REPORT OF THE ADVISORY GROUP
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

MAY 12, 1993

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Notwithstanding the previous efforts of all participants, the District Court system in Hawaii still can be improved - civil litigation can progress more efficiently and at less economic and emotional cost to the participants. Each of the following recommendations is intended to enhance case management, reduce costs, and/or reduce delay in civil litigation.

1. Maintain firm trial dates.
   - Continue to set trial dates at initial scheduling conferences.
   - Notify counsel immediately if the schedule is disrupted by subsequent events.
   - If the assigned judge is not available on the date set and another judge is available, the case should be shifted.
   - If another judge is not available, the parties should be offered the option of consenting to trial by a magistrate judge.
   - One judge should be designated for civil trials.
   - Motions to continue should contain an affirmative statement that the client concurs.
2. Modify the Temporary Order Regarding Trial Settings and Readiness Calendar issued November 5, 1992, so cases are required to be ready on the day set and the remainder of that week.

3. Have Article III judges, as well as magistrate judges hold mandatory settlement conferences.

   - At least every six months, each district judge will devote one week to settlement conferences in civil cases.

4. Study methods to relieve magistrate judges from hearing military traffic matters.

5. Increase the retention of prisoner petitions by Judges.

6. Hire a staff attorney to expedite pro se and prisoner litigation.

   - Create a pro se litigant handbook regarding federal rules and procedures.

7. Nominate and fill the fourth judgeship for the District.

8. Improve courtroom technology.

   - Install state-of-the-art communication equipment in courtrooms for use by all litigants.

9. Increase the utility of motions to dismiss and for summary judgment.

   - Grant or deny motions to dismiss and for summary judgment within ten days absent extraordinary circumstances.

   - Eliminate/refine issues by use of partial summary judgment more often.

10. Impose sanctions, including non-monetary alternatives, more often.

11. In conjunction with the lawyer advisory representatives or the Federal Bar Association, create a continuing legal education program focusing on federal practice and procedure.

13. Establish rules governing the number, length, scope and timing of depositions.

14. If an amended Fed. R. Civ. P. 26 is adopted and includes a requirement that privileged materials be disclosed, have Hawaii opt out of that provision.

15. Establish a pilot program in which senior or retired litigators will serve as settlement masters to conduct settlement conferences in selected civil cases.

16. Enter a temporary order requiring parties to make written offers of settlement with consequences akin to those available pursuant to Fed. R. Civ. P. 68 if no settlement is reached.

INTRODUCTION

The Civil Justice Reform Act of 1990[1] mandates that each United States District Court establish and implement a civil justice expense and delay reduction plan. To develop the plan, the Act requires the Chief Judge of each district to appoint an Advisory Group consisting of a balanced group of attorneys and other persons who are representative of major categories of litigants in the court.

The Advisory Group, in turn, is mandated to:

(a) Determine the conditions of the civil and criminal dockets.

(b) Identify trends in case filings and in the demands being placed on the court's resources.

(c) Identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation.

(d) Examine the impact of new legislation as a cause of cost and delay.

Consistent with the mandate of the Act, on March 1, 1991, the members of the District of Hawaii Advisory Group were appointed pursuant to section 478(b) of the Act. Appendix 2 to this report contains the names of the appointed members.

---

[1] The Civil Justice Reform Act of 1990, is the short title of Title I of the Judicial Improvements Act of 1990, Public Law 101-650 (1990) codified at 28 U.S.C. §§ 471-482. A copy of the Act is set forth in Appendix 1 to this report.

The report that follows embodies the majority view of the Advisory Group on each issue as determined after extensive, and often intensive, discussion and debate among the members of the Advisory Group.

The objective, or mission, of this Advisory Group has been to assess the overall condition of the court's docket with emphasis upon the civil docket. Particular attention has been paid to the subjects of case management, causes of unnecessary delay and unnecessary costs, and identification of potentially effective means to reduce them.

The District of Hawaii is unusual from both a geographic and demographic perspective. The District includes the entire state. Hawaii is an island state made up of eight principal islands, seven of which are populated. It is separated by over 2,400 miles of ocean from its nearest neighboring judicial district.

Although small in population and land area,[2] Hawaii provides a forum for many different types of litigation. The core concept of differential judicial case management is challenged by the diversity of issues presented in this District. Located in the middle of the Pacific, the Court decides civil litigation issues ranging from admiralty to zoning. The challenges to case management grow out of various factors, including: the evolving Hawaiian sovereignty movement; the multi-ethnic population with its resultant language and cultural differences; the large U.S. military presence which includes a major Army hospital and Naval Shipyard; the status of Honolulu as the nearest United States port of entry for legal and illegal

[2] The present population of Hawaii exceeds 1 million. The annual tourist visitor count exceeds 6.5 million.

immigrants from the Far East; the growth of environmental litigation; and the tremendous influx of tourists to the Hawaiian Islands.

Early in the division of labor leading to this report, it was decided that the Advisory Group would be operated as a committee-of-the-whole. Four subcommittees were created to gather information on different subjects. The subcommittees respectively concentrated on: (1) docket assessment, (2) judicial officer interviews, (3) attorney questionnaires, and (4) option identification. As a result, the committee-of-the-whole was able to draw not only upon the experiences and expertise of its members, but also from a broad informational base. That base included:

(a) Statistical fiscal year reports compiled by the Administrative Office of the United States Court;

(b) Statistical information concerning the District of Hawaii provided by the Clerk of Court;

(c) Personal interviews conducted by committee members with each of the active district court judges, senior judges, and magistrate judges;

(d) Results of a detailed questionnaire sent to a representative group of attorneys practicing within the District;

(e) Interviews with the Clerk of Court and staff; and

(f) Review of reports, statistics, and other related source material supplied by the Judicial Conference of the United States; the American Bar Association Task Force on the Civil Justice Reform Act; and other District Court Advisory Groups.

During the Advisory Group's existence, progress updates have been provided to the Court. Several of the recommendations contained in this report have already been put into practice by the Court.

COURT RESOURCES

JUDGES

The District of Hawaii is authorized three active judgeships and one temporary judgeship. The temporary judgeship has remained vacant since its inception.[3] At present, the Advisory Group understands that no nomination for the vacant temporary judgeship has been forwarded to the United States Senate for confirmation. However, a selection process has been initiated by the senior Senator from Hawaii, Daniel Inouye. This process is reported to be moving forward.

The Advisory Group strongly supports filling this vacant judgeship and believes that doing so would greatly enhance the ability of the Court to meet the goals cited in the Civil Justice Reform Act. At present, the unfilled position deprives the Court of the management flexibility that a fourth judge would bring.[4]

The three active judges for the District of Hawaii are:

Alan C. Kay, Chief Judge

Harold M. Fong, District Judge

David A. Ezra, District Judge

---

[3] Public Law 101-650, December 1, 1990, authorized the creation of a temporary judgeship for the District of Hawaii.

[4] Filling the temporary judgeship would allow the court to assign one judge to a full-time civil calendar. Presently this cannot be done, because of the size of the district's criminal caseload.

Two senior judges also sit in the District. One of the two senior judges, the Honorable Martin Pence, no longer participates in trials, but maintains a limited calendar of settlement conferences and hears motions on various civil and criminal matters. The other senior judge, the Honorable Samuel P. King, currently accepts and is assigned approximately 14% of the new civil cases filed within the District. The remaining 86% of the civil cases and all criminal cases are assigned to the three active judges.

MAGISTRATE JUDGES

The District has two full-time Magistrate Judges - Barry M. Kurren and Francis I. Yamashita, and two part-time magistrate judges. Both full-time magistrate judges have chambers within the courthouse in Honolulu. The part-time magistrate judges are located on the Islands of Hawaii and Maui, respectively. Both part-time magistrate judges fulfill limited administrative and judicial duties on these islands and are periodically called upon to serve in Honolulu in the absence of either of the full-time magistrate judges.

OFFICE OF THE CLERK OF COURT

The Clerk of Court, Walter A.Y.H. Chinn, enjoys an excellent reputation within the legal community. The office of the Clerk of Court has implemented advances in docketing, calendaring, and scheduling. Upgraded computer equipment and software programs have kept this office abreast of the electronic age. Implementation of the Integrated Case Management System (ICMS), an electronic docketing and case management system has automated the daily maintenance of the docket sheet, provided up-to-date information on the status of particular litigation, and now serves as a central resource point for all court

personnel who are connected to the system.[5] Additionally, the expansion of the court computer services to include electronic mail between chambers and the Office of the Clerk has increased the efficiency of support personnel.

However, the Office of the Clerk of Court faces serious management challenges because of reduced manpower and facility space. Of immediate concern is the projected reduction in work force announced for the District of Hawaii. When this Group began its study, the Office of the Clerk was authorized 32.5 positions and 29 were filled. During the evaluation of the administration of the Court, the Advisory Group determined that the addition of two more positions would enhance the administration of the Court by allowing more flexibility in the use of the work force. Now the Advisory Group has been advised that a judicial administration mandate has reduced the authorized work force level to 72 percent of current strength, or to 24 positions. These reductions are to be absorbed by elimination of all temporary hire positions and attrition of permanent positions through 1995.

An evaluation of the present work force demonstrates that, by mid-year 1993, at least six positions will be lost through known attrition and the elimination of three temporary positions. Not taken into consideration are other variables of staffing, such as vacation leave, sick leave, and the anticipated implementation of the Family Leave Act. When these absences are factored into the work force equation, it becomes obvious that the across-the-board scheduled reduction will seriously affect the District.

---

[5] ICMS is fully operational for all civil docketing and will be operational for criminal docketing by July 1993.

The issue of staffing is so critical to the overall operation of the Court that the Advisory Group strongly urges that a request for re-evaluation of the proposed cutbacks be made.

LIBRARY

The District Court library is well managed, and currently contains a useful mix of legal research material. Both LEXIS and WESTLAW are available to all court chambers. A continuing education program has been implemented for newly assigned court personnel on the use of both systems.

The Advisory Group, in reviewing the budget for the court library, found that it is sufficient, but only minimally so, for the maintenance of current material. The current budget does not allow for purchase of new publications. It is essential that recognition be given to the need to fund more fully the Court's library. There are few other law libraries or resources for legal research in the State of Hawaii. Arbitrary budget allotments based upon the number of judges serviced by the library fail to take into consideration the geographic isolation of the District.

The physical size of the facility is limited, as are those of other support functions within the courthouse. The planned new Federal Court Building would alleviate this problem, but in the interim, additional funds for purchase of selected new legal materials should be made a priority item.

OTHER COURTS AND FUNCTIONS

The Advisory Group was not charged with evaluating the needs of the Bankruptcy Court, Probation Office or the United States Marshal's Service. The Advisory Group does believe that each should be evaluated in the near term with regard to staffing and facility space needs. This recommendation is based in part upon the following observations:

(a) Bankruptcy filings have set new records within the District.

(b) Pretrial Services reports require increased work as do Presentence Reports under the new criminal sentencing guidelines.

(c) The United States Marshal's Service is facing daily staffing problems because of the lack of a federal detention facility in Hawaii. The absence of such a facility, when coupled with the loss of available cell spaces within the State of Hawaii's facilities, has forced the transfer of pretrial inmates to federal, state and county facilities on the mainland. The constant demand upon the U.S. Marshal's personnel to escort prisoners negatively affects the Marshal's ability to perform other assigned duties.

The Advisory Group supports the on-going process to locate a site and build a federal detention facility in Hawaii.

THE COURT DOCKET

CIVIL DOCKET

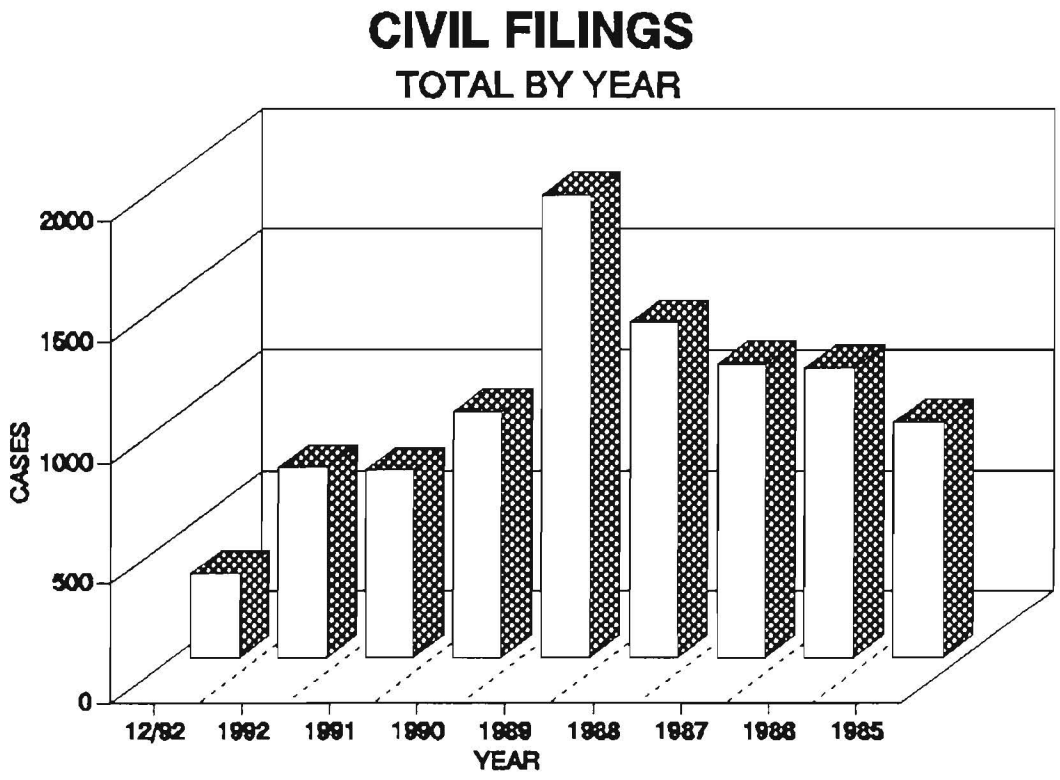
PROCEDURES FOR CASE ASSIGNMENT

Administrative assignment of cases is done by the Clerk of Court. Each civil case is assigned a number in sequential order. The case is then assigned to one of the district judges by means of a draw. Essentially the draw works as follows: the Clerk places 91 color coded cards into a box. The cards contain one of four color codes. Each judge is assigned one of the color codes. For each active judge, 26 cards of the same color code are put into the draw. Senior Judge King is assigned 50% of the draw in civil cases, thus 13 cards with his color code are placed in the draw. A "blind draw" is then made by the Clerk, or his designated assistant, each time that a case is ready for assignment to a judge. The color of the card drawn determines the judge to be assigned the case. After all 91 cards have been drawn from the box, the cycle begins again. A similar format is utilized in criminal cases, except that Senior Judge King has elected not to handle criminal matters. In addition, each even numbered case is assigned to one of the two magistrate judges, with the other receiving all odd numbered cases.

