article III judge, and can usually hear the case much sooner as a result of a lighter trial calendar. Some factors parties should consider in deciding which option to pursue include:

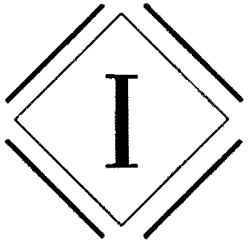
- The cost of the process relative to the amount of the dispute involved;
- The importance of prompt resolution;
- Whether an informal or formal proceeding would be beneficial;
- Whether privacy interests need special protection;
- What role the parties want the third-party neutral to play;
- Whether binding or non-binding options should be pursued;
- The number of issues and parties involved in the dispute;
- Whether a transcript of the proceeding should be made; and
- The desirability of establishing precedent.

B Court-Sponsored Dispute Resolution Processes

The Northern District of California sponsors six special procedures to facilitate resolution of disputes:

I. Early Neutral Evaluation;
II. Court-Annexed Arbitration;
III. Consensual Jury or Court Trial before a United States Magistrate;
IV. Settlement Conferences;
V. Non-binding Summary Jury or Bench Trials; and
VI. Special Masters.

These programs are briefly described below. The referenced authorities and contacts, at the end of each subsection, may be consulted for additional information.



Early Neutral Evaluation

The Early Neutral Evaluation (ENE) program offers a *confidential, non-binding* conference where the parties (face-to-face) and their counsel present the factual and legal bases of their case to one another and to an experienced and impartial attorney with expertise in the subject matter of the case. In a two-hour informal session, held within 150 days after the complaint is filed, the neutral evaluator hears both sides. The evaluator then identifies the primary issues in dispute, as well as areas of agreement, explores the possibility of settlement (if the parties desire), helps the parties devise a discovery or motion plan, articulates an assessment of the relative strengths and weaknesses of the parties' positions and the value of the case,

and discusses whether a follow-up session would be fruitful.

ENE has been endorsed by many lawyers for a number of reasons. First, the program provides *early* case evaluation by a neutral lawyer with expertise in the relevant subject matter. This early expert assessment may result in significant cost savings and may lead to settlement since the parties are compelled to develop an early understanding of the case and of the other side's position. Second, ENE may be a cost-effective substitute for some formal discovery and pretrial motions. It enables parties to communicate and learn more directly and productively about their case than they would in formal litigation. Third, confidentiality is maintained. The judge to whom the action is assigned does not learn any information communicated in the course of the ENE session by any of the participants (including the evaluator). Additionally, the evaluation session is informal; the Federal Rules of Evidence do not apply and there is no direct or cross-examination of witnesses. Thus an effective ENE session usually results in clarification of issues and the development of a case management plan. For these reasons, past ENE participants have highly praised the program.

While certain categories of cases are compelled to participate in ENE and court-annexed arbitration, litigants in other categories of cases may stipulate to participate in either program. Parties trying to decide between programs should consider several factors. For complex cases, or for matters that are not based on straightforward contract or tort theories, ENE offers the advantage of assuring that the neutral advisor is an expert in the relevant subject matter. Compared to arbitration under Local Rule 500, ENE also offers greater assurance of confidentiality, operates on a faster track, and may be less expensive. ENE might be appropriate even in cases where the principal relief sought is equitable if there is a reasonable chance that, with the aid of a neutral expert, the parties might be able to agree on the terms of an injunction or consent decree. Unlike court-annexed arbitration, however, transcripts may not be made of ENE proceedings and there is less opportunity to assess the relative credibility of key witnesses than in arbitration.

Subject Matter Scope: After two years experience, the court has concluded that the following cases are likely to benefit most from ENE:

> Contract (including business contracts, insurance coverage, Miller Act, negotiable instrument, stockholders suits, and contract product liability); Torts (including motor vehicle, motor vehicle product liability, personal injury, personal injury — product liability, and fraud); Civil Rights (employment); Intellectual Property; Antitrust; Racketeer Influenced and Corrupt Organizations; and Securities/Commodities Exchange.

