ABEC

United States District Court
EASTERN DISTRICT OF CALIFORNIA
5116 U.S. COURTHOUSE
1130 O STREET
FRESNO, CA 93721

CHAMBERS OF
ROBERT E. COYLE
CHIEF JUDGE

December 26, 1991

Duane R. Lee, Chief
Court Administration Division
Administrative Office of the
U. S. Courts
Washington, D.C. 20544

Dear Duane:

On behalf of the judges and magistrate judges for the Eastern District of California, I am pleased to submit the Civil Justice Expense and Delay Reduction Plan for this court prepared by the Civil Justice Reform Act Advisory Group, appointed by myself in March 1991. The court and the Advisory Group have reviewed and considered all of the measures as set forth in 28 U.S.C. § 473. This court is proud of the service and dedication exhibited by each member of the Advisory Group and is pleased with the group's very thorough and comprehensive study of the court's case management program and, after careful review and consideration, has adopted the Advisory Group's report as submitted to this court. A copy of this report can be found in Attachment "A".

Since this court is desirous of becoming an early implementation district (EID), it has drafted and adopted a plan for implementation to be effective as of December 31, 1991. A copy of this plan can be found in Attachment "B".

We look forward to hearing from you regarding the submission of our plan and of our court's approval as an early implementation district (EID).

Very truly yours,

ROBERT E. COYLE, Chief Judge
Eastern District of California

REC:mos
Attachments

cc: L. Ralph Mecham
Hon. Lawrence K. Karlton
Hon. Edward J. Garcia
Hon. William B. Shubb
Hon. David F. Levi
Hon. Oliver W. Wanger
Hon. M. D. Crocker
Hon. E. Dean Price
Hon. Milton L. Schwartz
Hon. Philip C. Wilkins
Hon. Thomas J. MacBride
Hon. John F. Moulds
Hon. Dennis L. Beck
Hon. Gregory G. Hollows
Hon. Peter A. Nowinski
Jack L. Wagner, Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

EFFECTIVE DECEMBER 31, 1991

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR THE EASTERN DISTRICT OF CALIFORNIA

INTRODUCTION

The Civil Justice Reform Act Advisory Group has completed its statutory task as required by the Civil Justice Reform Act of 1990, and has submitted to this court for its review a series of recommendations designed to reduce cost and delay associated with the adjudication of civil litigation in the Eastern District of California.

The Advisory Group was comprised of a diverse group of lawyers and client litigants representing the spectrum of civil litigants who regularly appear in federal court in this district.

The Advisory Group has been diligent in its efforts to gather information and data from a variety of sources that would afford the group members an opportunity to determine the extent to which civil case management could be enhanced for the benefit of litigants and the court. Through extensive interviews and a questionnaire of judges, counsel, litigants, and other interested parties, the Advisory Group was able to reach consensus and presented to the court its report.

Having reviewed and carefully considered the Advisory Group report, this court adopts the recommended measures, rules, and programs incorporated in its proposed sixteen point Civil

Justice Expense and Delay Reduction Plan (see pp. 93-100 of the report) and directs that the plan be implemented as of December 31, 1991.

THE COURT'S PLAN

A. MEASURES RECOMMENDED FOR INSTITUTIONAL COURT-WIDE ACTION

Point 1 - Amend Local Rule 252

At present, Local Rule 252 (arbitration proceedings) allows for voluntary reference of a case only to binding arbitration. The rule's purpose is to provide an incentive for the just, efficient, and economic resolution of certain controversies by means of informal and expeditious procedures. Consistent with this purpose, Local Rule 252 will be amended to include a voluntary reference of a case to non-binding arbitration.

Point 2 - Establish ADR Advisory Panel

An advisory panel of attorneys and other litigant representatives will be established for the purpose of monitoring the use and success of early neutral evaluation (ENE), court-annexed arbitration (CAA), and other alternative dispute resolution (ADR) programs which may be authorized by the court.

Point 3 - Sponsor Continuing Legal Education (CLE) Programs on Local Federal Practice

Consistent with its present practice, the court, in conjunction with the Federal Bar Association and other such

organizations, will sponsor continuing legal education (CLE) programs on local federal practice and procedure. Such programs will seek to increase the awareness of the court's alternative dispute resolution programs and will promote compliance with local rules and general orders of the district. In addition, the program will also address requirements of practice before individual judges of the court.

Point 4 - Expand Attorney Panels for Pro Se Civil Rights and Habeas Corpus Cases

Consistent with existing court procedures, this court will expand the size of panels of attorneys willing to accept appointment to represent pro se civil rights plaintiffs (incarcerated or not) and habeas corpus petitioners. Expansion of these panels will be achieved with the assistance of the county bar associations, local law schools and legal organizations, and the Federal Bar Association.

Point 5 - Formalize the Scheduling, Planning, and Invitation Process of the Annual Eastern District Meeting

The court's desire to create a forum for open debate and exchange of information to enhance the practice within the district and increase the effective and efficient functioning of the district court has been exemplified in its annual district meeting attended by practitioners and members of the judicial family. The court intends to continue these worthwhile and beneficial annual meetings.

Point 6 - Institute Experimental Screening or Tentative Ruling System Administered by a Volunteer District Judge

The court, under the direction of the Chief Judge, will develop and institute an experimental pre-argument notification program for civil law and motion practice that will be administered by a volunteer district judge. The purpose of the notification is to advise counsel of particular areas in which the judge would like the oral argument to focus. Alternatively, the court may use the notification to advise of a tentative ruling or to submit the matter without oral argument.

B. SUMMARY OF NATION-WIDE INSTITUTIONAL REFORMS TO BE ADDRESSED TO APPROPRIATE NATIONAL FORUMS

While the following (points 7 through 10) are included in the Advisory Group report, they are not made a part of the court's plan since the court has no control over their outcome. The court, however, does support the Advisory Group's position with respect to these four points.

Point 7 - Additional Law Clerks

Upon an appropriate showing of need, district judges in regular active service should be eligible for a third law clerk, while magistrate judges should be eligible for a second law clerk.

Point 8 - Prompt Action to Fill Vacant Judgeships

Responsible political authorities should be made fully

aware of the adverse consequences of delay in the appointment and confirmation of district judges.

Point 9 - Revision of Case-weight Criteria

The Administrative Office of the United States should be asked to place a high priority on updating the case-weight criteria by which judicial productivity is judged and additional judgeships allocated or recommended. In particular, capital punishment habeas corpus cases and prisoner civil rights cases are systematically undervalued by the present system which is rooted in the legal conditions of the 1970's. The present standards have become arbitrary.

Point 10 - Accurate Assessment and Advance Provision for Judicial Impact of New Legislation

The President and the Congress should consider carefully whether proposed legislation will adversely impact the ability of the federal courts to administer civil justice without undue cost and delay. When a legislative initiative will have a foreseeably significant and adverse judicial impact, additional judicial resources necessary to mitigate the foreseeable adverse effect on the federal courts should be allocated in advance.

C. SUMMARY OF MEASURES RECOMMENDED FOR IMPLEMENTATION BY INDIVIDUAL JUDGES INCIDENT TO MANAGEMENT OF THEIR PERSONAL DOCKETS

Point 11 - Staggered Scheduling of Law and Motion Matters

Lengthy proceedings should be specially set or scheduled

at the end of the motion calendar so attorneys on other matters do not have to wait in the courtroom for extended periods of time.

Point 12 - Avoidance of Continuances Except by Stipulation or Motion

While postponed court appearances or trials is only an occasional problem in this district, the court is aware of the cost of preparation by counsel. The court resolves to give close scrutiny to ex parte last minute requests for continuances. Requests for continuance normally should be by stipulation. Moreover, absent extraordinary circumstances, the parties should be required to adhere to the dates set in the pretrial scheduling order and in the local rules.

Point 13 - Setting of Realistic Trial Dates

Relatively few civil trial dates are continued in this district and when done so they are generally the result of priority criminal cases. This court will continue to exercise a fair but firm policy of setting realistic trial dates affording adequate time for pretrial activity. The trial date should be set at a time when the parties can predict accurately their discovery and motion practice requirements.

Point 14 - Bifurcation of Issues and Stated Discovery When Threshold Issues May be Dispositive

The court will explore the staging or staying of

discovery in appropriate cases in which particular issues may be dispositive.

Point 15 - Encourage Alternative Dispute Resolution (ADR)

This court is sensitive to the high cost associated with civil litigation and, as such, encourages and supports the use of alternative dispute resolution programs with positive benefits to litigants and the courts.

Point 16 - Experiment With Early Settlement Conferences

All judges within the Eastern District offer to conduct settlement conferences for the litigants. In addition to the district judges, magistrate judges are also available and willing to assist in civil settlement conferences. In many cases, a settlement conference is not productive until after discovery and motion practice have ended. In some instances, however, settlement conferences at an earlier stage of the litigation would lead to an earlier settlement. The court will seek to provide a judicially-sponsored settlement conference at the earliest appropriate opportunity in every case.

REPORT
of the
CIVIL JUSTICE REFORM ACT ADVISORY GROUP
of the
UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF CALIFORNIA

Richard W. Nichols, Esq.
Chair

Prof. John B. Oakley
Reporter

Submitted to the Court and the Public
Pursuant to Title 28, Section 472(b)
of the United States Code

NOVEMBER 21, 1991

McDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION
ATTORNEYS

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November 21, 1991

Honorable Robert E. Coyle
Chief Judge, United States District Court
Eastern District of California
1130 "O" Street, Room 5116
Fresno, California 93721

Re: Report of the Civil Justice Reform Act Advisory Group

Dear Judge Coyle:

As Chairman of the Civil Justice Reform Act Advisory Group for this District, I have the honor to present you with the Group's Final Report and Proposed Civil Justice Expense and Delay Reduction Plan, pursuant to Title 28 U.S.C. §471 et seq.

Should the Court deem it appropriate, it is the recommendation of the Advisory Group that the Court take the required steps to seek designation by the Judicial Conference of the United States as an Early Implementation District Court, pursuant to Section 103(c) of Public Law 101-650.

Very truly yours,

Richard W. Nichols

Richard W. Nichols

RWN/cs
Enclosure

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REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP
of the United States District Court
for the Eastern District of California

November 21, 1991

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REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP
of the United States District Court
for the Eastern District of California

November 21, 1991

I. DESCRIPTIVE PROFILE

A. History of the District

1. Creation in 1966

The Eastern District was created in 1966 as part of a general reorganization of the federal district courts of California.[1]

When California was admitted to the Union in 1850, Congress established two federal judicial districts: the Northern District, with its court in San Francisco; and the Southern District, with its court in Los Angeles. The 1966 reorganization expanded the number of California judicial districts by creating the Central and Eastern Districts.

The old Southern District, minus those counties assigned to the Eastern District, was split into two new districts. The new Southern District, whose court sits in San Diego, is comprised of the state's southernmost counties. The Central District, whose court sits in Los Angeles, is comprised of those counties that make up and surround the Los Angeles metropolitan area. The new Northern District

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[1] Act of Mar. 18, 1966, Pub.L. 89-372, § 2(a), 80 Stat. 75 (codified at 28 U.S.C. § 84).

Court continues to sit in San Francisco and is comprised of those counties not shifted from the old Northern District to the Eastern District.[2]

To create the Eastern District, Congress took from the old Northern District the counties of Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba. It also assigned to the new Eastern District the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, all formerly within the old Southern District. Fresno, Redding, and Sacramento were designated as the places for the holding of court within the Eastern District.[3]

2. Legislative History

The legislative history of the Eastern District makes unmistakably clear the intent of Congress that citizens of the fast-growing State of California have fair and adequate access to the federal court system.

In the first session of the 89th Congress, several bills were introduced creating additional circuit and district judgeships throughout the United States and providing for the creation of new districts in California. The Judicial Conference of the United States, at its 1965 sessions, recommended the creation of 44 new federal judgeships. The Judicial Conference's recommendations were introduced

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[2] *See* Historical and Revision Notes, 28 U.S.C.A. § 84.

[3] 28 U.S.C. § 84(b).

in the House as H.R. 9168 and in the Senate as S. 1666.[4] The Senate was the first to act, passing S. 1666 in June, 1965. As amended by the House the Senate bill became the legislation that created the Eastern District. [5]

The creation of the two new California districts was opposed by the United States Department of Justice, which objected to the loss of economies of scale that would result from subdivision of the two existing offices of United States Attorneys in California into four smaller offices.[6] Since this opposition was expressed after the Senate had already passed the measure, debate over the structure of the federal trial courts of California is recorded principally in proceedings of the House Judiciary Committee and on the floor of the full House.

In reporting favorably on an amended version of S. 1666, the House Judiciary Committee's report of February 9, 1966, acknowledged the additional costs of creating approximately 25 new attorney and marshal positions to staff the the offices of the Department of Justice within the two new judicial districts in California. The population within both of the existing districts of California was estimated to grow by 40.5 percent between 1960 and 1970. "The rapid growth of the State of California in population, production, and economy, requires a realignment of the geographic boundaries of the judicial districts. Your committee

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[4] *See* 1966 U.S. Code Cong. & Adm. News, at 2041.

[5] Act of Mar. 18, 1966, Pub.L. 89-372, 80 Stat. 75.

[6] Letter of Deputy Attorney General Ramsey Clark to Emanuel Celler, Chairman of the House Judiciary Committee, August 10, 1965, *reprinted in* 1966 U.S. Code Cong. and Adm. News, at 2044.

is of the opinion that there is a need, justified by facts, which warrant the additional costs involved."[7]

Support for the 1966 amendment on the floor of the House focused on the need for greater court access for the citizens of the most populous and fastest growing state.

Representative Edwards of California cited the combined factors of geographical size, population and economic growth. "The sheer size of the State of California warrants the creation of the two additional districts when viewed together with the incredible increase in population and the rapid industrialization of the State. California, with a [1960] population of 19 million, is the fastest growing of the larger States. It is the third state in area . . . and it has the longest [navigable] coastline of any state." Congressman Edwards noted that passage of the 1966 Act would reduce the ratio of population per district judge in California from 860,000 people per judge to the only modestly lower figure of 730,000 people per judge, still much higher than the national average of about 500,000 people per judge. As part of the solution to the understaffing of the federal courts in California it made eminent sense to split off the Eastern District from the Northern District, since the new district "is separated from the northern by

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[7] House Report (Judiciary Committee) No. 1277, Feb. 9, 1966, to accompany S. 1666, *reprinted in* 1966 U.S. Code Cong. & Adm. News, at 2040, 2053-54.

mountains and includes the major cities of Sacramento, Stockton, Bakersfield, and Fresno."[8]

Representative Cohelan of California observed that the two existing districts in California had been created to serve a population of less than 100,000 and that the state's economy had expanded beyond mining and agriculture to become "a great center of commerce and industry. Together with population this change has resulted in vastly increased caseloads and case complexities, coupled with traffic problems and congestion which commonly make access to existing court facilities difficult, costly, and frustrating." [9]

Opponents of the new California districts endorsed the efficiency argument of the Department of Justice, and Representative Gross of Iowa went so far as to declare that the additional judgeships would be unnecessary if the present judges would simply work longer and harder each day.[10]

Representative Van Deerlin of California replied to this opposition by questioning why California could warrant only two federal judicial districts when the states of New York and Texas each had four, and the much smaller states of Alabama, Florida, Georgia, Illinois, North Carolina, Oklahoma, Pennsylvania, and Tennessee each had three. Of particular continuing relevance to the status of civil

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[8] Congressional Record -- House of Representatives, March 2, 1966, at 4562.

[9] Congressional Record -- House of Representatives, March 2, 1966, at 4561.

[10] Congressional Record -- House of Representatives, March 2, 1966, at 4556.

justice within the Eastern District of California in 1991, Congressman Van Deerlin also took note in 1966 of the special problems of his constituents in San Diego, where the civil calendar had been adversely impacted by the extremely high criminal caseload associated with "serving an international border and an intensely impacted military center."[11]

At the end of this debate the House voted overwhelmingly in favor of the creation of the new California districts, by a margin of 371 to 23, with 39 not voting. [12]

B. Current Organization

1. Divisional Structure

By local rule of "intradistrict venue" the Eastern District of California is informally subdivided into units based in Fresno and Sacramento. The court is "in continuous session" in each city. Matters arising in Calaveras, Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolomne Counties must be commenced in Fresno. Matters arising elsewhere in the district must be commenced in Sacramento.[13]

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[11] Congressional Record -- House of Representatives, March 2, 1966, at 4564.

[12] Congressional Record -- House of Representatives, March 2, 1966, at 4569.

[13] E.D. Cal. Local Rule 120.

2. **Judicial Personnel**

a. *District and Magistrate Judges*

(1) *District judges in regular active service*

(a) **Chief Judge Robert E. Coyle**
1130 "O" Street, Rm. 5116
Fresno, California 93721
Appointed May 13, 1982

(b) **Chief Judge Emeritus Lawrence K. Karlton**
650 Capitol Mall, Rm. 2012
Sacramento, California 95814
Appointed July 24, 1979

(c) **Judge Edward J. Garcia**
650 Capitol Mall, Rm. 2546
Sacramento, California 95814
Appointed March 14, 1984

(d) **Judge William B. Shubb**
650 Capitol Mall, Rm. 2042
Sacramento, California 95814
Appointed October 1, 1990

(e) **Judge David F. Levi**
650 Capitol Mall, Rm. 2504
Sacramento, California 95814
Appointed October 1, 1990

(f) **Judge Oliver W. Wanger**
1130 "O" Street, Rm. 5104
Fresno, California 93721
Appointed March 25, 1991

(2) *Senior district judges*

(a) **Senior Judge M.D. Crocker**
1130 "O" Street, Rm. 5007
Fresno, California 93721 (Chowchilla)
Appointed September 21, 1959

(b) **Senior Judge Thomas J. MacBride**
650 Capitol Mall, Rm. 4052
Sacramento, California 95814
Appointed September 22, 1961

(c) **Senior Judge Philip C. Wilkins**
650 Capitol Mall, Rm. 4028
Sacramento, California 95814
Appointed December 18, 1969

(d) **Senior Judge Milton L. Schwartz**
650 Capitol Mall, Rm. 1060
Sacramento, California 95814
Appointed November 27, 1979

(e) **Senior Judge Edward D. Price**
1130 "O" Street, Rm. 5408
Fresno, California 93721
Appointed December 20, 1979

(3) *Full-time magistrate judges*

(a) **Chief Magistrate Judge John F. Moulds**
650 Capitol Mall, Rm. 4014
Sacramento, California 95814
Entered on duty January 6, 1986

(b) **Magistrate Judge Gregory G. Hollows**
650 Capitol Mall, Rm. 4507
Sacramento, California 95814
Entered on duty March 7, 1990

(c) **Magistrate Judge Dennis L. Beck**
1130 "O" Street, Rm. 5311
Fresno, California 93721
Entered on duty March 12, 1990

(d) **Magistrate Judge Peter A. Nowinski**
650 Capitol Mall, Rm. 1034
Sacramento, California 95814
Entered on duty February 14, 1991

(e) **Magistrate Judge Donald W. Pitts**
P.O. Box 575
Yosemite National Park, California 95389
Entered on duty December 1, 1975

(4) *Part-time magistrate judges*

(a) **Magistrate Judge Richard M. Bay**
1352 Oregon Street
Redding, California 96001
Entered on duty February 1, 1990

(b) **Magistrate Judge Dennis A. Cornell**
P.O. Box 2184
Merced. California 95344
Entered on duty April 7, 1986

(c) **Magistrate Judge Leonard A. Cosgrove**
767 West Lancaster Boulevard
Lancaster, California 93534
Entered on duty May 1, 1971

(d) **Magistrate Judge Louis P. Etcheverry**
3300 Truxtun Avenue
Bakersfield, California 93301-4692
Entered on duty January 1, 1984

(e) **Magistrate Judge Edward Forstenzer**
P.O. Box 1121
Bishop, California 93515
Entered on duty October 1, 1988

(f) **Magistrate Judge Frederic A. Jacobus**
2929 W. Main Street, Suite F
Visalia, California 93291
Entered on duty June 13, 1986

(g) **Magistrate Judge Craig M. Kellison**
P.O. Box 1238
Susanville, California 96130
Entered on duty August 9, 1986

(h) **Magistrate Judge Wray E. Kirsher**
P.O. Box 263
Mount Shasta, California 96067
Entered on duty November 16, 1975

(i) **Magistrate Judge Esther Mix**
650 Capitol Mall, Rm. 4049
Sacramento, California 95814
Entered on duty May 1, 1971

(j) **Magistrate Judge Monte M. Reece**
P.O. Box 20,000
South Lake Tahoe, California 96151
Entered on duty July 12, 1981

b. *Bankruptcy Judges*[14]

(1) **Chief Bankruptcy Judge Loren S. Dahl**
650 Capitol Mall, Rm. 8308
Sacramento, California 95814
Appointed February 6, 1980

(2) **Bankruptcy Judge Joseph W. Hedrick**
1130 12th Street
Modesto, California 95354
Appointed January 11, 1980

(3) **Bankruptcy Judge David E. Russell**
650 Capitol Mall, Rm. 8308
Sacramento, California 95814
Appointed October 7, 1986

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[14] We include a list of the Eastern District's bankruptcy judges in order to make our report as complete and informative as possible, and in order to pay proper respect to the bankruptcy judges as members of the official family of the Eastern District. By statute bankruptcy judges are judicial officers of the district court to which they are attached, but constitute a distinct "unit" of that district court. 28 U.S.C. § 151. The district court has appellate jurisdiction over judgments, orders, and decrees of the bankruptcy court, but (conditional on the consent of all parties) has referred its appellate jurisdiction in bankruptcy matters to the Ninth Circuit's Bankruptcy Appellate Panel. 28 U.S.C. § 158(a)-(b); Gen. Order No. 182, E.D. Cal., May 14, 1985. The operation of its bankruptcy court having scant present impact on the civil or criminal docket of the United States District Court of the Eastern District of California, we make no further reference to bankruptcy proceedings in this report.

(4) **Bankruptcy Judge Richard T. Ford**
1130 "O" Street, Suite 2656
Fresno, California 93721
Appointed January 1, 1988

(5) **Bankruptcy Judge Christopher M. Klein**
650 Capitol Mall, Rm 8308
Sacramento, California 95814
Appointed February 9, 1988

(6) **Bankruptcy Judge Brett Dorian**
1130 "O" Street, Suite 2656
Fresno, California 93721
Appointed February 16, 1988

C. Challenging Features

1. High Population per Judge Throughout the History of the District

The three district judges assigned to the Eastern District in 1966 served a population of 3.5 million persons.[15] With a population per judge at its inception of approximately 1.17 million people per judge, the Eastern District has been challenged from the start to make efficient use of extremely scarce judicial resources. The judges of the district have successfully met that challenge year in and year out, but the scope of the challenge has not abated.

The cities and counties of the Eastern District have grown tremendously since 1966, and they will continue to be the state's fastest growing regions through

[15] Statement of Rep. Edwards, Congressional Record -- House of Representatives, March 2, 1966, at 4562.

the turn of the century. As of 1990 the population of the Eastern District had grown to approximately 5.4 million.[16]

While the number of authorized district judges had by 1990 doubled to six, even when fully staffed[17] this entailed a population per judge of 905,000 persons, well in excess of the one-judge-per-860,000-persons ratio that served in 1966 as the benchmark of unacceptibility and the justification for augmenting and reorganizing the federal district bench in California.

A seventh district judgeship has been temporarily authorized for the Eastern District by the Judicial Improvements Act of 1990.[18] The President has nominated Mr. Garland Burrell, Assistant United States Attorney for the Eastern District of California, to fill this newly created judgeship.[19] The Senate has not yet scheduled a confirmation hearing.

Assuming the doubtful circumstance of no population growth since 1990, the confirmation of Judge Burrell in early 1992 would bring the population-per-judge ratio for the Eastern District down to about 771,000 persons per judge, slightly in excess of but reasonably close to the 730,000 person-per-judge ratio that Congress found suitable, statewide, when the Eastern District was created in 1966.

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[16] 1990 California Statistical Abstract, Table B-4.

[17] For discussion of the nature and extent of the judicial understaffing of the Eastern District in recent years, *see infra*, § III.C.3.e. of this Report.

[18] Act of Dec. 1, 1990, Pub. L. No. 91-650, 104 Stat. 5089.

[19] The new judge will sit in Sacramento.

2. Accelerating Future Growth

The Eastern District is now the fastest growing area in California. According to the California Department of Finance Population Research Unit, the state as a whole will grow in population by 24.6 percent during the period 1985-2000. Twenty California counties will grow by at least 35 percent. Fifteen of these high-growth counties are in the Eastern District. The Population Research Unit projects that by the year 2000 there will be an addition 1,744,022 residents of the counties comprising the Eastern District, for a total projected Eastern District population of 7.17 million persons at the turn of the new century.[20]

3. Vast Geographic Area

An additional challenge for the administration of the Eastern District is the unusual geographical combination of high population per judge (generally indicative of high population density) and high acreage per judge (generally indicative of low population density). The total area (land and water) of the counties within the Eastern District totals the vast expanse of 89,290.9 square miles (57,146,176 acres). This is 14,881.8 square miles (9,524,352 acres) per current active judge and 12,755.8 square miles (8,163,712 acres) per authorized active judge.

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[20] California Almanac at 12; 1990 California Statistical Abstract, Table B-4.

4. High Concentration of Federal Installations

A significant byproduct of the combination of the Eastern District's (1) vast acreage, (2) scattered areas of dense population and urban economies, (3) "Pacific Rim" location, and (4) proximity to the huge populations of Southern California and the San Francisco Bay Area, has been the establishment within the district of a great many federal military, recreational, and resource management installations. As a result, many essentially local disputes, regulatory matters and minor criminal infractions that would otherwise be adjudicated in the state courts are brought before the federal judges of of the Eastern District.

5. High Concentration of State Prisoners

The Eastern District's unusual combination of rural and urban characteristics has also resulted in the State of California housing approximately 50 percent of its prison population within the Eastern Distict.

D. Traditional Strengths

1. Collegiality

Collegiality is a hallmark of practice in the Eastern District. The judges are few enough in number to maintain a high degree of personal and professional interaction. This is especially true among the larger contingent of district and magistrate judges maintaining chambers in Sacramento. Traveling frequently and tirelessly between the Fresno and Sacramento courthouses, Fresno-based Chief Judge Robert E. Coyle has been particularly active in seeking to insure that any

feelings of isolation between the Sacramento and Fresno judges are kept to a minimum.

The ethics and attitude of federal practitioners in the Eastern District are also distinguished by a high level of collegiality. Visiting practitioners from other major metropolitan areas of the United States often remark upon the genuine "courtliness" of conduct at the bar of the Eastern District, and express regret that this spirit of cooperation and common purpose has become anachronistic in the courts of their home districts. Preserving the atmosphere of flexibility and trust that makes practice in the Eastern District both pleasant and efficient is an overriding priority of the Advisory Group in the framing of its recommendations.

2. **Self-sufficiency**

Another hallmark of practice in the Eastern District has been self-sufficiency, especially among the judicial complement. During the period of substantial judicial understaffing experienced for most of 1990, discussed in more detail below in § III.C.3.e., the court relied principally on the extraordinary efforts of the court's own judges, active and senior, rather than on visiting judges. The individual calendar system is particularly prized by the judges of the Eastern District, and by none more fervently than those judges who have served under the master calendar system of the California state court trial court system.

This ethic of self-sufficiency and of personalized and individualized judicial responsibility for docket control has resulted in the judges of the Eastern District

anticipating in their personal management styles many of the principles and techniques of early and pro-active judicial case management recommended by the Civil Justice Reform Act (CJRA). It has also fostered a lack of enthusiasm for centralized regulation of individual judicial case management styles through local rule or otherwise, barring demonstrated need to displace personalized and individualized management by each judge of his or her own docket.

3. Pioneering Use of District Meetings to Monitor the Administration of Justice Within the District

Although proud of the efficiency and collegiality of practice within the Eastern District under their autonomous but generally consistent case management procedures, the individual judges of the district have made pioneering use of collective, collegial review of the quality of justice within the district through the medium of the annual Eastern District Meeting. Beginning in 1983, in the first year of the Chief Judgeship of Chief Judge Emeritus Lawrence K. Karlton, a fall meeting of the judges and leading lawyers of the Eastern District has been an annual fixture of practice in the district. The annual district meeting quickly grew from a half-day local event to a weekend-long event held in a retreat setting at a resort location. The Eastern District Meeting has become the model for similar district meetings that have since become common throughout the Ninth Circuit.

Local procedural improvements in the administration of justice are a staple of the program at each year's Eastern District Meeting.[21]

II. EARLY IMPLEMENTATION STATUS

A. Recommendation That the Eastern District of California Become an Early Implementation District

The Advisory Group recommends that the court secure early implementation status by adopting on or before December 31, 1991, the proposed Civil Justice Expense and Delay Reduction Plan (CJEDRP) that is described and explained in this Report.

In effect, the principles of the CJRA have been implemented by the individual judges of the Eastern District of California for some years preceding enactment of the CJRA. This is reflected in the general health of the district's dockets and the high degree of confidence in the operation of the court expressed by federal practitioners in the Eastern District. The Eastern District's affinity for the management philosophy of the CJRA should be formalized and validated by early implementation of the proposed CJEDRP, which continues much of current practice while adding refinements and innovations inspired by the CJRA's recommended principles, guidelines, and techniques for reducing cost and delay in civil litigation.

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[21] All members of the Advisory Group were invited by the court to attend the 1991 Eastern District Meeting. A tentative final draft of this Report was discussed by the Chair and Reporter of the Advisory Group at a panel program during the October 27th general session of the 1991 Eastern District Meeting.

B. Benefits of Early Implementation Status

The benefits to the court of early implementation status are as follows:

1. Early review and feedback of the district's CJEDRP at the circuit-wide and national levels.
2. Opportunity for a leadership role in implementing the CJRA nationwide and concurrent ability to influence national judicial and legislative policy so as to maintain the positive civil justice environment presently existing in the Eastern District of California.
3. Access to enhanced fiscal resources that the CJRA authorizes the Judicial Conference to provide to Early Implementation Districts.

III. ASSESSMENT OF CURRENT CONDITIONS[22]

A. Docket Conditions[23]

1. Civil Docket

a. *Overview*

With the arrival of Judges Shubb, Levi, and Wanger to the bench in 1991, the logjam of cases, that had grown in part because of the resignation of Judge

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[22] Part III of this Report fulfills the statutory reporting mandate of 28 U.S.C. § 472(b)(1).

[23] This section of the Report fulfills the statutory reporting mandate of 28 U.S.C. § 472 (c)(1)(A). This section was drafted, and the accompanying tables of Appendix D were prepared, principally by chair Daniel J. McVeigh (re the civil docket) and Richard H. Jenkins and Malcolm S. Segal (re the criminal docket) as members of the Docket Assessment Subcommittee. The drafting of this Report was substantially completed before receipt of FY 1991 docket statistics in an October 31, 1991, memorandum from the Federal Judicial Center. The new statistics require no substantive revision of our analysis. They are set forth in full in Appendix D at pages 9-1 to 9-12.

Ramirez last year, has eased appreciably. The general consensus of federal practitioners and court personnel is that the demands of the civil calendar are being met presently by the court, and, with the anticipated confirmation of Judge-designate Garland Burrell, the future looks even better. The principal impediment to cases proceeding expeditiously toward trial, settlement or other resolution is generally perceived as the burden on the system created by the court's criminal caseload.

In the last two years the Eastern District has reported a decline in overall terminations of cases with a resulting increase in the number of pending cases. In 1989/90, the total pending cases increased to 3,268, which was a 12 percent increase from the prior year. This year, 1990/91, the pending cases remain relatively high at 3,140. It is expected that this number will decline with a full complement of judges on hand to handle the backlog.

While the civil filings for the Eastern District have historically far exceeded the criminal filings, the actual number of trial days committed to the criminal trial calendar generally exceeds that spent on trial civil cases. Since 1989, criminal cases in both Fresno and Sacramento have accounted for approximately 60 percent of the trial calendar days (see Appendix D-3). The one significant exception to this rule was in 1989 in Sacramento when 57 percent of the court's trial days was spent on civil cases. This variation was likely the result of the fact that a lengthy civil case, *FDIC v. Main Hurdman*, was tried in 1989 by Judge Karlton. In 1990,

44 percent of the Sacramento judges' trial days was spent on civil cases (144 days), while Fresno had 40 percent of its trial days devoted to the civil calendar (34 days).

b. *The Judges' Perspective*

In roundtable meetings with the judges of the district, the general consensus was that they did not perceive any significant increase in the size of the court's civil caseload in the last several years. Whatever problems now exist with the civil calendar are outgrowths of the further complexity of cases on the criminal docket, as well as the delay in appointing and confirming new judges. In Sacramento one judge commented that he was spending more time on his individual criminal caseload because of the increased complexity of the criminal cases and a greater number of multiple defendant cases. In particular, criminal law and motion has become more demanding in recent years, much of which was attributed to the new sentencing guidelines.

In Fresno, all the judges agreed that there were no significant problems with the civil docket. Approximately 96 percent of the civil cases in Fresno are settled, and a case usually can be set for trial within two months of filing, if necessary. Any case that has been pending in excess of three years in Fresno would not be a result of a court problem, but rather because of the desires of the parties or because of other circumstances. Concern was expressed, however, that caseloads may become more difficult to manage if filings increase proportionate to the

anticipated increase in population in the Fresno and Sacramento areas. In particular, there is concern that the capital facilities of the district, especially courtrooms, will be inadequate to service the increased demands on the district expected in the next decade.

It was the impression of the bench that the workload of the magistrate judges was extremely heavy, particularly with litigation involving prisoners, which the magistrate judges handle almost exclusively in the Eastern District. In fact, in July 1991, the magistrate judges each averaged a case-load of prisoner cases in excess of 350, in addition to their other responsibilities. Concern was expressed that the relative weighting system presently used by the Administrative Office fails to adequately reflect the complexity of some of these prisoner cases. In view of the fact that approximately 50 percent of the population of the California state prison system is housed in the Eastern District, this weighting system underestimates a significant aspect of the demands on the resources of the district.[24]

c. *The Bar's Perspective*

Civil attorneys interviewed generally were pleased with the condition of the civil docket, and with the pace of litigation in the Eastern District, especially when compared with other courts in which they practice.

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[24] Despite their heavy present workload the magistrate judges are willing to work overtime when necessary to handle settlement conferences or expedited civil trials by consent. Further growth in the docket of prisoner cases threatens, however, to so burden the magistrate judges as to limit their present ability and willingness to help out with general civil cases on a voluntary overload basis.

While some attorneys have had cases bumped on a fairly regular basis, due to a conflict with a criminal trial or other calendar-related reason, the court normally has given the attorney sufficient notice (at least one week) of such conflict and has set a new trial date within an acceptable period of time.

The Clerk's Office has indicated that the judges are resetting approximately one trial per month due to calendar concerns and that the new trial dates are generally set within two months of the original date. (This does vary significantly with some judges.)

In addition to bumping trial dates, one Sacramento judge noted that he was also bumping his civil law and motion matters due to scheduling problems more often now than in past years. Even so, the Clerk's Office related that, with few exceptions, most law and motion matters could be set within 28 to 35 days of request.

2. Criminal Docket

a. *Introduction*

The status of the criminal docket is discussed in the same format as the civil docket section, but is based principally on the local United States Attorney's fiscal year statistics. While the reporting year is slightly different from that of the Administrative Office statistics used in our report on the Civil Docket, the local criminal caseload statistics are in a more readily useable format and are more detailed.

b. *Present Status*

(1) *In general*

A review of all available statistical information concerning the criminal docket, when taken together with information gleaned from discussions with the United States Attorney's Office, the Federal Defenders' Office, private practititioners and other interested participants in the federal criminal justice system, leads inevitably to the view that the criminal docket is well-managed. The docket is under control despite the stresses placed upon the system by the advent of changing sentencing guidelines, vacant judgeships, and the press of complex narcotics and white collar cases.

The general consensus of those involved in the system is that cases proceed to trial, where appropriate, as scheduled. The court has also well-managed its caseload to cover circumstances where District Court Judges are unavailable or have two conflicting criminal trials.

The obvious difficulty in managing a criminal caseload is derived from the fact that cases are often presented for prosecution, with in-custody defendants, in rapidly moving criminal investigations, particularly in narcotics cases. While the United States Attorney has the option of declining to prosecute various classes of criminal cases or set limits on cases accepted for prosecution, and thereby control the caseload, he more often must make the decision to prosecute based upon the

merits of the individual narcotics cases without regard to the burden the case will impose upon the office's criminal caseload.

(2) *Indictments*

The filing history for indictments in the district reflects a general increase in the number of criminal filings for 1985 to 1990. While the number of indictments increases each fiscal year, there was an 18 percent decrease in the number of Fresno filings from fiscal year 1986 to fiscal year 1990. However, the United States Attorney's Office's fiscal year 1990, when compared to fiscal year 1986, shows an overall 43 percent increase in indictments. Projections for fiscal year 1991 indicate that there will not be an increase in the number of indictments over fiscal year 1990. When the numbers are broken down by offices, the Sacramento office had a 73 percent increase, 156 indictments to 269; and Fresno, a slight decrease, 89 to 81 indictments.

The most significant increase in case filings occurred in white collar crime cases, which more than doubled. Narcotics cases showed a 51 percent increase. In contrast, bank robbery offenses, which had theretofore been a significant numerical part of the United States Attorney's caseload, decreased 24 percent between 1986 and 1990. While the number of immigration cases increased 63 percent, all concur that those cases are more a calendaring burden than a trial problem. Of the 101 such cases in 1990, only one proceeded to trial. Other classes

of cases either suffered a modest increase in filings or were too few to be of statistical interest.

(3) *Trials*

One of the more significant statistical variants between fiscal year 1986 and 1990 was the sharp increase in the number of trials in the Sacramento Division of the district. While the number of trials in Fresno remained constant for the period, a 48 percent increase in trials occurred between 1986 and 1990 in the Sacramento Division.

In fiscal year 1986 the court conducted 34 criminal felony trials in comparison to 44 in fiscal year 1990, for an increase of 29 percent. However, the ratio between criminal felony trials and indictments is down. In fiscal year 1986 for every criminal felony trial approximately 7.2 indictments were filed. While in fiscal year 1990 for every criminal felony trial, approximately 7.9 indictments were filed.

An examination of the statistics available for the United States Attorney's office indicates that narcotics cases are more likely to proceed to trial than most other categories of crime. Narcotics-related cases accounted for over 50 percent of the criminal felony trials in fiscal year 1989 and 1990 and almost tripled in number between fiscal year 1986 and fiscal year 1990.

(4) *Trial days/trial hours*

The number of criminal felony trials increased from 34 in fiscal year 1986 to 44 in fiscal year 1990 for an increase of 29 percent. The actual increase in Sacramento was 48 percent while Fresno remained constant. However, the number of trial days increased only 18 percent overall and the number of trial hours increased 23 percent. These statistics indicate that trial days are slightly longer today than in previous years.

(5) *Number of defendants*

Some people familiar with the criminal docket perceived that there was a substantial increase in the number of multi-defendant trials which adversely effect the handling of the criminal docket. Statistics show that although the number of individual defendant indictments increased from 163 in fiscal year 1986 to 264 in fiscal year 1990, the number of multi-defendant indictments remained fairly constant. Actually, there was a slight decrease in the number of multi-defendant indictments. But the increasing complexity and public importance of multi-defendant prosecutions may make such cases more demanding of the time and resources of the court.

(6) *Median time from filing to disposition of criminal felony cases (Speedy Trial Act compliance and exceptions)*

While there is some indication in the statistics demonstrating a gradual increase in the median time from filing to disposition in criminal cases during the

period 1985 to 1990, the increase is most likely explainable by the increased complexity of the cases prosecuted in the district. Those familiar with the prosecution and defense of criminal cases all agree that the dramatic increase in narcotics cases and white collar crime cases also carried with it a concomitant increase in the complexity of the cases. In such instances, the court has been willing, albeit reluctantly, to grant exceptions under the Speedy Trial Act to permit the more extensive discovery required in white collar crime cases and complicated motion practice inherent in those cases. The court has also appropriately granted exemptions in multiple defendant cases.

3. Summary and Conclusion

The consensus is that the annual meetings of the district have served to appropriately raise civil and criminal docket related issues in an on-going and exemplary way. The general belief is that issues that have traditionally impacted the docket such as discovery, motion and pre-trial practice in civil cases, and plea bargaining, motion practice, and sentencing problems in criminal cases have been openly discussed by the federal bar, including civil litigators, prosecutors, defense attorneys, and the court, and have been largely resolved. The court has wisely included a major bankruptcy component at the meetings and has also invited representatives from the Clerk's Office, Probation Department and other interested parties. The discussions at the annual meetings have enabled the

district to prepare well in advance for docket management problems largely because of the willingness of the participants to alert the court to new issues.

The district's civil and criminal docket is well-managed. The district has maintained good control over its criminal calendar and trials, despite the pressure of an increase in narcotics and complex white collar criminal cases. The growth of population in the district seems to indicate that the court can expect an increase in the number and complexity of all cases in the future. It has a sufficiently strong infrastructure to withstand the stresses, especially once it is served by a seventh sitting district judge.

B. Trends in Case Filings and Resulting Demands on the Court's Resources[25]

1. Civil Filings

The filing history for the district reflects a relatively consistent pattern of filings from 1985 to 1990 (see chart - Appendix D-1). From a low of 2,424 total cases filed in 1986 to a high of 2,601 in 1989, there has been only a 7 percent variance during this five-year period of time. The single largest change occurred in the 12-month reporting period ending June 30, 1991. Civil filings in the previous 12-month period 1989/90 totaled 2,549. Civil filings in 1990/91 were only 2,228. This constitutes a 12 percent *decrease* from the prior reporting year.

It is not clear why the reduction in filings occurred in 1990/91. It may reflect the general state of the economy. It also may reflect the impact of the 1988

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[25] This section of the Report fulfills the statutory reporting mandate of 28 U.S.C. § 472 (c)(1)(B).

increase to $50,000 of the jurisdictional amount for diversity cases, which became effective in May of 1989.

This decrease in civil filings is reflected throughout the different types of civil actions filed in the Eastern District as classified on the Civil Cover Sheet prepared by the attorney or litigant who files a civil case (see Appendix D-2). Social Security claims declined by 18 percent (Category A), while claims for Recovery of Overpayment and Enforcement of Judgments declined 36 percent (Category B). Prisoner case filings last year were 12 percent behind the prior year, showing a decrease of 122 cases. The other "nongovernmental" claims, Categories E through L, also declined by 18.6 percent with Copyright, Patent and Tademark cases showing a 40 percent decline, while Labor claims and Contract cases declined 12 percent and 15 percent respectively. The only *increase* in filings in any civil case category was in Category H for Torts, which showed a 2 percent increase.

2. Criminal Filings

a. *Sentencing Guidelines*

The advent of changes in the criminal sentencing process in the district, and elsewhere, has led to the general view that the court has had to spend more time dealing with the disposition of criminal cases. While not statistically verifiable, it appears that the amount of judicial time devoted to the sentencing process had dramatically increased but that that increase is not reflected in the statistics

relating to in-court proceedings. Over the past several years, the district, in response to case law and rule changes, has established a procedure for factual challenges to presentence reports. Most challenges are apparently resolved on an informal basis with the assigned probation officer. Nonetheless, the court is often required to review materials challenging factual statements in the reports and resolve these issues prior to sentencing.

The resolution of guideline sentencing disputes is often even more time consuming for the practitioners and the court. Informal discussions between the committee members and the interested parties tend to demonstrate that the court is required to devote a great deal of personal judicial attention to the technical aspects of sentencing and to review carefully a substantial amount of material in chambers, in order to determine the efficacy of the findings of the probation officer when disputes arise as to the applicability of the various guidelines and the merits of upward or downward departures. In short, the court has had to schedule more available time prior to sentencing than it would have had to in the past in order to prepare itself for regularly scheduled in-court sentencing.

b. *Mandatory Minimum Sentences*

Issues have been raised as to whether or not mandatory minimum sentencing has impacted the number of trial proceedings in the district. Since mandatory minimum sentencing has been enacted most comprehensively with respect to narcotics offenses, and the number of trials of narcotics offenses has increased

dramatically in the Eastern District of California over the past several fiscal years, it may well be that the high number of narcotics trials has been caused by the applicability in federal court of mandatory minimum sentencing. An analysis of the narcotics case filings in the district show an increase from 49 in 1986 to 97 in 1989 and 74 in 1990. The number of narcotics trials, on the other hand, have shown a far more dramatic growth from nine in 1986 to 25 in 1989 and 25 in 1990. While suggestive, this trend is not conclusive evidence that mandatory minimum sentences are having a serious impact on the criminal trial docket.[26]

c. *Future Growth of the Criminal Docket*

The district has seen a sharp growth in the number of Assistant United States Attorneys (AUSAs) assigned to criminal prosecutions. The number of AUSAs assigned to criminal matters grew from 14 in 1986 to 32 in 1990. The United States Attorney has also been authorized to increase the number of criminal AUSAs by three in 1991, in order to accommodate an increase in the anticipated caseload involving banking frauds. An additional civil AUSA has also been authorized, in order to handle banking fraud forfeitures. The increase in the number of Assistant United States Attorneys raises the possibility of a greater number of criminal prosecutions, particularly in the area of banking crimes.