This method insures that all judges receive a random selection of new cases while eliminating any attempt by litigants to forum shop among the judges.

STATISTICAL TRENDS

A review of Court activity for fiscal year (FY) 1992 indicates that 794 new civil cases were filed within the District.[6] During the remaining six months of 1992, there were 354 new civil cases filed. A comparison of filings over the past several years is shown in Figure 1.



-FIGURE 1-

[6] When fiscal year (FY) figures are utilized in this report, they refer to the U.S. Administrative Office of the U.S. Courts' statistics, which utilize June 30 as the end of a fiscal year.

A breakdown of filings by categories is set forth in Figure 2. Litigation concerning contracts; personal injury and other torts; civil rights; and prisoner complaints and/or petitions are the most frequently filed cases within the District. This remained true during the last half of FY 92 with 15 percent of filings attributed to contracts; 15 percent to torts; 14 percent to civil rights; and 17 percent involving prisoner complaints/petitions.

CIVIL CASE DISTRIBUTION

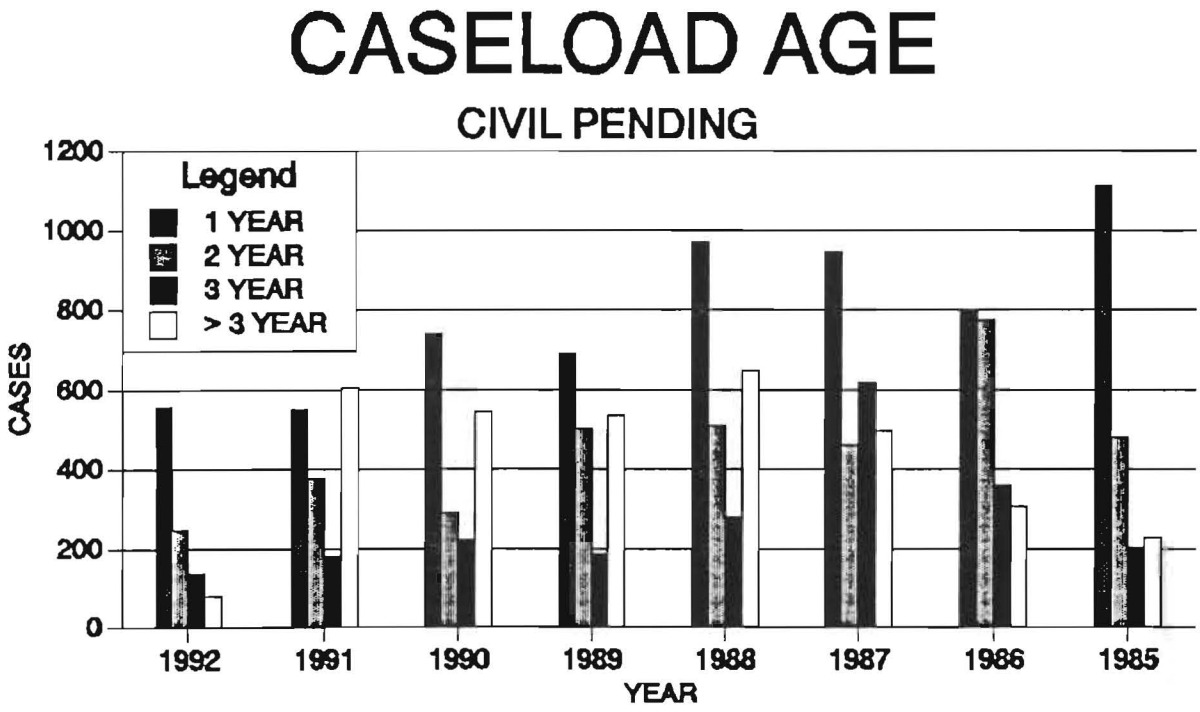
YEAR	12/92	1992	1991	1990	1989	1988	1987	1986	1985
CONTRACT	54	181	166	195	288	392	336	433	190
REAL PROPERTY	5	19	29	19	48	25	35	29	7
FELA	0	0	0	0	0	0	0	0	0
MARITIME PERS INJURY	13	34	18	22	40	39	21	17	19
MOTOR VEHICL PERS INJ	8	19	26	19	18	19	15	17	19
OTHER PERS INJURY	30	68	77	176	853	415	363	211	489
OTHER TORT ACTIONS	2	39	54	66	72	78	61	43	11
ANTI-TRUST	1	2	4	1	3	10	9	6	2
CIVIL RIGHTS	48	110	87	64	115	81	83	73	69
PRISONER PETITIONS									
HABEAS CORPUS	8	18	39	64	44	25	29	21	22
CIVIL RIGHTS	51	89	76	103	110	22	35	38	30
MANDAMUS & OTHERS	2	0	0	1	1	0	0	0	0
COPYRIGHT PATENT TRADEMKS	5	18	18	14	23	21	10	22	23
LABOR SUITS	35	65	58	58	58	72	66	80	49
ALL OTHERS	92	132	132	226	247	192	160	218	52
TOTAL CIVIL	354	794	784	1025	1920	1391	1223	1208	982

-FIGURE 2-

A review of civil cases pending in the court from 1985 to 1992 is shown in Figure 3. A very significant trend is the reduction in cases that are over 3 years old. The court has reduced this backlog to 46 cases as of the end of the first quarter FY 1993.

Several factors have contributed to this dramatic reduction of cases existing from prior years.

a. In July 1991, all pending asbestos cases were transferred to the United States District Court for the Eastern District of Pennsylvania for pretrial purposes. The possibility remains that these approximately 430 cases could be transferred back to the District of Hawaii for trial.



1 YEAR	559	553	739	692	972	946	797	1112
2 YEAR	247	376	289	504	510	460	773	479
3 YEAR	137	180	222	187	280	618	382	203
> 3 YEAR	81	608	546	537	647	498	306	228

-FIGURE 3-

b. A reduction of pending cases has been achieved by improved judicial management techniques. This is especially apparent when it is noted that the court reduced those cases pending over three years by almost 50 percent from July 1992 to December 1992. This result does not include asbestos cases.

c. More effective utilization of magistrate judges in judicial proceedings has been accomplished.

CRIMINAL DOCKET

Until FY 92, criminal filings remained fairly constant. Excluding traffic cases, primarily handled by magistrate judges, the high was 348 in FY 86 and the low was 247 in FY 88, with the annual average of criminal filings below 300. In FY 92 the criminal filings were 320 and this higher filing rate continued for the last half of CY 92. Many factors are cited for the higher criminal filing trend: An increased number of bank robberies that are investigated by the FBI and which are then referred to the United States Attorney for prosecution; Operation Triggerlock, a program providing for federal prosecution of crimes involving firearms to utilize the higher mandatory minimum sentencing under federal law; more drug cases involving interstate traffic because of differences between state and federal search and seizure and sentencing law; and increased smuggling of illegal aliens.

In reviewing the criminal docket, the Advisory Group observed that mandatory minimum sentencing statutes and the sentencing guidelines have had a significant impact on criminal litigation. These statutes and guidelines establish a minimum term that the court must follow in imposing most sentences.

Several knowledgeable attorneys have opined to the Advisory Group that they believe the sentencing reforms have actually added to the number of criminal trials by taking away incentives on the part of an accused to plead guilty. The sentencing process itself now consumes a much greater amount of judicial time than was true previously.

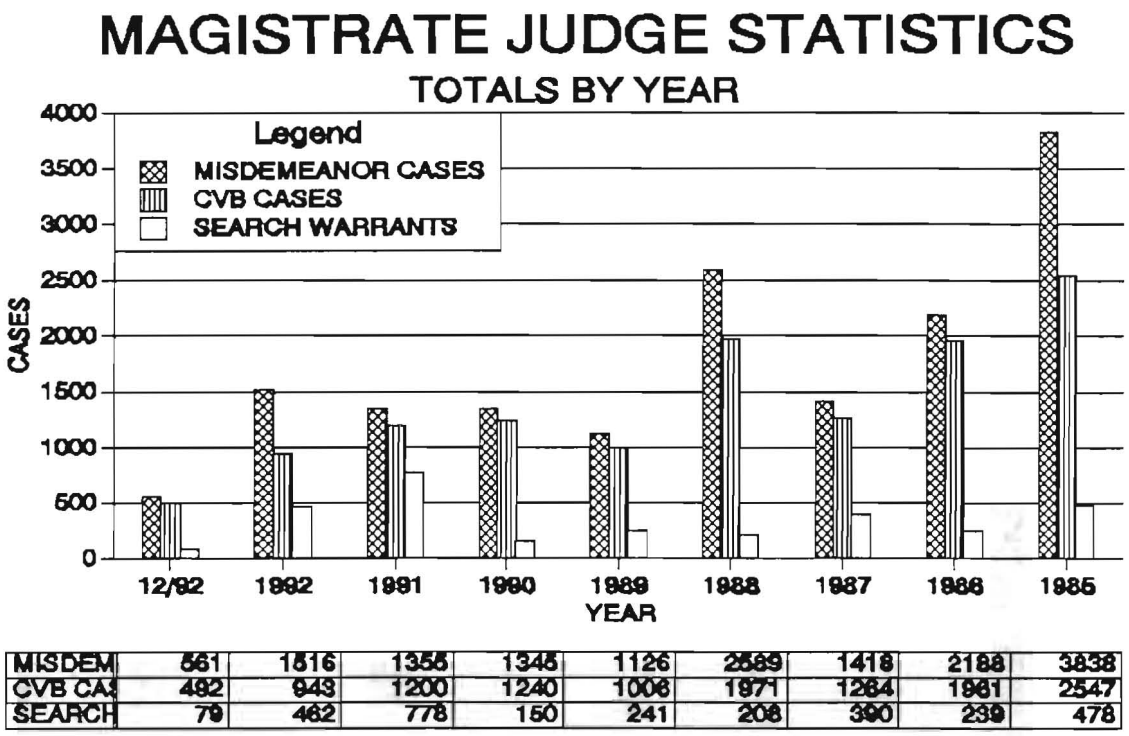
Figure 4 sets forth the criminal case filings for FY 85-92.

CRIMINAL CASE DISTRIBUTION

Year	1992	1991	1990	1989	1988	1987	1986	1985
GENERAL OFFENSES								
HOMICIDE	3	2	0	1	1	2	1	2
ROBBERY	15	10	7	16	1	2	1	2
ASSAULT	7	5	7	10	7	10	18	6
BURGLARY	1	1	2	2	4	2	1	2
LARCENY	38	76	72	85	60	86	121	100
EMBEZZLEMENT	2	3	5	7	9	8	7	9
FRAUD	33	42	32	42	52	51	50	41
WEAPONS & FIREARMS	19	9	3	4	5	5	5	6
FORGERY & COUNTERFEIT	12	5	3	6	5	9	3	3
TRAFFIC	1425	1640	1495	1148	1303	1039	1215	2758
ESCAPE	0	2	2	0	0	0	0	1
OTHER	15	5	19	11	8	11	18	16
DRUG LAWS								
MARIJUANA	47	31	28	51	37	28	65	56
NARCOTICS	42	31	34	34	39	26	16	34
CONTROL SUBSTANCES	58	21	25	11	4	1	5	9
OTHER DRUG RELATED	0	0	0	0	0	0	0	
SPECIAL OFFENSES								
IMMIGRATION LAWS	16	0	7	6	2	4	6	4
AGRICULTURAL ACTS	0	1	7	4	1	1	5	2
POSTAL LAWS	1		1	1	1	1	1	1
OTHER	11	8	9	8	11	11	20	14
TOTAL CRIMINAL	1745	1892	1758	1447	1550	1297	1558	3066

-FIGURE 4-

An extensive portion of the judicial workload of the magistrate judges also falls into the criminal area, as noted by reference to Figure 5.