It is clear, however, that other cases not falling within these subject matters may also profit from ENE.

ENE is not compelled (but may be available upon consent) for *in propria persona* cases, actions where the primary relief is equitable, and matters submitted to court-annexed arbitration under Local Rule 500.

Invocation: Presently, every even-numbered case which falls within the subject matter classifications set forth above (and in which the principal relief sought is not equitable) is automatically referred to ENE by the clerk of the court.

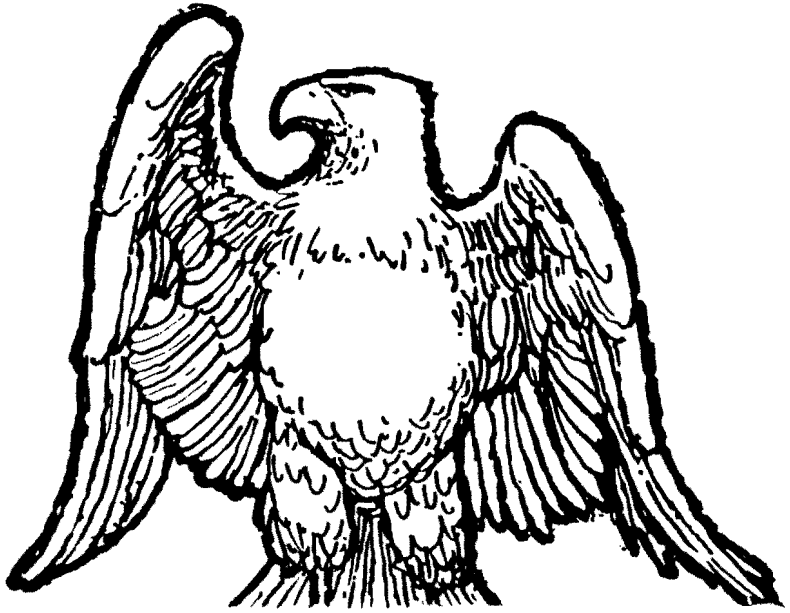
In addition, civil actions may be assigned to ENE on motion by a party and approval by the court or *sua sponte* by the judge to whom the action is assigned.

Right of Appeal: ENE is non-binding and confidential; therefore, there is no occasion for an appeal from the results of an ENE conference.

Requests for relief from the requirements of ENE must be made in writing and must be presented in the first instance to the ENE Magistrate. Appeals from his rulings must be filed with the assigned judge within ten calendar days.

Authority: Northern District of California, General Order No. 26.

Contact: For further information, call the clerk's office: (415) 556-5742.



II

Court-Annexed Arbitration

The Northern District of California was one of the first federal courts in the nation to experiment with court-annexed arbitration, beginning in 1978. Based on the success of that pilot program and recent congressional authorization, today Local Rule 500 establishes a *compulsory, non-binding* arbitration program primarily for contract or tort cases involving not more than $150,000 (exclusive of punitive or exemplary damages, interest and costs). Local Rule 500-8 also permits *voluntary*, non-binding arbitration for cases involving any amount in controversy or subject matter by stipulation of the parties and permission of the judge assigned the action. Court-annexed arbitration is distinct from private sector arbitration, which is usually voluntary and binding. The parties may stipulate, however, that the award in court-annexed arbitration shall be final and binding.

More than 80% of the lawyers who have had cases in the court's arbitration track endorse this program. Ninety-three percent (93%) agree that the arbitration procedures are fair, and when the variables of cost, time, and fairness are considered, arbitration is preferred by more lawyers than either a court trial or a jury trial. *See* B. Meierhoefer & C. Seron, *Court-Annexed Arbitration in the Northern District of California* 21-40 (1988) (Federal Judicial Center publication).

The cases referred to court-annexed arbitration are heard by qualified individual arbitrators or three-member panels, usually within six months of the filing of the answer. Attendance at the arbitration hearing and the production of documents may be compelled by subpoena. Testimony is given under oath and witnesses may be cross-examined. The Federal Rules of Evidence serve as guidelines but are not rigidly enforced. A party may arrange to have the proceedings reported and transcribed at his or her own expense.