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[26] While sentencing concerns may be a cause of the increase in narcotics trials, the causal relationship is not statistically verifiable. Even if it is assumed that such a relationship exists, it is too early to rule out that this is only a short term reaction to the change in the sentencing laws.

While the Federal Defender's staff only increased from seven assistant attorneys in 1986 to eight in 1990, a sharp increase to 13 assistants has been authorized for 1991 calendar year. The larger number is no doubt reflective of the increase of the staff in the United States Attorney's Office and in the number and complexity of the case filings in the district.

C. Identification of Principal Causes of Cost and Delay and Consideration of Potential Additional Causes of Cost and Delay[27]

1. Overview

In this part we seek to identify the principal causes of cost and delay in civil litigation in the Eastern district. We find the most significant cause of avoidable cost and delay to be understaffing of the court when judicial vacancies remain unfilled for prolonged periods of time. As required by the CJRA, we also look closely at court procedures and the ways in which litigants and counsel approach and conduct litigation, with an eye to identifying and remediating additional sources of avoidable cost and delay in civil litigation.

2. Summary of Findings and Methodology of Investigation of Potential Additional Causes Cost and Delay

a. *The Substantial Concerns of Recent Years Regarding Undue Cost and Delay in Civil Litigation in the Eastern District Have Been Remediated by the Recent Appointments of New District Judges*

The principal cause in recent years of cost and delay in civil litigation in the Eastern District has been the overload of the criminal docket. This has resulted

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[27] This section of the Report fulfills the statutory mandate of 28 U.S.C. § 472 (c)(1)(C).

primarily from delay by the executive branch in filling judicial vacancies. A secondary cause of the criminal docket overload that became acute during the period of the court's understaffing was a series of legislative and executive policy decisions to intensify the use of federal criminal jurisdiction as a front-line weapon in the "war" on crime and drugs.

After more than a year of operation with only four of six authorized judgeships filled, the court now has the services of six active and productive judges and expects soon to be at full strength with the anticipated confirmation of Judge-designate Burrell to sit as the court's seventh district judge in regular active service. The sense of the bench and bar is that the newly added judges have for the time being cured any major problems of delay and delay-related cost in civil litigation in the Eastern District.

These problems will recur, however, if future judicial vacancies are not promptly filled, or if additional judgeships are not authorized to keep pace with the population growth and urbanization of an already huge district (in terms of both people-per-judge and acres-per-judge), or if future national policy decisions by the legislative and executive branches continue to stress the criminal docket.

b. *Methods Employed to Consider Court Procedures and the Conduct of Litigants and Attorneys as Potential Causes of Cost and Delay*

In compliance with our CJRA mandate to look closely at court procedures, litigant attitudes, and attorney conduct as possible additional sources of avoidable

cost and delay, we (1) interviewed the judges of the district, (2) conducted a survey of active federal practitioners in the Eastern District, (3) examined carefully the details and methods of practice within the district, and (4) undertook a comparative study of the cost and delay reduction initiatives recently implemented in selected trial courts of the California state court system.

3. Investigation and Analysis of Potential Additional Causes of Cost and Delay

a. *Impact on the Civil Docket of Prisoners' Civil Rights Cases*[28]

Over the past decade, the number of prisoners' civil rights cases in the Eastern District has increased dramatically. Specifically, prisoner cases went from 11.6 percent of the total civil docket in 1981 to 36 percent of the total civil filings in 1990.[29] For a three-year period ending June 30, 1989, the Eastern District handled 1,780 prisoner civil rights actions, the highest number in California and the second highest number in the Ninth Circuit.[30] To see this figure in perspective, the distribution of case filings in the Eastern District from 1988-90 reveals that for all civil cases, prisoner cases represented approximately 34 percent

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[28] This section was drafted principally by Margaret Z. Johns as a member of the Cost and Delay Subcommittee.

[29] Federal Judicial Center, *Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990* (form memorandum incorporating caseload and docket information unique to the Eastern District of California), February 28, 1991, at 12, Table 1.

[30] Statistical Profile of the Ninth Circuit (informational handout distributed by Ninth Circuit staff at the Ninth Circuit's Conference of Chief District Judges, November 8-9, 1990).

of the total filings (the next highest percentage was contract cases which represented less than 15 percent of the total filings).

Several factors explain these figures. The most obvious factors are the state inmate population explosion and resulting overcrowding. While the crime rate over the past decade has remained steady,[31] the prison population has increased to 100,000 inmates. This is a 270 percent jump since 1980, when fewer than 27,000 inmates were incarcerated.[32]

The Department of Corrections cannot keep up with the growth. The 100,000 mark was reached when prisons were at 175 percent of capacity.[33] Forecasts for the future are grim. The legislative analyst expects the inmate population to reach 175,000 by 1996, when the prisons are expected to stand at 200 percent of capacity.[34] Despite the projected growth, the voters turned down a bond measure in November, 1990, preventing the construction of two authorized

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[31] Bancroft, *No Relief in Sight for Overcrowded California Prisons*, San Francisco Chronicle, April 22, 1991, at A13. While the crime rate has remained steady, inmates incarcerated on drug related offenses increased 400 percent in the past decade. According to a study by the Center on Juvenile and Criminal Justice, "the typical California inmate is a young non-white man with a drug problem and sixth grade reading ability serving time for a nonviolent offense." K. Grubb, Daily Recorder, May 13, 1991, at 1. Although 70 percent of the inmates are identified as drug users, there are virtually no drug treatment programs. Bancroft, *No Relief in Sight for Overcrowded California Prisons, supra*, at A14. There are no significant education or job training programs. *Id.*

[32] Ternus, *Costs of state's criminal justice programs soar*, Daily Recorder, April 3, 1991, at 1.

[33] *Id.*

[34] *Id.*

prisons.[35] According to Department of Corrections spokesperson Mike Van Winkle, if the state's inmate population growth continues at its current rate, by 1995 "we'll need all the prisons we have now, all that are under construction, all that are on the drawing boards, plus 20 more, just to bring our occupancy down to 120 percent."[36] The overcrowded conditions and inadequate prison resources spur civil rights actions.

The increased prison population statewide has a disproportionate impact on the Eastern District for two reasons. First, the Eastern District has a disproportionate share of prisons. In addition to all the county jails in the district, ten of the nineteen California Correctional Facilities are located in the Eastern District.[37] And the Eastern District will soon be home to two new federal institutions. Second, the Eastern District attracts a number of actions against the Director of the California Department of Corrections (CDC), whose offices are headquartered in Sacramento, California. These actions are brought by inmates incarcerated both inside and outside of the Eastern District who contend that their claims stem from policies adopted by the CDC. Thus, civil rights filings within the

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[35] *Id.*

[36] Bancroft, *No Relief in Sight for Overcrowded California Prisons, supra*, at A13.

[37] California Correctional Center, Susanville; California Correctional Institution, Tehachapi; California Medical Facility, Vacaville; California State Prison, Avenal; California State Prison, Corcoran; California State Prison, Folsom; California State Prison, Wasco; California Women's Facility, Chowchilla; Deuel Vocational Institution, Tracy; Mule Creek State Prison, Ione; Northern California Women's Facility, Stockton; Sierra Conservation Center, Jamestown.

Eastern District are affected by the increase in the prison populations both inside and outside the district.

A less obvious factor contributing to the huge number of federal prisoners' civil rights cases is the absence of meaningful alternative remedies. Many cases are filed in the Eastern District because state remedies are unavailable. California law imposes significant restrictions on prisoners' actions by enforcing a six-month government claim statute which is not subject to statutory tolling provisions.[38] Also, while many of the federal cases allege inadequate medical care, these cases often cannot be pursued as state malpractice actions because of the procedural restrictions imposed by the Medical Injury Compensation Reform Act (MICRA).[39]

California has not adopted a grievance procedure in compliance with the minimum standards of the Civil Rights of Institutionalized Persons Act (CRIPA).[40] Adoption of such a procedure might ease the burden on the district court and provide a meaningful state remedy for prisoner grievances.[41] In response to our inquiry, the California Attorney General has expressed

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[38] Cal. Gov't Code §§ 911.2 & 945.6.

[39] *See, e.g.*, Cal. Code of Civ. Proc. § 340.5; *Fogarty v. Superior Court*, 117 Cal. App. 3d 316, 320 (1981).

[40] 42 U.S.C. § 1997 et seq. *See especially* § 1997e(b).

[41] Under CRIPA, where a state has adopted an administrative procedure in compliance with the minimum standards specified in the Act, § 1983 civil rights cases may be tolled while the administrative remedy is pursued. 42 U.S.C. § 1997e(a).

reservations about the desirability of CRIPA certification but has offered to work with us and the Eastern District's judges to explore the possibility of submitting California's existing inmate appeals process for CRIPA certification.[42] Pending further study we do not presently recommend that the court request that California become CRIPA-certified.

The main burden of handling prisoner civil rights cases falls to the magistrate judges and staff attorneys. The magistrate judges are responsible for the prisoner civil rights cases from filing to the pretrial conference. Many cases lack merit and are disposed of summarily with the main time commitment falling on the staff attorneys who analyze the pleadings. The court has authority to dismiss in forma pauperis actions sua sponte if they are found to be frivilous. 28 U.S.C. § 1915(d). Under this authority, many prisoner civil rights cases are dismissed. For example, for the period from January 1990 through July 1991, 222 cases were dismissed with leave to amend and 666 were dismissed on findings and recommendations, while only 284 were ordered served. In other words, a great number of cases are summarily dismissed without even an appearance by the defendant. While the sheer number of cases burdens the staff attorneys, the majority of the cases do not impose a substantial burden on either the magistrate judges or the district court judges.

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[42] Letter to Advisory Group Reporter John B. Oakley from Advisory Group member Dennis Eckhart, Supervising Deputy Attorney General of California, on behalf of California Attorney General Daniel E. Lungren, August 1, 1991.

But the remaining cases can be substantial. For example, many complaints involve allegations of inadequate medical care. In response to the medical care problem, in 1988, the Legislature adopted a statute requiring new regulations to govern medical care in prisons.[43] But the regulations have yet to be adopted and to date only three of California's 20 state prisons operate licensed health facilities.[44] The three licensed facilities only obtained licenses after ordered to do so by the Sacramento Superior Court in 1987. The Department of Health found conditions at one facility so poor that it would be shut down if it were in the private sector; the Legislature's Joint Prison Committee found similar conditions throughout the prison system.[45] Litigation over these medical care issues is complex and time-consuming. For example, in a recent case involving the California Medical Facility at Vacaville, the court ordered substantial changes in medical, psychiatric and other health-care services. The proceeding was long and costly; the court awarded $5.5 million in attorneys fees to the plaintiffs' lawyers.[46]

Unfortunately, most civil rights actions proceed pro se, which poses additional problems for the court. It is difficult to find counsel willing to accept these cases since the issues are complex and the clients are "undesirable." Representation is also burdensome because prison visits are inconvenient, stressful

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[43] Cal. Health & Safety Code § 1264.10.

[44] Lobaco, *Doing Sick Time*, California Lawyer, March 1991, at 28.

[45] Bancroft, *No Relief in Sight for Overcrowded California Prisons, supra*, at A14.

[46] *Gates v. Deukmejian*, ED Cal. No. CIV-S-87-1636 LKK-JFM.

and time-consuming. Since the state aggressively defends these actions, representation is likely to be protracted. And, of course, prisoners usually lose. Since recovery is contingent, few attorneys are willing to accept the burdens and take the risk. While the district has a panel of volunteer attorneys, there are simply not enough attorneys available in these cases.

b. *Impact on the Civil Docket of Habeas Corpus Petitions*[47]

For the three-year period ending June 30, 1989, the Eastern District handled 465 habeas corpus petitions.[48] There is a definite trend to an increase in the rate of habeas corpus filings in later years. For example, for the one-year period following June 30, 1989, and June 30, 1990, 295 petitions were filed.[49] Such petitions are handled by the magistrate judges and staff attorneys through findings and recommendations for disposition.

In terms of court and staff time, a significant number of petitions are disposed of quickly on the grounds that petitioners have failed to exhaust state remedies. For example, for the period between January, 1990 and July, 1991, 42 petitions were dismissed with leave to amend, 285 were disposed of by findings and recommendations of dismissal, while 77 were ordered served. In other words, a

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[47] This section was drafted principally by Margaret Z. Johns as a member of the Cost and Delay Subcommittee.

[48] Statistical Profile of the Ninth Circuit (November 1990), *supra*.

[49] The statistics are a bit misleading. The figure for the period from June 30, 1989 through June 30, 1990 is taken from Reports of the Proceedings of the Judicial Conference of the United States and includes 57 motions to vacate sentence as well as habeas corpus petitions.

remarkable number of petitions are disposed of without the necessity of serving the petition or litigating on the merits.

However, the remaining petitions often demand a substantial amount of time for resolution. It appears that these cases are perhaps not weighted accurately; this is currently being reviewed and it is anticipated that it will be revised upward. In the future the death penalty habeas cases may be broken out and weighted separately so that a more accurate evaluation of the burden can be determined.

With respect to death penalty habeas cases, the Eastern District has taken a leadership role in developing rules and procedures through the service of Judge Karlton and Judge Moulds on the Ninth Circuit Judicial Council's Death Penalty Task Force. One concern is that a flood of habeas corpus petitions in death penalty cases is about to inundate the Eastern District. Theoretically, venue can be based either on the place of confinement or the place of conviction. For practical purposes, venue is based on the district of conviction since the Northern District (where San Quentin has the state's only Death Row) does not want to be responsible for all the death penalty habeas cases. The Eastern District has twice as many death penalty cases per judge as any other district court in California.

In handling these capital cases, to date the court has been able to appoint qualified counsel as needed. Recently, however, there have been instances of significant delay in finding counsel. Further, appointing counsel may become an urgent problem in the future for two reasons.

First, while the state public defender's office currently handles between 25-30 percent of the cases, it may decline to continue that representation so that the clients will be represented by new counsel. The need for new counsel is heightened by the recent United States Supreme Court restrictions on successive habeas petitions.[50] If the public defender's office declines representation, the court will need to find additional attorneys to accept these cases.

Second, Congress may reduce the rate of compensation for appointed counsel. The court currently compensates counsel at the rate of $110.00 per hour. However, a bill has recently passed in the Senate which would reduce the rate to $75.00 per hour. Obviously, any significant reduction in the compensation rate will make it much more difficult to find qualified counsel willing to take on the burdens of a capital habeas cases given their massive record, legal complexity, and emotional toll. If qualified counsel is not available, the burden on the court's time and resources will clearly increase substantially.

There may be one area of inefficiency in handling habeas corpus petitions. Specifically, federal cases under 28 U.S.C. § 2255 are currently referred to the magistrate judges for review rather than having the trial court review the petition. The magistrate judge then has to start fresh to review the record which is, of course, familiar to the trial court. It might be more efficient for the trial court to perform the initial review. Of course, the burden should not simply be shifted

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[50] *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454 (1991).

from the magistrate judges to the trial judges. Rather, the trial judges should have discretion to refer cases to magistrate judges in any case where an evidentiary hearing is required or in any other case where reference seems desirable. Further study is required to determine whether initial screening by the trial judge could weed out those cases that can be disposed of quickly by the trial judge but that would require a substantial amount of time for resolution by the magistrate judge.

c. *Effectiveness of Early Neutral Evaluation (ENE), Settlement Conferences, and Other Forms of Alternative Dispute Resolution*[51]

The Eastern District has a remarkable record of disposing of cases before trial. Specifically, in 1990, there were 2,597 terminations in the Eastern District but only 96 trials.[52] This successful record of settlements may in part be a reflection of the district's adoption of several effective methods of alternative dispute resolution including settlement conferences, arbitration and early neutral evaluation.[53] Moreover, all of the judges expressed their willingness to accommodate the parties' efforts to pursue ADR.

Despite these programs, serious settlement negotiations are often deferred until after the pretrial conference. Earlier settlements would provide advantages

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[51] This section was drafted principally by Margaret Z. Johns as a member of the Cost and Delay Subcommittee.

[52] 1990 Federal Court Management Statistics, at 128.

[53] *See* E.D. Cal. Local Rule 252 governing arbitration proceedings; E.D. Cal. Local Rule 270 governing court settlement conferences; E.D. Cal. General Order 247 establishing the Early Neutral Evaluation Pilot Project.

to both the parties and the court by reducing discovery and motion practice as well as pretrial and trial preparation.

Moreover, the Advisory Group's survey of federal practitioners in the Eastern District[54] suggests that the bar believes that increased use of ADR procedures would reduce cost and delay in the Eastern District. Specifically, 70.8 percent of the respondents agreed that use of non-binding ADR procedures should be encouraged; 67.9 percent agreed that counsel should be notified of binding ADR procedures; and 60.4 percent agreed that the court should use early attorney-moderated settlement conferences. Recent reports on the success of ADR procedures support the bar's opinion that a more aggressive approach to ADR in the Eastern District would reduce cost and delay.

For example, non-binding court-annexed arbitration (CAA) has proven successful in both the state and federal courts in California. Studies indicate that the time for completion of state court cases assigned to arbitration is about one-half of that for cases on the regular trial track.[55] As observed in the California State Bar's "Alternative Dispute Resolution Action Plan:" "[A] RAND study of judicial arbitration in California and other states suggests that arbitration offers a three- to five-fold savings for the courts over traditional court processing

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[54] This survey is reproduced as part of Appendix B to Part VII of this Report. It is discussed below in § III.C.3.g. of this Report.

[55] Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 Fordham L. Rev. 1, 19 (1990).

of civil claims. Studies also suggest that participants in ADR tend to have a high level of satisfaction with these dispute resolution processes; for example, another RAND study concerning court-annexed arbitration indicated that both plaintiffs and defendants viewed the process as fair and satisfying."[56]

The experience in federal courts has been equally promising. In the Northern District, 94 percent of the cases eligible for arbitration are terminated without returning to the trial calendar and 99 percent terminated short of trial.[57] Of course, most of those cases would have settled anyway. But the studies suggest that after non-binding CAA they settle in greater numbers and earlier in the process.[58]

The success of CAA is also reflected by the participants' satisfaction. According to Judge Kaufman, "Virtually every federal judge who has experience with the program advocates the expansion of CAA in scope and to other courts; almost all believed CAA helped them manage their civil dockets."[59] Of the participating lawyers in the Northern District of California, 80 percent approved

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[56] State Bar of California, Alternative Dispute Resolution Action Plan, proposed by the Joint Board Committee on Administration of Justice/Judicial Task Force on Access to Justice, May 1991, at 4 (footnotes omitted).

[57] Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, supra* at 20, note 133.

[58] *Id.* at 21. For example, in the Eastern District of Pennsylvania, only two percent of the cases submitted to CAA eventually went to trial, while the rate of trial in cases not submitted to CAA was eight percent. Thus submission to CAA reduced the probability that trial would be required by 75 percent.

[59] *Id.* at 21.

or strongly approved of the program and 60 percent felt the cases were concluded more rapidly and less expensively.[60] Surprisingly, a majority of the lawyers who demanded post CAA trial de novo felt that CAA saved them time and their clients money.[61] Finally, 85 percent of the parties reported that they believed the process was fair and 70 percent of them reported that CAA helped bring them together.[62] The conclusion from the studies to date is that CAA increases pre-hearing settlements, reduces the number of trials, saves time and expense for the litigants, and reduces court congestion.[63]

In the Eastern District, Local Rule 252 authorizes submission of cases to *binding* arbitration. This more-or-less irrevocable option lacks the flexible, advisory function of non-binding CAA. As a result, arbitration under Local Rule 252 is rarely invoked -- if the parties are mutually amenable to binding arbitration, this mode of ADR is usually invoked before either has filed suit.

Another promising program is Early Neutral Evaluation (ENE) which involves a pre-trial evaluation by an experienced attorney who discusses the case with both the attorneys and the parties. In the Northern District of California, the

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[60] *Id.* at 21, note 138, citing B. Meierhoefer & C. Seron, Court Annexed Arbitration in the Northern District of California 12 (Federal Judicial Center 1988).

[61] I. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, supra* at 21, note 139.

[62] *Id.*

[63] *Id.* at 22. *See also id.* at 22, note 140.

program is designed to hold the evaluation before major discovery.[64] As Judge Kaufman states: "To date, ENE's performance has been impressive. Parties and attorneys have felt that the program provided them with useful information about their opponent's case, as well as their own. Most have agreed that ENE enabled them to obtain key information more quickly and at less expense while focusing the case on the central issues. In addition, parties and counsel have felt that the process increased the chance of settlement. While ENE has yet to be subjected to sufficient study to justify firm conclusions about its cost-effectiveness, most of those who have participated in the program rate it a success."[65]

The experience in the Eastern District with ENE is limited but promising. The ENE Pilot Program in the Eastern District handled about 16 cases and had a settlement rate of approximately 50 percent. These results suggest that an expansion of the ENE Program could well bring about earlier settlements in a significant number of cases. Fortunately, expansion of the Pilot Project is currently underway. In Phase II the ENE Program hopes to handle 50 cases. The bar survey suggests that the attorney-moderated ENE program will receive wide support.

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[64] *Id.* at 12; Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation to Expedite Dispute Resolution*, 69 Judicature 279 (1986); Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394 (1986).

[65] I. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, supra* at 13.

Other ADR programs such a mediation, mini-trials, summary jury trials, and magistrate-hosted settlement conferences should also be considered. While not every case will benefit from an ADR program, studies indicate that a substantial number of cases will benefit provided that appropriate and varied programs are available. Many innovative approaches have yet to be tested in our district.

Of course, it is always difficult to get new projects off the ground. Building on a few well-designed programs is the most prudent approach. They can be made more effective by a combination of (1) judicial encouragement that attorneys explore ADR options; (2) education of the bar about ADR options and procedures; and (3) publicity about the benefits of ADR to litigants, courts, and the public interest.[66]

In the Eastern District, it seems that further development of ADR procedures could reduce cost and delay in civil litigation. The bar survey suggests widespread support for expanded programs as well as the need for increased education about and judicial encouragement of ADR.

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[66] As Magistrate Judge Brazil of the Northern District of California observed in a recent draft report on ADR options in federal court: "New programs encounter resistance born of inertia, ignorance, fear, and sometimes misguided perceptions of self-interest." W. Brazil, Draft -- Institutionalizing ADR Programs in Courts, at 24. In addition to the problems of inertia and ignorance, the bar will not accept new programs unless they appear fully supported by the bench. Again quoting Judge Brazil: "[I]t remains imperative for the courts, in some visible way, to give the process of exploring ADR options their full blessing and active encouragement. Bar interest, even if substantial at the outset, is likely to flag if the judiciary is persistently unresponsive. In our experience in northern California, it has been extremely important for the chief judge to actively and repeatedly communicate the court's great interest in exploring ADR programs and in supporting effective and appropriate alternative approaches to traditional litigation." *Id.* at 22.

d. *Impact on the Civil Docket of Federal Prosecutorial Policies Concerning Offenses That are Violations of Both Federal and State Law*[67]

In the background material furnished to the Advisory Group, there were frequent questions raised about whether federal prosecutorial policy for offenses that are violations of both federal and state law was having a significant impact on the docket. Some of the material indicated a belief in some districts that federal authorities were more often prosecuting offenses that formerly were prosecuted predominantly in state courts. The inference was that because criminal cases occupy most of the court's time, a change in federal prosecutorial policy might decrease the amount of time available for civil cases. This would have a consequent effect of increasing delay in getting civil cases to trial.

To conduct some analysis of this proposition, the Docket Assessment Subcommittee undertook a major review of the docket. There was also a joint meeting of the judges and the entire Advisory Group in Sacramento. Furthermore, on July 22, 1991, the Cost and Delay Subcommittee conducted a joint interview of Mr. Doug Hendricks, head of the Criminal Division of the Office of United States Attorney For the Eastern District of California, Mr. Arthur Ruthenbeck, federal defender, and Charles J. Stevens, an Advisory Group member with a significant private federal criminal law practice.

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[67] This section was drafted principally by Alan G. Perkins as co-chair of the Cost and Delay Subcommittee.

Several significant facts were found from these various interviews. The judges seem to share a belief that criminal cases are increasingly taking more of the court's time. They had an impression that more criminal cases that could be prosecuted in state court are now being prosecuted in federal court.

The interview with Messrs. Hendricks, Ruthenbeck and Stevens yielded some additional impressions. There was a shared belief that federal criminal cases in the Eastern District of California generally tend to be more complex than they were ten years ago. Furthermore, there appears to be a greater emphasis by the U.S. Attorney's office on prosecution of complex cases such as fraud and drug cases. However, the practitioners and the subcommittee found no evidence that the change in the mix of cases prosecuted has had such an impact that it has made a significant impact on the court's civil docket.

The impressions above are only subjective and consequently have some limitations. To fully determine the impact of federal prosecutorial policy, one would have to not only examine the status of the docket but then determine, even if there has been an increase, whether (1) the increasing nature of cases that could be prosecuted in either jurisdiction are a significant portion of the criminal docket, and (2) whether such an increase has any tangible effect in delaying civil cases to the point where it is likely that costs of litigating civil cases would be affected. Such a study could only be properly evaluated over time. Should funds be available, such a study might be useful although the anecdotal evidence obtained

does not indicate that the change in federal prosecutorial policy (if any) is having a significant effect on civil litigation in the Eastern District of California.

e. *Impact on the Civil Docket of Delays in the Appointment of Judges and Other Key Justice-System Personnel*[68]

This section analyzes the effect of the recent high rate of turnover in judicial officers and other personnel essential to the operations of the Eastern District of California, and discusses those changes as they impact the civil docket.

In recent years, many significant changes have occurred in the ranks of the district judges, magistrate judges, and other key personnel in the Eastern District.

For example, within one month at the end of 1989 fully one-half of the six regular active judgeships were vacated: (a) District Judge Raul A. Ramirez resigned on December 29, 1989; (b) District Judge Edward D. Price assumed senior status on December 31, 1989; and (c) District Judge Milton L. Schwartz assumed senior status on January 20, 1990.

Additionally, the following new personnel have since entered into service with the Eastern District within recent years: (a) District Judge William B. Shubb began service on October 29, 1989; (b) District Judge David F. Levi began service on November 6, 1990; (c) District Judge Oliver W. Wanger began service on May 30, 1991; (d) Magistrate Judge Gregory G. Hollows began service on March 7, 1990; (e) Magistrate Judge Dennis L. Beck began service on March 12, 1990; (f)

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[68] This section was drafted principally by William J. Coyne as co-chair of the Cost and Delay Subcommittee.

Magistrate Judge Peter A. Nowinski began service on February 14, 1991; and (g) Mr. Jack L. Wagner began service as Clerk of the Eastern District on 7/9/90.

The official ranks of the Eastern District have thus changed considerably over the past several years. With these changes has come some loss in productivity as the outgoing judges wind down their responsibilities, and as the newly appointed judicial personnel become familiar with the system and comfortable with their new responsibilities. The Advisory Group believes that the Eastern District has now completed its "settling in" process and that each of the newly appointed judges and magistrate judges is working efficiently within the limitations of the court's resources.

The Eastern District was the victim of considerable delay in the selection and appointment of new district judges and magistrate judges. This delay adversely affected the court's docket and its ability to timely resolve civil disputes. To put the delay in perspective, it is noted that ten months ensued between the resignation of Judge Ramirez and the swearing-in of Judge Shubb; nine and one-half months elapsed between the assumption of senior status by Judge Schwartz and the swearing-in of Judge Levi; seventeen months passed between the assumption of senior status by Judge Price and the swearing-in of Judge Wanger. The total vacant judgeship-months for the Eastern District for the year ending June 30, 1990 was 17.4, and the vacant judgeship-months for the period ending

June 30, 1991 was 26.1. These figures are considered quite high, especially given the relatively small number of judicial positions in this district.

The Federal Judgeship Act of 1990, enacted December 1, 1990, provided for the creation of one additional temporary judgeship for the Eastern District. However, this position has not yet been filled. After a delay of eight months, the President nominated Assistant United States Attorney Garland Burrell for the new judgeship. Mr. Burrell has not yet appeared before the Senate Judiciary Committee and no confirmation hearing is imminent. This lag in filling the newly created judgeship position has substantially delayed the Eastern District's recovery from the backlog of cases created during the period of serious judicial understaffing during 1990.

Several reasons exist for the delay in the selection and appointment of judges. As a practical matter, the search for a qualified successor cannot[69] begin until a judge has announced an intention to resign or assume senior status, or until a new judgeship exists. A pool of qualified candidates is not specifically assembled ahead of time. However, the selection committee does have a substantial amount of information on certain candidates which it has acquired from prior searches. The selection committee completes its work on a timetable established by the United States Senator from California who is of the President's own political party. At the direction of that Senator, the process can take anywhere from a couple of

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[69] Or at least ought not, lest judicial independence appear to be threatened.

weeks, to several months. A second reason for delay is the political struggle which exists (or existed) between President Bush on the one hand, and former Senator Pete Wilson, and Governor Wilson's successor, Senator John Seymour, on the other hand. While the President wanted three nominees for each position, the Senator was insistent that only one name be submitted. This difference in views lead to substantial delays in 1990 and 1991 in the appointment of district court judges. Thirdly, the scheduling of confirmation hearings before the Senate Judiciary Committee has caused delays in the appointment of judges. This has especially impacted nominee Garland Burrell in that the Senate Judiciary Committee's attention was focused exclusively on the impending Supreme Court confirmation hearings of Justice-designate Clarence Thomas for over two months after Mr. Burrell was nominated. No date has yet been set for a confirmation hearing regarding Mr. Burrell's nomination to the Eastern District of California.

The Bureau of Alcohol, Tobacco and Firearms has compiled statistics which compares the number of judgeships to the population of each district. According to those statistics, the national mean is 2.216 judges per million of population. The median state (Illinois) has 2.241 judges per million of population. Statewide in California there are 1.615 federal district judges per million of population. This ranks California 46th in the nation and confirms the heavy workload of California district court judges. The Eastern District of California has only 1.200 judges per million of population, lower than the last ranking state in the nation, Wisconsin,

with 1.250. Even with the addition of the seventh judgeship in the Eastern District, the Eastern District's ratio will still be only 1.400 judges per million of population.

The estimated projections in the Eastern District show increased needs for additional district court judges in coming years. Statistics compiled by the Eastern District indicate the following projected needs:

(a) Five year projection of needs: three district judges and two magistrate judges;

(b) Ten year projection of needs (cumulative from five): five district judges and four magistrate judges;

(c) Thirty year projection of needs (cumulative from years five and ten): ten district judges and eight magistrate judges.

The Eastern District must plan for the allocation of additional space, personnel and other resources necessary to meet these increased needs.

In summary, although excessive judicial vacancies existed in the Eastern District throughout 1990 and much of 1991, the court is now almost fully staffed and has completed the transition or "settling in" process. The selection and appointment process (including the political aspects) was largely responsible for the excessive number of vacancy months in the Eastern District during 1990 and 1991. With the expected confirmation of Assistant United States Attorney Garland Burrell to the newly created seventh judgeship, the Committee expects increased

ability of the Eastern District to handle its present docket. However, it is important to note that the Eastern District is, and will continue to be, understaffed with judges as compared to other districts nationwide. Projections of population increases indicate that there will be an increased need for additional district judges and magistrate judges in the Eastern District of California in the coming years.

f. *Comparative Analysis of State of California's Accelerated Civil Trials (ACT) Program*[70]

What does California's experience with the Delay Reduction Act indicate may be potential causes of undue cost and delay in civil litigation in the Eastern District of California?

Over the past five years, under a contract with the Judicial Council of California, the National Center for State Courts has collected data on California's "fast track" trial program. The Administrative Office of the Courts (California) served as staff to the Judicial Council. The project collected data on over 75,000 cases over a five year period. The research was conducted pursuant to the Trial Court Delay Reduction Act of 1986. That legislation revised the way in which the superior courts of some California counties operated in an attempt to decrease the amount of time taken to resolve civil litigation. Reduction of cost was not an expressed goal of the experiment, other than perhaps as part of a general

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[70] This section was drafted principally by Alan G. Perkins as co-chair of the Cost and Delay Subcommittee.

proposition that an increase in delay might be viewed as generally causing an increase in the cost of litigation.

The Trial Court Delay Reduction Act of 1986 required the Judicial Council to adopt case processing time standards, collect data, and selected nine superior courts to establish delay reduction programs. Training of judges and staff, and funding for additional automation, was also included.

The council adopted time standards effective July 1987. The standards provided for a phased reduction in the time frames for litigation. By January 1, 1989, civil cases were to be disposed of within four years after filing, by January 1, 1990, within three years, and by January 1, 1991, within two years. In July, 1991, the Judicial Council adopted the American Bar Association's recommended standards. Those standards generally require the disposition of 90 percent of civil cases within 12 months of filing, and 98 percent within 18 months. Every case (100 percent of civil filings) is to be resolved within two years.[71]

The Judicial Council eventually selected and implemented pilot programs in the superior courts for Alameda, Contra Costa, Kern, Los Angeles, Orange, Riverside, Sacramento, San Diego and San Francisco Counties. Ten other courts voluntarily chose to establish delay reduction programs. Those counties were

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[71] Prompt and Fair Justice in the Trial Courts - Report to the Legislature on Delay Reduction in the Trial Courts, July 1991, vol. 1, Intro., at 3-4.

Fresno, Humboldt, Lake, Mendocino, Napa, San Jose, Santa Barbara, Sonoma, Tehama and Yolo.[72]

The programs in the mandatory courts had a variety of features that are described in great detail in the Judicial Council's report. Some courts switched to an individual calendar system, some kept a master calendar system, and some adopted a hybrid calendar system. Within that framework, the courts also adopted a variety of case management techniques, many of which included status conferences, various reports, etc. A variety of techniques were also adopted with respect to arbitration, mandatory settlement conferences, the disposition of criminal cases, etc. Among the significant results was a dramatic improvement in case processing time, changing from more than three years from filing to disposition for 90 percent or more cases in seven of the nine mandatory courts, to disposition of the same percentage of cases within two years. Trial time for jury trials was reduced in seven of the nine mandatory pilot courts and pending cases were generally younger.[73]

The Judicial Council's report was not disseminated to the public until September 1991, despite its July 1991 date. Consequently, the Advisory Group has not had the benefit of review of public commentary on and reaction to the Judicial

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[72] *Id.* at 4.

[73] *Id.* at 7.

Council's report. Similarly, no legislative hearings have yet been held concerning the findings in the report.

In proceeding with its analysis of the California experience under the Trial Court Delay Reduction Act of 1986 (Article 5, commencing with section 68.600 of Chapter II of Title 8 of the Government Code), the Advisory Group's Cost and Delay Subcommittee made several general assumptions. First, because cost and delay is inherent in any litigation, one cannot say that all cost and delay is inherently bad. The key concept is "undue." The subcommittee focused its attention on undue or avoidable cost and delay, rather than on assessment of cost and delay in absolute terms.

Second, the subcommittee assumed that the reduction of cost and the reduction of delay are not necessarily linked. In fact, many of the measures linked to reduction of delay are often perceived as increasing cost. Many practitioners have expressed the belief that case management techniques have unnecessarily increased cost without achieving any avoidance of delay over what the parties what have wanted. Some perceived increased costs are as follows: (1) increased appearances; (2) increased paper work; (3) judicial intervention in discovery where parties do not need or desire such intervention. Others have said that case management techniques may be an extreme remedy for a problem that does not often affect most practitioners. Some also question whether such techniques are designed to avoid trials and force settlements. Although this may have some

wisdom from an efficiency standpoint (if the underlying assumption is true), such pressure could be contrary to the fundamental goals of the justice system as such pressure tends to value economics more than the concept of resolving matters on principle.

Despite these caveats, the subcommittee proceeded on the general assumption that the state court system in Sacramento, before the pilot program, generally imposed upon parties significant duplicative time because continuances were frequently granted on the very day set for trial. Such eleventh hour continuances were often granted repeatedly in the same case, and gaps of several months might ensue between continuances. This was perceived by most practitioners as causing a significant increased cost to litigants through increased preparation time. The subcommittee further assumed that even if costs were increased due to case management procedures imposed by the pilot program, if those procedures significantly reduced the number of continuances of trial dates, and generally reduced the time to trial, they would on the whole achieve a net reduction of costs. No firm data has been produced to validate both of those assumptions but the subcommittee proceeded on that basis.

To examine the effect of the Trial Court Delay Reduction Act of 1986, the subcommittee focused its effort on Sacramento County. Most subcommittee members had significant experience with that system and there was significant amount of information available to the subcommittee concerning its operation.

The subcommittee exchanged experiences among its members after consultation with colleagues. It also conducted an interview of Judge James Ford, the presiding judge of Sacramento County, to determine his view on the effectiveness of the pilot program and whether it could be transferred to a federal court. The subcommittee reviewed the three-volume California Judicial Council Report entitled "Prompt and Fair Justice in the Trial Courts - Report to the Legislature on Delay Reduction in the Trial Courts (July 1991)." Finally, the subcommittee reviewed other literature furnished to the subcommittee by Advisory Group members, especially an extensive set of articles and surveys assembled by Mr. Tony Keir of Aetna Casualty and Surety Company. However, the primary focus of the subcommittee was on the experience in Sacramento, which is perhaps the most metropolitan of the counties located in the Eastern District of California. This analysis was supplemented with the other materials described above.

(1) *Summary of important findings concerning California's state court ACT innovations*

The Sacramento experience, as supplemented by the Judicial Council Report, indicates that on the average civil cases were taking longer to get to trial in Sacramento and some other major metropolitan counties before the Delay Reduction Act than they do now. Although the results vary greatly, it generally seemed that cases were getting to trial sooner, and perhaps significantly so, after

the pilot programs had been in place for several years.[74] If the proposition is true that the cost of a case is greater the longer it takes to get to trial, then the reduction of this time would provide some support for the proposition that delay reduction reduces cost.[75]

There was also an indication that the pilot programs in various forms have reduced a significant element of unnecessary expense: day-of-trial postponements of trial. This factor was a significant element in Sacramento, where it was not uncommon before the pilot program to have trials continued several times. Now, about 75 percent of the trials in Sacramento find a courtroom on the first time, although that percentage is dropping.[76] Furthermore, in Sacramento, about 85 percent of all cases are resolved by the court in 13 months or less.[77]

Literature studied by the subcommittee alluded to somewhat similar results in San Diego and Los Angeles Counties. In those counties it was perceived that

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[74] It remains to be seen whether these gains in time-to-trial will continue. Under the California Trial Court Delay Reduction Act, cases filed after the effective date of the Act were given priority over older cases. Now that there are very few pre-1986 cases remaining in the pipeline, newly filed cases must compete on even terms with older cases. This may result in greater delay in bringing newly filed cases to trial over the long run than was experienced in the somewhat artificial circumstances accompanying initial implementation of the Act.

[75] However, we have no hard data to support this proposition. In fact, many practitioners with whom we spoke were skeptical of the proposition. Furthermore, Judge Ford noted that the goal of the Sacramento program was reduction of delay, not reduction of cost. Therefore, we have been unable to find hard data to support the proposition that reduction of delay necessarily reduces cost.

[76] Interview with Presiding Judge Ford, July 2, 1991. The slippage was attributed by Judge Ford to the existence of three vacancies on the court and a significant increase in criminal drug cases.

[77] Interview with Presiding Judge Ford, *supra*.

many more civil judges were hearing criminal cases before than do so now, and that the system is relatively less clogged.[78]

Given the findings above, it would seem fair to say that some of the various pilot program reforms adopted in California over the past few years seem to have reduced congestion on the day of trial. This would seem to support the proposition that these reforms have worked a net reduction of the cost of civil litigation.

(2) *How were the reforms implemented?*

The various pilot program counties used a variety of reforms and case management techniques. The common theme among the programs was adoption of a variety of measures to accomplish judicial management of cases. Various types of calendaring systems and various other reforms were used. The Judicial Council's 1991 report contains a large amount of data supporting the proposition that the case management techniques have led to a successful reduction in the amount of time it takes for civil cases to get to trial. However, there is relatively less data concerning the efficacy of given techniques. Consequently, the subcommittee placed a great deal of emphasis on the subjective impressions of participants in the Sacramento system to determine whether any particular case management techniques were thought to have achieved notable success in reducing delay.

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[78] Palermo, *Problem? What Problem?* California Lawyer, July 1991, at 26.

One factor noted by Judge Ford was the master calendar system. Under the Delay Reduction Act, Sacramento actually uses a hybrid system that has a number of civil cases monitored by a given judge up to the point a trial date is assigned, and then a master calendar is used after that point. Judge Ford felt that the master calendar system for assigning cases to trial was an important element for achieving the goals of the Sacramento pilot program. He believed that the master calendar system is effective in several ways:

(1) It allows the creation of specialized courtrooms to handle functions such as law and motion, probate, family law, etc. on a volume basis and allows the judges to become more efficient.

(2) It allows the trial departments to have longer trial days.

(3) The nature of the master calendar system is such that there is very little time in which a courtroom goes unused because judges are either hearing specialized matters (if they are in a specialized department) or are hearing trials.[79]

Although less extensive data was available concerning the programs in San Diego and Los Angeles, it appeared that the creation of specialized departments, and the ongoing use of a master calendar system, had a significant effect in those counties as well.[80]

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[79] Interview with Presiding Judge Ford, *supra*.

[80] Palermo, *Problem? What Problem?*, *supra* at 26.

It is interesting to note that the Judicial Council Report does not place much emphasis on the master calendar system. In fact, the report noted that national research suggests that individual calendars actually generally dispose of civil cases more rapidly than do master calendars. The survey found that attorneys and judges seem to prefer individual calendar systems to master calendar systems, except in Kern and Sacramento Counties where the judges preferred their hybrid systems.[81] Consequently, there appears to be anecdotal evidence in favor of both types of systems as a vehicle for reduction of delay, and the research data does not seem to support the proposition that a master calendar system is more effective in reducing delay.

Another important element in making the Sacramento pilot program work was the superior court review program. Sacramento, Los Angeles and San Diego Counties all adopted various reforms in the processing of criminal cases. These reforms generally involved the use of municipal court judges for some superior court duties, the use of specialized courtrooms for pleas and probation revocations hearings, etc. The superior court review program in Sacramento was one of these reforms and generally involved a superior and municipal court judge sitting together at an early stage in a felony criminal prosecution. The purpose of the reform appeared to be to minimize the effect of a statutory prohibition on superior

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[81] Prompt and Fair Justice in the Trial Courts, *supra*, vol. 1, ch. II, at 25.

court judges engaging in plea bargaining.[82] This reform together with the other similar types of reforms in Los Angeles and San Diego Counties in the criminal process, seem to have worked. San Diego and Los Angeles Counties reported reductions in their backlog, with fewer civil courtrooms hearing criminal cases.[83] Similar results were observed in Sacramento, as the superior court review program resulted in the disposition of 70 percent of the felony cases.[84] Regardless of what one thinks of the merits of plea bargaining, the reforms seem to have had an impact on the criminal docket which consequently made more space available for civil trials.

Another reform in Sacramento that Judge Ford, and many practitioners, felt to be effective was a reform in the settlement conference system. Before the pilot program, mandatory settlement conferences were generally heard by a judge who could generally allocate only approximately 40 minutes for the hearing of that case unless substantial progress was indicated at that time. Under that system, approximately 50 percent of the cases settled at the time of settlement conference.[85]

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[82] Interview with Presiding Judge Ford, *supra*; Palermo, *Problem? What Problem?*, *supra* at 26.

[83] Palermo, *Problem? What Problem?*, *supra* at 26.

[84] Interview with Presiding Judge Ford, *supra*.

[85] *Id.*

As part of its pilot program, Sacramento adopted a system similar to that used in Contra Costa County and some other counties. In that system, mandatory settlement conferences were supervised by a judge who put the settlements on the record. The conferences themselves were handled by a team of two attorneys who acted as judges pro tem. The judges pro tem allotted up to one-half day per month for each case. In Sacramento, this system generally had 63 percent to 66 percent of the cases settle at the time of the settlement conference.[86]

Judge Ford felt that the increased 13 percent was beneficial to the court in several ways. The number of cases settling before the day of trial also increased, he believed, because of the nature of the discussions generated at the settlement conference. He also believed that the number of settlements on the day of trial were reduced. These changes allowed better planning by the court and less wasted time on the day of trial. In essence, although Judge Ford did not believe that the absolute number of cases that went to trial was perhaps generally affected, he felt that settlements were achieved earlier which allowed better planning and less wasted time. It would also, one would believe, somewhat reduce the litigation expenses generated immediately prior to trial.

An interesting factor that may be useful in reducing the cost associated with delay reduction techniques was the use of automation to make case management techniques less intrusive than they might otherwise be. Judge Ford noted that the

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[86] *Id.*

Sacramento pilot program involved a substantial change from the former state practice because the court, for the first time, took an active role in managing cases. He noted that this system was designed to be as minimally intrusive as possible so as to reduce any increased costs associated with complying with the requirements imposed by the pilot program. The Sacramento program attempted to do this by functioning with a high degree of automation implemented by extensive monitoring by a trained staff. Accordingly, the program was designed so that some types of appearances were required only if deadlines were not met. For example, status conferences were not held if the parties filed status conference reports by a deadline. All cases are tracked by computer. When a deadline had not been met, the computer alerts the staff who then issues an order to show cause to schedule an appearance. Otherwise no appearance is necessary.

