UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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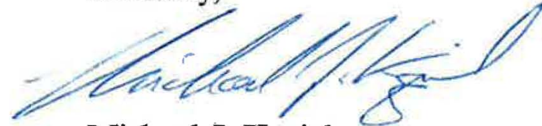
November 13, 1991

Mr. Abel J. Mattos
Acting Chief, Court Programs Branch
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. Mattos:

Attached is the Report of the Advisory Committee and Plan Adopted by this District. Thank you for providing the information on Early Implementation Districts.

Sincerely,



Michael J. Koziel
CJRA Analyst

REPORT

OF THE ADVISORY COMMITTEE

AND

PLAN

ADOPTED BY THE FEDERAL DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PURSUANT TO

THE CIVIL JUSTICE REFORM ACT OF 1990

October 18, 1991

P R E F A C E

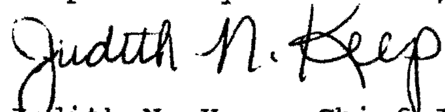
Pursuant to the Civil Justice Reform Act of 1990, the federal district courts were charged with instituting a plan to reduce cost and delay in the adjudication of civil cases. To this end, the Court solicited applications from the community for membership in an Advisory Committee that would assist in developing a Plan.

An Advisory Committee of twenty-four professionals from the legal and business community was selected. The Committee members are lawyers representing various private and public practice areas, judges, former judges, judicial administrators, and non-lawyers from the business community. Please see Exhibit A appended hereto for a complete listing of the Committee members. The Executive Committee of the Advisory Committee was composed of Robert Steiner (Chair), the Honorable J. Lawrence Irving and R. B. Woolley, Jr.

The members of the Advisory Committee conducted a tireless assessment of the factors attributing to cost and delay in this District and developed a suggested approach for reducing the incidence of those factors. The Committee's report is reproduced immediately following this preface. The Court thanks the Advisory Committee for its perseverance and resilience in tackling this gargantuan task under daunting temporal and financial constraints. The Court also publicly thanks the Chair for his diligence, wise leadership and good humor.

Also reproduced in the pages that follow is the Delay and Cost Reduction Plan adopted by this Court. We adopt in substantial part the recommendations of the Advisory Committee.

Respectfully submitted,



Judith N. Keep, Chief Judge
United States District Court
Southern District of California

REPORT OF THE ADVISORY COMMITTEE TO THE FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA AS REQUIRED BY THE CIVIL JUSTICE REFORM ACT OF 1990 ("BIDEN BILL")

September 19, 1991

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Report of the Advisory Group
to the Federal District Court
for the Southern District of California
as Required by the
Civil Justice Reform Act of 1990 ("Biden Bill")

PILOT PROGRAM

I. STATEMENT OF PURPOSE

A. STATUTORY CHARGE

In the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified as amended at 28 U.S.C. § § 471-82), (the "Statute"), Congress sought to address cost and delay in civil litigation in the federal district courts. See 1990 U.S.C.C.A.N. (104 Stat.) 6802 (legislative history).

Under the Statute, each district is directed to develop and implement a plan, with the assistance of an Advisory Group[1/] "to facilitate deliberate adjudication of civil cases, on the merits as well as monitor discovery, improve litigation management and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § § 471, 472.

We present this report of the recommendations of the Advisory Group to this Court to meet the Statute's objectives in the Southern District of California.

1/ The Statute is very specific on the time, manner, and constitution of the Advisory Group. See 28 U.S.C. § 478. The Advisory Group for the Southern District of California was formed and charged in strict adherence to Section 478. The members are listed in Appendix A of this Report.

B. CAVEATS AND DISCLAIMERS

1. "Cost" is not defined by the statute or the legislative history. In the approach that follows, we elected to define cost not as a total cost, but as unnecessary cost attributable to inefficiency, duplication or waste in court proceedings. While an exact definition is elusive, the concept of "cost" as used contextually in the Statute led us to judicial efficiency as our point of focus.

2. "Delay" is also not defined by the Statute or the legislative history. In the context of the Statute the term implies a criticism. However, fairness, due process, and the careful receipt and weighing of evidence all require time. Indeed, the Statute itself notes that an objective of the plan should be to "facilitate deliberate adjudication of civil cases on the merits." § 471. Thus, only after fairness and due process have been achieved can we legitimately assess whether there was undue delay. In this context we submit recommendations and proposals to reduce delay while at the same time achieving fairness.

3. This District has been plagued by, among other things, underfunding, space problems and judicial vacancies. These resource limitations are of long standing. The effectiveness of our Plan is undeniably predicated in part on aggressive efforts in Congress to cure these problems since they are beyond the court's control.

4. This District was designated a Pilot District under the

Statute, with instructions to adopt a plan, and begin its implementation, by December 31, 1991. There was thus a heightened urgency to produce this report quickly. Under these time constraints, an effective statistical analysis of this Court's docket was clearly limited. Additional funds are needed for a more complete statistical review and analysis. We include herewith a docket assessment based on the resources at our disposal.

II. CONCLUSIONS

A. SUMMARY OF FINDINGS

The median time for the disposition of civil cases in the Southern District of California has risen from 18 months in 1990 to 21 months in 1991. This increase in time has probably also increased costs. While much more analysis and statistical study are required, this state of affairs may be tentatively attributed to several sources:

1. Criminal filings have significantly increased over the last six years. The Sentencing Guidelines and mandatory minimum sentencing legislation have made this increasing criminal caseload much less likely to be resolved by a plea before trial. Due to the Speedy Trial Act, this increase in criminal cases results in a deferral of disposition of civil cases.

2. Many crimes historically prosecuted by the state criminal justice system are becoming the responsibility of the federal system.

3. The two judicial vacancies cause the court to devote a disproportionate amount of time to criminal cases, thereby deferring the resolution of civil cases.

4. If routine civil cases could be expedited the median time to disposition could be reduced and the court would be able to address the complex civil cases more promptly.

5. The difficulty of setting an early civil trial date, and of keeping that date once set, delays the disposition of civil cases.

6. The difficulty of setting an early hearing for dispositive motions, and of keeping the date once set, delays the disposition of civil cases.

7. Delay and abuse of discovery and the pre-trial process by civil litigants further delay disposition of civil cases.

B. SUMMARY OF RECOMMENDATIONS

1. Relieve the burden which the criminal docket imposes on civil cases by the following:

   a. The two existing judicial vacancies should be promptly filled.

   b. Each district judge should be excluded from the criminal draw for a two month period each year, so that the judge will have two months of time uninterrupted by newly-assigned criminal cases in which to try and dispose of civil cases that have previously been assigned to the judge in the civil draw.

   c. Visiting judges should be encouraged to visit San Diego and try criminal cases, so that our local judges can have the time to address and try civil cases. It is important that civil cases be tried by judges of the District because such disposition by trial establishes a track record which is essential to give lawyers and litigants a basis to evaluate cases and reach settlements. Civil litigants and lawyers need certainty and predictability in order to plan. Only in this fashion can business decisions be made which reduce cost and avoid delay.

   d. A committee whose membership includes the U.S. Attorney, a representative of Federal Defenders and a representative of the private criminal defense bar should be appointed by the Chief Judge to establish settlement procedures in criminal cases. This procedure should include a specific program for early calendaring by the Court Clerk of a confidential Settlement Conference before a judicial officer, with a right

of either party to take the matter off calendar if such party does not wish to participate.

e. Congress should eliminate mandatory sentencing by repealing existing legislation. 2/

f. Congress should eliminate guidelines sentencing by repealing existing legislation.

g. Congress should eliminate "Federalization" of criminal conduct by not adopting new legislation.

2. Institute the following procedures in respect to civil cases:

A. The District Judge

a. In certain cases, the assigned district judge should set a prompt trial date. A trial date within 12 months of the filing of the complaint should be set in Social Security matters, enforcement of judgments, prisoner petitions, and forfeiture and penalty cases. A trial date within 15 months of the complaint's filing should be set in Federal Tort Claims Act case. 25% of all remaining civil cases, that are not "complex", should be given a trial date within 18 months after the filing of the complaint. In this manner, the performance of the proposal may be tracked and monitored.

b. Once set, the trial date should be firm.

c. Requests for continuances of trial and motion dates should be granted only for good cause shown. When continuances are granted, selection of a new date should include accommodation to calendar commitments of the lawyers consistent with

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2/ The vote of this Advisory Group in respect to sub-paragraphs e, f and g was not unanimous. There were three negative votes: William Braniff, U.S. Attorney, Steven Petrix, Assistant U.S. Attorney and Christine Strachan, Dean, U. of San Diego Law School. They articulated the argument that these paragraphs recommend legislative repeal without the benefit of adequate factual investigation by the Advisory Group.

professional courtesy.

d. The district judge should encourage litigants to stipulate to trial by a magistrate judge.

e. Regular monthly reports of all civil cases, pending more than eighteen (18) months, and of all criminal cases pending more than six (6) months, should be given to the Chief Judge to assist the Court's assessment of the effectiveness of these recommendations.

B. The Magistrate Judge Supervising Pre-Trial Discovery with the consent of the District Judge

a. The assigned magistrate judge should supervise and manage each case from the outset.

b. The assigned magistrate judge should encourage settlement as early as possible.

c. A magistrate judge should supervise settlement negotiations and motions to confirm settlements unless the district judge opts to do so.

d. The assigned magistrate judge should supervise and if necessary control the discovery process.

e. Under the supervision of the assigned magistrate judge, non-binding mini-trials or summary jury trials could be ordered where appropriate in cases in which the magistrate judge finds after hearing with the opportunity to be heard (1) that the potential judgment does not exceed $250,000 and (2) that the use of such procedure will probably resolve the case.

f. As discussed in detail on pages 17 and 18, paragraphs 5 and 6, non-binding arbitration should be ordered by the magistrate judge in designated even numbered cases where the magistrate judge finds (1) the potential judgment does not exceed $100,000 and (2) that the use of such procedure will probably resolve the case. Data from this procedure should be collected and analyzed to evaluate effectiveness.

g. Additional local rules should be drafted and adopted to address supervision of settlement negotiations by magistrate judges. <u>See Proposed Pre-Trial Approach</u>, <u>infra</u>.

C. The System Generally

a. "Meet and Confer" requirements should be pursued to encourage cooperation among counsel.

b. Alternative Dispute Resolution ("ADR") should be encouraged. Early evaluation, mediation, arbitration, and mini-jury trials may be used in appropriate cases. ADR materials should be made available for distribution to all counsel. Wide dissemination of such information to the general public encouraged.

c. Accurate information should be generated about the civil caseload and how it is processed through the courts. Such information should be evaluated and analyzed

   i. An administrator should be employed to implement and supervise this statistical monitoring system;

   ii. Funds have been requested for this purpose from monies specifically available under the Statute for Pilot Programs, and a small allocation has been received.

   iii. We recommend an additional request be submitted seeking additional funds.

   iv. We recommend a complete statistical study and analysis of 10% of the civil cases in this district which are not complex be made.

d. A questionnaire should be developed to debrief the parties and their counsel, at the close of each civil case filed after January 1, 1992, in order to obtain a retrospective evaluation of the effectiveness of the system. Also, the judicial officer should informally debrief the parties and their counsel at the close of the case to obtain further information.

e. An Advisory Group should remain involved until 1995 to assist the court in the identification of solutions to problems encountered in the reform process.