To obtain a trial *de novo*, a party must file a written demand within thirty days of entry of judgment on the arbitration award. If no such demand is filed, the award becomes the final judgment of the court (and is not subject to appellate review). Absent a stipulation, the amount of any arbitration award would not be admissible at a subsequent trial *de novo*.

Numerous benefits can be obtained from court-annexed arbitration. Because arbitration is held relatively early in the case, parties can save time and money. The process is fair, as a neutral assessment of the case is made by a qualified, impartial attorney or by a panel of three attorneys. Parties help select the arbitrators from the list of ten names provided by the clerk's office by striking some of the nominees and listing those remaining in the parties' order of preference. An absolute right to a full trial is preserved. There is no penalty for demanding trial *de novo* or for failing to obtain a judgment at trial that is more favorable than the arbitration award. The arbitration award also may provide a useful starting point for settlement discussions. As important, the imminence of the arbitration hearing often encourages counsel to evaluate their case carefully and to enter serious settlement negotiations before the arbitration is held. In fact, most cases that are assigned to the arbitration track settle before the hearing is held.

For parties whose cases have not been ordered into ENE or arbitration, and who are trying to decide whether to participate voluntarily in one of the court's programs, court-annexed arbitration may have an advantage over ENE or a settlement conference when the case turns on credibility of witnesses. At an arbitration hearing, the witnesses testify under oath and are subject to cross-examination. However, arbitration also has disadvantages in comparison to ENE or an early settlement conference: the arbitration hearing may, occur later in the pretrial stage, it may be more formal (and therefore potentially more expensive), and provide less protection of confidentiality. Further, arbitration may lead to early disclosure of trial strategies. Court-annexed arbitration is also generally inappropriate when the principal relief sought is equitable.

Subject Matter Scope: Compelled in cases (1) that involve an amount in controversy not exceeding $150,000 (excluding punitive or exemplary damages, interest and costs) *and*, (2) that are based on personal injury, property damage, or contract. Consult Local Rule 500-2 for the particulars.

Court-annexed arbitration is *not* compelled in actions where the principal relief sought is equitable (except that declaratory relief actions in insurance coverage cases are sent to arbitration where the amount in controversy does not exceed $150,000).

Invocation: Automatic referral by the clerk of court where the subject matter criteria (noted above) are satisfied, or by stipulation of the parties and approval of the court.

Right of Appeal: Right to *de novo* trial if demanded within thirty days of entry of judgment on arbitration award. If timely demand for trial *de novo* is not made, the arbitrator's award becomes the final judgement and is not reviewable by appeal.

Authority: Local Rule 500 and the Judicial Improvements and Access to Justice Act of 1988, Title IX, Pub. L. No. 100-702, §§ 901-907 (codified at 28 U.S.C. §§ 651-658).

Contact: Courtroom deputy clerk for the judge to whom the action is assigned.

Consent to Jury or Court Trial Before a Magistrate

By written stipulation, the parties to any civil action may elect to have a magistrate of their choice (instead of the assigned Article III judge) conduct all proceedings in any civil case, including presiding over a jury or a non-jury trial. A trial before a magistrate is governed by exactly the same procedural and evidentiary rules as trial before a district judge, and a right of appeal is automatically preserved directly to the United States Court of Appeals under the same standards which govern appeals from district court judgments.

Parties often consent to resolution of their civil disputes by magistrate *bench* or *jury* trial because: (1) magistrates have less crowded calendars and do not set multiple cases for trial on the same date (as many judges do), thus usually permitting the parties to secure an *earlier* and *firm* trial date; (2) the parties may select any available magistrate within the Northern District of California; (3) jurisdiction extends to any civil matter within the jurisdiction of the federal courts; (4) a formal trial is conducted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure; (5) a full right of appeal is retained; and (6) a transcript of the proceedings may be taken by court reporter or, if the parties prefer, by electronic sound recording.