Judge Ford believed that this system reduced costs to litigants although it required substantial staff training and extensive automation. He felt that it functioned smoothly and avoided appearances and conferences that were of minimal value. It also gave the court a much better sense of its docket and allowed trained staff to spend time monitoring cases rather than allocating judicial resources to that task. Judge Ford felt that this feature of the Sacramento program allowed the court to avoid the expenditure of a substantial amount of court time on case management. In fact, he estimated that one of the four ACT

program judges in Sacramento spent only about 15 minutes per week on his status calendar.[87]

Yet another feature of interest in the Sacramento program was the tentative ruling system in the law and motion departments. Although this system was not a feature of the ACT pilot program, a number of subcommittee members received comments from other attorneys that the system was a significant factor in reducing costs by avoiding unnecessary court appearances on matters of minimal importance to their cases.

The Sacramento tentative ruling system is a variant of a system that is commonly used in many superior courts in California. In Sacramento, all law and motion matters are assigned to two judges. For most cases, a brief tentative ruling is available by telephone or a computer at 2:00 p.m. on the day before a scheduled hearing. If a party wishes to contest the tentative ruling, he or she must notify other counsel, and the court, by 4:30 p.m. that a hearing is requested. If no request is received, the ruling becomes final, although the court can ask the prevailing party to draft a formal order. If a hearing is requested, argument is held and a new ruling is issued. Even under this system, the court always has the freedom to not disseminate a tentative ruling if it desires argument.

Judge Joe S. Gray, one of the two law and motion judges in Sacramento, was most helpful in furnishing the subcommittee with a great deal of insight and

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[87] *Id.*

statistical information concerning the Sacramento tentative ruling system. According to Judge Gray, in March 1991, tentative rulings were made in 50 percent of all law and motion calendar matters. In those cases for which tentative rulings were given, 67.8 percent of the rulings were accepted by the parties. Of the cases where appearances were requested, 23.6 percent had appearances but no change in the ruling, and 2.4 percent were submitted with some changes.

Judge Gray noted that the mix of cases in a superior court law and motion calendar was undoubtedly different than that in a federal court's law and motion calendar. However, he noted that tentative rulings were given in the vast majority of cases on the superior court docket that would be analogous to federal court cases. He stated that the tentative ruling system was helpful in focusing the arguments of counsel on issues that were of concern to the court.

A final feature of the Sacramento pilot ACT program was the use of sanctions to accomplish compliance with the program deadlines. The statewide delay reduction consortium felt that the use of sanctions was essential to implement delay reduction program.[88] In contrast, Judge Ford, an experienced practitioner before he assumed the bench, felt that the use of sanctions had no significant beneficial effect on speeding the disposition of cases.[89] Some members of the subcommittee have received comments from other attorneys who

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[88] Prompt and Fair Justice in the Trial Courts, *supra*, vol. 1, ch. V, at 6.

[89] Interview with Presiding Judge Ford, *supra*.

take offense at the perceived increasing proclivity of courts to impose sanctions against counsel for matters where honest mistakes can be made and the conduct is not egregious. The subcommittee's efforts uncovered no evidence that an increased use of sanctions would be a significant factor in reducing the costs or delay in civil litigation. Accordingly, the subcommittee does not recommend any increased use of sanctions as part of an effort to reduce costs or delay of civil litigation in the Eastern District.

The basic thrust of the Judicial Council review of the pilot programs appears to be that the use of case management techniques can be a significant factor in reducing delay in civil litigation. The Judicial Council's report summarized four fundamental delay reduction principles to be achieved through active judicial case management: (1) judicial intervention at the first sign of party-induced delay; (2) monitoring case progress; (3) maintaining control, especially in complex cases; and (4) firm trial dates.[90]

The consortium also reached a broad consensus endorsing the following delay reduction procedures, practices and events.[91]

1. *Case assignment system* - case processing tracks should be linked to different case characteristics rather than having one system for all cases.

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[90] Prompt and Fair Justice in the Trial Courts, *supra*, vol. I, Intro., at 8.

[91] *Id.*, vol. 1, ch. V, at 2-6.

2. *Calendar system* - the consortium did not make a recommendation as to the use of any particular system, although earlier parts of the Judicial Council Report noted that an individual calendaring system is perceived by many as being more useful to reduce delay.

3. *Program rules* - uniform statewide rules were strongly recommended.

4. *Criminal cases* - management of the criminal calendar was perceived as being very important because of the significant effect of criminal cases on the court's ability to process civil cases.

5. *Status conferences* - the need for status conferences should be tied to case type because some cases do not benefit from them.

6. *Arbitration* - this can be a tool in delay reduction if the process is court monitored and future dates are set before the case goes through the process. Concern was also expressed that arbitration may not be effective for all case types and may not be the best use of the court's resources.

7. *Discovery* - discovery should be tailored to case classification and coordinated with case management.

8. *Settlement conferences* - judges felt that mandatory settlement conferences should not be required at a particular point. In contrast, attorneys felt that settlement conferences should be mandatory and requested the opportunity to discuss settlement, with judicial involvement, within the first six months of the case.

9. *At issue memoranda* - they should be eliminated in favor of discussing readiness at status conferences.

10. *Trial setting conferences* - same recommendation.

11. *Preprogram cases* - those were not perceived as being a problem for most pilot program courts but were a problem in the voluntary courts.

12. *Sanctions* - the consortium felt that the sanctions were essential.

(3) *Might some of these innovations be transferrable to the Eastern District of California, and would they reduce cost delay if implemented?*

The subcommittee was struck by the fact that many of the procedures promoted in the Judicial Council's Report as being effective to reduce costs and delay are those that are already in use under the Federal Rules of Civil Procedure, and in the Eastern District of California. Accordingly, the review of the Judicial Council Report, and the interviews with the Sacramento pilot program participants, did not lead the subcommittee to a conclusion that there were any glaring inefficiencies, or a drastic need for revision, in the current case-management practices of the Eastern District. Nevertheless, it may be useful to review some of the procedures that were felt to have had a significant effect in Sacramento and determine whether or not they were transferrable.

(a) *Master calendar - hybrid system*

Judge Ford felt that Sacramento's hybrid master calendar system was an important element in achieving maximum efficiency in the use of judicial

resources. Although generally not thought to be used in federal courts, a master calendar system was used in a number of metropolitan federal courts before 1969.[92] However, even Judge Ford questioned its suitability for a court of fewer than 10 to 15 judges.[93] Given the number of judges in the Eastern District, and the fact that the Judicial Council Report seems to indicate that an individual calendaring system may well be the best system for reducing costs and delay and managing cases efficiently, the subcommittee did not feel that a revision of the Eastern District's calendar system would be appropriate.

(b) *Plea bargaining - superior court review*

The superior court review program in Sacramento seems to have had a significant effect on making judicial resources available for more civil cases. This process essentially allowed a form of plea bargaining and early processing of felony cases. Rule 11 of the Federal Rules of Criminal Procedure would not seem to allow any such system in the federal system. Moreover, because of restrictions on the ability of magistrates to hear cases, it does not appear that the district court could easily incorporate an extensive system for cross-designating magistrates to hear criminal cases. Therefore, it is doubtful that any similar reform could be adopted in the Eastern District without substantial statutory revision to the

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[92] Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253, 257 (1985).

[93] Interview with Presiding Judge Ford, *supra*.

Federal Rules of Criminal Procedure and expansion of the ability of magistrates to hear cases.

(c) *Settlement conferences*

Attorney and judicial participants in the Sacramento pilot program seem to believe that the settlement conference reforms had a significant effect on increasing the rate of cases settled at the settlement conference. It was not clear whether the effect was due to the presence of two neutral attorneys to attempt settlement, more time allocated to settling each case, or both. One school of thought was that the higher rate of settlement was achieved basically because more time was spent at trying to settle the case. However, the Judicial Council Report also notes that settlement conferences do not necessarily lessen the overall time to disposition for total case load nor do they necessarily result in a lower percentage of cases going to trial .[94]

Under the state system, the settlement conference was held several weeks before trial, which allowed some economic incentive for settling the case and avoiding some trial preparation costs. In the Eastern District, most settlement conferences appear to be held after the pretrial conference which is characterized by many judges and attorneys as effectively being the first day of trial. Although one must be realistic and realize that not all trial preparation is done before the pretrial conference in all federal cases, the subcommittee felt that there remained

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[94] Prompt and Fair Justice in the Trial Courts, *supra*, vol. 1, ch. II, at 35.

a significant possibility that more trial preparation is generally done before an Eastern District settlement conference than before most state court settlement conferences.

The Judicial Council Report indicates some feeling that settlement conferences could be useful within the first six months of the case. Therefore, the subcommittee has recommended that the Eastern District of California modify its procedures to provide for settlement conferences, at least in some cases, to be held shortly before rather than shortly after the final pretrial conference. The subcommittee further recommended that the court consider be more vigorous in urging counsel to explore the possibility, in appropriate cases, of a settlement conference within the first six months of filing. It would be an interesting experiment for one or more judges to conduct settlement conferences under the current system while several other were to conduct conferences several weeks before the pretrial conference, schedule some types of settlement conferences within the first six months of filing, and compare the effect on the percentages of cases filed that go to trial.

(d) *Tentative rulings*

There seems to be a significant demand for some form of tentative ruling system. The subcommittee was mindful of the fact that one of the hallmarks of the federal judiciary has been the well-reasoned, well-crafted, written opinion. The subcommittee opposed procedural reform that would encourage judges to cut

corners in that process of reasoned decision for articulated reasons. However, tentative rulings seem to have their biggest effect, and their greatest potential for saving unnecessary cost, in small cases, or with respect to routine matters in large cases, where the parties generally recognize that argument may not be particularly helpful once the court has reached an initial conclusion. Upon the subcommittee's recommendation the Advisory Group urges the court, or at least one or two judges, to consider the experimental adoption of some form of tentative ruling system, so as to allow an empirical analysis of how effective such a system might be in reducing unnecessary court appearances. Such a system should measure factors such as: (1) in how many cases were tentative rulings issued; (2) in how many cases were they challenged; (3) when were they challenged; (4) how often were decisions reversed or significantly altered; and (5) in what percentage of the cases were counsel from out of Sacramento or Fresno Counties involved. Such an experiment is probably the only effective way of resolving the debate as to whether a tentative ruling system is practical, or wise, in the federal system.

If the court adopts an experimental tentative ruling system, it is recommended that such a system meet the following criteria: (1) it allow the judge the flexibility of not issuing a tentative ruling if he or she feels that the matter is in need of oral argument before it can properly be resolved; (2) the tentative ruling may specify that it could be reduced to a final, more lengthy order prepared by the court, or signed by the court after preparation by counsel; (3) that the

ruling be available at least a day, or two days if possible, by telephone and by computer; (4) that the burden be placed on counsel challenging the ruling to notify the court, and opposing counsel, if a hearing is requested.

The CJRA asks a great deal of advisory groups by requiring them to report on how much cost and delay is caused by court procedures, litigant attitudes, and attorney conduct. There is a great deal of literature on the possible effect of various delay reduction techniques, much less data about their effectiveness in general, and almost no data on the effect of such techniques in the Eastern District of California.

The Advisory Group has proposed a number of experiments, and increased monitoring of cases. To measure the effectiveness of some of these experiments, and to obtain additional data on the functioning of the Eastern District, it will be necessary for the district to receive additional funding for the clerk's office. These funds are needed to implement some of the reforms proposed and to obtain necessary equipment to track the information needed to determine whether the reforms are working and what impact they are having on the civil docket in the Eastern District.

g. *Effectiveness of Control of the Civil Docket by the Judges of the Eastern District*[95]

To a large extent, the condition of the civil docket in the Eastern District is affected by the control exercised by the judges over individual cases. This section examines several elements of judicial control in light of their effect on cost and delay in civil litigation.

Federal practitioners generally disagree with the proposition that there is unnecessary cost and delay involved in civil litigation in the Eastern District. As part of its review of process, the Advisory Group sent to federal practitioners in the district a packet of survey questions on possible causes of cost and delay. The Advisory Group received 268 responses, 259 of which were considered valid responses. Of the federal practitioners responding to the survey, 64.9 percent either disagreed or were neutral with respect to the question "Is there unnecessary cost involved in civil litigation in the Eastern District." Similarly, the federal practitioners generally agree that there is little or no unnecessary delay in the Eastern District. Of the valid survey responses, 76.8 percent either disagreed or were neutral to the question "Is there unnecessary delay involved in civil litigation in the Eastern District." The responses to these two questions were very consistent with responses to other questions in the survey. Overall, the federal practitioners feel that the Eastern District is in good shape and not in need of major reform or

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[95] This section was drafted principally by William J. Coyne as co-chair of the Cost and Delay Subcommittee.

changes. However, the federal practitioners do feel strongly concerning some particular modifications to the present system, such as the institution of a tentative ruling system.

(1) *Trial dates*

The early and firm setting of trial dates is seen to significantly reduce cost and delay. Survey responses indicate that 63.4 percent of the federal practitioners agree that the setting of trial dates as soon as feasible and maintaining continuous pressure on the parties to be ready for trial on the scheduled date significantly assists in reducing costs and delay. (Only 17.2 percent of respondents disagreed with this proposition with 19.5 percent remaining neutral.)

It is the general impression of the Advisory Group, obtained through interviews with the individual judges and federal practitioners, that criminal matters are increasingly taking priority over civil matters on the calendar, thereby causing continuances of civil trial dates. However, when specifically asked on the survey questionnaire, only 16.8 of the valid respondents agreed that they had experience unnecessary cost and delay by the continuance of a trial date after the parties had engaged in significant preparation for trial. Accordingly, while the continuance of civil trial dates is undoubtedly a cause of cost and delay, relatively few practitioners have actually experienced such continuance of their civil trial dates.

(2) *Law and motion matters*

Law and motion matters will occasionally be continued on the court's own motion. These continuances tend to delay the progress of the case and cause some additional costs. However, like continuances of trial dates, the continuance of law and motion matters are relatively infrequent and do not seem to be the cause of much concern.

Federal practitioners overwhelmingly favor a tentative ruling system on law and motion matters. Fully 86.7 percent of the survey respondents agreed that issuing tentative rulings may achieve significant cost and delay reduction. Only 4.9 percent of respondents disagreed with this proposition, and 8.4 percent of the respondents remain neutral. All judges of the Eastern District unanimously agreed that the federal system does not easily lend itself to a tentative ruling system. The judges feel that federal cases tend to be more complex and the cases do not easily lend themselves to tentative rulings. Further, the judges feel that it would be too time consuming to have to issue tentative rulings on all law and motion matters. Occasionally, some of the judges will, with the appropriate kinds of motions, call counsel and advise them not to appear and that the court will take the matter under submission without oral argument. Because of the strong preference of practitioners for tentative ruling systems, consideration should be given to some kind of screening system for identifying cases suitable for tentative rulings. Such an experimental system could implemented on a trial basis by one or two volunteer

judges and carefully monitored to see if genuine cost and delay savings result without qualitative compromise of the decisionmaking process.

(3) *Discovery*

There does not seem to be much of a concern among the judges or federal practitioners with respect to abuses in discovery practice. Only 32.3 percent of the survey respondents agreed with the question "In this district I have experienced unnecessary costs and delay caused by irresponsible use of discovery . . . ." Only 33.3 percent of the survey respondents agreed with the statement: "In this district I have experienced unnecessary costs and delays caused by abuse of the discovery process through 'hard ball' tactics intended to intimidate or wear down opponents by raising the cost and stress of litigation."[96]

(4) *Status (pretrial scheduling) conferences*

All judges in the Eastern District use status (pretrial scheduling) conferences to set discovery cut-off dates, the pretrial conference date and the trial date. The timing of these conferences differ between the individual judges. It is generally agreed that the status conferences are necessary and a productive use of time.

Of the survey respondents, 84.5 percent indicated that cost and delay could be reduced by permitting counsel to appear at status conferences by telephonic conference call. Only 10.2 percent of survey respondents disagreed with this

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[96] *See* discussion of sanctions *infra* at heading (6).

proposition, which 5.3 percent remaining neutral. In the Eastern District, most of the judges permit appearance at status conferences by telephone.

(5) *Final pretrial conference and pretrial orders*

All judges in the Eastern District require joint pretrial statements. Contents of the pretrial statements are set forth in the Local Rules and in the orders of the individual judges. Although joint pretrial statements are time consuming and expensive to prepare, the statements, the pretrial conference itself, and the resulting pretrial order are helpful in narrowing the issues and in getting the case ready for trial.

(6) *Sanctions*

Interviews with the district court judges reveal that the judges do not view sanctions as very effective in reducing cost and/or delay. No judge expressed any desire or willingness to change the manner in which sanctions are imposed in the Eastern District.

Consistent with the judges' view, the federal practitioners in the Eastern District do not view the failure to award sanctions as contributing to significant costs and delays. Only 19.7 percent of valid survey respondents agreed with the statement "In this district, I have experienced significant cost and delay caused by failure of judges to order payment of compensatory sanctions when a party or its counsel has unreasonably delayed litigation or caused unnecessary expense to an

opponent." Disagreement with this statement was expressed by 61.9 percent of the survey respondents, with 18.4 percent remaining neutral on the issue.

(7) *Law clerk staffing*

The Eastern District judges unanimously agreed that inadequate law clerk staffing contributes to delay in civil litigation. Adding a third law clerk to the staff of the district court judges would greatly increase efficiency and would reduce delay in the handling of civil matters.

(8) *Length of trial days*

Several judges in the Eastern District have increased the length of the trial days to 9 a.m. to noon and 1:30 p.m. to 5 p.m. This tends to speed up the progress of the trial and results in fewer trial days necessary to conclude a matter.

(9) *Narrowing of issues in case*

There was strong agreement among federal practitioners that the progressive narrowing of triable issues of fact helps reduce cost and delay in civil litigation. Of the survey respondents, 63.2 percent agreed with this proposition, and only 22.9 percent disagreed, with 13.9 percent remaining neutral.

(10) *Settlement conferences*

All judges in the Eastern District offer to conduct settlement conferences for the litigants. However, the settlement conferences are not mandatory and there is no real pressure to attend or prepare for settlement conference. The judges show great flexibility in efforts to accommodate the needs of the parties and will

tailor settlement conference needs to the case and suggestions or requests of counsel. The judges also noted that, in the appropriate case, mini-trials may be used to assist in settlement. Also, the magistrate judges are available and willing to assist in civil settlement conferences.

Of the survey respondents, 60.8 percent agreed that requiring the parties within six months of filing to participate in a settlement conference presided over by attorneys experienced in litigating similar disputes would help reduce cost and delay in civil litigation. Only 20.9 percent of the respondents disagreed, with 18.3 remaining neutral.

While attorneys voiced enthusiasm for settlement conferences, there was some difference of opinion as to when the settlement conferences should take place. Some attorneys favor early settlement conferences in an attempt to avoid further discovery and litigation expense. Other lawyers preferred to have the settlement conference closer to the trial date, after discovery had been completed and the lawyers were fully prepared to discuss the merits of the case.

(11) *Alternative dispute resolution procedures*

At the present, the judges do not encourage litigants to use ADR procedures. However, if the parties request ADR, judges will cooperate in that process. Of the federal court practitioners surveyed, 70.1 percent agreed that notifying the parties of the availability and possible cost and delay advantages of submitting disputes

to binding ADR by arbitrators or private judges would, in fact, lead to reductions in cost and delay. Only 11.5 percent disagreed.

The vast majority of federal practitioners felt that non-binding ADR procedures should be encouraged. Fully 70.1 percent of survey respondents agreed that the court should actively encourage parties to submit cases to non-binding forms of court-sponsored ADR procedures, such as mediation and early neutral evaluation. Only 13.8 percent of survey respondents disagreed with this proposal.

At present, the Eastern District does have a trial program for early neutral evaluation of cases. The program depends on volunteer attorneys to act as evaluators. The court voiced some concern over burdening volunteer attorneys with additional ENE responsibilities and/or settlement conference judge pro tem responsibilities. The attorneys, however, seem to enjoy acting in this volunteer capacity and do not view it as a burden.

(12) *Bench-bar relations*

Historically and presently, the Eastern District enjoys close bench-bar relations. These relations are fostered through, among other things, the annual district meeting and the local chapter of the Federal Bar Association. Federal practitioners and district court judges generally have a high regard for each other and mutual respect, which promotes problem solving and accommodation. Also, the close relationship between the bench and bar generally results in more successful settlement conferences and quicker disposition of cases.

(13) *Conclusion*

The judges of the Eastern District do a good job of reducing costs and delay through effective control of the civil docket. Further costs and delay may be achieved through implementation of the following:

1. A modified tentative ruling system for law and motion matters.

2. The addition of a third law clerk for district court judges.

3. More aggressive use of settlement conferences and/or alternative dispute resolution procedures.

D. Relationship Between the Cost and Delay of Civil Litigation and the Impact of New Legislation on the Courts[97]

1. Overview

After due consideration about how best to discharge this element of our statutory obligations, we decided to analyze in depth a limited number of topics that might illuminate the relationship between (1) problems of cost and delay in modern federal civil litigation, and (2) the considerable volume of new federal legislation that annually contributes to the growth in federal civil caseload pressure. In selecting topics we sought to address issues of particular important to our district; to generate material that may be useful to other districts' CJRA advisory groups; and to avoid foreseeable duplication of the parallel work of those other groups. We thus settled on two generic studies of the legislative process and two specific studies of particular statutory programs.

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[97] This section of the Report fulfills the statutory mandate of 28 U.S.C. § 472 (c)(1)(D).

2. Executive Summaries of Legislative Impact Subcommittee Research Papers[98]

a. *Legislative Drafting*[99]

Accidental ambiguity in federal legislation burdens the courts with unnecessary cost and delay. Ambiguous legislation is often caused by the failure to use plain English.

We studied two examples. The first is an immigration statute, 8 U.S.C. § 1128(e), authorizing hardship waivers of certain requirements. The second is a proposed amendment to Rule 404(b) of the Federal Rules of Evidence. In both examples, ambiguity itself is the problem, creating unnecessary questions of Congressional intent.

The principles of plain English are well established, yet the trick is to get Congress to pay attention to those principles. Different proposals offer hope. These include creating an Office of Judicial Impact Assessment, requiring "litigation hazards review", or placing the burden to use plain English squarely on Congressional shoulders.

Accidental ambiguity causes unnecessary cost and delay in the federal courts. Careful scrutiny of legislation and adherance to the principles of plain English can eliminate much ambiguity, thereby saving courts and litigants time, energy, and money.

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[98] These research papers are reprinted as Appendix E to this Report.

[99] Written for the Legislative Impact Subcommittee by Margaret Z. Johns.

b. *The Absence of Statute of Limitations Provisions in Federal Statutes Creating Private Rights of Action*[100]

This is a study of the cost and delay caused by federal legislation that creates new causes of action without specifying limitation periods. Litigants and judges alike are forced to waste a great deal of time, energy and money litigating these limitations issues when Congress fails to specify a time limit.

Federal causes of action may lack specific time limits for several reasons. A cause of action may be implied in a statute, or it may be entirely judge-made. However, the vast majority of disputes arise when Congress explicitly creates a new cause of action but fails to specify a proper limitation period. A court facing a federal statute silent on a limitation period has the limited options of (a) holding that Congress intended there be no time bar for actions under the statute, (b) borrowing the period from a analogous state cause of action, or (c) borrowing the period from a similar federal statute.

We determine that when courts are forced to choose among these limited options, the results have been disastrous and judges have complained loudly. The courts themselves face calendars swollen with unnecessary litigation. The confusion also substantially burdens litigants, and encourages them to forum-shop.

The impact on the courts has been eased somewhat by diligence of the Supreme Court in resolving these disputes, and by the Judicial Improvements Act

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[100] Written for the Legislative Impact Subcommittee by its chair, Kenneth C. Mennemeier, with the assistance of Eric Glassman.

of 1990 which provides a "catch-all" four year limitation for new statutes (enacted since December 1, 1990) that lack a specific time bar. The problem will slowly wane, but will continue to burden the courts for the forseeable future. Conflicts among the Circuits will continue to exist, and questions will remain even when the Supreme Court appears to resolve a limitations issue. Corollary issues of tolling, accrual, and retroactivity also burden the process.

c. *The Sentencing Reform Act of 1984*[101]

The Act amended various provisions of Title 18 of the United States Code, creating a Sentencing Commission to develop a set of sentencing guidelines for all federal crimes. These guidelines provide federal judges with a narrow range of sentence options and few exceptions.

There is little evidence that Congress considered the Act's impact on cost and delay. However, the Act included a provision directing the General Accounting Office to study the impact of the new Guidelines on the courts and to compare it to the existing system. The GAO's systematic investigation included interviews of judges, attorneys, court administrators, and academicians. A wide majority of the interviewees believed that the workload would increase for court personnel in general, and district court judges in particular. In addition to the GAO report, information provided to Congress from other sources suggested probable court workload increases. In spite of this input, Congress did not do or

[101] Written for the Legislative Impact Subcommittee by Charles J. Stevens.

say anything to address the cost and delay question. From this silence we infer that Congress anticipated that the Guidelines would result in increased workloads for the judiciary, but the increases would be within acceptable limits.

The actual impact of the guidelines has been less drastic than most knowledgeable people expected. The frequency of trials has not risen appreciably, nor do the district courts appear to be spending an inordinate amount of time drafting and publishing opinions. Although there is a consensus that the district courts are spending more time on sentencing matters generally since the implementation of the Guidelines, the question remains whether the additional time is having a *material effect* on the operation of the Eastern District. The consensus is that it is not.

An executive branch interpretation of the Act, contained in the Justice Department's 1987 *Prosecutor's Handbook*, has arguably had a significant impact on judicial cost and delay. The *Handbook*, which outlines plea-bargaining considerations applicable under the Guidlines, points out that a "plea-bargain" can either be a "charge-bargain" or "sentence-bargain" deal. The Commission's original policy statement (which is non-binding) on sentence-bargaining permitted courts to approve deals involving sentences which were outside the guideline range "for justifiable reasons." The Justice Department rejected this policy statement as at odds with the Act itself. In 1989 the Commission added commentary to its policy statement to resolve this ambiguity. However, the Department's rejection

of the original ambiguous policy statement had practical consequences for those two years in the decreased number of cases pleaded out.

Congress is subject to some criticism in its performance in anticipating the Act's impact on judicial cost and delay. The self-executing character of the Act (*i.e.*, the fact that the guidelines would become law unless Congress legislated after the guidelines were completed) made it difficult for Congress to consider the cost and delay issue, and indeed, Congress never openly adressed it. It appears that Congress has "lucked out" -- the cost and delay impact of the Act is not as great as was feared. Yet, there is much room for improvement.

d. *Civil Drug Forfeiture Laws*[102]

In 1970, Congress enacted Title II of the Controlled Substances Act. 1984's Comprehensive Crime Control Act, Title III, strengthened the forfeiture provisions of the 1970 legislation to encourage their use. The legislative history of the 1970 Act focuses on criminal penalties for drug trafficking, and virtually ignores the civil forfeiture provisions. The legislative history of the 1984 Act, however, reflects dissatisfaction with the lack of use of the forfeiture provesions.

Civil forfeitures have become a major tool employed by the Department of Justice in its war on drugs. The use of this tool has had a considerable impact on the courts, at least in terms of sheer numbers. However, that impact is lessened somewhat by the relative simplicity of the cases. We examined the impact of the

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[102] Written for the Legislative Impact Subcommittee by Richard H. Jenkins, with the assistance of Joseph E. Maloney.

forfeiture legislation through anecdotal evidence gathered from judges and federal prosecutors.

Apparently, Congress anticipated little impact upon the judiciary from the 1970 legislation. Given its intention in passing the 1984 Act, Congress must have anticipated a substantial increase in the use of the forfeiture remedy. However, it evidently gave little thought to its impact on the courts.

Congress could improve its impact assessment of future legislation by treating the courts as an "affected agency". This would force Congress to focus on the impact on the judiciary, as well as forcing the Executive Office of the Courts to review proposed legislation and to highlight potential impacts.

IV. RECOMMENDED MEASURES, RULES, AND PROGRAMS IN PROPOSED 16-POINT CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, WITH SUPPORTING COMMENTARY[103]

A. Measures Recommended for Institutional Court-wide Action by Eastern District of California

1. Amend Local Rule 252 *[Point 1]*

Local Rule 252 should be amended to authorize voluntary reference of a case to non-binding court-annexed arbitration (CAA). At present Local Rule 252 allows for voluntary reference only to binding arbitration. Amendment of Local

[103] Part IV of this Report fulfills the statutory mandate of 28 U.S.C. § 472(b)(3). A draft of the proposed Civil Justice Expense and Delay Reduction Plan in operative language suitable for adoption by the court is set forth separately as Appendix C to this Report.

Rule 252 will allow more flexible use of CAA as an alternative dispute resolution (ADR) device that may facilitate settlement.

2. Establish ADR Advisory Panel *[Point 2]*

An advisory panel of attorneys and other litigant representatives should be established to monitor the use and success of Early Neutral Evaluation (ENE), CAA, and any other ADR program authorized by the court.

3. Sponsor CLE Programs on Local Federal Practice *[Point 3]*

In conjunction with the Federal Bar Association or other such organizations, the court should sponsor continuing legal education (CLE) programs on local federal practice and procedure. The curriculum of such programs should seek to increase awareness of ADR and to promote compliance with the local rules and general orders of the district, as well as with the requirements of practice before individual judges of the court.

4. Expand Attorney Panels for Pro Se Civil Rights and Habeas Corpus Cases *[Point 4]*

With the assistance of county bar associations, local law schools and legal services organization, and the Federal Bar Association, the court should expand the size of panels of attorneys to appoint to represent pro se civil rights plaintiffs (whether or not incarcerated) and habeas corpus petitioners.

5. Formalize the Scheduling, Planning, and Invitation Process of the Annual Eastern District Meeting *[Point 5]*

The annual district meeting has become an indispensible part of the fair and efficient functioning of the Eastern District. It should continue to be held annually pursuant to General Order. Attorneys and the public should be put on notice of its existence.

6. Institute Experimental Screening or Tentative Ruling System Administered by a Volunteer District Judge *[Point 6]*

The Advisory Group distributed a questionnaire to approximately 1000 attorneys who had filed cases in the Eastern District in the six months preceding July, 1991. There were 263 responses to our question whether lawyers agreed or disagreed that a tentative ruling system would reduce the cost and delay of civil litigation in the Eastern District. Of the 263 respondents, 228 -- an undeniably signficant 86.7 percent -- were in agreement. There were 22 neutral responses, and only 13 respondents -- 4.9 percent -- expressed disagreement. (See Appendix B, Part IV, SUMMMARY OF ATTORNEY RESPONSES TO COST AND DELAY SURVEY, Q. 23, at B-63.) We recommend establishing an experimental pre-argument notification program keyed to law and motion practice before a volunteer judge.

B. Summary of Nationwide Institutional Reforms to be Addressed to Appropriate National Forums

1. Additional Law Clerks *[Point 7]*

District judges in regular active service should be eligible for a third law clerk upon an appropriate showing of need. Under similar standards magistrate judges should be eligible for a second law clerk.

2. Prompt Action to Fill Vacant Judgeships *[Point 8]*

Responsible political authorities should be made fully aware of the adverse consequences of delay in the appointment and confirmation of district judges.

3. Revision of Case-weight Criteria *[Point 9]*

The Admininstrative Office of the United States Courts should be asked to place a high priority on updating the case-weight criteria by which judicial productivity is judged and additional judgeships allocated or recommended. Capital punishment habeas corpus cases and prisoner civil rights cases are systematically undervalued by the present system, which is rooted in the legal conditions of the 1970s. The present standards have become arbitrary.

4. Accurate Assessment and Advance Provision for Judicial Impact of New Legislation *[Point 10]*

Much of the caseload pressure that produces avoidable cost and delay in modern federal civil litigation is attributable to the failure of the executive branch to seek and the legislative branch to enact the additional judgeships and other resources necessary for the judicial branch to meet the burdens of expanded

jurisdiction without compromising the pace or care of decision in routine civil cases. The President and the Congress should consider carefully whether proposed legislation will adversely impact the ability of the federal courts to administer civil justice without undue cost and delay. When a legislative initiative will have a foreseeably significant and adverse judicial impact, the President and the Congress should allocate in advance the additional judicial resources necessary to mitigate the foreseeable adverse impact on the federal courts.

C. Summary of Measures Recommended for Implementation by Individual Judges Incident to Management of their Personal Dockets

1. Staggered Scheduling of Law and Motion Matters *[Point 11]*

Where it is foreseeable that matters scheduled early in a law and motion calendar will consume a significant amount of the court's time, later matters should be scheduled to be heard at a specified time after the initial call of the calendar in order to minimize the cost to the parties of attorney time spent waiting through lengthy proceedings in cases calendared ahead of the cases in which they are appearing.

2. Avoidance of Continuances Except by Stipulation or Motion *[Point 12]*

Although it does not happen frequently in the Eastern District, preparation for a court appearance or trial that was postponed at the last minute was identified by a number of attorneys as an occasional problem productive of avoidable delay and, especially, the avoidable cost of preparing for an appearance that is put over

and must be prepared for again. Undue rigidity in granting continuances might well increase cost and delay, however, and might otherwise be contrary to the interests of justice. The benefits of a flexible continuance policy can be achieved without risk of undue delay or avoidable cost by generally requiring the parties to stipulate to a continuance or by requiring the party unilaterally seeking a continuance to follow the normal schedule for contested motions.

3. Setting of Realistic Trial Dates *[Point 13]*

The conviction of counsel that the date set for trial is a firm date acts as a highly effective inducement to prepare a case for disposition without undue cost and delay. The date set must be a realistic one. If it is manifestly too soon to permit a fair trial should the case not settle, the date will not be taken seriously and the disincentive to delay of a firm trial date will be lost. This may mean that the *date of setting trial* (not the date set for trial) cannot be as early in some cases as in other. If the progress and fruit of discovery may significantly affect the schedule of pretrial activity, attempting too early in the process to set a trial date produces not a firm trial date but, inevitably, a highly contingent trial date. When the trial judge does have adequate information on which to base the selection of a trial date, that date should be realistic, rather than one that can be honored only on a "best case" scenario. The important thing is to develop and reinforce the expectation of counsel that the date set for trial is the date on which trial indeed will be held.

4. Bifurcation of Issues and Staged Discovery When Threshold Issues May be Dispositive *[Point 14]*

Discovery is a major contributor to the cost and delay of federal civil litigation. That does not mean that discovery is an evil, or that far-reaching restrictions on discovery can be put in place without prejudice to the ability of trials to reach the truth of the matter. Judges should be sensitive, however, to litigative circumstances in which potentially dispositive issues are presented that might render moot costly discovery procedures that could more efficiently be delayed until after resolution of the potentially dispositive issues. On the other hand, caution must be exercised lest short-term cost-cutting result in long-term delay and greater net expense of litigation.

5. Encourage Alternative Dispute Resolution (ADR) *[Point 15]*

ADR procedures, including early judicial intervention in the settlement process, relieve courts and litigants of the burden of trying cases in which non-litigative resolution is possible, and thereby reduce the cost and delay of civil litigation. Attorneys need to be educated that counseling clients about ADR options is an important professional responsibility. Judicial encouragement and legitimation of ADR is extremely important in convincing attorneys that ADR should be a significant part of every litigator's practice.

6. Experiment with Early Settlement Conferences *[Point 16]*

The general practice in the Eastern District is to schedule a settlement conference after the pretrial conference. In some cases a settlement conference would be productive following the first status conference. In other cases a settlement conference two weeks in advance of pretrial might achieve settlement prior to the parties incurring the expense of preparing for the pretrial conference.

V. BASIS OF PROPOSED PLAN[104]

A. Overview

In this part of our Report we indicate our compliance with the three sets of statutory criteria for developing Part IV's recommendations. First we briefly note our compliance with 28 U.S.C. § 472(c)(1), which requires that we develop our recommendations in light of Part III's assessment of the criminal and civil dockets of the Eastern District of California and inquiry into the nature and causes of cost and delay in civil litigation in the Eastern District. We keep this discussion quite brief, since the connections between Part III and Part IV are obvious, pervasive, and seemingly self-evident. Next we discuss our compliance with 28 U.S.C. § 472(c)(2), which requires that we take into account particularized local needs and circumstances. Finally we discuss our compliance with 28 U.S.C. § 472(c)(3), which requires that we incorporate in our recommendations significant contributions by each of our constituencies -- court, counsel, and litigants.

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[104] Part V of this Report fulfills the statutory reporting mandate of 28 U.S.C. § 472(b)(2).

B. Relationship Between the Proposed Plan and Part III of This Report

Our assessment of the Eastern District's civil and criminal dockets and our related inquiry into the nature and degree of civil justice expense and delay in the Eastern District demonstrate that the civil justice system of the Eastern District operates smoothly, with only minimal problems of avoidable cost and delay, so long as the district has its full complement of judicial officers. We have accordingly framed our recommendations so as to address and remediate the marginal cost and delay problems that we identified without disturbing the smooth functioning of a system that affords the judges of the district substantial in their individual case-management styles. Practice in the Eastern District features a high degree of early and active judicial involvement in the pretrial process, with an active ADR program, a high rate of settlement, and a low rate of concern that federal civil litigation involves undue cost and expense. We have a collegial bench and bar with a great deal of active communication between and among judges and lawyers, facilitated by our annual Eastern District Meeting. The conduct of civil litigation in the Eastern District compares favorably to the parallel civil litigation system of the California state courts. There is no sentiment among the bench, bar, or litigants that drastic change is either necessary or desirable. The system needs no overhaul, but we have recommended fine-tuning where we think a good system could be made even better.

C. Consideration of Particularized Local Needs and Circumstances

1. The Eastern District of California

The Eastern District of California is a court that is working well with a nearly full complement of judicial officers attuned to a district with great geographical spread, a high population density per judge, and two distinct and rather remote centers of gravity in Sacramento for the northern counties and in Fresno for the southern counties. The greatest local needs are to have a full bench of judges, who are each allowed, in the future as in the past, to respond to the challenging features of the Eastern District by managing their individual civil dockets according to their individualized good sense, sound discretion, and hands-on professional experience. The territorial range of the district requires continuation of the large and valuable group of part-time magistrate judges in addition to the invaluable corps of full-time magistrate judges in Sacramento and Fresno. The high population density, and in particular the high prison population and rate of state court capital convictions within the district, require that the district judges receive the support of an ample number of magistrate judges and have available at both the district judge and magistrate judge levels the support of supernumerary law clerks for those judges requesting them. Anticipated future growth in the population of the Eastern District also requires the present allocation of resources for the planning and construction of the future courtroom space that will be needed to meet the high rate of predicted growth.

2. Litigants in the Eastern District

As previously noted, prisoners account for an unusually high percentage of litigants in the Eastern District. Because of the geographic range of the district and the general satisfaction with the California state trial court system, ordinary civil litigants from the non-metropolitan counties file a disproportionately low rate of civil cases in federal court. Cases from such counties are likely to come to the docket of the Eastern District by way of removal, and care must be taken to accomodate the burden of additional expense and delay that such "local" litigants may encounter when their cases are removed to the distant environs of Sacramento or Fresno. The government is a frequent litigant on the civil as well as the criminal side of the court, and because of the many environmentally sensitive areas of the district and the location of the state capitol within the district, government cases often pose complex and judge-intensive issues. This range of litigants with differing needs and perspectives makes it imperative that the judges of the district remain free to manage their dockets individually with a minimum of procrustean regulation impeding individualized case-management discretion.

3. The Bar of the Eastern District

Our survey of bar perceptions of the degree and nature of avoidable cost and delay in the Eastern District demonstrated a high degree of professional satisfaction with the conditions of practice in the Eastern District. Because attorneys as well as litigants must often travel extensive distances for court

appearances in such a far-flung district, there was substantial sentiment for some system of pre-argument notification of preliminary judicial reaction to noticed motions. Our recommended experimental screening or tentative ruling system, pursuant to proposed new Local Rule 233, seeks to respond to this concern.

D. Significant Contributions by the Court, Litigants, and their Counsel to Improving Access to Courts by Reducing Cost and Delay

1. Contributions by the Court

Our recommendations not only call for the experiment pre-argument notification system of proposed new Local Rule 233, but also focus the attention of the individual judges on the need for careful attention to the cost and delay benefits of staggered law and motion scheduling, advance notice of unilateral continuances, firm trial dates, staged discovery, and encouragement that the litigants consider and reconsider their ADR options throughout the pretrial process.

2. Contributions by Litigants

Our recommendations call for litigants to contribute to the reduction of civil justice expense and delay principally by participating whole-heartedly in the development and employment of ADR programs that span the spectrum of the age of litigation from the earliest pretrial stages to the eve of trial. Existing ADR devices available but perhaps under-utilized by litigants in the Eastern District are early neutral evaluation and court-annexed arbitration in addition to the more

familiar formal settlement conference. Our recommendations for amendment of Local Rule 252 to authorize non-binding arbitration, for establishment of an ADR advisory panel, for judicial encouragement that litigants and attorneys consider their ADR options, and to formalize the annual district meeting process at which ADR programs may be proposed and evaluated, are all intended to expand and facilitate the range and rate of utilization of ADR options within the Eastern District.

3. Contributions by Litigants' Attorneys

Our recommendations acknowledge and continue the tradition of outstanding bench-bar cooperation within the Eastern District by calling for a wide range of attorneys' contributions to the reduction of cost and delay in civil litigation. In addition to calling for increased consideration and use of ADR options, the recommendations enlist attorneys to serve the court on an ADR advisory panel, in the sponsorship of CLE programs promoting competence in federal practice, in representing pro se civil rights and habeas corpus litigants, in preserving and formalizing the existing excellent system of annual district meetings, and in adhering to firm dates for hearings and trials.

VI. CONSIDERATION OF STATUTORILY RECOMMENDED PRINCIPLES, GUIDELINES, AND TECHNIQUES FOR COST AND DELAY REDUCTION[105]

A. Consideration of Recommended Principles and Guidelines of Litigation Management and Cost and Delay Reduction Specified by 28 U.S.C. § 473(a)

1. Systematic, Differential Treatment of Civil Cases [§ 473(a)(1)] and Early and Ongoing Judicial Control of the Pretrial Process [§ 473(a)(2)]

The first two recommended principles and guideliness of § 473(a) call for judges to pay close attention to their individiual civil dockets, discriminating carefully and systematically from the start of litigation between complex cases requiring early and intensive judicial monitoring and case management and more routine cases that can be assigned to less intensively monitored pretrial tracks. Trial judges are asked to take early and ongoing control of the pretrial process, setting an early and firm trial date and proactively scheduling motions and discovery so as to keep the case on track for early trial or other disposition.

This is already very much the style of the judges of the Eastern District. We do not wish to formalize pretrial procedures, which might unduly rigidify the pretrial process, when early and active judicial control of that process is already a hallmark of local practice.

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[105] Part VI of this Report fulfills the statutory reporting mandate of 28 U.S.C. § 472(b)(4).

2. Careful and Deliberate Monitoring of Complex Litigation [§ 473(a)(3)], Encouragement of Voluntary Discovery [§ 473(a)(4)], and Conditioning Coercive Discovery Orders on Certification of Attempted Good-faith Negotiation [§ 473(a)(5)]

These recommendations focus principally on the discovery process, although the call for specialized treatment of complex litigation also entails extensive use of pretrial status conferences and scheduling orders for other purposes. As with the recommendations for early tracking of cases and judicial control of the pretrial process in general, the pro-active, judicially managed litigation environment that these recommendations seek to create already by and large exists in the Eastern District. Discovery abuse is not a particular problem of this district, and absent demonstrated need there is no desire to displace individualized judicial discretion with formalized innovations or restrictions relating to discovery.

3. Authorization to Refer Cases to ADR Programs [§ 473(a)(6)]

Our recommendations incorporate the substance of this statutory guideline. We endorse strong judicial encouragement of ADR and active bench-bar collaboration in expanding ADR options. Our proposed amendment to Local Rule 252 would make non-binding voluntary arbitration an ADR option in the Eastern District. We would expect new Local Rule 233's ADR Advisory Panel to investigate and report to the district meeting on the desirability of adding mediation, minitrial, and summary jury trial to the roster of existing ADR options and programs.

B. Consideration of Recommended Litigation Management and Cost and Delay Reduction Techniques Specified by 28 U.S.C. § 473(b)

1. Require Counsel to Present Joint Discovery Plan at Initial Pretrial Conference [§ 473(b)(1)], Require Counsel to Appear with Full Settlement Authority at Each Pretrial Conference [§ 473(b)(2)], and Require Parties as Well as Counsel to Sign Requests for Continuances of Discovery or Trial [§ 473(b)(3)]

In the conditions of practice in the Eastern District imposing these burdens on the parties and their counsel in every case would increase rather than decrease the cost of civil litigation, with no foreseeable benefit in accelerating the pace of litigation.