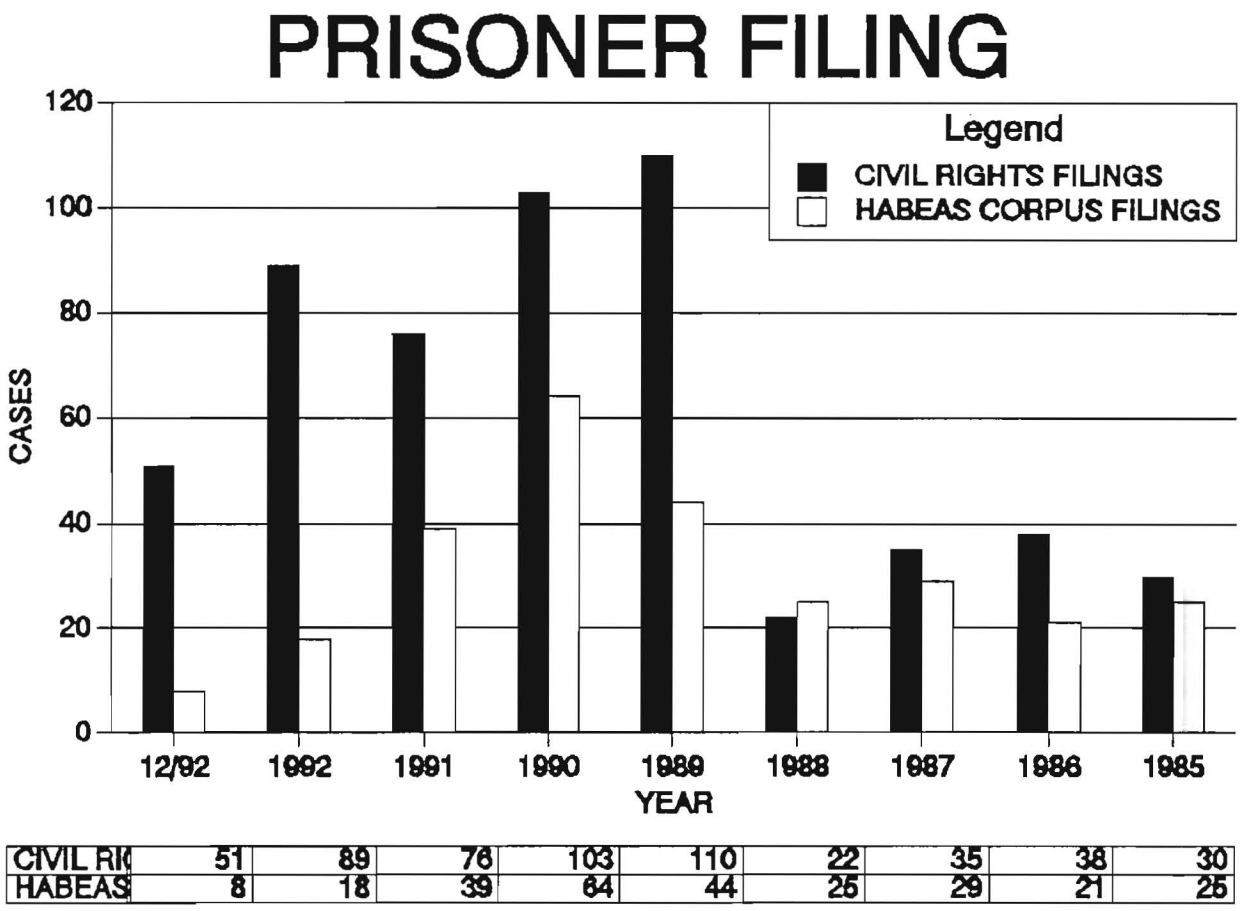


MISDEM	561	1516	1358	1348	1126	2589	1418	2188	3838
CVB CAS	482	943	1200	1240	1006	1971	1264	1961	2547
SEARCH	79	462	778	150	241	208	390	239	478

-FIGURE 5-

As displayed by this graphic (Figure 5), the magistrate judges have a heavy caseload of traffic and misdemeanor cases occurring on military installations. In addition, they are available on a 24 hour basis to respond to requests for the issuance of search warrants in criminal matters.

Two additional areas of increased workload over the past few years are prisoner complaints and writs of habeas corpus. Figure 6



CIVIL RI(	51	89	76	103	110	22	35	38	30
HABEAS	8	18	39	64	44	25	29	21	25

-FIGURE 6-

At present, all prisoner complaints and habeas corpus actions are first assigned to the magistrate judges to review, to conduct hearings, and to determine non-dispositive motions. The magistrate judges generally prepare a report and recommendation to the assigned district judge for final adjudication. Not only has the number of these prisoner cases increased over the years, but many of the filings have become more sophisticated. Since appellate court decisions require that a liberal construction be given to prisoner complaints, summary disposition

of them based upon review of the initial pleading has become more difficult. Representing 1/6 of all new case filings within the District, this category of civil litigation must be marked for further evaluation.

JURY COSTS AND USAGE

Petit and grand jury usage for civil and criminal trials increased over the last four years, peaking in 1992. Total criminal and civil jury trials for the years 1989 through 1992 are as follows:

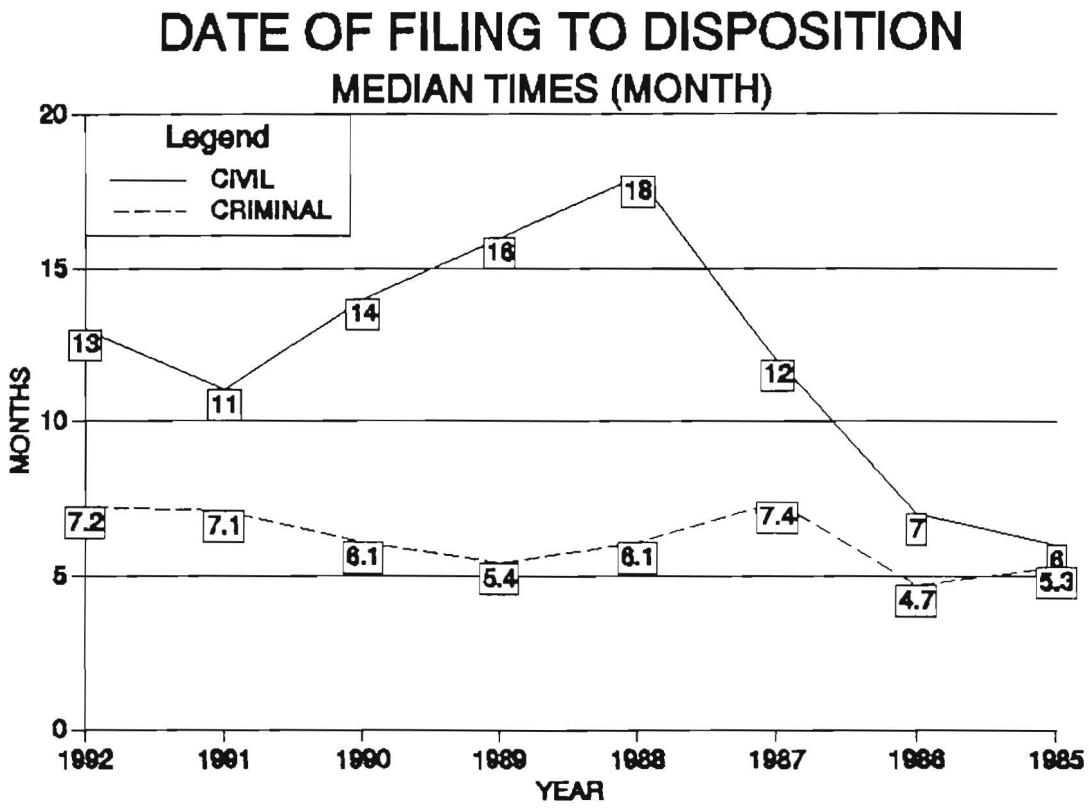
1989	26 Criminal Trials
	12 Civil Trials
1990	34 Criminal Trials
	14 Civil Trials
1991	29 Criminal Trials
	9 Civil Trials
1992	47 Criminal Trials
	13 Civil Trials

The District's jury plan for the selection of petit and grand jurors complies with the provisions of the Jury Selection and Service Act of 1968. The plan encompasses the entire State of Hawaii.[7] Implementation of the jury pool selection process is a time consuming administrative task compounded by multiple island population centers and the transient character

[7] Jurors selected from off of the Island of Oahu must travel by commercial air transportation, and, if selected for jury duty, they must be provided per diem allowance while performing their jury duty.

of the local populace. Costs associated with trial jury selection are high because of the cost of air transportation for neighbor island jurors. The Court has kept costs to a minimum by using pre-selection screening questionnaires. Administrative office statistics rank this Court thirty-second nationwide in the least number of jurors dismissed or challenged from jury pools. The District is ranked fifth within the Ninth Circuit.

Any analysis of a court docket must consider the median times for the disposition of cases from the date of filing. This statistic provides a general yardstick to measure the delay inherent in the system, and allows a comparison to other districts. Figure 7 depicts the median filing times for this District.



-FIGURE 7-

In making an analysis of this data, it might be assumed that since the number of cases filed has decreased (Figure 1), the median time to disposition should decrease. However, such an assumption does not take into consideration factors such as the complexity of litigation and the increased criminal caseload. Despite the fact that weighted caseload

statistics[8] also show a downturn, Figure 8, it will be another year before they demonstrate a meaningful trend. They are included in this report to serve as a reference point for ongoing evaluation by the Advisory Group.

WEIGHTED CASELOAD STATISTICS

Year	1992	1991	1990	1989	1988	1987	1986	1985
Caseload	276	273	426	392	563	634	482	582

-FIGURE 8-

[8] Weighted caseload statistics are based upon a formula established by the Administrative Office of the United States Courts. Recognizing that no two cases are alike and that certain categories of cases by their very nature take longer in litigation, a weight factor was created to be applied to each case filing. The purpose of the weight factor is to identify how much time, on average, a judge will be required to spend on any specific case. While the statistic is not infallible, it does provide another case management tool to be used when evaluating the workload of a court or individual judge.

JUDGE AND CLERK INTERVIEWS

Borrowing liberally from the questionnaires employed in other districts, teams of Advisory Group members interviewed a number of judges and magistrate judges, present and past, as well as the court's chief clerk.[9] Their candid comments helped to educate the committee and provided invaluable insight. They included the following, which is not exhaustive and is not necessarily indicative of the views of all of the interviewees:

- The volume of criminal cases impedes the orderly progress of civil matters to the frustration of the court and litigants alike.
- Hawaii needs a fourth Article III judge and additional magistrate judges.
- Mandatory settlement conferences should be conducted by the assigned trial judge.
- Litigation costs often are excessive because "second-class" attorneys do not exercise good judgment and abuse the system.
- Attorneys being compensated "by the hour" contributes to increased delay and costs.
- Differential case management techniques should be tried.
- Master calendaring will not be productive, because cases need more individual analysis from judges.
- Judges should conduct discovery conferences and be more forceful in managing cases
- Judges should be more aggressive about enforcing Fed. R. Civ. P. 11.

---

[9] Appendix 3 contains the questionnaire utilized by members of the Advisory Group in interviewing judges, magistrate judges, and the clerk of court.

- Sanctions should be imposed for abusive pre-trial motions practices.
- Partial or full summary judgment should be entered more often.
- Oral arguments should be eliminated in many cases.
- Military traffic cases should go to state courts.
- Alternative dispute resolution methods are favored.
- Magistrate Judges should not be used as a "dumping ground" and should be given more responsibility.
- Discovery is excessive.
- There is great need to keep courtrooms from being "dark" or vacant.
- Steps need to be taken to improve the chances of keeping a "firm" trial date.
- Consideration should be given to local rules designed to reduce cost and delay.
- Parties' decision makers should be involved in litigation earlier and to a greater extent.
- New practitioners should be required to become educated in federal practice and procedure.

ATTORNEY SURVEY

To fulfill the Act's requirement that the Advisory Group examine "the approach and conduct of litigants and attorneys," a questionnaire was developed and distributed to a 140 practicing attorneys in the District. Sixty were returned.[10]

The following summarizes observations made in these responses.

- Attorneys fees and discovery costs have increased in the past 10 years.

[10] See Appendix 4 for a compilation of the responses.

- Delays in disposing of civil cases are a serious problem and have increased.
- The six areas receiving most intense criticism were:
  - Backlog in cases
  - Shortage of judges
  - Discovery abuses
  - Delays
  - Speedy Trial Act
  - Costs
- The areas of least criticism were:
  - Too much judicial involvement
  - Complicated procedures
  - Lack of consistent standards/procedures
  - Too little judicial involvement
  - Judicial delay in decision making
- Discovery is the most serious factor contributing to increases in costs.
- The four most preferred changes are:
  - Encouraging early pretrial conferences/meetings
  - Encouraging pretrial settlement
  - Firm trial dates
  - Greater judicial involvement

RECOMMENDATIONS OF THE ADVISORY Group

The Advisory Group, voting as a committee-of-the-whole, discussed various measures that might be recommended to the court as means of reducing delay in civil proceedings and reducing the cost of litigation. Each recommendation was adopted by the committee-of-the-whole, following a procedural guide contained in Appendix 5.

RECOMMENDATION NO. 1

Trial dates shall be set by the Magistrate Judge at the initial scheduling conference.

RECOMMENDATION NO. 2

The presiding judge, upon noting that a trial date cannot be met due to matters outside the control of the parties, shall immediately (within 24 hours) notify all parties and the Chief Judge, that a conflict in holding the trial on the established date is anticipated.

RECOMMENDATION NO. 3

In the event the trial cannot proceed as scheduled, the Chief Judge shall first ascertain whether another District Court Judge is available to conduct the trial, and if so, direct that the trial be reassigned to that judge for hearing on the date previously set. If no District Court Judge is available, the parties will be offered a trial by a Magistrate Judge during the scheduled week or at an early firm date.

RECOMMENDATION NO. 4

Any continuance of a trial date sought by an attorney shall contain an affirmative statement that the client concurs in the request.

RECOMMENDATION NO. 5

One District Court Judge shall be designated to handle exclusively civil trials on a rotating schedule provided that a fourth judge is appointed.

RECOMMENDATION NO. 6

The Clerk of Court shall maintain, for the next nine months, a log of all civil cases in which the trial dates are reset, with the reason listed for each such action, together with a notation as to whether another district judge was available to try the case on the initial date set.

COMMENTS ON RECOMMENDATION NOS. 1 - 6

The establishment of firm trial dates early in the litigation process is an essential first step in the successful management of litigation within the District. Maintenance of a firm trial date sets the tone for all subsequent actions in the judicial process. Of all the issues and suggestions brought before the Advisory Group, the subject of maintaining a firm trial date was continually at the forefront of all discussions.

Within this District, a trial date is established at the scheduling conference (held approximately 90 days after the filing of the complaint). The trial date is then set by the Magistrate Judge based upon the then known court calendar of the judge assigned to the case (averaging approximately six months after the scheduling conference). Trial date resettings are presently authorized to be made by the Magistrate Judges, upon request of the parties, provided that the request is made more than 30 days prior to the date of trial. All requests for new trial dates made within 30 days of the trial must be approved by the District Judge assigned to hear the case.

The Advisory Group found the mechanics of the District in initially setting trial dates to be satisfactory. No change in this procedure is recommended. The problem of firm trial dates rests not in their creation, but rather in meeting the date set. Various factors may intervene in the best laid plans of the court such as jury trials that extend past projected dates, criminal trials requiring immediate action under the Speedy Trial Act, and motions for continuance by the

parties. These unanticipated variables do play a part in the maintenance of firm trial dates. They are not, however, insurmountable and there should be an established means available to lessen the chance of a trial date being reset due to such factors.

RECOMMENDATION NO. 7

The current Temporary Order Regarding Trial Settings And Readiness Calendar Issued November 5, 1992,[11] directs that all civil and criminal cases shall be placed on a Readiness Calendar one week prior to the date of scheduled trial, and be subject to call on one day notice during that Readiness Week. We recommend that the Order be modified by the Court so that the Readiness Week begins and the case "trails" the fixed trial date by one week.