Subject Matter Scope: Any civil proceeding.

Invocation: Written consent of the parties indicated on a form available from the clerk's office. 28 U.S.C. § 636(c)(2).

The parties may also discuss reference to a magistrate at pretrial conference. *See* Fed. R. Civ. P. 16(c)(6).

Right of Appeal: There is a direct appeal to the U.S. Court of Appeals. *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). As an alternative, the parties may choose to preserve a right to appeal to the U.S. District Court. *See* 28 U.S.C. § 636(c)(4); Fed. R. Civ. P. 73(d) & 74-76. *See also* Local Rule 410-2(c).

Authority: 28 U.S.C. § 636(c); Fed. R. Civ. P. 16(c)(6) & 73-76; Local Rules 405(k) & 410-2(c).

Contact: Courtroom deputy clerk for the judge to whom the action is assigned or any magistrate.

IV

Settlement Conferences Conducted by a Judge or Magistrate

A judicially conducted settlement conference may be held at any time during the pendency of a civil case. Most settlement conferences are conducted by magistrates, but district judges also help with settlement negotiations as their calendars permit. Under Local Rule 240-1, the judge or magistrate who would preside at trial does not conduct the settlement conference unless the parties request in writing that he or she do so. Normally, the settlement process is initiated upon the request of a party or on the motion of the judge to whom the action is assigned. However, the parties should be prepared to discuss the possibility of settlement at any pretrial conference, including the initial status conference. A court-appointed special master (discussed in the next subsection) may also be used for settlement purposes.

Counsel who attend the settlement conference are required to be thoroughly familiar with the case and have authority to negotiate a settlement. Many judges have standing orders that require the attendance of the parties unless they reside more than fifty miles from the settlement conference site, in which case they are required to be available by telephone for consultation with the judge or magistrate.

The settlement judge or magistrate acts as a mediator or facilitator at the settlement conference, promoting communication among the parties, holding one-on-one sessions with each side, offering an objective assessment of the case, and suggesting settlement options. A magistrate or judge has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. If settlement is reached, the parties will sign an agreement, thereby avoiding the cost of trial or other litigation. If no settlement is reached, the case proceeds to trial before the judge to whom the action is assigned.

Confidentiality is maintained at the conference, which fosters frank, open discussions. Written settlement conference statements are submitted directly to the judge or magistrate and are not made part of the case file. The judge who would preside at trial is not told what positions the parties took during the settlement conference (unless by agreement he or she is also the settlement judge). Federal Rules of Evidence 408 and 403 may bar use at trial of communications made during the settlement negotiations.

A settlement conference is suitable for any kind of civil case, from the most straightforward to the most complex. The process is informal. Parties can communicate *ex parte* with the person conducting the conference, who can offer the parties an informed yet neutral view of the case. Often the parties help select the judge or magistrate who will conduct the settlement conference. A special master may be selected when the available judicial officers do not have the time for the negotiations or when specialized subject-matter expertise is required.

The settlement conference is similar to ENE in that it may aid the identification and narrowing of issues in dispute. Creative lawyers also can use settlement conferences to establish streamlined discovery plans. Unlike an ENE session, which usually occurs shortly after the case is filed, a settlement conference may be conducted at any time.

Subject Matter Scope: Any civil action.