2. Provide Access to an Early Neutral Evaluation Program [§ 473(b)(4)]

We share the Civil Justice Reform Act's enthusiasm for Early Neutral Evaluation. The Act recommends that an ENE program be available, but does not recommend that submission to ENE be required in every case. We agree with this voluntary approach as our experience with ENE evolves. While our experience with ENE may later support a determination to require it routinely, we are presently reluctant to increase the cost of civil litigation by imposing requiring such an expenditure of attorney time in every case. Our recommendations that ADR be expanded and encouraged within the Eastern District demonstrates our firm conviction that a balanced and comprehensive array of voluntary ADR options, including ENE, is among the most effective strategies for reducing the

delay and expense of civil litigation in a district that is already functioning smoothly and efficiently when fully staffed with judges.

3. Require Representatives of All Parties to be Present or Available by Telephone, and Possessed of Full Settlement Authority, During Any Settlement Conference [§ 473(b)(5)]

Settlement conferences work well under the existing procedures of the Eastern District, and a high rate of settlement has allowed the court to keep control of its civil docket even during the challenging period of judicial understaffing during 1990 and early 1991. Our judges already possess inherent authority to order appearances the parties or their agents with settlement to appear for settlement conferences, and do so as they see fit. In a related recommendation we acknowledge the value of settlement conferences in focusing the parties on the hazards of trial and the benefits of negotiated disposition, and therefore urge the judges of the Eastern District to experiment with scheduling settlement conferences earlier in the course of litigation than they customarily do at present.

4. Other Cost and Delay Reduction Techniques Recommended by the Advisory Group [§ 473(b)(6)]

As suggested by the Act, we have recommended a number of cost and delay reduction techniques that are addressed to the individual case-management practices of the judges of the Eastern District. These six recommendations are summarized above in § IV.C. of this Report. The six additional recommendations

summarized above in § IV.A. of this Report relate to cost and delay reduction techniques suitable for implementation on a district-wide basis.

Finally, the four recommendations summarized above in § IV.B. of this Report bear witness to the important fact that much of the cost and delay experienced in recent years in the Eastern District was caused by factors beyond the control of the judges, parties, or attorneys of the Eastern District. The actions called for in the four recommendations of § IV.B., if implemented conscientiously by the responsible national officials, would greatly strengthen the hand of the judges of the Eastern District in dealing with cost and delay at the local level.

VII. APPENDICES

APPENDIX A: MEMBERSHIP OF ADVISORY GROUP, EXECUTIVE COMMITTEE, AND SUBCOMMITTEES

APPENDIX B: ADVISORY GROUP OPERATING PROCEDURES AND WORKING PAPERS

APPENDIX C: PROPOSED 16-POINT CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

APPENDIX D: STATISTICAL MATERIAL RELATING TO PART III.A.'S DOCKET ASSESSMENT

APPENDIX E: RESEARCH PAPERS RELATING TO PART III.D.'S ASSESSMENT OF THE IMPACT OF NEW LEGISLATION ON THE FEDERAL COURTS

APPENDIX A

MEMBERSHIP OF ADVISORY GROUP, EXECUTIVE COMMITTEE, AND SUBCOMMITTEES

I. EXECUTIVE COMMITTEE

A. Richard W. Nichols, Esq.
Chair of the Advisory Group
McDonough, Holland & Allen
Sacramento

B. John B. Oakley, Esq.
Reporter for the Advisory Group
School of Law
University of California, Davis

C. William J. Coyne, Esq.
Co-chair, Cost and Delay Subcommittee
Diepenbrock, Wulff, Plant & Hannegan
Sacramento

D. Louise Burda Gilbert, Esq.
Member, Legislative Impact Subcommittee
Weintraub, Genshlea & Sproul
Sacramento

E. Richard H. Jenkins, Esq.
Member, Docket Assessment Subcommittee
First Assistant United States Attorney
Former Acting United States Attorney

F. Margaret Z. Johns, Esq.
Member, Cost and Delay Subcommittee
Member, Legislative Impact Subcommittee
School of Law
University of California, Davis

G. Anthony Keir [Public Member]
Member, Docket Assessment Subcommittee
Aetna Casualty & Surety Co.
Fresno

H. Daniel J. McVeigh, Esq.
Chair, Docket Assessment Subcommittee
Downey, Brand, Seymour & Rohwer
Sacramento

I. Kenneth C. Mennemeier, Esq.
Chair, Legislative Impact Subcommittee
Orrick, Herrington & Sutcliffe
Sacramento

J. Alan G. Perkins, Esq.
Co-chair, Cost and Delay Subcommittee
Wilke, Fleury, Hoffelt, Gould & Birney
Sacramento

K. Malcolm S. Segal, Esq.
Member, Docket Assessment Subcommittee
Segal & Kirby

L. Charles J. Stevens, Esq.
Member, Legislative Impact Subcommittee
Gibson, Dunn & Crutcher
Sacramento

II. ADDITIONAL SACRAMENTO AND MODESTO MEMBERS

A. Luis A. Cespedes, Esq.
Cost and Delay Subcommittee
Law Offices of Luis Cespedes

B. Dennis Eckhart, Esq.
Docket Assessment Subcommittee
Supervising Deputy Attorney General
State of California

C. James F. Gilwee, Esq.
Docket Assessment Subcommittee
Crow, Sevey, Gilwee, Weninger, Alpar & Tronvig

D. Patrick G. Hays [Public Member]
Legislative Impact Subcommittee
Sutter Health and Community Hospitals

E. Carolyn B. Langenkamp, Esq.
Docket Assessment Subcommittee
Metrailer, Langenkamp & Kirk

F. Jack B. Owens, II [Public Member]
Legislative Impact Subcommittee
Ernest & Julio Gallo Winery, Modesto

G. Henry Teichert [Public Member]
Docket Assessment Subcommittee
A. Teichert & Son, Inc.

H. Robert G. West, Esq.
Cost and Delay Subcommittee
Lothrop & West

III. ADDITIONAL FRESNO MEMBERS

A. John D. Chinello, Jr., Esq. [Deceased September 5, 1991]
Docket Assessment Subcommittee
Chinello, Chinello, Shelton & Auchard

B. Mary Louise Frampton, Esq.
Legislative Impact Subcommittee
Frampton, Soley, Hoppe & Boehm

C. William J. Smith, Esq.
Cost and Delay Subcommittee
Law Offices of William Smith

IV. LIAISON COURT PERSONNEL

A. Chief District Judge Robert E. Coyle
Fresno

B. District Judge David F. Levi
Sacramento

C. Jack Wagner
Clerk of the Court

APPENDIX B

ADVISORY GROUP OPERATING PROCEDURES AND WORKING PAPERS

I. HISTORICAL SUMMARY AND OVERVIEW OF OPERATIONS

The Civil Justice Reform Act Advisory Group for the Eastern District of California was convened by Chief Judge Robert E. Coyle in March 1991. With some membership changes over the course of the year, a total of twenty-three people, plus the Reporter, have served on the Advisory Group. They have been from diverse groups: six representatives from large firms who represent primarily business entities, six representatives from small firms or solo practitioners who represent primarily individuals, three criminal defense attorneys, representatives of the United States Attorney's Office and the Office of the California Attorney General, two law school professors, and five civilians representing the interests of client-litigants. Geographically, there was representation from the Sacramento, Fresno and Modesto areas.

The Advisory Group divided itself into three subcommittees: (1) a Docket Assessment Subcommittee, charged with investigating and reporting on the existing condition of the court's docket, and trends relating thereto; (2) a Cost and Delay Subcommittee, charged with investigating and reporting on the causes of unecessary cost and delay, and possible remedies with regard thereto; and (3) a Legislative Impact Subcommittee, charged with investigating and reporting on the

impact of new legislation upon the operation of the court. Each of those subcommittees submitted preliminary reports to the Advisory Group as a whole, and to the Reporter; those preliminary reports served as the foundational basis for this Report. An Executive Committee was formed, consisting of the Advisory Group Chair, the Reporter, the Subcommittee Chairs and Co-Chairs, and two (later increased to five) additional active Advisory Group members

The full Advisory Group met on a monthly basis. Copies of the minutes of those plenary monthly meetings are reprinted below as part of this Appendix. In addition to the monthly meetings and fortnightly meetings of the Executive Committee (as required by the press of business), the following activities were undertaken by the Reporter and by members of the various subcommittees:

A. Attendance at and participation in the Federal Judicial Center Seminar in Naples, Florida, for Chairs and Reporters of the CJRA;

B. A group interview of the Sacramento district judges, followed by individual interviews with each of the district judges and magistrate judges in both Sacramento and Fresno;

C. Meetings with the Clerk of the District Court, with on-site monitoring of the Clerk's Office functions for a full day's activities;

D. Interviews with the two most recent presiding judges of the Sacramento County Superior Court, primarily oriented toward the operation and impact of the California Accelerated Civil Trial program;

E. Interviews with the Sacramento County law-and-motion judges and the Sacramento County presiding settlement judge;

F. Preparation and dissemination of a questionnaire surveying approximately 1,000 federal practitioners concerning various aspects of federal practice in the Eastern District of California, and compilation of the 268 responses received;

G. Communication with, and review and analysis of draft reports from, other Advisory Groups in other districts;

H. *Ad hoc* interviews and communications with federal practitioners known to Advisory Group members;

I. Review and analysis of miscellaneous newspaper and magazine articles from various sources dealing with the subject of litigation efficiency;

J. Presentation of a near-final draft of the Report to the attendees at the annual Eastern District Meeting of lawyers and judges active in the affairs of the Eastern District of California; and

K. Frequent communication with Chief Judge Coyle, providing him with progress reports and receiving his input and feedback on an on-going basis.

II. MINUTES OF MONTHLY PLENARY ADVISORY GROUP MEETINGS

April 12, 1991

MEMO TO: Members of the Advisory Committee for the Eastern Federal Judicial District of California, Appointed Under the Civil Justice Reform Act of 1990
Professor John Oakley, Reporter for the Committee

FROM: Richard W. Nichols, Chairman

DATE: April 12, 1991

For future shorthand purposes, communications from this office pertaining to the "Advisory Committee for the Eastern Federal Judicial District of California, Appointed Under the Civil Justice Reform Act of 1990" will reference the group as the "Biden-II Committee."

The next meeting of the Committee will occur on May 1, 1991, at 5:00 p.m., at the Law Offices of Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, 16th Floor, Sacramento, California 95814. For those of you who are not from Sacramento, the Diepenbrock firm is located approximately three blocks west of the federal courthouse, toward the Sacramento River.

This is also to remind you that thoughts and suggestions for discussion items at the May 1 meeting should be in my hands not later than April 22, 1991, so that I can compile and disseminate them to you prior to the May 1 meeting.

Finally, please review the accuracy of your addresses and telephone numbers provided by Judge Coyle, and advise me as to any changes or corrections which should be made thereto. Please also advise me as to any telefax numbers which are available for communicating with you.

May 13, 1991

MEMO TO: Members of the "Biden-II Committee"
Professor John Oakley, Reporter

FROM: Richard W. Nichols, Chairman

The Biden-II Committee met on May 1, 1991, at 5:00 p.m., at the 16th Floor Conference Room of the Law Offices of Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, Sacramento, California 95814. After various discussions concerning the appropriate course of procedure to be followed by the Committee, the actions set forth in paragraph 1 were taken pursuant to vote:

1. It was determined that three sub-committees would be formed at this time, with the following charges and the following memberships:

a. There will be a Subcommittee ("the Docket Subcommittee") to ascertain the present condition of the civil and criminal dockets in both Sacramento and Fresno. The Docket Subcommittee will also be responsible for reviewing and identifying trends in case filings, and the demands that those trends impose upon court resources.

The Docket Subcommittee is to be Chaired by Dan McVeigh, who will also lend expertise with regard to the Sacramento civil docket. Other members of the Docket Subcommittee appointed on May 1 are the following, with areas of concentration noted:

Malcolm Segal, Sacramento criminal docket;
Richard Jenkins, Fresno criminal docket;
Dennis Eckhart, Sacramento civil docket;
Jack Chinello, Fresno civil docket;
Anthony Keir (public member), Fresno civil docket and possible statistical resources; and
Henry Teichert (public member), possible statistical resources.

b. There will be a Subcommittee ("the Cost/Delay Subcommittee") charged with investigating the causes of costs and delays involved in court procedures. Among other matters, the Cost/Delay Subcommittee will inquire into the historical results being obtained under the "Fast Track" procedures which have been promulgated pursuant to the Accelerated Civil Trial programs in the California state courts.

Co-Chairs of the Cost/Delay Subcommittee are Bill Coyne and Alan Perkins. Alan Perkins' responsibility as Co-Chair will focus primarily upon the "Fast Tract" inquiries, and Bill Coyne's responsibilities will cover the remainder of the Subcommittee's areas of inquiry. Other members of the Cost/Delay Subcommittee appointed on May 1 are Willie Smith, Margaret Johns, Jim Gilwee and Bob West.

c. There will be a Subcommittee ("the New Legislation Subcommittee") charged with investigating the effects of new legislation upon the functioning of the court. The term "New Legislation" was defined as including legislation enacted during the last ten years, i.e. since the commencement of the Reagan Administration in 1981. The New Legislation Subcommittee will be Chaired by Ken Mennemeier. Other members appointed on May 1 to the New Legislation Subcommittee are Richard Jenkins, Margaret Johns, Mary Louise Frampton, Louise Burda Gilbert and Jack Owens (public member).

2. The Committee was notified that public member William Meeham has resigned his appointment to the Committee and will not be participating.

3. By reason of calendar conflicts, some members of the Committee were unable to be present at the May 1 meeting. Accordingly, the Committee Chair has made the following additional subcommittee appointments:

Luis Cespedes, to the Cost/Delay Subcommittee;
Carolyn Langenkamp, to the Docket Subcommittee; and
Patrick Hayes (public member), to the New Legislation Subcommittee.

If any of these persons would prefer to be on a different subcommittee, they should contact the Committee Chair and make such a request.

4. Each of the Subcommittee Chairs will communicate with the membership of that Subcommittee to establish procedures and/or meeting schedules for that Subcommittee, prior to the next meeting of the full Committee. It is anticipated that the Subcommittee Chairs will report to the full Committee concerning interim progress of the Subcommittees. One subject of discussion at the May 1 meeting was that of the appropriateness and/or desirability of retaining consultant services to assist in obtaining statistical and/or other information on the basis of which ultimately to make recommendations; it is anticipated that the individual Subcommittees will address this subject.

5. The Committee's Reporter, John Oakley, advised that he would endeavor to obtain copies of the annual report of the Administrative Office of the Courts, detailing comparative statistics for the various federal judicial districts, for the benefit of those members interested. Additionally, the Reporter, together with Chief Judge Coyle, will be attending a program in Florida dealing with the subject of implementation of the Biden Bill. This program will occur during the latter part of the week of May 13. The Reporter will advise the Committee as to the benefit of the program at our next full Committee meeting.

6. The next meeting of the full Committee will be on May 30, 1991, at 5:00 p.m., at the Diepenbrock office.

cc: Hon. Robert E. Coyle
Hon. David F. Levi
Hon. Gregory G. Hollows
Jack L. Wagner

June 6, 1991

MEMO TO: Members of the "Biden-II Committee"
Professor John Oakley, Reporter

FROM: Richard W. Nichols, Chairman

The Chairman apologizes to the members of the Committee for the confusion that resulted in their non-receipt of the minutes of the Committee's May 1 meeting and announcement of the May 30 meeting. That confusion will not be repeated. Enclosed, for your records, is a copy of those minutes.

Minutes of May 30, 1991

The Committee met on May 30 at the offices of the Diepenbrock firm. John Oakley reported on the Federal Judicial Center Seminar for Chairs and Reporters of Civil Justice Reform Act ("CJRA") Advisory Groups, held in Naples, Florida, on May 16. Among other things he noted that there appears to be an agenda being pursued by the Federal Judicial Center ("FJC"), oriented toward establishing that the bulk of civil delays are the result of overly burdensome criminal caseloads. In particular, references were made by Judge Schwarzer, Director of the FJC, concerning the number of federal prosecutions of drug cases, gun cases and career criminal cases. Another disturbing statement by FJC personnel was to the effect that the CJRA constitutes an implied authorization permitting the FJC or the Judicial Conference of the United States to override provisions of the Federal Rules of Civil Procedure, particularly in the discovery arena. Professor Oakley vigorously disagrees with this interpretation.

Attached is a three-page summary of Professor Oakley's notes from the Florida Seminar and a copy of the seminar's agenda. Professor Oakley will present the second half of his report on the Florida Seminar at the next [June 20] meeting of the full Committee.

Professor Oakley reported that Judge Levi had identified potential ways of reducing delay and cost through California's adoption of a system of administrative review of prisoners' grievances under the provisions of "CRIPA," the Civil Rights of Institutionalized Persons Act. John distributed explanatory materials on CRIPA to the Chair and Subcommittee Chairs, and will discuss the matter with Dennis Eckhart of the California Attorney General's Office.

Dan McVeigh, Chairman of the Docket Subcommittee, reported that his group had met with the Clerk of the Court, Jack Wagner. Concerns were expressed about permitting access of outside consultants to the Clerk's data base, particularly in light of existing personnel vacancies in that office. Questions were also expressed concerning the usefulness to the Committee of much of the statistical information maintained by the Clerk, which appears primarily oriented toward personnel information and needs. It was suggested that before a significant effort is expended to obtain statistical data, the Committee should determine what types of information are wanted, and what uses are to be made of it. In this regard it was suggested that the interviews of the district judges and magistrate judges be undertaken before statistical information requests are made, to establish areas of inquiry on an intuitive basis.

It was agreed that the four Subcommittee Chairs (Messrs. McVeigh, Coyne, Perkins and Mennemeier), Louise Gilbert as an ad hoc member, the Committee Chairman and the Reporter would constitute an "Executive Committee" to hold interim planning sessions.

Minutes of June 5, 1991

A meeting of the Executive Committee was held on June 5, at the offices of the McDonough firm. Bill Coyne, Co-Chair of the Cost & Delay Subcommittee, gave a report on the results of an interim meeting of that subcommittee.

Bill advised that interviews by subcommittee members were being scheduled with Sacramento Superior Court Master Calendar Judges Ford and Bond to obtain their views concerning the operation and experience of Sacramento County's ACT program. Similar interviews were under consideration with the Sacramento County Law and Motion Judges Robie and Gray, and with Sacramento County Settlement Judge Boskovich, concerning

their experiences. A questionnaire is being prepared for distribution to all members of the Sacramento County Bar Association soliciting suggestions for changes and improvements in federal court procedure, rules, etc. It was suggested that that distribution be broadened to include at least some of the other counties within the Eastern District. The subcommittee is also considering the desirability and usefulness of obtaining copies of Local Rules for other districts within the Ninth Circuit, and of individual judges' "local local" rules in those districts.

John Oakley is planning on spending "a day in the Clerk's Office" to observe the flow of case filings and other activity on a random basis, in an effort to ascertain whether there are any matters that the Committee might be able to recommend for systemic improvements.

There was considerable discussion concerning the functional interrelationship of the information-gathering activities of the Docket Subcommittee and the Cost/Delay Subcommittee. It was ultimately determined that each of the three subcommittees would be given a "target date" of July 31, for completion of draft reports of their activities, findings and recommendations. Upon receipt of those reports, the Reporter will review them with the judges at the Ninth Circuit Judicial Conference which is to be held in early August, and the full Committee will then meet to synthesize the three separate reports into a unified whole. It was generally agreed that the formation of a Plan need not require that that Plan be fully implemented before the end of 1991 in order to qualify for early implementation status; the concept was expressed that the Plan could itself provide for monitoring and tinkering with its suggested activities over the course of the next two years.

In response to concerns expressed about the level of statistical information required from the subcommittees, John Oakley opined that anecdotal information obtained through interviews, and impressions gained through experiences, are as important as simple statistical data, because the statistical data may be subject to interpretation based on the value-judgments of persons who do not practice within the District and who may have different priority considerations than those of local practitioners and their clients. John indicated an intention to meet with each of the members of the Executive Committee individually, to obtain views, and to prepare a "mission statement" in an effort to focus our inquiries.

Some substantive observations concerning specifics were made at the June 5 meeting, as follows:

1. The problem of "costs" and the problem of "delay" are not necessarily identical, and may in fact involve conflicting considerations. For example, aggressive judicial "case management" may (or may not) result in reduction of delays in the judicial process, but that reduction may come at the expense of increased costs to the clients, resulting from the imposition of increased reporting requirements to the Court.

2. The "weighting" system used by the Administrative Office of the Courts is subject to question, and, as it is applied to the Eastern District, presents a skewed picture of the true per-judge caseload burden. For the twelve-month period ending June 1990, for example, the Eastern District had the highest number of civil filings per judge in the Ninth Circuit in terms of raw numbers, but was only sixth (out of fifteen) in the Circuit per judge after the "weighting" adjustments were made.

3. Although there has been a great deal of attention paid to perceived unnecessary costs in the discovery arena, it was generally agreed that the event that most significantly increases unnecessary costs is the inability to get to trial on the scheduled trial date because of continuances required by the Court's calendar, and the cost of preparing for a trial that doesn't start as scheduled. It was suggested that inquiry be made as to the number of such incidents, and the Court's procedures in dealing with them. This inquiry would include (a) what percentage of cases have been rescheduled within six months of trial, (b) what percentage of cases have been rescheduled at or after the final pretrial conference, (c) how many cases have been rescheduled within a week of the scheduled trial, (d) what percentage of cases have settled as a result of the settlement conferences conducted at or after the final pretrial conference, and (e) what relationship, if any, is there between the length of judicial time spent in settlement conferences and the rate of settlements resulting therefrom.

4. It was suggested that each of the Committee members, at the next meeting of the full Committee, have two or three specific topics dealing with the subjects of cost and/or delay, to augment those topics which the Cost/Delay Subcommittee is already developing. With specific topics in mind, it will be easier to more efficiently focus on what statistical information is desired.

Two personnel adjustments were made. Louise Gilbert has been given an additional assignment to the Cost/Delay Subcommittee. Jack Owens has been reassigned from the New Legislation Subcommittee to the Cost/Delay Subcommittee.

The next meeting of the full Committee will be held on June 20 at 5:00 p.m., at McDonough, Holland & Allen, 555 Capitol Mall, Suite 950, Sacramento, California. Chief Judge Coyle has been invited to, and is expected to, be in attendance.

cc: Hon. Robert E. Coyle
Hon. David F. Levi
Hon. Gregory G. Hollows
Jack L. Wagner, Clerk
Ms. Dana Merritt, Office of
the Circuit Executive

Agenda

Presiding: *Hon. William W Schwarzer, Director, Federal Judicial Center and U.S. District Judge, ND-Cal.*

8:30 Welcomes -- Seminar Purpose and Format

Opportunities and Challenges in Implementing the Civil Justice Reform Act

Judge Schwarzer

8:50 Current status of implementation -- reports from a few districts

Robert M. Landis (ED-Pa.) *James H. Geary (WD-Mich.)*
Edwin J. Wesely (ED-NY)

9:20 Report from the Administrative Office of the U.S. Courts and the Federal Judicial Center: support available, status of appropriations, current plans, etc.

Abel Mattos, Chief, Court Programs Branch, Court Administration Division, AO
Donna Stienstra, Senior Research Associate, Research Division, FJC

9:50 Intermission

Presiding: *Hon. William C. O'Kelley, Chief Judge, ND-Ga.*

10:20 Pitfalls in analyzing caseload statistics

John Shapard, Program Supervisor, FJC

10:50 How to Meet the Statutory Objectives

- How to assess the condition of the civil and criminal docket and determine the causes of problematic cost and delay
- How to account for the particular needs of the court, the litigants, and the litigating attorneys
- How to determine necessary contributions to be made by the court, litigants, the bar, Congress, and the executive branch

Preliminary comments from:

W. J. Michael Cody (WD-Tenn.) *Shelby Grubbs (ED-Tenn.)*
Tracy Nichols (SD-Fla.) *Louis Paisley (ND-Ohio)*

11:55 Wrap-up

12:00 Adjournment

From: John Oakley, Reporter, E.D. Cal. CJRA Advisory Group

To: Advisory Group Members at May 30th Meeting

Date: May 30, 1991

Re: Notes from Federal Judicial Center seminar for Chairs and Reporters of CJRA Advisory Groups, Naples, Florida, May 16, 1991

Highlights of comments by Judge William W Schwarzer Director, Federal Judicial Center

* Contributions by counsel may include restraint by U.S. attorneys in prosecuting drug cases

* Cases that get to trial are taking longer and longer.
1940 . . . 3 % of cases take > 3 days to try
1990 . . . 25 % of cases take > 3 days to try

* CJRA report should pay special attention to impact of asbestos and other mass tort cases -- ripe for congressional reform re repetitive trials of claims for punitive damages

* Be candid about individual judges' variations in productivity

* Report goes forward and stands as written regardless what sort of plan the district court adopts. Report is autonomous but WWS recommends ongoing communication with court.

* Overall objective should be to reduce transaction costs of civil litigation

* What if proposed CJRA plan calls for local rules re discovery, etc., that are at odds with Federal Rules of Civil Procedure? WWS asserts that there is implied authority under the CJRA to regulate procedure in the district even if plan supersedes federal rules of nationwide applicability. Thus if plan requires, say, voluntary disclosure as prerequisite to discovery, plan will control over F.R.C.P. But local rules may need amendment to conform to plan.

* Mandatory court-annexed arbitration presents a separate problem. A pilot project is underway pursuant to the 1988 Judicial Improvements and Access to Justice Act. This procedural/policy initiative is proving highly controversial.

James Geary, Chair, W.D. Michigan

W.D. Michigan is a demonstration district. They have found no major problems of delay -- 10 months to trial for civil cases, 5 months for criminal cases. Their focus will be on cost, not delay. Group is looking for a legal sociologist grad student/Ph.D. candidate to assist in surveying litigants' expectations and attitudes. The advisory group was not in favor of tracking (early differential case management) but as a demonstration district they are required to put such a system in place. They have found that there was a de facto tracking system operating already. The group is attempting to standardize discovery controls and pre-trial scheduling so judges act consistently. Focus is on case-sensitive use of the Rule 16 pre-trial conference. Five subcommittees have been set up:

Differential case management

Discovery

ADR

Cost monitoring

Continuing legal education

Ed Wesley, Chair E.D.N.Y. (also ex officio member S.D.N.Y.)

E.D.N.Y. had preexisting committee on civil litigation that was reincorporated with some changes in membership as CJRA advisory group. Prior committee had 8 year history in which all recommendations had been adopted by court. Advisory group broadened and diversified to 33 members, including one or more general counsel of major corporation, community legal officer, plaintiff's lawyer, large firm defense lawyer, solo practitioner, rural practitioner, government counsel (federal, state, local), public defender, criminal litigator, lay people, physician, management consultant, legal accountant, one law professor each from schools in district: Brooklyn, St. John's, N.Y.U. (each is reporter for 2 of the group's 6 subcommittees).

Group intends to interview each district judge and magistrate judge as well as U.S. attorneys and "back office" court/clerk's staff.

Strict time line adopted in order to get early implementation status while allowing plenty of time for public comment. This requires completing most of the substantive group's substantive work by the end of June. The preliminary reports of the subcommittees will then be worked over and amalgamated by a committee

of style and substance, which will report back by the end of July. The draft report will be issued for public comment by approximately Labor Day.

In the E.D.N.Y. magistrates handles the entirety of discovery and other non-dispositive pre-trial matters. The magistrate judge is assigned to the case at the same time as the district judge.

There is a huge negative impact in the E.D.N.Y. of criminal cases arising out of drug busts at LaGuardia and JFK airports. Last year Judge Nickerson tried 40 cases, and not one of them was a civil case.

Bob Landis, Chair, E.D.Pa.

As a pilot district, their report is due by July 31. (By local court order?) The group has 15 members working as a committee of the whole to avoid bureaucratization. Seven members are in the American College of Trial Lawyers. U. of Penn. Professor Leo Levin, former directer of Federal Judicial Center, is reporter -- a great asset. Six meetings so far, strictly limited to 2 hours 9-11 am every other week. This pace will accelerate soon. Group meets in the court's ceremonial courtroom, keeps electronic transcripts. (Unresolved by group whether these are within public meeting laws.) Judges are interviewed in chambers and interviews are tape-recorded with transcripts prepared and sent to entire group assesses the interview data.

Court statistics look good. Group is wary of fixing things that aren't broken, and of creating unnecessary paperwork. There are 19 judges (4 recently added). A major problem has been 14-month delay between authorization and funding of new magistrate judge positions. Major impact from the federalizing of the criminal process re guns, drugs and career criminals.

E.D.Pa. is pilot district for the 1988 Act's court-annexed arbitration study. It has worked very, very well. Arbitration, plus early neutral evaluation newly added. Mediation via experienced lawyer. 6000 pending asbestos cases are managed by Senior Judge Charles Weiner. He is very good at ADR dispositions.

June 25, 1991

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols, Chairman

RE: Minutes of Meeting of June 20, 1991

A meeting of the Biden-II Committee was held on June 20, 1991, at the offices of McDonough, Holland & Allen in Sacramento. Chief Judge Coyle was present, and the members from Fresno participated by telephone conference call.

The Reporter distributed and discussed a "Mission Statement" which he had prepared for the members of the Committee, in light of previous comments indicating some uncertainty as to the scope and direction of subcommittee assignments. A copy of that "Mission Statement" is an attachment to these Minutes.

Chief Judge Coyle commented that, from the judicial perspective, the District's docket is presently in relatively good shape. He also noted that diversity jurisdiction has not created an undue burden for the district judges. With the recent appointment of Judges Shubb, Levi and Wanger and the presence of an active complement of senior judges, one significant difficulty is the absence of sufficient courtrooms to accomodate all available judges. This difficulty is anticipated to increase as the District's population increases; projections indicate that, over the next twenty (20) years, there will be a need for thirty-two (32) courtrooms to accommodate district judges, magistrate judges and bankruptcy judges in Sacramento alone.

Chief Judge Coyle noted, in response to comments by members of the Committee, that there is little uniformity on the part of the district judges with regard to the imposition of sanctions. There is, however, a general disinclination on the part of the judges to establish either a system requiring separate qualifications for admission to practice in the District or a disciplinary system apart from the issuance of sanctions, because of the administrative and perceived due-process implications that such system(s) would involve.

Chief Judge Coyle also commented on the fact that during the period when three judicial positions (50% of the District's assigned positions) were vacant, the District was able to operate at an acceptable level of efficiency because of (a) consideration by the United States Attorney's Office in not authorizing high levels of criminal matters more properly prosecutable in state court, (b) a harmonious bar resulting in a high percentage of settlements, and (c) conscientious activity by the senior judges within the District to assist with the caseload.

The Reporter noted that, under the Act, every district must have a Plan implemented by November 30, 1993, but that early implementation requires that involved districts adopt a Plan by December 31, 1991. Two reasons were articulated for being an Early Implementation District: first, that the District would preserve a greater degree of autonomy in creating a Plan responsive to the needs of this particular District rather than to national needs which are not necessarily reflective of this District; and second, that the possibility of funding for monitoring activities exists. The Reporter noted, on the subject of timing and chronology, that the Court need not have actually amended Local Rules by December 31 in response to a Committee Plan in order for the District to qualify for early implementation status, as long as the proposals have been made by that date.

The Committee has decided, as a policy matter, not to delegate assessment activities to outside consultants or entirely to the Reporter, but has elected to retain a "grass-roots" involvement in the process. Extensive discussions occurred concerning judicial interviews. It is anticipated that the Reporter will attempt to interview the district judges, on an individual basis, and that the Docket Assessment and the Cost/Delay subcommittees will seek to meet informally with the judges collectively. The Reporter emphasized that initial subcommittee reports should be in his hands by July 31, so that he can synthesize them and discuss them with the judges and the lawyer delegates at the Ninth Circuit Judicial Conference during the first week of August.

The Cost/Delay subcommittee is scheduled to meet with Judges Bond and Ford of the Sacramento Superior Court, to obtain an assessment from them of the Accelerated Civil Trial program in Sacramento County. Fresno County has a voluntary program, and the Fresno members of the subcommittee will supply similar information.

It was agreed that the Committee's membership would be expanded by adding Charles J. Stevens of the Sacramento Office of Gibson, Dunn & Crutcher.

Finally, as set forth in a separate notice, the next meeting of the full Committee will take place on July 18, 1991, at 5:00 p.m., at the offices of Weintraub, Genshlea & Sproul, 2595 Capitol Oaks Way, Sacramento, California.

MISSION STATEMENT
and
ACTION PLAN

Civil Justice Reform Act (CJRA) Advisory Group
["Biden-II Committee"]
United States District Court
Eastern District of California

June 20, 1991

I. MISSION STATEMENT

A. Statutory Responsibilities

1. Short-term: Submit to the court a public report containing four modules. [28 U.S.C. § 472(b)]

   a. docket assessment [28 U.S.C. §§ 472(b)(1), 472(c)(1)]

   b. recommendation of a plan for reduction of delay and expense in civil litigation [28 U.S.C. § 472(b)(3)]

   c. explanation of the basis for the plan by reference to the docket assessment module [28 U.S.C. § 472(b)(2)]

   d. explanation of the merits of the plan by reference to the statutorily recommended six "principles and guidelines of litigation management and cost and delay reduction" and the six "litigation management and cost and delay reduction techniques" [28 U.S.C. §§ 472(b)(4)]

2. Long-term: Once a plan has been implemented, consult with the district court annually thereafter for purposes of assessing the condition of the court's civil and criminal dockets. [28 U.S.C. § 475]

B. Development of the Docket Assessment Module

1. Use of Subcommittees

At its May 1, 1991, plenary meeting the Eastern District, California Advisory Group (EDCAG) created three subcommittees to serve as task forces developing information and recommendations for the docket assessment module of EDCAG's initial public report. The subcommittee assignments

are keyed to the four components of the docket assessment module, as set forth in the four statutory subdivisions of 28 U.S.C. § 472(c)(1). The text of § 427(c)(1) is as follows:

> In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall --
>
> (A) determine the condition of the court's civil and criminal dockets;
>
> (B) identify trends in case filings and in the demands being placed on the court's resources;
>
> (C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and
>
> (D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

2. Rationale for Subcommittees

EDCAG's creation of the assessment module subcommittees reflects the consensus of the group that faithful performance of the statutory mandate and due regard for the welfare of the court require "hands on" involvement of individual group members in the development of the docket assessment and expense/delay reduction plan to be set forth in EDCAG's initial public report. EDCAG has made a conscious decision not to delegate primary responsibility for the initial public report either to an outside consultant or to the EDCAG reporter. The subcommittees are charged with approaching their tasks with this decision in mind.

3. Responsibilities of Subcommittees

a. Docket Conditions and Trends Subcommittee

This subcommittee, chaired by Dan McVeigh, is responsible for reporting on the matters described in the first two subdivisions of § 472(c)(1).

(1) Subdivision (A) requires EDCAG "to determine the current condition of the civil and criminal dockets." To

the extent that the subcommittee consults statistics as an aid to its judgment of current conditions, it is seeking to develop a "snapshot" image of here-and- now docket conditions. Certainly the subcommittee should look at the statistical profile of the district's docket as generated by the Administrative Office (AO) as a guide to possible problem areas. But absent *prima facie* evidence of a problem disclosed either by the AO's statistics or by the subcommittee members' own information and experience, there is no need for the subcommittee to seek or to generate detailed local statistical data. Such data should be sought and analyzed on an as-needed basis insofar as certain aspects of the court's docket or operations merit close attention by the subcommittee in the discharge of its reporting function.

Reporter's note. What EDCAG desires of this subcommittee is a *professionally informed evaluation* of the "condition" of the civil and criminal dockets. This evaluation should be based on the intuition and experience of the members of the subcommittee and of their colleagues at the bar. As such, it should reflect the experiences and expectations of veteran litigators in the state and federal courts of the district. This "gut-level" evaluation should be tested by comparison to such selected statistical data, whether nationally or locally generated, as the subcommittee feels is appropriate.

A useful metaphor to keep in mind is that of a skillful physician giving an annual physical examination to a patient. The patient's temperature is taken, height and weight noted, age and gender recorded, vital signs are checked, certain routine blood and urine tests are run. In addition, the skillful physician will take time to talk with the patient about the patient's self-perceptions of health and in general terms about the state and quality of the patient's life. No expensive radiography or invasive procedures are performed absent sound diagnostic indications.

In the final analysis, pun intended, autopsies are for dead patients, not live ones. Congress has not asked us to undertake an autopsy of the current civil and criminal dockets -- only to take their temperature and do more where signs of pathology justify more probing of analysis.

(2) Subdivision (B) requires EDCAG to "identify trends in case filings and in the demands being placed on the court's resources." This calls for some degree of retrospective analysis, relating the state of affairs captured in the subdivision (A) "snapshot" of current conditions to historical causes.

Reporter's note. The scope of the subcommittee's attention to subdivision (B) should be sensitive to its subdivision (A) findings as to the health of the civil and criminal dockets. The importance of trends in filings and other demands on the court's resources is a function of crisis. If the court's dockets are in good shape now that the court has its full judicial complement, this part of the subcommittee's report can be fairly brief.

I do not mean that this component of the docket assessment module should be neglected. For instance, the AO statistics in the February 28, 1991, "Guidance to Advisory Groups Memo" from the Federal Judicial Center (FJC) show tons (one-third of all filings) of prisoner cases in our district (Chart 1, page 11). These cases have steadily increased (in numbers of filings per year) in almost linear fashion over the ten year period (1981-1990) reported in Table 1, at page 12 of the Feb. 28th memo. That is certainly a trend worth noting.

Furthermore, the AO's weighting system seems to regard prisoner's cases as generically undemanding, as evidenced by Chart 3, at page 13 of the Feb. 28th memo. This is confirmed by the table of AO case weights supplied to all EDCAG members as an attachment to Chief Judge Coyle's memo of May 17, 1991. Page 2 of Mary Ann's Jan. 8. 1991, memo to Chief Judge Coyle shows that a death penalty prisoner petitions merits only a case weight of .3412 [case category 535], in comparison to the 2.6349 [case category 442] accorded to a Title VII employment discrimination case.

It is conceivably true that in states within the 11th Circuit the typical Title VII case consumes 722 percent of the judicial attention devoted to a writ of habeas corpus by a condemned prisoner. But that is a bizarre weighting system as applied to current California conditions, for at least two reasons: the thorny issues yet to be resolved at the federal level about the application of California's death penalty laws; and the increased complexity of habeas petitions given the ever stricter application of the Supreme Court's "only-one-bite-out-of-the-apple" rules against successive habeas petitions. This would be an appropriate observation to make in connection with a report of "the demands being placed upon the court's resources" that are causing congestion of the civil docket.

b. Causes of Cost and Delay Subcommittee

This subcommittee, co-chaired by Bill Coyne and Alan Perkins, is responsible for for reporting on the matters described in subdivision (C) of § 472(c)(1), which calls on EDCAG to "identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedure and the ways in which litigants and their attorneys approach and conduct litigation." When EDCAG created this subcommittee on May 1st, it recognized that identification of causes of cost and delay can proceed in two ways.

First, by sampling informed opinion of participants in the system to determine from within the trenches what participants perceive to be the causes of cost and delay. Special attention should be given to *avoidable* cost and delay, not that which is inherent to any reasonably deliberate process of dispute resolution. Bill Coyne is chairing this segment of the subcommittee's work.

Second, by examining the effectiveness of procedural innovations in other systems for cause-and-effect evidence of the links between court procedure and the conduct of litigants and counsel on the one hand, and avoidable cost and delay on the other hand. The California "fast track" experiment with far-reaching procedural reform and strict standards for litigant and attorney conduct provides a fertile area for comparative research and cost-benefit analysis in a coordinate judicial jurisdiction. Alan Perkins is chairing this segment of the subcommittee's work.

Reporter's Note. Clearly the last word cannot be written about identifiable causes of cost and delay until the report of the Docket Conditions and Trends Subcommittee is available. Nonetheless, there is much useful work for the Causes of Cost and Delay Subcommittee to undertake concurrently with the work of the Docket Conditions and Trends Subcommittee.

For Bill Coyne's cohort I suggest that immediate investigation seek to isolate the problem of *cost* from that of delay. The information to be received from the Docket Conditions and Trends Subcommittee will be relevant principally to identifying areas of delay. Subcommittee members should draw on their personal intuitions and experiences to identify possible areas of avoidable cost. The subcommittee could then look closely at these areas to see if the causes of the suspect cost are remediable through changes in court procedures, attorney behavior, or client expectations. To some extent the subcommittee could also begin analysis of avoidable delay by sampling the opinions of subcommittee members and others about the kinds of delay they typically occur in their practices. Of these identifiable kinds and causes of recurrent delay, which could be avoided by feasible changes in the behaviour judges, attorneys and litigants?

For Alan Perkin's cohort there are also good grounds to move forward concurrently with the work of the other subcommittees. Interviews of both judges and practitioners in the Superior Court of Sacramento County and other California "fast track" court should provide some evidence of the kinds of costs and delays that can be cured and the kinds of illusory cures that simply transfer costs and delays to other stages and participants in the process.

Judge Levi has suggested that it would be useful for the judges (at least the Sacramento contingent) of the district to meet collectively with a group of lawyers to discuss issues and ideas pertinent to EDCAG's duties. Dan McVeigh is looking into this, with the preliminary idea of an informal but working meeting of the judges and the members of both the Docket Conditions and Trends Subcommittee and the Causes of Cost and Delay Subcommittee. We should consider whether to integrate discussions with the magistrate judges into this event, or conduct that group session separately.

c. Legislative Impact Subcommittee

This subcommittee, chaired by Ken Mennemeier, is responsible for for reporting on the matters described in subdivision (D) of § 472(c)(1), which calls on EDCAG to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." Legislation can impact courts in manifold ways that will increase the cost and delay of civil ltigation: by expanding jurisdiction, by expanding the scope of the substantive rights enforceable under a pre-exising jurisdictional grant, by altering procedures in ways that make suits easier to file and claims easier to join, and so forth. In addition, the policies by which administrative agencies and the executive branch exercise their power to enforce regulatory and criminal legislation can contract or compound the direct effect of new legislation on the courts.

Congress has phrased this element of the assessment module in terms that are at once descriptive, historical, and normative. The descriptive component entails identifying particular legislation that has had an adverse impact on the courts. The historical component entails study of the legislative history of such a statute to see whether any attention was paid to its probable judicial impact, and if so, how accurate the assessment was. The normative component entails recommendations for how Congress might more systematically and accurately identify and take responsiblity for the likely impact legislation on the courts. The normative component also invites recommendations on how Congress might more carefully monitor and either control or share responsiblity for administrative and executive

enforcement programs that increase the adverse impact of new legislation on the courts.

Reporter's note. The subcommittee need not seek to empty this ocean with a spoon. Rather than focus on the mass of legislation impacting the federal courts in general, the subcommittee should strive to identify a few (perhaps two to four) instances in which new legislation (loosely defined) has created burdens for the courts that were not addressed and mitigated in the legislation itself. The executive subcommittee resolved by consensus at its meeting of June 5, 1991, that the reporter's suggested definition of "new legislation" as that enacted since the beginning of the Reagan Administration in 1981 was unduly restrictive, since presently burdensome statutes such as RICO predate that period. In addition to RICO, other statutes that seem ripe for a close look are ERISA (Pensions) and CERCLA (Environmental Superfund).

When the subcommittee has identified a few statutes that are proving especially problematic in this district, it should then systematically analyze the legislative history of the statutes to determine what attention, if any, was given to the probable impact on the judiciary. Depending on what it finds, the subcommittee should feel free to propose systems and standards for analyzing and accounting for the judicial impact of future legislation.

d. Executive Subcommittee

At the suggestion of the Chair, at its May 30th plenary meeting EDCAG created a seven-person executive subcommittee. The members of the EDCAG executive subcommittee are the Chair and the Reporter, the four chairs and co-chairs of the three docket assessment subcommittees, and *ad hoc* member Louise Gilbert, who is chair of the Eastern District's delegation of lawyer representatives to the Ninth Circuit Judicial Conference. The executive subcommittee is expected to meet more frequently than the monthly plenary meetings of EDCAG. The initial responsibility of the executive subcommittee is to coordinate the content and progress of the work of the docket assessment subcommittees.

4. Conservative Mandate to Subcommittees

The consensus of all plenary meetings of EDCAG to date has been that the district is in generally good health. There is a shared and sincere desire to discharge EDCAG's assessment and planning functions in good faith, but without the expectation that deep problems will be found. There is concern that problems might be created where none presently exist. The charge to the subcommittees has therefore been a conservative one: conduct the docket assessment in good faith, do not waste time looking for problems that do not exist, do not create or exaggerate problems just to justify the effort of assessment, but conduct the assessment carefully and professionally with

the consciousness that a "no problems" report and a "stand-pat" plan will be acceptable only if it is unmistakenly the product of an unimpeachable process of strict statutory compliance.

C. Steps in the Process After the Assessment Stage

1. Receive and review Reporter's profile of district and compilation of information obtained in interviews of judicial personnel and court staff.

2. Draft docket assessment module based on subcommittee reports and Reporter's profile

3. Collect additional data and statistics as needed for incorporation in docket assessment module

4. Draft the planning module (§ 472(b)(3)'s recommendation to the court a "civil justice expense and delay reduction plan") and any needed accompanying changes in local rules

5. Draft explanatory module (§ 472(b)(2)'s account of the basis for the proposed expense and delay reduction plan, tying together the findings of the docket assessment module and the recommendations of the planning module)

6. Draft justificatory module (§ 472(b)(4)'s defense of the merits of the proposed expense and delay reduction plan in terms of the statutorily recommended six-by-six litany of principles, guidelines and techniques of litigation management.