COMMENTS ON RECOMMENDATION NO. 7

The Advisory Group has considered the need for the above rule and has received comments from various litigants. The Advisory Group endorses the need for a "readiness rule" and has carefully analyzed the current rule of the court. The present "readiness rule" requires all parties to litigation to be prepared, on one day notice, to present their case at trial one week in advance of the set trial date. To meet such a burden, parties are required to have their witnesses, personal calendars, and support staffs clear of any intervening conflicts for one full week prior to an anticipated trial date. In many instances, this requires expert and other witnesses to travel to Hawaii one full week in advance of a scheduled trial, on the chance that a court docket would free itself, so that the trial could be advanced on one day notice by a full week. Many of the nonlawyer members of the Advisory Group questioned such a practice in light of the emphasis being placed on seeking cost reduction in civil litigation matters.

---

[11] A copy of the November 5, 1992 ORDER is contained in Appendix 7 to this Report.

It is with this emphasis on reducing costs of trial that the Advisory Group recommends a modification of the current Order. Specifically, the Advisory Group recommends that the week after the set trial date, rather than the week before, be established as a "standby" week. This in effect creates a "trailer week" wherein unanticipated delays on meeting the established trial date, such as criminal trials, can be accommodated without the same degree of scheduling conflict of the parties and witnesses.

The Advisory Group considered the possibility of establishing certain types of litigation that could meet the present dictates of the Order such as prisoner litigation or cases in which only local witnesses would be required. However, the Advisory Group found this to be an area that would need further study, and in the interim considers this modification to the current Order to best serve the needs of the litigants and the court, while reducing anticipated costs.

RECOMMENDATION NO. 8

Mandatory settlement conferences shall be held in all cases.

RECOMMENDATION NO. 9

At least once every six months, each District Judge in the District shall set aside one full week for the exclusive purpose of holding settlement conferences on civil cases assigned to that judge.

COMMENTS ON RECOMMENDATION NOS. 8 - 9

The District Court recently issued an Order titled Procedures for Settlement Conferences Before United States Magistrate Judges.[12] The Advisory Group considers this a positive step and commends the court for its action. The Advisory Group is concerned, however, that the very issuance of such an Order has sent out the wrong message to litigants. Specifically, it

[12] Order dated November 2, 1992. Copy of Order is contained in Appendix 6.

implies that only magistrate judges will hold settlement conferences and that District Judges are no longer available or inclined to become involved in settlement discussion. Such a perception is counterproductive to an excellent mechanism for reducing civil trials. All judicial officers within the District must be committed to the settlement process if it is going to meet the intended goal of reducing costs and litigation time spent in the court system.

RECOMMENDATION NO. 10

The processing of traffic violations occurring on United States Military Reservations shall be studied to determine whether the use of full time Magistrate Judges for such cases can be reduced or eliminated.

COMMENTS ON RECOMMENDATION NO. 10

At the present time, the two full time magistrate judges are handling an inordinate number of traffic cases that are referred to the court by the United States Army, Navy and Marine Corps. These cases involve both civilian and military violators. A minimum of two mornings a week are set aside for these traffic hearings by a magistrate judge. The Advisory Group understands that the United States Air Force does not refer military traffic offenders to the district court and seldom files traffic cases involving civilians with the court.

The Advisory Group recommends that a study be conducted into a means of freeing the full time magistrate judges from this time consuming task. The study should include: (1) discussions with the military services, locally, about their individual procedures, (2) evaluation of the appointment of an additional part-time magistrate judge on the island of Oahu with a specific, assigned duty to hear these traffic offenses, (3) greater use of the two part-time magistrate judges located on the islands of Hawaii and Maui to hear these cases, and (4) in order to reduce costs of administration, setting the hearings semimonthly rather than weekly.

RECOMMENDATION NO. 11

Increase, where feasible, the retention of prisoner petitions by Article III judges.

COMMENTS ON RECOMMENDATION NO. 11

The Advisory Group noted that one of the single largest definable groups of cases arises from pro se prisoner suits, usually brought pursuant to 42 U.S.C. Section 1983, or the federal habeas statute. Reducing the backlog of these cases is and should be a substantial goal for the District of Hawaii.

Under 28 U.S.C. Section 636, the District Courts have the authority to refer such cases, without consent of the parties, to Magistrate Judges, to "hear and report." Although such referrals conceivably can produce an initial determination on summary judgment motions at a much earlier point in the litigation, Section 636 referrals also can lead to delay, and, if an appeal is filed, in a large number of cases would result in only a small saving in judicial resources at the District Judge level of review. Experience by the Department of the Attorney General, State of Hawaii, shows that a large number of adverse Magistrate Judge reports are objected to, both by petitioners and by responding government parties. Such litigation, the Group finds, is almost inevitable in a system that provides for an additional layer of judicial review.

Because of the potential of Section 636 referrals to "crowd" the Magistrate Judge docket without any appreciable savings in the time of the District Judges, the Advisory Group urges that the Court, in its day-to-day decision making, attempt to balance these disadvantages of referral with the advantages which a referral does provide (i.e., the making of a record and the production of a written report which marshals the law and facts). The Group particularly believes that motions for summary judgment, which are well-briefed and supported, could be

decided more frequently at the District Judge level without the need for a referral. The Group believes it would also be appropriate to retain, to the extent possible, motions which raise questions of sovereign or officer's immunity from suit. Such motions frequently involve issues that are "collateral" to the merits, and are more likely to end the litigation at an early stage. By retaining these motions, while referring cases that seek more complex forms of relief (injunction or other equitable relief), the Court could have a record developed in cases that are much more likely to warrant such development.

RECOMMENDATION NO. 12

Establish the position of a staff attorney to the United States District Court.

RECOMMENDATION NO. 13

Prepare a pro se litigant handbook which addresses solely procedural matters for distribution to pro se litigants.

COMMENTS ON RECOMMENDATION NOS. 12 - 13

The District Court does not have an assigned staff attorney position. As a result, all pro se, pro per, and prisoner litigation is initially administered by the two magistrate judges and their law clerks. Additionally, the Office of the Clerk must devote a great deal of administrative time to handling inquiries from these litigants. The Advisory Group has studied the statistics of the court and has discussed this problem with members of the Court. It is the opinion of the Advisory Group that the creation of this position would be a positive administrative action, and the expense of creation would be more than justified by the elimination of an extremely heavy burden presently being borne by the court's limited staff.

Duties of the staff attorney would include, but not be limited to, the initial processing of all pro se/pro per litigants. In essence, the attorney would function as a standard reviewing office for all prisoner complaints and habeas corpus actions. By creating this position the court would establish an important continuity in the procession of prisoner litigation, thereby improving the present system that requires each new law clerk to become educated in an area that is becoming more complex and demanding of the court's time. Much of the delay in case evaluation and administration in this area stems from this lack of a single manager.

Creation of this position would also meet another recommendation, suggested by various sources, that a pro per/pro se litigant handbook be prepared to be distributed by the Office of the Clerk to pro per/pro se litigants. The preparation of the handbook would be an excellent additional duty for the staff attorney to perform in conjunction with other duties assigned by the Chief Judge.

RECOMMENDATION NO. 14

Nominate and fill the Fourth Judgeship for the District of Hawaii.

COMMENTS ON RECOMMENDATION NO. 14

A Fourth Judgeship for this District has gone unfilled for several years. The addition of a fourth Judge would greatly enhance the ability of the Court to meet the very basic issues cited in the Civil Justice Reform Act. At present, the unfilled position has hampered the Court by depriving it of the management flexibility enjoyed in many jurisdictions.

RECOMMENDATION NO. 15

Current state of the art communications equipment should be provided by the Court and available for use in the courtroom.

COMMENTS ON RECOMMENDATION NO. 15

There are available for courtroom usage various devices which make communicating information more effective and efficient during trial. Many of these new communication devices can be found already in use by other districts. Within this District, at the present time, litigants incur the often considerable expense of providing their own equipment to display a document, video tape, slide, transparency, or photograph. Trial time is unnecessarily consumed by passing exhibits among the triers of fact; even though visual aids such as "video presenters," etc., could be used to present documents and objects to everyone in the courtroom simultaneously.

Simple changes would greatly assist all parties, such as replacing the existing wall screens in this District's courtrooms, which are considered too small, making them ineffective for projection purposes. Valuable time and litigation costs could be saved by permanently equipping the courtrooms with current state of the art communication equipment which would be available to all litigants.

RECOMMENDATION NO. 16

Rulings on motions for summary judgment and motions to dismiss shall be made within ten days of argument, or submission for decisions without argument, absent extraordinary circumstances.

RECOMMENDATION NO. 17

The court shall make greater use of partial summary judgment rulings.

COMMENTS ON RECOMMENDATION NOS. 16 - 17

The Advisory Group considers Rule 56 Fed. R. Civ. P., "Summary Judgment," to be an extremely effective means of reducing both costs and delays in civil proceedings, when the authority provided to Article III judges by the Rule is fully utilized.

The United States Supreme Court in Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), in discussing the role of summary judgment in the Federal Courts, noted: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action."

Within this District, the Advisory Group learned that there is a perception among many attorneys that the Court, as a whole, remains reluctant to rule upon motions for summary judgment. As an example, instances have occurred where final pretrial conferences have been held by the magistrate judges, while motions for summary judgment were still pending before the district court judges. On occasion these motions have even been calendared after or so near the trial date as to dampen any settlement discussions pending the outcome of the motion. While the Advisory Group did not find this to be a common occurrence, such delays in ruling upon summary judgment motions can add to the "clutter" of litigation before the court.

The effectiveness of Rule 56 in reducing frivolous litigation cannot be overemphasized.

It is the recommendation of the Advisory Group that rulings on motions for summary judgment be made within ten days after argument absent the presiding judge declaring extraordinary circumstances which would require a delay in making a final ruling upon the

motion. The Advisory Group also recommends that the same principle of speedy resolution be taken in motions to dismiss filed pursuant to Rule 41 Fed. R. Civ. P..

RECOMMENDATION NO. 18

The Court shall consider and impose nonmonetary sanctions where appropriate.

COMMENTS ON RECOMMENDATION NO. 18

The Court has indicated an intent to invoke Rule 11 Fed. R. Civ. P. to impose sanctions more frequently as noted in the Order of the Court dated November 2, 1992, titled Procedures for Settlement Conferences before U.S. Magistrate Judges.[13] In addition, the Federal Rules of Civil Procedure provide for the imposition of sanctions in certain discovery matters. The need to impose and enforce court rules and procedures is fully supported by the Advisory Group. The Advisory Group recommends that in lieu of exclusively imposing monetary sanctions or rulings for the non-offending party, the use of alternative forms of sanctions also be considered. Examples are directing counsel to perform a certain number of hours of pro bono legal work or requiring attendance at a mandatory continuing legal education programs. Sanctions should not merely punish monetarily where the resultant costs may be passed to an "innocent" client directly or indirectly. Sanctions should be tailored to the specific cause of the violation, and often the best cure can be found in non-monetary recourse against the offender.

[13] Appendix 6.

RECOMMENDATION NO. 19

Creation of a program of continuing legal education for practitioners in the United States District Court.

COMMENTS ON RECOMMENDATION NO. 19

The Advisory Group noted that one of the frequent comments made by both judges and attorneys dealt with the added burden that is placed upon the court and litigants by inexperienced practitioners who are not familiar with the Federal Rules of Civil Procedure and the Local Rules of the Court. Many of the rules and procedures followed within the United States Federal Court are significantly different from those utilized in the Hawaii State Courts. Some practitioners, especially those with fewer than five years of legal practice, or those who seldom file cases in Federal Court, are not fully aware of the rules and procedures. This leads to costly delays and additional litigation expenses. A short course, in the form of lectures and seminars, on the Federal Court System and its rules and procedures would greatly enhance the overall effectiveness of counsel, thereby reducing both delays and litigation expenses to all parties.

The Lawyer Advisory Representatives to the District of Hawaii and the Federal Bar Association could be requested by the Court to assist in creating such a continuing legal education program for practitioners who plan to appear before the Court. Newly admitted members of the Bar should be actively encouraged to participate.

The Advisory Group is aware of the fact that a short presentation is now made semiannually to newly admitted members to the Federal Court by the Office of the Clerk. Additionally, the Federal Bar Association in conjunction with the Hawaii Institute For Continuing Legal Education has initiated a two hour "Federal Practice Lunch with the U.S. Magistrate Judges." Both these programs provide a good cornerstone for the building of a

strong educational program that cannot help but assist both the Court and litigants in reducing delays in future proceedings.

RECOMMENDATION NO. 20

A Pilot Study to determine whether a form of arbitration could be effectively utilized by the Court in reducing both costs and delays in civil litigation is recommended.

COMMENTS ON RECOMMENDATION NO. 20

The Advisory Group considered various Alternative Dispute Resolution (ADR) methods that might be available to the Court. They include:

a. Settlement conferences

b. Nonbinding mini-trials

c. Special Masters

d. Third-party mediation

e. Arbitration

The Advisory Group could find little value to the use of non-binding mini-trials within this District. While it may have some value in larger districts with a larger judicial staff, this alternative dispute resolution option does not appear to provide a logical utilization of this court's judiciary. It may provide a sounding board for the litigants, since they have the opportunity of presenting their case and hearing their opponent's case, but there is little empirical data available which indicates that this program would eliminate delays or reduce costs to litigants. In fact, the very opposite result may be expected, particularly when time and costs of the court are added to the equation.

The Advisory Group noted that the use of special masters is presently included in the Local Rules (LR 401-7).[14] While LR 401-7 provides that a magistrate judge may be designated by a United States District Judge to serve as a special master in appropriate civil cases, it became apparent to the Advisory Group that such designations would seldom be made, except in the area of complex litigation, and under that circumstance the use of a magistrate judge would be appropriate.

There are several districts presently utilizing third-party mediation, however the Advisory Group is of the opinion that the present methods utilized by this District in conducting settlement conferences meets all the criteria that can be found in third-party mediation. Thus, it would be only in instances where the caseload of the court became excessive that such an alternative dispute resolution method would be of value.

Of the methods considered, the use of arbitration was the one which the Advisory Group found to be a candidate for a pilot study. The creation of such a court-annexed arbitration pilot study will require a study group to set out the parameters of such a program, as well as preparing the necessary publicity for members of the Bar. Reports from several other districts indicate that the use of court-annexed arbitration has been found to be an effective administrative tool in reducing the number of cases that result in trial. Whether the District should implement non-binding or binding arbitration is a question that can only be determined after the pilot study is completed. In creating such a pilot study, it is the recommendation of the Advisory Group

---

[14] The Rules of the United States District Court for the District of Hawaii, November 27, 1991, as amended, are supplemental rules to the Federal Rules of Civil/Criminal Procedure and are commonly referred to as the "Local Rules" or "LR."

that all arbitrators be selected from qualified members of the Bar and that magistrate judges not be utilized as arbitrators in this pilot study due to their present caseloads.