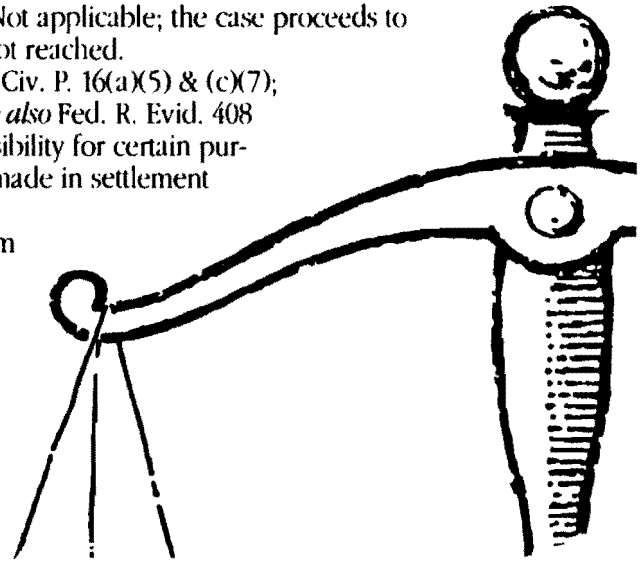
Invocation: On motion of the judge to whom the action is assigned or on motion of a party with approval by the court.

The parties may also discuss "the possibility of settlement" at the pretrial conference. Fed. R. Civ. P. 16(c)(7).

Right of Appeal: Not applicable; the case proceeds to trial if settlement is not reached.

Authority: Fed. R. Civ. P. 16(a)(5) & (c)(7); Local Rule 240-1. *See also* Fed. R. Evid. 408 (concerning inadmissibility for certain purposes of statements made in settlement negotiations).

Contact: Courtroom deputy clerk for the judge to whom the action is assigned or the judge or magistrate conducting the settlement conference.



Non-Binding Summary Jury or Bench Trials

In cases that would take many court days to try, counsel might consider more elaborate settlement vehicles known as non-binding summary jury or bench trials. These procedures are designed to enable parties and their lawyers to see how, in abbreviated forms, the presentation of their case compares to the presentation of their opponent's case, and to gain insights into how a jury or judge is likely to react to the basic components of the parties' respective positions. While these procedures can be tailored to the specific needs of individual cases or situations, they generally include telescoped presentations of each side's case either to a judge or magistrate (not the judge to whom the case is assigned for trial if no settlement is reached) or to a jury selected from the same venire as the court's other juries. If a jury is used, it is given brief instructions by the court in the relevant legal principles, then each side takes anywhere from an hour to a day to present a well-focused version of its case, using narratives by counsel, documents, deposition transcripts, video-tapes, or live testimony. Rules of evidence are not applied, and cross-examination either is not permitted or is quite limited. After closing arguments, the jury or judge retires to deliberate, then returns to articulate an advisory judgment.

After the judgment is announced, counsel are permitted to ask questions of the judge or jury to explore the reasoning that supported the judgment, to assess how the fact-finder reacted to particular arguments or evidence and whether it failed to understand any important parts of the presentations. Neither party is bound by the advisory judgment and both are free to proceed to full trial without penalty (unless, by stipulation, the parties agree in advance that they should build some disincentive to go to trial into the rules of their special procedure). The parties themselves are required to attend these proceedings and to watch both how the respective cases are presented and how the jury or judge responds to them.

After the questioning of the fact-finder the parties may elect to discuss settlement, with or without the assistance of the judge or magistrate who presided over the summary proceedings. If they fail to settle, the matter proceeds to trial on a normal schedule.

This more elaborate vehicle for exploring settlement possibilities is appropriate only in cases that would require relatively lengthy trials. Such non-binding summary proceedings can be especially helpful to parties who disagree fundamentally about how neutral fact-finders are likely to respond to the basic outlines of each side's story, or how a judge or jury is likely to apply an elusive legal standard to a given set of facts.

Counsel who would like to set up a non-binding jury or bench trial should raise the matter with the assigned judge, asking him or her for permission to contact the magistrate or judge whom the parties would like to preside at the non-binding proceedings. No special fee is charged for this service. There are organizations in the private sector which, for a fee, will help parties design and conduct similar kinds of proceedings outside the court system. One version of such proceedings is sometimes called a "mini-trial". A list of some of the private organizations that can help parties set up these kinds of procedures is available from the clerk's office.