III. DISCUSSION

A. INTRODUCTION

Pursuant to the statute, this Report of the Advisory Group (1) must be made available to the pubic, and (2) must include the following topics:

(1) an assessment of the civil and criminal dockets in the District, an identification of trends in case filings, a designation of the principal causes of cost and delay, and an assessment of the potential impact of new legislation;

(2) the basis for the recommendations;

(3) recommended measures, rules and programs; and

(4) an explanation of the manner in which the recommended plan complies with the statutory principles embodied by statute.

See 42 U.S.C. § 412, 473,.

B. DESCRIPTION OF THE DISTRICT

The Southern District of California encompasses both San Diego County and Imperial County. It has jurisdiction over the international border between California and Mexico, and the sea coast from Mexico northward for approximately one hundred miles to Orange County.

San Diego was discovered by Cabrillo in 1542. The City of San Diego, where the District's courthouse is located, has become the second largest city in California, and the sixth largest in the United States. San Diego County has been one of the fastest

growing areas in the United States. The San Diego Metropolitan area has a diversified economy which includes agriculture, aerospace, military, manufacturing and international commerce.

The federal courthouse complex is located in downtown San Diego, and is conveniently near an international airport, the Amtrak station and the Port of San Diego. The courthouse itself is a modern building which was completed in 1976 and is currently undergoing remodeling. As remodeled and expanded, the existing courthouse will have sufficient capacity until 1995-1996, when three of the active judges plan to take senior status. At that time the courthouse will be short three courtrooms.

There is also an adjunct facility in Imperial County where a part-time magistrate judge sits for criminal matters. The old federal courthouse, located near the present one, is also currently being remodeled to receive the bankruptcy courts in approximately eighteen months.

The district has eight authorized judicial positions, two of which are vacant. Four senior judges assist on a regular basis. As the courthouse has only twelve full sized courtrooms, all courtrooms will be committed. There are five full-time magistrate judges in San Diego, each of whom carry both a criminal and civil calendar. There is a part-time magistrate judge located in Imperial County who carries only a criminal calendar. Four bankruptcy judges sit in San Diego.

The district's caseload is characterized by an extremely large criminal docket, which has been continually increasing over

the past several years. Indeed, the district's criminal load, represents one of the highest ratios of criminal defendants to federal judges in the United States. A significant part of the criminal case load is drug related.

This district also has many complex and sophisticated civil cases such as securities, fraud, and anti-trust cases, which require a significant amount of judicial time.

C. AN ASSESSMENT OF THE CIVIL AND CRIMINAL - TRENDS, CAUSES, LEGISLATION

The Advisory Group enlisted the assistance of The Justice Research Institute. Its president, William Slate, a former Clerk of the Second Circuit, helped in assessing the state of this district's docket and identifying potential causes of delay in the civil calendar. Attached is his full report. (Appendix B) We note that while the Justice Research Institute Report is helpful and provides valuable insight, much more study is necessary before a firm footing may be placed on the state of the dockets and potential sources of delay.

Essentially, the Justice Research Institute Report finds that the median time between the filing of a civil action and its disposition has increased from eighteen months in 1990 to twenty-one months in 1991. This increase is attributed in part to the increasing criminal caseload, the difficulty of setting and holding firm trial dates in civil cases, and the presence of unfilled judicial vacancies.

The increased time in the disposition of civil cases is particularly troubling since the number of civil filings have

progressively decreased from 3125 cases by year end 1984 to 1868 cases for the year ended 1990. [3/] A partial explanation is that while civil filings have decreased, the criminal docket has progressively swelled from 1694 felony cases by year end 1984 to 2536 felony filings in 1990. [4/] In addition to criminal felonies, there has also been a consistently high incidence of Class-A Misdemeanor and Class-B Petty Offense filings. [5/] Consequently, while civil filings have decreased over the last six years, the judicial workload has been more than offset and supplemented by a commensurate increase in the criminal caseload.

3/ The civil filings by number of cases in the District between the year ended 1984 and the year ended 1990 are:

1984	3125
1985	3055
1986	2514
1987	1984
1988	2135
1989	2033
1990	1868

4/ The criminal filings, by defendant, in the District are:

1984	1694
1985	1748
1986	1603
1987	2434
1988	2109
1989	1903
1990	2536

5/ The following Misdemeanors (Class-A) and Petty Offenses (Class-B) were filed:

Class-A		Class-B
1984	141	5563
1985	251	5470
1986	159	7808
1987	86	9079
1988	941	6757
1989	323	5260
1990	565	6228
1991	N/A	5069

Indicative of the rise in criminal prosecutions is the increase in the number of Assistant United States Attorneys. While there were only thirty-six Assistant U.S. Attorneys in 1980, there were eighty-nine as of 1991.

Further, the criminal caseload has recently had an accentuated effect on the civil docket due to sentencing legislation making it much less likely that criminal cases are disposed of by pleas prior to trial. In light of constraints imposed by the Speedy Trial Act, civil cases ready for trial must be displaced to accommodate criminal trials.

Moreover, the burgeoning criminal load affecting the civil docket has been further increased by a rise in prosecutions in federal court of cases traditionally handled by the state criminal justice system. Due to a variety of factors to include (1) severe budget deficiencies being experienced by the County of San Diego, (2) severe budget deficiencies being experienced by the State of California, (3) lack of adequate state and county jail facilities, (4) perceived procedural benefits of pursuing federal prosecution where both state and federal criminal charges are possible and (5) heavier sentences within the federal system for similar offenses, the federal courts have become the forum for the prosecution of cases which also involve state crimes. In fact, Governor Pete Wilson has recently stated publicly that all crimes of dual jurisdiction should be referred to federal court to ease burdens on the State of California. It is thus clear that any prospective legislation or unofficial efforts to

"federalize" state crime will have a detrimental affect on the cost and delay inherent in managing the civil docket.

The foregoing factors are compounded by judicial vacancies which have not been promptly filled. The district has for several months had three vacancies on a court of only eight designated active judges. [6/] One vacancy was filled in May 1991, but the remaining two openings are still vacant and will likely remain unfilled for some time to come. The political process at the root of this delay appeared to have been solved just before Governor Wilson left the Senate to become the Governor of California. The newspaper reports now state that the situation has reverted to the earlier uncertainty. With the resignation of the Attorney General and the senatorial election campaign becoming very active, it is impossible to predict when or if the problem will be solved.

In light of the heavy criminal calendar and unfilled judicial vacancies, it has become very difficult to set a definite trial date in civil matters, or keep a date certain once set. As a corollary, it is also difficult to hear and resolve dispositive motions on civil cases as promptly as would be necessary to prepare a case for trial in a reasonable time.

D. RECOMMENDED MEASURES, RULES AND PROGRAMS

1. Criminal Reforms

The burden of the criminal docket on civil cases could be

6/ The district also had two vacancies for magistrate judges which were recently filled.

relieved through a variety of measures. The civil docket would most clearly benefit from a repeal of the Sentencing Guidelines, mandatory minimum sentencing statutes, and other such legislation curbing the discretion of the courts which decrease the incentive for criminal cases to be resolved by pleas before trial.

We recommend that each judge be excused from the criminal draw for a two month period each year on some type of a rotating basis. Thus the judge's calendar may be clear for two months so that each judge will have two months of time uninterrupted by newly assigned criminal cases within which to try or dispose of civil cases which have been assigned to that judge in the civil draw. Where possible this period can be used for civil case management, trial and disposition.

Additionally, we recommend that a vigorous effort be made to honor civil trial dates as firm by actively seeking visiting judges to handle criminal trials. The current system of multiple calendaring whereby several trials are set to begin the same day is presently a practical necessity but very stressful on the court and very inconvenient for counsel and their clients in civil cases.

Statistically, many criminal cases are resolved by pleas of guilty, and many civil cases settle. Yet the exception happens all too frequently where the criminal case proceeds to trial and the civil case has to be rescheduled. Any time a civil trial is rescheduled the attendant delay and cost are significant. A number of alternatives were considered. The essential conclusion

is the trial date set for a civil case should be firm, not to be continued except on a showing of good cause.

We recommend the pursuit of innovative criminal settlement procedures fashioned to seek the early disposition of criminal cases that are ripe for such a resolution. We recommend that the Chief Judge appoint a committee to aid in establishing written settlement procedures for criminal cases. At the inception of this program there should be consent by both the U.S. Attorney and defense counsel as to which cases will be selected for settlement discussions. This program's effectiveness should be closely monitored and changes proposed as appropriate.

2. Judicial Vacancies

This problem area is beyond the Court's control. We thus underscore the critical need that the appointing process be given priority by the Legislative Branch. Excellent candidates have submitted their names and we hope new judges are quickly appointed.

3. Civil Reforms

In addition to the factors discussed, civil case management may be improved.

We recommend that cases be evaluated for settlement as soon as possible under the supervision of a district judge or magistrate judge.

We recommend trial dates, once set, be firm. Continuance of trial and dispositive motion dates should be for good cause. (Yet when rescheduling the calendar commitments of the lawyers

should be considered.)

The judge or magistrate judge supervising the pretrial process should take a substantive role in the process to expedite the preparations for trial.

We recommend ADR be encouraged.

What follows is our proposed pre-trial approach. It is written as a plan to the magistrate judge, to apply as appropriate to each case, since in this district, some district judges prefer to refer to assigned magistrate judges the supervision of the pretrial process to include discovery. Nothing in our report, however, precludes a district judge from handling these pre-trial procedures personally. It is viewed as a matter of personal preference.

Proposed Pre-Trial Approach

1. All complaints shall be served within 120 days of filing. Proof of service shall be filed with the clerk. Any application for an extension shall be made to an assigned judicial officer. Any extension shall be granted for good cause only. On the 130th day following filing of the complaint, or on the tenth day following an extension of time to serve, if proof of service has not been filed, the clerk shall prepare an order dismissing the case without prejudice. The order shall be signed by a district judge.

2. No party without court approval may extend the time to answer or to move for dismissal of a complaint. Applications for such an extension of time may be made _ex parte_ (subject to 24 hour notice to opposing counsel) to an assigned Judicial Officer who shall grant them only on a showing of good cause. The application must be made prior to the expiration of the original time to answer. If an answer or motion to dismiss is not filed within the original or extended time, the clerk shall enter a default and serve notice thereof on the parties. The defendant(s) shall have 30 days from entry of a default to file motion papers to set aside the judgment under Rule 55(b) of the Federal

Rules of Civil Procedure. If plaintiff(s) fail(s) to move for default judgment within the 30-day period, the clerk shall promptly prepare an order dismissing the complaint without prejudice, for filing by the assigned district judge. A magistrate judge may extend the time for moving for a default judgment upon a showing of good cause.

3. Where possible, motions to dismiss shall receive priority in scheduling and disposition on a district judge's calendar and ideally shall be heard within 60 days of the filing of the notice of motion. A motion for summary judgment, or other non-emergency motion, may be displaced to allow hearing a motion to dismiss.

4. Upon the filing of an answer, the clerk shall notify the assigned magistrate judge. Within 45 days of the filing of an answer, counsel and the parties (to include insurance representatives where applicable) who have authority to discuss and enter into settlement, shall appear before the assigned magistrate judge for an Early Neutral Evaluation ("ENE") Conference. (Insofar as the U.S. Attorney or the U.S. Government is involved, this proposal is subject to § 473(c).) The ENE Conference should be informal, off the record, privileged and confidential. Parties and counsel may be excused from attendance only on a showing of good cause and by a written order. Sanctions may be imposed for unexcused failure to attend. Such sanctions may include reimbursement of the expenses and attorneys fees of the parties who attended. At the ENE Conference, the magistrate judge and the parties shall discuss the claims and defenses and try to settle the case.