RECOMMENDATION NO. 21

In the event Federal Rule of Civil Procedure 26 is modified to require disclosure of attorney-client privileged information, a local rule should be adopted to opt out of the requirement to disclose attorney-client privileged information.

RECOMMENDATION NO. 22

At the initial scheduling conference or as soon thereafter as practical under the circumstances, the Magistrate Judge shall establish limitations on the taking of depositions. Specific limitations shall be set on the number of depositions, the scope of the deposition, the number of hours for depositions or the time within which all depositions must be completed.

COMMENTS ON RECOMMENDATION NOS. 21 - 22

The newly proposed changes to the discovery rules of the Federal Rules of Civil Procedure have recently been disseminated to all the Federal District Courts for their information and consideration. If the proposed changes, particularly those concerning the disclosure of evidence, are adopted, the changes have a direct impact upon discovery issues. Until further analysis can be made concerning these proposed changes, the Advisory Group determined that it would be inappropriate to make substantial recommendations to the Court on changing its policies toward discovery. The Advisory Group does wish to advise the Court that it strongly disagrees with the proposed changes to Rule 26 Fed. R. Civ. P., which might require the disclosure of attorney-client privileged information. Should such a rule be adopted, this District should opt out of that provision.

One area of discovery that can and should be addressed now by the court deals with depositions sought by litigants. It is the consensus of the Advisory Group that litigants often

take the attitude that they have unlimited right to depose any person, for any length of time, on any subject, without fear of judicial sanction. To forestall such activity by any party, the Advisory Group recommends that the magistrate judge, at the initial scheduling conference with the parties, establish firm guidelines to be utilized in the taking of depositions. This should include limitations on the number of depositions, scope of the depositions, the number of hours that a witness may be deposed, or the time within which all depositions must be completed. It is recognized that there will be exceptions that require modification of the magistrate judge's original restrictive order, but any modification should be the exception and not the rule. A firm judicial hand in the area of depositions and other discovery matters is required if costs of litigation are to be scaled back or held to their present level.

RECOMMENDATION NO. 23

Adoption of a pilot project in which respected senior or retired litigators serve as settlement masters to conduct settlement conferences in civil cases selected for referral to them by the District Judges or Magistrate Judges.

COMMENTS ON RECOMMENDATION NO. 23

The Advisory Group was impressed by reports of the success of the Parajudicial Officer Program adopted by the United States District Court for the District of Connecticut. In that program, several well respected retired litigators have volunteered their time to serve as settlement judges for selected civil matters. The program has been successful in settling cases as these senior members of the bar are well qualified to assess cases and assist the parties in settlement negotiations. Where appropriate, the Parajudicial Officers, as they are known in the District of Connecticut, make recommendations to the court concerning the further management

of the case on matters such as discovery if settlement is not achieved. A pilot project in our District is recommended to further study this approach to the settlement of cases.

RECOMMENDATION NO. 24

Adoption of a pilot project for a period of one year which would require parties in litigation to make written offers of settlement at a time designated by the Magistrate Judge in the initial Scheduling Conference or later conference. At the conclusion of the trial of the matter, the court may award attorney's fees and costs against the party whose settlement offer is farthest from the final judgement.

COMMENTS ON RECOMMENDATION NO. 24

This recommendation stems from extensive discussion among members of the Advisory Group concerning the possible implementation of a form of the "English Rule" as it pertains to assigning responsibility for the cost of litigation.

Rule 68 Fed. R. Civ. P., provides that a party defending against a claim may serve upon the adverse party an offer to allow judgment against the defending party for a specific amount of money, property, or other specified judgment, with costs then accrued. If the opposing party declines the offer of judgment, and in the subsequent trial the opposing party gains a verdict for less than the prior offer of judgment, all costs incurred from the date of the offer may be adjudged against the declining party. The Advisory Group considers the issuance of a similar rule applying to settlement as a very effective means of controlling costs of litigation.

Accordingly, the Advisory Group recommends that the court promulgate by a temporary order, or by a supplement to the District of Hawaii Local Rules, the following:

"The magistrate judge shall, at the initial scheduling conference, advise all parties to the litigation that the local rules of the court require that each party exchange and submit to the settlement judge, or magistrate judge, a written settlement offer at a time to be established by

the magistrate judge. The party whose settlement offer was furthest from the final judgment at trial, may at the discretion of the presiding judge, be assessed all fees and costs from the date the settlement offers were exchanges and submitted to the settlement judge or magistrate judge."

MINORITY REPORT ON RECOMMENDATION 24

(Submitted by Members Lynch, Michaels, and Spaulding)

These views are presented concerning the Group's proposal that the District adopt a local rule that would authorize District Judges to shift costs, including possibly attorneys' fees, to the party who was farther apart in a required "best" settlement offer, made by a date certain, than its opponent, from a litigated result. This proposal passed by a narrow margin after a fair degree of debate in Committee.

The minority, while of the view that the purpose of the proposal -- avoiding the proverbial "settlement on the courthouse steps" -- is a laudable one, believes that the proposal advocates a step which the Court is not empowered to take and which will not likely work as intended in any event.

First, it appears to us quite likely that any local rule that departs significantly from the language of a present rule of civil procedure on the same subject will face substantial hurdles under the Rules Enabling Act. Congress has limited the authority of the District Courts and the Courts of Appeals to write their own cost-shifting rules, and the Group's proposal is quite likely to be deemed to transgress those limits. See Partington v. Gedan, 923 F. 2d 686 (9th Cir. 1991) (en banc) (Ninth Circuit Local Rule 1-1 cannot sweep up for the appellate process the terms of Rule 11 Fed. R. Civ. P., which applies in the District Courts); Zambrano v. City of Tustin, 885

F.2d 1473 (9th Cir. 1989)(fee shifting under local rules must be accompanied by finding of recklessness, gross negligence, or repeated - although unintentional - flouting of court rules).

Any local rule which does not follow these limitations in its operation is not likely to produce much in terms of positive results. It is important to stress here what the Group is doing and what it is not doing. Under the Group proposal, a party is not merely bound to make a "best" offer of settlement by a date certain; instead, the failure to make a "best" offer that accurately (or more accurately, to be accurate) predicts the litigated result leads to certain financial consequences. While the proposed rule speaks to the Court's power as discretionary, for the rule to have any bite it will have to go beyond the situation where a party has submitted an offer in violation of Rule 11 or the existing sanctioning authorities. To this degree the proposed rule departs from both Rule 11, and from Rules 54, and 68, which grant "prevailing" parties, as defined in very strict and precise legal terms, the authority to apply for an award of costs. To the extent the proposed rule only seeks to codify Rule 11 in some other fashion, it is simply not needed. To the extent the proposed rule would give good ground for denying costs to otherwise prevailing parties, the same hold true. Discretion already exits under Civil Rule 54 to do that.

Beyond this, even if it could be assumed that the proposed rule would have the desired effect of causing parties to "put more on the table" sooner, the proposed rule, like Rule 11 and other sanctioning authorities, is likely to generate substantial "satellite" litigation that will likely dwarf any gains in efficiency or reductions in court congestion generated by the rule. The inherently discretionary character of the rule, which is not accompanied by any meaningful guidance by this Advisory Group, also has the potential for infecting the cost-shifting process

with value judgements about a party's case, irrespective of the merits. For all these reasons, the minority members of the Advisory Group dissent from the adoption of Advisory Group Recommendation No. 24.

OTHER FINDINGS AND COMMENTS

IMPACT OF LEGISLATION ON COST AND DELAY

As required, the Advisory Group examined the extent to which cost and delay would be reduced by better assessment of the impact of new legislation on the courts.[15] It concluded the a vehicle to analyze such impact is needed on a national, rather than a local, level.

Consideration was given to requiring a judicial impact statement, akin to an environmental impact statement; however, it elected not to make such recommendation. Among other things, it is difficult to assess the numerous categories of legislation for which this would be required, and the resulting cost and delay in the legislative process that would result.

The Advisory Group did conclude delay in both the Executive and Legislative branches in appointing and confirming individuals to fill judicial vacancies should be eliminated.

DIFFERENTIAL CASE MANAGEMENT

A means to assign trial and related dates for various types of cases based upon historical data would enhance case management. Such differential case management techniques employed in other districts were reviewed. Based thereon, the potential for developing procedures for the following three "tracks" was considered: (1) fast or expedited track; (2) standard track; and (3) complex track. Such procedures could take into account the length of time and amount of necessary discovery, numbers and locations of witnesses, motions, and length of trial.

---

[15] See 28 U.S.C. § 472(c)(1)(D).

No recommendation is included with respect to differential case management, because the court is not believed to have sufficient present resources to administer it. Nevertheless, a consensus of the group favors magistrate judges utilizing the scheduling practice to effect an informal plan of differential case management.

LOCAL RULES

As the local rules recently were revised, the Advisory Group did not devote substantial time to discussions concerning them.

OTHER TECHNIQUES CONSIDERED TO ELIMINATE COST AND DELAY

The Act mandates consideration, but not adoption of recommendations, concerning six cost and delay savings techniques, as follows.[16]

1. **REQUIRE COUNSEL FOR THE PARTIES TO JOINTLY PRESENT A DISCOVERY-CASE MANAGEMENT PLAN AT THE INITIAL PRETRIAL CONFERENCE, OR EXPLAIN THEIR REASON FOR FAILING TO DO SO.[17]**

While the suggestion appears to have merit in complex litigation, the Advisory Group does not so recommend. In smaller, less complex cases, it would be of little value, and might even increase costs to the litigants. The present Fed. R. Civ. P. 16 conferences and resulting orders[18] are considered sufficient in this regard.

2. **REQUIRE EACH PARTY TO BE REPRESENTED AT EACH PRETRIAL CONFERENCE BY AN ATTORNEY WITH AUTHORITY TO BIND THAT PARTY REGARDING ALL MATTERS (AS REASONABLY RELATED MATTERS) PREVIOUSLY IDENTIFIED BY THE COURT FOR DISCUSSION.[19]**

The Advisory Group favors such a requirement, but members had reservations based on experiences with government litigants, federal, state and local. Generally, lawyers representing government agencies or entities have no power to commit the entity in advance on settlement matters. There is, however, merit in considering this requirement tailored to discovery and procedural matters.

---

[16] See 28 U.S.C. § 473.

[17] See 28 U.S.C. § 473(b)(1).

[18] See Appendix 6.

[19] See 28 U.S.C. § 473(b)(2).

3. **REQUIRE ALL REQUESTS FOR EXTENSIONS OF DEADLINES FOR COMPLETION OF DISCOVERY OR FOR POSTPONEMENT OF TRIAL BE SIGNED BY AN ATTORNEY AND THE PARTY MAKING THE REQUEST.**[20]

This suggestion was accepted partially, as reflected in Recommendation number four concerning maintenance of firm trial dates, i.e., the Advisory Group recommends a requirement that motions to continue trial be accompanied by an affirmation that the client concurs. The proposed requirements with respect to discovery and that would require clients actually have signed documents presented to the court were rejected. Such a requirement would imply an attorney's signature is insufficient, sending a false negative message concerning integrity of counsel.

4. **EMPLOY A NEUTRAL EVALUATION PROGRAM INVOLVING PRESENTATION OF THE LEGAL AND FACTUAL BASIS OF A CASE TO COURT APPOINTED NEUTRAL EVALUATOR AT A NON-BINDING CONFERENCE EARLY IN THE LITIGATION.**[21]

Although several districts appear to have successfully employed such programs, and there is recognition they may lead to early settlements or subsequent time/cost savings, the results are believed inconclusive. Therefore such a program is not recommended for Hawaii at this time.

---

[20] See 28 U.S.C. § 473(b)(3).

[21] See 28 U.S.C. § 473(b)(4).

5. **REQUIRE, UPON NOTICE FROM THE COURT, REPRESENTATIVES OF THE PARTIES WITH AUTHORITY TO BIND THEM IN SETTLEMENT BE PRESENT OR AVAILABLE BY TELEPHONE DURING SETTLEMENT CONFERENCES.**[22]

This practice is in place in Hawaii and its continuance is supported by the Advisory Group.[23]

6. **CONSIDER SUCH OTHER TECHNIQUES AS THE DISTRICT COURT CONSIDERS APPROPRIATE AFTER CONSIDERING THE RECOMMENDATIONS OF THE ADVISORY GROUP.**[24]

The Advisory Group's recommendations are included supra.

---

[22] See 28 U.S.C. § 473(b)(5).

[23] See Appendix 6.

[24] See 28 U.S.C. § 473(b)(6).

APPENDIX 1

Civil Justice Reform Act

JUDICIAL IMPROVEMENTS ACT OF 1990

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

TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

SEC. 101. SHORT TITLE.

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

SEC. 102. FINDINGS.

The Congress makes the following findings:

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

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

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

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

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

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

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

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

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

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

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

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

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.

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

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

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

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

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

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

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

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

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

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

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

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

"(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and

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

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

"(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

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

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

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

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

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

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

"(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

"(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

"(A) assessing and planning the progress of a case;

"(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that—

"(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

"(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

"(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

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

"(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

"(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

"(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

"(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

"(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

"(ii) phase discovery into two or more stages; and

"(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

"(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

"(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

"(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

"(A) have been designated for use in a district court; or

"(B) the court may make available, including mediation, minitrial, and summary jury trial.

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

"(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

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

"(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

"(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

"§ 474. Review of district court action

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

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

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

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

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

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

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

"§ 475. Periodic district court assessment

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

"§ 476. Enhancement of judicial information dissemination

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

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

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

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

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

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

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

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

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

"§ 478. Advisory groups

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"§ 480. Training programs

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

"§ 481. Automated case information

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

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

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

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

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

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

"§ 482. Definitions

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

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

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

(c) EARLY IMPLEMENTATION DISTRICT COURTS.—

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

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

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

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

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

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

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

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

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

SEC. 104. DEMONSTRATION PROGRAM.

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

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

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

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

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

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

SEC. 105. PILOT PROGRAM.