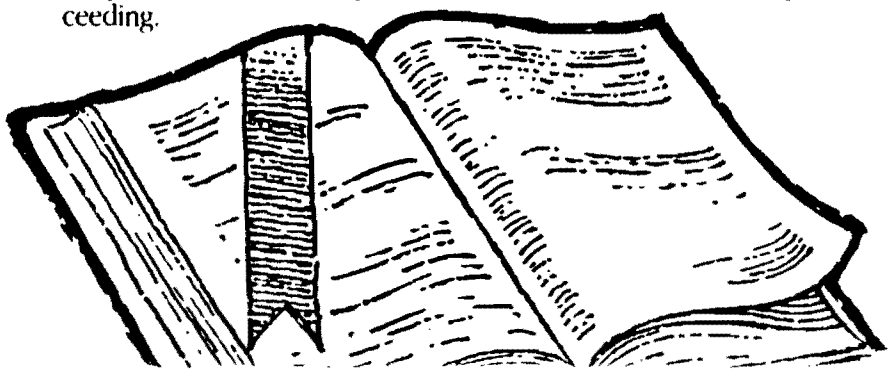
Subject Matter Scope: Any civil suit, but best suited to cases that would require many court days to try formally.

Invocation: By stipulation of the parties and with the permission of the assigned judge, as well as the judge or magistrate who would preside over the non-binding proceedings.

Right of Appeal: Since the "judgment" of the jury or judge in the summary proceeding is non-binding and only advisory, there is no occasion for an appeal.

Authority: Written stipulation by all parties; Fed. R. Civ. P. 16 (by implication); and the inherent powers of trial courts.

Contact: The assigned judge and the magistrate or judge whom the parties would like to preside at the non-binding summary proceeding.



VI

Special Masters

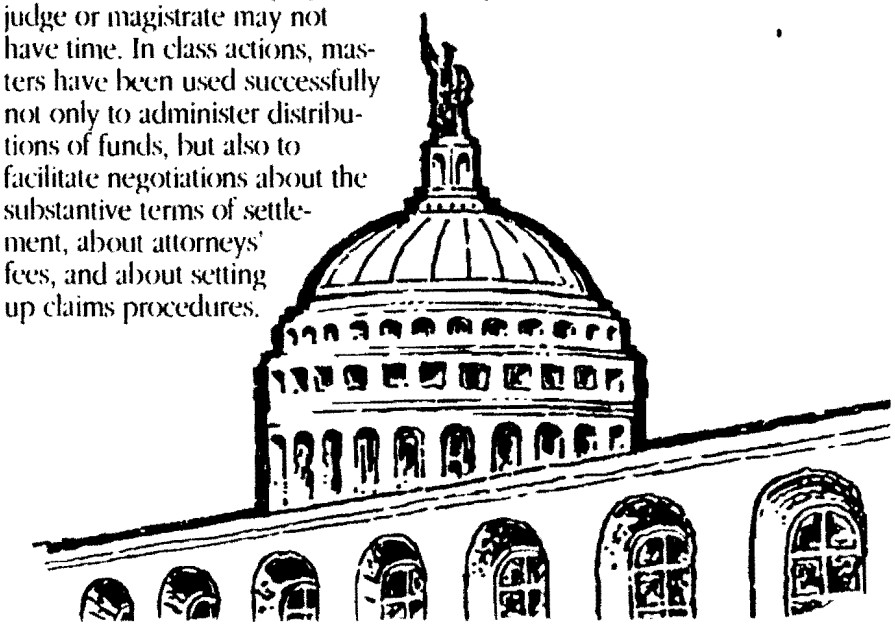
A special master is a private lawyer, retired judge, law professor, or other person who may be appointed to perform any of a wide range of tasks, including case management, discovery resolution, fact-finding, and settlement. A master may be appointed in response to a motion or on the court's own initiative. Special masters have contributed significantly to dispute resolution in several roles, including:

- Managing the case development process;
- Resolving discovery disputes;
- Monitoring discovery (e.g., depositions and document productions);
- Reviewing documents to determine whether they are protected by privilege or fall within the terms of a protective order;
- Performing technical or specialized functions (such as auditing);
- Fact-finding;
- Assisting in settlement negotiations, (e.g., in complex cases and class actions); and
- Monitoring the implementation of equitable decrees after trial.