II.
ACTION PLAN

Subcommittee reports by July 31

Feedback from judges at Circuit Conference Aug. 5-8

Complete drafting of proposed assessment based on subcommittee reports and district profile by end of August

Development of proposed plan by end of September

Presentation of proposed final report and plan to District Conference at end of October

Public comment during November

District Court action during December

Assuming early implementation, monthly meetings during first year, at least quarterly thereafter with monthly meetings in quarter preceeding annual year-end report. Incorporate advisory group report into fall district conference. Begin setting up staggered four-year terms of group members to assure continuity. Formally express judicial appreciation to members of committee.

MEMORANDUM

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols

DATE: August 6, 1991

RE: Minutes of Meeting of July 18, 1991

As a reminder following up on my memo notice of July 26, the next meeting of the full Biden-II Committee will be held on August 22, 1991, at 5:00 p.m., at the offices of Wilke, Fleury, Hoffelt, Gould & Birney, 300 Capitol Mall, Suite 1300, Sacramento, California. This meeting date was selected, instead of August 15 as the customary third Thursday of the month, on a one-time basis only, because of the intervening Ninth Circuit Judicial Conference.

The July 18, 1991 meeting of the Biden-II Committee was held at the offices of Weintraub, Genshlea & Sproul in Sacramento. The Fresno membership was represented by Anthony Kier. Chief Judge Coyle and Court Clerk Jack Wagner also attended.

The Chairs of the various subcommittees reported on the progress of those subcommittees to date. The Cost/Delay Subcommittee has prepared a draft of a questionnaire, which it intends to circulate among federal court practitioners, with a return date of August 10. A report was made on the Committee's meeting of July 9 with the Sacramento District Judges collectively, and of the Subcommittee's meeting with members of the Civil Division of the U.S. Attorney's Office. That Subcommittee is scheduled to meet with the Criminal Division of the U.S. Attorney's Office on July 29.

A report was presented on the interview of Judge Ford, Presiding Judge of the Sacramento Superior Court, concerning that Court's experiences under ACT. Judge Ford indicated that the primary effect of ACT has been that cases are settling earlier, i.e. three weeks before trial rather than three days before trial. He also indicated that a major reason for favorable settlement results is the participation of the judges in plea bargaining sessions, a practice which is precluded by Rule 11, FRCrimP. There was disagreement among the Committee members concerning the optimum time for holding settlement conferences or other alternative dispute resolution procedures, and as to whether such procedures should be mandatory in nature.

The Judicial Council of the State of California is to be contacted concerning the effect of the existing ACT pilot programs. The Council's formal report on those programs is due "shortly." It was noted that the "pilot program" is to become a statewide mandate.

The following general subjects were discussed:

a. There is a poor percentage of first-time cases actually getting out for trial, primarily because of the significant number of criminal drug cases.

b. Issues relating to concurrent criminal jurisdiction, and plea bargaining issues, are not fungible between the courts.

c. The Sentencing Guidelines create peculiar problems for the federal courts. In particular, issues requiring detailed analysis are extensive in number, the Commission frequently issues revisions, and the number of multi-defendant cases is increasing, thus rendering sentencing issues more complex.

d. Delays in the appointment process, both with regard to federal judges and with regard to U.S. Attorneys, have been particularly disadvantageous within this District.

e. There is a general attitude of informality, friendliness and collegiality among the District's practitioners, and between practitioners and the bench, which

enables the Court to run much more efficiently than the available judicial manpower would suggest.

The Subcommittee on New Legislation has expanded its scope of inquiry to include consideration of Attorney General policy decisions as well as new legislation. The Subcommittee is presently looking at six to ten items for further study.

Finally, the bulk of the meeting was devoted to a review of the proposed attorney questionnaire, and efforts to make it less suggestive of responses.

cc: Chief Judge Coyle
Judge Levi
Judge Hollows
Jack Wagner
Dana Merritt

MEMORANDUM

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols

DATE: August 28, 1991

RE: Minutes of Meeting of August 22, 1991

The August 22, 1991 meeting of the Biden-II Committee was held at the offices of Wilke, Fleury, Hoffelt, Gould & Birney in Sacramento. The San Joaquin Valley membership was represented by Anthony Keir, Jack Owens and William Smith. Chief Judge Coyle and Court Clerk Jack Wagner also attended.

Discussion commenced concerning the responses obtained with regard to the questionnaire circulated to federal court practitioners with Chief Judge Coyle's letter of July 25. It was noted that there was approximately a 25% response rate, which was higher than had been anticipated. It was also noted, however, that we should be cautious about reading too much into the survey results, because this was a survey of practitioners and not of client-consumers. Discussions were had, but no specific solution reached, concerning how to compile an appropriate mailing list to survey client-consumers in the same way. Copies of the survey, and of the tabulation of responses thereto, are attached to these minutes; the responses should be read with recognition that value 1 means strong agreement, value 3 is neutral and value 5 means strong disagreement.

It was the consensus that additional statistical evaluation should be performed with regard to those questions as to which there was at least 60% agreement either pro (values 1 and 2) or con (values 4 and 5). John Oakley will perform that evaluation, with regard to the following responses:

3. 62.3% <u>disagreed</u> with the proposition that, in this District, they have experienced unnecessary cost and delay caused by continuance of a trial date after the parties have engaged in significant preparation for trial on the vacated date.

13. 62.5% disagreed with the proposition that, in this District, they have experienced significant cost and delay caused by failure of judges to order payment of compensatory sanctions when a party or its counsel has unreasonably delayed litigation or caused unnecessary expense to an opponent.

16. 62.6% agreed with the proposition that progressive narrowing of triable issues of fact by a succession of pretrial orders entered at status conferences after due consideration of discovery and motion practice does, or would, significantly assist in reducing cost and delay in this District.

17. 86.0% agreed with the proposition that permitting counsel to appear at status conferences by telephonic conference call does, or would, significantly assist in reducing cost and delay in this District.

19. 70.8% agreed with the proposition that actively encouraging parties to submit cases to non-binding forms of court-sponsored alternative dispute resolution procedures, such as mediation and early neutral evaluation, does, or would, significantly assist in reducing cost and delay in this District.

20. 67.9% agreed with the proposition that notifying parties of the availability and possible cost and delay advantages of submitting their disputes to binding alternative dispute resolution by arbitrators or private judges does, or would, significantly assist in reducing cost and delay in this District.

21. 60.4% agreed with the proposition that requiring the parties, within six months of filing, to participate in settlement conferences presided over by attorneys experienced in litigating similar disputes and empowered to refer the parties for further settlement conferencing before a judicial officer, does, or would, significantly assist in reducing cost and delay in this District.

22. 64.5% agreed with the proposition that setting trial dates as soon as feasible, maintaining continuous pressure on parties to be ready for trial on the scheduled date, and, barring other disposition, commencing trial on that date, does, or would, significantly assist in reducing cost and delay in this District.

23. 86.8% agreed with the proposition that the screening of pending motions and the issuance of tentative rulings, in selected circumstances, would significantly assist in reducing cost and delay in this District.

Jack Owens raised the question of whether structural changes in the civil justice system were appropriate subjects for discussion within the purview of the Committee. He noted the rapidly growing trend of business entities to elect arbitration rather than litigation as a dispute resolution procedure, because of

problems of cost and delay associated with the litigation process; specifically mentioned were discovery costs and witness preparation which led to a lack of testimonial spontaneity. He also noted, however, that the Eastern District of California is much more responsive to client-consumer concerns than are more metropolitan districts in which his company also has litigation, and that it would not be desirable to impose supposed solutions upon this District that might be appropriate for other districts with other problems.

This led to discussions about whether practitioners within this District would be receptive, on a Local Rule basis, to limitations on the number of experts, the number and length of depositions and other discovery devices. Willie Smith noted that a good deal of that type of court management already occurs, at status conferences held pursuant to Rule 16, FRCP, and Local Rule 240. It was the general consensus that that type of individualized case management is much preferable to the creation of more precise rules which would restrict judicial discretion in the area.

Discussion then commenced concerning the subject of a tentative ruling procedure. It was noted that 86% of the survey respondents thought that such a system would be desirable. Questions were raised, however, concerning precisely what was meant by a "tentative ruling," i.e. whether it meant (a) a ruling which focused counsel's attention on particular issues on which the Court wished to have oral argument, (b) a tentative ruling on the motion itself, with oral argument by the losing counsel to be functionally in the nature of a request for reconsideration, or (c) a final order on the motion prior to and without oral argument, which might then generate formal motions for reconsideration. It was noted that this subject had been introduced with considerable frequency at previous annual District conferences, and that for various logistical reasons the Court had not been receptive to it. The members of the Committee noted that some members of the Court will enter orders on motions prior to the scheduled hearing date, where they have determined that oral argument would not be of assistance and the issues are clear; the members of the Committee indicated a desire that that practice be expanded throughout the Court.

There was then some discussion concerning diversity jurisdiction, and (a) whether anything should be done to further restrict it, and (b) if so, whether

anything could be done on a district level as opposed to nationally. It was the general, but not unanimous, view of the Committee that diversity jurisdiction remains a valuable and desirable portion of the federal courts' docket.

Finally, there was discussion concerning new and anticipated legislation. The subcommittee charged with preparation of a report on this subject has indicated an intent to study (a) the federal sentencing guidelines, (b) CIRCLA, (c) Operation Triggerlock, (d) the new federal statute of limitations, and (e) a new domestic violence and gender bias statute. Willie Smith suggested that the recently enacted Older Workers Benefit Protection Act, and amendments to the Americans with Disabilities Act, might also be profitable subjects of the report. There was discussion, however, about whether the report should address matters of prospective legislation, as opposed to existing legislation concerning which there can be focus upon a "track-record" of judicial impact.

MEMORANDUM

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols

DATE: September 23, 1991

RE: Minutes of Committee Meeting of September 19, 1991

The September 19, 1991 meeting of the Biden-II Committee was held at the offices of Downey, Brand, Seymour & Rohrer in Sacramento. In attendance were members Coyne, Johns, Nichols and Segal, the Reporter, Chief Judge Coyle and the Clerk, Jack Wagner.

Distributions were made of the following documents:

1. Revised Data Run of Responses to the Lawyer Questionnaire, showing updated information based on responses obtained subsequent to the Committee's August meeting, through September 4;

2. Report on the Status of the Docket, dated September 12 and submitted by the Docket Subcommittee;

3. Draft Outline of Report of and Cost and Delay Subcommittee;

4. California Judicial Council's Report to the Legislature on Delay Reduction in the Trial Courts of the State of California;

5. Reports by members of the New Legislation Subcommittee on the subjects of (a) Legislative Drafting, (b) the Sentencing Reform Act of 1984, (c) Civil Drug Forfeiture Laws, and (d) the Absence of Statute of Limitations Provisions in Federal Statutes; and

6. An article entitled "Reform Needed for Litigation Flood in Federal Courts," authored by Judge Edith H. Jones of the Fifth Circuit Court of Appeals.

John Oakley reported that he has been significantly assisted by the efforts of a law student, Chris Dawson, in connection with various statistical and other analyses of the responses to the Lawyer Questionnaire. This has been accomplished through the efforts of Jack Wagner in securing funding for such services. A statistical profile of the Eastern District of California is in the course of preparation.

Questions were again raised concerning the matter of becoming an "Early Implementation District." It was pointed out that the primary benefit of such status is eligibility for continuing funding, and that through the efforts of Jack Wagner we had already some funding. There was discussion concerning the extent to which, if at all, early implementation status would be beneficial in achieving our goal of plan acceptance so that we do not have a plan imposed upon us by others. John Oakley repeated his description of the differing views concerning the authority of Washington to "approve" district plans, i.e. Judge Schwarzer's view that the Judicial Conference has general "plan approval authority," and John's view that the statute limits the effect of any "approval authority" to the decision of whether or not to make funding available for implementation of the plan.

There was also discussion concerning the degree of specificity required in connection with plan proposals. There is a continuum of possibilities, involving, at one end, a requirement that specific local rule changes be implemented, and at the other end that nothing at all in the way of changes even be discussed. Between these extremes are, for example, the possibilities (a) that the plan can propose, but not implement, specific local rule changes, and (b) that the plan can propose that the Court look at general areas in which rule changes might be appropriate, without proposing specific changes in those areas. It was the consensus of those present that this latter concept would be the most desirable one on the basis of which to proceed with plan drafting.

There will be a 30-minute presentation of the Committee's Proposed Report and Plan, made at the Eastern District Conference in Napa on the weekend of October 26. At that time, the Reporter will have completed a Proposed Report and Plan, which will be printed and available for review by

the attendees of the Conference. The presentation will simply describe, in summary manner, the charge of the Committee under the CJRA, and the methodology of our response to that charge. We will ask the attendees to review the Proposed Report and Plan, and to make any comments which they may have with regard thereto to either the Reporter or the Chairman within the following two or three weeks, for possible incorporation into a Final Report depending upon content and substance.

There was discussion concerning the interrelationship, if any, of presentations to be made by this Committee and by the Court's Committee on Local Rules, at the Conference. Dick Nichols is to be in contact with John Mendez of the Federal Bar Association to establish whatever coordination of those presentations is appropriate.

It is anticipated, additionally, that public dissemination of the Proposed Plan and Report will be made through one or more of (a) a Federal Bar Association luncheon, (b) notice thereof in Sacramento County Bar Association's publication "The Docket," (c) notice thereof published in The Daily Recorder, legal newspaper in Sacramento, and (d) notice thereof published in the Sacramento Bee and/or the Sacramento Union. Methods of additional public dissemination in the Fresno area remain to be considered.

It is anticipated that, upon the receipt of public comments by late November, a Final Report and Plan will be presented to the Court in early December, for its review and action.

Finally, subsequent to the September 19 meeting, the Chair received the enclosed memorandum from Ralph Mecham of the Judicial Conference, concerning the position of the Administrative Office of the Courts concerning the scope of the CJRA vis-a-vis the Federal Rules of Civil Procedure, etc. Please refer to this enclosure closely, as it appears to state a position impacting existing statutes and rules.

As indicated in the accompanying meeting notice, the next meetings of the Committee will be held at 5:00 p.m. on October 3 at the McDonough offices, and on October 17 at the Diepenbrock offices.

MEMORANDUM

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols

DATE: October 18, 1991

RE: Notice of Meeting

The next meeting of the Biden-II Committee will be held at 5:00 p.m. on Thursday, October 24, 1991, at the offices of Wilke, Fleury, Hoffelt, Gould & Birney, 300 Capitol Mall, Suite 1300, Sacramento, California.

The Biden-II Committee met on October 17, 1991, at the offices of Diepenbrock, Wulff, Plant & Hannegan. The meeting was devoted primarily to the logistics of completing the Committee's report and circulating it at the Eastern District of California Conference scheduled for the weekend of October 26-27. A presentation concerning the work of the Committee is to be made at that Conference on Sunday morning, October 27.

It was decided that a proposed "plan and recommendations" section for the report would be prepared by John Oakley, with assistance from Chuck Stevens, and would be faxed to those Committee members requesting it sometime during the early part of the week of October 21. A further meeting of the Committee will be held on October 24 to discuss that proposed "plan and recommendations." It is anticipated that that "plan and recommendations" portion of the proposed report will be approximately three pages in length. It was suggested and agreed that the

"plan and recommendations" portion of the report should be on colored paper so that it will stand out from the evidentiary and appendices portions of the report.

It was proposed and agreed that, after the October 24 meeting, sufficient copies of the finalized "plan and recommendations" portion of the report be prepared so that each attendee at the Conference can be supplied with a copy. It was also proposed and agreed that approximately fifty (50) copies of the full report should be prepared, so that those attendees interested in reviewing the entire report can obtain it, while avoiding the necessary for preparing unnecessary copies. If we run out, additional copies can be prepared and sent to requesting attendees the following week.

Discussion occurred concerning the time-line for presentation (a) to the judges, and (b) by the judges for early implementation status. It was concluded that the Committee's function is simply to present the report to the judges in sufficient time to enable them, at their option, to apply for early implementation status. Although concern was raised that a final report being presented to the judges in mid-November might not afford sufficient time for judicial review, it was pointed out that the great majority of the final report would be in the form presented at the Conference, and that to the extent that time was a consideration, the judges should be encouraged to commence their reviews of the report based on that draft.

There was discussion concerning the post-report monitoring role of the Committee, and the interrelationship of that role with Local Rules oversight. Concern was voiced about both limited and conflicting input to the judges on the subject. It was ultimately suggested and agreed that Ann Schwing should be invited either (a) with the Court's approval, to become a member of the Committee, or (b) to act as a consultant to the Committee on the subject of Local Rules updating and revision. The Chairman is to discuss the subject with Ann.

cc: Hon. Robert E. Coyle
Hon. David F. Levi
Hon. Gregory G. Hollows
Jack L. Wagner, Clerk
Ms. Dana Merritt, Office of
the Circuit Executive

MEMORANDUM

TO: Biden-II Committee Members
Professor John B. Oakley, Reporter

FROM: Richard W. Nichols

DATE: October 29, 1991

RE: Notice of Meeting, and Minutes of October 24, 1991

The next meeting of the Biden-II Committee will be held at 5:00 p.m. on Thursday, November 14, 1991, at the offices of Segal & Kirby, 770 L Street, Suite 1440, Sacramento, California.

The Biden-II Committee met on October 24, 1991, at the offices of Wilke, Fleury, Hoffelt, Gould & Birney. John Oakley presented a "District Conference Draft" version of the tentative report. There was some discussion concerning a few specific factual assertions in the report, and some modifications were proposed and adopted with regard thereto.

The bulk of the meeting, however, involved the proposed plan recommendations which were to be included with the tentative report. John had previously faxed an outline of proposed plan recommendations to those who had requested advance notice thereof at the October 17 meeting. There was considerable discussion concerning both the language and the substance of some of those proposals. In particular, there was substantial discussion concerning the language to be used in that portion of the recommendations dealing with the subject of tentative rulings. In addition to language modifications, the Committee agreed:

a. To delete a recommendation that statutory and sentencing guideline mandatory minimum sentences be abolished (the Committee felt that this invaded the political/legislative arena to an impermissible degree);

b. To delete a recommendation that the judges announce their intentions to resign or assume Senior Status at an earlier date (the Committee concluded that the judges are already doing this, and that it is in the political/appointment arena that undue delay occurs in the replacement of active judges);

c. To delete a recommendation for initial district judge review of motions under 28 U.S.C. §2255 (the Committee concluded that there were too many variables in this area, and too few situations in which initial district judge involvement would be beneficial, to justify such a procedure as a matter of course);

d. To delete a recommendation for acceptance of joint prosecution/defense stipulations as to predicate facts pertaining to mandatory minimum sentencing (the Committee concluded that the input of the Probation Office could not properly be thus avoided, and that the judges were obligated to find their own facts for sentencing purposes regardless of stipulations by the parties);

e. To add a recommendation suggesting judicial encouragement of alternative dispute resolution procedures; and

f. To add a recommendation suggesting that the court experiment with the holding of settlement conferences (i) shortly after the initial status conferences, or (ii) shortly prior to the pre-trial conference, as well as or instead of the present system which provides for settlement conferences only after the pretrial conference has been completed.

These revisions were to be incorporated into the draft of the Report which was to be presented for discussion at the District Meeting in Napa on October 27. It was agreed that some copies of the full draft report would be available at that meeting for review, and that all attendees would be supplied with (a) a copy of the table of contents of the full draft report, and (b) a full copy of the plan recommendations portion of that report, to encourage input with regard to those recommendations.

cc: Hon. Robert E. Coyle
Hon. David F. Levi
Hon. Gregory G. Hollows
Jack L. Wagner, Clerk
Ms. Dana Merritt, Office of the Circuit Executive

III. ADVISORY GROUP SURVEY OF EASTERN DISTRICT ATTORNEYS' OPINIONS REGARDING EXTENT AND CAUSES OF COST AND DELAY

United States District Court

EASTERN DISTRICT OF CALIFORNIA

8116 U.S. COURTHOUSE
1130 O STREET
FRESNO, CA. 93721

CHAMBERS OF
ROBERT E. COYLE
JUDGE

July 25, 1991

Dear Members of the Bar of the
Eastern District of California:

Pursuant to the Civil Justice Reform Act of 1990, this court has appointed an advisory group for the development and implementation of the Civil Justice Expense and Delay Reduction Plan for the Eastern District of California. A resource for information to formulate such a Plan is the membership of the Bar of the Eastern District.

Through Mr. William J. Coyne, Co-Chairman of the Cost and Delay Subcommittee, you have been furnished with a questionnaire relating to conditions of the civil practice in our District. I urge you to take the responsibility to carefully read and answer all the questions propounded in the questionnaire. If you have any comments, recommendations or suggestions that you wish to express, by all means set them forth under Part D of the questionnaire.

For the advisory group to fulfill its obligation of developing a meaningful Expense and Delay Reduction Plan for our District, we must have input from those who represent the litigants the District serves. The committee has spent endless hours to date and deserves your cooperation in its efforts on your behalf.

Please return your questionnaire as soon as possible, hopefully no later than **August 10, 1991.** My personal thanks for your assistance.

Very truly yours,

ROBERT E. COYLE, Chief Judge
Eastern District of California

REC:lg

CJRA/EDCAG CIVIL JUSTICE EXPENSE AND DELAY REDUCTION SURVEY
JULY 1991

INSTRUCTIONS FOR PARTS A AND B

These questions refer only to the conditions of civil practice in the United States District Court for the Eastern District of California, and should be answered accordingly.

Please circle the number that most closely approximates your view.

Number 1 signifies the strongest level of agreement: you agree completely with the proposition.

Number 2 signifies qualified agreement: for the most part you agree but you have some reservations that preclude you from reporting complete agreement.

Number 3 signifies conflicting views: on balance you neither agree nor disagree.

Number 4 signifies qualified disagreement: for the most part you disagree but you have some reservations that preclude you from reporting complete disagreement.

Number 5 signifies the strongest level of disagreement: you disagree completely with the proposition.

If you wish to express no opinion, don't circle any of the numbers, leaving the response line blank for that proposition. Since this is a rough survey, please opt for one of the five choices rather than seeking to register a more finely gradated opinion. If you circle more than one number or circle the space between numbers, your response won't be counted and we will lose the benefit of your view.

Your responses to Parts A and B will be reviewed only by the court's data processing personnel. If you have any written comments to make on causes of cost and delay in civil litigation in the Eastern District of California, please enter them as directed at Parts C and D, which will be reviewed personally by the lawyer members of the court's advisory group.

PART A: SURVEY QUESTIONS ON POSSIBLE CAUSES OF COST AND DELAY

QUESTION 1

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

There is unnecessary cost involved in civil litigation in the Eastern District of California.

QUESTION 2

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

There is unnecessary delay involved in civil litigation in the Eastern District of California.

QUESTION 3

LACK OF FIRM TRIAL DATES?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced unnecessary cost and delay caused by continuance of a trial date after the parties have engaged in significant preparation for trial on the vacated date.

QUESTION 4

IRRESPONSIBLE DISCOVERY?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced unnecessary cost and delay caused by irresponsible use of discovery to turn over every stone without due cost-benefit consideration of the cost of providing the information sought versus the likely probative value of that information.

QUESTION 5

ABUSIVE DISCOVERY?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced unnecessary cost and delay caused by abuse of the discovery process through "hardball" tactics intended to intimidate or wear down opponents by raising the cost and stress of litigation.

QUESTION 6

ABUSIVE MOTION PRACTICE?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced unnecessary cost and delay caused by the filing of unjustified motions intended to intimidate or wear down opponents by raising the cost and stress of litigation.

QUESTION 7

INEXPERIENCED LAWYERS' LACK OF SOUND PROFESSIONAL JUDGMENT?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced unnecessary cost and delay caused by the poor judgment of inexperienced lawyers who fail to conduct litigation with reasoned discretion in light of the social and transactional costs that could be saved by stipulating to matters of relatively little consequence.

QUESTION 8

LAWYERS' LACK OF EXPERIENCE WITH FEDERAL PRACTICE?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

In this district, I have experienced significant cost and delay caused by the inexperience of counsel with nationwide federal rules of jurisdiction and procedure.

QUESTION 9

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

LAWYERS' FAILURE TO COMPLY WITH THE LOCAL RULES OF THE EASTERN DISTRICT OF CALIFORNIA?

In this district, I have experienced significant cost and delay caused by the failure of counsel to comply with the local rules of the Eastern District of California.

QUESTION 10

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

LAWYERS' FEAR OF MALPRACTICE CLAIMS?

In this district, I have experienced significant cost and delay caused by over-litigation of cases caused by fear of malpractice liability.

QUESTION 11

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

JUDGE-CAUSED INEFFICIENCIES OF PRE-TRIAL CONFERENCING AND MOTION PRACTICE?

In this district, I have experienced significant cost and delay caused by inefficiencies in court procedure that require lawyers to make unnecessary or unnecessarily time-consuming appearances in court.

QUESTION 12

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

FAILURE OF CLIENTS TO CONTROL LAWYERS?

In this district, I have experienced significant cost and delay caused by failure of clients to control lawyers by withholding fees generated by unnecessarily costly or dilatory litigation tactics.

QUESTION 13

FAILURE OF JUDGES TO AWARD SANCTIONS?

Strongly Agree				Strongly Disagree
1	2	3	4	5

In this district, I have experienced significant cost and delay caused by failure of judges to order payment of compensatory sanctions when a party or its counsel has unreasonably delayed litigation or caused unnecessary expense to an opponent.

PART B: SURVEY QUESTIONS ON CASE-MANAGEMENT RELATED TO COST AND DELAY

In your opinion, do (or would) any of the following significantly assist in reducing cost and delay in the Eastern District of California:

QUESTION 14

EARLY AND FIRM PRETRIAL SCHEDULES?

Strongly Agree				Strongly Disagree
1	2	3	4	5

Adhere to a firm schedule of pretrial activities pursuant to a pretrial order entered early in the litigation.

QUESTION 15

EARLY AND FIRM DISCOVERY LIMITS?

Strongly Agree				Strongly Disagree
1	2	3	4	5

Adhere to a firm discovery schedule pursuant to a pretrial order entered early in the litigation.

QUESTION 16

PROGRESSIVE NARROWING OF TRIABLE ISSUES OF FACT?

Strongly Agree				Strongly Disagree
1	2	3	4	5

Narrow triable issues of fact by a succession of pretrial orders entered at status conferences after due consideration of discovery and motion practice.

QUESTION 17

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

TELEPHONIC STATUS CONFERENCES?

Permit counsel to appear at status conferences by telephonic conference call.

QUESTION 18

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

MANDATORY JUDICIALLY-ANNEXED ARBITRATION?

Require non-binding arbitration as a condition to jury trial of civil cases, with shifting of costs and attorney fees to party that demanded jury trial but was less successful by jury verdict than by proposed arbitral award.

QUESTION 19

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

ENCOURAGEMENT OF NON-BINDING ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES?

Actively encourage parties to submit cases to non-binding forms of court-sponsored ADR procedures, such as mediation and early neutral evaluation.

QUESTION 20

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

NOTIFICATION OF AVAILABILITY OF BINDING ADR PROCEDURES?

Notify parties of the availability and possible cost and delay advantages of submitting their disputes to binding ADR by arbitrators or private judges.

QUESTION 21

EARLY ATTORNEY-MODERATED SETTLEMENT CONFERENCES?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

Require parties within six months of filing to participate in settlement conferences presided over by attorneys experienced in litigating similar disputes and empowered to refer the parties for further settlement conferencing before a judicial officer.

QUESTION 22

FIRM CONTROL OF TRIAL DATES?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

Set trial dates as soon as feasible, maintain continuous pressure on parties to be ready for trial on the scheduled date, and barring other disposition commence trial on that date.

QUESTION 23

TENTATIVE RULING SYSTEM?

Strongly Agree . . . . . Strongly Disagree

1 2 3 4 5

Screen pending motions and issue tentative rulings where this may achieve significant cost and delay reduction.

QUESTION 24

Approximately how many cases in the Eastern District of California have you appeared in, supervised, or followed within the past five years?

0-2___ 2-7___ 7 or greater___

PARTS A AND B WITH YOUR RESPONSES TO THESE SURVEY QUESTIONS WILL BE REVIEWED ONLY BY THE COURT'S DATA PROCESSING PERSONNEL. IF YOU HAVE ANY WRITTEN COMMENTS TO MAKE ON CAUSES OF COST AND DELAY IN CIVIL LITIGATION IN THE EASTERN DISTRICT OF CALIFORNIA, PLEASE ENTER THEM AS DIRECTED ON THE FOLLOWING PAGES OF THIS QUESTIONNAIRE, WHICH WILL BE REVIEWED PERSONALLY BY THE COURT'S ADVISORY GROUP.

PART C: FOCUSED COMMENTS ON LOCAL RULES

Please comment, both generally and with respect to specific rules with which you are familiar, on the effectiveness of the Local Rules of the United States District Court for the Eastern District of California[1].

[1] The 1984 Local Rules of the Eastern District of California, with revisions through February 1, 1991, appear in West Publishing Company's paperbound volume, "California Rules of Court, Federal -- 1991." A new "desktop publishing" edition of the 1984 Local Rules, with revisions through May 10, 1991, is available without charge from the office of the clerk of the court (tel. 916-551-2615). The court's edition is designed for use in a three-ring looseleaf binder.

settlements offer appealing possibilities for cost and delay reductions if the time and expense of holding multiple premature settlement conferences can be avoided. The judges of the Court have resolved to experiment individually with early settlement conferences in appropriate cases.

Appended to Point 1: Text of Amended Local Rule 252

RULE 252

ARBITRATION PROCEEDINGS

(a) Scope and Effectiveness of Rule. This Rule governs the voluntary referral of civil actions to ~~binding~~ arbitration. It shall remain in effect until further order of the Court. Its purpose is to provide an incentive for the just, efficient, and economic resolution of certain controversies by means of informal and expeditious procedures.

(b) Administration. Civil actions voluntarily referred to ~~binding~~ arbitration shall be administered pursuant to agreement with the Arbitration Administrator of the Superior Court of the State of California in and for the Counties of Sacramento and Fresno. The Arbitration Administrator shall supervise the operation of the arbitration program, and perform any and all additional duties delegated to said Arbitration Administrator by the presiding judge of the respective Superior Court.

(c) Actions Subject to This Rule. Except as otherwise provided, the following civil actions may be subject to ~~binding~~ arbitration without regard to the amount of monetary relief requested:

(1) Actions founded on diversity of citizenship (28 U.S.C. § 1332);

(2) Actions founded on contract, written or oral;

to pretrial litigation is likely to reduce the overall cost without unreasonable delay of the litigation.

Point 15: Encouragement of counsel to perceive and pursue the benefits of alternative dispute resolution (ADR).

ADR, including early judicial intervention in the settlement process, is an integral part of modern caseload management. The judges of the Court reaffirm their commitment not only to make court-sponsored ADR programs available to litigants in the Eastern District but also to encourage counsel to make knowledge of and participation in ADR programs an essential part of professional practice in the Eastern District. To this end the judges of the Court declare the desirability of exploring and exhausting ADR options as part of the pretrial process in every suitable case.

Point 16: Experimentation with settlement conferences prior to the final pretrial conference.

The Advisory Group has reported the perception of the bar and the experience of the Sacramento County "fast track" program that settlement conferences held relatively early in the pretrial process can in appropriate cases accelerate the time at which the parties agree to settle, thereby reducing the net cost of the settlement. Since the overwhelming majority of civil cases filed in the Eastern District are disposed of by settlement rather than by trial, early

Point 13: Setting of realistic and firm trial dates.

The Advisory Group has reported the sense of the bar that the setting of a firm trial date which is unlikely to be continued as of course is vitally important in inducing timely and thorough preparation and in encouraging serious settlement discussions as the trial date draws near. The judges of the Court declare it to be their policy that a trial date will not be set until the litigation has matured to the point where a reasonably accurate judgment can be made as to when it will be ready for trial, and that a trial date once set will be firmly adhered to absent good cause for upsetting the expectations of the parties. In many cases the trial date can be set at the initial status conference. There are cases, however, in which it is appropriate to schedule a further status conference for the purpose of determining an appropriate trial date.

Point 14: Bifurcation of issues and staged discovery in appropriate cases.

The Advisory Group has reported the perception of litigants and the bar that discovery costs may be unnecessarily incurred when discovery proceeds on all fronts at once in an action in which preliminary issues may be dispositive. The judges of the Court declare it to be their policy in the management of general civil discovery, and particularly in the framing of discovery plans in complex litigation, to bifurcate issues and order staged discovery where such a piecemeal approach

PART III
CASE MANAGEMENT TECHNIQUES AND INNOVATIONS RECOMMENDED FOR IMPLEMENTATION OR EXPERIMENTATION AS A MATTER OF INDIVIDUAL JUDICIAL DISCRETION

Point 11: Experimentation with staggered scheduling of law and motion matters.

The Advisory Group has reported the interest of the bar in avoiding the cost and delay of having every lawyer who appears to be heard on a civil law and motion matter wait in court from the call of the entire calendar until the call of each lawyer's particular case. As circumstances permit the individual judges will in the management of their individual calendars experiment with staggered scheduling of law and motion matters.

Point 12: Consciousness of cost and delay consequences of granting continuances in the absence of stipulation or normally noticed motion.

The Advisory Group has reported the interest of the bar in avoiding the cost and delay caused when a lawyer who has prepared to go forward with a trial or contested motion finds, after investing substantial preparation in anticipation of the scheduled appearance, that the Court has granted an opponent's ex parte request for a continuance of the matter. The judges of the Court resolve to give careful consideration to this particularized cost and delay concern when issuing last-minute continuances.

Point 10: Accurate pre-enactment assessment of and provision for the impact of new legislation on the federal courts.

The judges of the Eastern District of California note that the Civil Justice Reform Act Advisory Group has requested that the responsible political authorities seek systematically to assess and provide for the additional caseload and other adverse impacts that proposed federal legislative and enforcement programs might have upon the federal courts, especially when an expansion of the subject-matter jurisdiction of the federal courts is the means by which a proposed new program of federal regulation would be enforced. The judges believe that it is not for the courts to weigh and pass upon the costs or benefits or net social value of legislative programs. The Advisory Group has concluded from its study of the causes of cost and delay that careful cost-benefit analysis must underlie the legislative policy option to "federalize" some troublesome sphere of conduct traditionally regulated by state law (if regulated at all). The Advisory Group believes it imperative that responsible officials understand and act upon the reality that there is at present no untapped marginal capacity of the federal judiciary to decide more cases without the appointment of more judges suitably equipped with staffs and courtrooms.

Eastern District. It is the view of the Advisory Group based on its research and input from the legal community, that the recent history of the Eastern District has demonstrated conclusively that unfilled judicial vacancies create serious civil justice cost and delay problems that are beyond local control.

Point 9: Revision of case weights used to monitor judicial performance and to assign increased judicial resources.

The judges of the Eastern District of California respectfully request that the Administrative Office of the United States Courts undertake as soon as possible to reevaluate and revalidate the case weights currently used to adjust caseload statistics according to differing demands on judicial time of cases of various types. It is our understanding that the case weights currently in use are based on studies conducted in the 1970s and have not been comprehensively reviewed and revised in over a decade. It is our experience that even within particular case types, most particularly habeas corpus petitions, prisoners' civil rights actions and environmental cases, the caseloads of the 1990s are different in kind as well as degree from the caseloads of the 1970s from which the current case weights were derived.

motion. The judges of the Eastern District have previously expressed on numerous occasions their concern that a tentative ruling system would at once disrupt the judges' schedules for pre-argument preparation and impair the quality of their decisions by elevating first reactions to the status of tentative rulings. Nonetheless, in the spirit of innovation and cooperation that distinguishes practice in the Eastern District from both sides of the bench, Judge _____ has volunteered to institute a temporary pre-argument notification program (PANP) as set forth in the appended Notice to Counsel.

PART II
REQUESTS FOR NATIONAL ASSISTANCE IN REDUCING CIVIL JUSTICE EXPENSE AND DELAY

Point 7: Authorization of extra law clerks in exceptional circumstances.

The judges of the Eastern District of California respectfully request that upon individual particularized showing of need, a district judge or magistrate judge with an above-average caseload be authorized to hire for his or her chambers one extra law clerk in addition to the regularly alloted number of law clerks.

Point 8: Prompt appointment and confirmation of new district judges.

The judges of the Eastern District of California note that the Civil Justice Reform Act Advisory Group has requested that the responsible political authorities make every reasonable effort promptly to fill judicial vacancies in the

procedure. The Chief Judge shall report on the progress of this investigation at or before the 1992 Eastern District Meeting.

Point 4: Expansion of attorney panels for civil rights and habeas corpus cases.

The Chief Judge shall investigate practicable means for the Court to expand the number of attorneys ready, willing, and able to provide representation for uncounseled civil rights complainants and habeas corpus petitioners who have filed civil actions in this Court. The Chief Judge shall report on the progress of this investigation at or before the 1992 Eastern District Meeting.

Point 5: Formalization of organization and planning of the annual Eastern District Meeting.

The Chief Judge shall issue a General Order governing the organization and planning of an annual district meeting.

Point 6: Experimental program for screening pending motions to identify matters suitable for disposition without oral argument, or with oral argument after tentative ruling, or with oral argument directed to particular issues.

The Advisory Group has reported to the Court that strong attorney sentiment exists for reducing the cost and delay of civil motion practice by advising counsel in advance of appearance and argument either that the motion does not merit oral argument, or that the Court desires argument to be informed by its tentative ruling or other indication of pre-argument judicial reaction to the

PART I
CHANGES IN PRACTICE AND PROCEDURE WITHIN THE EASTERN DISTRICT

Point 1: Authorization of voluntary, non-binding, court-annexed arbitration.

Notice is hereby given that absent intervening action by the Court, Local Rule 252 shall be amended as of March 1, 1992, to delete all instances of the word "binding." This amendment to Local Rule 252 shall become effective on March 1, 1992, without further action of the Court. The Court deems the interval between the date of implementation of this Plan and March 1, 1992, to be an appropriate period of time for public notice and comment concerning local rulemaking activity, as required by 28 U.S.C. § 2071(b). The amended text of Local Rule 252 is appended to this Plan, with the deleted words indicated by the use of strike-out type.

Point 2: Creation of advisory panel of attorneys to monitor alternative dispute resolution (ADR) programs.

New General Order _____ is hereby adopted, effective forthwith. The text of new General Order _____ is appended to this Plan.

Point 3: Sponsorship of continuing legal education (CLE) programs.

The Chief Judge shall investigate practicable means for the Court to sponsor or otherwise encourage CLE programs focused on local federal practice and

APPENDIX C

PROPOSED 16-POINT CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN[1]

Upon due consideration of the Report of the Civil Justice Reform Act Advisory Group submitted to the Court on November 15, 1991, and pursuant to the powers and responsibilities vested in them by the Civil Justice Reform Act of 1990 and sections 471 through 482 of Title 28 of the United States Code, the judges in regular active service of the United States District Court for the Eastern District of California hereby adopt and implement the following 16-Point Civil Justice Expense and Delay Reduction Plan. Responsibilities assigned to the Chief Judge by this Plan may be carried out by such other judicial officers, subordinates, consultants, or consenting members of the bar of the Court as the Chief Judge may designate.

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[1] This proposed plan restates in operative language the recommendations of Part IV of the Advisory Group's Report. Under § 103(b) of the Civil Justice Reform Act of 1990 and 28 U.S.C. § 471, the Advisory Group's function is only to *recommend* a Civil Justice Expense and Delay Reduction Plan. The power to *implement* such a plan rests exclusively with the district court.