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

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

(b) PROGRAM REQUIREMENTS.—(1) Ten district courts (in this section referred to as "Pilot Districts") designated by the Judicial Conference of the United States shall implement expense and delay reduction plans under chapter 23 of title 28, United States Code (as added by section 103(a)), not later than December 31, 1991. In addition to complying with all other applicable provisions of chapter 23 of title 28, United States Code (as added by section 103(a)), the expense and delay reduction plans implemented by the Pilot Districts shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.

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

(3) The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the

6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

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

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

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

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

SEC. 106. AUTHORIZATION.

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

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

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

TITLE II—FEDERAL JUDGESHIPS

SECTION 201. SHORT TITLE.

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

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

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

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

APPENDIX 2

Membership of Advisory Group

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In the Matter of the CIVIL JUSTICE REFORM ACT OF 1990	)

ORDER APPOINTING ADVISORY GROUP

The Civil Justice Reform Act of 1990 requires each United States District Court to develop and implement a civil justice expense and delay reduction plan to address the problems of cost and delay in civil litigation. The Act requires the appointment of an advisory group to include attorneys and other persons representative of major categories of litigants of the district.

Each advisory group member shall be appointed to serve a term or terms of years which in no event shall exceed four years. The United States Attorney or his designee shall be a permanent member. Further, the court designates Professor John Barkai as the reporter for the group. Additionally, the Clerk of the Court or his designee shall serve as co-reporter to provide logistical support to the advisory group and serve in such other capacity as the court may deem appropriate.

Accordingly, pursuant to the Act, the court hereby appoints the following members to the Advisory Group of the United States District Court for the District of Hawaii:

Four-year term

J.W.A. Buyers
L. Richard Fried, Jr., Esq.
Stuart Ho, Esq.
Lisa Woods Munger, Esq.
Jeffrey S. Portnoy, Esq.
George P. Shea, Jr.
Corinne K.A. Watanabe, Esq.
Peter C. Wolff, Jr., Esq.

Three-year term

Edmund Burke, Esq.
Herbert Cornuelle
Diane D. Hastert, Esq.
Robert S. Katz, Esq.
Paul A. Lynch, Esq.
Howard Stephenson
Herbert R. Takahashi, Esq.
Lily K. Yao

Two-year term

Gerald Czarnecki
Louise K.Y. Ing, Esq.
James A. Kawachika, Esq.
Gerry Keir
William C. McCorriston, Esq.
Dr. Denis Mee-Lee
Paul P. Spaulding, III, Esq.

The court appoints Jeffrey S. Portnoy, Esq. as Chair and Diane D. Hastert, Esq. as Vice-Chair of the group.

DATED: Honolulu, Hawaii, MAR 0 1 1991

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In the Matter of the)
)
CIVIL JUSTICE REFORM ACT)
OF 1990)
)
)

ORDER AMENDING ORDER
APPOINTING ADVISORY GROUP

The court having been advised that Professor John Barkai has resigned as reporter for the advisory group, the court hereby appoints Fred Sims as his successor.

DATED at Honolulu, Hawaii June 11, 1992.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

REPORTER NOTES:

1. By ORDER of the Court, STEVEN S. MICHAELS, Esq. was appointed to replace CORINNE K.A. WATANABE Esq. as a member of the Advisory Group.

2. The permanent membership assigned to the United States Attorney or his designee was held by DANIEL A. BENT, Esq. until his resignation from office in March 1993. ELLIOT ENOKI Esq. now represents the Office of the United States Attorney on the Advisory Group.

APPENDIX 3

Court Questionnaire

July 8, 1992

GENERAL OVERVIEW

1. Do you believe litigation costs (attorneys' fees plus out-of-pocket expenses) for litigation in this court have become excessive or should be reduced?

   a. What is your basis for believing they are high/low/about right?

   b. Would a special cost study for the Hawaii District Court be useful?

   c. What do you think are the causes of high costs?

2. How do you view adoption of the "English Rule" of litigation costs that forces the losing party to pay the attorneys' fees of the winning party?

3. Do you believe litigation delay in this court is a problem?

   a. If so, what do you perceive as the causes?

   b. In what ways do you perceive court calendars, systems or personnel as contributors to court delay?

DOCKET ASSESSMENT

4. What is your view of your (the) docket?

   a. Are you (Is it) current? What does "current" mean?

5. What trends do you perceive in the federal court docket? Does it seem more/less crowded than 3 years ago? Than 5 years ago?

   a. In your (the) docket specifically?

6. If you perceive problems with your (the) docket, what do you think are the causes?

7. What steps have you (the district) taken to address these problems?

   a. How effective have these steps been?

8. What are your views on using differential case management techniques in this District?

9. Would you favor or oppose a master calendar system?

10. What measures would you like to see implemented, if any, that are not currently being used in the District of Hawaii?

PRE-TRIAL PROCEDURES

11. Do you have suggestions on how pre-trial proceedings could be streamlined to result in less costly litigation?

12. Do all judges/magistrates use a standard scheduling conference order?

    a. If not, why not?

    b. Would it be beneficial to standardize?

    c. Do scheduling conference orders produce any benefits? Cause any problems? Net benefit?

13. Do you believe federal judges are forceful enough in their case management?

14. How firm are trial settings? How early?

    a. Should they be firmer? If so, how do we accomplish this?

    b. Should they be earlier? If so, how do we accomplish this?

DISCOVERY

15. Do judges conduct discovery conferences early in the litigation to plan, with the parties, the scope and pace of discovery?

    a. If so, under what circumstances and why?

        i. What occurs at the conference?

b. If not, why not? Is there any class of case the judge would view appropriate for such a conference?

c. What are your views concerning the benefits and burdens associated with such conferences?

d. Do you have a view on the need for more (or less) judicial control of the discovery process?

i. If so, what would you like to see done?

ii. Is there any need for further regulation of discovery in the local rules?

16. Do you believe that some/many/most lawyers practicing in this court abuse the discovery process?

a. Can you single out any group or type of lawyer?

17. How could the court minimize or control these abuses better?

18. What are your views on:

a. Limiting the total number of interrogatories, depositions or document requests?

b. Mandatory Rule 26(f) discovery conferences?

19. Do you think the judges in this court have been aggressive enough in enforcing Rule 11? Why? Should there be more aggressive enforcement?

MOTIONS

20. Do you have any views on how pre-trial motion practice can be made less burdensome for the court as well as the litigants?

a. Do you have any suggestions for reducing the volume of pre-trial motions?

b. What are your views on means of accelerating consideration of dispositive motions? Should there be an accelerated docket for regulation of these motions, for example?

c. Should partial or full summary judgment motions be encouraged? How could this be done?

d. What do you think of oral argument on motions as a substitute for briefing? How about eliminating oral argument in certain cases?

i. Would either of these reduce costs?

ii. Are there any types of motions that are particularly suited for oral argument?

TRIAL PROCEDURES

21. What trial and pre-trial procedures are used to make trials in your court more efficient?

a. What is your experience with each of these techniques?

b. Would you recommend it for district-wide implementation? For inclusion in local rule?

22. What techniques or procedures have been considered but not implemented? Why not?

23. What use, if any, is made of pre-trial conferences?

a. What is your experience?

b. Do such conferences reduce cost and delay?

c. Is there a need for changes in the local rule regulating pre-trial conferences? What? Why?

ALTERNATIVE DISPUTE RESOLUTION

24. What are your views on settlement practices in this court?

a. What, if anything, should be done to encourage prompt settlement? (E.g., early mandatory settlement conferences?)

b. Are there any class of cases particularly susceptible to early settlement?

i. If so, what could be done to encourage early settlement in those cases?

c. What techniques have been employed in your court to encourage settlement? What has been your experience with these techniques?

d. What techniques have been considered, but rejected? Why?

e. What do you know about various ADR techniques? What is your reaction to each?

f. What is your view toward the need for more (or less) judicial management of the settlement process?

25. What are your views on mandatory arbitration for certain classes of cases?

ROLE OF MAGISTRATES

26. What is the appropriate role of magistrate judges?

27. Should magistrates be given more or less responsibility in the following areas:

a. Settlement conferences

b. Discovery

c. Pre-trial motions

d. Case supervision and management

e. Civil trials

28. Do different judges utilize magistrates in different ways? What are the reasons for the differences? Should there be more standardization?

FACILITIES/PERSONNEL/EQUIPMENT

29. What are the court's additional personnel needs, if any?

30. What use is made of special masters? How does one judge's use of them compare with that of other judges? What is the appropriate role of special masters?

31. Are the judges' physical facilities adequate?

a. If not, in what way?

b. If not, does the inadequacy contribute to the court's problems?

32. Are the court's support facilities adequate?

a. If not, in what way?

b. If not, does the inadequacy contribute to the court's problems?

OTHER ISSUES

33. Do you believe that some/many suits are filed in this court that should never have been filed in the first place? If so, what are the causes and what can be done to address this problem?

34. Do you think that great pre-filing review of cases, by clients should take place? Would you favor, for example, CEO review of all cases before filing?

35. Can you suggest any ways that clients might be able to reduce costs and/or delays as litigation progresses?

APPENDIX 4

Attorney Survey

QUESTIONNAIRE

The Civil Justice Reform Act of 1990 requires each United States District Court to develop and implement a civil justice expense and delay reduction plan "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes." 28 U.S.C. §471. Pursuant to the Act, an Advisory Group of the United States District Court for the District of Hawaii has been appointed to assist in developing the plan.

The Hawaii Advisory Group is interested in knowing how you, as an attorney practicing before the United States District Court for the District of Hawaii (hereafter Hawaii U.S. District Court), feel about certain aspects of your practice. The Advisory Group would greatly appreciate your taking the time to fill out this survey.

PLEASE NOTE THAT THIS QUESTIONNAIRE ADDRESSES ONLY YOUR CIVIL PRACTICE BEFORE THE HAWAII U.S. DISTRICT COURT. ANY CRIMINAL, PRISONER LITIGATION OR BANKRUPTCY PRACTICE IS SPECIFICALLY EXCLUDED FROM THIS STUDY.

1. Please identify the principal areas of your practice before the Hawaii U.S. District Court.

5 Asbestos	1 Banks/Banking	21 Civil Rights
1 Commerce: ICC Rates, etc.	29 Contract	2 Copyright/ Trademark/ Patent
5 ERISA	3 Forfeiture & Penalty (Excl. Drug)	4 Fraud/Truth in Lending
7 Labor	5 Land Condemnation	29 Personal Injury
1 Social Security	2 RICO	3 Securities/ Commodities
1 Student Loan	2 Tax	1 Immigration
2 Environmental	1 Admiralty/ Maritime	

2. Please indicate the primary nature of your practice before the Hawaii U.S. District Court.

24 Private Practice, Plaintiff	23 Private Practice, Defense
13 Government	6 Public Interest

3. How many years have you practiced law:

(Average)

14 In Hawaii	12 Before the Hawaii U.S. District Court	13 In All Jurisdictions

4. Transaction costs are attorneys' fees and discovery costs. Adjusting for inflation, in your experience, have transaction costs for civil litigation in Hawaii U.S. District Court in the last ten years:

17 Increased Greatly	25 Increased Somewhat
2 Decreased Somewhat	7 Decreased Greatly
1 Remained the Same	____ Not sure

5. Overall, do you feel that transaction costs for civil litigation in the Hawaii U.S. District Court are:

____ A Major Problem	____ A Moderate Problem
____ A Minor Problem	____ Not a Problem
____ Not Sure	

6. Regarding delays in disposing of civil cases in Hawaii U.S. District Court, would you say that in the last ten years delays have:

14 Increased Greatly	17 Increased Somewhat
2 Decreased Greatly	5 Decreased Somewhat
12 Remained the Same	9 Not Sure

7. Overall, would you say that delays in Hawaii U.S. District Court are:

13 A Major Problem	20 A Moderate Problem
17 A Minor Problem	7 Not a Problem
3 Not Sure	

8. Rank in order of seriousness (with 1 being the most serious and 10 the least serious) the criticisms you have of the process of civil litigation in Hawaii U.S. District Court today.

(Average)		
4.6 Delays	4.3 Discovery Abuses	4.7 Costs
4.1 Backlogs	4.3 Shortage of Judges	4.7 Speedy Trial Act
4.9 Frivolous Litigation	6.7 Complicated Procedures	5.0 Excessive Paperwork
8.1 Too Much Judicial Involvement	6.6 Too Little Judicial Involvement	5.1 Judges not Effectively Participating in Settlement Conferences
6.6 Lack of Consistent Standards/ Procedures	6.4 Judicial Delay in Decision Making	3.9 Unreasonable Positions Taken by Litigants

____ Other _____

9. Classify each of the following as a major cause, a minor cause or not a cause of high civil litigation transaction costs or civil litigation delays in Hawaii U.S. District Court.

Major Cause	Minor Cause	Not a Cause	
31	25	2	Lawyers Who "Over-Discover," Rather Than Focus on the Major Issues
38	19	2	Lawyers Who Use Discovery as an Adversarial Tool to Raise the Stakes for Their Opponents
26	27	5	Lawyers Seeking Material Irrelevant to Their Cases
25	24	9	Lawyers Who Use Discovery to Drive Up Their Bills
23	30	4	Lawyers Who Attempt to Withhold Discoverable Materials
6	33	16	Lawyers Who Are Ignorant of Discovery Rules

10. In a typical case you have litigated in Hawaii U.S. District Court, what percentage of all your transaction costs would you estimate was devoted to discovery?

%								
	0%	1	31-40%	11	51-60%	8	71-80%	7
	10-20%	6	41-50%	13	61-70%	5	81-90%	2

11. Which do you think would do most to improve the discovery process?

13 Changes in the Rules

21 Greater Exercise of Judicial Discretion

9 Changes in Informal, Unwritten Practice

13 Not Sure

____ Other See questionnaires for comments

12. As a means of controlling the discovery process, which of the following do you favor or oppose?

Favor	Oppose	
43	12	Requiring Counsel to Negotiate Conflicts Before Seeking Court Resolution
48	6	Requiring Early Discovery Conferences Soon After Cases Are Filed
28	26	Requiring Parties to Agree on a Final Discovery Plan Well in Advance of the Pretrial Conference
38	13	Establishing Standard Discovery Orders to Instruct Lawyers on How to Proceed
33	22	Limit the Number of Interrogatories
22	32	Limit the Number of Depositions
42	13	Setting a Time Limit on Discovery
35	18	Greater Use of Sanctions
33	22	Limit the Scope of Discovery by Amending Rule 26b to Apply to Issues "Relevant to the Claims or Defenses of Either Party" Rather than "Relevant to the Subject Matter" of the Action
18	35	Limiting Discoverable Information Beyond that Initially Exchanged to a Standard of "Substantial Need"
25	26	The Use of a Two-Stage Discovery Process, the First of Which Involves Only Minimal Discovery to Assess the Strengths and Weaknesses of the Parties' Cases
20	30	Have Discovery Motions, Such as for Sanctions or to Compel, Non-Hearing Motions
44	8	Utilize Magistrates More
_____		Other_____

13. Classify each of the following as a major cause, a minor cause or not a cause of high civil litigation transaction costs or civil litigation delays in Hawaii U.S. District Court.