Compensation for masters is determined by the judge. The court can appoint a master selected by either the court itself or by the parties, and may appoint a magistrate. The parties may be ordered to share equally the master's hourly fee. When a magistrate is designated to serve as a master, no fee is charged.

The authority of the master is fixed by the court's order of reference. Depending on the terms of the appointment, a master may compel the production of evidence, rule on the admissibility of evidence, and examine witnesses or parties under oath. Witnesses may be subpoenaed by the parties to appear before the master. Masters' determinations are subject to district court review. In non-jury trials, a court accepts the findings of fact of the master unless clearly erroneous. Within ten days of service, a party may file an objection to such findings. In jury trials, a master's findings are admissible as evidence. The parties may also stipulate that a master's findings be deemed final.

There can be several advantages to using a special master. The order of reference to a master can be carefully tailored to fit a particular case need. Although the direct cost of a special master can be substantial (depending on the terms of compensation), in appropriate cases the appointment of a special master has resulted in substantial savings to the litigants. Masters can reduce dramatically the time to resolve pretrial disputes. The master's immediate availability and thorough familiarity with the details of the case can discourage litigants from taking disruptive and costly positions. The master can bring expertise in a specialized field to the case that a generalist judge may not have. In addition, parties retain the right to have the court review decisions made by the master. The use of a master is generally appropriate in matters where the amount in controversy is substantial and technical issues are involved. Masters may be used to conduct lengthy settlement negotiations for which a judge or magistrate may not have time. In class actions, masters have been used successfully not only to administer distributions of funds, but also to facilitate negotiations about the substantive terms of settlement, about attorneys' fees, and about setting up claims procedures.



Subject Matter Scope: Any civil matter referred by the district court and subject to the specifications and limitations of the appointment order.

Invocation: *Sua sponte* court appointment or at the request of the parties. Fed. R. Civ. P. 53.

The parties may discuss reference to a master at any pretrial conference. Fed. R. Civ. P. 16(c)(6).

Right of Appeal: Fixed by order of reference or Fed. R. Civ. P. 53. Rulings and findings generally are reversible only if clearly erroneous.

Authority: Fed. R. Civ. P. 16(c)(6) & 53, as well as the Court's inherent authority. Concerning the possibility of a magistrate serving as a special master, see 28 U.S.C. § 636(b)(2); Fed. R. Civ. P. 53(a), (b) & (f).

Contact: Courtroom deputy clerk for the judge to whom the action is assigned.

C Private Options for Alternative Dispute Resolution

Federal Rule of Civil Procedure 16(c)(7) expressly provides that after a civil action has been filed in federal court, the parties may consider "the use of extrajudicial procedures to resolve the[ir] dispute." There are numerous dispute resolution providers in the private sector offering a variety of services, including arbitration, fact-finding, conciliation, mediation, negotiation, and private trials. The role of the "neutral" can be played by retired judges, law professors, former government officials and experienced attorneys with specialized expertise in dispute resolution techniques. Virtually all private sector providers charge fees for their services.

Interested lawyers or parties may obtain from the clerk's office in San Francisco or San Jose a list of private organizations, firms, and individuals who have informed the court that they provide dispute resolution services.

This list is not necessarily complete. Any provider omitted may contact the clerk's office to request inclusion in subsequent editions. By providing this list, the court does not endorse any particular organization and does not imply any opinion about the quality of the services that may be offered.

Special Acknowledgement

The Judges of this Court wish to express their sincere gratitude to Mark L. Krotoski, former law clerk to Chief Judge William A. Ingram, for the many hours of splendid work he committed to the development of this brochure. Working under considerable time pressure, Mr. Krotoski marshalled a great deal of information, coordinated inputs from many sources, prepared several working drafts of this document, and helped publicize the Court's work in this area. His work, and the spirit in which he performed it, were marvelous. We are in his debt.