ADDED VARIABLE: LOCATION OF RESPONDENT AS DETERMINED BY PLACE OF POSTMARK

Value	Frequency	Percent	Valid Percent	Cum Percent
Fresno	44	16.4	16.4	16.4
Sacramento or elsewhere	224	83.6	83.6	100.0
Total	268	100.0	100.0	
Valid cases	268	Missing cases	0	

Q. 22: **FIRM CONTROL OF TRIAL DATES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***72***	***26.9***	***27.5***	***27.5***	***Strong Agreement***
2.0	***94***	***35.1***	***35.9***	***63.4***	***Qualified Agree.***
3.0	51	19.0	19.5	82.8	Neutral
4.0	28	10.4	10.7	93.5	Qualified Disagreement
5.0	17	6.3	6.5	100.0	Strong Disagreement
.	6	2.2	Missing		
	---	---	---		
Total	268	100.0	100		
Valid cases	262	Missing cases	6		

Q. 23: **TENTATIVE RULING SYSTEM?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***131***	***48.9***	***49.8***	***49.8***	***Strong Agreement***
2.0	***97***	***36.2***	***36.9***	***86.7***	***Qualified Agree.***
3.0	22	8.2	8.4	95.1	Neutral
4.0	4	1.5	1.5	96.6	Qualified Disagreement
5.0	9	3.4	3.4	100.0	Strong Disagreement
.	5	1.9	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	263	Missing cases	5		

Q. 24: **EASTERN DISTRICT CASES IN LAST FIVE YEARS?**

Value	Frequency	Percent	Valid Percent	Cum Percent
0-2	32	11.9	12.0	12.0
2-7	118	44.0	44.4	56.4
7+	116	43.3	43.6	100.0
.	2	.7	Missing	
	---	---	---	
Total	268	100.0	100.0	
Valid cases	266	Missing cases	2	

Q. 19: **ENCOURAGEMENT OF NON-BINDING ADR PROCEDURES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***90***	***33.6***	***34.5***	***34.5***	***Strong Agreement***
2.0	***93***	***34.7***	***35.6***	***70.1***	***Qualified Agree.***
3.0	42	15.7	16.1	86.2	Neutral
4.0	17	6.3	6.5	92.7	Qualified Disagreement
5.0	19	7.1	7.3	100.0	Strong Disagreement
.	7	2.6	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	261	Missing cases	7		

Q. 20: **NOTIFICATION OF AVAILABILITY OF BINDING ADR PROCEDURES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***84***	***31.3***	***32.1***	***32.1***	***Strong Agreement***
2.0	***92***	***34.3***	***35.1***	***67.2***	***Qualified Agree.***
3.0	56	20.9	21.4	88.5	Neutral
4.0	18	6.7	6.9	95.4	Qualified Disagreement
5.0	12	4.5	4.6	100.0	Strong Disagreement
.	6	2.2	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	262	Missing cases	6		

Q. 21: **EARLY ATTORNEY-MODERATED SETTLEMENT CONFERENCES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***75***	***28.0***	***28.5***	***28.5***	***Strong Agreement***
2.0	***85***	***31.7***	***32.3***	***60.8***	***Qualified Agree.***
3.0	48	17.9	18.3	79.1	Neutral
4.0	37	13.8	14.1	93.2	Qualified Disagreement
5.0	18	6.7	6.8	100.0	Strong Disagreement
.	5	1.9	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	263	Missing cases	5		

Q. 16: **PROGRESSIVE NARROWING OF TRIABLE ISSUES OF FACT?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***56***	***20.9***	***21.1***	***21.1***	***Strong Agreement***
2.0	***112***	***41.8***	***42.1***	***63.2***	***Qualified Agree.***
3.0	37	13.8	13.9	77.1	Neutral
4.0	36	13.4	13.5	90.6	Qualified Disagreement
5.0	25	9.3	9.4	100.0	Strong Disagreement
.	2	.7	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	266	Missing cases	2		

Q. 17: **TELEPHONIC STATUS CONFERENCES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	***165***	***61.6***	***62.5***	***62.5***	***Strong Agreement***
2.0	***58***	***21.6***	***22.0***	***84.5***	***Qualified Agree.***
3.0	14	5.2	5.3	89.8	Neutral
4.0	15	5.6	5.7	95.5	Qualified Disagreement
5.0	12	4.5	4.5	100.0	Strong Disagreement
.	4	1.5	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	264	Missing cases	4		

Q. 18: **MANDATORY JUDICIALLY-ANNEXED ARBITRATION?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	47	17.5	18.0	18.0	Strong Agreement
2.0	63	23.5	24.1	42.1	Qualified Agreement
3.0	42	15.7	16.1	58.2	Neutral
4.0	41	15.3	15.7	73.9	Qualified Disagreement
5.0	68	25.4	26.1	100.0	Strong Disagreement
.	7	2.6	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	261	Missing cases	7		

Q. 13: **FAILURE OF JUDGES TO AWARD SANCTIONS?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	19	7.1	7.8	7.8	Strong Agreement
2.0	29	10.8	11.9	19.7	Qualified Agreement
3.0	45	16.8	18.4	38.1	Neutral
4.0	***83***	***31.0***	***34.0***	***72.1***	***Qualified Disagree.***
5.0	***68***	***25.4***	***27.9***	***100.0***	***Strong Disagree.***
.	24	9.0	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	244	Missing cases	24		

PART B: SURVEY QUESTIONS ON CASE-MANAGEMENT RELATED TO COST AND DELAY

Q. 14: **EARLY AND FIRM PRETRIAL SCHEDULES?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	52	19.4	19.8	19.8	Strong Agreement
2.0	86	32.1	32.8	52.7	Qualified Agreement
3.0	48	17.9	18.3	71.0	Neutral
4.0	52	19.4	19.8	90.8	Qualified Disagreement
5.0	24	9.0	9.2	100.0	Strong Disagreement
.	6	2.2	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	262	Missing cases	6		

Q. 15: **EARLY AND FIRM DISCOVERY LIMITS?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	42	15.7	16.1	16.1	Strong Agreement
2.0	74	27.6	28.4	44.4	Qualified Agreement
3.0	63	23.5	24.1	68.6	Neutral
4.0	53	19.8	20.3	88.9	Qualified Disagreement
5.0	29	10.8	11.1	100.0	Strong Disagreement
.	7	2.6	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	261	Missing cases	7		

Q. 10: **LAWYERS' FEAR OF MALPRACTICE CLAIMS?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	12	4.5	4.9	4.9	Strong Agreement
2.0	29	10.8	11.9	16.9	Qualified Agreement
3.0	76	28.4	31.3	48.1	Neutral
4.0	69	25.7	28.4	76.5	Qualified Disagreement
5.0	57	21.3	23.5	100.0	Strong Disagreement
.	25	9.3	Missing		
	268	100.0	100.0		
Total					
Valid cases	243	Missing cases	25		

Q. 11: **JUDGE-CAUSED INEFFICIENCIES OF PRE-TRIAL CONFERENCING AND MOTION PRACTICE?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	29	10.8	11.3	11.3	Strong Agreement
2.0	56	20.9	21.8	33.1	Qualified Agreement
3.0	38	14.2	14.8	47.9	Neutral
4.0	84	31.3	32.7	80.5	Qualified Disagreement
5.0	50	18.7	19.5	100.0	Strong Disagreement
.	11	4.1	Missing		
	268	100.0	100.0		
Total					
Valid cases	257	Missing cases	11		

Q. 12: **FAILURE OF CLIENTS TO CONTROL LAWYERS?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	7	2.6	3.1	3.1	Strong Agreement
2.0	16	6.0	7.1	10.2	Qualified Agreement
3.0	75	28.0	33.3	43.6	Neutral
4.0	69	25.7	30.7	74.2	Qualified Disagreement
5.0	58	21.6	25.8	100.0	Strong Disagreement
.	43	16.0	Missing		
	268	100.0	100.0		
Total					
Valid cases	225	Missing cases	43		

Q. 7: **INEXPERIENCED LAWYERS' LACK OF SOUND PROFESSIONAL JUDGMENT?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	22	8.2	8.6	8.6	Strong Agreement
2.0	71	26.5	27.8	36.5	Qualified Agreement
3.0	73	27.2	28.6	65.1	Neutral
4.0	62	23.1	24.3	89.4	Qualified Disagreement
5.0	27	10.1	10.6	100.0	Strong Disagreement
.	13	4.9	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	255	Missing cases	13		

Q. 8: **LAWYERS' LACK OF EXPERIENCE WITH FEDERAL PRACTICE?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	22	8.2	8.7	8.7	Strong Agreement
2.0	59	22.0	23.2	31.9	Qualified Agreement
3.0	73	27.2	28.7	60.6	Neutral
4.0	72	26.9	28.3	89.0	Qualified Disagreement
5.0	28	10.4	11.0	100.0	Strong Disagreement
.	14	5.2	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	254	Missing cases	14		

Q. 9: **LAWYERS' FAILURE TO COMPLY WITH THE LOCAL RULES OF THE EASTERN DISTRICT OF CALIFORNIA?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	17	6.3	6.7	6.7	Strong Agreement
2.0	46	17.2	18.1	24.8	Qualified Agreement
3.0	66	24.6	26.0	50.8	Neutral
4.0	91	34.0	35.8	86.6	Qualified Disagreement
5.0	34	12.7	13.4	100.0	Strong Disagreement
.	14	5.2	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	254	Missing cases	14		

Q. 4: **IRRESPONSIBLE DISCOVERY?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	36	13.4	14.3	14.3	Strong Agreement
2.0	45	16.8	17.9	32.3	Qualified Agreement
3.0	53	19.8	21.1	53.4	Neutral
4.0	79	29.5	31.5	84.9	Qualified Disagreement
5.0	38	14.2	15.1	100.0	Strong Disagreement
.	17	6.3	Missing		
Total	268	100.0	100.0		
Valid cases	251	Missing cases	17		

Q. 5: **ABUSIVE DISCOVERY?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	36	13.4	14.3	14.3	Strong Agreement
2.0	48	17.9	19.0	33.3	Qualified Agreement
3.0	47	17.5	18.7	52.0	Neutral
4.0	86	32.1	34.1	86.1	Qualified Disagreement
5.0	35	13.1	13.9	100.0	Strong Disagreement
.	16	6.0	Missing		
Total	268	100.0	100.0		
Valid cases	252	Missing cases	16		

Q. 6: **ABUSIVE MOTION PRACTICE?**

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	18	6.7	7.1	7.1	Strong Agreement
2.0	37	13.8	14.7	21.8	Qualified Agreement
3.0	70	26.1	27.8	49.6	Neutral
4.0	85	31.7	33.7	83.3	Qualified Disagreement
5.0	42	15.7	16.7	100.0	Strong Disagreement
.	16	6.0	Missing		
Total	268	100.0	100.0		
Valid cases	252	Missing cases	16		

IV. SUMMARY OF ATTORNEY RESPONSES TO COST AND DELAY SURVEY

CJRA/EDCAG LAWYER QUESTIONNAIRE
Table of Responses
SPSS/PC Data Run 9-4-91

PART A: SURVEY QUESTIONS ON POSSIBLE CAUSES OF COST AND DELAY

Q. 1: IS THERE UNNECESSARY COST IN E.D. CAL.?

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	27	10.1	10.4	10.4	Strong Agreement
2.0	64	23.9	24.7	35.1	Qualified Agreement
3.0	59	22.0	22.8	57.9	Neutral
4.0	85	31.7	32.8	90.7	Qualified Disagreement
5.0	24	9.0	9.3	100.0	Strong Disagreement
.	9	3.4	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	259	Missing cases	9		

Q. 2: IS THERE UNNECESSARY DELAY IN E.D. CAL?

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	21	7.8	8.1	8.1	Strong Agreement
2.0	39	14.6	15.1	23.2	Qualified Agreement
3.0	67	25.0	25.9	49.0	Neutral
4.0	100	37.3	38.6	87.6	Qualified Disagreement
5.0	32	11.9	12.4	100.0	Strong Disagreement
.	9	3.4	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	259	Missing cases	9		

Q. 3: LACK OF FIRM TRIAL DATES?

Value	Frequency	Percent	Valid Percent	Cum Percent	Response
1.0	18	6.7	8.0	8.0	Strong Agreement
2.0	20	7.5	8.8	16.8	Qualified Agreement
3.0	49	18.3	21.7	38.5	Neutral
4.0	***75***	***28.0***	***33.2***	***71.7***	***Qualified Disagree.***
5.0	***64***	***23.9***	***28.3***	***100.0***	***Strong Disagree.***
.	42	15.7	Missing		
	---	---	---		
Total	268	100.0	100.0		
Valid cases	226	Missing cases	42		

PART E: OPTIONAL TEAR-OFF SHEET TO BE RETURNED SEPARATELY IDENTIFYING RESPONDENTS WHO WISH TO CONTINUE WORKING ON COST AND DELAY PROBLEMS AND SOLUTIONS

We would like to develop a mailing list of persons experienced in civil litigation in the Eastern District of California who are willing to assist the court in its continuing evaluation of the state of its dockets and the success of its efforts to reduce unnecessary cost and delay. Because we are asking you to identify yourself for purposes of inclusion on this focused mailing list of persons interested in working with the court on its delay and expense reduction program, we have designed this "opt-in" form to be detached (if you wish) from the balance of the form and returned under separate cover to the court. In that way your identity will be completely protected. The address to use (identical to that on the franked return envelope provided for return of Parts A-D), is:

CJRA Survey c/o Jack Wagner
Clerk of the Court
United States District Court
U.S. Courthouse, Second Floor
650 Capitol Mall
Sacramento, CA 95814

If you do not wish to go to the trouble of returning this form separately, you may simply fill it out and leave it attached. Upon receipt by the court, our clerical staff will divide returned forms into three parts: Parts A and B will be routed to data processing. Parts C and D will be routed to our group for personal review of your comments. Any completed Part E returned to the court along with Parts A-D will be detached upon receipt and routed to a separate file for use in future mailings. Your anonymity will thus be protected even if you return all parts of this survey form at once.

By asking to be included on our focused mailing list, you are volunteering to receive and complete such further surveys and questionnaires as the court may develop to study problems of cost and delay in more detail. If you wish to volunteer for the follow-up mailing list, provide the identifying information requested below:

Name

Firm or other affiliation

Mailing address or P.O. Box — Street address, if different

City, State, and ZIP — Street ZIP, if different

Office telephone number(s), including area code

FAX number, including area code

PART D: GENERAL COMMENTS ON PROBLEMS AND SOLUTIONS REGARDING THE COST AND DELAY OF CIVIL LITIGATION IN THE EASTERN DISTRICT

Please enter here any comments you may wish to express regarding the topics raised in Parts A and B or any other cause of cost and delay. Please also let us know your opinion of the degree of unnecessary cost and delay that you perceive or have experienced in the conduct of civil litigation in the Eastern District of California. Use as many additional sheets as necessary to inform us of your views.

Are the rules successful in streamlining civil litigation? What changes, if any, would you make in the rules? We invite your particular attention to the following rules:

(1) Rule 240, Status Conference

(2) Rule 250, Discovery Documents

(3) Rule 251, Motions Dealing with Discovery Matters

(4) Rule 252, Arbitration Proceedings

(5) Rule 260, Summary Judgment Motions

(6) Rule 270, Court Settlement Conferences

(7) Rule 281, Pretrial Statements

(8) Rule 282, Pretrial Conference

(3) Actions founded on the provisions of the Miller Act (40 U.S.C. § 270(b)) wherein the United States has no monetary interest in the claim and the law of California governs; or

(4) Actions requiring the general application of state law.

(d) Discovery. As to all civil actions referred for ~~binding~~ arbitration pursuant to this Rule, discovery shall be completed prior to the date set for the arbitration hearing unless the Court, upon a showing of good cause, makes an order granting an extension of time within which discovery must be completed.

(e) Compensation and Reimbursement of Arbitrators. As to all civil actions referred for ~~binding~~ arbitration pursuant to this Rule, it shall be the continuing duty of counsel for the respective parties to insure the prompt and complete payment of all arbitration fees and costs in accordance with the fee schedules as established by the Superior Court in and for the Counties of Sacramento and Fresno. Failure of counsel to pay when due may be grounds for imposition by the federal court of any and all sanctions as more particularly described in L.R. 110.

Appended to Point 2: Text of New General Order _____

GENERAL ORDER _____

ADVISORY PANEL OF ATTORNEYS TO MONITOR ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

The Chief Judge of the Court shall appoint a panel of attorneys to monitor the use in the district of Early Neutral Evaluation (ENE), Court-annexed Arbitration (CAA), and such other alternative dispute resolution (ADR) programs as the Chief Judge may specify. The chair of the advisory panel shall also be a member of the Court's Civil Justice Reform Act Advisory Group and shall report regularly to the Court and to the Advisory Group on the activities monitored by the advisory panel.

Appended to Point 6: Text of Notice to Counsel

NOTICE TO COUNSEL

EXPERIMENTAL PRE-ARGUMENT NOTIFICATION PROGRAM IN CIVIL LAW AND MOTION MATTERS

(a) Introduction. On a temporary basis Judge _____ will experiment with a form of pre-argument notification program (PANP) for civil law and motion matters that may involve either notice of issues of particular interest to the court, notice of intended ruling, or notice of intent to rule without oral argument. The operation of the PANP is outlined below in sections (b) and (c). In addition to the details specified therein, counsel should understand that:

(1) Tentative rulings may not be issued in all, or even most, cases.

(2) In lieu of a ruling, the court may instead direct the parties to focus their arguments on certain issues or questions, or may simply order the matter submitted without argument.

(3) When a ruling is issued, unless it otherwise states, the court retains the freedom to explain or expand upon its ruling by way of a more detailed minute order or written order prepared by the court or by counsel.

(b) Operation of the PANP.

(1) On the afternoon of the second court day ("the notification day") before any civil law and motion calendar, Judge _____ may cause to be recorded a tentative ruling, statement focusing argument, or statement foreclosing argument with respect to any matter on the forthcoming law and motion calendar. Any tentative ruling or statement for the forthcoming law and motion calendar will be available after _____ p.m. on the notification day by telephoning a taperecorded message at (___) ___-____.[2] When the forthcoming law and motion calendar will be held on a Monday, the notification day shall be the first court day preceding that Monday.

(2) A tentative ruling shall become the ruling of the court, unless a party desiring to be heard so advises the courtroom deputy of Judge _____ no later than _____ p.m. on the notification day, and further advises the clerk that such party has notified the other side(s) of its intention to appear.

(3) Where argument has not been foreclosed by the court, limited oral argument will be permitted.

(c) Orders After Hearing. Unless otherwise directed, the prevailing party shall prepare orders after hearing, and all such orders shall by submitted to Judge _____'s courtroom deputy within _____ court days of the date of hearing, and shall specify, immediately below the case number, the date the matter was last calendared for hearing. Such order shall be served within _____ days of receipt of the tentative order or minute order signed by the court. Unless otherwise directed, compliance with the order shall be within _____ days of service of the signed written order.

---

[2] In the event the Court wishes to install a computerized "on line" PANP by means of an "electronic bulletin board," the following language is suggested for inclusion at this point in the Notice to Counsel as an alternative means for counsel to receive pre-argument notification.

> ". . . or by accessing the court's electronic bulletin board at (___) ___-____. The complete text of the tentative ruling or statement focusing or foreclosing argument may be downloaded in ASCII format by any computer equipped with a 1200 or 2400 baud modem."

APPENDIX D

STATISTICAL MATERIAL RELATING TO PART III.A.'s DOCKET ASSESSMENT

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

	CALIFORNIA EASTERN		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1991	1990	1989	1988	1987	1986		
OVERALL WORKLOAD STATISTICS	Filings*		2,677	2,965	3,072	2,831	2,763	2,742		
	Terminations		2,594	2,597	3,012	3,030	2,858	2,731		
	Pending		3,140	3,268	2,910	2,848	3,048	3,142		
	Percent Change In Total Filings Current Year	Over Last Year		-9.7					72	12
		Over Earlier Years		-12.9		-5.4	-3.1	-2.4	24	2
	Number of Judgeships		7	6	6	6	6	6		
	Vacant Judgeship Months		26.1	17.4	.0	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	382	494	512	472	461	457	40	5
		Civil	318	425	434	407	412	404	45	6
		Criminal Felony	64	69	78	65	49	53	27	8
	Pending Cases		449	545	485	475	508	524	29	6
	Weighted Filings**		349	438	447	428	436	435	54	8
	Terminations		371	433	502	505	476	455	41	5
	Trials Completed		14	16	20	22	21	22	92	13
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	6.9	5.5	5.1	4.8	4.6	4.0	73	11
		Civil**	10	10	9	11	12	10	46	8
	From Issue to Trial (Civil Only)		20	20	22	22	20	17	63	9
OTHER	Number (and %) of Civil Cases Over 3 Years Old		129 4.6	149 5.1	201 7.8	270 10.5	252 8.8	272 9.3	28	3
	Average Number of Felony Defendants Filed per Case		1.4	1.4	1.5	1.4	1.4	1.8		
	Jurors	Avg. Present for Jury Selection	34.46	41.63	33.63	39.90	30.45	41.22	49	4
		Percent Not Selected or Challenged	30.1	35.5	27.4	35.5	24.9	38.2	49	9

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1991 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2228	163	62	853	110	46	148	243	170	25	197	3	208
Criminal*	437	97	29	22	2	15	57	34	3	97	4	44	33

Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.

--See Page 167.

CIVIL FILINGS BY NATURE OF SUIT BY YEAR ENDING JUNE 30
APPENDIX II

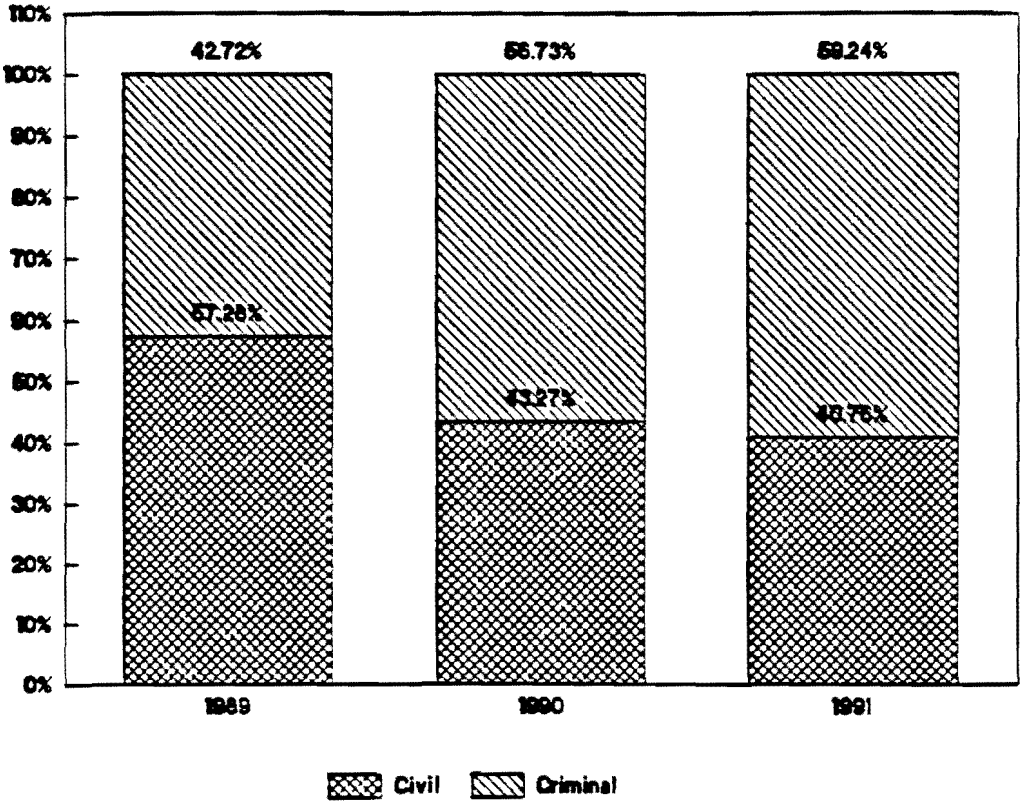
YEAR	TOTAL FILINGS PER YEAR	A- SOCIAL SECURITY	B- RECOVERY OF OVER-PAYMENTS AND ENFORCEMENT OF JUDGMENTS	C- PRISONER PETITIONS	D- FORFEITURES AND PENALTIES AND TAX SUITS	E- REAL PROPERTY	F- LABOR SUITS	G- CONTRACTS	H- TORTS	I- COPYRIGHT, PATENT, AND TRADEMARK	J- CIVIL RIGHTS	K- ANTITRUST	L- OTHER
1991	2,228	163	62	853	111	46	148	243	170	24	197	3	208
1990	2,549	200	97	975	116	55	169	285	166	40	216	3	227
1989	2,601	139	141	886	150	68	160	386	208	47	208	6	202
1988	2,439	268	56	810	82	38	161	349	189	54	224	5	203
1987	2,474	302	52	728	82	57	175	356	226	48	245	8	195
1986	2,424	288	95	619	126	46	154	401	239	50	206	4	196
1985	2,530	282	210	672	94	54	130	312	226	41	195	14	300

FEDERAL COURT MANAGEMENT OF RESOURCES

SACRAMENTO AND FRESNO COUNTIES

COUNTY	CIV/CRIM	YEAR	HOURS	DAYS	%-HRS	%-DAYS
Fresno	Civil	1989	364.5	70	38.43%	37.04%
		1990	205.0	34	41.75%	40.00%
		1991	89.5	16	18.96%	20.51%
				AVERAGE	33.05%	32.52%
Fresno	Criminal	1989	584.0	119	61.57%	62.96%
		1990	286.0	51	58.25%	60.00%
		1991	382.5	62	81.04%	79.49%
				AVERAGE	66.95%	67.48%
Sacramento	Civil	1989	768.3	171	57.28%	56.81%
		1990	703.0	144	43.27%	44.17%
		1991	337.5	71	40.76%	40.57%
				AVERAGE	47.11%	47.18%
Sacramento	Criminal	1989	573.0	130	42.72%	43.19%
		1990	921.5	182	56.73%	55.83%
		1991	490.5	104	59.24%	59.43%
				AVERAGE	52.89%	52.82%

SACRAMENTO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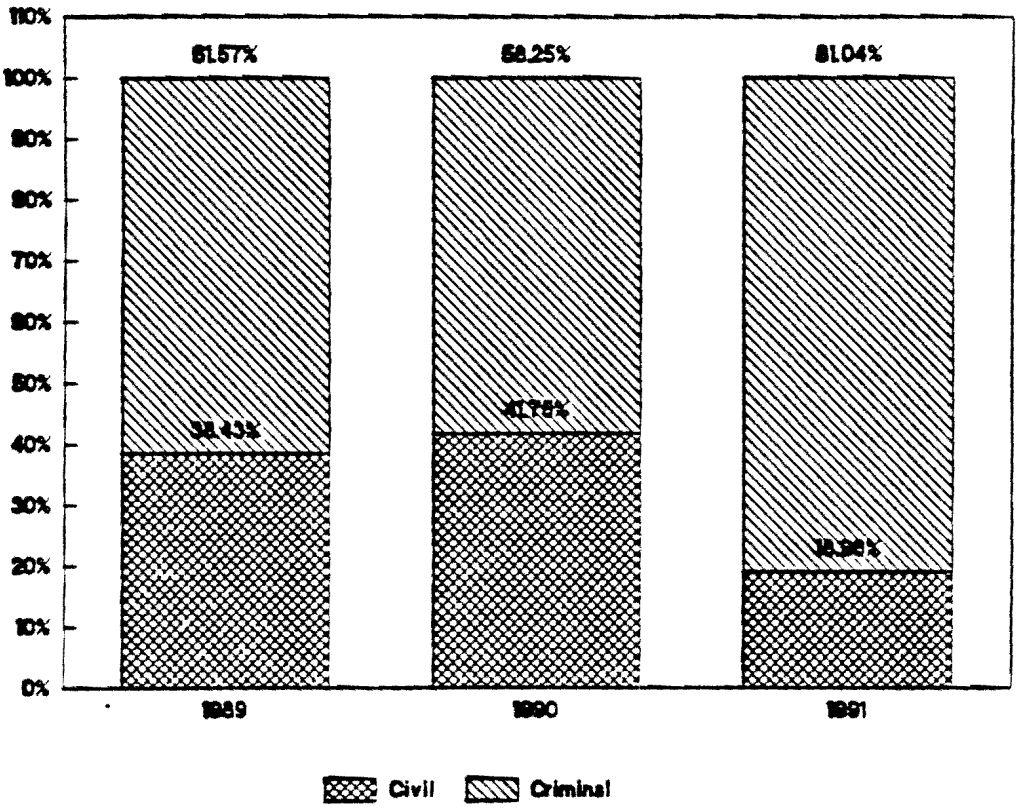
1989
1990
1991
Civil
Criminal

FRESNO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58.25%
61.04%
38.43%
41.75%
38.96%
1989
1990
1991
Civil
Criminal

SACRAMENTO AND FRESNO
CRIMINAL DIVISION STATISTICS
FY 86 - FY 91

INDICTMENTS - % OF CHANGE

	FY86	FY87	FY88	FY89	FY90	FY91 (3/4 FY)
Sacramento	156	192	278	307	269	212 (3/4 FY)
% of change from prior year	18%D	23%I	45%I	10%I	12%D	
Fresno	89	60	102	118	81	61 (3/4 FY)
% of change from prior year	25%D	33%D	70%I	16%I	31%D	
TOTAL	245	252	380	425	350	273 (3/4 FY)
% of change from prior year	20%D	3%I	51%I	12%I	18%D	

COMPARISON BETWEEN FY86 AND FY90 INDICTMENTS

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	156	269	72% Increase
FRESNO	89	81	9% Decrease
BOTH	244	350	43% Increase

DOJ FISCAL YEAR (FY) IS OCT-SEPT.

I = INCREASE
D = DECREASE

Prepared By: Patsy Silva
U.S. Attorney's Office
July 18, 1991

COMPARISON BETWEEN FY86 AND FY90 INDICTMENTS

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	156	269	72% Increase
FRESNO	89	81	9% Decrease
BOTH	245	350	43% Increase

COMPARISON BETWEEN FY86 AND FY90 INDICTMENTS BY CHARGE

	FY86	FY90	INCREASE/DECREASE
WHITE COLLAR CRIME	33	69	109% Increase
NARCOTICS	49	74	51% Increase
BANK ROBBERY	50	38	24% Decrease
IMMIGRATION	62	101	63% Increase
GUNS & EXPLOSIVES	4	15	275% Increase
ALL OTHERS	47	53	13% Increase

DOJ FISCAL YEAR (FY) IS OCT-SEPT.

I = INCREASE
D = DECREASE

Prepared By: Patsy Silva
U.S. Attorney's Office
July 18, 1991

INDICTMENT CHARGE BREAKDOWN
(Broken Down by Predominant Character of Offenses)

	FY86			FY87			FY88			FY89			FY90			FY91(3/4 FY)		
	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL
WHITE COLLAR CRIME (see attached for Charge Breakdown)	15	18	33	14	7	21	45	16	61	42	17	59	51	19	70	48	18	66
NARCOTICS - 21/846; 841(A)(1); 848; and 963;18/1956	29	20	49	28	15	43	56	13	69	77	20	97	58	16	74	48	12	60
BANK ROBBERIES																		
Unarmed	20	10	30	19	15	34	24	26	50	17	10	27	17	7	24	18	7	25
Armed	15	5	20	6	6	12	8	3	11	4	4	8	9	5	14	5	1	6
IMMIGRATION - 8/1326;1324; 1325;1160(B)	55	7	62	95	0	95	82	9	91	109	41	150	87	14	101	54	6	60
TREASURY/POSTAL 18/471-472; 495;500;1708-1709	4	4	8	5	4	9	2	3	5	12	4	16	1	0	1	2	1	3
GUNS & EXPLOSIVES 18/842;844;922;924 1202;5861	1	3	4	10	4	14	20	11	31	13	10	23	11	4	15	13	3	16
PORNOGRAPHY - 18/2241-2256	0	0	0	0	0	0	2	1	3	1	1	2	3	3	6	0	1	1
ALL OTHERS	17	22	39	15	9	24	39	20	59	32	11	43	32	13	45	24	12	36
TOTAL INDICTMENTS	156	89	245	192	60	252	278	102	380	307	118	425	269	81	350	212	61	273 (3/4 FY)

Prepared By: Patsy Silva
U.S. Attorney's Office
July 18, 1991

INDICTMENT CHARGE BREAKDOWN
(Broken Down by Predominant Character of Offenses)

	FY86		FY87		FY88		FY89		FY90		FY91(3/4 FY)	
	SAC	FRE TOTAL	SAC	FRE TOTAL	SAC	FRE TOTAL	SAC	FRE TOTAL	SAC	FRE TOTAL	SAC	FRE TOTAL
WHITE COLLAR CRIME												
Title 26 - Tax Offenses (26\7201;7203;7206; 7207;72010;72030)	5	6 11	0	3 3	5	2 7	4	7 11	5	7 12	5	2 7
18/152 - Bankruptcy Fraud	0	0 0	0	0 0	0	1 1	2	0 2	1	1 2	6	1 7
18/286-287 - False Claims	3	1 4	2	2	6	4 10	2	3 5	4	1 5	1	1 2
18/201 - Bribery	2	0 2	1	0 1	0	2 2	1	0 1	1	1 2	2	1 3
18/656-657 - Bank Embezzlement	2	3 5	6	2 8	11	2 13	11	2 13	15	5 20	9	5 14
18/1001 - False Statement	2	3 5	1	1 2	8	1 9	3	1 4	3	2 5	4	1 5
18/1029 - Access Devices	0	2 2	2	0 2	2	0 2	1	1 2	0	0 0	2	0 2
18/1341 - Mail Fraud	1	1 2	1	0 1	6	3 9	5	3 8	13	0 13	9	3 12
18/1344 - Bank Fraud	0	2 2	1	1 2	7	1 8	13	0 13	9	2 11	10	4 14

Prepared By: Patsy Silva
U. S. Attorney's Office
July 18. 1991

COMPARISON BETWEEN FY86 AND FY90 # OF DEFENDANTS INDICTED

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	260	382	47% Increase
FRESNO	186	143	23% Decrease
BOTH	446	525	18% Increase

COMPARISON BETWEEN FY86 AND FY90 # OF DEFENDANTS INDICTED BY CHARGE (SACRAMENTO AND FRESNO)

	FY86	FY90	INCREASE/DECREASE
WHITE COLLAR CRIME	55	95	73% Increase
NARCOTICS	173	193	12% Increase
BANK ROBBERY	64	48	25% Decrease
IMMIGRATION	73	104	42% Increase
GUNS & EXPLOSIVES	4	17	325% Increase
ALL OTHERS	77	68	12% Decrease

DOJ FISCAL YEAR (FY) IS OCT-SEPT.

I = INCREASE
D = DECREASE

Prepared By: Patsy Silva
U.S. Attorney's Office
July 18, 1991

INDICTMENT CHARGE BREAKDOWN BY DEFENDANT
(Broken Down by Predominant Character of Offenses)

	FY86			FY87			FY88			FY89			FY90			FY91(3/4 FY)		
	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL	SAC	FRE	TOTAL
WHITE COLLAR CRIME (see attached for Charge Breakdown)	31	24	55	22	12	34	60	21	81	51	19	70	69	26	95	69	31	100
NARCOTICS - 21/846; 841(A)(1); 848; and 963;18/1956	98	75	173	71	39	110	125	45	170	167	48	215	132	61	193	92	33	125
BANK ROBBERIES																		
Unarmed	24	15	39	21	16	37	26	28	54	22	11	33	20	8	28	22	7	29
Armed	17	8	25	6	7	13	9	4	13	4	5	9	13	7	20	5	1	6
IMMIGRATION - 8/1326;1324; 1325;1160(B)	55	18	73	99	0	99	84	18	102	115	67	182	89	15	104	55	6	61
TREASURY/POSTAL 18/471-472; 495;500;1708-1709	10	7	17	6	11	17	8	4	12	19	9	28	3	1	4	2	1	3
GUNS & EXPLOSIVES 18/842;844;922;924 1202;5861	1	3	4	11	5	16	20	16	36	13	10	23	13	4	17	17	3	20
PORNOGRAPHY - 18/2241-2256	0	0	0	0	0	0	2	2	4	1	1	2	3	3	6	1	1	2
ALL OTHERS	24	36	60	17	12	29	55	23	78	46	16	62	40	18	58	30	13	43
TOTAL DEFENDANTS	260	186	446	253	102	355	389	161	550	438	186	624	382	143	525	293	96	389

Prepared By: Patsy Silva
U.S. Attorney's Office
July 18, 1991

OF DEFENDANTS PER INDICTMENT

	FY86	FY87	FY88	FY89	FY90	FY91 (3/4 FY)
1 Defendant	163				264	
2 Defendants	43				49	
3 Defendants	16				14	
4 Defendants	14				10	
5 Defendants	3				7	
6 Defendants	2				1	
7 Defendants	2				1	
8 Defendants	1				0	
10 Defendants	0				1	
12 Defendants	1				2	
33 Defendants	1				0	

COMPARISON OF # OF DEFENDANTS PER INDICTMENT

	1986		1990
1 Defendant	163	62% Inc.	264
2-3 Defendants	59	7% Inc.	63
4-9 Defendants	22	14% Dec.	19
10+ Defendants	2	50% Inc.	3

NUMBER OF TRIALS, DAYS, AND HOURS BY DISTRICT COURT JUDGES

	JURY		COURT		JURY&COURT		DAYS		HOURS	
	SAC	FRE	SAC	FRE	SAC	FRE	SAC	FRE	SAC	FRE
	TOTAL		TOTAL		TOTAL		TOTAL		TOTAL	
FY 86	18	11	3	2	21	13	159	44	848	215
	29		5		34		203		1063	
FY 87	21	15	3	2	24	17	89	72	433	361
	36		5		41		161		804	
FY 88	25	21	3	1	28	22	114	85	549	385
	46		4		50		199		934	
FY 89	19	21	0	0	19	21	88	93	406	540
	40				40		181		946	
FY90	29	13	2	0	31	13	190	50	986	325
	42		2		44		240		1311	
FY91 (3/4 FY)	18	13	0	1	18	14	101	70	503	392
	31		1		32		171		895	(3/4 FY)

COMPARISON OF # OF TRIALS BETWEEN FY86 AND FY90

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	21	31	48% Increase
FRESNO	13	13	0%
BOTH	34	44	29% Increase

COMPARISON OF TRIAL DAYS BETWEEN FY86 AND FY90

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	159	190	19% Increase
FRESNO	44	50	14% Increase
BOTH	203	240	18% Increase

COMPARISON OF TRIAL HOURS BETWEEN FY86 AND FY90

	FY86	FY90	INCREASE/DECREASE
SACRAMENTO	848	986	16% Increase
FRESNO	215	325	51% Increase
BOTH	1063	1311	23% Increase

Prepared by: Patsy Silva
U.S. Attorney's Office
July 18, 1991

TRIAL BREAKDOWN BY CHARGE
(Broken Down by Predominant Character of Offenses)

	FY86	FY87	FY88	FY89	FY90	FY91 (3/4 FY)
NARCOTICS	9	18	21	25	25	16
BANK FRAUD	2	1	2	1	1	1
TAX FRAUD	3	5	4	0	0	2
PUBLIC CORRUPTION	0	0	0	0	3	0
OTHER WHITE COLLAR CRIME	5	2	3	4	1	5
BANK ROBBERIES	4	2	6	0	4	2
GUNS & EXPLOSIVES	1	2	4	3	1	3
IMMIGRATION	3	2	5	2	1	1
TREASURY/POSTAL	0	0	0	1	0	0
ALL OTHERS	7	9	5	4	8	2
TOTAL TRIALS	34	41	50	40	44	32 (3/4 FY)

Prepared by: Patsy Silva
U.S. Attorney's Office
July 18, 1991

EXPLANATION OF PROFILES FOR UNITED STATES DISTRICT COURTS

*OVERALL WORKLOAD STATISTICS	Filings	TOTAL NUMBER OF DISTRICT COURT CASES WHICH WERE (Exclusive of all misdemeanor criminal cases)	Filed during the year, including transfers
	Terminations		Terminated during the year
	Pending		Pending at the end of the year
	Percent Change in Total Filings – Current Year	Over Last Year ▶	Percentage change in total filings – current year over previous
		Over Earlier Years ▶	Percentage change in total filings – current year over two, three, four and five years ago
	Number of Judgeships	Authorized Judgeships (Does not include senior judges)	
	Vacant Judgeship Months	Number of months during profile year that an authorized judgeship was not filled	
*ACTIONS PER JUDGESHIP	FILINGS – Total	ALL FIGURES IN THIS SECTION ARE OBTAINED BY DIVIDING THE TOTAL STATISTICS FOR THE COURT BY THE NUMBER OF AUTHORIZED JUDGESHIPS. Excludes all misdemeanor criminal cases	Total civil and criminal felony cases filed
	FILINGS – Civil		Includes all civil cases filed
	FILINGS – Criminal Felony		Includes all criminal felony cases filed whether by indictment, information, or transfer
	Pending Cases		Total pending cases at the end of the year
	Weighted Filings*		This figure is a mathematical adjustment of filings which gives heavier count to cases known to be of a more difficult and time consuming nature
	Terminations		Includes all terminated cases, civil & criminal felony, tried and not tried, disposed of during the year
	Trials Completed		Total trials completed by judges, including evidentiary trials, hearings on temporary restraining orders and preliminary injunctions
MEDIAN TIMES (MONTHS)	From Filing to Disposition – Criminal Felony	For all criminal felony defendants and all civil cases except land condemnation, prisoner petitions, and deportation reviews, terminated during the year whether by trial or other disposition, this figure shows the time interval in months for the middle (median) case. For all criminal felony defendants time is computed from the filing date to either the sentencing date or the dismissal/acquittal date including excludable delays reported under the Speedy Trial Act. When the District had less than 10 terminations the median case was not computed	
	From Filing to Disposition – Civil		
	From Issue to Trial (Civil Only)	For civil cases, except land condemnation, going to a trial during profile years, this figure shows the time interval in months for the middle (median) case. Time is computed from the date the answer or response is filed to the date trial begins.	
OTHER	Number (and %) of Civil Cases Over 3 Years Old	Total number of civil cases pending three years or more as of the end of the year and the percentage these same cases represent of total civil pending caseload. Figures prior to 1987 excluded land condemnation cases	
	Triable Defendants* in Pending Criminal Felony Cases Number (and %)	Excludes those defendants who were awaiting sentence, committed for observation and study, physically or mentally incompetent to stand trial, awaiting trial on another charge, or fugitives. All other defendants are considered triable.	
	Jurors – Present for Jury Selection	Average number of petit jurors reporting to court for jury selection	
	Jurors – Percent Not Selected, Serving, or Challenged	Percent of petit jurors not selected, serving or challenged on jury selection days	

*See Page 167.

NATURE OF SUIT AND OFFENSE CATEGORIES

CASE CLASS	A	B	C	D	E	F	G	H	I	J	K	L
CIVIL	Social Security	Recovery of Overpayments and Enforcement of Judgments	Prisoner Petitions	Forfeitures and Penalties and Tax Suits	Real Property	Labor Suits	Contracts	Torts	Copyright, Patent, and Trademark	Civil Rights	Antitrust	All Other Civil Cases
CRIMINAL FELONY (Excludes transfers.)	Immigration	Embezzlement	Auto Theft	Weapons and Firearms	Escape	Burglary and Larceny	Marihuana and Controlled Substances	Narcotics	Forgery and Counterfeiting	Fraud	Homicide, Robbery, and Assault	All Other Criminal Felony Cases

WHAT THE DISTRICT'S NUMERICAL STANDINGS MEAN — These show where an individual district court stands in relation to other district courts in the circuit and in the country. All "workload" statistics are ranked in descending order (highest value receives rank of 1) and all other statistics are ranked in ascending order (lowest value is ranked first). In some categories fewer than 94 courts are ranked because the information was not available for all districts.

VERTICAL ROW OF NUMBERS IN RIGHT MARGIN

WEIGHTED FILINGS

The weighted filings figures were based on weights developed from the 1979 Time Study conducted by the Federal Judicial Center. A detailed discussion of that project can be found in the 1979 Federal District Court Time Study, published by the FJC in October 1980. Also, a historical statement about weighted caseload studies completed in the U.S. district courts appears in the 1980 Annual Report of the Director, pages 290 through 296.

CIVIL MEDIAN TIME

Civil median times shown for all six years on the profile pages exclude not only land condemnation, prisoner petitions, and deportation reviews, but also all recovery of overpayments and enforcement of judgments cases. The large number of these recovery/enforcement cases (primarily student loan and VA overpayments) are quickly processed by the courts and would shorten the median times in most courts by approximately one month. Excluding these cases gives a more accurate picture of the time it takes for a case to be processed in the Federal courts.

TRIABLE FELONY DEFENDANTS IN PENDING CRIMINAL CASES

Triable defendants include defendants in all pending felony cases who were available for plea or trial on June 30, as well as those who were in certain periods of excludable delay under the Speedy Trial Act. Excluded from this figure are defendants who were fugitives on June 30, awaiting sentence after conviction, committed for observation and study, awaiting trial on state or other Federal charges, mentally incompetent to stand trial, or defendants for whom an authorization of dismissal had been requested by the U.S. Attorney to the Department of Justice.

United States District Courts — National Judicial Workload Profile

			ALL DISTRICT COURTS					
			1990	*1989*	*1988*	*1987*	*1986*	*1985*
OVERALL WORKLOAD STATISTICS	Filings[1]		251,113	263,896	269,174	268,023	282,074	299,164
	Terminations		243,512	262,806	265,916	265,727	292,092	293,545
	Pending		272,636	265,035 *	268,070	264,953	262,637	272,636
	Percent Change in Total Filings – Current Year	Over Last Year ▶		-4.8				
		Over Earlier Years ▶			-6.7	-6.3	-11.0	-16.1
	Number of Judgeships		575	575	575	575	575	575
	Vacant Judgeship Months		540.1	374.1	485.2	483.4	657.9	883.8
ACTIONS PER JUDGESHIP	FILINGS	Total	437	459	467	466	491	520
		Civil	379	406	417	416	444	476
		Criminal Felony	58	53	51	50	47	44
	Pending Cases		474	461 *	466	461	457	474
	Weighted Filings		448	466	467	461	461	453
	Terminations		423	457	462	462	508	511
	Trials Completed		36	35	35	35	35	36
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.3	5.0	4.3	4.1	3.9	3.7
		Civil	9	9	9	9	9	9
	From Issue to Trial (Civil Only)		14	14	14	14	14	14
OTHER	Number (and %) of Civil Cases Over 3 Years Old		25,207 (10.4)	22,391 (9.2)	21,487 (8.8)	19,782 (8.1)	19,252 (7.9)	16,726 (6.6)
	Triable Defendants in Pending Criminal Felony Cases Number (and %)		20,544 (43.6)	18,084 (43.2)	17,349 (46.2)	16,408 (49.3)	14,171 (44.1)	12,301 (42.9)
	Jurors	Present for Jury Selection	35.84	35.89	32.7	31.1	32.0	32.0
		% Not Selected, Serving, or Challenged	34.2	35.8	33.7	32.1	34.3	34.8

1990 CIVIL AND FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

TOTAL CIVIL		TOTAL CRIMINAL FELONY[1]	
A-Social Security	7,439	A-Immigration	2,180
B-Recovery of Overpayments and Enforcement of Judgments	10,878	B-Embezzlement	1,653
C-Prisoner Petitions	42,630	C-Weapons and Firearms	2,582
D-Forfeitures and Penalties and Tax Suits	8,797	D-Escape	777
E-Real Property	9,505	E-Burglary and Larceny	1,819
F-Labor Suits	13,841	F-Marihuana and Controlled Substances	3,427
G-Contracts	35,161	G-Narcotics	7,229
H-Torts	43,759	H-Forgery and Counterfeiting	1,280
I-Copyright,Patent, and Trademark	5,700	I-Fraud	6,508
J-Civil Rights	18,793	J-Homicide and Assault	583
K-Antitrust	472	K-Robbery	1,379
L-All Other Civil	20,904	L-All Other Criminal Felony Cases	2,981

[1] *Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.*

YEAR ENDED JUNE 30, 1990

NINTH CIRCUIT

			AK	AZ	CA.N.	CA.E.	CA.C.	CA.S.	HI	ID	MT
*OVERALL WORKLOAD STATISTICS	Filings		674	3,694	5,293	2,965	9,876	2,842	1,167	711	990
	Terminations		646	3,241	5,225	2,597	9,943	3,047	1,278	738	1,106
	Pending		1,081	4,306	5,490	3,268	10,360	4,138	1,918	799	1,429
	Percent Change In Total Filings Current Year	Over Last Year	-6.8	-2.6	-15.6	-3.5	-11.0	-8.0	2.8	.3	-17.9
		Over 1985	-17.1	-19.1	-43.5	2.9	-11.7	-27.2	-32.1	-25.3	-27.1
	Number of Judgeships		3	8	12	6	22	7	3	2	3
	Vacant Judgeship Months		12.0	4.6	19.2	17.4	12.0	.0	.0	5.0	3.1
*ACTIONS PER JUDGESHIP	FILINGS	Total	225	462	441	494	449	406	389	356	330
		Civil	198	358	400	425	401	275	342	309	257
		Criminal Felony	27	104	41	69	48	131	47	47	73
	Pending Cases		360	538	458	545	471	591	639	400	476
	Weighted Filings*		240	412	500	438	487	440	426	344	323
	Terminations		215	405	435	433	452	435	426	369	369
	Trials Completed		12	46	17	16	29	64	31	18	23
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.2	5.6	6.2	5.5	5.1	6.5	6.1	5.4	5.0
		Civil	13	9	8	10	7	12	14	15	14
	From Issue to Trial (Civil Only)		22	20	16	20	12	18	14	21	21
OTHER	Number (and %) of Civil Cases Over 3 Years Old		179 (17.2)	394 (11.5)	746 (15.1)	149 (5.1)	742 (8.6)	297 (12.7)	546 (30.4)	58 (7.7)	205 (15.8)
	Triable Defendants in Pending Criminal Felony Cases Number (and %)		18 (34.0)	500 (36.8)	545 (59.4)	314 (62.1)	1,264 (52.4)	1,013 (38.1)	59 (34.1)	36 (50.7)	129 (59.2)
	Jurors	Avg. Present for Jury Selection	45.59	52.59	54.98	41.63	51.81	48.80	48.59	31.74	34.71
		Percent Not Selected or Challenged	50.8	31.5	35.8	35.5	25.3	40.7	19.8	22.0	31.1

*See Page 167.

COMPARISON OF DISTRICTS WITHIN THE CIRCUIT -- YEAR ENDED JUNE 30, 1990

NINTH CIRCUIT

			NV	OR	WA.E.	WA.W.	GUAM	NMI
*OVERALL WORKLOAD STATISTICS	Filings		1,953	2,355	1,208	2,643	244	24
	Terminations		1,929	2,325	1,617	2,529	218	35
	Pending		2,214	1,999	866	2,492	933	48
	Percent Change In Total Filings Current Year	Over Last Year	-.7	-5.8	-9.7	-4.8	66.0	-63.1
		Over 1985	-1.1	-16.4	-5.0	-25.5	57.4	-38.5
	Number of Judgeships		4	5	3	7	1	1
	Vacant Judgeship Months		.0	5.2	.0	.0	12.0	.0
*ACTIONS PER JUDGESHIP	FILINGS	Total	488	471	403	378	244	24
		Civil	406	393	238	332	81	22
		Criminal Felony	82	78	165	46	163	2
	Pending Cases		554	400	289	356	933	48
	Weighted Filings*		480	493	334	348	-	-
	Terminations		482	465	539	361	218	35
	Trials Completed		34	50	41	20	9	10
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	6.4	5.7	3.6	4.7	4.0	8.1
		Civil	10	8	11	9	7	19
	From Issue to Trial (Civil Only)		17	11	17	17	-	-
OTHER	Number (and %) of Civil Cases Over 3 Years Old		164 (8.6)	44 (2.6)	61 (9.7)	71 (3.2)	829 (92.3)	2 (4.7)
	Triable Defendants in Pending Criminal Felony Cases Number (and %)		262 (51.3)	222 (46.3)	145 (61.7)	203 (43.1)	7 (16.7)	2 (40.0)
	Jurors	Avg. Present for Jury Selection	34.32	41.91	36.15	37.88	49.75	87.33
		Percent Not Selected or Challenged	23.9	33.3	25.3	36.8	34.2	55.7

CALIFORNIA EASTERN

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. Circuit	
		1985	1984	1983	1982	1981	1980		
OVERALL WORKLOAD STATISTICS	Filings*	2,882	2,714	2,255	1,960	1,609	1,801		
	Terminations	2,891	2,478	1,704	1,630	1,518	1,480		
	Pending	3,131	3,141	2,904	2,348	2,019	1,927		
	Percent Change in Total Filings Current Year	Over Last Year ▶ 6.2		27.8	47.0	79.1	60.0	39	9
		Over Earlier Years ▶						52	9
	Number of Judgeships	6	6	6	6	6	6		
	Vacant Judgeship Months	.0	8.7	5.0	10.3	5.9	23.4		
ACTIONS PER JUDGESHIP	FILINGS Total	480	452	376	327	268	300	62	9
	FILINGS Civil	422	395	316	259	216	246	65	8
	FILINGS Criminal Felony	58	57	60	68	52	54	20	6
	Pending Cases	522	524	484	391	337	321	30	4
	Weighted Filings**	452	468	360	341	278	282	39	7
	Terminations	482	413	284	272	253	247	56	5
	Trials Completed	26	22	28	24	23	15	79	9
MEDIAN TIMES (MONTHS)	From Filing to Disposition — Criminal Felony	4.1	4.2	4.4	3.8	3.5	3.8	66	10
	From Filing to Disposition — Civil	10	11	11	13	11	8	79	12
	From Issue to Trial (Civil Only)	18	15	17	16	27	-	62	8
OTHER	Number (and %) of Civil Cases Over 3 Years Old	195 6.9	191 6.7	204 7.8	143 7.1	176 10.1	187 11.1	66	10
	Triable Defendants** in Pending Criminal Felony Cases Number (and %)	231 (63.3)	181 (54.7)	191 (54.3)	206 (49.0)	168 (54.4)	90 (38.8)		
	Jurors** Present for Jury Selection	42.07	55.91	41.87	—	—	—	84	12
	Jurors** % Not Selected, Serving, or Challenged	44.3	48.3	44.3	-	-	-	87	14

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW—OPEN FOLDOUT AT BACK COVER

1985 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of Case	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil*	2530	282	210	672	94	54	130	312	226	41	195	14	300
Criminal*	341	45	13	1	19	14	20	44	24	27	50	73	11

*Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not
**See Page 261.

CALIFORNIA EASTERN

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
		1986	1985	1984	1983	1982	1981		
OVERALL WORKLOAD STATISTICS	Filings*	2,742	2,882	2,714	2,255	1,960	1,609		
	Terminations	2,731	2,891	2,478	1,704	1,630	1,518		
	Pending	3,142	3,131	3,141	2,904	2,348	2,019		
	Percent Change in Total Filings – Current Year	Over Last Year ▶	-4.9						
		Over Earlier Years ▶		1.0	21.6	39.9	70.4	46	13
	Number of Judgeships	6	6	6	6	6	6	16	4
	Vacant Judgeship Months	.0	.0	8.7	5.0	10.3	5.9		
ACTIONS PER JUDGESHIP	FILINGS – Total	457	480	452	376	327	268	58	9
	FILINGS – Civil	404	422	395	316	259	216	56	8
	FILINGS – Criminal Felony	53	58	57	60	68	52	30	8
	Pending Cases	524	522	524	484	391	337	27	6
	Weighted Filings**	435	452	468	360	341	278	48	7
	Terminations	455	482	413	284	272	253	62	9
	Trials Completed	22	26	22	28	24	23	86	11
MEDIAN TIMES (MONTHS)	From Filing to Disposition – Criminal Felony	4.0	4.1	4.2	4.4	3.8	3.5	48	8
	From Filing to Disposition – Civil	10	10	11	11	13	11	82	13
	From Issue to Trial (Civil Only)	17	18	15	17	16	27	57	7
OTHER	Number (and %) of Civil Cases Over 3 Years Old	272 9.3	195 6.9	191 6.7	204 7.8	143 7.1	176 10.1	73	13
	Trials Defendants** in Pending Criminal Cases Number (and %)	241 (57.4)	231 (63.3)	181 (54.7)	191 (54.3)	206 (49.0)	168 (54.4)		
	Jurors** – Present for Jury Selection	41.22	42.07	55.91	41.87	—	—	83	11
	Jurors** – % Not Selected Serving, or Challenged	38.2	44.3	48.3	44.3	—	—	73	14

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW – OPEN FOLDOUT AT BACK COVER

1986 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2424	288	95	619	126	46	154	401	239	50	206	4	196
Criminal*	297	66	5	1	8	2	10	34	23	19	62	57	10

* Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.
** See Page 167.

CALIFORNIA EASTERN

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
		1987	1986	1985	1984	1983	1982		
OVERALL WORKLOAD STATISTICS	Filings*	2,763	2,742	2,882	2,714	2,255	1,960		
	Terminations	2,858	2,731	2,891	2,478	1,704	1,630		
	Pending	3,048	3,142	3,131	3,141	2,904	2,348		
	Percent Change in Total Filings – Current Year	Over Last Year ▶	.8						
		Over Earlier Years ▶		-4.1	1.8	22.5	41.0	22 / 13	4 / 5
	Number of Judgeships	6	6	6	6	6	6		
	Vacant Judgeship Months	.0	.0	.0	8.7	5.0	10.3		
ACTIONS PER JUDGESHIP	FILINGS – Total	461	457	480	452	376	327	47	8
	FILINGS – Civil	412	404	422	395	316	259	43	5
	FILINGS – Criminal Felony	49	53	58	57	60	68	42	10
	Pending Cases	508	524	522	524	484	391	34	8
	Weighted Filings**	436	435	452	468	360	341	45	6
	Terminations	476	455	482	413	284	272	38	7
	Trials Completed	21	22	26	22	28	24	87	11
MEDIAN TIMES (MONTHS)	From Filing to Disposition – Criminal Felony	4.6	4.0	4.1	4.2	4.4	3.8	66	9
	From Filing to Disposition – Civil	12	10	10	11	11	13	77	14
	From Issue to Trial (Civil Only)	20	17	18	15	17	16	67	8
OTHER	Number (and %) of Civil Cases Over 3 Years Old	252 8.8	272 9.3	195 6.9	191 6.7	204 7.8	143 7.1	70	10
	Trials Defendants** in Pending Criminal Cases Number (and %)	155 (47.5)	241 (57.4)	231 (63.3)	181 (54.7)	191 (54.3)	206 (49.0)		
	Jurors** – Present for Jury Selection	30.45	41.22	42.07	55.91	41.87	—	52	4
	Jurors** – % Not Selected, Serving, or Challenged	24.9	38.2	44.3	48.3	44.3	—	37	4

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW—OPEN FOLDOUT AT BACK COVER

1987 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2474	302	52	728	82	57	175	356	226	48	245	8	195
Criminal*	277	85	14	-	14	1	6	29	13	12	30	59	14

* Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.
** See Page 167.

CALIFORNIA EASTERN

U.S. DISTRICT COURT
JUDICIAL WORKLOAD PROFILE

		TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. Circuit	
		1988	1987	1986	1985	1984	1983		
OVERALL WORKLOAD STATISTICS	Filings*	2,831	2,763	2,742	2,882	2,714	2,255		
	Terminations	3,030	2,858	2,731	2,891	2,478	1,704		
	Pending	2,848	3,048	3,142	3,131	3,141	2,904		
	Percent Change in Total Filings – Current Year	Over Last Year ▶ 2.5							
		Over Earlier Years ▶		3.2	-1.8	4.3	25.5	39 / 8	4 / 2
	Number of Judgeships	6	6	6	6	6	6		
	Vacant Judgeship Months	.0	.0	.0	.0	8.7	5.0		
ACTIONS PER JUDGESHIP	FILINGS Total	472	461	457	480	452	376	48	6
	FILINGS Civil	407	412	404	422	395	316	49	7
	FILINGS Criminal Felony	65	49	53	58	57	60	20	6
	Pending Cases	475	508	524	522	524	484	41	8
	Weighted Filings**	428	436	435	452	468	360	48	6
	Terminations	505	476	455	482	413	284	34	4
	Trials Completed	22	21	22	26	22	28	84	9
MEDIAN TIMES (MONTHS)	From Filing to Disposition Criminal Felony	4.8	4.6	4.0	4.1	4.2	4.4	61	9
	From Filing to Disposition Civil	11	12	10	10	11	11	71	10
	From Issue to Trial (Civil Only)	22	20	17	18	15	17	72	10
OTHER	Number (and %) of Civil Cases Over 3 Years Old	270 10.5	252 8.8	272 9.3	195 6.9	191 6.7	204 7.8	74	10
	Trials Defendants** in Pending Criminal Cases Number (and %)	171 (42.0)	155 (47.5)	241 (57.4)	231 (63.3)	181 (54.7)	191 (54.3)		
	Jurors** Present for Jury Selection	39.90	30.45	41.22	42.07	55.91	41.87	72	7
	Jurors** % Not Selected, Serving, or Challenged	35.5	24.9	38.2	44.3	48.3	44.3	65	10

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW—OPEN FOLDOUT AT BACK COVER

1988 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2444	268	56	810	82	38	161	349	189	54	229	5	203
Criminal*	370	87	15	3	22	4	28	31	39	5	56	65	15

* Filings in the "Overall Workload Statistics" section include criminal felony transfers, while filings "by nature of offense" do not.

** See Page 167.

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

CALIFORNIA EASTERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1989	1988	1987	1986	1985	1984		
OVERALL WORKLOAD STATISTICS	Filings*		3,072	2,831	2,763	2,742	2,882	2,714		
	Terminations		3,012	3,030	2,858	2,731	2,891	2,478		
	Pending		2,910	2,848	3,048	3,142	3,131	3,141		
	Percent Change in Total Filings Current Year	Over Last Year		8.5					16	2
		Over Earlier Years			11.2	12.0	6.6	13.2	10	3
	Number of Judgeships		6	6	6	6	6	6		
	Vacant Judgeship Months		.0	.0	.0	.0	.0	8.7		
ACTIONS PER JUDGESHIP	FILINGS	Total	512	472	461	457	480	452	28	2
		Civil	434	407	412	404	422	395	34	3
		Criminal Felony	78	65	49	53	58	57	17	5
	Pending Cases		485	475	508	524	522	524	39	7
	Weighted Filings**		447	428	436	435	452	468	40	5
	Terminations		502	505	476	455	482	413	31	3
	Trials Completed		20	22	21	22	26	22	86	9
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.1	4.8	4.6	4.0	4.1	4.2	53	9
		Civil	9	11	12	10	11	11	30	4
	From Issue to Trial (Civil Only)		22	22	20	17	18	15	79	11
OTHER	Number (and %) of Civil Cases Over 3 Years Old		201 7.8	270 10.5	252 8.8	272 9.3	195 6.9	191 6.7	55	6
	Triable Defendants** in Pending Criminal Cases Number (and %)		367 (66.1)	171 (42.0)	155 (47.5)	241 (57.4)	231 (63.3)	181 (54.7)		
	Jurors**	Present for Jury Selection	33.63	39.90	30.45	41.22	42.07	55.91	51	2
		% Not Selected, Serving, or Challenged	27.4	35.5	24.9	38.2	44.3	48.3	39	3

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1989 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2601	139	141	886	150	68	160	386	208	47	208	6	202
Criminal*	456	139	22	1	28	5	15	46	74	8	51	44	23

* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

CALIFORNIA EASTERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1990	1989	1988	1987	1986	1985		
OVERALL WORKLOAD STATISTICS	Filings*		2,965	3,072	2,831	2,763	2,742	2,882		
	Terminations		2,597	3,012	3,030	2,858	2,731	2,891		
	Pending		3,268	2,910	2,848	3,048	3,142	3,131		
	Percent Change In Total Filings Current Year	Over Last Year		-3.5					37	6
		Over Earlier Years			4.7	7.3	8.1	2.9	12	2
	Number of Judgeships		6	6	6	6	6	6		
	Vacant Judgeship Months		17.4	.0	.0	.0	.0	.0		
ACTIONS PER JUDGESHIP	FILINGS	Total	494	512	472	461	457	480	24	1
		Civil	425	434	407	412	404	422	24	1
		Criminal Felony	69	78	65	49	53	58	28	8
	Pending Cases		545	485	475	508	524	522	25	5
	Weighted Filings**		438	447	428	436	435	452	38	6
	Terminations		433	502	505	476	455	482	47	7
	Trials Completed		16	20	22	21	22	26	91	12
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.5	5.1	4.8	4.6	4.0	4.1	47	8
		Civil	10	9	11	12	10	11	45	7
	From Issue to Trial (Civil Only)		20	22	22	20	17	18	69	9
OTHER	Number (and %) of Civil Cases Over 3 Years Old		149 5.1	201 7.8	270 10.5	252 8.8	272 9.3	195 6.9	38	4
	Triable Defendants** in Pending Criminal Cases Number (and %)		314 (62.1)	367 (66.1)	171 (42.0)	155 (47.5)	241 (57.4)	231 (63.3)		
	Jurors**	Avg. Present for Jury Selection	41.63	33.63	39.90	30.45	41.22	42.07	71	6
		Percent Not Selected or Challenged	35.5	27.4	35.5	24.9	38.2	44.3	70	10

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1990 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2549	200	97	975	116	55	169	285	166	40	216	3	227
Criminal*	407	117	19	13	4	6	48	31	9	84	4	45	26

* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990

SY91 Statistics Supplement

October 1991

Prepared for the United States District Court for the Eastern District of California

NOTES:

The pages that follow provide an update to section IIb of the February 28, 1991 "Guidance to Advisory Groups" memorandum, incorporating data for Statistical Year 1991 (the twelve months ended June 30, 1991). The pages have been formatted exactly like the corresponding pages of the original memorandum, and may replace the corresponding pages in the original. There are no changes to the text of the document, except for a few references to the dates covered by the data. Certain discrepancies may be apparent between the original document and this update, as follows:

1. Table 1 (page 12) may show slightly different counts of case filings for recent years (e.g., SY88-90) than were shown in Table 1 of the original document. The variations arise from two sources. First, some cases actually filed in a particular statistical year are not reported to the Administrative Office until after it has officially closed the data files for that year (it is a practical necessity that the A.O. at some point close the files so that it may prepare its annual statistical reports). This can result in increased counts of cases filed in prior years. Second, both filing dates and case-type identifiers are occasionally reported incorrectly when a case is filed, but corrected when the case is terminated. The corrections can result in both increases and decreases in case filing counts.

2. Chart 6 (page 15) in the original document was incorrectly based on a subset of the "Type II" cases (as defined on page 10). It has been replaced in this update with a chart entitled "Chart 6 Corrected," which is based on all Type II cases. In most districts, the difference between the original, incorrect Chart 6 and the new version will be insignificant. In only a few districts is the difference significant.

3. An error was made in constructing Chart 8 in the original document. The text indicating the percentage of cases in the "Other" category lasting 3 years or more was shown as "8.0%," without regard to the actual percentage. The bars shown in the chart, however, were accurate. The error has been corrected in this update.

b. Caseload mix and filing trends. The variety of cases making up the caseload in most district courts will be surprising to many who study them for the first time. That variety may be important to advisory groups in assessing the docket and in considering what groups of cases, if any, should be treated differently in management plans. Different types of cases tend to move through the courts in different ways. For example, some are almost always disposed of by default judgment (student loan); some are in the nature of an appeal (bankruptcy); some are a unique subset of another category (asbestos cases in the personal injury category). From readily available data we cannot discern how a specific case moved through the system nor how a future case may move. Some types of cases, however, may move through the system in distinctive ways often enough to warrant your special attention. Do they affect court performance distinctively? Do they consume court resources distinctively?

We have sorted case types into two categories to illustrate the point of distinctive paths. Type I case types 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 summary judgment. Type II case types, 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. (See the table in Appendix B for a complete definition of the case types.)

Type I includes the following case types, which over the past ten years account for about 40% of civil filings in all districts:

- student loan collection cases
- cases seeking recovery of overpayment of veterans' benefits
- appeals of Social Security Administration benefit denials
- condition-of-confinement cases brought by state prisoners
- habeas corpus petitions
- appeals from bankruptcy court decisions
- land condemnation cases
- asbestos product liability cases

The advisory group may wish to consider whether, in this district, these categories or any others identified by the group are distinctive enough to warrant special attention in assessing the condition of the docket or in recommending future actions. Careful documentation of analyses and decisions of this kind will contribute significantly to the final report the Judicial Conference must make to Congress.

Type II includes the remainder of the case types, which collectively account for about 60% of national civil filings over the past ten years. Case types with the largest number of national filings were:

- contract actions other than student loan, veterans' benefits, and collection of judgment cases
- personal injury cases other than asbestos
- non-prisoner civil rights cases
- patent and copyright cases
- ERISA cases
- labor law cases
- tax cases

- securities cases
- other actions under federal statutes; e.g., FOIA, RICO, and banking laws

Chart 1 shows the percentage distribution among types of civil cases filed in your district for the past three years.

Chart 1: Distribution of Case Filings, SY89-91

Eastern District of California

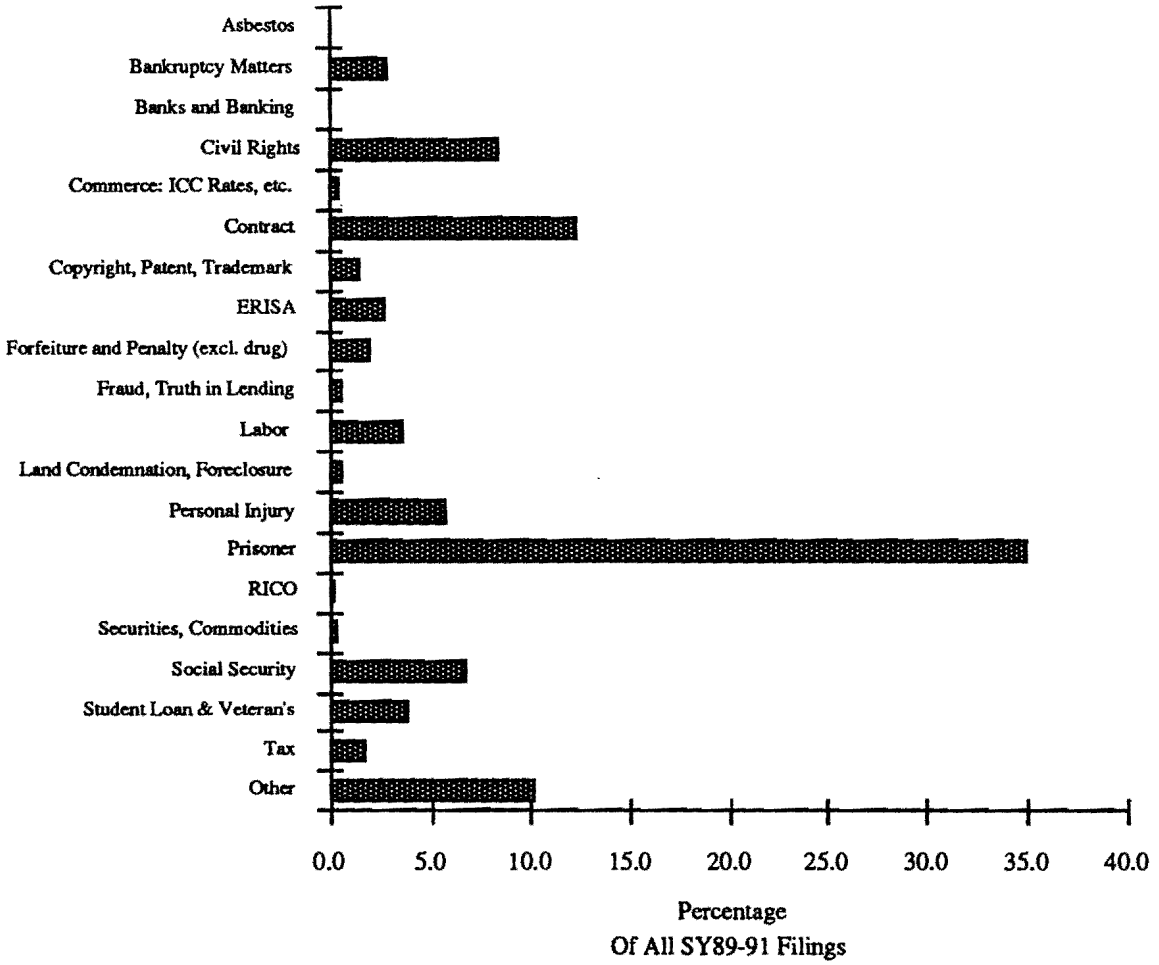


Chart 2 shows the trend of case filings over the past ten years for the Type I and Type II categories. Table 1 shows filing trends for the more detailed taxonomy of case types.

Chart 2: Filings By Broad Category, SY82-91
Eastern District of California

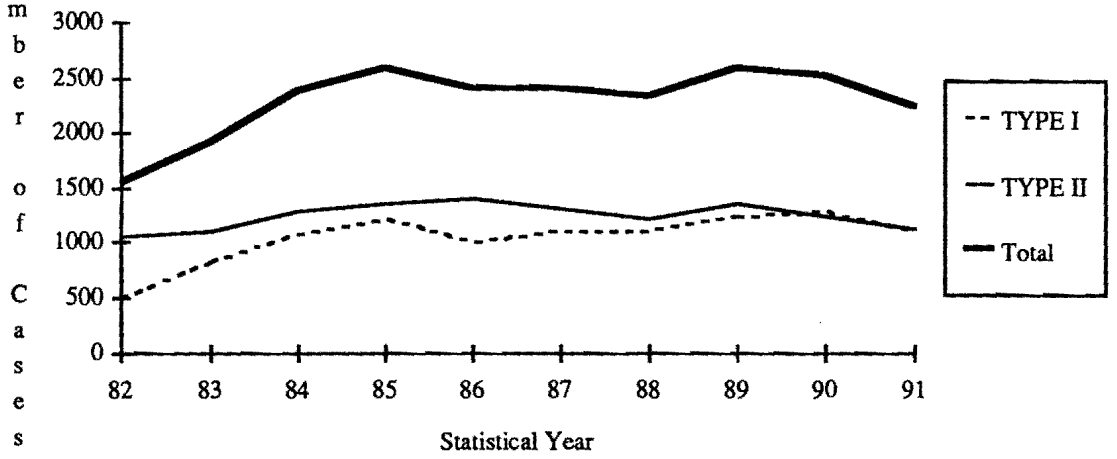


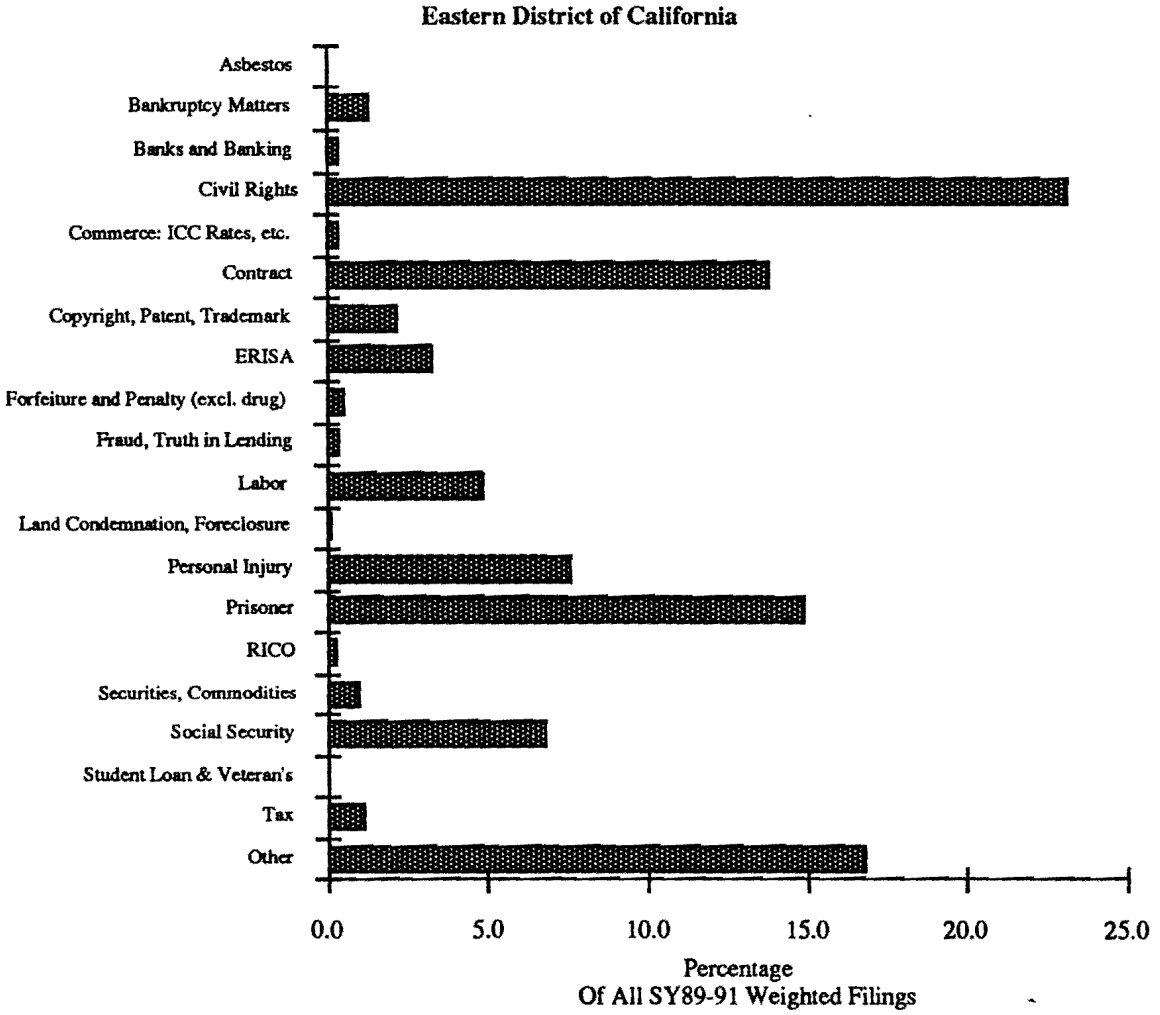
Table 1: Filings by Case Types, SY82-91

Eastern District of California

	82	83	84	85	86	87	88	89	90	91
Asbestos	0	0	0	29	2	1	0	0	1	1
Bankruptcy Matters	4	88	147	134	50	51	55	79	68	67
Banks and Banking	2	3	2	1	4	3	4	1	9	0
Civil Rights	190	187	305	195	210	241	217	207	214	197
Commerce: ICC Rates, etc.	2	9	8	5	5	13	21	13	9	15
Contract	248	302	300	313	400	348	334	385	278	241
Copyright, Patent, Trademark	40	38	50	41	51	50	51	45	41	25
ERISA	14	21	25	36	50	45	69	66	71	65
Forfeiture and Penalty (excl. drug)	27	47	17	41	77	31	38	108	27	10
Fraud, Truth in Lending	11	12	14	18	12	17	17	18	16	12
Labor	76	79	107	94	106	121	85	91	95	83
Land Condemnation, Foreclosure	24	22	5	10	12	26	18	24	13	14
Personal Injury	160	136	157	178	182	181	132	160	136	129
Prisoner	191	342	514	648	593	682	721	852	906	804
RICO	0	0	0	0	3	5	10	8	7	6
Securities, Commodities	14	15	25	19	24	26	18	14	13	6
Social Security	212	261	354	287	284	296	259	138	195	163
Student Loan and Veteran's	76	100	67	102	58	35	50	138	93	60
Tax	65	78	57	54	50	49	44	43	46	42
All Other	195	172	220	366	231	182	185	194	268	288
All Civil Cases	1551	1912	2374	2571	2404	2403	2328	2584	2506	2228

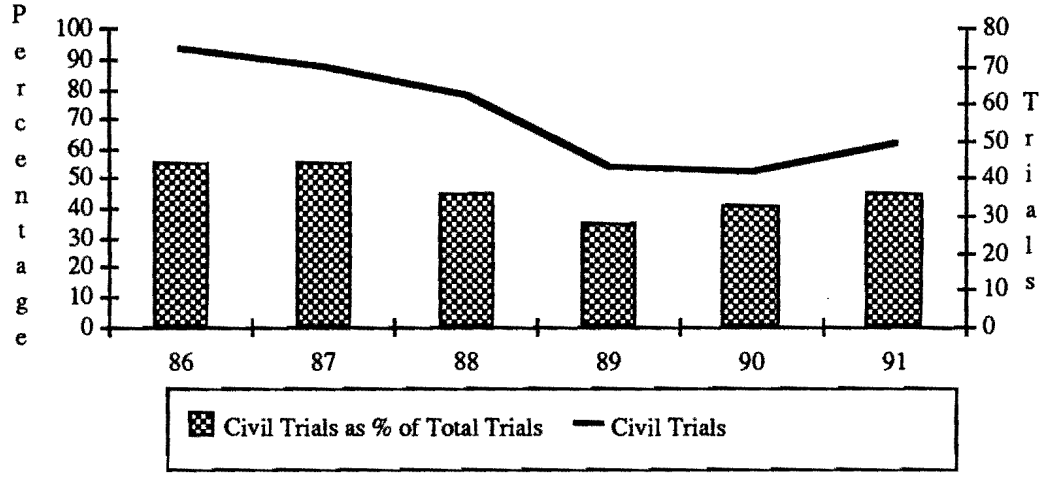
c. Burden. While total number of cases filed is an important figure, it does not provide much information about the work the cases will impose on the court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases. Chart 3 employs the current case weights to show the approximate distribution of demands on judge time among the case types accounting for the past three years' filings in this district. The chart does not reflect the demand placed on magistrate judges.

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



Another indicator of burden is the incidence of civil trials. Chart 4 shows the number of civil trials completed and the percentage of all trials accounted for by civil cases during the last six years.

Chart 4: Number of Civil Trials and Civil Trials as a Percentage of Total Trials, SY86-91
Eastern District of California



d. Time to disposition. This section is intended to assist in assessments of "delay" in civil litigation in this district. We first look at conventional data on the pace of litigation and then suggest some alternative ways of examining data to estimate the time that will be required to dispose of newly filed cases. The *MgmtRep* table shows the median time from filing to disposition for civil cases and for felonies. Time from joinder of issue to trial is also reported for civil cases that reached trial. These data are commonly used to assess the dispatch with which cases have moved through a court in the past. When enough years are shown and the data for those years are looked at collectively, reasonable assessments of a court's pace might be made.

Data for a single year or two or three may not, however, provide a reliable predictor of the time that will be required for new cases to move from filing to termination. An obvious example of the problem 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 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.

Since age of cases terminated in the most recent years is not a reliable predictor of next year's prospects, we offer other approaches believed to be more helpful. *Life expectancy* is a familiar way of answering the question: "How long is a newborn likely to live?" Life expectancy can be applied to anything that has an identifiable beginning and end. It is readily applied to cases filed in courts.

A second measure, *Indexed Average Lifespan* (IAL), permits comparison of the characteristic lifespan of this court's cases to that of all district courts over the past decade. The IAL is indexed at a value of 12 (in the same sense that the Consumer Price Index is indexed at 100) because the national average for time to disposition is about 12 months. A value of 12 thus represents an average speed of case disposition, shown on the charts below as IAL Reference. Values below 12

indicate that the court disposes of its cases faster than the average, and values above 12 indicate that the court disposes of its cases more slowly than the average. (The calculation of these measures is explained in Appendix B.)

Note that these measures serve different purposes. Life expectancy is used to assess change in the trend of actual case lifespan; it is a timeliness measure, corrected for changes in the filing rate but not for changes in case mix. IAL is used for comparison among districts; it is corrected for changes in the case mix but not for changes in the filing rate. Charts 5 and 6 display calculations we have made for this district using these measures.

Chart 5: Life Expectancy and Indexed Average Lifespan, All Civil Cases SY82-91

Eastern District of California

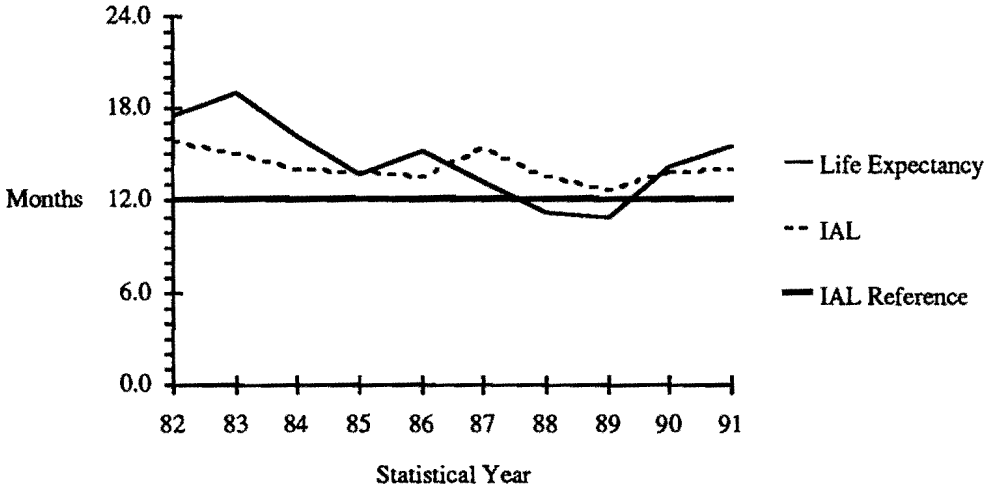


Chart 6 Corrected: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY82-91

Eastern District of California

e. Three-year-old cases. The *MgmtRep* table shows the number and percentage of pending cases that were over three years old at the indicated reporting dates. We have prepared Charts 7 and 8 to provide some additional information on these cases.

Chart 7 shows the distribution of case terminations among a selection of termination stages and shows within each stage the percentage of cases that were three years old or more at termination.

Chart 7: Cases Terminated in SY89-91, By Termination Category and Age

Eastern District of California

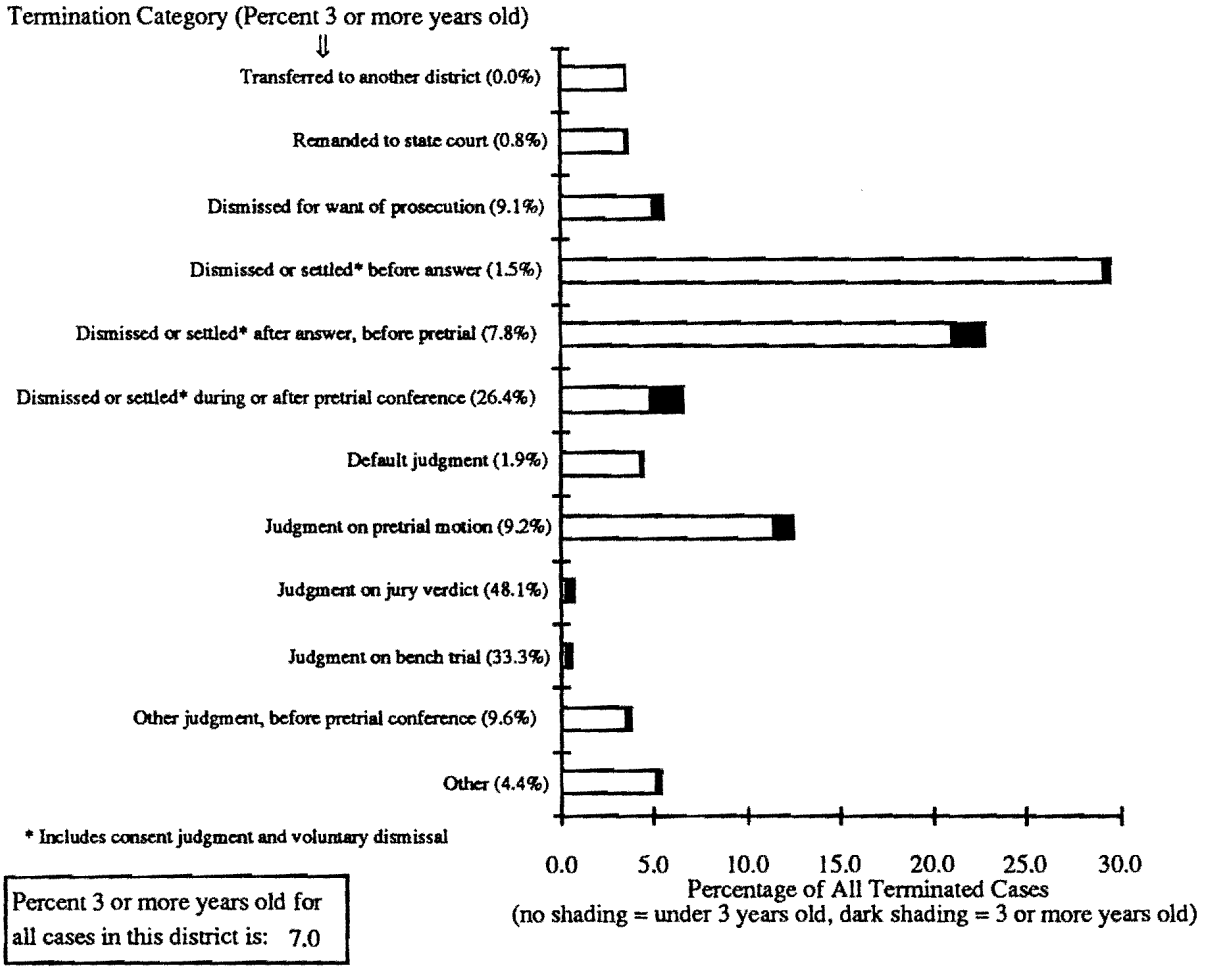
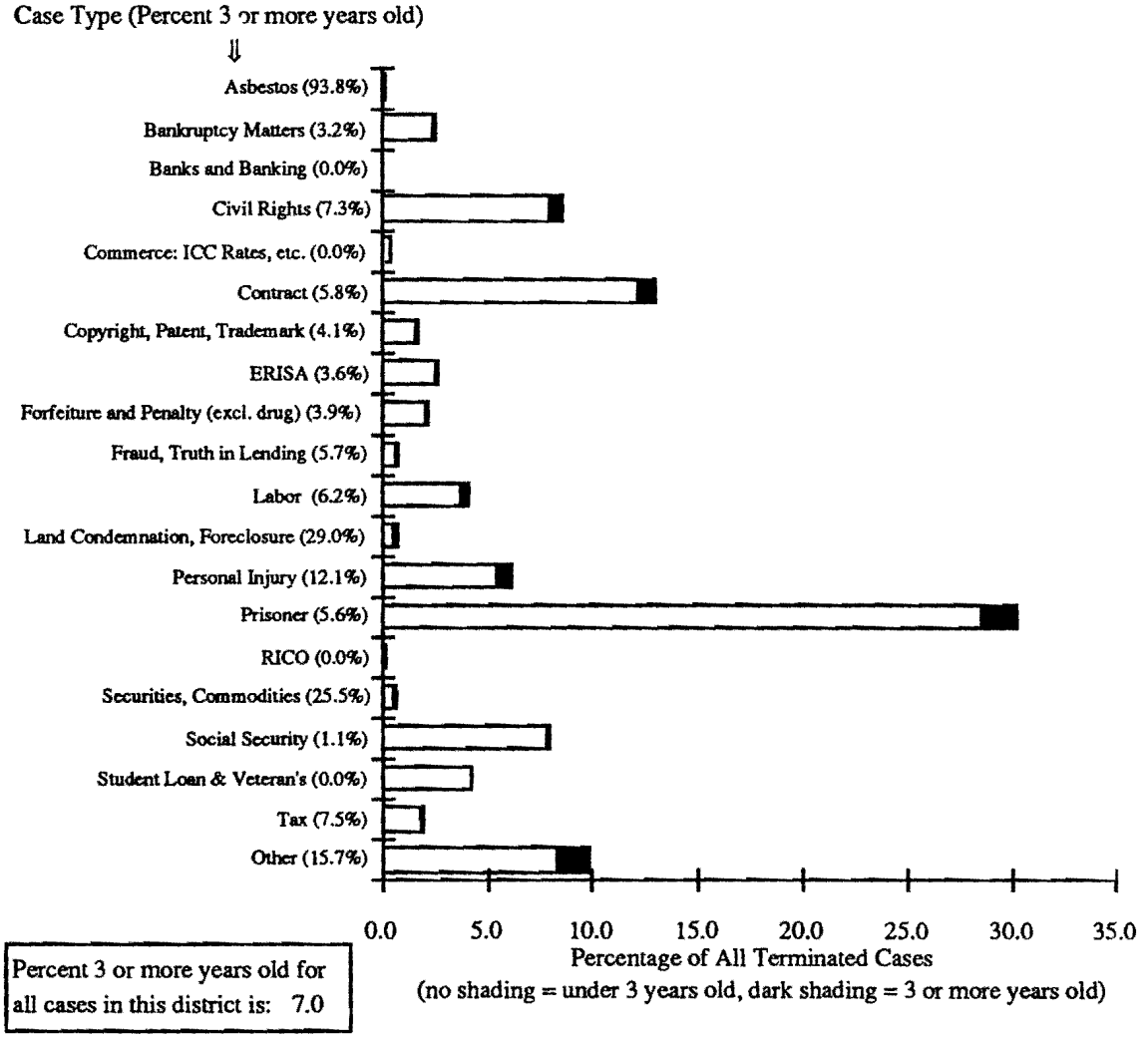


Chart 8 shows the distribution of terminations among the major case types and shows within each type the percentage of cases that were three years old or more at termination.

Chart 8: Cases Terminated in SY89-91, By Case Type and Age

Eastern District of California



f. Vacant judgeships. The judgeship data given in *MgmtRep* permit a calculation of available judge power for each reported year. If the table shows any vacant judgeship months for this district, a simple calculation can be used to assess the impact: Multiply the number of judgeships by 12, subtract the number of vacant judgeship months, divide the result by 12, and then divide the result into the number of judgeships. The result is an adjustment factor that may be multiplied by any of the per-judgeship figures in the *MgmtRep* table to show what the figure would be if computed on a per-available-active-judge basis. For instance, if the district has three judgeships and six vacant judgeship months, the adjustment factor would be 1.2 (36 – 6 = 30; 30 / 12 = 2.5; 3 / 2.5 = 1.2). If terminations per judgeship are 400, then terminations per available active judge would be 480 (400 × 1.2). This will overstate the workload of the active judges if

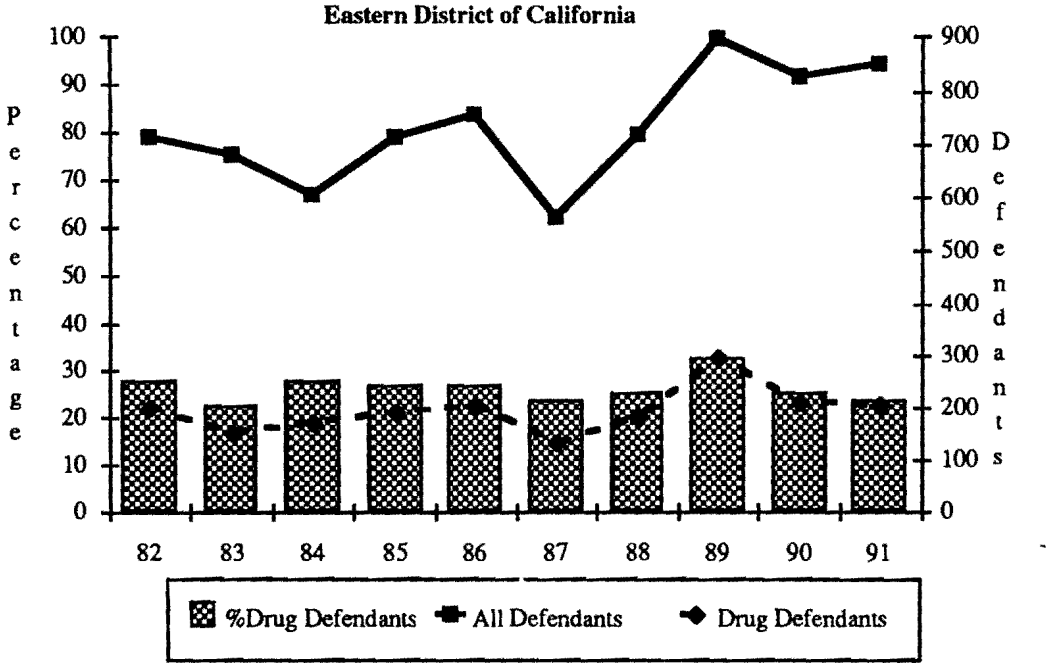
there are senior judges contributing to the work of the district. Because of the varying contributions of senior judges, however, there is no standard by which to take account of their effect on the workload of the active judges.

2. The Criminal Docket

a. The impact of criminal prosecutions. In calling on the advisory group to consider the state of the criminal docket, Congress recognized that the criminal caseload limits the resources available for the court's civil caseload. It is important to recognize that the Speedy Trial Act mandates that criminal proceedings occur within specified time limits, which may interfere with the prompt disposition of civil matters.

The trend of criminal defendant filings for this district is shown in Chart 9. We have counted criminal defendants rather than cases because early results from the current FJC district court time study indicate that burden of a criminal case is proportional to the number of defendants. Because drug prosecutions have in some districts dramatically increased demands on court resources, we have also shown the number and percentage of defendants in drug cases. A detailed breakdown of criminal filings by offense is shown on the last line of the table reproduced on page 8. A more detailed, five-year breakdown of the district's criminal caseload is available from David Cook of the Administrative Office's Statistics Division (FTS/633-6094).

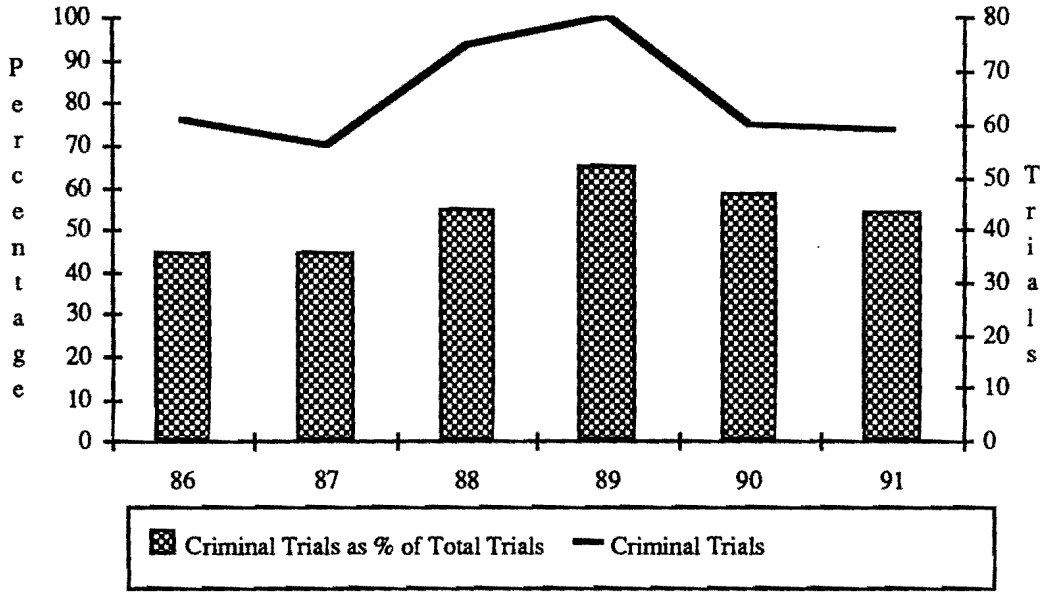
Chart 9: Criminal Defendant Filings With Number and Percentage Accounted for by Drug Defendants, SY82-91



b. The demand on resources by criminal trials. Chart 10 shows the number of criminal trials and the percentage of all trials accounted for by criminal cases during the last six years.

Chart 10: Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY86-91

Eastern District of California



For more information on caseload issues

This section was prepared by John Shapard of the Federal Judicial Center with assistance from David Cook and his staff in the Statistics Division of the Administrative Office of the U.S. Courts. Questions and requests for additional information should be directed to Mr. Shapard at (FTS/202) 633-6326 or Mr. Cook at (FTS/202) 633-6094.

APPENDIX E

RESEARCH PAPERS RELATING TO PART III.D'S ASSESSMENT OF THE IMPACT OF NEW LEGISLATION ON THE FEDERAL COURTS

APPENDIX E-1

LEGISLATIVE DRAFTING[1]

I. INTRODUCTION

Drafting legislation inevitably involves compromise and ambiguity calculated to obtain the votes necessary to secure passage. But accidental ambiguity often causes unnecessary cost and delay in the federal court system. The problem of accidental ambiguity has been raised by both the Report of the Federal Courts Study Committee[2] and the President's Council on Competitiveness.[3] As the President's Council observed: "[T]he federal government bears a great deal of responsibility for the rise in litigation caused by poorly drafted federal statutes."[4]

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[1] Written for the Legislative Impact Subcommittee by Advisory Group member Margaret Z. Johns.

[2] Report of the Federal Courts Study Committee, April 2, 1990, at 22.

[3] Report from the President's Council on Competitiveness: Agenda for Civil Justice Reform in America, August 1991.

[4] Report from the President's Council on Competitiveness: Agenda for Civil Justice Reform in America, August 1991, Council Recommendations: An Overview.

II. THE PROBLEM

As the following examples illustrate, ambiguity is often caused by the failure to use plain English. The first example is a mind-boggling statute the First Circuit had to decipher to resolve an immigration case. The second example is a proposed amendment to Federal Rule of Evidence 404(b) which will -- unless rewritten -- inevitably cause another spate of litigation which could be avoided by careful drafting.

A. Immigration and Naturalization Exemption, 8 U.S.C. § 1128(e)

In 1970, the First Circuit was confronted with an immigration statute authorizing hardship waivers of certain requirements, *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970). The statute read as follows:

> Provided further, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government Agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest * * *.[5]

The court observed that the statute could be read two ways and the question was "which clause modified which." As the court stated, it could be read to condition the waiver of the two-year residence requirement on either (a) the

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[5] 8 U.S.C. § 1182(e).

favorable recommendation of the Secretary of State pursuant to the request of an interested U.S. government agency, or (b) the request of the Commissioner of the INS. But it could also be read as authorizing a waiver conditioned on the recommendation of the Secretary of State when he (a) has received a request of a government agency, or (b) has received a request of the Commissioner after he had determined hardship. Because of the ambiguity, the court was forced to turn to legislative intent to resolve the issue. Ultimately the court determined that the Secretary of State was required to recommend all waivers.

Needless litigation and forays into legislative history could be avoided by simply drafting the statue clearly. For example, the issue would never have arisen if the statute had read:

> The Attorney General may waive the requirement of two-year foreign residence in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest only if one of the following conditions is met:
>
> (1) the Secretary of State recommends the waiver pursuant to a request of an interested United States Government Agency; or
>
> (2) the Secretary of State recommends the waiver pursuant to the request of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien).

In short, by drafting the statute in plain, readable English, the legislature could have avoided this unnecessary litigation.

B. Proposed Amendment to Federal Rule of Evidence 404(b)

In his recent book on legislative drafting, Professor Robert J. Martineau provides a classic example of the ignorance of accidental ambiguity.[6] As Professor Martineau observes, the U.S. Judicial Conference's Advisory Committee on the rules of practice and procedure did an excellent job of reviewing and revising the rules in terms of substance, but did a poor job of expressing the proposed changes clearly. Specifically, the Advisory Committee proposed an amendment to Federal Rule of Evidence 404(b) governing the admissibility of evidence of prior acts of misconduct. Currently, such evidence is not admissible to show character but may be admitted for other purposes. The Advisory Committee proposed an amendment which would require the prosecution in a criminal case to provide the accused with advance notice of the general nature of the evidence it intended to introduce, provided that the accused requests advance notice. The Advisory Committee added the proposed change to the last sentence of the current rule, as follows:[7]

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses*

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[6] R. Martineau, *Drafting Legislation and Rules in Plain English* (1991) at 3-5.

[7] New material italicized.

pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The proposed amendment is loaded with ambiguity. Professor Martineau catalogues a series of potential problems with the proposed language; one is offered here to illustrate the point. The language does not explain whether "the authorization to the court to allow the evidence at trial if good cause is shown applies only when the accused has made a pretrial request for notice with which the prosecution has not complied."[8] What happens if the request is made during trial? Viewed one way, the evidence is admissible without court approval if no pretrial request has been made. But that would mean that in every case the accused would be required to make a pretrial request to protect against the possibility of prior acts evidence. Viewed another way, the court would always be required to approve the evidence, even though no pretrial request is made by the accused. As Professor Martineau concludes: "Far simpler would be to put the burden on the prosecution to give the pretrial notice when it knows in advance that it intends to introduce this type of evidence, but upon a showing of good cause to permit the court to allow the evidence if pretrial notice has not been given.[9]

For purposes of this subcommittee, the merits of different approaches to the issue are irrelevant. The point is that the ambiguity is itself a problem.

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[8] *Id.*

[9] *Id.* at 5.

Regardless of the position the Advisory Committee takes (burden on prosecution to give notice vs. burden on the accused to request notice), it should clearly express its position. If the ambiguity remains, we can count on multiple lawsuits wending their way through the circuits with predictably conflicting results and confusion.

III. POSSIBLE SOLUTIONS

The principles of plain English are well established. Over the past 50 years, they have been developed and publicized by Strunk and White,[10] Mellinkoff,[11] Wydick[12] and Flesch.[13] Professor Martineau had recently published a text showing how to apply those principles to the process of drafting legislation and rules.[14] The trick is to get Congress to pay attention to the principles.

Different proposals for monitoring sloppy drafting have been suggested. The Report of the Federal Courts Study Committee recommends the creation of an Office of Judicial Impact Assessment within the judicial branch to apply a checklist

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[10] W. Strunk, Jr. and E.B. White, *The Elements of Style* (3rd ed. 1979).

[11] D. Mellinkoff, *The Language of the Law* (1963) and *Legal Writing: Sense and Nonsense* (1982).

[12] R. Wydick, *Plain English for Lawyers* (2d ed. 1985).

[13] R. Flesch, *The Art of Plain Talk* (1946), *The Art of Readable Writing* (1949) and *How to Write Plain English* (1979)

[14] R. Martineau, *Drafting Legislation and Rules in Plain English* (1991).

to proposed legislation to cover such things as provision of a statute of limitations, specification of whether the statute is enforceable by a private suit, indications of which statutes are intended to be repealed, modified or preserved intact, an indication of whether the statute should be broadly or narrowly construed, an indication of whether a criminal statute requires specific intent to establish guilt, and avoidance of inconsistency between the text of the statute and the explanation of the statute's meaning in committee reports.[15] The Office would also report to Congress on the interpretations a statute receives in the courts which reveal ambiguities, gaps, and oversights. As the Report explains, these problems could be readily corrected by amendment because they are "technical rather than political glitches."[16] Review for adherence to the principles of plain English could be incorporated into this screening and monitoring proposal.

Alternatively, the President's Council on Competitiveness Agenda for Civil Justice Reform in America recommends that "[a]ll proposed laws should undergo a 'litigation hazards' review to insure that poor drafting of legislation does not create unnecessary litigation."[17] As the Agenda observes:

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[15] Report of the Federal Courts Study Committee, April 2, 1990.

[16] *Id.*

[17] President's Council on Competitiveness Agenda for Civil Justice Reform in America, August 1991.

> Each year thousands of laws are proposed. Too frequently, poor drafting leaves routine areas, e.g., statute of limitations or standards of proof, unaddressed. These ambiguities and omissions result in uncertainty and court challenges.

Again, a review for compliance with plain English principles could be incorporated into the proposed "litigation hazards" review.

Another approach would be to put the burden of screening for plain English on Congress itself. A number of plain English statutes have been adopted which put the burden of using plain English on the drafting entity. For example, a California statute provides that each department, office or agency of state government "shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style."[18] Admittedly, this provision has failed to solve the problem, but it's a start. Ideally, specific standards would be articulated and applied to proposed legislation rather than a generalized admonition to write using a "coherent and easily readable style." Hawaii has gone the farthest by adopting a constitutional provision requiring plain language for all governmental writing.[19]

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[18] Cal. Gov't Code § 6215(a) (West Supp. 1991).

[19] Hawaii Const., Art. XVII, Section 13.

IV. CONCLUSION

Accidental ambiguity causes unnecesary cost and delay in the federal courts. While some ambiguity is unavoidable, sometimes the problem could easily have been eliminated by careful drafting. A thorough scrutiny of legislation and adherence to the principles of plain English would save both the courts and the litigants thousands of hours and dollars in needless litigation.

APPENDIX E-2

THE ABSENCE OF LIMITATIONS PROVISIONS IN FEDERAL STATUTES CREATING PRIVATE RIGHTS OF ACTIONS[1]

I. INTRODUCTION

One major source of judicial delay and expense is Congress' habit of expanding the jurisdiction of federal courts by enacting civil legislation without specifying limitation periods. Congress' frequent failure to include statutory cutoffs has resulted in numerous lawsuits which needlessly monopolize judicial resources. While newly passed legislation and the admirable efforts of the Supreme Court have lessened the problem, its effects continue to adversely impact the federal court system.

II. DEFINING THE PROBLEM

Federal causes of action lack limitation periods for a variety of reasons. Disputes arise over limitation periods when courts find an implied cause of action in a statute, such as in section 10(b) of the Securities Exchange Act or section 301 of the Labor Management Relations Act.[2] In other cases, the cause of action is entirely judge-made, such as the right to seek damages for constitutional violations

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[1] Written for the Legislative Impact Subcommittee by Advisory Group member and subcommittee chair Kenneth C. Mennemeier, with the assistance of Eric Glassman.

[2] *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (§ 10(b)); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) (§ 301).

by a federal agent based on *Bivens v. Six Unknown Named Agents.*[3] Yet the vast majority of disputes arise because Congress failed to specify a limitation period in creating a cause of action. The last few years have seen federal appellate courts deal with limitation issues involving such major pieces of legislation as the Social Security Act, ERISA, the Economic Stabilization Act, RICO, the Clean Air Act, and sections 1981 and 1983 of the Civil Rights Act.[4] In each case, the statute is silent as to the proper limitation period.

Courts have three options when faced with interpreting a statute without a time bar. Courts have sometimes held that the lack of a limitation period reflects Congress' intent that no action under the statute be time barred.[5] A much more common response, however, has been for the court to borrow the limitation period of the most analogous state cause of action. Federal courts have applied state limitation periods to federal claims so frequently that the Seventh Circuit

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[3] 403 U.S. 388 (1971). *See, e.g., Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989).

[4] *E.g., Hollander v. Brezenoff*, 787 F.2d 834 (2nd Cir. 1986) (Social Security); *Northern Cal. Retail Clerks Union v. Jumbo Markets Inc.*, 906 F.2d 1371 (9th Cir. 1990) (ERISA); *Kellermyer v. Blue Flame Gas Corp.*, 797 F.2d 983 (Temp. Emer. Ct. App.) *cert. denied*, 479 U.S. 985 (1986) (Economic Stabilization Act); *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987) (RICO); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987) (Clean Air Act); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (§ 1981); *Owens v. Okure*, 488 U.S. 235 (1989) (§ 1983).

[5] *E.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (Title VII enforcement actions by EEOC are not subject to statute of limitations; courts have discretion to bar actions in cases of inordinate delay).

describes the process as acting on "auto-pilot."[6] An increasingly prevalent practice has been for the court to apply the time limitation of a similar federal statute. The Supreme Court has recently taken this approach in creating limitation periods for violations of RICO and section 10(b) of the Securities Exchange Act.[7]

III. IMPACT ON THE COURTS

Even given these limited options, the results have been disastrous. Extended battles over which state or federal cause of action is most nearly analogous to the statute in question are common. One commentator notes that three courts reached three different conclusions as to the proper statute of limitations in a single section 1983 civil rights case.[8] All three applications were proven incorrect by the Supreme Court in *Wilson v. Garcia*, a holding which the Court needed to later clarify in *Owens v. Okure*.[9]

Courts have been very vocal in criticizing the current situation and calling for standardized limitation periods. Writing for the majority in *Agency Holding Corp. v. Malley-Duff & Assoc.*, Justice O'Connor echoed concerns raised in

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[6] *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir. 1990) *cert. denied*, 111 S. Ct. 2887 (1991).

[7] *Malley-Duff*, 483 U.S. 143 (RICO) and *Lampf, Pleva*, 111 S. Ct. 2773 (§ 10(b)).

[8] D. Siegel, *Practice Commentary: The 1990 Enactment of a Uniform Statute of Limitations on Federal Claims*, in 28 U.S.C.A. § 1658 (1991 Supp.) at 22-23.

[9] *Wilson*, 471 U.S. 261 (1985); *Owens*, 488 U.S. 235 (1989).

Wilson in holding that "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation'" in RICO actions.[10] The frustration experienced by lower courts is aptly summarized by Judge Easterbrook's observation in attempting to apply limitation periods to federal securities acts:

> This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours . . . . Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in law, for help. . . . [T]he courts of appeal disagree on every possible question about limitation periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field * * *.[11]

In the absence of such uniformity and predictability, courts have continued to muddle through.

Numerous problems have been created by Congress' failure to specify time bars.[12] The most obvious is the added burden on the court system. An examination of the Supreme Court's calendar in any recent year would show that

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[10] 483 U.S. at 150.

[11] *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) (citations omitted) *cert. denied*, 484 U.S. 943 (1987).

[12] The Federal Courts Study Committee reported the following regarding the current situation:

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

H.R. Rep. No. 734, 101st Cong., 1st Sess. 24, *reprinted in* 1990 U.S. Code Cong. & Admin. News 6850, 6870, *quoting* Report of the Federal Courts Study Committee.

the Court is expending significant energy in resolving these issues. The impact is reflected to a greater degree in the already crowded dockets of the lower courts.

Less obvious results also multiply the burden on the courts. The absent limitation periods cause uncertainty for litigants, who justifiably seek judicial resolution. As Judge Posner notes, "predicting what statute of limitations will be borrowed is impossible and as a result extensive litigation often is necessary before a definitive conclusion on the limitations period emerges. It may not come until a Supreme Court decision is rendered resolving an intercircuit conflict that was years in the brewing."[13] Additionally, since statutes of limitations vary from state to state, forum shopping is encouraged when a litigant realizes that a federal limitations period will be discerned by analogy to state law.

IV. MOVEMENT TOWARD A PARTIAL SOLUTION

Two factors have lessened the impact uncertain limitation periods will have on the federal court system in the future. The first of these is the diligence the Supreme Court has shown in settling statute of limitation disputes. The past few years have seen the Court deal with the proper time bar from statutes as widely litigated as the Securities Exchange Act to legislation as obscure as the Catawba

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[13] *Short*, 908 F.2d at 1394 (Posner, J., concurring).

Indian Tribe Division of Assets Act.[14] Significantly, the Court has clarified the statute of limitations for four acts which were the source of extensive litigation in the circuit courts: section 10(b) and Rule 10b-5 of federal securities law, sections 1981 and 1983 of the Civil Rights Act, RICO, and section 301 of the Labor Management Relations Act.[15] Resolution of these issues alone should have a major impact on the number of statute of limitation challenges heard in federal courts each year.

Passage of the Judicial Improvements Act of 1990 should also help to lessen the number of limitation controversies. The act includes a catch-all limitation provision providing a four year limitation period for all civil statutes passed after December 1, 1990 without a specified time bar.[16] Thus no limitation problems should arise in new legislation. If Congress fails to include a specific time bar, the four year residual statute will apply.

While the problem is likely to diminish in the future, it is clear that issues regarding the proper statute of limitation for a federal cause of action will

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[14] *Lampf, Pleva*, 111 S. Ct. 2773; *South Carolina v. Catawba Indian Tribe Inc.*, 476 U.S. 498 (1986).

[15] *Lampf, Pleva*, 111 S. Ct. 2773 (securities); *Lukens Steel*, 482 U.S. 656 (§ 1981); *Owens*, 488 U.S. 235 (§ 1983); *Malley-Duff*, 483 U.S. 143 (RICO); *Del Costello*, 462 U.S. 151 (labor).

[16] 28 U.S.C.A. § 1658 provides:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

continue to needlessly burden the courts. Because the House of Representatives ignored the recommendation of the Department of Justice and the Judicial Conference to make the catch-all provision retrospective,[17] uncertainty will continue to exist in interpreting statutes that the Supreme Court has not yet ruled upon. Although their number is diminishing, conflicts among the circuits still exist. For example, while the Ninth Circuit affirmed a district court ruling that the statute of limitations for an ERISA claim is to be borrowed from a state breach of contract action,[18] the Third Circuit has affirmed a decision that the most analogous state claim is either employment discrimination or breach of fiduciary duty.[19]

History has also shown that even when the Supreme Court appears to resolve a limitation issue, questions remain. Four years after the Supreme Court seemingly put to rest the issue of limitations for section 1983 claims by ruling that a state's limitation period for a personal injury claim would apply, the Court was forced to solve a dispute in the circuits regarding states with more than one personal injury statute.[20] Similarly, the courts of appeal are still grappling with

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[17] H.R. Rep. No. 734, 101st Cong., 1st Sess. 24, *reprinted in* 1990 U.S. Code Cong. & Admin. News 6850, 6870.

[18] *Jumbo Markets*, 906 F.2d 1371, 1372.

[19] *Gavalik v. Continental Can Co.*, 812 F.2d 834, 843 (3rd Cir.), *cert. denied*, 484 U. S. 979 (1987).

[20] *Owens*, 488 U.S. 235.

the Supreme Court's 1983 decision that limitations from federal statutes are to be used in applying section 301 of the Labor Management Relations Act in certain situations but state statutes are to be used in others.[21]

Nor can litigants be assured that controversies involving similar federal statutes will be consistently resolved. The Supreme Court extended its reasoning in section 1983 civil rights claims to section 1981 claims in holding that limitation periods of state personal injury statutes are to be applied.[22] Yet several courts of appeal were overturned in their assumption that they were to borrow a federal statute of limitations in interpreting an act very similar to section 301 of the Labor Management Relations Act.[23]

V. COROLLARY ISSUES

Also burdening the federal court system are the unresolved corollary issues of tolling, accrual, and retroactivity. There is disagreement on the issue of whether state tolling rules are to be borrowed along with state statutes of limitations. Most courts, finding that tolling rules are inextricably tied to limitation provisions, have held that a federal court borrowing one must apply the

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[21] *See, e.g., International Union of Elevator Const. v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986).

[22] *Lukens Steel*, 482 U.S. 656.

[23] *Reed v. United Trans. Union*, 488 U.S. 319 (1989) (state limitation period for personal injury action to be applied to violations of § 102 of the Labor-Management Reporting and Disclosure Act).

other.[24] The Supreme Court has confused the issue by rejecting that position in *West v. Conrail*,[25] yet seeming to readopt it two years later in *Hardin v. Straub* without mentioning *Conrail*.[26] Federal courts seem to be unanimous in holding that federal accrual rules continue to apply when a state limitation period is applied to a federal cause of action.[27] Yet none have explained why accrual provisions are less intertwined with limitation periods than rules governing tolling.[28]

Because a litigant cannot safely predict whether a court's decision regarding a statute of limitations issue will be retroactive, he cannot accurately perceive the benefit of extended litigation on the subject. For example, the Eleventh Circuit held that *Owens v. Okure* was to be applied retroactively, thus barring any claims longer than the state's personal injury limitation period, unless the plaintiff could

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[24] *See, e.g., Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989) (California relation back provisions rather than federal tolling rule applies to § 1983 claim); *See, also*, C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §4514, (1991 Supp.) at 78.

[25] 481 U.S. 35 (1987).

[26] 490 U.S. 536 (1989).

[27] *See, e.g., McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988). The courts of appeal have shown considerably less agreement in deciding which federal accrual rule is to be applied to statutes lacking limitation periods. *E.g.*, regarding RICO claims, *compare Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) *with Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991).

[28] For a discussion of how the new catch-all provision might effect current rulings on borrowing state tolling and accrual rules, *see* D. Siegel, *Practice Commentary* in 28 U.S.C.A. § 1658 (1991 Supp.) at 26.

show that he relied on a clear precedent for a longer period.[29] The Ninth Circuit granted a one year extension to claims that would have expired due to the Supreme Court's earlier section 1983 decision, *Wilson v. Garcia*.[30] The Supreme Court avoided this murkiness in securities actions by making its holding on limitation periods immediately retroactive.[31] If retroactivity rules were standardized, parties might be more cautious in litigating a limitation issue.

VI. CONCLUSION

Congress' failure to include limitation periods within legislation creating civil causes of action has placed a severe burden on the federal court system. While decisions by the Supreme Court and a new catch-all provision affecting future legislation have improved the situation, the lack of statutorily imposed time bars will continue to adversely impact the functioning of the federal judiciary.

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[29] *Jones v. Preuit & Mauldin*, 876 F.2d 1480, 1483 (11th Cir. 1989).

[30] *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

[31] *Lampf, Pleva*, 111 S. Ct. at 2782.

APPENDIX E-3

THE SENTENCING REFORM ACT OF 1984[1]

I. BACKGROUND

The Sentencing Reform Act of 1984 ("Act") (P.L. 98-473, Oct. 12, 1984), passed as part of the Comprehensive Crime Control Act of 1984, changed the face of federal criminal sentencing in America. The Act, which amends various provisions of Title 18 of the United States Code, established a Sentencing Commission, whose primary charge was to develop a set of sentencing guidelines for all federal criminal offenses. The Commission was to attach numerical values to the gravity of each offense, as well as to any aggravating or mitigating circumstances or conditions the Commission could foresee. The numerical values would in turn translate to a sentencing grid which would provide a sentencing judge a relatively small sentencing range within which the sentence must fall. According to the Act, a judge can depart from this guideline range only if he finds that the case before him involves circumstances or conditions of a kind not contemplated or considered by the Commission when it drafted its guidelines. In addition to promulgating these guidelines, the Commission was to propose policy statements regarding plea bargaining and other aspects of the criminal

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[1] Written for the Legislative Impact Subcommittee by Advisory Group member Charles J. Stevens.

adjudicatory system. Unlike the guidelines, these policy statements would not be binding on courts, but instead would be advisory in nature.

The guidelines promulgated by the Commission pursuant to the 1984 Act were originally to take effect in November 1986. The date was later postponed by Congress to November 1987. The Act was self-executing in that legislation by Congress after the Commission had developed its guidelines was not necessary for the guidelines to become operative; unless Congress legislated otherwise, the guidelines were to become law automatically shortly after the Commission submitted them. The guidelines submitted by the Commission did in fact take effect on (and were applicable to crimes committed on or after) November 1, 1987. A little more than a month later, Congress passed legislation modifying the guidelines that the Commission had submitted.

II. CONGRESSIONAL CONSIDERATION OF IMPACT ON JUDICIAL SYSTEM

There is precious little evidence that in passing the Act in 1984 Congress considered, or even had expectations regarding, the impact that sentencing guidelines would have on cost and delay in the judicial system. Instead, the text and the legislative history of the Act suggest that Congress was primarily, if not exclusively, concerned with the impact the guidelines would have on sentence uniformity and on the prison system. Indeed, the Act directed the Commission to conduct a formal study of the impact the guidelines would have on federal prison

populations. The Commission was not required by the Act to study or consider the impact of the guidelines on the judicial system.

Section 235 of the 1984 Act did direct the General Accounting Office (GAO) "to conduct a study of the Guidelines [after they are submitted], and their potential impact in comparison with the operation of the existing sentencing and parole release system, and report its findings to Congress" within three months from the date the guidelines were submitted. Under the Act Congress then had three additional months within which to legislate before the guidelines took effect automatically. These provisions were apparently intended to provide Congress and other interested persons the opportunity to examine and debate the proposed guidelines before they replaced the existing system.

Although Congress' directive to the GAO was somewhat vague, the GAO did conduct a fairly systematic examination of the anticipated impact of the guidelines on the operation of lower and appellate courts, probation departments, and prosecuting and defense counsel. To obtain their views on the likely impact of the sentencing guidelines on the workload of the federal criminal justice system, the GAO interviewed twenty-six persons, including seven district and circuit court judges, five probation officers, five defense and prosecuting attorneys, an official from the Administrative Office of the United States Courts' Magistrates Division, three officials from the Federal Judicial Center, an official from the American Bar Association, and a law Professor from Yale University. Most of the persons

interviewed believed that the Commission's guidelines would increase the workload of all court-related personnel except magistrates.

With respect to the impact on district judges, which is of primary concern here, the GAO found that twenty-four of the persons interviewed concluded that the the workload of district judges would increase under the proposed guidelines. No respondent expressed a belief that a decrease would occur. The primary reasons given to explain the expected increase in work were:

1) an increase in the number of trials because more defendants will elect to go to trial rather than plead guilty under the guidelines;

2) a increase in time spent reviewing plea agreements to assure that the guidelines are not being circumvented;

3) an expected increase in the number, duration, and complexity of hearings to resolve factual disputes relevant to aggravating and mitigating factors; and

4) a need to take greater care in explaining reasons for sentences in order to comply with reporting requirements and possible appellate review.

The respondents to the GAO survey believed the workload of prosecuting and defense attorneys would increase for much the same reasons. The expected increase in the number of trials, and the expected increase in the time spent putting together and reviewing plea agreements were by far the most important changes anticipated as a result of the new system. All of the persons interviewed

expected the workload of circuit judges to increase, both because the Act gave the government new rights to appeal a defendant's sentence, and because the guidelines themselves contained a number of ambiguous provisions whose meanings would have to be determined by appellate courts.

The GAO submitted its report containing these conclusions to Congress in September 1987, three months after the Commission submitted its initial guidelines. Prior to this time, Congress had information available to it from other sources that tended to suggest similar expectations with respect to the impact of the guidelines on federal judicial administration. For example, in its *Report of the Proceedings of the Judicial Conference of the United States* held on September 18-19, 1986, the Judicial Conference noted that although the details of the Commission's guidelines had not yet been finalized, there was no doubt that the guidelines would significantly increase the work of probation officers and district and circuit court judges. In a similar vein, in his July 23, 1987 testimony before the House Judiciary Committee's Subcommittee on Criminal Justice, a representative of the Federal Judicial Center said that "[t]he guidelines will greatly increase the length of sentencing hearings which will increase the work of district judges . . . . [A]ppellate judges and their personnel will [also] experience a vast increase in their workloads."

All of this information regarding the expected impact of the guidelines was before Congress in November 1987 when the guidelines took effect. It was also

before Congress a month later when it amended the Act in several respects. But there is no hint during this time of any Congressional reaction to this input by the judiciary and the GAO. Nothing in the text or legislative history of the December 1987 amendments evinces any Congressional concern over judicial cost and delay. Nor did Congress say or do anything to suggest that it disagreed with or found unrealistic the expectations documented in the GAO report and other sources. In the end, then, the fairest inference is that Congress anticipated that the guidelines would result in significant additional judicial cost and delay at the district court level -- primarily in the form of more trials and more time spent on plea bargains -- but that such an increase was not unacceptable given the benefits to be gained from the Act.

III. THE ACTUAL IMPACT OF THE ACT

The actual impact of the guidelines on district courts in the last three and a half years has been less drastic than most knowledgeable persons would have expected. Most importantly, the percentage of federal criminal cases that have gone to trial did not increase significantly in 1988 or 1989.[2] Instead, the percentage of criminal cases going to trial has remained under 10 percent. Thus, contrary to most predictions, the available empirical data suggests that the

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[2] *See* United States Sentencing Commission, Annual Report (1988), (1989). (The 1990 numbers are not yet available.)

guidelines do not appear to be imposing a burden on the *trial* time of the district courts.

The available clinical evidence -- views of practitioners and judicial officers -- is consistent with the empirical evidence that trial time of the district courts has not increased as a result of the sentencing guidelines. It simply does not appear to be the case that more cases are going to trial in the Eastern District (or any other district) because of the sentencing guidelines. Indeed, we have been unable to identify a single case in the Eastern District that has gone to trial because of the guidelines.

That the guidelines are not resulting in more trial time does not mean, of course, that the district courts have not been spending additional time on sentencing matters since the effective date of the sentencing guidelines. Based on our interviews of practitioners, as well as comments by some judges, it appears that the district courts are spending more time on sentencing because of the need to resolve factual disputes that could have a significant effect on the guidelines range. Although there seems to be a consensus that the judges are spending some additional time on sentencing matters now, it is far from clear that this additional time is having a material effect on the operation of the Eastern District. Indeed, some practitioners believe that because more cases are not going to trial because of the guidelines, the operation of the district has not been materially impacted.

Finally, the district courts do not appear to be spending additional time drafting opinions or publishing cases concerning guidelines issues. Although some rulings were supported by a memorandum by the court, we could locate no published case in the Eastern District of California relating to a novel question under the guidelines. The same, of course, cannot be said of the courts of appeals, which have published hundreds of cases in the last few years addressing thorny issues raised under the guidelines.

In the end, then, it appears as if the major concerns with respect to district court administration under the guidelines were exaggerated, although some additional burden has been imposed on the district courts.

IV. JUDICIAL IMPACT OF EXECUTIVE BRANCH INTERPRETATIONS OF THE ACT

One significant executive branch construction of the Act has possibly had an impact on judicial cost and delay. The Justice Department, in the *Prosecutor's Handbook on Sentencing Guidelines and other provisions of the Sentencing Reform Act of 1984*, issued November 1, 1987, outlined considerations that are applicable to plea bargaining under the guidelines. The *Handbook* observes that there are two kinds of plea bargaining in which the government can engage. Under a charge-bargaining deal, the government, in return for a guilty plea on some count(s), agrees to dismiss (or not indict)

remaining counts. Under a sentence-bargaining deal, the government promises to make a recommendation to the court for a particular sentence.

The Sentencing Commission, pursuant to its Congressional mandate, proposed advisory (non-binding) policy statements with respect to plea bargaining, including the sentence-bargaining situation described above. The policy statement indicates that a court may accept a government-recommended sentence made as part of a sentence-bargaining deal if (1) the sentence is within the guideline range, or (2) the sentence departs from the guideline range for "justifiable reasons." *See* United Sentencing Commission, *Guidelines Manual*, § 6B1.2.(b)(2) (1987).

The Criminal Division of the Justice Department rejected this policy statement because it conflicts with the provision in the Act itself authorizing departure from a guideline range only upon a finding that an aggravating or mitigating circumstance exists which was not adequately taken into consideration by the Commission in formulating the guidelines. *See* 18 U.S.C. § 3553(b). The Department believes that the more flexible "justifiable reason" standard is at odds with the Act, and would permit prosecutors to completely circumvent the sentence-uniformity goal of the Act by recommending sentences outside the guideline ranges at will. Accordingly, Department policy does not allow a prosecutor to recommend a sentence outside a guideline range unless the stringent statutory standard discussed above has been met.

Apparently in response to the Department's *Handbook*, the Commission in 1989 added commentary to its policy statement to make clear that a reason is "justifiable" only if it satisfies the dictates of section 3553(b). *See* United States Sentencing Commission, *Guidelines Manual*, commentary to § 6B1.2.(b)(2) (1989).

Nonetheless, because of the ambiguity in the original policy statement, the Department's rejection of the statement did have practical consequences for two years. By rejecting the Commission's policy statement on plea bargains, the Department may have decreased the number of cases which pleaded out from 1987 to 1989. Consequently, the Department's interpretation of the Act may have resulted in more trial cost and delay, although it bears repeating that even after this executive branch interpretation the percentage of cases going to trial under the guidelines was no greater than under the old scheme. In any event, the Department did not explicitly take into account any increased judicial cost and delay which might have resulted from its rejection of the Commission's policy statement. This is not very surprising, however, since the Department concluded that the policy statement conflicted with the Act itself. Under these circumstances, the Department had very little choice but to reject the policy statement.

V. EVALUATION AND CONCLUSION

As just noted, the executive branch can hardly be criticized for not considering judicial cost and delay in rejecting the Commission's policy statement on plea bargaining. Even if such a rejection had resulted in a dramatic increase in the number of federal criminal trials, the Department would have felt constrained to defer to Congress' wishes as expressed in the Act itself.

Congress' performance in anticipating and considering the judicial cost and delay that might result from the Act, on the other hand, is subject to some criticism. Congress never openly addressed the issue, although it paid lip service to efficiency concerns by directing the GAO study (the scope of which was left unclear in the Act). To be sure, a more systematic and explicit consideration of judicial cost and delay resulting from the Act would have been preferable, if for no other reason than to assure the judicial branch that its interests are being safeguarded.

The self-executing character of the Act also made it difficult for Congress to adequately consider judicial cost and delay. Congress commissioned the guidelines (which were to take effect automatically) before it had any idea at all what effect they would have on judicial workloads. Although Congress could have, upon learning of the judicial impact the guidelines, legislated to prevent the implementation of the guidelines, such a prospect seems unlikely given the enormous legislative inertia that prevails today.

In the end, Congress appears to have been more lucky than wise. At least at the district court level, the impact of the guidelines on judicial workloads appears not to be very great. Had the reality turned out differently, however, Congress would be in line for far harsher criticism of its drafting of the Act than it has so far received. Certainly there is room for Congressional improvement.

APPENDIX E-4

CIVIL DRUG FORFEITURE LAWS[1]

I. ANALYSIS OF ENACTMENT AND IMPLEMENTATION

A. Legislation

In 1970, Congress enacted Title II of the Controlled Substances Act (CSA), which extended the civil forfeiture laws of the United States to drugs and narcotics.[2] In 1984, Congress, dissatisfied with the intensity of the Department of Justice's use of civil forfeiture laws in the fight against drugs, strengthened the forfeiture provisions to encourage their use.[3]

B. Legislative History

The CSA was a comprehensive legislative package addressing what, at that time, was the developing drug crisis.[4] The legislative history focuses on the criminal penalties for drug trafficking associated with other provisions of the CSA, as well as the rehabilitative aspects of the law with respect to users. Very little of the history pertains specifically to the civil forfeiture provisions,[5] and none of that

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[1] Written for the Legislative Impact Subcommittee by Advisory Group member Richard H. Jenkins, with the assistance of Joseph E. Maloney.

[2] Pub.L. 91-513, Title II, § 511, October 27, 1970, *enacting* 21 U.S.C. § 881.

[3] Comprehensive Crime Control Act of 1984, Title III (Pub.L. 98-473, October 11, 1984).

[4] *See generally* H.R. Rep. No. 91-1444 91st Cong., *reprinted in* [1970] 3 U.S. Code Cong. & Admin. News at 4567 et. seq.

[5] *Id.* at 4623-24.

material focuses on the impact on the courts of this new category of civil litigation While specific provision was made in the legislation for increased funding and agents for executive agencies,[6] no provision was made for increased burdens on the court flowing from the various provisions of the act, including the civil forfeiture provisions.

Interestingly, in keeping with its routine practice, Congress solicited letters for the various federal agencies affected by the proposed legislation, and responses are reproduced in the legislative history.[7] No letter from the judicial branch is found in the history, although there is no way of knowing whether this is because the views of the judiciary were not requested, or whether there was no response.

The legislative history of the 1984 Act reflects Congressional dissatisfaction with the lack of use of the civil forfeiture provisions it had made applicable to drug cases in 1970. As late as 1981, that use of that remedy was summarized in a report to Congress of the General Accounting Office entitled *Asset Forfeiture -- A Seldom Used Tool in Combatting Drug Trafficking.*[8] The report noted various impediments to the use of the remedy, which Congress set out to eliminate in the 1984 Act. Presumably, then, Congress anticipated that a direct consequence

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[6] *See* § 103 (300 new drug agents); § 709 (additional appropriations for the Department of Justice).

[7] *Id.* at 4629-37.

[8] S. Rep. No. 98-225, 98th Cong. 191, *reprinted in* [1984] U.S.Code Cong. & Admin News at 3374.

of the amendments would be increased filings of such cases in Federal District Courts (although that result was not specifically forecast in the legislative history). Indeed, Congress cited the need to infuse additional funds into law enforcement agencies to facilitate increased use of the remedy.[9] Nevertheless, the 1984 Act contained no measures to assist the courts in handling any increased burden.

C. Executive Action

As Congress anticipated, civil forfeitures have become a major tool employed by the Department of Justice in combating the production and sale of illegal drugs. Civil forfeitures are employed to enhance and supplement the efforts of the criminal division, enhance cooperation with other law enforcement agencies at the state and local level through sharing of the proceeds of forfeitures, and produce revenues to strengthen law enforcement.[10] This has had the effect of maximizing the impact of the legislation on the courts, since DOJ's program hinges on civil litigation.

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[9] *Id.* at 3380.

[10] *See* Attorney General's Guidelines on Seized and Forfeited Property (July 31, 1990).

II. ANALYSIS OF JUDICIAL IMPACT

A. Cases Filed

The impact of the legislation on the courts, at least in terms of sheer numbers, has been considerable. As of the date of this analysis, there were 117 civil drug forfeiture proceedings pending in the Eastern District of California (84 in Sacramento and 33 in Fresno). This is a case category that did not exist at all before the 1970 Act, and which, in fact, did not exist in large numbers until approximately 1984.

The impact of this category of cases is lessened, however, by their relative simplicity. Those interviewed agree that few have gone to trial. (In fact, the U.S. Attorney reports that the first civil drug forfeiture jury trial was recently completed in Fresno, and none have been tried in Sacramento). Most result in at least a scheduling conference appearance, however, and many generate discovery disputes to be resolved by the magistrate and many others must be resolved by a motion for summary judgment.

B. Anecdotal Evidence

The impact of civil drug forfeitures is apparent from discussion with the various personnel involved.

1. U.S. Attorney's Office

Edward L. Knapp is the Deputy Chief of the Civil Division of the office of the United States Attorney for the Eastern District of California. Civil forfeitures

in drug cases constitute a new category of case that, practically, was unheard of prior to 1984. The recent emphasis on this work (including adding Assistant United States Attorneys and paralegals devoted exclusively to such work in U.S. Attorneys offices around the country) by the Department of Justice has lead to additional civil actions brought by the office which simply did not exist in large numbers in the past. He notes that two Assistant United States Attorneys are assigned full time to handling civil forfeitures in the Eastern District. Additionally, the efforts of the equivalent of two more attorneys are devoted to such cases by various Assistants whose case loads include civil forfeitures. There are currently 117 civil drug forfeiture proceedings pending in the Eastern District of California (84 in Sacramento and 33 in Fresno).

Kris S. Door is an Assistant who devotes full time to civil forfeiture cases. She observes that almost all result in a status conference. Many generate discovery disputes for the magistrate, and "about half" result in a motion for summary judgment being filed that must be addressed by the court. Trials are rare. The first case to be tried in the District went to trial in July of 1991 in Fresno.

2. Judiciary

Chief Judge Robert E. Coyle reports that, while he has a significant number of cases occupying this new category of work, the court is not required to devote a substantial amount of time to the cases. The first case ever to be tried was recently tried in front of him, and took only three days. Usually, he reports, the cases are settled without judicial intervention. Thus, the impact on the court is limited to the filing and initial scheduling conferences.

Chief Judge Emeritus Lawrence K. Karlton reports that, while civil drug forfeitures are substantial in number, they have not had a correspondingly substantial impact on the court's workload. Most of those that are filed go as far as the status conference, but none have gone to trial in his court and, in fact, he cannot recall having to address one on summary judgment. They all seem to settle without very much judicial involvement, for which he is grateful.

III. COMPARING THE ACTUAL TO ANTICIPATED IMPACT

From the legislative history, Congress apparently did not anticipate much impact on the judiciary from the 1970 legislation. Certainly Congress did not anticipate the impact that has occurred in terms of numbers of cases. Given the motivation for the 1984 amendments, however, Congress cannot have failed to have anticipated increased use of the forfeiture remedy, although it evidently gave little thought to the impact of increased use on the judiciary. This is true even

though Congress expressly anticipated the impact of increased use of the remedy on executive agencies.

IV. IMPROVED ASSESSMENT OF IMPACT ON THE COURTS

One measure Congress might adopt to improve impact on the courts is to follow the same procedure with respect to the judicial branch that it routinely follows with respect to the executive branch. That is, inviting comments on proposed legislation by "affected agencies". By routinely treating the courts as an "affected agency" when legislation is considered that would involve judicial remedies, Congress might more effectively anticipate impacts in the future. Conversely, being subject to such an inquiry might force the Executive Office of the Courts to become sensitive to potential impacts in ways that other agencies are not. Just as executive agencies automatically review new legislation to determine the potential impact of the changes on the agency's burdens, the Executive Office could adopt the institutional role of reviewing proposals for that purpose and highlighting potential impacts to Congress at a time when such impacts might be considered as part of the original legislative process.