Major Cause	Minor Cause	Not a Cause	
15	31	8	Failure of Judges to Control the Discovery Process
22	23	8	Failure of Judges to Hold Substantive Conferences at an Early Stage
21	20	13	Failure of Judges to Schedule Early, Firm Trial Dates
18	23	12	Reluctance of Judges to Impose Sanctions or Protective Orders
3	15	36	Excessive Referral by Judges of Discovery Matters to Magistrates
21	21	11	The Increasing Complexity of Litigation
16	28	9	Having Too Few Judges
18	18	17	Frivolous Law Suits
10	25	17	Frivolous Defenses
12	35	6	Incompetent or Inexperienced Lawyers
16	23	15	Expansion of the Substantive Law
10	24	17	The Way the Court Calendar is Set and Managed

14. In general, would you say that judges in Hawaii U.S. District Court engage in case management that is:

0 Excessive	32 Not Forceful Enough
21 About Right	4 Not Sure

15. Who do you think <u>most</u> controls the pace of litigation?

8 Judges	33 Plaintiff's Counsel	18 Defense Counsel
0 Plaintiff	1 Defendant	7 Not Sure

16. Do you believe that the judges in Hawaii U.S. District Court help reduce the civil case load by effective participation in settlement conferences? (Please rank 1 to 10 with 1 being the most effective.)

(Average)
5

17. Currently, do you believe that bifurcation (e.g. separate trials for liability and damages issues) is being used:

2 Too Often 18 Too Seldom 11 About Right 27 Not Sure

18. Do you believe that the introduction of procedural improvements and reforms would significantly reduce transaction costs and delays?

33 Yes 5 No 21 Not Sure

19. Currently federal judges handle both criminal and civil cases. Do you believe that civil litigation transaction costs or delays would be reduced if individual judges were restricted to handling only civil or criminal cases on a rotating basis?

13 Yes, Greatly 26 Yes, Somewhat 11 No 9 No Opinion

20. Rank in order of preference (with 1 being most preferable) the changes you would make in the process of civil litigation in Hawaii U.S. District Court.

(Average)

3.6 Greater Judicial Involvement/Authority

2.5 Encourage Early Pretrial Conferences or Meetings

5.3 Greater Use of Sanctions

3.4 Firm Trial Dates

4.7 Swift Judicial Decisions

3.2 Encourage Pretrial Settlement

7.1 Limit Judicial Involvement in Case Management

5.0 Greater use of Magistrates

____ Other _____

21. Do you think that federal judges should grant summary judgment:

35 More Often 0 Less Often 22 About the Same

22. Under Rule 53, F.R.C.P., the court may appoint masters to hear and rule upon certain matters. Would you approve or disapprove of a more liberal use of masters as a way to decrease transaction costs and delays?

14 Strongly Approve 30 Approve 5 Disapprove

5 Strongly Disapprove 5 No Opinion

23. In how many cases in the United States District Court in Honolulu in the past five years have you been lead counsel to conclusion of the case (including settlement)?

13 0-2 20 3-5 10 6-10

5 10-15 5 15-20 5 20 or more

24. In how many cases in the United States District Court in Honolulu in the past five years have you had a significant role (e.g., prepare and argue dispositive motions or opposition thereto, examine witnesses or otherwise participate at trial)?

6 0-2 16 3-5 14 6-10

9 10-15 9 15-20 6 20 or more

25. In the past five years, how many civil trials have you had in federal court?

32 Jury Trial

51 Non-Jury Trial Before a Judge

23 Non-Jury Trial Before a Magistrate

26. In your opinion, what are the three greatest sources of unnecessary delay in the district?

(See attached)

a. _____

b. _____

c. _____

27. If you had the power to make <u>any</u> three changes (in laws, rules, attitude, workload, etc.) to reduce unnecessary delay, what three changes would have the greatest impact?

(See attached)

a. _____

b. _____

c. _____

28. In your opinion, what are the three greatest sources of unnecessary expense in the district?

(See attached)

a. _____

b. _____

c. _____

29. If you had the power to make any three changes (in laws, rules, attitude, workload, etc.) to reduce unnecessary expense in the litigation process, what three changes would have the greatest impact?

(See attached)

a. _____

b. _____

c. _____

30. The time required to have a matter resolved in Hawaii U.S. District Court is:

11	Much Too Long	24	Somewhat Too Long
22	Just About Right	1	Somewhat Too Fast
0	Much Too Fast		

31. The cost to have a matter resolved in Hawaii U.S. District Court is:

2	Relatively Inexpensive	31	Somewhat Too Expensive for the Benefit Recieved
14	Equal to the Benefit Received	8	Much Too Expensive for the Benefit Received

32. Do you think the Federal District Court should institute any alternative dispute resolution (ADR) procedures?

38 Yes 18 No

If yes, which types of ADR procedures should be used and for what types of cases?

_____

_____

_____

33. In the typical case that does not go to trial, what percentage of your time and fee is the result of:
(See attached)

_____% Initial Investigation and Evaluation (Not Including Pretrial Discovery)

_____% Pretrial Discovery (Depositions and Interrogatories of Non-Experts)

_____% Pretrial Discovery Involving Experts

_____% Responding to Opponents' Motions

_____% Preparation for and Attending Court Conferences

_____% Trial Preparation, Even Though There Was No Trial

_____% Other Activities

34. In the past three years, what percentage of civil cases of yours that were set for trial have been continued to another trial date because no courtroom or judge was available?
(Average)

60 %

11 Total Number of Civil Cases Set for Trial in the Past Three Years

(the following responses repeated at least once)

26. In your opinion, what are the three greatest sources of unnecessary delay in the district?

-lack of firm trial dates
-too few judges
-abusive discovery tactics
-backlog because criminal cases take precedence to civil cases
-judges do not have early settlement conference
-criminal case overload
-lack of incentive to settle until trial is certain
-incompetent magistrates
-frivolous claims

27. If you had the power to make any three changes (in laws, rules, attitude, workload, etc.) to reduce unnecessary delay, what three changes would have the greatest impact?

-stronger rules requiring early settlement/mediation
-more limits on discovery
-use magistrates more
-make many pretrial motions non-hearing
-hire more judges
-limit written discovery requests
-dismiss quickly frivolous claims
-hire competent magistrates
-sanctions against attorneys for pursuing frivolous claims and defenses
-divide court (primarily judges) into civil and criminal divisions
-firm trial dates
-active participation by judges in settlement
-early pretrial and discovery conferences
-greater usage of summary judgement
-impose realistic discovery deadlines

28. In your opinion, what are the three greatest sources of unnecessary expense in the district?

-excessive unmanaged discovery (often by insurance defense attorneys)
-time spent preparing to try cases that will settle
-preparing for trial dates that get vacated
-uncertain trial dates
-too many meaningless depos
-attorneys and/or parties who abuse the process or act in bad faith and unnecessarily prolong cases in order to rack up fees and costs or to make it too costly for a party to proceed
-frivolous litigation
-uncertain trial dates
-lack of court directed settlement efforts

(28. continued)

-too much delay prior to serious settlement talk
-abuse of discovery rules
-too many unnecessary experts
-trials that are not well-limited

29. If you had the power to make any three changes (in laws, rules, attitude, workload, etc.) to reduce unnecessary expense in the litigation process, what three changes would have the greatest impact?

-limit experts
-force early settlement conferences
-limit discovery
-focus discovery to resolving key issues
-firm trial dates
-limit number of depos
-greater usage of summary judgement
-greater judicial involvement in case management
-time limits on depos
-exercise more control over discovery process
-tighten rules governing discovery

33. In the typical case that does not go to trial, what percentage of your time and fee is the result of:

% 1-10	% 11-20	% 21-30	% 31-40	% 41-50	% 51-60	% 61-70	
34	8	4	0	2	0	0	Initial Investigation Evaluation (not including Pretrial Discovery)
4	11	18	7	4	1	1	Pretrial Discovery (Depos and Interrogatories of Non-Experts)
20	19	5	2	1	0	0	Pretrial Discovery Involving Experts
22	11	10	1	2	0	0	Responding to Opponents' Motions
38	4	0	0	0	0	0	Preparation for and Attending Court Conferences
11	19	7	3	0	0	0	Trial Prep, Even Though No Trial
17	1	2	0	1	1	0	Other Activities

APPENDIX 5

Advisory Group Voting Procedures

USDC ADVISORY COMMITTEE
DISTRICT OF HAWAII
PROCEDURE FOR APPROVING IMPLEMENTATION PLAN

1. Robert's Rules of Order shall govern the committee's conduct of business.

2. Sixty percent (60%) of the committee membership shall constitute a quorum for the conduct of business.

3. Meetings of the committee shall be scheduled upon at least 15 days' written notice.

4. The purpose of the December 12th meeting of the committee shall be to determine those court reform options (as identified by the Options Identification Subcommittee) that shall be discussed and voted on at an extended meeting in January, 1993. The selection of the options to be discussed and voted on in January shall be by majority vote of the quorum present.

5. An extended meeting shall be scheduled in January, 1993, at which the committee will discuss and vote on those reforms that shall be included in the recommended implementation plan which will be submitted to the judges. Any changes to existing court practice and procedure shall be included in the plan only upon a 2/3 vote of the quorum present. Existing court practice and procedure may be included in the plan by a majority vote of the quorum present.

6. Any committee member who wishes the committee to consider options in addition to those identified by the Options Identification Subcommittee may propose the option at or before the January meeting. If at least 30% of those present at the January meeting vote in favor of the option being considered, it shall be included in the options to be discussed and voted on at the January meeting.

7. If any option proposing a change to an existing court practice or procedure garners a majority, but less than a 2/3 vote at the January meeting, the proposed change shall nonetheless be reported to the judges in the committee's report as having received a majority vote, but not the required 2/3 vote.

8. Following the January, 1993 meeting, the Reporter shall draft the committee report and recommended implementation plan and circulate them within 30 days to all committee members for review and comment. Comments and any minority reports shall be submitted to the Reporter within 15 days.

9. Following submission of the comments and the revision of the report and plan accordingly, the committee shall meet to vote on the final version of the report and recommended implementation plan. The report and plan shall be approved by 2/3 vote of those present.

10. The report and recommended implementation plan shall thereafter be submitted to the judges for review, and revision or adoption.

11. The judges shall meet with the committee before issuing their final implementation plan to discuss their decision regarding the report and recommended implementation plan.

12. The committee may take such further action as the judges request and the committee determines by majority vote is authorized by its governing statute.

7139H

APPENDIX 6

Scheduling Conference Order

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In the Matter of Scheduling Conferences, Settlement Conferences, Final Pretrial Conferences, and Expedited Hearings on Discovery Motions Before U.S. Magistrate Judges.	)

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 2 1992

at 2 o'clock and 50 min. P.M.
WALTER A. Y. H. CHINN, CLERK

ORDER

IT IS HEREBY ORDERED that the following shall be applicable in matters before Magistrate Judges:

1. Attached "Report of Scheduling Conference, Minutes and Order";

2. Attached "Procedures for Settlement Conferences before U.S. Magistrate Judges";

3. Attached "Report of Final Pretrial Conference, Minutes and Order (Bench Trial)";

4. Attached "Report of Final Pretrial Conference, Minutes and Order (Jury Trial)"; and

5. Attached "Expedited Hearings on Discovery Motions before U.S. Magistrate Judges".

DATED: Honolulu, Hawaii, NOV 2 1992.

Chief United States District Judge

United States District Judge

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Plaintiff_,	CIVIL NO.
vs.	
Defendant_.	REPORT OF SCHEDULING CONFERENCE, MINUTES AND ORDER

REPORT OF SCHEDULING CONFERENCE, MINUTES AND ORDER

Pursuant to the Federal Rules of Civil Procedure, Rule 16 and L.R. 235-3, a scheduling conference was held in chambers on _____, 199___, before the Honorable _____, United States Magistrate Judge. Appearing at the conference were _____.

Pursuant to Federal Rules of Civil Procedure, Rule 16(e) and L.R. 235-4, the Court enters this scheduling conference order:

1. Bench/Jury trial in this matter will commence before the Honorable _____, United States _____ Judge on _____, 199___ at ___:____ __.m.

2. A final pre-trial conference shall be held on _____, 199___, at ___:___ __.m. before the Honorable _____, United States Magistrate Judge.

3. Pursuant to L.R. 236-7, each party herein shall serve and file a separate pre-trial statement by _____, 199___.

4. Pursuant to the Federal Rules of Civil Procedure, Rule 16(c)(5) and (e), the plaintiff(s) herein shall serve and file a disclosure of non-expert witnesses reasonably expected to be called by the plaintiff(s) on or before _____, 199___.

Pursuant to the Federal Rules of Civil Procedure, Rule 16(c)(5) and (e), the defendant(s) herein shall serve and file a disclosure of non-expert witnesses reasonably expected to be called by the defendant(s) on or before _____, 199___.

The disclosure of non-expert witnesses shall include the full name, address, and telephone number of each witness, and a short summary of anticipated testimony. If certain required information is not available, the disclosure shall so state. Each party shall be responsible for updating its disclosures as such information becomes available. Such duty to update such disclosure shall continue up to and including the date that trial herein actual terminates.

5. Pursuant to the Federal Rules of Civil Procedure, Rule 16(c)(5) and (e), each party shall serve and file a disclosure of the names, addresses, and field of expertise of all expert witnesses to be called by _____, 199___.

6. Pursuant to the Federal Rules of Civil Procedure, Rule 16(b)(1), all parties shall file any motion to join additional parties or to amend the pleadings by _____, 199___.