5. If no settlement is reached, the magistrate judge shall do one of the following:

   a. For the next 45 days the parties and their counsel will be encouraged to confer with the objective of reaching an agreement to pursue alternative dispute resolution. A case management conference will be set approximately 60 days after the ENE Conference.

   b. Mandatory referral to non-binding arbitration or mediation will be made by the magistrate judge as to (1) every even-numbered simple contract or simple tort action (excluding Federal Tort Claims Act cases) where the magistrate judge finds the potential judgment is less than $100,000; and (2) every even-numbered trademark and copyright case.

A reasonable effort will be made to select a mediator or arbitrator who has expertise as to the issues. The mediation or arbitration hearing should be conducted within 45 days after the assignment except where good cause is shown to justify a longer period. (The objective of selecting even-numbered cases is to develop a control group against which to judge the effectiveness of the suggested program.) A case management conference will be set approximately 60 days after the ENE Conference.

c. Where no arbitration or mediation is agreed upon or ordered, the magistrate judge shall set a case management conference approximately 30 days after the ENE.

6. The Court shall establish a committee to seek competent volunteers to staff a panel of mediators and arbitrators who will commit to accept the referral of one case a year without compensation with the expectation of devoting up to 8 hours of time to the process.

7. As these procedures proceed, there should be no stay on discovery unless expressly so ordered on good cause shown.

8. The parties who have the responsibility and control of the litigation, and their attorneys who will try the case shall be present at the case management conference. The magistrate judge may approve attendance of a party or counsel by telephone conference call.

9. At a reasonable time before the case management conference:

   a. All counsel will discuss discovery, and endeavor to resolve any disputes;

   b. Plaintiff's counsel will in good faith specify in an informal writing the essential detail of the claims being asserted, and the identity of the principal witnesses;

   c. In response, defense counsel will in good faith specify in an informal writing the essential detail of the defenses to such claims, and the identity of their principal witnesses; and

   d. The informal writings will be discussed by counsel

to focus the issues, and the informal writings will be provided to the assigned magistrate judge in advance of the case management conference. These writings will not necessarily be part of the pleading file. The purpose is to aid the magistrate judge in preparing a case management order.

10. At the case management conference, the magistrate judge shall discuss:

    a. The complexity of the case;

    b. The anticipated discovery and encourage a cooperative discovery schedule appropriate for the issues and complexity of the case and seek a stipulated discovery schedule;

    c. The likelihood of further motions;

    d. The number of anticipated percipient and expert witnesses;

    e. The evaluation of the case and the need for early supervision of settlement discussions;

    f. The available ADR alternatives and whether the parties should voluntarily seek ADR outside the court system; and

    g. Any other special factors applicable to the progress of the case.

11. At the end of the conference the magistrate judge shall prepare a Case Management Order which will:

    a. Set out the issues;

    b. Include an appropriate discovery plan which may set dates for serving and responding to interrogatories, set dates for requesting and responding to requests for admission, set dates for requesting and responding to the production of documents, identify witnesses to be deposed, set dates for deposition, set a time for supplementation of witness lists and provide an opportunity for their deposition, set dates for hearing pre-trial motions;

    c. Set a time for a further case management conference if necessary; and

d. Set a time for the proponent of each issue to identify expert witnesses; set a time for the responding party to identify expert witnesses in reply; set a time for the depositions of experts; set a time for the supplementation of such expert designation depending on the circumstances.

12. At the case management conference, the magistrate judge shall in each case set a date for a Mandatory Settlement Conference, unless it is determined by the magistrate judge that a Mandatory Settlement Conference should be excused.

13. The assigned magistrate judge shall hold periodic status meetings as appropriate.

14. Once a particular case is determined ready for settlement by the magistrate judge, it should be calendared for a settlement conference by the magistrate judge even over the objection of one or more parties, or their counsel. In this regard:

    a. The magistrate judge handling settlement will be disqualified from trying the case unless there is agreement by all parties to waive this restriction;

    b. The magistrate judge handling settlement will receive communications _in camera_ from each party and its counsel, and maintain such in confidence unless there is a stipulation to the contrary;

    c. Each party will have in physical attendance at the settlement conference a person with full authority to enter into an agreement to settle the case, unless there is an express stipulation and order, in advance, to the contrary. The court is encouraged not to waive this requirement unless there is good cause; and

    d. The magistrate judge handling settlement should schedule as many follow up settlement conferences as the magistrate judge wishes in any given case, since in the more complex case it may take more than one meeting.

15. The trial judge should endeavor to set trial dates or disposition dates falling within 12 months of the filing of the complaint for the following classes of cases:

a. Social Security (cross motions for summary judgment);

b. Recovery of overpayment and enforcement of judgments;

c. Prisoner petitions dealing with conditions of confinement; and

d. Forfeiture and penalties.

16. The trial judge should endeavor to set trial dates or dispositive dates falling within 15 months of filing of the complaint for cases arising under the Federal Tort Claims Act.

17. The trial judge should endeavor to set trial dates for 25% of all remaining civil cases within 18 months of the filing of the complaint. This percentage can be increased as the backlog is reduced.

18. A case may be exempted from the above trial date requirements if it involves complex issues of fact or law requiring greater time for resolution; if new parties are added; and if the trial judge finds such other exceptional reason as may require an extension of the trial date, including those set forth in § 473(a)(2)(B) of the Civil Justice Reform Act of 1990. No trial date may be extended except by written order of the trial judge.

19. In an appropriate case where the magistrate judge finds the potential judgment does not exceed $250,000, the magistrate judge may order the parties to submit the issues to a non-binding mini-trial or summary jury trial. The proceeding will be on the record.

20. At the conclusion of a case, the magistrate judge should issue the parties and their counsel a questionnaire fashioned to discover their retrospective evaluation of the techniques that have been developed to expedite the disposition of civil cases. Further, the judicial officer who considered the case should debrief the parties and counsel in an informal setting to evaluate candid comments, criticism and suggestions. If the judicial officer involved is the district court judge, then on the judge's referral, these tasks can be delegated to the magistrate judge.

    We recognize that such reports and analysis would not necessarily be made public. Our recom-

mendation is that such reports and analysis be used as an internal management tool by the Chief Judge. Only by collecting this information and analyzing it carefully can a comprehensive analysis be made along the lines required by the Civil Justice Reform Act of 1990.

NOTES AND COMMENTS ON THE PROPOSAL

It is recognized that the local rules currently require meetings between opposing counsel on pretrial matters. Local Rule 235-4(c). It is believed that the proposed system will be measurably improved if the magistrate judge will, at the outset of the case, determine if a cooperative discovery schedule is necessary. If such a schedule is found to be necessary, counsel must attempt in good faith to submit a stipulated plan to the magistrate judge so that the magistrate judge may, after a hearing, implement such a plan. If no such stipulation can be reached the magistrate judge after hearing and agreement will implement a discovery plan by an order.

The literature contains many recommendations of specific limits on discovery; this we reject. The Statute calls for tailor-made and individualized case management. Rather than specific rules as to the number of depositions, or the like, under our proposal, the judge or magistrate judge charged with case management will encourage stipulated solutions which will be monitored by regular status conferences. The magistrate judge has the power under the local rules to impose appropriate

limitations on interrogatories. <u>See</u> 230-1. Other similar rules need to be evaluated, consistent with fairness and deliberate adjudication of the issues on the merits.

We note that emphasis is placed on ADR in the statute as a means of resolving cases more quickly and in a less costly manner. ADR is a concept that incorporates a varied and rapidly developing technique. We recommend that the court hire an administrator, with funds available under the Statute, to seek out, collect and make available to the court and counsel current information as to available ADR alternatives. Periodic programs can be arranged through such organizations as the local chapter of the Federal Bar Association or the Federal Court Committee of the San Diego County Bar Association to circulate this information and keep the lawyers abreast of new developments in this area.

We note further the Statute suggests that a neutral evaluation program be considered and conducted in the early stages of any proposed plan. § 473(b)(4). The proposal herein effectively sets up the magistrate judge as such neutral person unless the district judge elects to supervise pre-trial proceedings. Since the magistrate judge is required by statute to tailor-make a case specific pre-trial program, there is good reason to include neutral evaluation as part of those duties.

We recommend the ongoing involvement of an Advisory Group until 1995, the period specified by the Statute, to aid civil litigants and the court to identify solutions to any problems encountered.

This report is directed to the pretrial procedure. The conduct of the trial is left to the discretion of the trial judge. As a matter of completeness we observe the literature has many examples of suggestions to expedite trials, such as (1) limitations of issues, (2) limitations of experts, (3) methods to introduce expert direct examination by affidavit, (4) limitations on total time for presentation of evidence, (5) bifurcation of issues, and (6) orders charging order of proof or order of going forward.

It is emphasized in the statute that such procedures to expedite trial should not be contrary to a fair and deliberate result on the merits.

STATUTORY COMPLIANCE

The Statute requires that this Report include an explanation of how the proposed plan complies with the Statute's principles. Those principles are:

1. Systematic, differential treatment of civil cases that tailors the level of individualized and case-specified management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

2. Early and ongoing control of the pretrial process through involvement of a judicial officer in (a) assessing and planning the progress of a case, (b) setting early, firm trial dates, (c) controlling discovery, and (d) setting deadlines for motions;

3. For all complex cases careful and deliberate monitoring through a discovery-case management conference;

4. Encouragement of cost effective discovery through cooperation;

5. Initiation of discovery motions only after counsel have met and conferred in an attempt to seek agreement; and

6. Authorization to refer appropriate cases to ADR programs.

See § 473(a)

The proposal presented herein was tailored to meet the objectives of § 473(a) and consider the suggestions made by Congress at § 472(b) to implement the goals of § 473(a).[7] The plan provides for a systematic case management plan which treats cases differently and provides discretion to allow for complexities and resource limitations that arise. See, e.g., Plan at ¶ ¶ 1-2, 7, 11, 18. The critical importance, moreover, of setting early and firm trial dates and improvements in the

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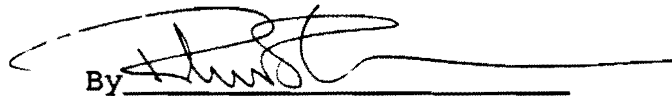
7/ At Section 473(b), Congress provides some suggestions on meeting the goals of the Statute:
a. That counsel for each party present a joint discovery management plan for the case at the initial conference;
b. That all counsel at a conference have the authority to bind his or her client on all matters previously identified as topics for discussion by the Court;
c. That requests for continuances be signed by both the party and counsel making the request;
d. That a neutral evaluation program be established;
e. That counsel attend settlement conferences with explicit authority to bind their clients; and
f. That the court consider other features suggested by the Advisory Group.

control of discovery and civil motions practice is also incorporated. See e.g., id. at ¶ ¶ 15-18. The management of complex cases, moreover, is specifically integrated into the plan. See, e.g. id. at ¶ ¶ 10, 14, 18. Finally, the encouragement of cooperation, "meet and confer" requirements, and the use of ADR programs are part of the plan. See, e.g. id. at ¶ ¶ 4, 5.

THE ADVISORY GROUP



By Robert G. Steiner
Chairman

September 19, 1991

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August 19, 1991

Hon. William W. Luddy, Clerk
United States District Court
for the Southern District of California
940 Front Street
San Diego, California 92189

Re: Civil Justice Reform Act Plan for the U.S. District Court for the Southern District of California

Dear Bill:

A review of the condition of the civil and criminal dockets along with the identification of certain trends within the district is enclosed with this letter. Per our telephone conversation last week I am sending the document first by fax and then by overnight mail today. If you have any questions or comments I will, of course, be available to you by telephone today and tomorrow.

Although it is patently clear that yours is an incredibly hard working district that is also extremely well managed, our report is rather straight forward in the sense that it does not make value judgments nor pass out well deserved bouquets. I do believe there is a well deserved place in the report which will ultimately be filed with the district and plan to acknowledge the quality work being accomplished. Also, I have not taken the liberty of drawing certain conclusions which I hope are self-evident and include the fact that the district's administrative and judicial personnel are going full speed and thus, it is incumbent upon the bar to pick up the laboring oar. This can be accomplished in a number of ways including the bar's involvement in ADR and also by such measures as shortening the numbers and days as they relate to pre-trial discovery.

You will recall that at an earlier time I sent you a cost of litigation survey instrument which in my view is very straight forward and very non-threatening. I would encourage its use in order that we might zero in on cost related issues and assist the committee in looking at the process and progress of a civil case at those points where costs are predominately a factor.

Also if I may assist your other efforts with respect to the preparation and completion of your plan I would, of course, be very pleased to have the opportunity for further collaborations with you.

With every good wish.

Yours sincerely,

William K. Slate, II

WKS,II/emb
enclosure

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CONDITION OF THE CIVIL AND CRIMINAL DOCKETS AND TRENDS

I. Overall Workload [1]

Five year trends indicate that total filings in the United States District Court for the Southern District of California are decreasing by over five percent annually. This decrease is slightly less than the national trend of a seven percent annual decline. However, it should be noted that the bulk of this decline in the district is accounted for by a large decrease of filings between 1986 and 1987. Since that time the decreasing rate of filings has moderated to a decline of 1% annually.

Terminations show a five year trend of approximate decline of two percent annually. Although the rate of filings is decreasing faster than the rate of terminations, the number of pending cases continue to rise slightly. This reflects a larger raw number of filings than terminations. However, these numbers are beginning to converge. If the filing and termination rates are continued in the future, one would expect to see a steady state of pending cases in the short run and a decline in the long run.

Long-term trends are generally better indicators of the future. While terminations in 1989 and 1990 seemed to show that the declining rate of terminations was beginning to reverse, the

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[1] Unless otherwise indicated statistics referenced are for the federal courts statistical year ended June 30, 1991.

number of case terminations declined again in 1991. This seems to reinforce the long term trend of a declining number of case terminations annually.

II. Condition of Criminal Docket

The district processes an extremely large number of criminal cases. The rate of filings of criminal felony cases in the district is increasing by over 3% annually. California Southern ranked seventh nationally as of June 30, 1990 with 131 criminal felony filings per judgeship. Although the 1991 national comparisons have not yet been published, the district will rank at the top of the nation with 156 criminal filings per judgeship for the statistical year ending June 30, 1991. The total felony filings were 917 in 1990 and 1,092 in 1991. The large criminal caseload naturally affects the court's ability to process felony cases. Thus, in 1990, the district ranked 77th out of 94 districts in the median time from filing to disposition in criminal cases. For that statistical year the district averaged 6.5 months to dispose of criminal felony filings.

Trials

In the 1991 statistical year the district had 308 criminal trials.[2] Although the majority of the current year's criminal trials (170) were disposed of in one day, 45 cases took two days, 43 cases three days, 44 cases from four to nine days, 3 cases from

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[2] In statistical year 1990 there were 389 criminal trails conducted.

ten to nineteen days, and one case over twenty days. It is accepted wisdom nationally that criminal trials in districts with large numbers of drug related case filings inordinately consume the time available from district judges.

Drug Related Cases

It is also a well known fact that the district's criminal felony filings are disproportionately populated by drug related cases. In both 1990 and 1991 over 40% of the criminal felony filings in the district were drug related cases. By comparison less than 33% of the criminal felony cases in all United States district courts combined were drug related. Drug cases also increasingly involve multiple defendant actions and this is also true in the district with 2,248 defendants in 1990 and 2,200 in 1991.

It should be noted that the number of criminal prosecutors and federal criminal investigators are increasing nationally and this clearly foretells a continued rise in the criminal caseload for the district in succeeding years.

Summary

The district has probably the highest per judge criminal case filing in the Nation and the largest percentage nationally of drug related cases. Multiple defendant cases consume extended trial days and a continued trend in the growth of criminal case filings is expected. See attached graph describing criminal case filings.

III. The Condition of the Civil Docket.

In statistical year 1990 the district was ranked 78th nationally in total civil filings. That year the district averaged 275 civil filings per judgeship. The number of civil filings per judgeship decreased to 266 in 1991. This is a significant decline from the average of 441 civil filings per judgeship in 1985.

Despite the relatively light load of civil cases per judgeship, the median time from issue to trial in 1990 was 18 months. The median time from issue to trial in the year ending June 30, 1991 was 21 months -- up 3 months in one year. A fair deduction is that the demands of the criminal docket impact negatively on the time available for civil cases.

Three Year Old Cases

One very positive indicator with respect to the disposition of civil cases, however, is a declining trend for those cases on the docket which are over three years old. On June 30, 1991, there were 2,142 pending civil cases, 250 of which were over three years old. That figure reflects a continuing decline in cases over three years old since one year earlier there were 297 such cases and in 1989 there were 382 three year old cases. When considered as a percentage of the total civil docket, 250 cases is 11.7% of the pending civil docket whereas in 1990, three year old cases consumed 12.7% of the docket and 1989, 14.4% of the total pending civil docket.

Trials

A total of 53 civil trials were held in the statistical year just concluded.3[3] The great majority of those (18) consumed just one day. However, 16 civil trials lasted from four to nine days, 6 civil trials from ten to nineteen days and 3 civil trials consumed twenty days and over.

Types of Civil Filings

Although the "nature of suit" for civil filings is not yet available for statistical year 1991, the categories have been fairly consistent over recent years. In statistical year 1990 the single greatest category of civil cases filed was for cases in contract representing 392 new filings out of a total of 1,923 new civil cases. The next largest single category of suit was in the nature of forfeitures and penalties and tax suits (which are collected statistically under one heading) and accounted for 306 cases. Civil rights suits was the next largest category with 231 cases followed by torts which accounted for 210 new civil cases. The only other three digit category of civil cases for that statistical year was prisoner petitions which totaled 163 new filings.

Summary

Civil filings continue to decline as does the percentage of cases pending over three years. The median time from issue to

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[3] Fifty-seven civil trials were held in 1990.

trial in civil cases is up from 18 to 21 months and is likely due to the increasing demands of the criminal caseload. The nature of civil suits filed and trial days consumed in complex cases are also factors in management of the civil docket.

IV. Magistrate Judge Utilization

The district is authorized five full time magistrate positions in San Diego, one part-time magistrate position at El Centro. During the twelve month period ending June 30, 1991, magistrates disposed of a total of 13,913 matters. The breakdown by major subject headings was as follows:

Criminal Matters

Petty offenses totaled 5,069; immigration matters were the largest total within that category numbering 4,461; preliminary proceedings totaled 6,389 with initial appearances being the largest category under this heading totaling 2,609; additional duties under the criminal category including motions, pre-trial conferences and evidentiary hearings totaled 115.

Civil Matters

Under the civil heading 2,315 matters were disposed of with pre-trial conferences being the largest category and totaling 1,938. Motions was the second largest category totaling 370; 25 civil cases were disposed of "on consent" with 21 being without trial and 4 non-jury trials.

Although Congress envisioned that magistrate-judges should play an important role in implementing the Civil Justice Reform

Act, magistrate judges in districts such as Southern California with exceptionally heavy criminal caseloads may not have time to assist significantly with civil cases. Nonetheless it is significant to note that out of almost 14,000 actions handled by magistrates in the district in the statistical year ended June 30, 1991, 2,340 were civil matters.

Summary

The magistrates are handling a large caseload which is predominately criminal and for the short-run it is problematic as to their increased availability to assist the civil docket.

V. Bankruptcy Cases

Although the bankruptcy court's caseload is not per se contemplated within nor a factor under the Civil Justice Reform Act plan, it is prudent to note that the district is experiencing unusual growth in bankruptcy case filings. District judges presently spend virtually no time directly involved in bankruptcy matters, however, the growth in the bankruptcy caseload brings with it the possibility of required district judge attention. For the 12 month period ending March 31, 1991, 12,377 bankruptcy petitions were commenced representing a 19.7% increase over the previous 12 month period. That percentage of growth was the largest in the entire Ninth Circuit. Terminations more than kept pace with 11,747 petitions being terminated or an increase in terminations by 23.6%. However, pending cases rose to 19,274 or an increase of 3.4%.

Summary

A growth in the bankruptcy docket may place increasing demands on district judges.

VI. Summary of Trends

Overall Workload

* Total filings in the district are declining at a rate of approximately 1% annually.

* Total terminations are not increasing sufficiently at present to reduce the pending caseload but will likely increase in the next several years.

* Pending cases will continue to rise in the short run but flatten and decline in the long-term.

The Criminal Docket

* Criminal filings per judgeship lead the nation and will continue to grow for the foreseeable future.

* Drug cases and multiple defendant cases place large demands on available judge time and result in a higher than average time required to dispose of criminal felony filings.

The Civil Docket

* Civil case filings continue to decline and likely will over the next several years.

* The median time from issue to trial in civil cases is up three months this year and will likely continue to grow based upon demands of criminal docket.

* A positive trend continues in the reduction in the number of three year old cases on the pending civil docket.

Magistrate Utilization

* Magistrates are largely concerned with criminal matters and will likely have little additional time in the future to provide substantial assistance to the civil docket.

Bankruptcy Cases

* The growing number of bankruptcy cases in the district foretells the possibility of increased demands placed upon U.S. District Judges.

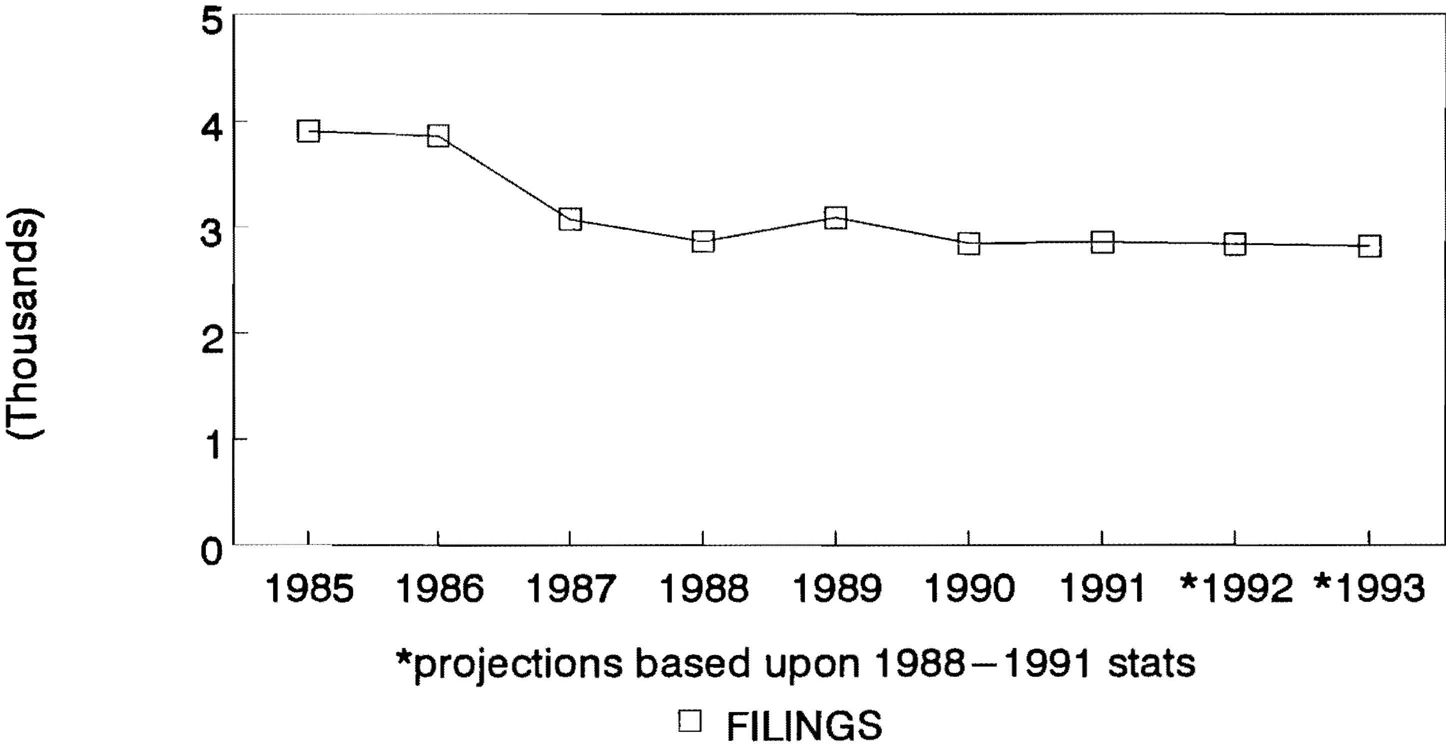
OVERALL WORKLOAD STATISTICS

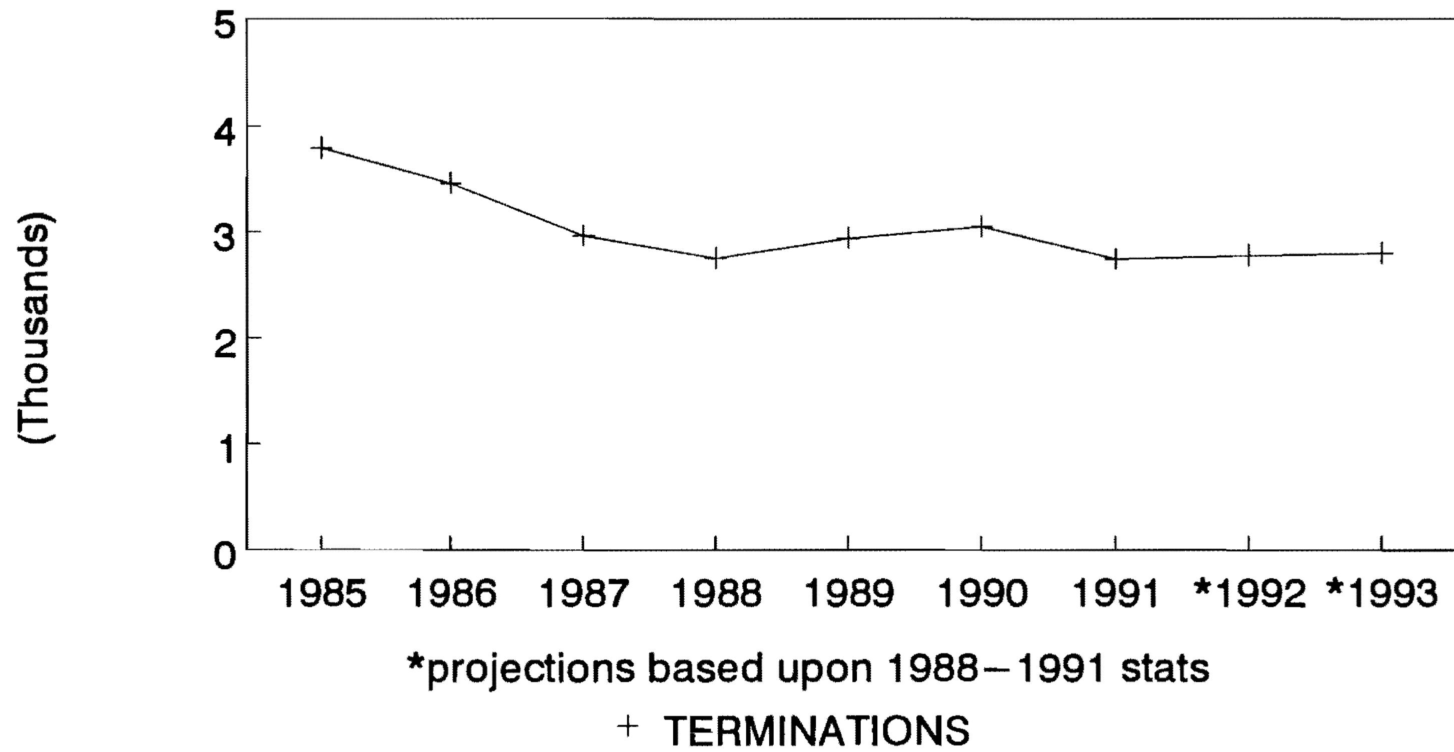
United States District Court
Southern District of California

Workload Statistics

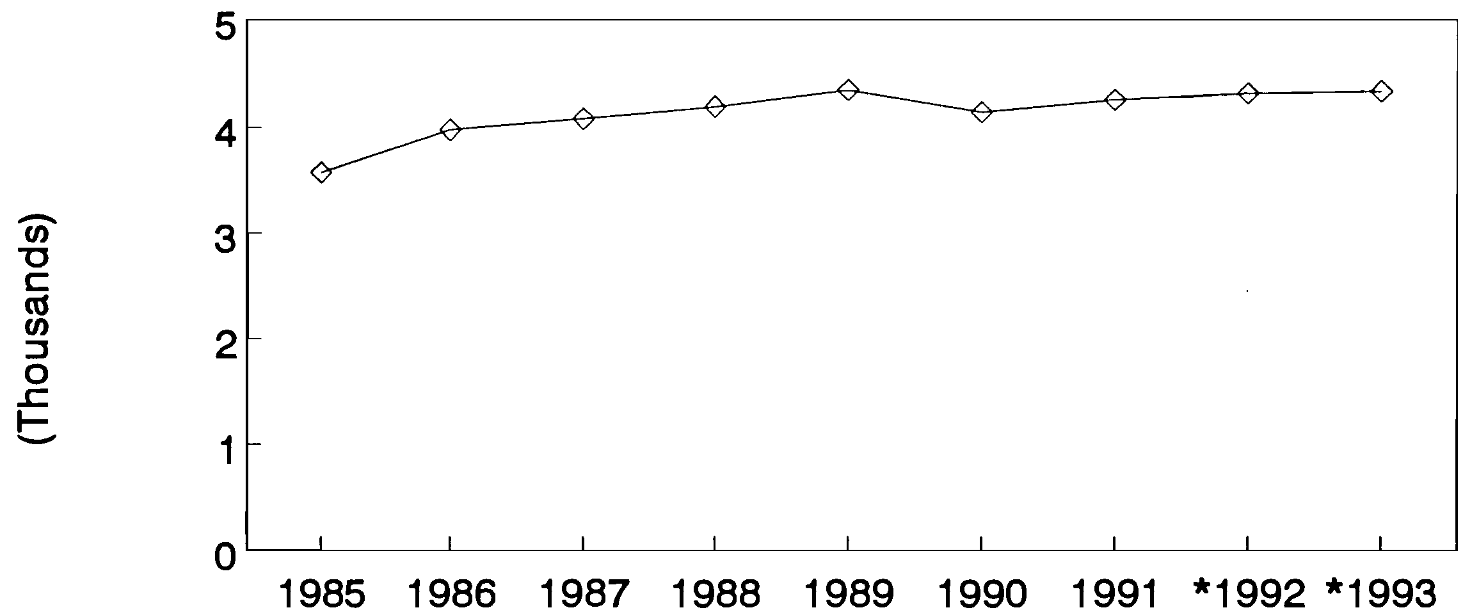
YEAR	FILINGS	TERMINATIONS	PENDING
1985	3902	3791	3571
1986	3858	3457	3970
1987	3074	2960	4074
1988	2862	2749	4188
1989	3088	2938	4343
1990	2842	3047	4138
1991	2855	2741	4252
*1992	2837	2775	4314
*1993	2820	2800	4334

* projections based upon 1988–1991 statistics

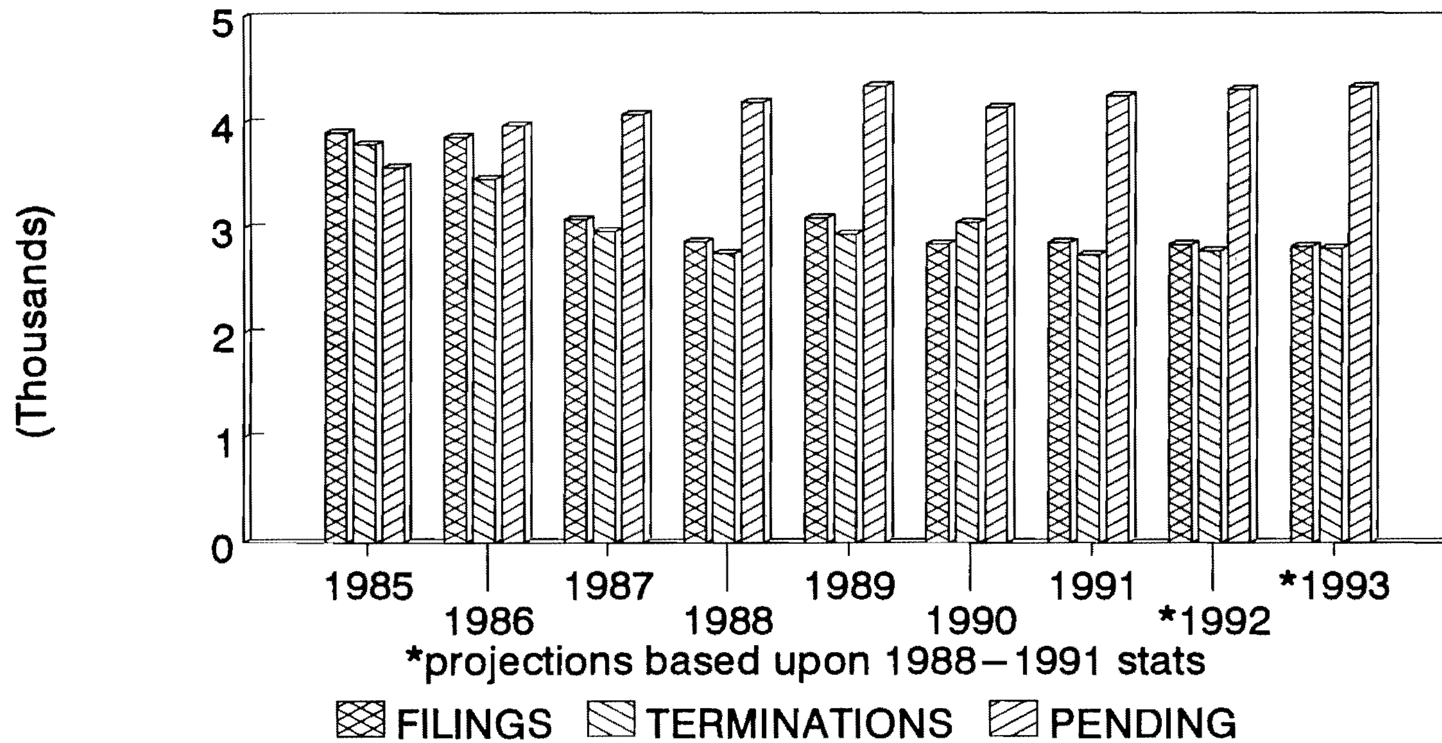

CALIFORNIA SOUTHERN
WORKLOAD STATISTICS
(Thousands)
5
4
3
2
1
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988–1991 stats
FILINGS



CALIFORNIA SOUTHERN
WORKLOAD STATISTICS
(Thousands)
5
4
3
2
1
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988–1991 stats
+ TERMINATIONS



CALIFORNIA SOUTHERN
WORKLOAD STATISTICS
(Thousands)
5
4
3
2
1
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988–1991 stats
PENDING


CALIFORNIA SOUTHERN
WORKLOAD STATISTICS
(Thousands)
5
4
3
2
1
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988-1991 stats
FILINGS
TERMINATIONS
PENDING

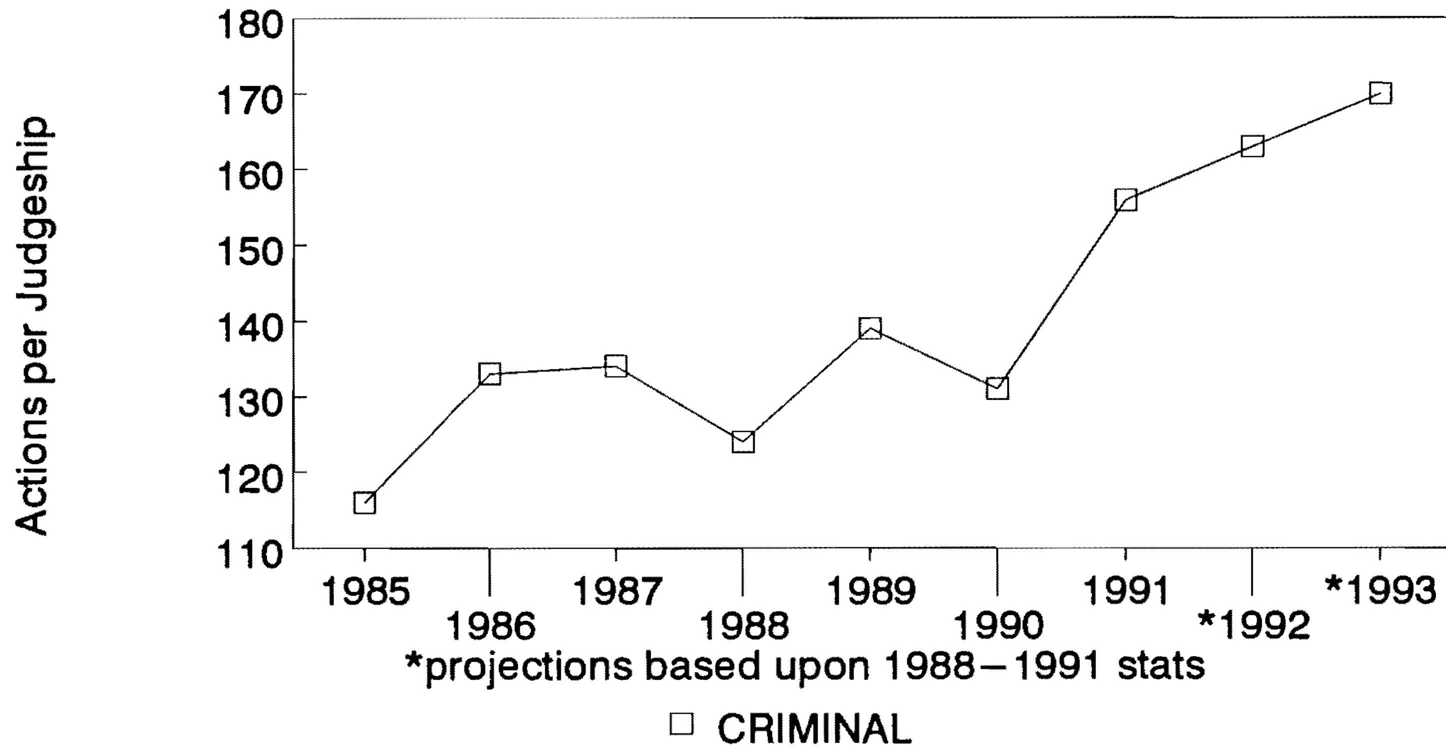
ACTIONS PER JUDGESHIP

United States District Court
Southern District of California

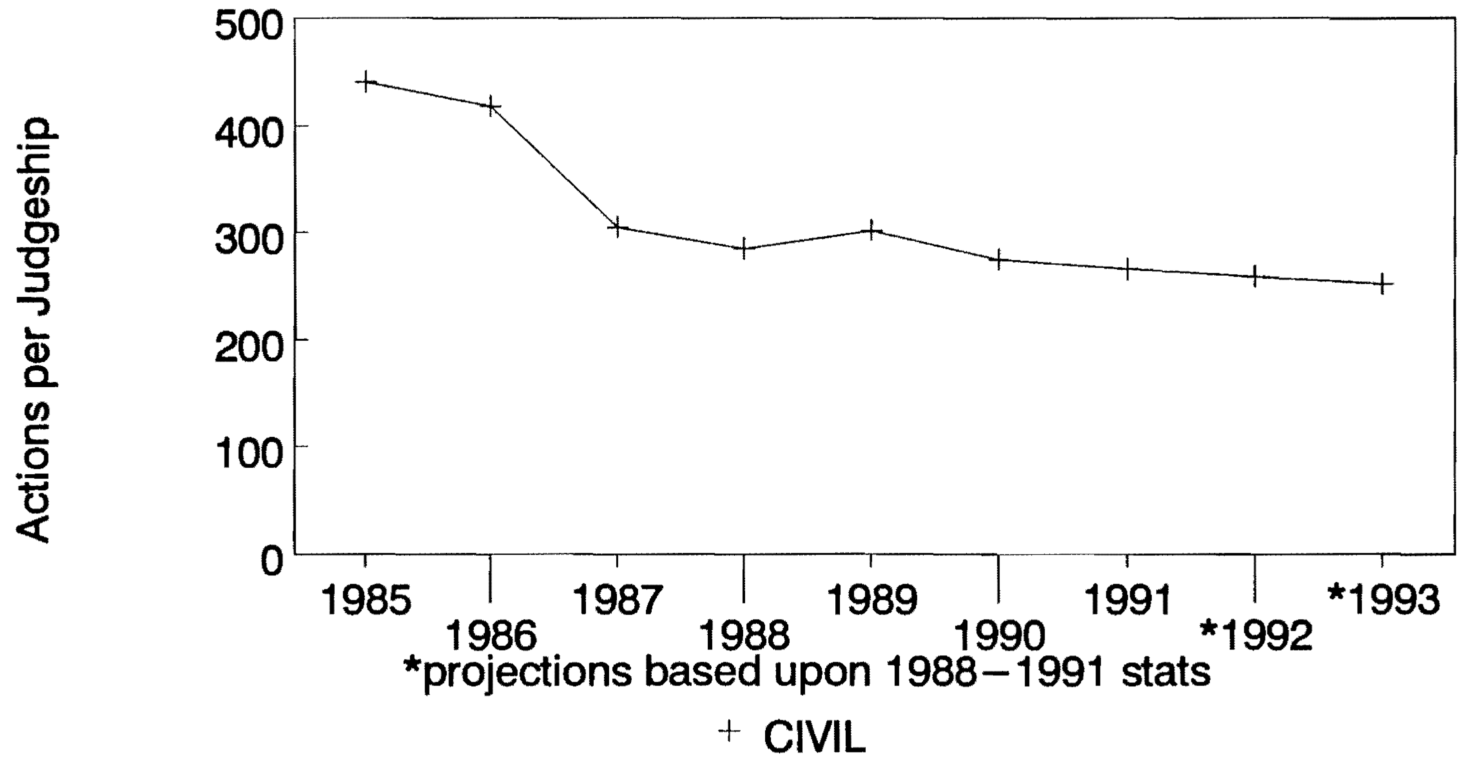
Actions per Judgeship

YEAR	CRIMINAL	CIVIL	TOTAL
1985	116	441	557
1986	133	418	551
1987	134	305	439
1988	124	285	409
1989	139	302	441
1990	131	275	406
1991	156	266	422
*1992	163	259	422
*1993	170	252	422

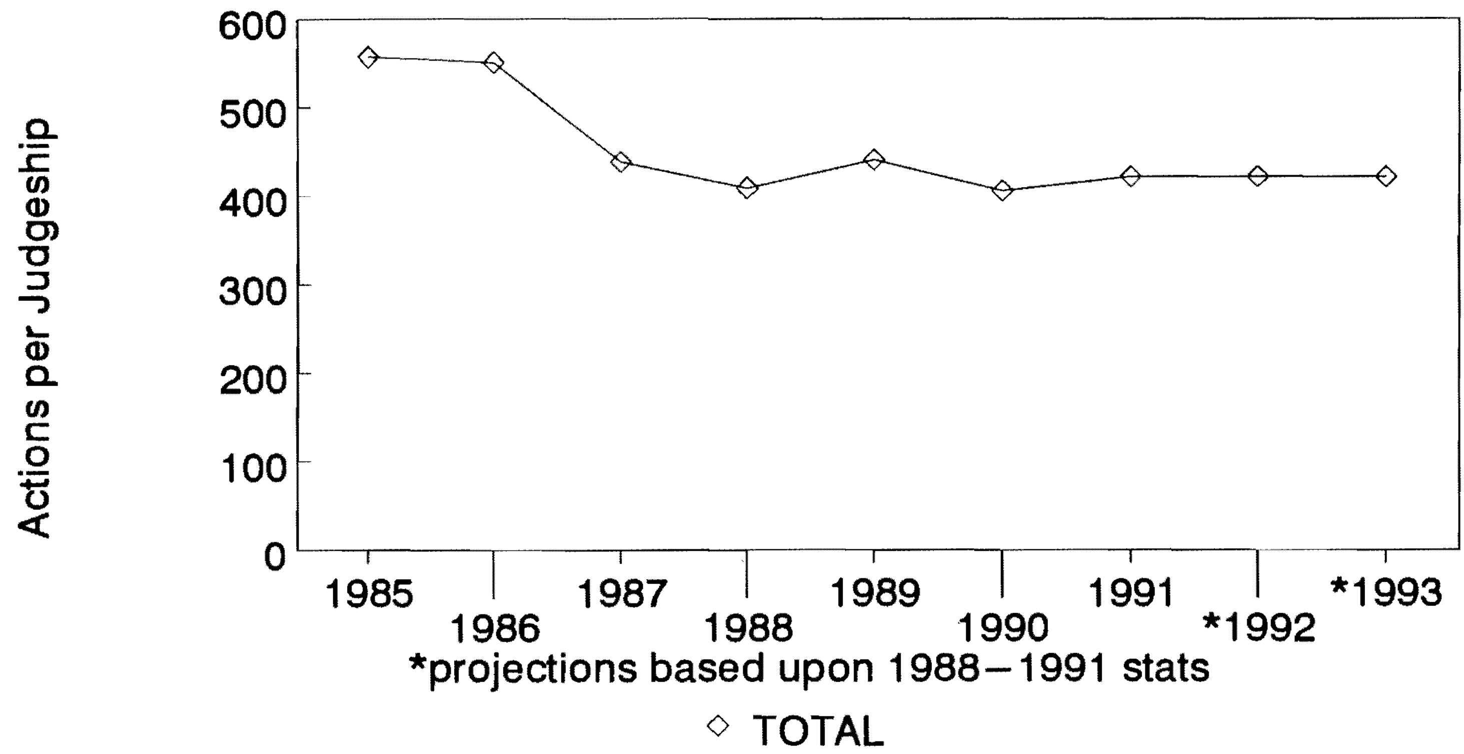
* projections based upon 1988–1991 statistics



CALIFORNIA SOUTHERN
FILINGS
Actions per Judgeship
180
170
160
150
140
130
120
110
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988-1991 stats
CRIMINAL



CALIFORNIA SOUTHERN
FILINGS
Actions per Judgeship
500
400
300
200
100
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988-1991 stats
CIVIL


CALIFORNIA SOUTHERN
FILINGS
Actions per Judgeship
600
500
400
300
200
100
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988—1991 stats
TOTAL

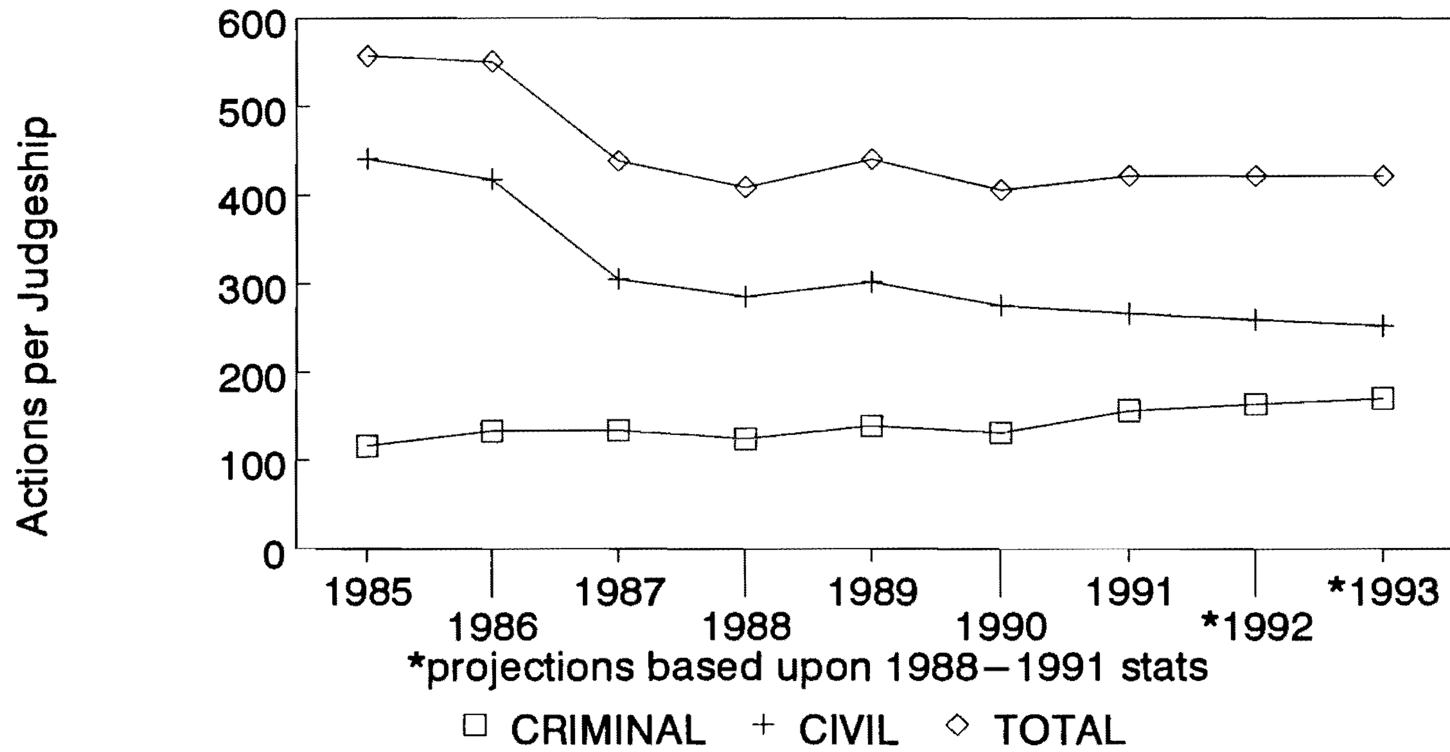

CALIFORNIA SOUTHERN
FILINGS
Actions per Judgeship
600
500
400
300
200
100
0
1985
1986
1987
1988
1989
1990
1991
*1992
*1993
*projections based upon 1988-1991 stats
CRIMINAL
CIVIL
TOTAL

EXHIBIT C

How Caseload Statistics Deceive

Prepared by John Shapard, Federal Judicial Center

August 9, 1991

(NOTE: A draft of this paper dated May 2, 1991, contained an error in the parenthetical at the end of the first paragraph on page 3: the word "divided" should have been "multiplied". The only difference between this version and that of May 2 is correction of that error.)

EXHIBIT C

How Caseload Statistics Deceive

Despite the various adages concerning statistics and lies, statistics don't lie. Instead, we often mislead ourselves by misinterpreting statistics. Court caseload statistics present numerous opportunities for this sort of self-deception. Obvious ways of looking at caseload data and obvious nostrums about assessing a court's caseload are sometimes just simply wrong. Their flaws are unappreciated not because they are hard to grasp, but because we are conditioned to think about statistics using apples-and-oranges or dice-throwing examples. Because significant time elapses over the life of many court cases, the better statistical analogy is that of human populations. Failure to appreciate how the lifespans of cases affect caseload statistics causes numerous misunderstandings. The purpose of this paper is to illustrate three closely related misunderstandings about caseload statistics, in the hope that a basic understanding of the problem can help prevent mistakes on the part of the various parties charged under the Civil Justice Reform Act with trying to improve the condition of court dockets .

Here is an example, to illustrate the problem. The standard index of case duration in a district is the median time from filing to disposition for cases disposed of in the most recent year. Suppose that the judges of a district , responding to increases in this median time index, decide to improve the situation by working especially hard to clean up the backlog of older pending cases. The judges begin working overtime trying cases that have been awaiting trial, expediting or dismissing cases that have languished too long in the pretrial process, and generally moving along or moving out all cases that they deem overdue for some such movement. The effort and its results are impressive: annual case dispositions increase, the number of cases pending decreases, and the median time from filing to disposition goes way **up**! The key indicator of the court's "speed" indicates that it has gotten slower than ever. The reason is not hard to see. Exactly as it intended, the court disposed of a lot more old cases last year than it had in previous years. Because the cases terminated last year include an unusually large number of old cases, but only the usual number of young cases, the median age of terminated cases went up. The statistics are not lying. We are deceiving ourselves in thinking that the median age of terminated cases is a reliable indicator of average case duration.

1. Statistics based on terminated cases do not tell us about current caseloads.

The basic flaw in our thinking is this: **terminated cases are not representative of the court's caseload.** The reason can be seen by considering the analogy to human populations. In human populations as well as court caseloads, the life expectancy of newborns or of newly filed cases is not necessarily the same as the average age at death of persons who died last year or of cases disposed of last year. There is a connection, but it is diffused, sometimes greatly, by the passage of time between birth and death or filing and disposition.

Consider a district that has for many years enjoyed a very stable caseload: each year 2000 cases are filed, 2000 cases are terminated, and 2000 cases remain pending at the end of the year. The median time from filing to disposition has long been 8 months. The

average[1] time from filing to disposition has long been 12 months, and cases reaching trial account for 10% of all cases terminated. Suddenly, in 1991, the case filing rate jumps to 3000 per year, the average age at termination drops to 10 months, and the percent of cases reaching trial drops to 8%. It seems likely that the 1000 "new" case filings must have been composed mainly of cases that are "faster" and "easier" than average. But that is wrong. The truth is that nothing has changed except filing rate: the 3000 cases filed in 1991 will average one year from filing to disposition, and 10% of them will reach trial. The average age and trial rate statistics, which for many years told us the truth, are now lying.

The reason is not hard to understand. The 1000 additional case filings produce a major increase in the number of young cases in the pending caseload (a "baby boom" of sorts). Since the pending caseload is the supply of cases from which case terminations arise, and since most cases are disposed of relatively quickly, the number of cases disposed of at an early age increases dramatically. But there is no corresponding increase in the supply of old cases, which arose when annual filings were just 2000 per year, so the number of old case dispositions remains what it was in past years. Hence the average age at termination drops. Similarly, because few young cases reach trial, the number of cases disposed of after trial has not yet changed much. But the total number of case terminations has increased due to the increased number of young-case dispositions, so the percentage of cases disposed of after trial drops.

If our hypothetical court's filings rate either stayed at 3000 per year, or dropped back to 2000 per year and stayed there, the statistical distortions would eventually disappear. After a few years, the statistics would be back to normal, again showing the historic one-year average age at termination and ten percent trial rate. But reality is not so kind. Filing rates change, and in the long term trend they are often either increasing or decreasing. When filing rates are continuously increasing, the median time from filing to disposition will be constantly distorted downward, as will the trial rate, due to the constant relative oversupply of young cases in the pending caseload. Conversely, decreasing filing rates cause an upward distortion in both median age and trial rate.

2. How can you tell if a district is "staying abreast" of new case filings?

An oft-repeated nostrum is that to keep abreast of its caseload, a court must each year dispose of as many cases as are filed Although that advice seems to make sense, the unfortunate truth is that it is correct only under circumstances when it is too obvious to be worth saying. If a court continues year after year to receive 2000 case filings and to dispose of only 1800, there is obviously a problem. As can be seen from the example used in the preceding section, an abrupt increase in case filings does not lead to a comparable increase in case terminations, even when a court is staying fully abreast of its caseload in the sense that it is maintaining a constant average age at termination. Conversely, when filings are decreasing, saying abreast will yield annual case terminations that exceed annual filings.

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[1] Average is used here to represent the arithmetic average, or mean--the sum of the ages of terminated cases divided by the number of cases. Annual reports from the Administrative Office of the U.S. Courts usually report the median--half of all cases are terminated at an age that is at or below the median, and half at an age that is at or above the median. The average age of terminated cases is usually about 50% greater than the median.

If the nostrum is false, how can you tell whether a court is "staying abreast?" The answer is to track the ratio of pending cases to annual case terminations. If that ratio stays constant, the court is staying abreast; if it decreases, the court is gaining ground--disposing of cases faster--and if it increases, the court is falling behind. The ratio of pending cases to annual case terminations is a good **estimate** of the true average duration (or life expectancy) of a court's cases (the ratio gives average case duration in years; if multiplied by 12 the result is average case duration in months).

It is useful to understand why the ratio of pending to terminated cases is a good estimate of average case duration. The key point is that there is an absolute, albeit rough arithmetic relationship between pending caseload and average case duration. To see that relationship, consider a very simple example of a court that handles a single type of case, each of which lasts exactly one year. Suppose the court receives exactly one case per month, filed on the first of each month. This court must have exactly 12 cases pending at any time (the case filed on the first of this month and those filed on the first of the preceding 11 months). If instead each case lasts exactly six months, then the court will have exactly six cases pending at any time. Although it is not intuitively obvious, the same relationship exists--and can be mathematically proven--in respect to **average** case duration. Provided that the mix of cases of varying durations remains constant and case filings are continuous (i.e., they are not all filed in January, but are filed in roughly equal numbers throughout the year), the pending caseload will equal average case duration (in years) multiplied by annual case terminations. This point is key to the next and final topic.

3. The "momentum" of court caseloads.

Suppose a court that now has an average case duration of 24 months adopts a plan for expediting case dispositions, with the goal of reducing average case duration to 12 months. What will this require? Consider the relationship explained in the previous section. If average case duration is approximately equal to the ratio of pending cases to annual case terminations, and if average case duration is 2 years, then the pending caseload must include about twice as many cases as are annually terminated. To reduce average duration to 1 year, the pending caseload must be cut in half. To accomplish that in the next year, the court must dispose next year of twice as many cases as it did last year (provided that annual filings do not change). To do it in two years requires that case terminations be maintained for two years at a pace fifty per cent higher than current pace.

Are such accomplishments really possible? Probably not, although the answer depends on how an increased pace of case terminations can be achieved. If it can be done by methods that impose little additional demand on court resources, then it might be possible to halve the pending caseload in a year or two. If instead the necessary methods require a drastic increase in trials or other activities that place major demands on court resources, then the pending caseload cannot be quickly cut in half without a major increase in those resources.

Caseloads have momentum. The pending caseload is a heavy weight, and a court can only be as fast as that weight will allow. To get faster, the court must shed weight. Prescriptions and decisions about dieting will lead to disappointment if they are not based on realistic goals and timetables.

DELAY & COST REDUCTION PLAN

ADOPTED BY THE

DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OCTOBER 7, 1991

Plan of the Judges
Of the Federal District Court
For the Southern District of California
As required by the
Civil Justice Reform Act of 1990

October 7, 1991

Whereas, the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified as amended at 28 U.S.C. §§ 471-82), (the "Statute"), has charged that this Federal District Court assess cost and delay in the adjudication of its civil cases, consider solutions for reducing cost and delay, and adopt a plan to implement those solutions;

Whereas, the Advisory Group for this District has identified a burgeoning criminal calendar caused in significant part by mandatory minimum sentencing and guideline sentencing, unfilled judicial vacancies, the difficulty of setting and keeping early civil trial and motion dates, and delay and abuse of the discovery process by civil litigants, as sources of the cost and delay in civil adjudication; and

Whereas, the Advisory Group has suggested a variety of recommendations to address the various factors increasing cost and delay in this District;

Be it, therefore,

Resolved that we, the Judges of the Southern District of California, adopt the following plan to reduce the cost and delay associated with civil litigation in this District:

We order that each district judge be excluded on a rotating basis from the criminal draw for a two month period each year so that the judge will be afforded two full months of uninterrupted civil case management time.

We authorize the Chief Judge to increase her efforts to find visiting judges to come to this District to preside over criminal trials.

We authorize the Chief Judge to appoint a committee whose membership will include the U.S. Attorney, a representative of Federal Defenders and a representative of the private criminal defense bar, to recommend settlement procedures in criminal cases.

We order that early trial dates be set in certain cases. In Social Security matters, enforcement of judgments, prisoner petitions challenging conditions of confinement, and forfeiture and penalty cases, a trial date which falls within twelve (12) months of the filing

of the complaint should be set. In Federal Tort Claims Act cases, we order a trial date be set that falls within fifteen (15) months of the filing of the FTCA complaint. We also order that twenty-five (25) percent of the remaining civil cases that are not "complex" be given a trial date which falls within eighteen (18) months of the filing of the complaint.

With respect to the foregoing order for early trial dates we further order: (1) that the trial date set be firm and that all requests for continuances of trial and motion dates be granted only for good cause shown; (2) that trial by magistrate judge be encouraged to the parties; (3) that the ability to resolve these cases within the early time limits be tracked and monitored and compared to the adjudication of cases not given early trial dates; (4) that a case be exempted from the trial date requirements only if: it involves complex issues of fact or law requiring greater time for resolution, if new parties are added, or if the trial judge finds such other exceptional reason as may require an extension; and (5) that no trial date will be extended except by written order of the trial judge.

We order that the clerk of court make regular monthly reports to the Chief Judge of all civil cases pending more than eighteen (18) months on the dockets of each judge, and of all criminal cases pending more than six (6) months, in order to assist the Court in assessing the effect and effectiveness of the various recommendations.

We order that the Magistrate Judge, or the District Court Judge should s/he opt to manage pretrial discovery, (hereinafter "Judicial Officer"), closely manage each case from the outset and encourage settlement as early as possible, supervise negotiations and motions to confirm settlements, and control the discovery process.

We order that after a hearing with an opportunity to be heard, the Judicial Officer shall order a non-binding mini-trial or summary jury trial in all cases s/he finds that (1) the potential judgment does not exceed $250,000 and (2) that the use of this procedure will probably resolve the case.

We order that the Judicial Officer order non-

binding arbitration/mediation[1] in all even numbered simple contract and simple tort cases (excluding FTCA cases) where the Judicial Officer finds the potential judgment does not exceed $100,000, and in every even numbered trademark and copyright case. Data from this procedure is to be collected and analyzed to evaluate effectiveness.

We authorize the Chief Judge to establish a committee to seek competent volunteers to staff a panel of arbitrators/mediators who will commit to accept the referral of one case per year without compensation with the expectation of devoting up to eight (8) hours of time to the process.

We authorize the Chief Judge to supervise the development of a questionnaire to debrief parties and their counsel at the close of each civil case filed after January 1, 1992. The questionnaire should be fashioned to seek information evaluating the effectiveness of the system retrospectively.

We order that accurate information be generated about the civil caseload and how it is processed through the courts. To this end, an administrator will be employed to implement and supervise this statistical monitoring system implemented in accordance to recommendations in the Advisory Group Report.

We order that counsel "meet and confer" prior to filing any discovery motion and seek to resolve the matter informally. If counsel are in the same county, they are to meet in person; if counsel practice in different counties, they are to confer by telephone. However, under no circumstances may counsel satisfy the "meet and confer" obligation by written correspondence.

Beyond the foregoing, we order the implementation of a comprehensive pretrial program to include the following:

X. All complaints shall be served within one hundred and twenty (120) days. Any extension shall be granted only upon good cause shown.

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[1] This mode of arbitration is not to be confused with the determinations provided for under 28 U.S.C. § 658 since the procedures ordered herein are to be strictly non-binding and no formal judgment will be filed with the clerk or the court pursuant to this procedure.

. On the one hundred and thirtieth (130th) day following the filing of the complaint, or on the tenth (10th) day following an extension of time to serve, if proof of service has not yet been filed, the clerk shall prepare an order dismissing the case without prejudice and submit it to the assigned district judge for signature.

. Extensions of time for answering, or moving to dismiss, a complaint shall only be secured by obtaining the approval of a Judicial Officer, whom shall base his or her decision on a showing of good cause.

. If an answer, or motion to dismiss, is not filed within the original or extended time, the clerk shall enter a default and serve notice thereof on the parties. If plaintiff(s) fail(s) to move for default judgment within thirty (30) days, the clerk shall promptly prepare an order dismissing the complaint without prejudice for filing by the assigned district judge.

. A motion for summary judgment, or other non-emergency motion may be displaced to facilitate a hearing of a motion to dismiss within sixty (60) days of its filing.

. When an answer has been filed, the clerk shall notify the assigned district judge.

. <u>Early Neutral Evaluation ("ENE") Conference</u>: Within forty-five (45) days of the filing of an answer, counsel and the parties shall appear before the assigned Judicial Officer supervising discovery for an ENE Conference; this appearance shall be made with authority to discuss and enter into settlement.

> . At the ENE Conference, the Judicial Officer and the parties shall discuss the claims and defenses and seek to settle the case.
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> . The ENE Conference will be informal, off the record, privileged and confidential.

i. Attendance may be excused only for good cause shown and by written order. Sanctions may be appropriate for an unexcused failure to attend.

8. If no settlement is reached at the ENE Conference, the Judicial Officer shall do one of the following:

a. Encourage the parties and their counsel to confer for the next forty-five (45) days with the objective of reaching an agreement to pursue alternative dispute resolution ("ADR") and set a Case Management Conference for sixty (60) days after the ENE Conference;

b. Refer to non-binding arbitration or mediation to occur within forty-five (45) days (1) every even-numbered simple contract or simple tort action (except FTCA cases) where the Judicial Officer finds the potential judgment is less than $100,000, and (2) every even-numbered trademark and copyright case. Additionally, a Case Management conference shall be set in these cases approximately sixty (60) days after the ENE Conference.

c. Where no arbitration or mediation is agreed upon or ordered, the Judicial Officer shall set a Case Management Conference approximately thirty (30) days after the ENE Conference.

10. As the ENE Procedures proceed, no stay in discovery may occur unless specifically ordered by the Judicial Officer on good cause shown.

11. Case Management Conference: The parties who have responsibility over the litigation and the counsel who will try the case, will be present at the Case Management Conference. The Judicial Office may approve attendance of a party or counsel by telephonic conference call. At a reasonable time before this Conference:

a. All counsel will discuss discovery and endeavor to resolve any disputes;

b. Plaintiff's counsel will in good faith specify in an informal writing the essential detail of the claims asserted, and the identity of the principal witnesses;

c. In response, defense counsel will in good faith specify in an informal writing the essential detail of the defenses to such claims, and the identity of their principal witnesses; and

d. The informal writings will be discussed by counsel at the Conference in order to focus the issues, and the writings shall be provided to the Judicial Officer in advance of the Case Management Conference.

e. At the Conference, the Judicial Officer will (1) discuss the complexity of the case: (2) encourage a cooperative discovery schedule; (3) discuss the likelihood for further motions; (4) discuss the number of anticipated percipient and expert witnesses; (5) evaluate the case and the need for early supervision of settlement discussions; (6) discuss the availability of ADR alternatives; and (7) discuss any other special factors applicable to the progress of the case.

f. At the end of the Conference, the Judicial Officer shall prepare a Case Management Order which will:

i. Set out the issues in the case. (The Judicial Officer may direct the parties to prepare a stipulation setting forth a

concise statement of the issues);

ii. Include a discovery schedule;

iii. Set a time for a further Case Management Conference if necessary; and

iv. Set a time for the proponent of each issue to identify expert witnesses; set a time for the responding party to identify expert witnesses in reply; set a time for the depositions of experts; set a time for the supplementation of such expert designation depending on the circumstances;

v. Set a deadline for filing pretrial motions;

vi. Set a firm pretrial conference date.

9. At the Case Management Conference, the Judicial Officer will set a date for a Mandatory Settlement Conference, unless it is determined that such a conference should be excused.

12. If at any time prior to the Mandatory Settlement Conference, a particular case is determined ready for settlement by a Judicial Officer, it may be calendared for a settlement conference, even over the objection of one or more parties or their counsel. In this regard:

a. The Judicial Officer handling settlement will be disqualified from trying the case unless there is agreement by the parties to waive

this restriction;

b. The Judicial Officer handling settlement may receive communications in camera from each party and its counsel, and shall maintain such in confidence unless there is a stipulation to the contrary;

c. Each party will send a representative to the settlement conference with full authority to enter into an agreement to settle the case unless good cause is shown waiving this requirement;

d. The Judicial Officer handling settlement should schedule as many follow up settlement conferences as the Judicial Officer finds appropriate in light of the complexity of the matter or other factors.

N. At the conclusion of a case, the Judicial Officer shall issue to the parties and their counsel the questionnaire discussed at Paragraph K of this Plan, supra.

[illegible]. At the conclusion of a case, the Judicial Officer shall also debrief the parties and counsel in an informal setting to evaluate candid comments, criticism and suggestions. The Judicial Officer will prepare a confidential report to the Chief Judge as to the comments made during this debriefing. This information is to be used by the Chief Judge as an internal management tool to assess and track the success or failures of the new civil case management features.