7. Pursuant to the Federal Rules of Civil Procedure, Rule 16(b)(2), all motions not otherwise provided herein shall be filed by _____, 199___.

8. All motions deadline stated herein will be strictly enforced. After such deadline the parties may not file such motions except with leave of court, good cause having been shown.

9. Pursuant to the Federal Rules of Civil Procedure, Rule 16(b)(3), discovery shall be completed by _____, 199___.

10. Pursuant to the Federal Rules of Civil Procedure, Rule 16(a), settlement conference shall be held on _____, 199___ at ___:___ __.m. before the Honorable _____, United States Magistrate Judge.

Each party shall deliver to the presiding Magistrate Judge a confidential settlement conference statement by _____, 199___.

11. This order shall continue in effect in this matter unless and until amended by subsequent order of the Court.

12. OTHER MATTERS:

_____

_____

_____

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, _____.

_____

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Plaintiff_,	CIVIL NO.
vs.	
Defendant_.	PROCEDURES FOR SETTLEMENT CONFERENCES BEFORE UNITED STATES MAGISTRATE JUDGES

PROCEDURES FOR SETTLEMENT CONFERENCES
BEFORE UNITED STATES MAGISTRATE JUDGES

I. CONFIDENTIAL SETTLEMENT CONFERENCE STATEMENT

At least five court days before the settlement conference, each party shall deliver directly to the presiding magistrate judge a confidential settlement conference statement, which should not be filed nor served upon the other parties. The settlement conference statement will not be made a part of the record, and the information contained in the statement will not be disclosed to the other parties without express authority from the party submitting the statement.

The confidential settlement conference statement shall include the following:

1. A brief statement of the case.
2. A brief statement of the claims and defenses, i.e., statutory and other grounds upon which claims are founded; a forthright evaluation of the parties' likelihood of prevailing on the claims and defenses; and a description of the major issues in

dispute, including damages.

3. A summary of the proceedings to date, including a statement as to the status of discovery.

4. An estimate of the time to be expended for further discovery, pretrial proceedings and trial.

5. A brief statement of present demands and offers and the history of past settlement discussions, offers and demands.

6. A brief statement of the party's position on settlement.

II. REQUIRED ATTENDANCE AT THE SETTLEMENT CONFERENCE

Unless otherwise permitted in advance by the court, lead trial counsel and all parties appearing pro se shall appear at the settlement conference with full authority to negotiate and to settle the case on any terms at the conference. Unless otherwise ordered by the Court, parties may be present at the settlement conference. However, all parties shall be available by telephone to their respective counsel during the settlement conference. The parties must be immediately available throughout the conference until excused regardless of time zone difference. Any other special arrangements desired in cases where settlement authority rests with a governing body, shall also be proposed to the court in advance of the settlement conference.

III. SANCTIONS

Any failure of the trial attorneys, parties or persons with authority to attend the conference or to be available by telephone will result in sanctions to include the fees and costs expended by the other parties in preparing for and attending the conference. Failure to timely deliver a confidential settlement conference statement will also result in sanctions.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Plaintiff_,	CIVIL NO.
vs.	
Defendant_.	REPORT OF FINAL PRETRIAL CONFERENCE, MINUTES AND ORDER (BENCH TRIAL)

REPORT OF FINAL PRETRIAL CONFERENCE, MINUTES AND ORDER

A final pretrial conference was held in chambers on _____, before the Honorable _____, United States Magistrate Judge. Appearing at the conference were _____.

Pursuant to Federal Rules of Civil Procedure, Rule 16(e), the Court enters this final pretrial conference order:

1. Bench trial in this matter will commence before the Honorable _____, United States _____ Judge on _____.
The parties estimate that this trial will require _____ days of trial time inclusive of arguments.

2. Unless otherwise indicated, all actions required herein by

this order shall be completed on or before _____.

3. **WITNESSES:**

a. Each party shall serve and file a final comprehensive witness list indicating the identity of each witness that the party will call at trial and describing concisely the substance of the testimony to be given and the estimated time required for the testimony of the witness on direct examination.

b. The parties shall make arrangements to schedule the attendance of witnesses at trial so that the case can proceed with all due expedition and without any unnecessary delay.

c. The party presenting evidence shall give notice to the other party the day before of the names of the witnesses who will be called to testify the next day and the order in which the witnesses will be called.

4. **EXHIBITS:**

a. The parties shall meet and exchange copies or, when appropriate, make available for inspection all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the trial other than for impeachment or rebuttal. Each proposed exhibit shall be premarked for identification using the following designations:

PARTY	EXHIBIT #	TO	EXHIBIT #
_____	___		___
_____	___		___

Upon request, a party shall make the exhibit or the underlying documents of any exhibit available for inspection and copying. The parties shall meet and confer regarding possible stipulations to

the authenticity and admissibility of proposed exhibits.

b. The parties shall jointly prepare a consolidated and comprehensive list of all exhibits to be offered at trial. That list shall concisely describe the particular exhibit, identify it by identification marking, indicate by which party each exhibit will be offered in evidence, indicate whether objection is anticipated by any party and provide a short statement of the basis of the objection.

c. The original set of exhibits (in individual folders), and one copy (in a binder) and the list of all exhibits shall be submitted to the court.

5. **DEPOSITIONS, INTERROGATORIES AND ADMISSIONS:**

The parties shall serve and file on or before _____, 199___, statements designating excerpts from depositions (specifying the witness and page and line referred to), from interrogatory answers and from responses to requests for admissions to be used at trial other than for impeachment or rebuttal. Objections to any such statements and any statements counter-designating other portions of depositions, interrogatory, answers or responses to requests for admission shall be served and filed.

6. **TRIAL BRIEFS:**

Each party shall serve and file a trial brief on all significant disputed issues of law, including foreseeable procedure and evidentiary issues, setting forth briefly the party's position and the supporting arguments and authorities.

7. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Each party shall serve and file proposed findings of fact and conclusions of law.

8. MOTIONS IN LIMINE:

Motions in limine shall be served and filed on or before _____, 199___. Any opposition memorandum to a motion in limine shall be served and filed on or before _____, 199___.

9. STIPULATIONS:

Stipulations shall be filed with the Court.

10. FILING OF DOCUMENTS:

A copy of any and all documents filed with or submitted to the court shall be given to the trial judge's courtroom deputy.

11. OTHER MATTERS:

_____

_____

12. This order shall remain in effect until modified by the Court and shall be modified by the Court only to prevent manifest injustice.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, _____.

_____

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Plaintiff(s),	CIVIL NO.
vs.	
Defendant(s).	REPORT OF FINAL PRETRIAL CONFERENCE, MINUTES AND ORDER (JURY TRIAL)

REPORT OF FINAL PRETRIAL CONFERENCE, MINUTES AND ORDER

A final pretrial conference was held in chambers on _____, 199___, before the Honorable _____, United States Magistrate Judge. Appearing at the conference were _____.

Pursuant to Federal Rules of Civil Procedure, Rule 16(e), the Court enters this final pretrial conference order:

1. Jury trial in this matter will commence before the Honorable _____, United States _____ Judge on _____, 199___.

The parties estimate that this trial will require _____ days of trial time inclusive of jury selection and arguments.

2. Unless otherwise indicated, all actions required herein by this order shall be completed on or before _____, 199___.

3. JURY ISSUES:

a. The parties shall prepare in writing and submit to the court any special voir dire inquiries they wish the judge to ask the jury panel.

b. The parties shall confer in advance of trial and prepare an agreed upon special verdict form, if a special verdict form is to be requested. The agreed upon special verdict form shall be submitted to the court. In the event of disagreement, the parties shall submit all proposed special verdict forms to the court.

c. JURY INSTRUCTIONS:

i. Jury instructions shall be prepared and submitted in accordance with L.R. 235-11. The parties shall serve upon each other a set of proposed jury instructions on or before _____, 199___.

ii. The parties shall thereafter meet and confer for the purpose of preparing one complete set of agreed upon jury instructions. The jury instructions which are agreed upon shall be filed with the Court.

iii. Supplemental instructions which are not agreed upon and a concise argument supporting the appropriateness of the proposed instruction shall be filed with the Court.

iv. All objections to the non-agreed upon instructions shall be in writing and filed.

4. **WITNESSES:**

a. Each party shall serve and file a final comprehensive witness list indicating the identity of each witness that the party will call at trial and describing concisely the substance of the testimony to be given and the estimated time required for the testimony of the witness on direct examination.

b. The parties shall make arrangements to schedule the attendance of witnesses at trial so that the case can proceed with all due expedition and without any unnecessary delay.

c. The party presenting evidence shall give notice to the other party the day before of the names of the witnesses who will be called to testify the next day and the order in which the witnesses will be called.

5. **EXHIBITS:**

a. The parties shall meet and exchange copies or, when appropriate, make available for inspection all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the trial other than for impeachment or rebuttal. Each proposed exhibit shall be premarked for identification using the following designations:

PARTY	EXHIBIT #	TO	EXHIBIT #
_____	___		___
_____	___		___

Upon request, a party shall make the exhibit or the underlying documents of any exhibit available for inspection and copying. The parties shall meet and confer regarding possible stipulations to

the authenticity and admissibility of proposed exhibits.

b. The parties shall jointly prepare a consolidated and comprehensive list of all exhibits to be offered at trial. That list shall concisely describe the particular exhibit, identify it by identification marking, indicate by which party each exhibit will be offered in evidence, indicate whether objection is anticipated by any party and provide a short statement of the basis of the objection.

c. The original set of exhibits (in individual folders), and one copy (in a binder) and the list of all exhibits shall be submitted to the court.

6. DEPOSITIONS, INTERROGATORIES AND ADMISSIONS:

The parties shall serve and file on or before __(10 DAYS)___, statements designating excerpts from depositions (specifying the witness and page and line referred to), from interrogatory answers and from responses to requests for admissions to be used at trial other than for impeachment or rebuttal. Objections to any such statements and any statements counter-designating other portions of depositions, interrogatory, answers or responses to requests for admission shall be served and filed.

7. TRIAL BRIEFS:

Each party shall serve and file a trial brief on all significant disputed issues of law, including foreseeable procedure and evidentiary issues, setting forth briefly the party's position and the supporting arguments and authorities.

8. **MOTIONS IN LIMINE:**

Motions in limine shall be served and filed on or before _____, 199___. Any opposition memorandum to a motion in limine shall be served and filed on or before _____, 199___.

9. **STIPULATIONS:**

Stipulations shall be filed with the Court.

10. **FILING OF DOCUMENTS:**

A copy of any and all documents filed with or submitted to the court shall be given to the trial judge's courtroom deputy.

11. **OTHER MATTERS:**

_____

_____

_____

12. This order shall remain in effect until modified by the Court and shall be modified by the Court only to prevent manifest injustice.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, .

_____

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Plaintiff_,	CIVIL NO.
vs.	
Defendant_.	EXPEDITED HEARINGS ON DISCOVERY MOTIONS BEFORE UNITED STATES MAGISTRATE JUDGES

EXPEDITED HEARINGS ON DISCOVERY MOTIONS BEFORE UNITED STATES MAGISTRATE JUDGES

Expedited hearings before United States Magistrate Judges in the United States District Court for the District of Hawaii are available primarily for the resolution of discovery disputes. The court intends the expedited procedures to afford a swift but full hearing following abbreviated and simultaneous briefing by the parties.

Parties choosing the expedited procedure must first telephone the courtroom deputy clerk to calendar a hearing, which will be set approximately 5-10 days from the date of the request, depending upon the schedule of the court and the parties. Following the calendaring, the party requesting the hearing must notify the opposing party by telephone, and then confirm by letter to the court and opposing counsel the date and time of the hearing and the deadline for filing letter briefs.

Letter briefs of five pages or less shall be filed by all parties simultaneously no later than one day prior to the expedited hearing, with conformed copies delivered to chambers. The letter brief shall contain all relevant information, including: dates of discovery cut-off, and trial; a discussion of the dispute; and a description of the efforts already made to resolve the dispute. Pursuant to L.R. 230-4, the court will not entertain discovery motions, including expedited procedures, unless the parties have previously conferred in a good faith effort to resolve the dispute.

If appropriate, essential documents at issue in the discovery dispute should be attached to the party's letter brief. In the context of expedited hearings, however, the court views voluminous attachments with disfavor. Disputes necessitating review of extensive document attachments **do not qualify for expedited hearing** and should be noticed for a motion hearing in accordance with Local Rule 220.

The expedited hearing may be conducted via telephone conference call to the court. Arrangements for the conference call must be made outside of the Court's phone lines by the moving party. Personal appearances are allowed or may be ordered by the court as appropriate.

Even though this alternative procedure is expedited, the court will give full attention to the matter and will issue orders that may fully resolve the dispute or that set, as necessary, tailored schedules for further briefing.

APPENDIX 7

Temporary Order Regarding Trial Setting and Readiness Calendar

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In re)
)
Trial Readiness Procedure)
)
)
)

TEMPORARY ORDER REGARDING
TRIAL SETTING AND READINESS CALENDAR

PREAMBLE

Due to the demands of the criminal caseload and the requirements of the Civil Justice Reform Act it is necessary that this court adopt a procedure to insure maximum utilization of available court resources. To this end the court has adopted the following trial setting and readiness procedure in an effort to increase the number of civil and criminal cases available to be tried in the event cases set for the primary trial week are settled, continued, or are otherwise unavailable for trial.

TRIAL SETTING AND READINESS PROCEDURE

All civil and criminal trials set to commence on or after the week of January 4, 1993, shall be considered placed on a two-week readiness calendar. The week in which a case is set for trial shall be considered that case's primary week. The week prior to the week a case is set for trial shall be considered that case's standby week. As the calendar moves forward cases will rotate from standby to primary week status with the succeeding weeks cases moving into standby status. Cases not tried during their primary week shall be reset for trial in accordance with present court practice.

The court will consider all cases set on either the primary or standby calendar to be ready for trial and any such case may be called for trial on one day's notice without further order of the court. Failure of a party to be ready to proceed to trial on any case set on the two-week readiness calendar may subject that party to sanctions as provided in L.R. 100-3 which sanctions may include entry of adverse judgment or dismissal.

Cases not called to trial during their primary week shall be reset for trial at the earliest available date in accordance with court procedures.

This order shall remain in force until further order of the court.

IT IS SO ORDERED:

DATED: Honolulu, Hawaii, NOV 5 1992.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE