UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
OFFICE OF THE CLERK
OKLAHOMA CITY, OKLAHOMA 73102
(405)231-4792 • FTS 736-4792

ROBERT D. DENNIS
CLERK

April 26, 1991

Mr. Abel Mattos, Chief
Programs Branch
Court Administration Division
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Mattos:

Pursuant to our telephone conversation, please find enclosed a copy of our court's report to the Advisory Group which has been mailed to all members. The first meeting of the Advisory Group is scheduled for May 7, 1991. We will keep you informed of further developments.

Sincerely,

Robert D. Dennis
Court Clerk

RDD/cm
Enc.

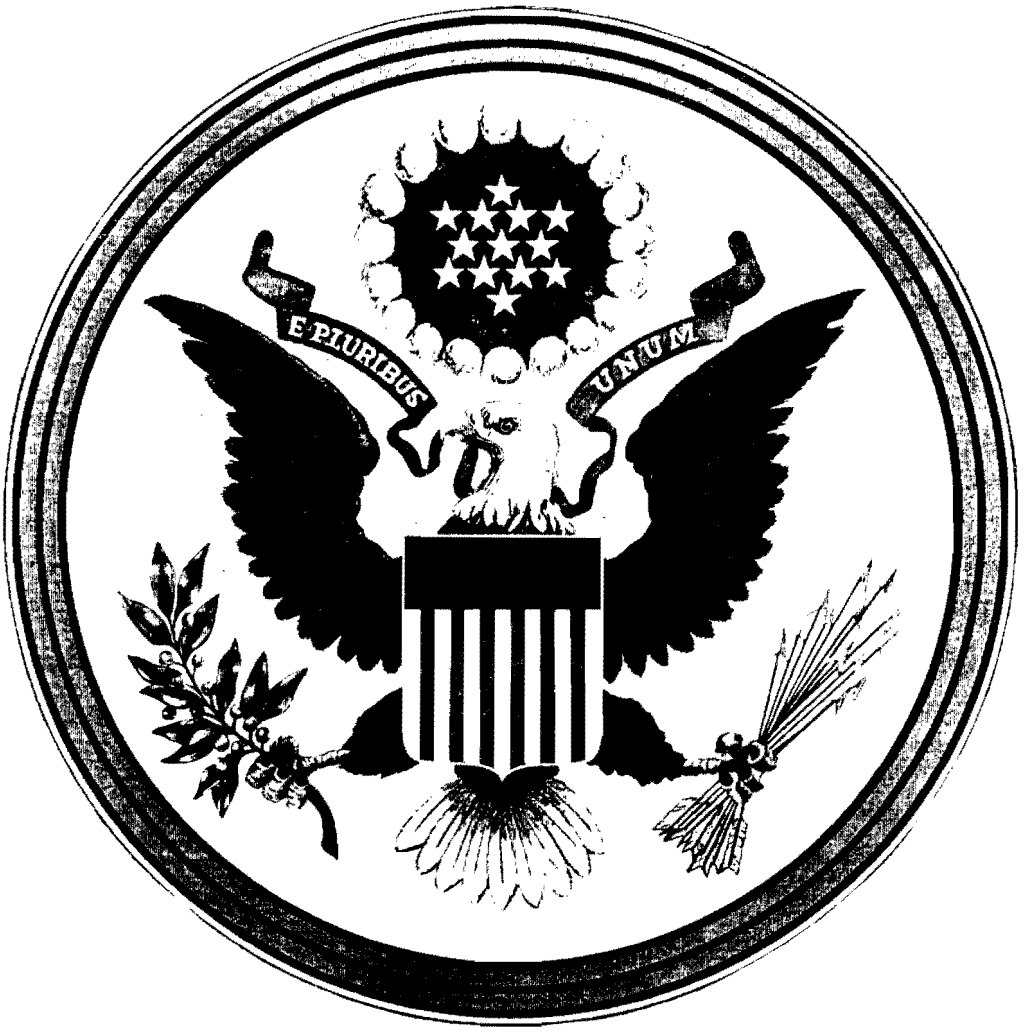
Ah —

. . .

Wow!

United States District Court
Western District of Oklahoma

Civil Justice Reform Act of 1990



Advisory Group

United States District Court
Western District of Oklahoma

Information and Guidance for the Advisory Group Appointed under the Civil Justice Reform Act of 1990.

April 1991

APPOINTMENT

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

IN THE MATTER OF MISCELLANEOUS)
)
ORDERS OF THE COURT,)

MISC. NO. 22

REVISED ADMINISTRATIVE ORDER

This court's Administrative Order of February 4, 1991, appointing the court's Civil Justice Reform Act Advisory Group, is hereby revised as follows:

Four Year Term	**Three Year Term**	**Two Year Term**
Peter B. Bradford	Sue Wycoff	Roy J. Davis
Judy Hamilton Morse	Stephen P. Friot	Anthony M. Massad
Emmanuel Edem	Garvin A. Isaacs	Steven A. Novick
Glen D. Huff	Michael McGuire	James G. Harlow

Ex officio, non-voting members:

Ralph G. Thompson, Chief Judge
Lee R. West, U. S. District Judge
David L. Russell, U. S. District Judge
Wayne E. Alley, U. S. District Judge
Layn R. Phillips, U. S. District Judge
Robin L. Cauthron, U. S. District Judge
Ronald L. Howland, U. S. Magistrate Judge
Pat Irwin, U. S. Magistrate Judge
Doyle W. Argo, U. S. Magistrate Judge

IT IS SO ORDERED this 17th day of April, 1991.

CHIEF JUDGE

United States District Court

Western District of Oklahoma
United States Courthouse
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

Ralph G. Thompson
Chief Judge

Telephone
405-231-5153
FTS 736-5153

February 4, 1991

Some letter to each other member -

Timothy D. Leonard, Esq.
U. S. Attorney
4434 U. S. Courthouse
Oklahoma City, OK

Re: Civil Justice Reform Act Advisory Group

Dear Tim:

Sincere thanks for accepting an appointment to the Civil Justice Reform Act Advisory Group for the court.

The advisory group is a clearly outstanding one. Not only does it consist of distinguished and knowledgeable individuals, it is also balanced and representative of the categories of parties and cases coming before the court. Other members are:

Peter B. Bradford
Roy J. Davis
Emmanuel E. Edem
Judy Hamilton Morse
Glen D. Huff
Sue Wycoff
Michael G. McGuire
Stephen P. Friot
Garvin A. Isaacs
Steven A. Novick
Anthony M. Massad
James G. Harlow, Chairman of the Board and CEO of Oklahoma Gas and Electric Company - our non-lawyer member.

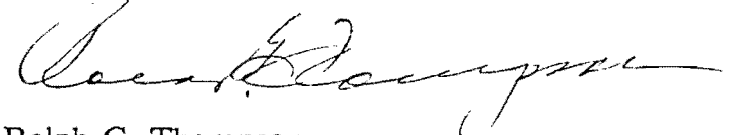
Non-voting members are Judges Thompson, West, Russell, Alley and Phillips and U. S. Magistrate Judges Howland, Cauthron and Argo. Clerk of Court Robert D. Dennis, Deputy Clerk of Court Grant Price and law clerk Ann Marshall will assist the group in supporting roles.

The purpose of the advisory group is to advise the court in its design of a revised plan for the management of civil litigation, the goal of which is to reduce both time and expense of civil litigation in the U. S. District Court. Our court is, and has been for several years, sixth in the nation in the prompt disposition of such cases. This was true even when we had the heaviest case load in the entire nation. This may be why we were selected as a pilot court for the development of such a litigation plan. From our work, and that of nine other pilot courts, a model plan for the federal courts of the nation will be developed. So, our work is important, not only for our own jurisdiction, but as it may influence the way civil cases are eventually managed by all federal district courts.

As we proceed with this project your frank and critical guidance will be greatly appreciated. In turn, I promise to make every effort to conserve your time and to proceed as efficiently as possible. At this time, the clerk is marshalling data that will be helpful in our efforts to analyze the demands of various types of litigation, identify common causes of costs and delay in litigation and other practices affecting them. Also, we will prepare a report on how the court has addressed these matters to date. You will be contacted again and furnished these and other materials that will help explain our task in greater detail and prepare you for the advisory role that is forthcoming.

Thanks again and very best regards.

Sincerely,



Ralph G. Thompson
Chief Judge

RGT/sh

United States District Court
Western District of Oklahoma
United States Courthouse
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

Ralph G. Thompson
Chief Judge

Telephone
405-231-5153
FTS 736-5153

April 15, 1991

TO: Members of the Civil Justice Reform Act Advisory Group

RE: Notice of First Meeting

Dear Members of the Advisory Group:

The first meeting of the Advisory Group will be as follows:

Date: Tuesday, May 7, 1991

Time: 8:30 a.m.

Place: Library of Chief Judge's Office
Room 3301 U. S. Courthouse (3rd Floor)
200 N. W. 4th Street
Oklahoma City, OK

We are presently compiling and organizing materials which we believe will be helpful to you and plan to get them to you for review prior to the meeting.

Your Chairman, Pete Bradford, and Vice Chairman, Judy Hamilton Morse, join me in looking forward to seeing you. Every effort will be made to proceed efficiently and I believe the first meeting should be concluded in thirty minutes to one hour.

Please let us know if you can attend by calling Sharon or Joan of my office at 231-5153.

Sincerely,

Ralph G. Thompson

RGT/sh

United States District Court
Western District of Oklahoma
United States Courthouse
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

Ralph G. Thompson
Chief Judge

Telephone
405-231-5153
FTS 736-5153

Done copy to all members

April 25, 1991

Peter B. Bradford, Esq.
Daugherty, Bradford, Fowler & Moss
204 North Robinson Avenue, Suite 900
Oklahoma City, OK 73102

Re: Civil Justice Reform Act Advisory Group

Dear Peter:

Your participation as a member of this court's Advisory Group is about to commence. Again, many thanks for your willingness to serve. You will serve as Chairman of the Advisory Group and Judy Hamilton Morse as Vice-Chairman. A membership list is enclosed.

The Civil Justice Reform Act of 1990 provides for the creation and implementation of Civil Justice Expense and Delay Reduction Plans in the United States District Courts. The Act was designed to develop and implement ways of reducing costs and delays in civil litigation at the district court level. It provides for the appointment of a local advisory group to make recommendations for such a plan for each court, thus creating an opportunity for communications between judges, lawyers and litigants, i.e., the entire legal community. By the Act's terms, it is to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management and insure the just, speedy, and inexpensive resolution of civil disputes."

Our court has been designated one of ten pilot courts by the Judicial Conference of the Unites States. Thus, we are to develop and implement our plan not later than December 31, 1991. Other courts will do so by the end of 1993. The plan must include the six principles and guidelines of litigation management and costs and delay reduction required by the Act and listed in the enclosed memorandum.

As the Advisory Group for our court you are being asked to conduct an analysis of the court by assessing the court's workload, examining the conditions of the civil and criminal dockets, identifying trends in litigation and the demands being placed on the court's resources. You will help to identify causes of avoidable costs and delay by evaluating the court's procedures and the ways in which litigants and lawyers approach and

conduct litigation. Also, you are to examine the extent to which costs and delays can be reduced by a better assessment of the impact of new legislation, or its lack, on the courts. Eventually, you will make your findings, develop your recommendations and submit a report to the court. The court will then develop the plan with the benefit of your recommendations.

After promulgating and implementing the plan, advisory groups are intended to meet annually thereafter to assist the court by a continued assessment of the civil and criminal dockets. This continuing assessment is intended to identify any additional appropriate actions needed to improve the initial plan.

The accompanying materials should be helpful to you in the course of your work. Although they appear to be voluminous, I believe they will be entirely manageable as the various phases of your work are reached. If time permits, it will facilitate our first meeting if you will read them in advance. It is important that you read, at least, the report found at Tab B. These materials are intended to help, and in no way to limit, your assessments and recommendations. All court records are entirely at your disposal and will be provided promptly upon request.

If you have any questions or need any additional information or assistance please call me at (405) 231-5153.

Sincerely,

Ralph G. Thompson
Chief Judge

RGT/sh
Enclosures

REPORT

INTRODUCTION

Pursuant to the requirements of the "Civil Justice Reform Act of 1990" (CJRA), the following information is provided to assist you in your work as the court's Advisory Group. You are being asked to complete a thorough assessment of the state of the court's civil and criminal dockets, including trends in case filings and demands on the court's resources in order to recommend to the court proposals for a civil justice expense and delay reduction plan. The purpose of the plan is to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management and insure the just, speedy and inexpensive resolution of civil disputes." Stated differently, our common goal is to enhance the court's ability to provide the highest possible quality of justice, in the least possible time, for the least possible expense. It is a most worthy and important task and we assure you of the court's full cooperation and support.

I. Preliminary Information: Description of the Court

The Western District of Oklahoma is comprised of 40 counties which cover approximately the western half of the state. The Court sits primarily in Oklahoma City, however, on occasion, trials are held in other locations within the district. Currently, the court consists of 6 active U.S. District Judges, 2 senior U.S. District Judges, 4 full-time U.S. Magistrate Judges (3 traditional and 1 settlement magistrate) in Oklahoma City, and 3 part-time Magistrate Judges sitting in Enid, Lawton and at Tinker Air Force Base. Our sixth U.S. District Judgeship was created by the Federal Judgeship Act of 1990. Judge Robin J. Cauthron was sworn-in to this position April 5, 1991. Judge Layn R. Phillips has announced his resignation effective June 22, 1991. Timothy D. Leonard, United States Attorney for the Western District of Oklahoma has been recommended by United States Senator Don Nickles as Judge Phillips' successor.

Each U.S. District Judge is authorized two law clerk positions, and each full-time magistrate judge, one law clerk. In addition, there are presently two temporary (one year) law clerks shared among the federal judges. Each judge and magistrate judge has one full-time secretary.

The current staffing level of the clerk's office totals 39 deputy court clerk positions plus the Clerk of Court. Among these deputy clerks are one civil docket clerk and one courtroom deputy per district judge, as well as one docketing/courtroom deputy assigned to our two senior judges, and one courtroom deputy per magistrate judge. The courtroom deputies are responsible for calendaring and case management. The implementation of the computerized Integrated Case Management System (ICMS) is underway, and automated docketing and case management should be fully operational by third quarter 1991.

Our court is burdened with severe space shortage problems. For the past several years attorney conference rooms and witness rooms have, by necessity, been converted to office space

for continually growing staff. Our sole remaining witness room was recently converted to a computer room which now houses a main frame computer running the ICMS. In order to alleviate our space shortages, the renovation and realignment of the entire courthouse is now underway. This project is expected to take from three to four years. Upon completion, additional courtrooms, chambers, conference rooms and office facilities will be provided.

II. Assessment of the Court's Civil and Criminal Dockets

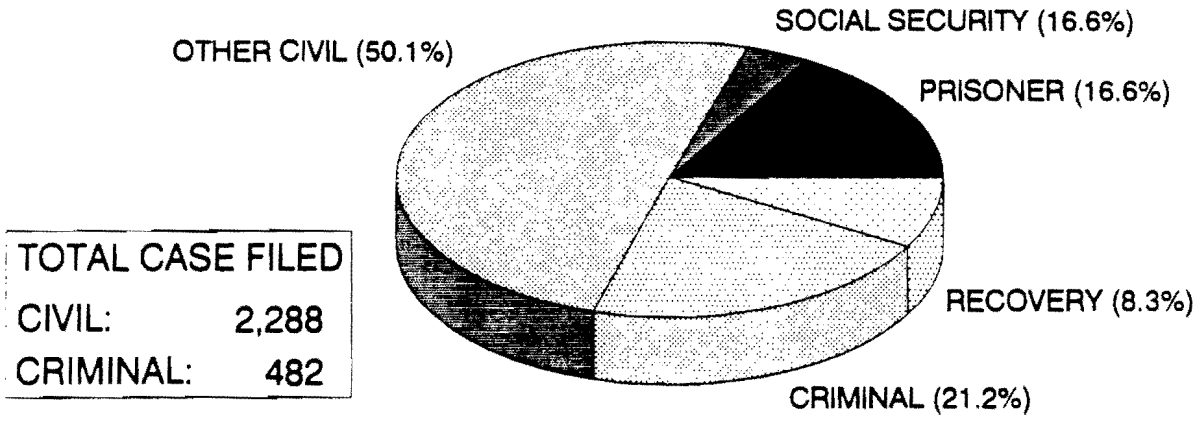
Each district court compiles specific statistics which cover workload and case processing. These statistics are incorporated into to a uniform national reporting system maintained by the Administrative Office of the Courts. It is this data, regularly collected and published in the Federal Court Management Statistics, which is utilized here. Statistical year-end is June 30 of the year in question. This basic information about our court should be of assistance to you as you assess the court's civil and criminal dockets.

The Criminal Docket

It is important to recognize that the Speedy Trial Act mandates that criminal proceedings occur within specified time limits which may interfere with the prompt disposition of civil matters. A heavy criminal caseload will limit the resources available for the court's civil cases.

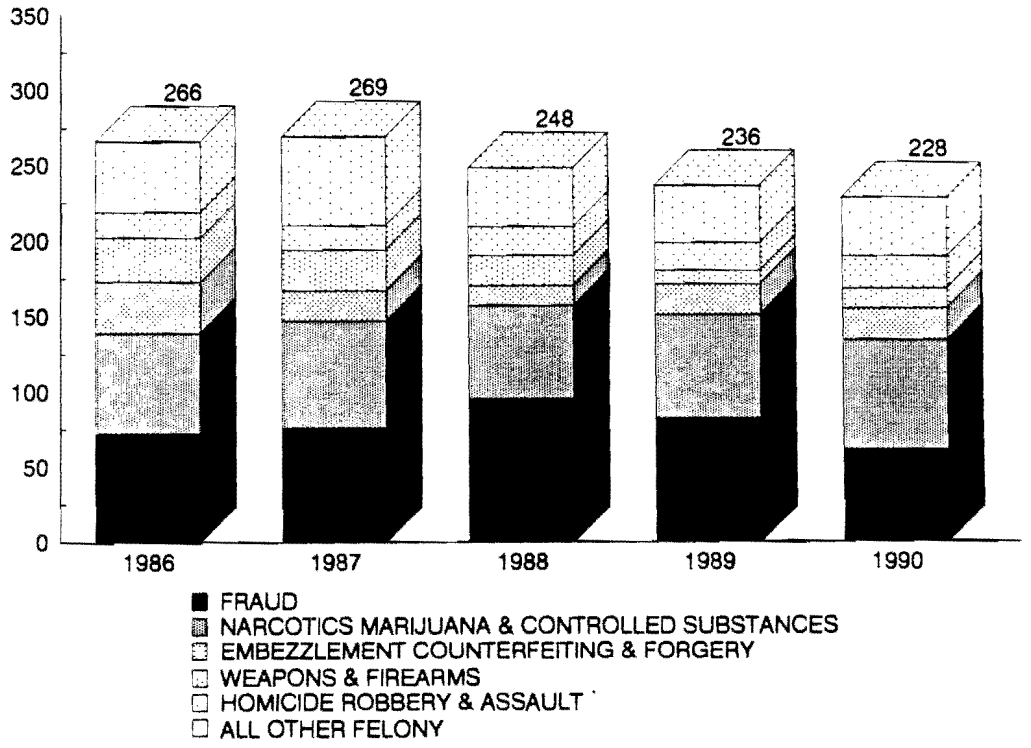
Due to these criminal case time requirements, Local Rule 38 was enacted some time ago. It sets time limitations, including trial dates, and describes procedures for all matters affecting criminal defendants. Use of the court's Uniform Reciprocal Discovery Order in criminal cases has been effective in reducing motion and discovery problems in criminal practice. It could be called a "disclosure" order requiring a substantial degree of information sharing by both the government and the defendants. (See Appendix, Tab H)

Criminal Workload and Trends. Our court's criminal caseload was 21.2% of the overall workload for 1990, as pointed out in the diagram below.



There were 228 criminal felony filings in statistical year 1990, on 289 felony defendants. Felony drug offenses in our district steadily increased to the second largest category with 57 filings in 1990. With the continued emphasis on drug interdiction and use of drug task forces, the drug related caseload with multiple defendants should continue to increase well into the 1990's. Our largest category of criminal filings was fraud, as evidenced by the growing number of complex financial fraud cases with multiple defendants. A third grand jury was empaneled in March of 1990 as a result of the growth of such fraud and drug related cases. The complexity and trial length of such cases will have a serious impact on our court's ability to handle its civil trial docket.

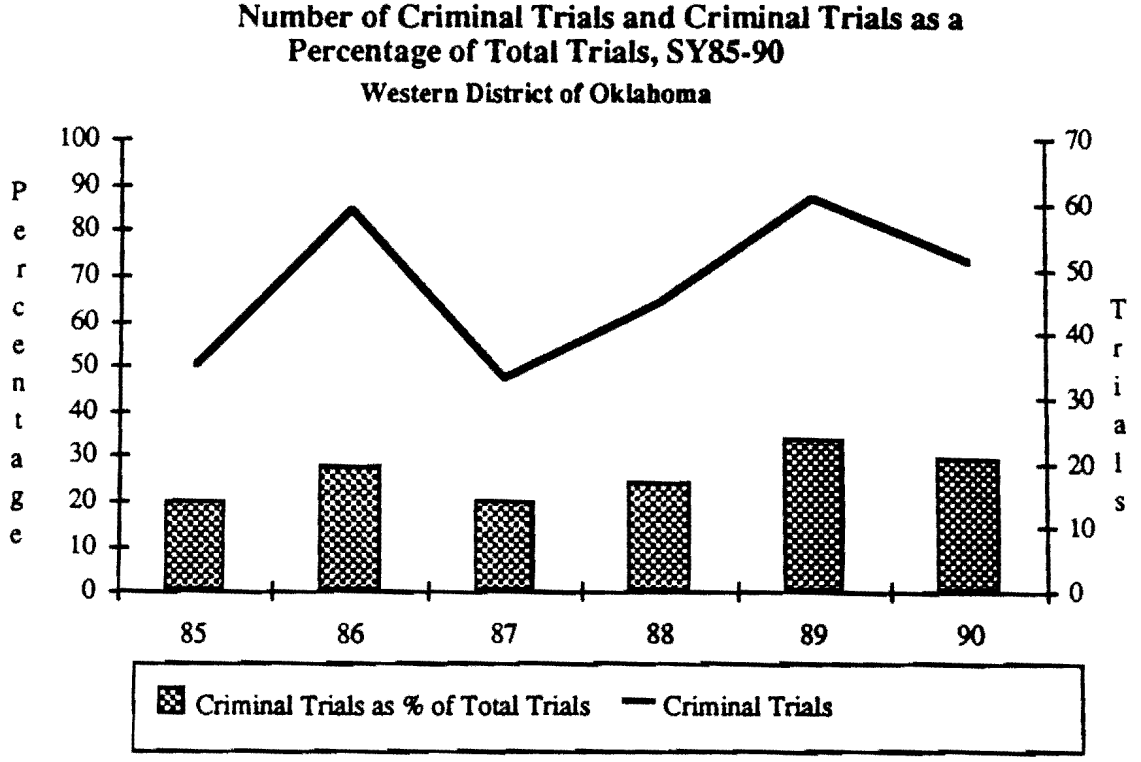
The following graph reflects criminal felony filings by offense for statistical year 1986 - 1990:



Sentencing guidelines as mandated by the Sentencing Reform Act of 1984 have placed additional demands on the resources of our court. Application of these guidelines has added to the judge's time in consultation with probation officers as well as time spent on contested matters arising from sentencing hearings.

Criminal Case Management. The 1990 Federal Court Management Statistics reported the Western District of Oklahoma as fifth nationwide in the prompt disposition of criminal felony cases, with an average time of 3.5 months from filing to disposition. Our court had a decrease

in the number of criminal trials in 1990 to 51 from 59 in 1989, with an average of 10.2 trials per judge. The following graph indicates the demand on resources by criminal trials for the past several years:



The Civil Docket

Recent Developments in Civil Case Management. Beginning in 1980, the Court was literally inundated with litigation generated by the boom-bust period of Oklahoma's economy. Between 1982 and 1986, this court had, at times, the heaviest or second heaviest weighted caseload per judge of any federal court in the nation.[1] In an effort to cope with the demands of these caseloads, the court initiated new and somewhat innovative methods of case management and alternative methods of resolving disputes. They worked. During the years of the heaviest caseloads, we, nevertheless, ranked very high nationally in the prompt disposition of those cases. For instance, in 1984, when our court had the second heaviest caseload in the nation, we were eighth in the nation in their prompt disposition with a five month median time from case filing to termination. We were pioneers and a pilot court in some of these techniques. Now that the caseloads have diminished to some extent we continue to employ them successfully. In 1990,

[1] "Weighted" case filings take into account the complexity of the case and the amount of judge time involved.

we ranked sixth in the nation in the prompt disposition of cases. Those techniques are described as follows:

Early Judicial Intervention in the Pretrial Process.

As soon as a civil case is at issue, it is scheduled for a status/scheduling conference and a complete scheduling order is filed within 120 days from the filing of the complaint. The parties are required to submit a joint status report containing stipulations, list of contentions, exhibits and witnesses to the extent known, estimated trial time, possibility of arbitration and other matters. At the status/scheduling conference deadlines are established for every pretrial event and the case is actually set for trial on the court's trial docket for a given month. The actual date for trial within the monthly docket is established at a later date. The schedule sets deadlines for motions, exchange of witnesses, exchange of exhibits, filing of final contentions, discovery completion date and other pretrial events such as the filing of requested jury instructions and the tendering of a final proposed pretrial order. A date for the initiation of settlement discussions is established as well as dates for reporting on the status of such settlement efforts to the court.

In addition to this early court control of the management of the civil trial process, alternative dispute resolution programs were initiated, described next.

Alternative Dispute Resolution Programs.

The Settlement Conference. Judicially conducted settlement conferences are held before a full-time "settlement" magistrate judge who acts as a mediator/facilitator to promote negotiation among the parties. They are normally held at the end of the litigation process when the case is set on a trial docket. Conferences last approximately two hours. All cases set on trial dockets are set for settlement conferences. Frequently counsel request early conferences before great cost is invested. It is a low-cost procedure and most any type of case can benefit. Magistrate Judge Pat Irwin held 546 settlement conferences in calendar year 1990. His caseload is directly related to the number of cases that are set on trial dockets. In complex cases, more than one conference may be held. His chambers estimates that of those settlement conferences held, approximately 3 out of 5 settle at the conference, and a large number settle several days later due largely to the continued efforts of the judge.

The Summary Jury Trial. At the discretion of the assigned judge, certain trial-ready cases are referred to a magistrate judge for summary jury trial. Such proceeding consists of a presentation by counsel to an advisory jury. Litigants are offered the insights and reactions of actual jurors which creates the opportunity for a realistic perspective of the case. The procedure is intended to last only one day and the jury result is non-binding. This process is utilized for both simple and complex cases when liability, and particularly damages, are at issue. In 1990, the judges referred 46 cases to magistrate judges for summary jury trials. Twenty-five summary jury trials were actually held. Our statistics show seventeen cases settled after referral, but before summary jury trial. Thirteen cases settled after summary jury trial and before jury trial.

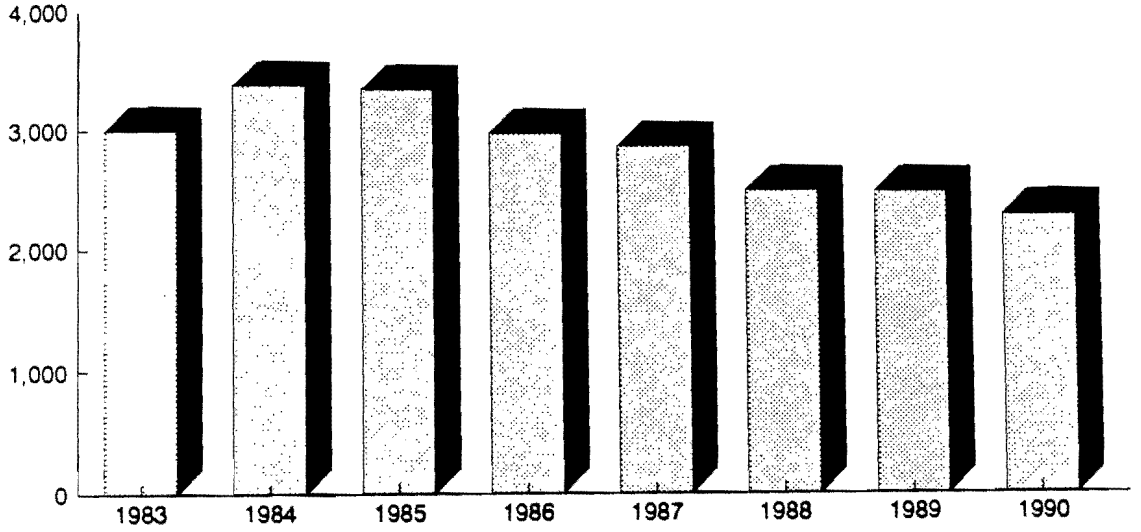
Ten cases went to civil trial after summary jury trial. Five referrals were stricken and one case settled during summary jury trial.

Court-Annexed Arbitration. Cases selected for the court-annexed arbitration program are either mandatory or voluntary. They are mandatorily submitted for arbitration if the money damages do not exceed $100,000 (certain other cases are excepted from mandatory arbitration including civil rights cases). The parties may consent to submit any civil case to voluntary arbitration. Arbitration is an early disposition program for the lower dollar, less complex case which is evaluated by an impartial third party attorney arbitrator. After his/her evaluation, the arbitrator makes a non-binding decision/award which is filed under seal. The right to trial is preserved by a timely request for a trial de novo. Normally, money damage cases of a tort or contract nature that are considered straight forward and less complex have best utilized this procedure. Again, it is an abbreviated, summary procedure intended to take no more than 2 1/2 hours. In calendar year 1990, 223 cases representing 11% of the caseload were assigned to the arbitration tract, down from 18% in the mid-1980's. Only 89 hearings were conducted due to earlier settlements or dispositions. For the total program, only 1.3% of all cases assigned to the arbitration tract have proceeded through trial.

Since our court began utilizing the settlement conference in 1982, the summary jury trial in 1983, and arbitration in 1985, our settlement rate has increased from 84% to 96%. We have fully incorporated these case management techniques and cost reduction tools into our court procedures.

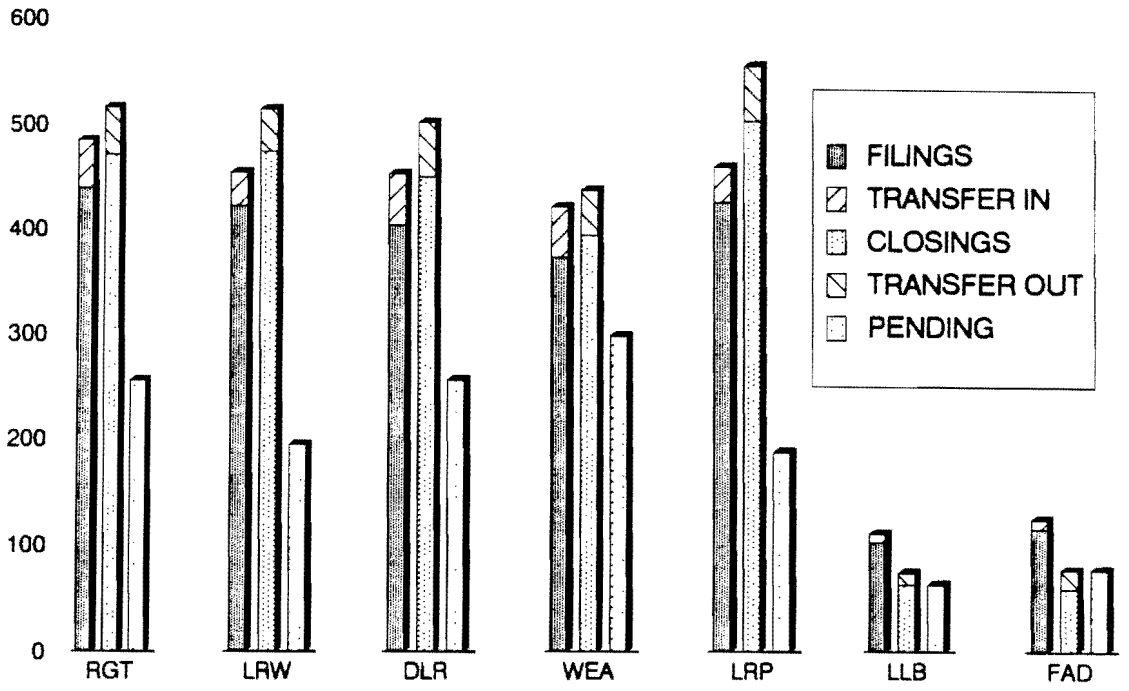
Civil Caseload Volume. 3,392 civil cases were filed in our court in 1984. By 1990 this figure decreased by approximately 30% to 2,288. The following graph demonstrates this trend.

Civil Case Filings for Statistical Years 1983-1990



In 1990, each of our judges was assigned an average of 457.6 cases, while terminating an average or 494.4. Hence the civil pending caseload decreased by 11.9% from 1,526 in 1989 to 1,344 in 1990. Our court averaged 268 pending cases per judge for statistical year 1990.

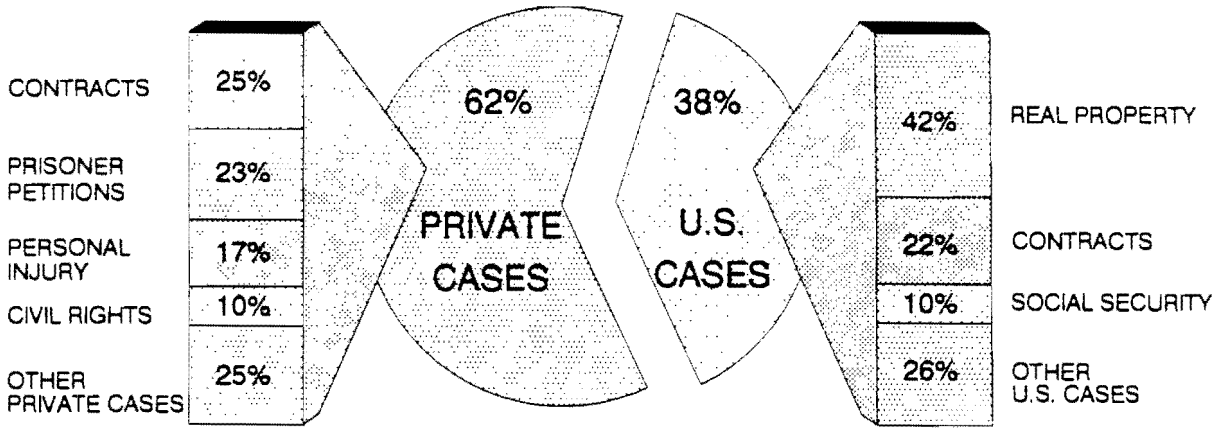
Below is a graph showing the civil workload statistics for judges in 1990.



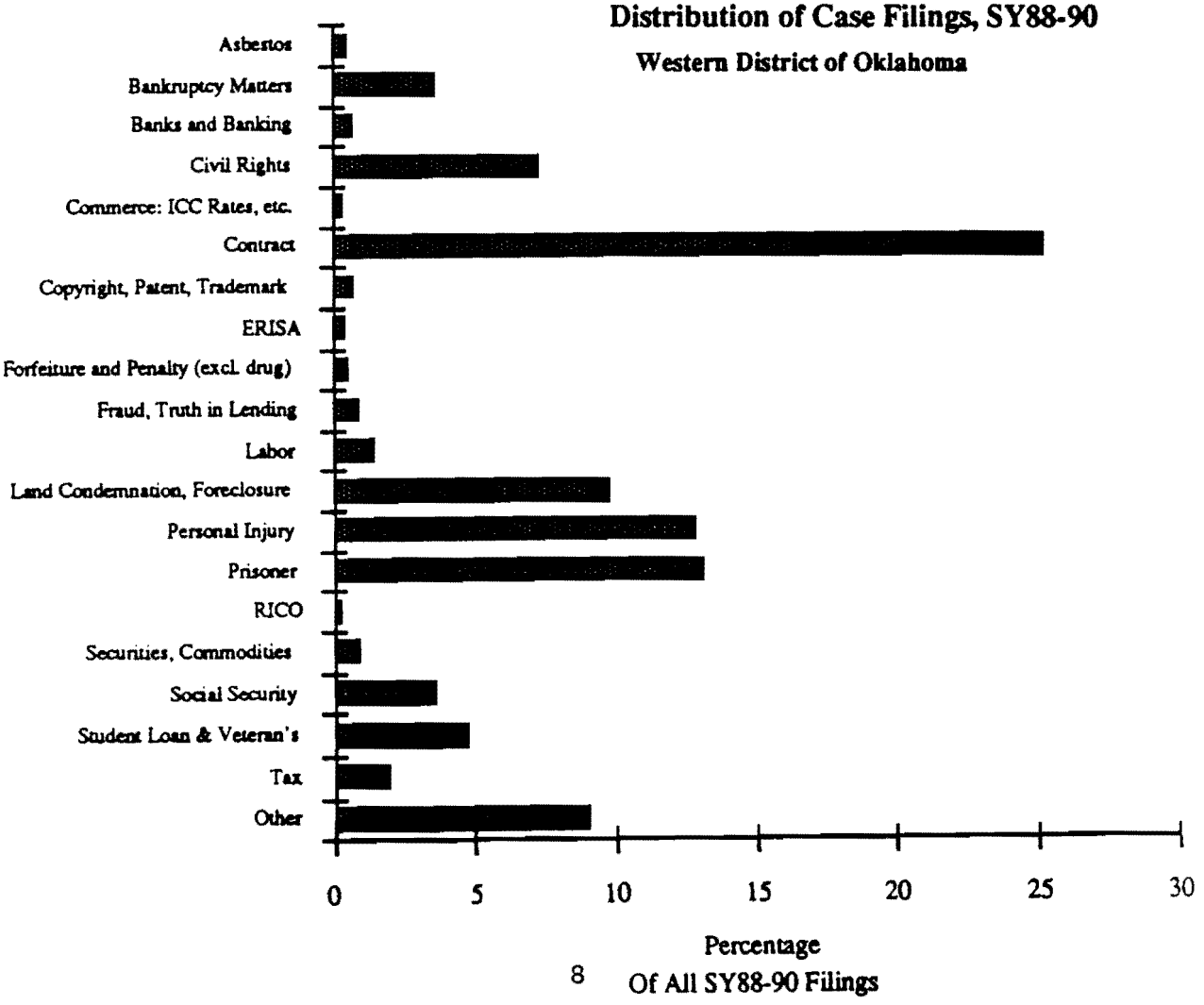
Type of Cases and Filing Trends. The civil docket for the Western District of Oklahoma reflects generally the national trend on civil caseloads. Civil filings increased from 1980 to 1985 and decreased every year thereafter. This downward trend can be attributed to fewer filings by the government for recovery of overpayment of veteran's benefits and defaulted student loans as well as a reduction in the number of claims for social security benefits filed against the government. In addition, the Judicial Improvements and Access to Justice Act of 1988 increased the jurisdictional amount for diversity cases to $50,000. This may account for fewer filings in our court. Nevertheless, we rank 35th nationally in the number of weighted case filings per judge.

Nationally, asbestos personal injury product liability cases have increased significantly in recent years. Asbestos cases tend to move through the court system slowly because of their complexity and because often many of the defendants are involved in bankruptcy proceedings. We currently have sixteen asbestos cases pending. However, we also have pending before the Judicial Panel on Multidistrict Litigation, a request for their transfer from our district.

Private cases in our court account for 62% of the civil caseload while cases involving the United States as a party account for 38%. Below is a chart summarizing civil filings in our court.

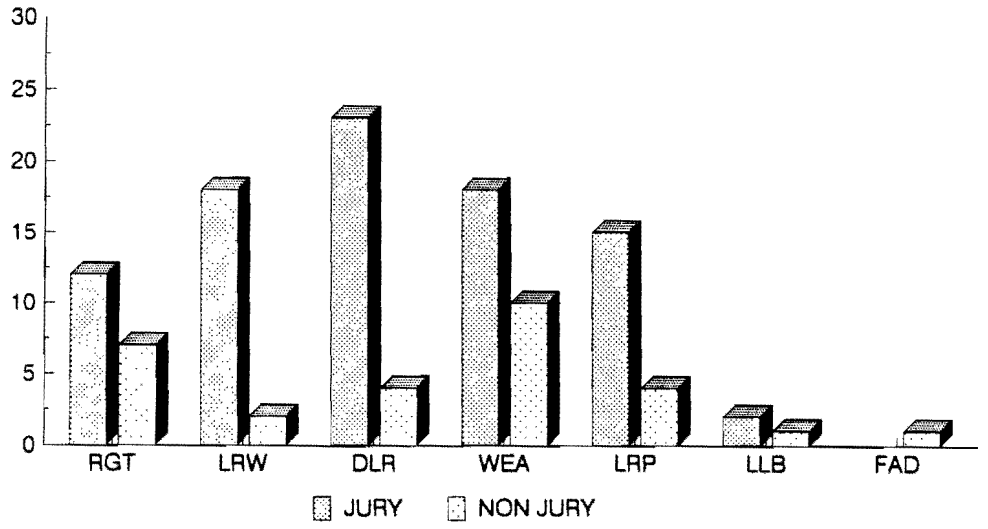


The following chart shows the percentage distribution among types of civil cases filed in this district for the past three years.



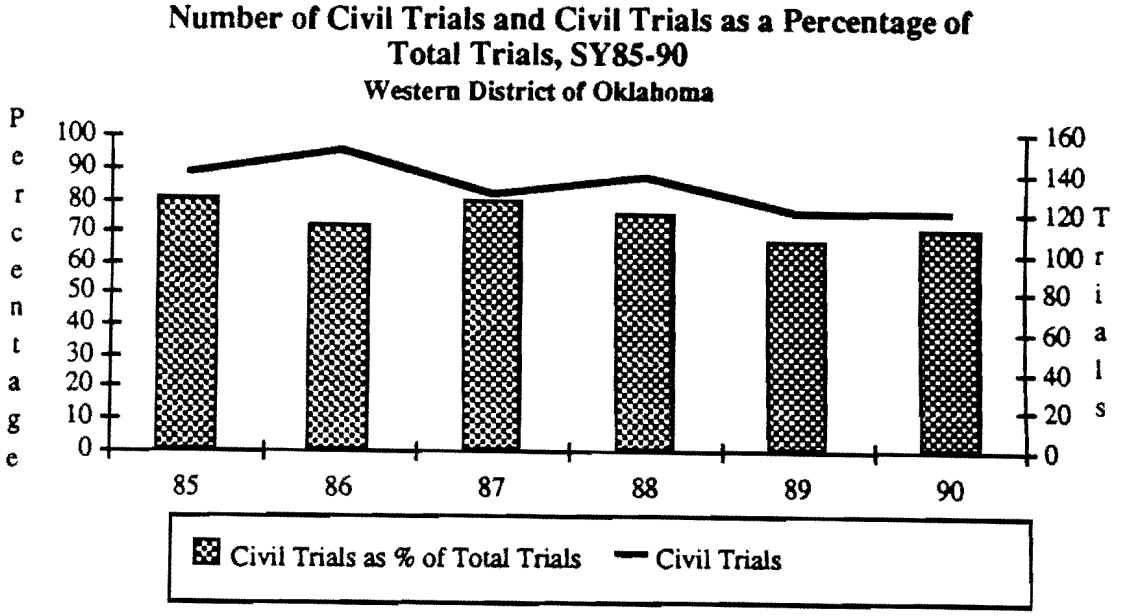
Civil Case Management Statistics and Information. As stated, our court ranks sixth nationwide in the prompt disposition of civil cases, measured by the median time from filing to final disposition. We have maintained an excellent ranking for the past several years. The national average is nine months, while we average seven months from filing to disposition.[2]

Our court completed 118 civil trials in 1990, an average of 23.6 trials per judge. The following chart compares jury and non-jury trials among our judges:



[2] This statistic excludes certain types of cases: Land condemnation, prisoner petition, recovery cases, enforcement of judgments and deportation review.

The percentage of civil trials compared to all trials over the past 6 years is shown below. This graph shows a high percentage of civil trials compared to criminal trials held in our district.



Consent to Trial Before U.S. Magistrate Judges in Civil Actions. Under federal statutes, the parties to a civil case may consent to trial by magistrate judges. This practice helps to alleviate docket pressures on the district judges as well as provide a forum for earlier trial than the district judge's dockets might permit. Historically, consent to trial before magistrate judges has been under-utilized; however, with the passage of the 1990 Judicial Improvements Act, ability of the court to more fully utilize magistrate judges in civil matters has been broadened. Now judges and magistrate judges may advise civil litigants of the option to consent to trial before a magistrate judge. Several such trials have already been held in 1991. A more effective, but non-coercive, method of advising the parties of this option should be a part of our court's litigation plan.

Age of Caseload and Motion Disposition. The CJRA also requires the Administrative Office of the Courts to prepare a semi-annual report available to the public that discloses for each judicial officer the number of motions and bench trial submissions pending more than six months and the number of cases that have not terminated within three years of filing. 28 U.S.C. § 476.

The number of pending cases three years old or more, decreased from 50 in 1989, to 43 in 1990. As of the end of the last statistical year, Judge Thompson had 9 cases over three years old, Judge West 0, Judge Russell 13, Judge Alley 18, Judge Phillips 2, and Judges Daugherty

and Bohanon had none.[3] While we have a total of 43 such cases court-wide, the national average is 44 per judge. This ranks us 19th nationwide. These cases all fall within the complex weighted category consisting typically of securities fraud, civil rights, asbestos, FDIC and multidistrict litigation cases. Most all of these cases have multiple parties and claims and several have bankruptcy issues.

Courts are required to report all matters that have been pending at issue for more than 60 days. Currently in our court, no judge has any motion or bench trial submission pending six months or more. Our court strives to adhere closely to this "60-day list" requirement. As of the last reporting quarter (December, 1990) only four motions were pending for over 60 days for all of the judges.

The motion practice burden may be described as reasonably to moderately heavy. Most cases that proceed to trial have at least 2 to 3 motions involved. Rule 11 responsibilities, and the sanctions that may be imposed thereunder, are thought to have reduced the number of frivolous motions. Most discovery disputes are routinely referred to magistrate judges and some attorney's fee hearings are also so referred. These referrals constitute a growing part of a magistrate judges' workload and are considered to be of invaluable benefit to the court.

Although specific deadlines for every step of the pretrial process are established very early in the case, there is an average of 10 to 15 motions for extension of various deadlines filed per judge per day. This is an obvious problem needing correction.

Pro Se Litigation. Pro se litigation is another factor that should not be overlooked when assessing the civil docket in terms of cost and delay. The problem of frivolous motions is a real one. In fairness, and indeed as a matter of law, the courts are obliged to construe such pleadings liberally, but occasionally such filings constitute a very difficult and burdensome problem. Magistrate judge's time is also involved with review procedures under 28 U.S.C. § 1915(d) -- in forma pauperis proceedings. Although our court has a designated pro se law clerk position to assist in such cases, it is currently used primarily to assist with prisoner litigation.

Bankruptcy Court and the Civil Docket. A brief note on bankruptcy court statistics and its interrelationship to district court. There were 8,679 total bankruptcy filings for the statistical year 1990, up 4.7% over 1989. 926 of those were business filings, down from prior years according to one of the bankruptcy judges. Local Rule 45 describes the procedural relationship between district court and bankruptcy court. The bankruptcy appeal caseload is down from previous years. Nationally, bankruptcy filings doubled between 1981 and 1990 and the strain on bankruptcy courts is not expected to ease in the near future. The Civil Justice Reform Act is silent as to whether it is to apply to bankruptcy courts, but the report of the Senate Judiciary Committee states that it does not (Senate Report, p. 51). However, bankruptcy

[3] There are no significant changes since these statistics were compiled; however, Judge West has received one superfund case over three years old by transfer from Judge Phillips.

factors are important to our overall picture as our civil docket is affected by parties in bankruptcy and by bankruptcy appeals. Generally, these statistics make a statement about economic conditions in this district.

Other Factors Affecting Workload. The judges participate in naturalization ceremonies every month and both judges and magistrate judges participate in the training sessions that accompany new attorney admissions days. More significantly, the judges serve on committees of the Judicial Conference of the United States and on other courts. For example, Chief Judge Thompson serves on the Federal-State Jurisdiction Committee of the Judicial Conference and as a judge of the U.S. Foreign Intelligence Surveillance Court which sits in Washington, D.C.; Judge West serves as a member of the Tenth Circuit Judicial Counsel; Judge Russell is a member of the Judicial Resources Committee of the Judicial Conference of the United States; and Judge Alley serves as Chairman of the Magistrates Committee of the Judicial Conference. Every year, each judge is asked to serve by designation as a member of the U. S. Court of Appeals for the Tenth Circuit to assist that court with its caseload. While the judges consider it a privilege, these are very demanding assignments and are, of course, in addition to their regular caseloads on this court.

III. Current Practice and Procedure; Civil Justice Reform Act Requirements; Comments and Considerations.

We now turn to a discussion of many of the court's current case management practices - both court-wide and by individual judge in light of the Acts' required contents for our plan. Please recall that as a pilot court under § 105 of the Act, our plan must be implemented by December 31, 1991 and it "must include" all six principles and guidelines of 28 U.S.C. § 473(a) and "shall consider and may include" the six techniques referred to in 28 U.S.C. § 473(b). You may wish to refer to your copy of the Act in the Appendix at Tab A. Do analyze these court procedures for any avoidable cost and delay issues and begin to identify litigant and attorney practices that could also be involved so that any findings and recommendations you will make for the plan will be all inclusive. (See Appendix, Tab B, Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990.)

1. **Systematic, Differential Case Management.** § 473(a)(1). This is "principle and guideline" number one. According to the Senate Report:

> A differentiated case management system combines three core elements. First, it is "event-oriented," so that certain events in each litigation are viewed as important benchmarks in ascertaining case progress. Second, it controls the periods of time between case events and incorporates methods to supervise and control these intervals in order to make them more predictable. Third, it recognizes that while cases may be classified by broad definitions,

> each case is unique; thus, procedures are accommodated to fit the characteristics of each case. (Senate Report, p. 24)

Differentiated case management, therefore, is characterized by flexibility and necessarily involves the exercise of judicial discretion. It is "designed to make an early assessment of each case filed in terms of the nature and extent of judicial and other resources required for preparation and disposition of the case" (House Report, pp.10-11). It also can recognize certain categories of cases that involve little or no discovery and not much judicial intervention.

Presently, our court does "categorize" certain cases that have standard patterns and do not require the extent of judicial oversight required by other cases. Certain specific court-wide procedures are in place which "systematically tailor the level of judicial civil case management to the needs of the case." These include some types of prisoner cases, Social Security appeals, government collection and foreclosure cases, and bankruptcy appeals. Social Security appeals and most prisoner cases are referred to magistrate judges for disposition on a routine basis. Courtroom deputies monitor government collection and foreclosure cases as many are disposed of by default judgment or entry of judgment with little or no court involvement. After the requisite time period, most courtroom deputies are now placing these cases on status conference dockets for status check if no judgment or other disposition has occurred. This setting usually causes the necessary concluding documents to be filed. Motions to confirm sale are also often placed on the monthly status docket for hearing to facilitate final disposition. Bankruptcy appeals are included in the normal Local Rule 8 assignment procedures and require no traditional case management.

All other civil cases are customarily set on the assigned judge's monthly Federal Rule 16/Local Rule 17 pretrial status/scheduling conference docket when they become at issue as monitored by the judge's courtroom deputy. Note that Local Rule 17, by requiring a scheduling order in some civil cases, and by excluding administrative reviews and prisoner cases, does itself describe one of the concepts of systematic differential case management. The scheduling order also allows for referral to mandatory or consensual non-binding arbitration under Local Rule 43. Cases set into the "arbitration tract" are offered basically an accelerated docket if used properly. The arbitration process is designed to be integrated into the general schedule of the case, not to interfere with the trial setting. Overall case management remains with the assigned judge.

Other than just described, there is no other so-called "systematic," upfront, tracking or treatment set forth by rule or scheduling order for type of case, number of parties, etc., for determination of complexity or the resource intensity of a case. However, individual judges make such determinations at case specific pretrial/scheduling conferences and discuss and examine the individual needs of cases in more depth, making specific provisions in the scheduling order or other orders as appropriate.

Comments and Considerations.

* Do we already satisfy the requirement of guideline number one, at least in part? Do we need specific language of "systematic, differential treatment" in Local Rule 17 or the scheduling order as part of this "plan"?

* Should the rules or scheduling order provide for this systematic management for the more complex case? See Section 3 for a full discussion of case management for the complex case.

2. **Early and Ongoing Control of the Pretrial Process Through Judicial Involvement** §§ 473(a)(2)(A), (B), (D) and (3)(D) **and Cost Reduction Considerations.**

Enhanced case management through early and ongoing judicial intervention is one of the key objectives Congress is seeking to achieve (Senate Report, pp.16-18) and, indeed, as earlier explained, has been one of the key reasons for our court's success in achieving prompt disposition of cases. We now seek to find ways to improve our present practices, especially in promoting early cost reduction and achieving even earlier dispositions.

Judicial oversight pervades all the principles of case management cited in the Act -- motion practice, discovery, ADR programs and trials and may now extend to cost oversight as well. We concentrate here on pretrial scheduling practices and proposed cost containment measures. Discovery, ADR and trial issues will be separately discussed.

Assessing and Planning the Progress of the Case. § 473(a)(2)(A). Local Rule 17 governs the general pretrial and management practice of our court. The court holds an early status/scheduling conference in all civil cases except as previously discussed. It is this conference where attorneys and judges work together to assess and plan the case. The court's philosophy is that all cases are important and each should have an opportunity for early judicial involvement. These conferences, held monthly, are currently aimed primarily at establishing comprehensive schedules for each case. A case is scheduled for a status/scheduling conference as soon as it is at issue, so that the scheduling order is filed within 120 days from the filing of the complaint in compliance with Federal Rule 16.

Prior to each conference, trial counsel are required to confer, prepare and file a Joint Status Report (See Appendix, Tab C - Local Rule 17 and Appendix 4 to the Local Rules). This report is required to be filed five days prior to the conference and requires counsel to include, to the extent then known, stipulations, contentions of each party and the issues of fact and law. It also must contain a list of all exhibits, witnesses and discovery materials to the extent then known, together with the estimates of time needed to complete discovery and trial of the case. Counsel must also include a discussion of the possibility of settlement and whether court-annexed

arbitration is appropriate along with the necessary certification as to amount of damages for arbitration purposes.[4]

Each conference usually lasts 10 to 15 minutes, and occasionally longer for the complex, multi-party case. Local Rule 17 requires the "counsel who will conduct the trial" to be present. This comports with the "technique" recited in § 473(b)(2) which requires the lead attorneys "with authority to bind all parties" to be present at all pretrials.

At the status/scheduling conference the discussion generally relates to the time needed to complete discovery, to add additional parties, to amend, to file dispositive motions and other matters. From such discussion the trial date and deadlines for pretrial matters are established. At the conclusion of such conference, a uniform scheduling order is filed, although such order may vary somewhat depending upon the particular circumstances of the case. Also, the scheduling order allows for additional status conferences if they should be needed and a final pretrial conference if requested. (See Appendix, Tab D)

In every one of their civil cases, Chief Judge Thompson and Judge Phillips require the filing of a certificate by counsel, their clients, and pro se parties certifying that they have discussed the time and expense of litigation including costs of pretrial preparation, trial, and appeals. The parties must also certify that they are aware of their responsibilities under Rule 11, Federal Rules of Civil Procedure. (See Appendix, Tab E)

Comments and Considerations. The following topics are suggested by the Federal Judicial Center as proper discussion items for pretrial conferences: settlement; alternative dispute resolution procedures; need for a special master or referral to a magistrate judge; refinement of factual and legal issues; need for early rulings on certain dispositive or major issues; and whether limited exchange of documents and discovery should occur before another evaluation of the case. Finally, the need for a discovery management program may be discussed. Local Rule 17 and Federal Rule 16 itemize a wide range of topics that could be more fully considered at these initial pretrial conferences. (See Federal Rule 16(a)(3) discouraging wasteful pretrial activities). Other courts are encouraging case budgeting concepts in order to achieve cost reductions in their civil cases.[5]

* Should an estimated cost of litigation statement be required either as a part of the status report or filed separately or contemporaneously with it?

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[4] Local Rule 43(B)(2)(c) and Appendix 4 to the Local Rules.

[5] See, for example, the Northern District of Ohio case management and budget order utilized by Chief Judge Thomas D. Lambros of that court found in the Appendix, Tab F.

* Should such reports be updated and reviewed periodically in order to better control the extent of pretrial preparation?

Setting a Firm Trial Date. § 473(a)(2)(B). At the initial pretrial status/scheduling conference, in addition to establishing all pretrial deadlines, a trial date is set. No continuance of a trial date or change of any other date set in the scheduling order is allowed without application to the Court. Local Rule 19. Specific showings and justifications must be made in such applications, including whether opposing counsel objects to it, whether previous application for extensions have been made and whether the extension would impact on scheduled trials or other deadlines. See Local Rule 14(H).

Because Congress considered the setting of early and firm trial dates one of the more effective tools of case management, this "principle and guideline" would mandate that trials be scheduled within 18 months of filing the lawsuit unless a judge certifies otherwise. Since our court's median disposition time is 8 months, we do not appear to have a problem here except that our local rule does not currently include a time limitation requirement.

Comments and Considerations.

* As we are in substantial compliance for setting firm trial dates, should our present system be changed in any respect except for the inclusion of this 18 month time limitation in our local rules?

* § 473(b)(3) requires all requests for an extension of deadlines for discovery or postponement of trial to be signed by the attorney and party making the request. Should Local Rule 14(H) and 19 be so amended?

* Further, should a cost accounting be required when extensions are requested?

Controlling Motion Practice. § 473 (a)(2)(D), and (3)(D). As stated, our court presently exerts ongoing control over the scheduling of the case and any motions filed. The local rules do speak to certain motion control methods. Local Rules 13 and 14 discuss technical requirements of briefs, including length limitations, timing requirements, which motions should be accompanied by briefs, other specific motion requirements for motions to reconsider (14 G), and, as earlier explained, for extensions of time (14 H). All applications to extend deadlines must be accompanied by a proposed order. These are not necessarily summarily granted. Motions to extend deadlines are inordinately numerous and require too much of the courtroom deputies' and judges' time.

The scheduling order also sets dispositive motion cutoff dates in each case, usually at or shortly after the discovery cutoff date. This procedure allows the gathering of sufficient information and insures sufficient time for a responsive ruling by the court before the trial date.

Presently there is no time framework set out in our local rules for the disposition of motions by the court itself as contemplated in § 473(a)(2)(D) and (3)(D). As earlier reported, the court has very few motions pending over 60 days. However, the Act seems to contemplate a time framework for the disposition of motions. Whether the present 60 day list reporting requirement satisfies this aspect of Congress' concern needs to be considered.

Congress identified the undue delay often associated with the resolution of motions (Senate Report, pp. 26-27; House Report, p.15). It felt that such delay is caused by several factors: the filing of too many, and often unnecessary motions, the excessive volume of papers involved, the failure to file appropriate dispositive motions as well as the failure to file them at the proper time, and the occasional delay in the resolution of the motion.

Comments and Considerations. Our goal is to provide for the effective and economical use of motion practice.

* Does the present 60 day list report satisfy the requirement of a time framework for motion disposition as called for by the Act?

* Consider the possibility of including in our local rules a provision that no motion be filed unless counsel certify that they have conferred and in good faith attempted to resolve or narrow the issue. Consider some statement regarding Federal Rule 12(b) motions that are curable by amendment, thus limiting motion practice and thereby curtailing costs.

3. **Case Management Conferences - Pretrial Conferences for the Complex Case § 473(a)(3).** It appears from the Act that for complex or other appropriate cases, a discovery case management conference may be required. This is guideline/principle number 3 and should be included in our plan. It requires the oversight of a judicial officer to assist in a scheduling conference in order to set appropriate time limitations as needed for such litigation.

Comments and Considerations.

* Although our current practice allows us the latitude to conduct a full discovery case management conference, does § 473(a)(3) contemplate a specific plan or local rule? Does the language "careful and deliberate monitoring" require us to do more?

* Consider technique number 1 at § 473(b)(1) that requires counsel for each party to jointly present a discovery/case management plan for the case at the initial status/scheduling conference.

* Could all cases, not just the most complex, benefit from this prior analysis by counsel?

* A "case management conference" could also address cost containment issues. A cost management statement or certification could become a requirement of the status report. Such status report might require the signatures of the parties as well as counsel. (See Appendix, Tab E).

Section 473(a)(3)(A) requires some procedure to "explore the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation." All our judges presently address the issue of settlement at the scheduling conference. Often, early settlement conferences are provided if appropriate. Other courts offer a more structured discussion that might be called "two tracking."

* Some suggestions include early identification and differentiation between cases that will certainly require full discovery (a case management/litigation tract) and those where a "settlement tract" is more appropriate when initial, more limited discovery is identified that would make settlement more promising.

* Other ideas include holding a form of settlement conference at the status/scheduling conference (possibly with clients present) with a judicial officer presiding.

* Have the judge or magistrate judge suggest a settlement figure (early evaluation figure) with a report to the court due within two days after consultation with clients.[6]

4. Control of Discovery. § 473 (a)(2)(C), (a)(3)(C), (a)(4) & (a)(5). The Act requires pilot courts to include in their plans, the following "principles/guidelines":

> "Controlling the extent of discovery and the time for completion of discovery, and insuring compliance with appropriate requested discovery in a timely fashion."
> § 473 (a)(2)(C)

> "For complex or other appropriate cases, preparation of "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." § 473(a)(3)(C)

[6] This format is suggested by the Northern District of Oklahoma (See Appendix, Tab G).

> "Encouragement of cost effective discovery through voluntary exchange of information between litigants and their attorneys and through the use of cooperative discovery devices." § 473(a)(4)
>
> "Conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by 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." § 473(a)(5)

Congress found a "compelling need for judicial officers to control discovery and its attendant costs" (Senate Report, p. 22; House Report, p. 10). There is wide agreement that excessive discovery and protracted discovery disputes are a major source of cost and delay in civil litigation.

As previously discussed, our court does set deadlines for the discovery cutoff of each case pursuant to Local Rule 17 and may, depending on the complexity of the case, enter an individualized discovery case management order. Except for the time allowed for discovery, nothing in the present rule or scheduling orders makes a distinction between discovery in complex and non-complex cases. In regard to interrogatories and admissions under Federal Rule 33 and 36, Local Rule 10(A) limits their number to 30 unless leave of court is sought and a showing is made that a good faith attempt to resolve the matter has been unavailing. Local Rule 10(B) is a "paperwork reduction" provision mandating no filing in court of depositions, interrogatories, etc., without special order of the court. Local Rule 15 assists in the control of deposition taking by defining the reasonable notice requirement of Federal Rule 30(B)(1) to be five days, and allowing the taking by agreement when leave of court would normally be required. Local Rule 14(E) is the good faith certification required pursuant to § 473(a)(5) [before the hearing of any discovery dispute.] Avoidable discovery disputes are considered to be a major misuse of judicial resources, and sanctions are sometimes imposed in instances of unreasonableness on the part of counsel and/or their clients. Many of these discovery disputes are referred to magistrate judges for hearings.

Comments and Considerations. A new concept is being espoused in discovery called "prediscovery disclosure". The following is a proposed local rule suggested by the Federal Judicial Center:

> a. Prediscovery disclosure
>
> Before any party may initiate any discovery, that party must submit to the opponent (1) the identity of all persons known or believed to have substantial discoverable information about the claims or defenses, together with a summary of that information; (2) a description, including the location, of all documents that are reasonably likely to bear substantially on the claims or defenses;

(3) a computation of any damages claimed; (4) the substance of any insurance agreement that may cover any resulting judgment; and (5) a copy of any report of an expert who may be called at trial. The disclosure obligation is reciprocal and continues throughout the case. [Note: Local rules incorporating the substance of this proposal are now in use in the Central District of California and the Southern District of Florida, and the Advisory Committee on Civil Rules is considering a similar proposal.]

b. Joint discovery plan

Counsel shall as part of their case management conference report or case management plan prepare and submit a joint discovery plan, scheduling the time and length for all discovery events. [See § 473(b)(1)] The Plan shall conform to the obligation to limit discovery under Fed.R. Civ. P. 26(b). Discovery events shall, unless the court for good cause orders otherwise, be limited for each side (or grouping of parties with common interest) to: 5 depositions, 15 interrogatories, and 2 requests for production of documents.

Counsel's plan shall consider the desirability of conducting phased discovery, limiting the first phase to developing information needed for a realistic assessment of the case. If the case does not terminate, the second phase would be directed at information needed to prepare the case for trial. (Senate Report, p. 22)

* Refer to our similar discovery order in criminal cases (See Appendix, Tab H).

* Consider for further accountability that the certification itself or the "good faith" language in the local rule might be changed to require the dates and times the attorneys conferred and a summary of the positions taken.

* Consider including a requirement that in the status case management report the attorneys identify what discovery is needed and what voluntary exchanges of information could narrow the scope of discovery while still providing the essential discovery needed to evaluate the case. The attorneys could estimate the time required and the limits of that discovery as well. Essential discovery to evaluate a case should be identified.

* Consider the requirement of filing a status report after completion of discovery. Such report could also entail cost accounting. Consider a return to the court for status report after discovery completion. If this report were to be filed, it could be a cost accounting report as well.

* Refer again to technique number 3 found at § 473(b)(3) suggesting that all requests for extension of discovery be signed by the attorney and the party making the request.

* Consider the inclusion of costs to date as part of any extension of discovery request.

* Consider adding to the discovery cutoff date on the scheduling order a provision that interrogatories and Rule 34 requests must be made 30 days in advance of discovery cutoff.

5. **Use of Alternative Dispute Resolution Including Settlement, § 473(a)(6)** This is "principle and guideline" number 6, which requires pilot courts to include in their plans authorization to refer appropriate cases to ADR programs. It is through early termination of a case that major reductions in cost and delay can be achieved. Thus the real goal of these settlement encouraging procedures is to provide the parties to the litigation an early resolution of the dispute that is efficient, economical and generally satisfactory to both sides, accomplished before the expense and time of extensive discovery, motion practice, trial preparation and/or trial are incurred.

Local Rule 17 on pretrial management also refers to all of our court's ADR programs. As discussed earlier, our court relies heavily on these programs. Local Rule 44 provides for voluntary, binding arbitration by stipulation and agreement of the parties.[7]

Each of our current settlement procedures requires an appropriate notice, and that all parties with settlement authority be present. Thus, the notice and presence requirements of technique no. 5 (§ 473(b)(5)) are satisfied.

The Act asks advisory groups to consider implementing a neutral evaluation program to be conducted early in the litigation. § 473(b)(4). Often our arbitration program can and does provide this evaluation, but it is not available for all cases. Courts such as the Northern District of California and the District of Columbia have ENE programs (see Appendix, Tab J). Mediation programs can also achieve this end.

You should be aware that at the state level, Oklahoma has had a dispute mediation system since 1983 which is overseen by the Court Administrator's office of the State Supreme Court and governed by the Oklahoma Dispute Resolution Act, 12 Okla.Stat. § 1801 et seq. There are regional community based dispute mediation centers - Early Settlement Centers - throughout the state offering an inexpensive voluntary mediation process by state trained and certified mediators. The Seventh Judicial District, consisting of Oklahoma and Canadian Counties, has recently adopted a local rule for referral of cases to ADR and mediation with a mediation

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[7] See Appendix, Tab I for an article comparing arbitration and mediation.

program in place utilizing oversight of the ADR committee of the Oklahoma County Bar Association. Both attorney and non-attorney mediators can be selected by the parties from a non-exclusive list in each judge's chambers (See Appendix, Tab K for information concerning this program).

Comments and Considerations. The Federal Judicial Center recommends requiring settlement and case appropriate ADR discussions at every pretrial conference. The Court requests the Advisory Group's consideration of whether mediation, as an additional technique of dispute resolution, is desirable.

* Court appointed attorney mediators could be made available as an extension of or in conjunction with our arbitration program. (Several of our attorney arbitrators are trained mediators or have recently taken mediator training)

* Consider utilization of the Oklahoma County mediation program already in existence through a court referral system. The Northern District of Texas is beginning to use the Dallas County Mediation Program.

* Consider the use of adjunct settlement conference judges as attorney mediators patterned after the program which is in use in the Northern District of Oklahoma.

* Consider recommending an early neutral evaluation program as mentioned in technique 4 of the Act. Such program could be an alternative to arbitration and offered earlier in the litigation process.

* Consider the use of the "business mini trial" as an alternative to the summary jury trial for certain cases.[8]

* Consider improvement of summary jury trial procedures including how the criteria for the cases best suited for the summary jury trial may be identified and providing for a limited use of witnesses where credibility is a crucial issue.

* Also, consider the use of the so-called "high/low" settlement arrangement, agreed to in advance of the summary trial. By this arrangement, attorneys and parties may agree to accept the summary jury trial verdict as binding if it falls within a certain range, established by the final settlement offers of the parties.

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[8] A "business mini-trial" is a non-binding settlement procedure structured so as to convert a legal dispute back into a business problem. Often with the aid of a neutral facilitator, attorneys make abbreviated presentations, not to a judge or jury, but to business executives who undertake to negotiate a settlement. Thus an agreement frequently resembles a creative solution to a business problem rather than a legal judgment based on legal issues. The court has a film on both the summary jury trial and the business mini-trial.

6. Trial Management and the Final Pretrial Conference. Our court requires final pretrial orders in all cases (See Appendix, Tab C). Deadlines for such submission of the final pretrial order are set forth in the scheduling order, and are usually due the first day of the month in which the trial is set. The orders are comprehensive and control the issues to be tried, including the lists of witnesses and exhibits to be offered, objections to them and the rules relied on, stipulations and other matters. So extensive and precise are these final pretrial orders that none of the judges routinely hold formal final pretrial conferences unless one is requested. The scheduling order does provide for such a request. The Federal Judicial Center suggests a final pretrial conference as the best way to control the length, scope and completion of trials, but it is not known if the suggestion contemplates the extent of our comprehensive final pretrial order.

In order to better avoid waste and enhance economical jury usage, our court participates in expedited jury selection by preselecting most civil jurors for the month. This is accomplished by the judges selecting juries in several cases for trial on the first day that the new jury panel is present. By utilizing the jury panel on hand the first day, the wasteful practice of leaving jurors on hand who are neither called nor challenged is avoided. By conscientiously employing this technique, our court has significantly improved the efficiency of its jury usage over past years, resulting in substantial cost reduction to the government.

Streamlining orders for trial management, such as the one used by Chief Judge Thompson, and other special techniques for the management of expert witnesses are now in effect in certain cases. (See Appendix, Tab L)

Comments and Considerations. Even though relatively few of the civil cases actually go to trial, any program implementing cost and delay reduction concepts must be mindful that the length, scope and complexity of trials must be properly managed. Indeed, Local Rule 22 sets some necessary limitations (arguments, instructions and opening statements). The court is receptive to new streamlining trial techniques that can inspire fairness and at the same time enhance speedy and less expensive trials. New trial management techniques which may be considered, include, but are not limited to: technical advances such as document management by laser disk storage and display, computer generated graphics to illustrate testimony, deposition testimony using video presentations, use of multiple large monitors or screens and the use of summarized depositions. Some other courts are now also allowing interim arguments to the jury during certain stages of the trial.

IV. Examining the Impact of New Legislation on the Court.

As your final "assessment" duty, the Act directs advisory groups to "examine the extent to which cost and delay could be reduced by better assessment of the impact of new legislation on the courts (§ 472(c)(1)(D)). This addresses a role for Congress in reducing civil delay and expense and an opportunity for the legal community, through the various advisory committees, to advise the Congress on what they could do that would improve the civil litigation process. The group should study the impact of legislation on court docket procedures and rules that both encumber and encourage litigation.

For your consideration, the following lists are some examples of legislation that has impacted the courts, offered to us by the Federal Judicial Center and the Administrative Office of the Courts:

A. Criminal legislation

1. Adoption of guideline sentencing and impact of particular aspects of the sentencing guidelines - possible burden on the court's dockets
2. Mandatory minimum sentencing statutes
3. New statutory drug and gun offenses
4. Expansions of federal criminal jurisdiction

B. Civil legislation

1. RICO-civil and criminal sanctions - creation of new causes of action
2. ERISA
3. Financial recoveries from federally insured financial institutions (savings and loans, banks, etc.)
4. Civil rights acts, including the Americans with Disabilities Act of 1990
5. Superfund and other environmental legislation
6. Federal Debt Collection Procedures Act
7. Immigration Act of 1990

C. Legislative inaction

1. Implied causes of action in regulatory statutes
2. Statutes of limitations unspecified
3. Choice of law issues
4. Federal common law
5. Multi-party, multi-forum jurisdiction and procedure
6. Legislative reconciliation of demands and resources (e.g., asymmetry between "authorization" and "appropriation" for responsibilities placed on judiciary such as this Act)
7. Approval of nominees for judicial vacancies
8. Other failures to enact legislation that would ease the burden on dockets such as authorizing only consensual and not more mandatory court-annexed arbitration programs.
9. Lack of coordination in raising amount in controversy in diversity cases and capping dollar amount for current mandatory arbitration programs.

This portion of your assessment and recommendation report could also consider steps that the judicial branch as a whole, or our individual court, can take to improve its ability to adapt to new legislation. The annual assessment meetings called for by the Act for the advisory group could be a valuable tool toward this end.

V. Making Recommendations to the Court. § 472(b).

After you have reviewed this report and made your assessments under § 472(c)(1), you are asked to submit to the Court a report with your recommendation that the district court develop a plan and what those recommendations are.

The Act states that the group's report shall include the following:

- "Recommended measures, rules and programs § 472(b)(3)"

- "The basis for its recommendation" § 472(b)(2);

- An explanation of "the manner in which the recommended plan complies with § 473" § 472(b)(4);

- Responsiveness to "particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys § 472(c)(2)"; and it should

- "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." § 472(c)(3)

Again, plans implemented by the ten pilot districts, such as our court, "shall include" the six principles and guidelines of litigation management and cost and delay reduction identified in 28 U.S.C. § 473(a) [§§ 103 and 105(b)of the Act (See Appendix, Tab A)]. The Federal Judicial Center and the Administrative Office suggest that the following considerations may be helpful to groups in pilot districts:

- If the group finds that the state of the court's docket is satisfactory and there are no discernable causes of avoidable cost and delay, it may recommend measures that incorporate the court's existing practices and procedures, adapted to reflect the six principles and guidelines in a manner that will not disrupt the existing satisfactory operation.

- If the group finds the existence of causes of avoidable cost and delay to which some of the principles and guidelines may be relevant, it should recommend their adaptation to "the needs and

circumstances" of the court in a pragmatic manner, keeping in mind that the objective is to aid the administration of justice.

Congress expects the provisions of each plan to reflect a significant commitment to cost and delay reduction. Your recommendations do need to reflect contributions by all involved: the court, the litigants and their counsel. They need not be limited to the means set forth in the Act.

Once you have begun your assessments, and as your suggestions are developed, the reporter for the Advisory Group will keep a record which will eventually constitute your findings and recommendations. The Court staff assigned to this Committee remain available to provide you with full support. As you continue with your assessment and analysis, if you need any further information from the Court, please do not hesitate to call. As any additional pertinent information or additional guidance from the Federal Judicial Center, Administrative Office of the Courts or Judicial Conference is received, it will be immediately forwarded to you. All of the records of the Court are entirely open and available to you and will be provided on the highest priority basis upon request.

Ralph G. Thompson
Chief Judge
For the Court

Note: Information for this report was compiled from the following sources: the Civil Justice Reform Act of 1990; Senate and House Reports on this legislation, S. Rep. No. 101-416 on S. 2648, Aug. 3, 1990 and H. Rep. No. 101-733 on H.R. 5316, Sept. 21, 1990; Memo dated 12-20-90 from the Administrative Office of the U.S. Courts entitled "Civil Justice Reform Act of 1990"; Memo dated 1-16-91 from the Federal Judicial Center entitled "Implementation of the Civil Justice Reform Act of 1990"; Memo dated 1-22-91 from the Administrative Office of the U.S. Courts entitled "Select Significant Factors in the Workload of the Federal Courts"; A report entitled "Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990," dated 2-28-91, prepared by the Administrative Office and the Federal Judicial Center; the 1990 and 1991 Annual Reports for the Western District of Oklahoma; interviews with a variety of court and judicial staff; Local Rules of the Western District of Oklahoma; and the various annual Federal Court Management Statistics reports prepared by the Administrative Office of the U.S. Courts. This information may not be specifically cited except to the Act itself. It is, of course, available upon request.

APPENDIX

APPENDIX

Tab A	The Judicial Improvements Act of 1990 - Title I "The Civil Justice Reform Act of 1990"
Tab B	Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990
Tab C	Local Rule 17, Civil Status Conferences - The Status Report
Tab D	Scheduling Orders
Tab E	Order and Certificate of Responsibilities, Ralph G. Thompson, U.S. District Judge, Western District of Oklahoma
Tab F	Case Management Plan and Case Management Budget, Thomas D. Lambros, U.S. District Judge, Northern District of Ohio
Tab G	Scheduling Procedure, Northern District of Oklahoma
Tab H	Order for Discovery and Inspection in Criminal Cases, Western District of Oklahoma
Tab I	Arbitration vs. Mediation - Explaining the Differences, John W. Cooley, 69 Judicature 236 et seq, Feb.-Mar. 1986
Tab J	Early Neutral Evaluation, Northern District of California
Tab K	Oklahoma and Canadian County Judges Encourage ADR and Provide for Referral to Mediation in Pending Cases, Nancy K. Anderson and Gloria C. Bates, 61 O.B.A.J. 3168 et seq 1990 (reprinted with permission of the authors) - Oklahoma and Canadian Counties Local Rule CR-7-90-4 Alternative Dispute Resolution, CR -7-90-5 Rules for Mediation.
Tab L	Trial Management Order, Ralph G. Thompson, U.S. District Judge, Western District of Oklahoma; Case Management Orders, U.S.A. v. Hardage, et al., Lee R. West and Layn R. Phillips, U.S. District Judges, Western District of Oklahoma

A

Appendix A

PUBLIC LAW 101-650 [H.R. 5316]; December 1, 1990

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. 102. 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;

B

Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990

February 1991

Prepared for the United States District Court for the Western District of Oklahoma

Table of Contents

Guidance to Advisory Groups

Introduction

This document provides guidance to the advisory groups appointed pursuant to the Civil Justice Reform Act of 1990 (see Appendix A). The Act seeks reductions in the cost and delay of civil litigation in the U.S. district courts through "significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch" (28 U.S.C. § 102.3). The Act thus contemplates a community effort, and it requires each district court to develop and adopt a civil justice expense and delay reduction plan as the primary means of mobilizing that effort. The purpose of each plan must be "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" (28 U.S.C. § 471). The advisory group has been appointed to assist in developing this plan.

Each advisory group is required initially to conduct a prompt assessment of the court's workload and then to prepare a report recommending adoption of specified measures, rules, and programs that would constitute the court's plan or adoption of a model plan (to be developed by the Judicial Conference of the United States). The Act does not specify when the advisory group is to submit its report to the court, but it does require the group to "promptly complete" its assessment of the docket (§ 472(c)(1)). Although the court must consider the group's recommendations, the plan will be determined by the court itself. Copies of the court's plan are to be distributed to the judicial council of the circuit, all chief district judges in the circuit, and the director of the Administrative Office of the U.S. Courts. The chief district judges and the chief judge of the circuit then serve as a committee to review each court's plan and suggest revisions. Each plan must be reviewed by the Judicial Conference, which may request the district court to make additional revisions.

The following materials have been prepared to meet the Act's March 1, 1991, deadline for appointment of advisory groups. The Judicial Conference, Federal Judicial Center, and Administrative Office expect to provide further assistance to the advisory groups and to respond to specific requests for assistance.

Implementation of the Act

The Act imposes implementation duties on the courts, the Judicial Conference, the Administrative Office, and the Federal Judicial Center. Implementation duties in some districts will be different from those in others. Districts that develop and implement a plan by Dec. 31, 1991, will be designated by the Judicial Conference as early implementation districts (§ 103(c)). If funds for implementation of the Act are appropriated by Congress, these districts will become eligible to apply for additional resources necessary to implement the court's plan, such as technological and personnel support. In addition, the Act requires the Judicial Conference to conduct a pilot program in ten districts to be designated by the Conference (§ 105). The ten pilot districts must implement plans by Dec. 31, 1991, and must include in their plans the six principles of litigation management and cost and delay reduction set forth in § 473(a) of the Act. All other courts must implement plans by Dec. 1, 1993.

The Act also designates five district courts as demonstration districts (§ 104). The Western District of Michigan and the Northern District of Ohio are to experiment with assignment of cases to appropriate processing tracks. The Northern District of California, the Northern District of West Virginia, and the Western District of Missouri must experiment with various methods of reducing cost and delay, including alternative dispute resolution procedures. These five courts may become early implementation districts if they elect.

The Act requires that an independent organization with expertise in the area of federal court management compare the results from the ten pilot courts with those from ten comparable districts that were not required to adhere to the six litigation management principles specified in § 473(a). The Judicial Conference must present the results of this independent study to Congress by Dec. 31, 1995, along with recommendations whether some or all courts should be required to incorporate the six principles. If the principles do not prove effective, the Judicial Conference must adopt and implement alternative cost and delay reduction programs.

Although the Act is silent on whether it is intended to apply to bankruptcy courts, the Report of the Senate Judiciary Committee states that it is not (S. Rep. No. 101-416 on S. 2648, Aug. 3, 1990, Senate Report, p. 51).

Overview of Advisory Group Functions

The group's statutory functions fall into these general categories:

- assess the court's docket, the litigation practices and procedures in the district, and the impact of new legislation, in order to identify causes of cost and delay in civil litigation (§ 472(c));
- prepare a report recommending the adoption of a civil justice expense and delay reduction plan, which should include measures, rules, and programs to reduce cost and delay and which should state the basis for the recommendations (§ 472(b)); and
- consult with the court in the annual post-plan assessment of the civil and criminal dockets (§ 475).

These are daunting tasks—nothing on this scale has ever been attempted in the federal court system. Congress has made it clear that the courts and their advisory groups should carry them out in a meaningful manner to try to achieve concrete results, and it is in the interests of the courts and the public that this be done. Because the time and resources available are limited, the tasks must also be carried out in a practical and realistic manner so that they may be accomplished within those limits. Below is a brief introduction to each of the major functions of the advisory group.

A. Assessing the court's civil and criminal dockets (§ 472(c))

A starting point for determining the condition of the court's dockets is an analysis of court statistics. No one statistical formula can determine whether a district is "good" (or "not so good") in litigation management. Therefore, an analysis will incorporate several statistical methods and will take into consideration the particular circumstances of the district, such as unusual case mix, judgeship vacancies, use of senior or visiting judges, and so on. Section II of these materials is provided to assist the group in this analysis.

To identify trends in case filings and in the demands being placed on the court's resources, the group may use court statistics not only to review general trend data, but also to identify categories of cases creating special burdens (e.g., death penalty, asbestos, prisoner, complex crimi-

nal, and RICO cases). The advisory group may also want to explore the causes underlying filing trends, such as conditions giving rise to particular kinds of civil litigation or charging decisions by the U.S. Attorney. The Senate Report notes that this would also include a determination of whether the court lacks sufficient resources, including judicial personnel and administrative staff or space, facilities, and equipment (Senate Report at p. 52.). Section II includes an outline that may be helpful in assessing trends in the relationship between demand and resources.

B. Identifying the principal causes of costs and delay

In performing its assessment, the advisory group is required to identify the principal causes of cost and delay in civil litigation. In so doing, it must consider such potential causes as court procedures and the way litigants and attorneys approach and conduct litigation. It will be difficult for the groups to accomplish this task with precision. However, they might undertake a broad review of litigation practices and procedures both in and out of court with a view toward learning how these practices could be modified to reduce cost and delay. To assist the group with this review, Section III presents a list of some of the practices and procedures in civil litigation.

C. Examining the impact of new legislation on the court

The Act also looks to the advisory group to examine the impact of new legislation on the courts. Thus it addresses a role for Congress in reducing civil delay and expense. Among the topics the group might address are procedural reforms that encumber the courts and encourage litigation, failures of Congress to express its intent clearly or to enact legislation that would ease the burden on courts, and the impact of legislation on court dockets. The group should also consider steps that individual courts or the judicial branch as a whole can take to improve their ability to adapt to new legislation. A discussion of this topic can be found in Section IV.

D. Recommendations to the court

The Act requires that the advisory group, in developing its recommendations, "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys" (§ 472(c)(2)). Thus, the recommendations of the group should be more than generalized findings and conclusions. The advisory group's report should state with specificity the assessments made by the group, the findings on which it bases its recommendations, the particular circumstances of the district that affect cost and delay, and recommended changes in litigation procedures, rules, and methods. Section V addresses this advisory group duty.

The discussions, tables, outlines, and other aids presented below are intended to assist the group with its monumental tasks, not by supplying solutions, but by providing starting points for inquiry. This document does not undertake to tell groups what to do or how to do it, nor does it offer normative judgments. Advisory group members will have been selected for their competence, experience, and judgment, and they can be expected to bring these to bear on the task at hand. When they have completed their work, the court will be able to make decisions about its plan and the implementation of a constructive, workable program for the administration of civil justice.

I. Obtaining Guidance from the Court Regarding the Role of Advisory Groups

As the groups prepare to undertake the analyses required by the Civil Justice Reform Act, they may wish to seek further guidance from the court. Following are some questions a group may wish to ask.

1. Does the court wish to be an early implementation district, or has it been designated a pilot or a demonstration district? If either is so, the court must implement an expense and delay reduction plan by Dec. 31, 1991.

2. If the court is neither a pilot nor an early implementation district, what is the deadline by which the court wishes the advisory group to submit its report? The outside limit set by the statute for implementation of a plan is three years from the date of enactment, i.e., Dec. 1, 1993.

3. If a reporter has been appointed, what is to be the reporter's role?

4. Does the court wish to establish any ground rules for the advisory group with respect to such matters as interviewing members of the bar, government officials, or others?

5. What kind of access will the advisory group have to the court? Will the court permit interviews with judges, magistrate judges, and staff? What court records may be consulted by the advisory group? Will the advisory group be expected or permitted to examine the caseload at the level of individual judges?

6. What resources, monetary and otherwise (e.g, assistance from the court through its clerk or clerk's office staff), will be provided to the advisory group?

7. Will the advisory group be expected or permitted to call on experts, such as statisticians or pollsters? Can names be recommended to the group? What resources will be available for this purpose?

8. What role will the advisory group play in the annual review of the plan and the dockets required by the Act?

9. What are the terms of the current advisory group members? How will future appointments to the group be made?

II. Assessing the Court's Dockets (§ 472(c)(1))

Each district compiles certain statistics on workload and case processing. These statistics conform to a uniform national reporting system, maintained by the Administrative Office, and provide certain basic information about the state of a court's dockets. This information is the necessary starting point for any analysis and is presented here for your use. However, because the national reporting system was not specifically designed for identifying and analyzing causes of cost and delay, the advisory groups will find it necessary to seek and analyze supplemental information.

In Section A we present some of the routinely collected statistics along with several additional measures for assessing the condition of the dockets and for analyzing trends in case filings. (Note that all measures presented in Section A are specific to your district.) In Section B we list some measures the group may wish to seek or develop to aid its assessment of trends in the demands placed on court resources.

A. Determining the condition of the civil and criminal dockets and identifying trends in case filings (§ 472(c)(1)(A) & (1)(B))

A major source of information about the caseloads of the district courts is the statistical data regularly collected and published in the *Federal Court Management Statistics (MgmtRep)*, which provides a six-year picture for each district, and in the *Annual Report of the Director of the Administrative Office of the United States Courts (AORep)*.

The published tables are prepared from individual case data regularly reported to the Administrative Office by the courts. A report is provided when a case is filed, with a follow-up when the case is terminated. As in any massive reporting process, there are many opportunities for error and inconsistency to enter the system, but there is no reason to expect systematic error that would affect specific locations or specific activities.

The published data are the basis of the assessments of court activity that are currently made by the courts, by the judicial system, and by Congress. Consequently, a thorough grasp of those data will be helpful for understanding the assessments others will be making and for communications both among the advisory group, the courts, and the Judicial Conference and among advisory groups.

1. Measures for Determining the Condition of the Civil Docket

a. Caseload volume. *MgmtRep* for 1990 shows the number of civil and criminal cases filed, terminated, and pending for statistical years (years ended June 30) 1985-1990. A copy of the table for the Western District of Oklahoma appears on the following page. The table also shows the number of authorized judgeships and the months of judgeship vacancy. The authorized judgeships—not the available judge power—is used in calculating the number of actions per judgeship reported in this table.

The table does not report the number of actions per magistrate judge. In some districts, these judicial officers handle a substantial volume of pretrial proceedings in civil cases. In most districts, magistrate judges also have responsibility for misdemeanor cases and for preliminary proceedings in felony cases. Statistics on the workload of magistrate judges may be obtained from the Magistrates' Division of the Administrative Office.

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

OKLAHOMA WESTERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1990	1989	1988	1987	1986	1985		
OVERALL WORKLOAD STATISTICS	Filings*		2,533	2,718	2,744	3,136	3,250	3,557		
	Terminations		2,720	2,936	3,096	3,290	3,293	3,449		
	Pending		1,436	1,623	1,840	2,192	2,348	2,391		
	Percent Change In Total Filings Current Year	Over Last Year...		-6.8					51	4
		Over Earlier Years...			-7.7	-19.2	-22.1	-28.8	75	7
	Number of Judgeships		5	5.25	5.25	5.25	5.25	5.25		
	Vacant Judgeship Months		.0	.0	.0	.0	1.6	11.6		
ACTIONS PER JUDGESHIP	FILINGS	Total	507	518	523	597	619	678	20	2
		Civil	458	472	474	545	566	638	19	2
		Criminal Felony	49	46	49	52	53	40	51	6
	Pending Cases		287	309	350	418	447	455	84	7
	Weighted Filings**		444	504	543	618	663	670	35	4
	Terminations		544	559	590	627	627	657	8	1
	Trials Completed		34	34	34	31	40	33	49	6
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	3.5	3.5	2.8	3.3	3.3	3.6	5	2
		Civil	7	7	8	7	8	8	6	2
	From Issue to Trial (Civil Only)		11	10	13	13	9	9	12	3
OTHER	Number (and %) of Civil Cases Over 3 Years Old		43 3.2	50 3.3	47 2.7	42 2.0	37 1.7	21 .9	19	3
	Triable Defendants** in Pending Criminal Cases Number (and %)		42 (35.6)	63 (43.8)	58 (36.5)	55 (46.2)	67 (42.7)	18 (17.5)		
	Jurors**	Avg. Present for Jury Selection	18.22	27.11	22.90	29.18	28.35	25.74	5	2
		Percent Not Selected or Challenged	20.9	40.9	33.3	42.6	38.2	34.0	21	4

FOR NATIONAL PROFILE AND NATURE OF SUIT AND OFFENSE CLASSIFICATIONS SHOWN BELOW -- OPEN FOLDOUT AT BACK COVER

1990 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2288	84	89	377	70	425	52	463	317	18	174	5	214
Criminal*	228	4	16	13	4	10	16	57	5	61	6	15	21

* Filings in the "Overall Workload Statistics" section include criminal transfers, while filings "by nature of offense" do not.
**See Page 167.

Key To Table At Left

Weighted filings

To assess how much work a case will impose on the court, the Judicial Conference uses a system of case weights based on measurements of judge time. The weighted filings figures presented in the table are based on weights developed from the 1979 Time Study conducted by the Federal Judicial Center. A detailed discussion of that project can be found in the *1979 Federal District Court Time Study*, published by the Center in October 1980. Also, a historical statement about weighted caseload studies completed in the U.S. district courts appears in the 1980 *AORep*, pages 290 through 298.

Civil median time

Civil median times shown for all six years on the profile pages exclude not only land condemnation, prisoner petitions, and deportation reviews, but also all recovery of overpayments and enforcement of judgments cases. The large number of these recovery/enforcement cases (primarily student loan and VA overpayments) are quickly processed by the courts and their inclusion would shorten the median times in most courts. Excluding these cases gives a more accurate picture of the time it takes for a case to be processed in the federal courts.

Triable felony defendants in pending criminal cases

Triable defendants include defendants in all pending felony cases who were available for plea or trial on June 30, as well as those who were in certain periods of excludable delay under the Speedy Trial Act. Excluded from this figure are defendants who were fugitives on June 30, awaiting sentence after conviction, committed for observation and study, awaiting trial on state or other federal charges, or mentally incompetent to stand trial, as well as defendants for whom the U.S. Attorney had requested an authorization of dismissal from the Department of Justice.

Key to nature of suit and offense

Civil Cases	Criminal Cases
A Social Security	A Immigration
B Recovery of Overpayments and Enforcement of Judgments	B Embezzlement
C Prisoner Petitions	C Weapons and Firearms
D Forfeitures and Penalties and Tax Suits	D Escape
E Real Property	E Burglary and Larceny
F Labor Suits	F Marijuana and Controlled Substances
G Contracts	G Narcotics
H Torts	H Forgery and Counterfeiting
I Copyright, Patent, and Trademark	I Fraud
J Civil Rights	J Homicide and Assault
K Antitrust	K Robbery
L All Other Civil	L All Other Criminal Felony Cases

b. Caseload mix and filing trends. The variety of cases making up the caseload in most district courts will be surprising to many who study them for the first time. That variety may be important to advisory groups in assessing the docket and in considering what groups of cases, if any, should be treated differently in management plans. Different types of cases tend to move through the courts in different ways. For example, some are almost always disposed of by default judgment (student loan); some are in the nature of an appeal (bankruptcy); some are a unique subset of another category (asbestos cases in the personal injury category). From readily available data we cannot discern how a specific case moved through the system nor how a future case may move. Some types of cases, however, may move through the system in distinctive ways often enough to warrant your special attention. Do they affect court performance distinctively? Do they consume court resources distinctively?

We have sorted case types into two categories to illustrate the point of distinctive paths. Type I case types are distinctive because within each case type the vast majority of the cases are handled the same way; for example, most Social Security cases are disposed of by summary judgment. Type II case types, in contrast, are disposed of by a greater variety of methods and follow more varied paths to disposition; for example, one contract action may settle, another go to trial, another end in summary judgment, and so on. (See the table in Appendix B for a complete definition of the case types.)

Type I includes the following case types, which over the past ten years account for about 40% of civil filings in all districts:

- student loan collection cases
- cases seeking recovery of overpayment of veterans' benefits
- appeals of Social Security Administration benefit denials
- condition-of-confinement cases brought by state prisoners
- habeas corpus petitions
- appeals from bankruptcy court decisions
- land condemnation cases
- asbestos product liability cases

The advisory group may wish to consider whether, in this district, these categories or any others identified by the group are distinctive enough to warrant special attention in assessing the condition of the docket or in recommending future actions. Careful documentation of analyses and decisions of this kind will contribute significantly to the final report the Judicial Conference must make to Congress.

Type II includes the remainder of the case types, which collectively account for about 60% of national civil filings over the past ten years. Case types with the largest number of national filings were:

- contract actions other than student loan, veterans' benefits, and collection of judgment cases
- personal injury cases other than asbestos
- non-prisoner civil rights cases
- patent and copyright cases
- ERISA cases
- labor law cases
- tax cases

- securities cases
- other actions under federal statutes; e.g., FOIA, RICO, and banking laws

Chart 1 shows the percentage distribution among types of civil cases filed in your district for the past three years.

Chart 1: Distribution of Case Filings, SY88-90

Western District of Oklahoma

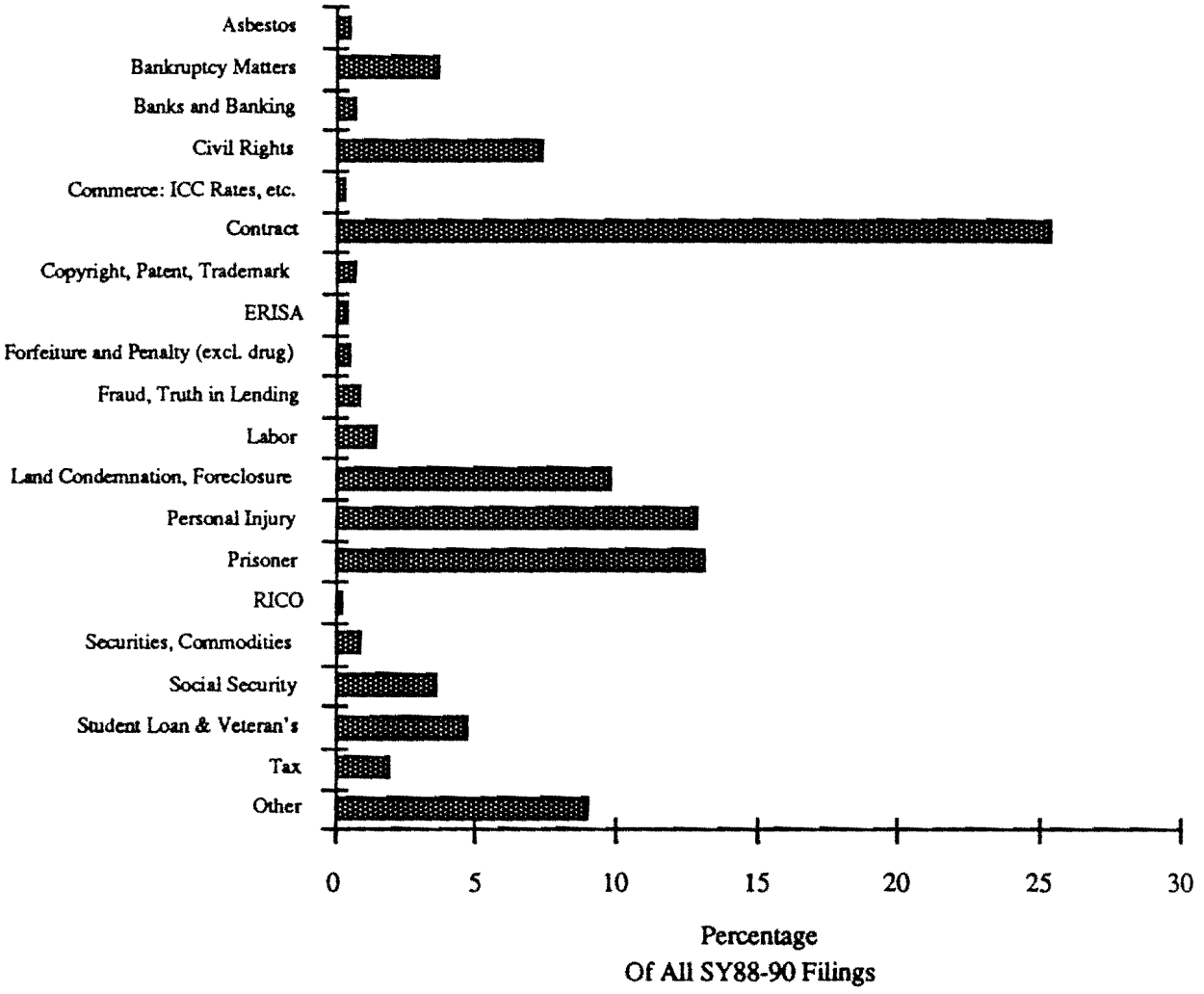


Chart 2 shows the trend of case filings over the past ten years for the Type I and Type II categories. Table 1 shows filing trends for the more detailed taxonomy of case types.

Chart 2: Filings By Broad Category, SY81-90
Western District of Oklahoma

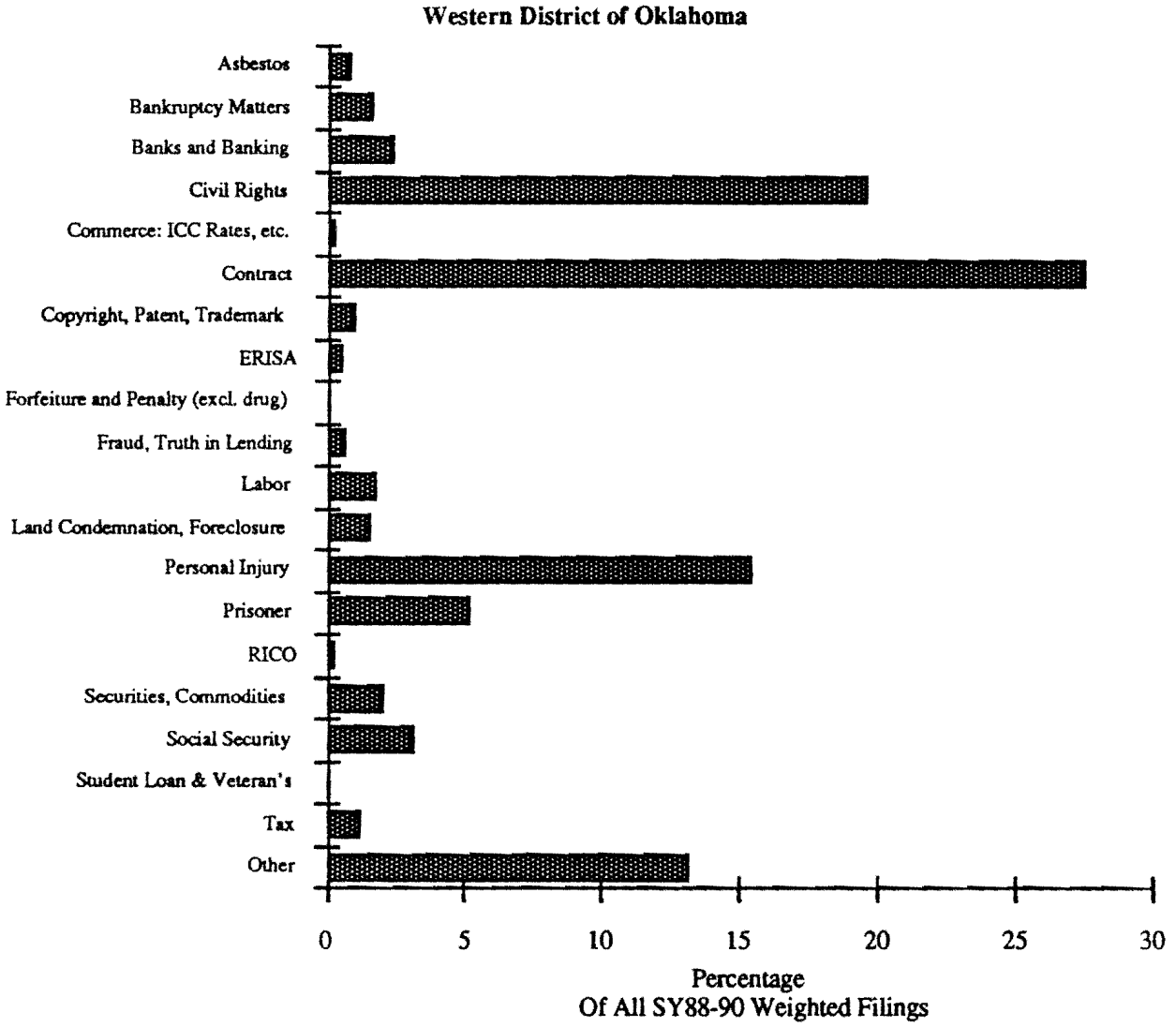
Table 1: Filings by Case Types, SY81-90

Western District of Oklahoma

	81	82	83	84	85	86	87	88	89	90
Asbestos	0	0	0	2	2	2	4	13	15	15
Bankruptcy Matters	9	18	20	43	38	62	109	120	75	77
Banks and Banking	1	1	71	8	12	15	18	19	26	13
Civil Rights	122	105	167	175	220	227	198	184	187	174
Commerce: ICC Rates, etc.	4	2	6	5	10	6	7	10	2	17
Contract	402	530	1022	1120	1032	1087	1033	767	631	462
Copyright, Patent, Trademark	18	21	25	21	21	14	17	13	27	18
ERISA	2	1	2	2	5	19	10	19	10	10
Forfeiture and Penalty (excl. drug)	21	9	17	8	18	8	13	15	25	4
Fraud, Truth in Lending	8	15	24	28	44	32	39	28	24	18
Labor	32	13	18	28	26	36	34	27	38	42
Land Condemnation, Foreclosure	100	154	191	150	124	170	151	69	260	386
Personal Injury	331	350	372	477	537	498	422	365	327	251
Prisoner	188	182	204	273	219	280	286	306	298	353
RICO	0	0	0	0	0	1	14	11	6	7
Securities, Commodities	32	29	131	82	52	34	35	25	21	21
Social Security	57	46	67	139	71	45	54	78	105	83
Student Loan and Veteran's	0	123	398	543	605	125	186	129	127	87
Tax	35	49	46	40	48	47	43	58	38	51
All Other	406	271	235	230	265	259	188	227	231	198
All Civil Cases	1768	1919	3016	3374	3349	2967	2861	2483	2473	2287

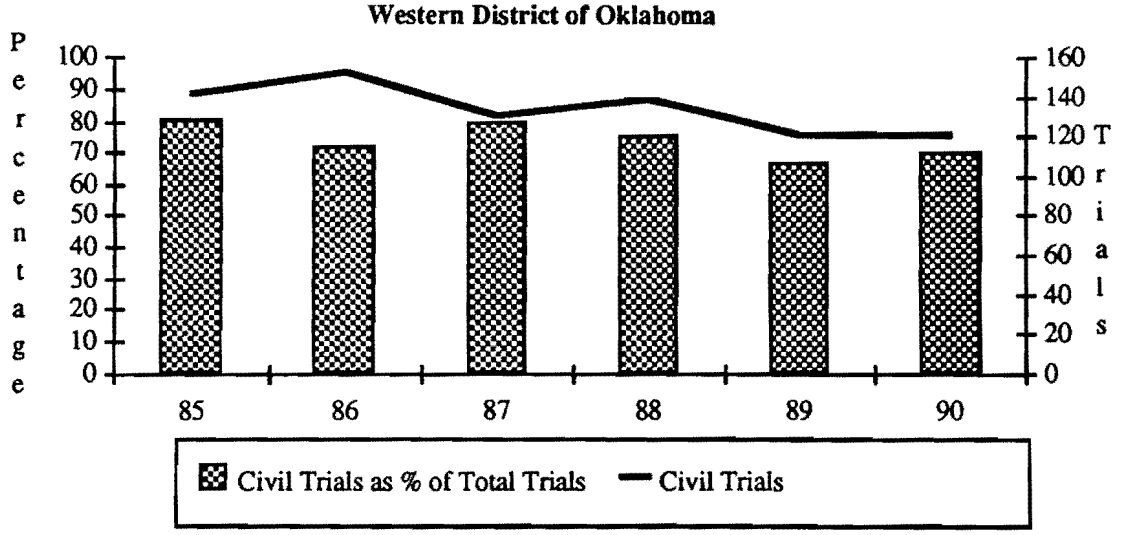
c. Burden. While total number of cases filed is an important figure, it does not provide much information about the work the cases will impose on the court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases. Chart 3 employs the current case weights to show the approximate distribution of demands on judge time among the case types accounting for the past three years' filings in this district. The chart does not reflect the demand placed on magistrate judges.

Chart 3: Distribution of Weighted Civil Case Filings, SY88-90



Another indicator of burden is the incidence of civil trials. Chart 4 shows the number of civil trials completed and the percentage of all trials accounted for by civil cases during the last six years.

Chart 4: Number of Civil Trials and Civil Trials as a Percentage of Total Trials, SY85-90
Western District of Oklahoma



d. Time to disposition. This section is intended to assist in assessments of "delay" in civil litigation in this district. We first look at conventional data on the pace of litigation and then suggest some alternative ways of examining data to estimate the time that will be required to dispose of newly filed cases. The *MgmtRep* table shows the median time from filing to disposition for civil cases and for felonies. Time from joinder of issue to trial is also reported for civil cases that reached trial. These data are commonly used to assess the dispatch with which cases have moved through a court in the past. When enough years are shown and the data for those years are looked at collectively, reasonable assessments of a court's pace might be made.

Data for a single year or two or three may not, however, provide a reliable predictor of the time that will be required for new cases to move from filing to termination. An obvious example of the problem arises in a year when a court terminates an unusually small portion of its oldest cases. Both average and median time to disposition in that year will show a decrease. The tempting conclusion is that the court is getting faster when the opposite is actually the case. Conversely, when a court succeeds in a major effort to clean up a backlog of difficult-to-move cases, the age of cases terminated in that year may suggest that the court is losing ground rather than gaining.

Since age of cases terminated in the most recent years is not a reliable predictor of next year's prospects, we offer other approaches believed to be more helpful. *Life expectancy* is a familiar way of answering the question: "How long is a newborn likely to live?" Life expectancy can be applied to anything that has an identifiable beginning and end. It is readily applied to cases filed in courts.

A second measure, *Indexed Average Lifespan* (IAL), permits comparison of the characteristic lifespan of this court's cases to that of all district courts over the past decade. The IAL is indexed at a value of 12 (in the same sense that the Consumer Price Index is indexed at 100) because the national average for time to disposition is about 12 months. A value of 12 thus represents an average speed of case disposition, shown on the charts below as IAL Reference. Values below 12

indicate that the court disposes of its cases faster than the average, and values above 12 indicate that the court disposes of its cases more slowly than the average. (The calculation of these measures is explained in Appendix B.)

Note that these measures serve different purposes. Life expectancy is used to assess change in the trend of actual case lifespan; it is a timeliness measure, corrected for changes in the filing rate but not for changes in case mix. IAL is used for comparison among districts; it is corrected for changes in the case mix but not for changes in the filing rate. Charts 5 and 6 display calculations we have made for this district using these measures.

Chart 5: Life Expectancy and Indexed Average Lifespan, All Civil Cases SY81-90

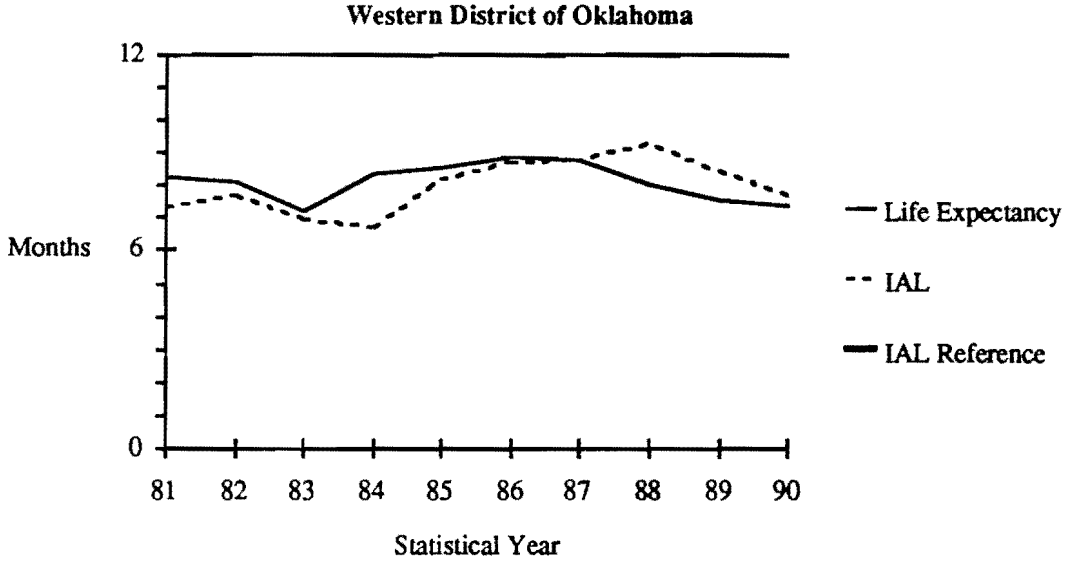
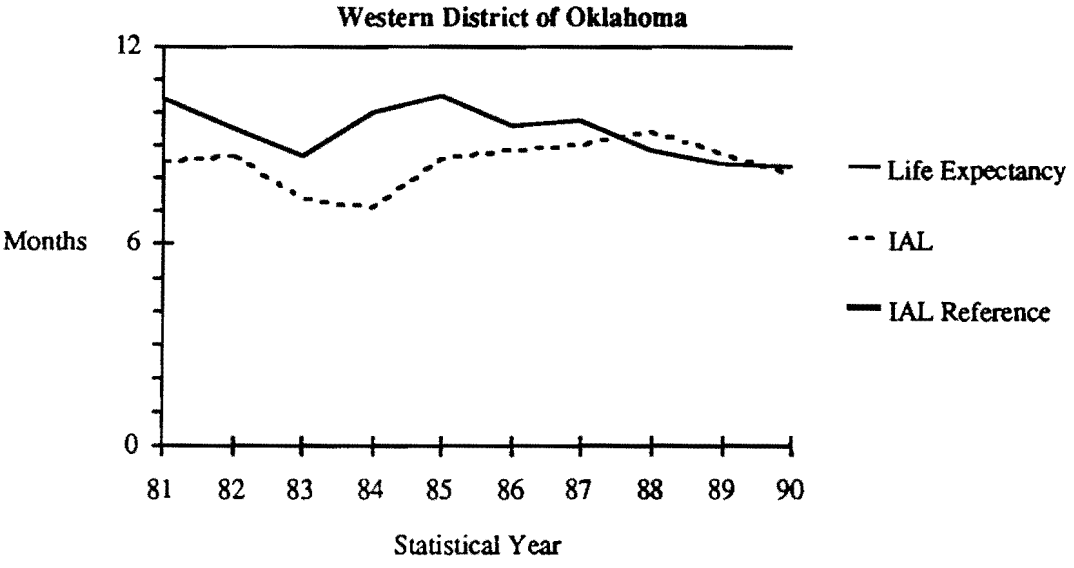


Chart 6: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY81-90



e. Three-year-old cases. The *MgmtRep* table shows the number and percentage of pending cases that were over three years old at the indicated reporting dates. We have prepared Charts 7 and 8 to provide some additional information on these cases.

Chart 7 shows the distribution of case terminations among a selection of termination stages and shows within each stage the percentage of cases that were three years old or more at termination.

Chart 7: Cases Terminated in SY88-90, By Termination Category and Age

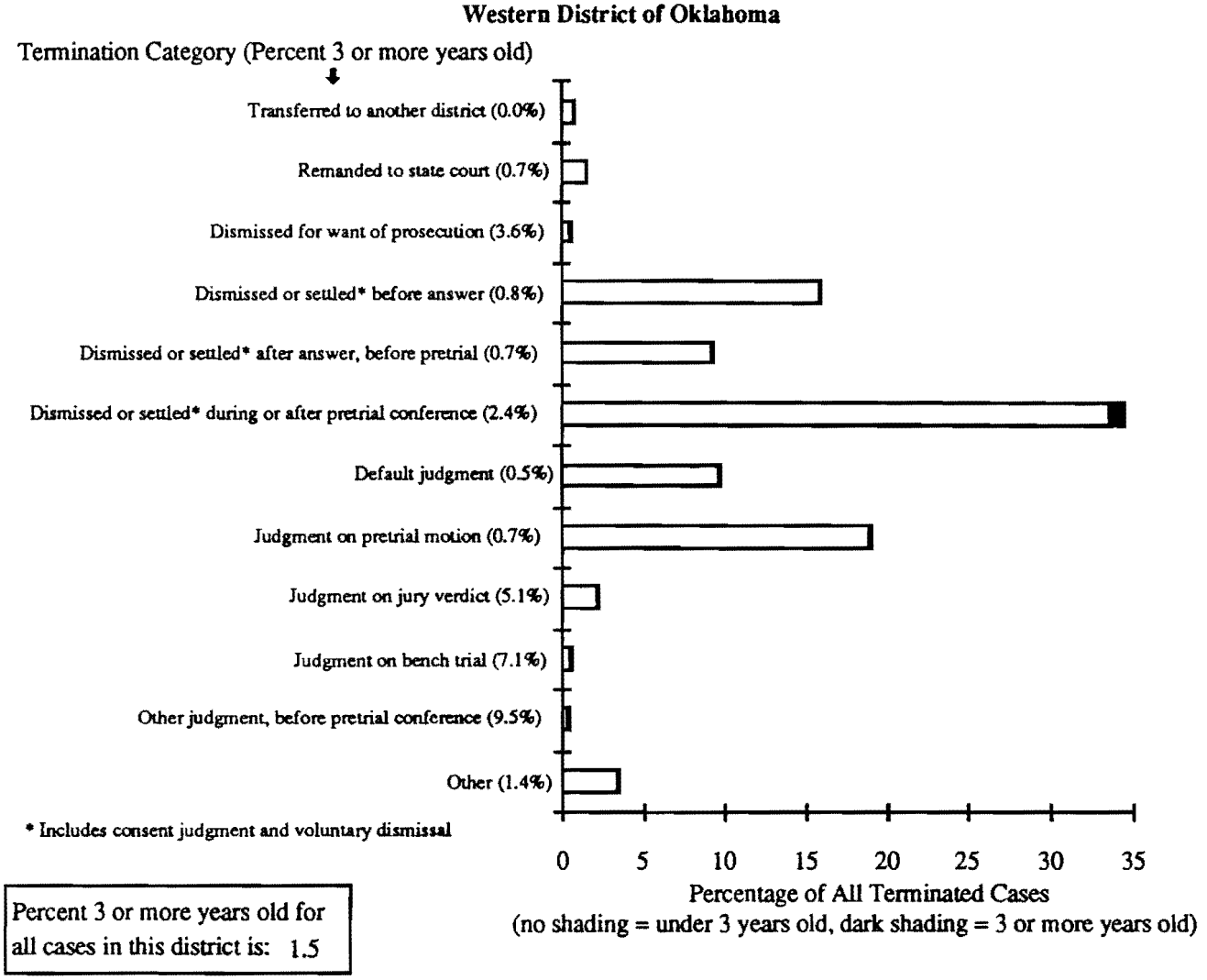
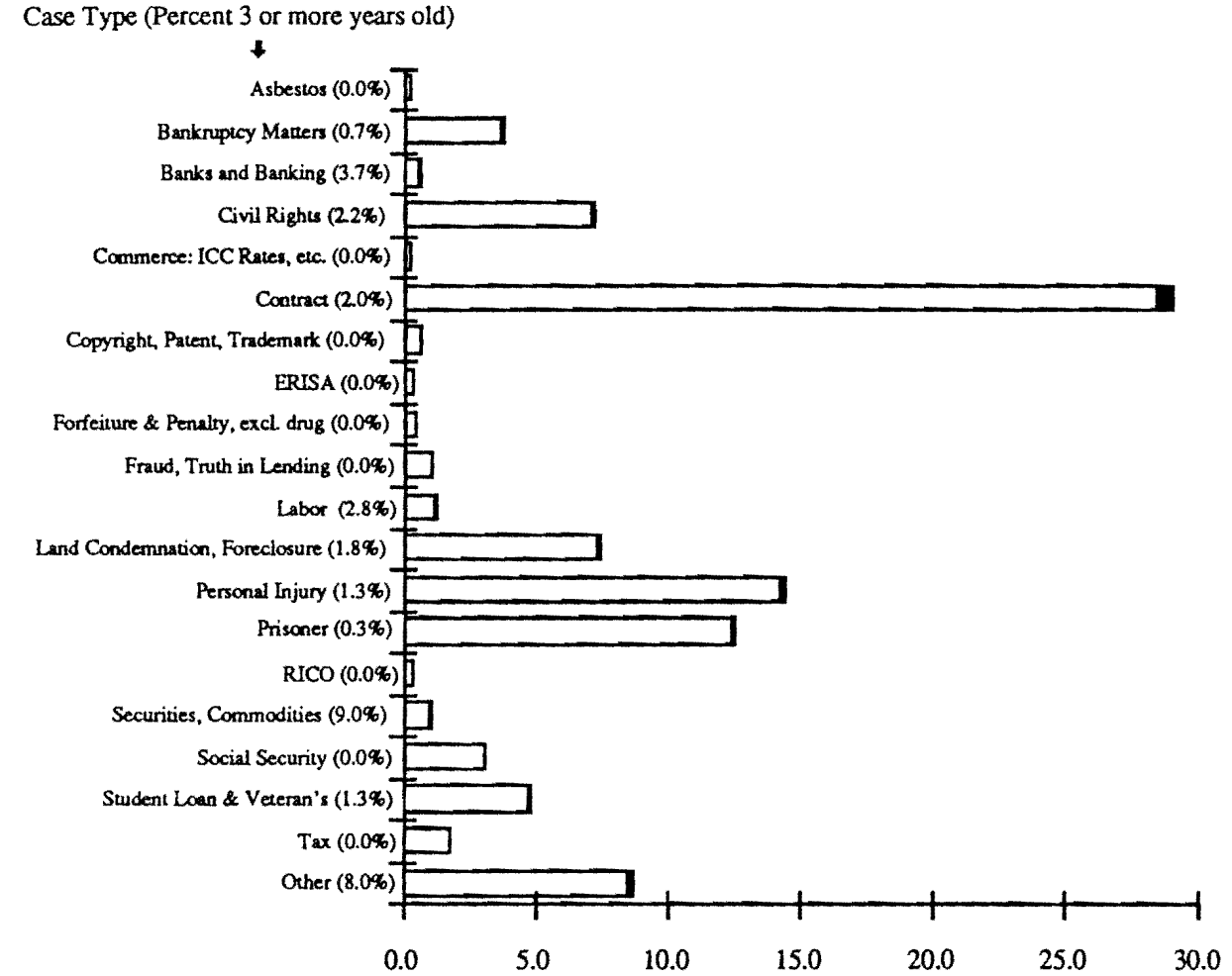


Chart 8 shows the distribution of terminations among the major case types and shows within each type the percentage of cases that were three years old or more at termination.

Chart 8: Cases Terminated in SY88-90, By Case Type and Age

Western District of Oklahoma



Percent 3 or more years old for all cases in this district is: 1.5

f. Vacant judgeships. The judgeship data given in *MgmtRep* permit a calculation of available judge power for each reported year. If the table shows any vacant judgeship months for this district, a simple calculation can be used to assess the impact: Multiply the number of judgeships by 12, subtract the number of vacant judgeship months, divide the result by 12, and then divide the result into the number of judgeships. The result is an adjustment factor that may be multiplied by any of the per-judgeship figures in the *MgmtRep* table to show what the figure would be if computed on a per-available-active-judge basis. For instance, if the district has three judgeships and six vacant judgeship months, the adjustment factor would be 1.2 (36 – 6 = 30; 30 / 12 = 2.5; 3 / 2.5 = 1.2). If terminations per judgeship are 400, then terminations per available active judge would be 480 (400 × 1.2). This will overstate the workload of the active judges if

there are senior judges contributing to the work of the district. Because of the varying contributions of senior judges, however, there is no standard by which to take account of their effect on the workload of the active judges.

2. The Criminal Docket

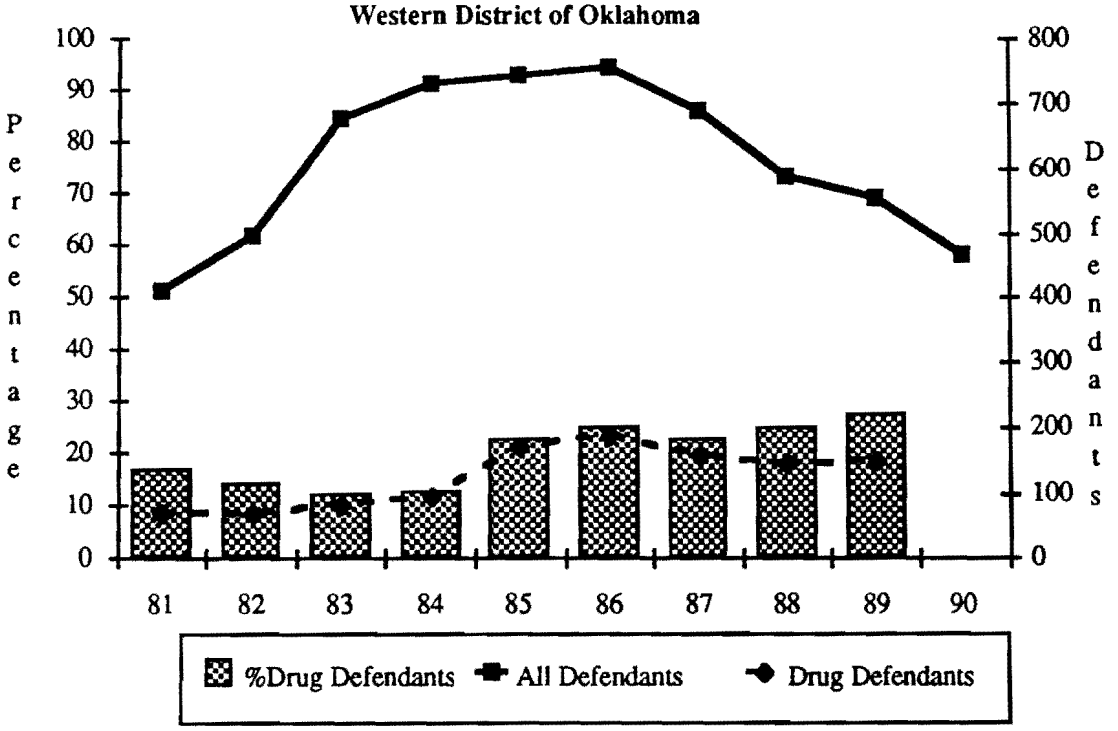
a. The impact of criminal prosecutions. In calling on the advisory group to consider the state of the criminal docket, Congress recognized that the criminal caseload limits the resources available for the court's civil caseload. It is important to recognize that the Speedy Trial Act mandates that criminal proceedings occur within specified time limits, which may interfere with the prompt disposition of civil matters.

The trend of criminal defendant filings for this district is shown in Chart 9. We have counted criminal defendants rather than cases because early results from the current FJC district court time study indicate that burden of a criminal case is proportional to the number of defendants. Because drug prosecutions have in some districts dramatically increased demands on court resources, we have also shown the number and percentage of defendants in drug cases. A detailed breakdown of criminal filings by offense is shown on the last line of the table reproduced on page 8. A more detailed, five-year breakdown of the district's criminal caseload is available from David Cook of the Administrative Office's Statistics Division (FTS/633-6094).

Chart 9: Criminal Defendant Filings SY81-90, With Number and Percentage Accounted for by Drug Defendants, SY81-89

(Drug filings data not available for SY90)

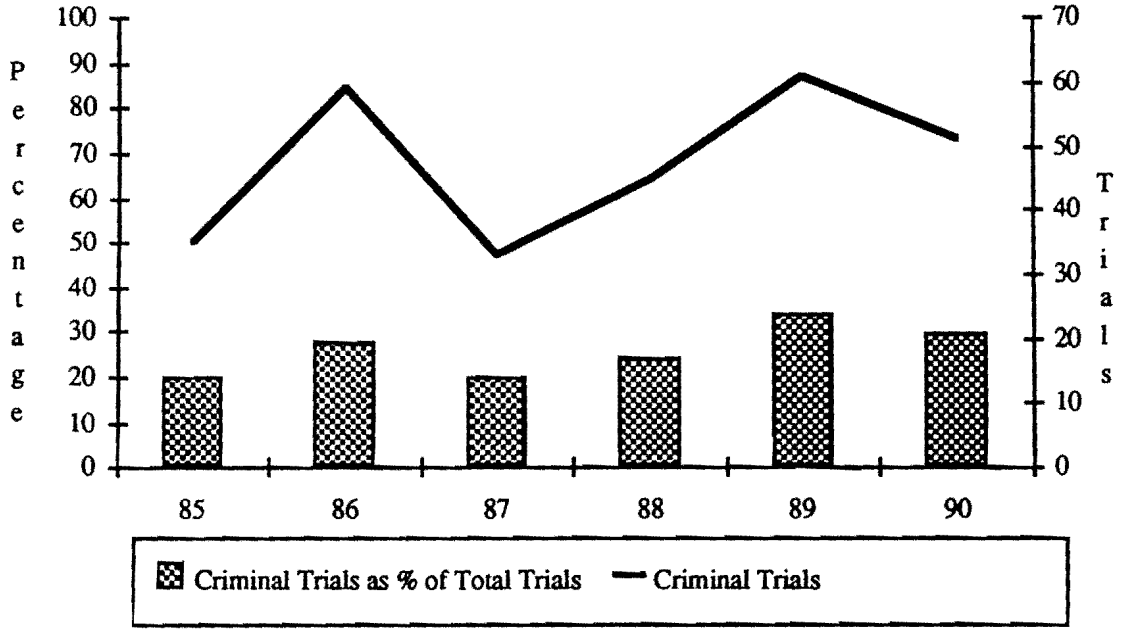
Western District of Oklahoma



b. The demand on resources by criminal trials. Chart 10 shows the number of criminal trials and the percentage of all trials accounted for by criminal cases during the last six years.

Chart 10: Number of Criminal Trials and Criminal Trials as a Percentage of Total Trials, SY85-90

Western District of Oklahoma



For more information on caseload issues

This section was prepared by John Shapard of the Federal Judicial Center with assistance from David Cook and his staff in the Statistics Division of the Administrative Office of the U.S. Courts. Questions and requests for additional information should be directed to Mr. Shapard at (FTS/202) 633-6326 or Mr. Cook at (FTS/202) 633-6094.

B. Identifying trends in the demands placed on the court's resources (§ 472(c)(1)(B))

While courts maintain some data reflecting trends in the demands on their resources (e.g., the case filing information presented above), these data generally do not provide information about the state of the resources themselves and how these resources relate to demand. The advisory group will want to try to develop information reflecting trends in the relationship between demand and resources. In this section, we suggest some key indicators that may be helpful. Some may be quantifiable. Others will be based on non-numerical information gathered from court personnel.

Court resources may be divided into four categories:

- judicial officers
- supporting personnel
- buildings and facilities
- automation and other technical support.

The following sections provide an outline for assessing trends in the relationship between demand and resources, for each category listed above.

1. Judicial Officers

(a) Article III Judges

The group may want to examine trends over a significant period (five years or more) in the following areas:

- filings and terminations per judgeship and per active judge
- weighted filings per judgeship and per active judge
- raw caseloads per judgeship and per active judge
- weighted caseloads per judgeship and per active judge
- criminal filings and terminations per judgeship and per active judge
- vacant judgeship months
- civil and criminal trials per judge
- participation of senior judges
- participation of visiting judges
- other relevant information

(b) Magistrate Judges

Information may be developed for a similar period in the following areas:

- civil and criminal caseloads per magistrate judge
- civil trials per magistrate judge
- volume of criminal calendars
- vacant magistrate judgeship months
- other relevant information

2. Supporting Personnel

(a) Clerk's Office

Information may be developed for a similar period in the following areas:

- personnel strength and deficiencies in the clerk's office, e.g., percentage of authorized positions permitted to be filled; percentage of positions filled; rate of employee turnover, etc.
- ratio of staff to filings and caseloads
- staff participation in duties related to case management
- other relevant information

(b) Probation/pretrial services department

Information may be developed in the following areas for a period that should take into account the impact of the sentencing guidelines implemented in November 1987:

- personnel strength/deficiencies in the department, e.g., percentage of authorized positions filled, rate of turnover, etc.
- caseloads per officer
- ratio of officers to criminal filings
- other relevant information

3. Buildings and Facilities

Information may be developed for a significant period (five years or more) concerning the adequacy of:

- courtroom facilities
- jury facilities
- prisoner facilities
- library facilities
- support staff facilities

4. Automation and other technical support

Information may be developed for a similar period concerning the adequacy of:

- automation facilities and services
- courtroom reporting services

III. Identifying the Principal Causes of Cost and Delay in Civil Litigation (§ 472(c)(1)(C))

Legislation cannot alter the fact that civil litigation necessarily takes time and costs money. The implementation of the Act can, however, identify causes of avoidable cost and delay, and this is the task on which the group should focus. The group should attempt to arrive at a common understanding of the sense in which it will use those terms. Thus the Act does not specify cost to whom (e.g., the court, the parties, the public) or how much time constitutes delay. The group should define what it means when it uses those terms. So too the group should define other terms and concepts it uses and ensure that its analysis will be as meaningful as possible to the reader. By way of example, to report that "ERISA cases have delayed the resolution of other civil cases" is entirely different from reporting: "As the percentage of ERISA cases on the court's pending civil caseload has grown from __ % in 1986 to __ % in 1990, the life expectancy of all civil cases has grown from __ months to __ months. Six of the seven judges on the court attribute this growth to demands of ERISA cases on their dockets." While the group members' experience and judgment will lend weight to their conclusion, specificity and reference to objective indicia will add greatly to the utility of their report.

The group may begin with a review and analysis of the statistical data assembled in assessing the court's docket and resources (Part II, above). For example (and by way of illustration only), the group may identify a mismatch of demands and resources, illustrated by the emergence of categories of litigation imposing new and substantial burdens on the court's docket, an increasing number of vacant judgeship months, and a decline in the clerk's office personnel. Or the group may find the court's docket to be in a satisfactory state in the sense that it reflects no avoidable cost or delay. Findings such as these should be specific and should not be made in generalities.

Having made its assessment under Part II, the group should proceed to analyze possible causes of cost and delay in "court procedures and the ways in which litigants and their attorneys approach and conduct litigation" (§ 472(c)(1)(C)). The following sections list numerous procedures and practices in civil litigation, although the listing is not intended to be exhaustive. The question to be considered is whether the presence, absence, or application of any such procedures or practices appear to cause avoidable cost or delay in civil litigation.

A. Analysis of court procedures to identify problems of cost and delay

The term "court procedures" may refer to court-wide procedures, i.e., those followed by the court as a whole, whether by rule, order, or custom. It may also refer to the procedures or practices followed by individual judges. For example, assignment of cases typically is a court-wide practice—there is no place for individual variation. On the other hand, the conduct of Rule 16 conferences is essentially a matter for individual judges, even though rules or general orders may be in effect. Some procedures may relate to both categories, e.g., calendaring practices and

jury management practices. In making its study, the group should recognize this distinction and make as clear as possible in its analysis and report which category of procedure it is addressing.

1. Assignment procedures
   a. Methods for assigning cases at filing
   b. Methods of reassigning cases (to new judges, recusal, disqualification, related cases, illness/disability, backlog, protracted/complex cases)
2. Time limits
   a. Monitoring service of process
   b. Monitoring timing of responses to complaint
   c. Enforcing time limits in rules and orders
   d. Practices regarding extensions of time
3. Rule 16 conferences
   a. Exemptions for categories of cases
   b. Format of conference
   c. Development of scheduling orders (See Rule 16(b))
   d. Timing of conferences
   e. Subject matters of conferences (See Rule 16(c))
   f. Use of magistrate judges
4. Discovery procedures
   a. Use and enforcement of cutoff dates
   b. Control of scope and volume of discovery
   c. Use of Rule 26(f) conferences
   d. Use of voluntary exchanges and disclosure and other alternatives to traditional discovery
   e. Procedures used for resolving discovery disputes
   f. Use of sanctions for discovery abuse
   g. Use of magistrate judges
5. Motion practice
   a. Scheduling of motions
   b. Monitoring the filing of motions, responses, and briefs
   c. Hearing and calendaring practices
   d. Method of ruling on motions
   e. Timing of rulings
   f. Use of proposed orders
   g. Use of magistrate judges
6. Final pretrial conferences
   a. Narrowing issues and limiting trial evidence
   b. Controlling length of trials
   c. Structuring sequence of trial issues
   d. Exploring settlement possibilities
7. Jury trials
   a. Method of selection of the venire
   b. Conduct of voir dire
   c. Use of jury selection aids (e.g., pre-screening questionnaires)

d. Use of juror comprehension aids (e.g., encouraging use of visual aids)
e. Use of jury deliberation aids (e.g., written instructions and verdict forms)
f. Assessment of juror costs for late settlement

8. Trial setting
   a. Methods for scheduling trial (e.g., date certain, trailing, combination, etc.)
   b. Timing of setting date for trial
   c. Adherence to trial dates
   d. Priorities (Speedy Trial Act and civil case scheduling--28 U.S.C. § 1657)
   e. Back-ups for multiple settings
   f. System for "clearing the calendar" (e.g., joint trial calendar)
9. Review and dismissal of inactive cases
10. Use of magistrate judges
    a. Pretrial and discovery stages
    b. Settlement conferences
    c. Consent trials
    d. Use as special masters
11. Use of senior and visiting judges
12. Use of courtroom deputy clerks and other personnel to assist judge
    a. Scheduling
    b. Monitoring deadlines
    c. Liaison with attorneys
    d. Preparation of internal statistical reports
    e. Administrative and other functions
13. Use of alternative dispute resolution
    a. Arbitration (voluntary and involuntary)
    b. Early neutral evaluation
    c. Mediation
    d. Mini-trials
    e. Settlement conferences (judicial officer-hosted)
    f. Summary jury trials
    g. Judicial incentives/disincentives to use ADR
14. Efficacy/deficiencies of local rules
    a. Use/non-use of local rules
    b. Alternatives to local rules (e.g., standing orders)
    c. Page limits on briefs
    d. Discovery limits
    e. Time limits
    f. Rules regarding non-filing of discovery materials
    g. Rules on other items from this checklist
15. Use of sanctions
    a. Timing and treatment of motions
    b. Hearings
    c. Control of collateral proceedings
    d. Form and timing of rulings

16. Handling of attorneys' fee petitions
    a. Methods and procedures for setting fees
    b. Hearings, findings, orders
17. Communication and coordination among judges' chambers, magistrate judges' chambers, and clerk's office
18. Other relevant practices of the court or judges

B. Analysis of litigant and attorney practices—privately represented litigants

1. Pre-filing practices—screening cases
    a. Assessing time available for a case
    b. Screening cases for merit
    c. Prefiling investigation of law and fact
    d. Interviewing fact witnesses
    e. Consulting with expert witnesses
    f. Checking documentary evidence
    g. Contacting opposing party
    h. Evaluating the case
    i. Advising client about availability of ADR procedures
2. Pleading practices
    a. Limiting theories and claims in complaint and answer
    b. Amending to remove unfounded claims or defenses
3. Discovery practices
    a. Voluntary exchange of information
    b. Use of admissions and stipulations
    c. Limiting discovery
    d. Resolving discovery issues with counsel
    e. Use of discovery motions
    f. Compliance with rulings
4. Motion practice
    a. Limiting volume of motions
    b. Use of stipulations or consent
    c. Length of pleadings and briefs
    d. Requests for hearings
    e. Conduct of hearings
5. Trial practice
    a. Preparing and organizing evidence
    b. Narrowing claims
    c. Stipulating facts
    d. Estimating time
    e. Complying with time limits
    f. Jury practices—voir dire, selection

6. Sanctions practice
   a. Timing
   b. Circumstances and reasons for requesting sanctions
   c. Frequency of use
   d. Effects on litigation
7. Private attorneys' fees
   a. Effect of local billing and charging practices as incentives/disincentives to litigate
   b. Asymmetries between defense and plaintiff incentives/disincentives
8. Court-awarded attorneys' fees
   a. Class action practices—incentives/disincentives
   b. Statutory fees—incentives/disincentives
9. Settlement practices
   a. Evaluation and ongoing reevaluation of case
   b. Timing of initial discussions
   c. Plaintiff/defendant practices and asymmetries
   d. Resort to court/judge provided procedures—incentives/disincentives
   e. Timing of settlements
10. Use of alternative dispute resolution methods
    a. Incentives/disincentives for plaintiffs and defendants
    b. Use of binding alternatives
    c. Requests for trial de novo
    d. Demand for alternative programs
    e. Resources to implement alternatives
11. Compliance with time limits and local rules at all stages of the litigation
12. Appeals practices
    a. Interlocutory appeals
    b. Appeals on merits
13. Client participation in litigation events and decision making
    a. Impact of presence/absence of client
    b. Fixing client responsibility

C. Analysis of special problems relating to pro se litigation

1. Control of filing of pro se litigation
   a. Review by magistrate judge or judge (28 U.S.C § 1915(d))
   b. Assessing partial filing fees
   c. Orders controlling repeated filings
   d. Certification of grievance procedures by district court (28 U.S.C. § 1997(e))
2. Use of court resources
   a. Delegation to magistrate judges
   b. Use of pro se law clerks

3. Control of hearings
   a. Screening of claims (e.g., at prison)
   b. Narrowing issues
4. Appointment of counsel
   a. Available resources and procedures
   b. Judicial practices

D. Analysis of special problems relating to U.S. litigation

1. Criminal practices
   a. Charging practices (numbers of charges and defendants, separate incidents combined within single indictment, prosecution of offenses in state jurisdiction, etc.)
   b. Plea negotiation practices
   c. Timing of delivery of Jencks Act statements
   d. Discovery practices (e.g., open file; contested)
   e. Length of trials
   f. Use of cross-designations of state prosecutors
2. Civil practices
   a. Selection of cases
   b. Use of removal from state courts
   c. Exercise of settlement authority
   d. Use of alternative, non-adjudicatory procedures
   e. Other practices as listed under Section B above

E. Analysis of special problems relating to state and local government litigation

1. Procedures and practices used by district/states attorneys in habeas corpus litigation
2. Procedures and practices used by district/states attorneys in other prisoner litigation (including use of non-adjudicatory procedures, resort to grievance procedures, etc.)
3. Others

F. Analysis of special problems relating to complex cases

1. Coordination among court, bar, and litigants
2. Pretrial procedures
3. Discovery procedures
4. Motions practice
5. Trial scheduling

IV. Examining the Impact of New Legislation on the Court (§ 472(c)(1)(D))

The Act directs the advisory groups to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts" (§ 472(c)(1)(D)). One approach to making this assessment is to examine the impact of recent legislation on the courts. Another is to consider the lack of legislation that could have improved the civil litigation process. For illustrative purposes only, here are examples of legislative action, or inaction, the group may wish to consider:

A. Criminal legislation

1. Adoption of guideline sentencing and impact of particular aspects of the sentencing guidelines
2. Mandatory minimum sentencing statutes
3. New statutory drug and gun offenses
4. Expansions of federal criminal jurisdiction

B. Civil legislation

1. RICO—civil and criminal sanctions
2. ERISA
3. Financial recoveries from federally insured financial institutions (savings and loans, banks, etc.)
4. Civil rights acts, including the Americans with Disabilities Act of 1990
5. Superfund and other environmental legislation
6. Federal Debt Collection Procedures Act
7. Immigration Act of 1990

C. Legislative inaction

1. Implied causes of action in regulatory statutes
2. Statutes of limitations unspecified
3. Choice of law issues
4. Federal common law
5. Multi-party, multi-forum jurisdiction and procedure
6. Legislative reconciliation of demands and resources (e.g., asymmetry between "authorization" and "appropriation" for responsibilities placed on judiciary such as this Act)
7. Approval of nominees for judicial vacancies

V. Making Recommendations to the Court (§ 472(b))

After making its assessments under § 472(c)(1), the group must submit to the court a report with "its recommendation that the district court develop a plan or select a model plan" (§ 472 (b)(2)). Model plans developed by the Judicial Conference are not expected to be available before the second half of 1992. Moreover, as each plan is to be responsive to local needs and circumstances, it is not likely that a model plan will satisfy the needs of a district.

A. Contents of report

The Act states that the group's report shall:

- include "recommended measures, rules and programs" (§ 472(b)(3));
- include "the basis for its recommendation" (§ 472(b)(2));
- explain "the manner in which the recommended plan complies with section 473" (§ 472(b)(4));
- "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys" (§ 472(c)(2)); and
- "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" (§ 472(c)(3)).

In making its recommendations, Congress did not intend to displace or restrict judicial discretion. The House Judiciary Committee said that it was "unwilling to impose the Congress' view of proper case management upon an unwilling judiciary" (House Report, p. 14). Advisory groups (other than those in pilot districts, addressed below) have the discretion to recommend any or all of the principles, guidelines, or techniques of § 473(a) and (b). They must, however, state the reasons for their choices. Specifically, a group must show:

- that it has "consider[ed] . . . the . . . principles and guidelines of litigation management and cost and delay reduction" set out in § 473(a) and (b); and
- that it has included in its recommended measures, rules, and programs those of the Act's principles, guidelines, and techniques that, for the reasons stated in the group's report, are considered appropriate for the needs and circumstances of the district.

While the Act does not require a plan to incorporate specific provisions (except in pilot districts), Congress clearly expects them to reflect a significant commitment to cost and delay reduction. Recommended actions are to "include significant contributions to be made [not only] by the court, [but also] by the litigants, and the litigants' attorneys" (§ 472(c)(3)). They need not be limited to the means set forth in the Act to reduce cost and delay. Nor need they be limited to matters touching directly on the processing of litigation. A plan might, for example, call upon the bar to sponsor advocacy training programs for federal litigators or to provide greater *pro bono* representation to indigent litigants who would otherwise proceed *pro se*.

Implementation of a plan will not necessarily require a court to change current methods and techniques. Where existing methods and techniques are found to be effective in controlling cost and delay, the plan should incorporate them to ensure that they remain part of the court's procedure.

The group should report on problems of cost and delay regardless of whether those problems might be remedied by the Act's principles and guidelines. Problems beyond the control of courts, litigants, and attorneys should be identified, but this material does not address how the group should treat them.

B. Format of report

The Judicial Conference must review all district reports (§ 474(b)(1)) and prepare a report to Congress (§ 479). The Conference will find it helpful if the reports generally conform to a pattern permitting comparison across districts. Such reports will also facilitate research on the administration of justice in federal courts. To be helpful to the court and to the Judicial Conference, reports should, where possible, correlate particular identified problems with particular recommendations. Recommendations should be specific; they may, for example, take the form of a suggested rule, order, or procedure. The Conference, in consultation with the Federal Judicial Center and the Administrative Office, will be working with all the courts to explore appropriate formats.

C. Pilot districts

Plans implemented by the ten pilot districts "shall include the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a)" (§ 105(b)). The following considerations may be helpful to groups in pilot districts:

- If the group finds that the state of the court's docket is satisfactory and there are no discernible causes of avoidable cost and delay, it may recommend measures that incorporate the court's existing practices and procedures, adapted to reflect the six principles and guidelines in a manner that will not disrupt an existing satisfactory operation.
- If the group finds the existence of causes of avoidable cost and delay to which some of the stated principles and guidelines may be relevant, it should recommend their adaptation to "the needs and circumstances" of the court in a pragmatic manner, keeping in mind that the objective is to aid, not impair, the administration of justice. For example, a court already straining under its criminal caseload should not be subjected to procedures imposing additional burdens and demands unless their impact will demonstrably improve the overall ability of that court to process its dockets.

While these considerations are especially relevant to the pilot districts, advisory groups in all districts will want to keep them in mind as they develop their reports and recommendations to the court.

C

RULE 17

CIVIL STATUS CONFERENCES; CRIMINAL PRETRIAL CONFERENCES; MANAGEMENT

(A) Scheduling. A scheduling order shall issue in civil cases (excepting administrative reviews and prisoner cases) within one hundred twenty (120) days from the date of filing the complaint, in accordance with Rule 16, Federal Rules of Civil Procedure.

(B) Preparation by Counsel for Status Conference Scheduled by the Court. Prior to the first status conference scheduled by the Court, trial counsel for each of the parties shall confer and prepare a status report. Said report shall include, to the extent then known, the contentions of each party and the issues of fact and law. It will also contain a list of all exhibits, witnesses, and discovery materials to the extent then known, together with estimates of time needed to complete discovery and trial time. It shall be the duty of counsel for the plaintiff to arrange this conference and the duty of all counsel to jointly participate in and facilitate it. The information exchanged shall be incorporated into the status report. This status report will be prepared and signed jointly and filed as a single document with the Clerk of the Court no later than five (5) days prior to the status conference scheduled by the Court. (The Status Report shall conform to the form required for Final Pretrial Order, attached to these Rules as Appendix IV, but shall be entitled "Status Report.")

(C) Agenda at Conference.

(1) Counsel who will conduct the trial and pro se litigants shall attend any conference required by the Court and shall be prepared to discuss:

(a) the streamlining of claims and/or defenses;

(b) the possibility of obtaining admissions of fact and of documents;

(c) the avoidance of unnecessary proof and of cumulative evidence;

(d) the identification of witnesses and documents;

(e) the possibility of settlement or use of extra-

judicial procedures;

(f) the disposition of any pending matters;

(g) the need for adopting special procedures for managing of difficult or protracted litigation that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(h) all other appropriate matters.

(2) The Court at the status conference will establish insofar as feasible the time:

(a) to join other parties and to amend the pleadings;

(b) to serve and hear motions;

(c) to conduct and complete discovery; and

(d) to file the submissions required by the Final Pretrial Order entered by the Court, said submissions including proposed voir dire, requested jury instructions or proposed findings of fact and conclusions of law, witness lists, exhibit lists, trial briefs, joint preliminary statements, stipulations, and hypothetical questions.

(3) The Court will also set if necessary or feasible the dates of any supplemental status conferences, the date of the final pretrial conference, if any, and the date of trial.

(D) Preparation of Status Reports, Final Pretrial Orders, and Other Orders.

(1) Unless otherwise ordered by the Court, counsel for the plaintiff, with full and timely cooperation of other counsel and pro se parties, is responsible for preparing, obtaining approval of all parties, and furnishing the Court any status reports, pretrial orders or other orders required by the Court or these Rules.

(2) The clerk who keeps the minutes of the status conference shall have forms available substantially conforming to that attached to these Rules as Appendix V whereby the time and/or

date fixed by the Court for the performance of specified duties may be inserted. Upon request therefor, counsel will be supplied with a copy of such form so that they may make their own notations of deadlines and of other orders prescribed by the judge presiding over the conference. Such executed form, when approved by the Court and filed, shall constitute the order of the Court as to such schedules without the necessity of filing of any other order to the same effect. Unless otherwise directed by the assigned judge, the form and content of a Final Pretrial Order, conforming to the sample form shown at Appendix IV, attached hereto, shall be filed by plaintiff's counsel on or before the first day of the month that the case is scheduled for trial.

(E) Default. Failure to prepare and file a required status report, failure to comply with the Final Pretrial Order, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions: the striking of a pleading, a preclusion order, staying the proceeding, default judgment, assessment of expenses and fees (either against a party or the attorney individually), or such other order as the Court may deem just and appropriate.

(F) Criminal Case -- Pretrial Conference. A pretrial conference may be held in criminal cases for the purpose of considering such matters as will promote a fair and expeditious trial. Such conference may, at the discretion of the Court, be conducted by a magistrate, as provided in Rule 39(B)(2) hereof.

(G) Criminal Case -- Stipulations -- Exhibits. Consistent with the applicable Federal Rules of Criminal Procedure, and whenever it can be done without violating or jeopardizing the constitutional rights of the defendant in any criminal case, stipulations should be made at or prior to the pretrial conference with respect to the undisputed facts and the authenticity of documents. Each instrument which it is anticipated may be offered in evidence by either side (or photostatic copy of such instrument, if agreeable), should be marked with an exhibit number prior to the trial.

(H) Settlement Conferences. The Court may upon its own motion or at the request of any of the parties order a settlement conference at a time and place to be fixed by the Court. A magistrate or a district judge other than the judge assigned to the case, to be known as the settlement conference judge, shall conduct it. The lead attorney who will try the case for each party shall appear, and shall be accompanied by one with full settlement authority. The latter will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly and actively associated with the party or parties. Other interested parties such as insurers or indemnitors shall attend and are subject to the provisions of this Rule. Only the settlement conference judge may excuse attendance by any attorney, party or party's representative. The parties, their representatives and attorneys are required to be completely candid with the settlement conference judge so that he may properly guide settlement discussions, and the failure to attend a settlement conference or the refusal to cooperate fully may result in imposition of sanctions mentioned in paragraph (E) of this Rule. The settlement conference judge may issue such other and additional requirements of the parties or persons having an interest in the outcome as to him shall seem proper in order to expedite an amicable resolution of the case. The settlement judge will not discuss the merits of the case with the assigned judge but may discuss the status of motions and other procedural matters and shall have the right to meet jointly or individually with parties or persons or representatives interested in the outcome of the case without the presence of counsel. No statements, admissions, or conversations will, in any form, be used in the event of subsequent trial.

(I) Summary Jury Trial; Alternative Methods of Dispute Resolution. The Court may, in its discretion, set any civil case for summary jury trial, mandatory (nonbinding) arbitration (in accordance with Rule 43), mediation or other alternative method of dispute resolution as the Court may deem proper.

APPENDIX IV

NOTE: Use this form for both
STATUS REPORT
(complete to extent possible at time filed)
and
FINAL PRETRIAL ORDER
(complete fully)

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

JOHN DOE, by his guardian ad litem, JANE DOE, Plaintiff,	)	
vs.	)	CIV. _____
XYZ CORPORATION, Defendant.	)	

(STATUS REPORT)
or
(FINAL PRETRIAL ORDER)

(use title as appropriate)

Date of Conference: _____, 19 ___.

Appearances: John Y. Lawyer, Walters, Oklahoma, for plaintiff;
Sam X. Attorney, Lawton, Oklahoma, for defendant.

I. A. BRIEF PRELIMINARY STATEMENT stating facts and positions of the parties. (To be used in jury selection and in instructing the jury.)

B. Suggested voir dire questions.

II. STIPULATIONS

A. all parties are properly before the court;

B. the court has jurisdiction of the parties and of the subject matter;

C. all parties have been correctly designated;

D. there is no question as to misjoinder or nonjoinder of parties;

E. plaintiff, a minor, appears through her guardian;

F. Facts:

1. Plaintiff is a citizen of Wichita County, Texas.

2. Defendant is a New York corporation, licensed to do business in the State of Oklahoma.

G. Legal Issues:

May a 9-year old child be held guilty of contributory negligence?

H. Factual Issues:

1. Was plaintiff injured and damaged by the negligence of the defendant?

2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

III. CONTENTIONS

A. Plaintiff:

1. Facts:

(a) That Richard Roe was driving defendant's truck as defendant's agent;

(b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.

2. Factual Issues:

(a) What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant:

1. Facts:

(a) That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.

2. Factual Issues:

(a) Did plaintiff, by his own negligence, contribute to his injury and damage?

IV. EXHIBITS

Exhibits not listed will not be admitted by the Court unless good cause be shown and justice demands their admission.

A. Plaintiff:

Number	Title	Objection	Rule Relied Upon
1	Patrol Report	Hearsay	803
2	Photo of plaintiff	None	

B. Defendant:

Number	Title	Objection	Rule Relied Upon
1	Photo of scene	None	
2	Scale model	None	

V. WITNESSES

No unlisted witness will be permitted to testify as a witness in chief except by leave of Court when justified by exceptional circumstances.

A. Plaintiff:

Name	Address	Proposed Testimony
John Jones	615 Rains Street Wichita Falls, TX	Facts surrounding accident, extent of
Frank Flake Joe Rock	Selma, N.C. Temple, Arizona	Speed of defendant's vehicle, intoxication of driver

B. Defendant:

Name	Address	Proposed Testimony
All witnesses listed by plaintiff.		
Sam Smith	4 Appian Way Okla. City, OK	Facts surrounding the theft by driver of the vehicle

Appendix IV - Continued

VI. TRIALS BRIEFS, including requested jury instructions or proposed findings of fact and conclusions of law.

VII. ESTIMATED TRIAL TIME

_____.

VIII. POSSIBILITY OF SETTLEMENT

Good _____ Fair _____ Poor _____

IX. POSSIBILITY OF COURT-ANNEXED ARBITRATION - LOCAL RULE 43 (For Status Reports only - inapplicable for Final Pre-Trial Orders).

Include a statement as to the eligibility of this case for mandatory arbitration and/or whether you wish to consent to arbitration under Local Rule 43. In accordance with 28 U.S.C. §652(a)(2) and Local Rule 43(B)(2)(c), this statement should also include any necessary certification as to amount of damages.

All parties approve this order and understand and agree that this order supersedes all pleadings and shall not be amended except by order of the Court.

_____
John Y. Lawyer
Counsel for Plaintiff

_____
Sam X. Attorney
Counsel for Defendant.

APPROVED this _____ day of _____, 19___.

_____
United States District Judge

D

APPENDIX V

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

_____ Plaintiff,	)	
vs.	)	Case No. _____
_____ Defendant.	)	

MINUTE OF ORDERS ENTERED AT STATUS OR
FINAL PRETRIAL CONFERENCE

Date _____ Time _____ to _____

Judge _____ Clerk _____ Total _____

Case to be tried: Jury _____ Nonjury _____ Trial Docket _____

Appearing for Plaintiff: _____

Appearing for Defendant: _____

THE FOLLOWING DEADLINES ARE SET BY THE COURT

1. Motions to join additional parties to be filed by _____

2. Motions to amend pleadings to be filed by _____

3. Plaintiff to submit to defendant final list of witnesses in chief, together with addresses and brief summary of expected testimony where witness has not already been deposed*: _____

4. Defendant to submit to plaintiff final list of witnesses in chief, together with addresses and brief summary of expected testimony where witness has not already been deposed*: _____

5. Plaintiff to submit to defendant final exhibit list (if exhibit is nondocumentary, a photograph or brief description thereof sufficient to advise defendant of what is intended will suffice)*: _____

6. Defendant to submit parties final exhibit list (if exhibit is nondocumentary, a photograph or brief description thereof sufficient to advise plaintiff of what is intended will suffice)*: _____

7. Discovery to be completed by: _____

8. Plaintiff's final contentions to be submitted to defendant's counsel by: _____

9. Defendant's final contentions to be submitted to plaintiff's counsel _____ days thereafter

10. All dispositive motions to be filed by _____

11. All stipulations to be filed by _____

12. Motions in limine to be filed by _____

13. Requested jury instructions to be submitted on or before _____

Appendix V - Continued

14. Joint statement of case to be submitted by _____

15. Requested voir dire to be submitted by _____

16. Trial briefs to be filed by _____

17. Proposed findings and conclusions to be submitted no later than _____

18. Hypothetical questions to be submitted in writing no later than _____

19. Any objections to the above trial submissions to be filed 5 days thereafter.

20. Final pretrial order approved by all counsel to be submitted to the Court by _____

21. Plaintiff's counsel is directed to initiate settlement discussions with defendant on or before _____ and report status of such discussions to the Court no later than _____

22. This case is referred to Mandatory Arbitration under Local Rule 43 ☐.

This case is referred to Consensual Arbitration under Local Rule 43 ☐.

The proposed Arbitration Hearing date is _____.

The Court exempts the case from Arbitration ☐.

23. IT IS ORDERED that all exhibits intended to be offered herein be premarked at least _____ days before the commencement of the trial. The Clerk will supply gummed labels for this purpose.

24. Other: _____

_____

25. Supplemental Status Conference to be set _____

26. Final Pretrial to be set _____

_____

* The exchange of witnesses required by numbers 3 and 4 above shall be by letter with two copies of the letter of transmittal to be submitted to the Clerk of this Court for filing. Except for good cause shown, no witness shall be permitted to testify in chief for any party unless such witness' name was listed in the letter of transmittal. The exchange of exhibits required by numbers 5 and 6 above shall also be accomplished via a letter of transmittal with a copy thereof to be furnished to the Clerk for filing. If upon receipt of such final exhibit list a party does not make written objection thereto within five (5) days, he is deemed to have waived all objection to said exhibit or exhibits. If written objection is so filed, the basis of same shall be spelled out in detail by way of brief. Further, in the event of objection both sides shall, in the pretrial order, state the rule or rules upon which they rely.

BY ORDER OF THE COURT.

ROBERT D. DENNIS, CLERK

by: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

	)	
	)	
Plaintiff(s),	)	
	)	
v.	)	**No. CIV-_____**
	)	
	)	**ORDER REGARDING**
	)	**STATUS/SCHEDULING CONFERENCE**
Defendant(s).	)	

This matter came before the Court for purposes of a Status/Scheduling Conference on the _____ day of _____, 19___. Appearing for the plaintiff(s) at said conference was _____ _____. Appearing for the defendant(s) at said conference was _____ _____. The following deadlines were set by the Court at the conference:

MOTIONS TO JOIN OR AMEND

1. Motions to join additional parties or to amend pleadings shall be filed by _____.

DISCOVERY CUT-OFF AND FINAL CONTENTIONS

2. The discovery cutoff date in this matter is _____. Plaintiff(s) final contentions are to be filed with the Court by _____. Defendant(s) final contentions are to be filed with the Court within ten (10) days thereafter.

All discovery devices, such are requests for admissions or interrogatories, must be initiated in sufficient time prior to the discovery cutoff date so that the responses will be due prior to discovery cutoff. Discovery requests by either party which would require responses outside the discovery cutoff period must be approved in advance by the Court upon a showing of compelling circumstances.

The parties may, however, conduct any form of discovery outside the time limitations of this paragraph without Court approval if (1) such discovery is agreed upon by the parties and (2) such discovery will not impact the trial date or dispositive motion deadline dates set forth below. To avoid credibility contests over the existence or non-existence of any such agreement, it must be reduced to writing in order to be enforced or recognized by the Court.

WITNESS LISTS

3. By _____, the plaintiff(s) shall submit to the defendant(s) its final list of witnesses in chief, together with addresses and a brief summary of expected testimony where the witness has not already been deposed. If the witness has been deposed, no summary is necessary.

4. By _____, the defendant(s) shall submit to the plaintiff(s) its final list of witnesses in chief, together with addresses

and a brief summary of expected testimony where the witness has not already been deposed.

5. The exchange of witnesses required by paragraphs 3 and 4 shall be by letter, with a copy of said letter to be submitted to the Clerk of this Court for filing. Except by leave of Court and exceptional circumstances shown, no witness shall be permitted to testify for any party unless such witness's name was listed in the letter of transmittal. These rules concerning the exchange of witness lists contemplate identifying with particularity all potential witnesses so that they may be deposed by opposing counsel, if desired, during the discovery period. Generalized non-specific descriptions of witnesses or categories of witnesses are not in compliance with this rule, unless the parties have mutually agreed to a delayed identification of certain witnesses pursuant to paragraph 2 of this order. To avoid credibility contests over the existence or non-existence of any such agreement, it must be reduced to writing in order to be enforced or recognized by the Court. The Court will not tolerate the "hiding" or "attempted hiding" of witnesses during the discovery period.

EXPERT WITNESSES

6. With regard to each expert witness, the identity and area of expertise must be made known, and the expert's curriculum vitae must be filed with the Clerk of the Court as part of the letter of transmittal referenced in paragraph 5. The curricula vitae filed with the Clerk shall be in written form suitable for introduction into evidence as an exhibit at trial. Moreover, the expert must be made available for deposition examination during the discovery period unless waived, in writing, by opposing counsel. Unless agreed otherwise by counsel pursuant to paragraph 2 of this order, the deposition of each expert shall be taken in sufficient time to allow the testimony to be concluded within the discovery period. Additionally, at least two (2) days prior to the scheduled deposition of the expert, the party who is sponsoring the expert as its witness will provide opposing counsel with (1) an identification and description of the specific areas or fields in which the witness will be tendered as an expert, and (2) a separate listing and brief summary of each opinion to be rendered by the expert during the expert's direct examination at trial. This latter requirement may not be waived by any party under any circumstances. Upon failure to accomplish the above, the expert will not be permitted to testify absent exceptional circumstances. If an expert's deposition testimony is to be offered in video form at trial, no more than five (5) minutes of the presentation of the direct examination will be devoted to the issue of the expert's qualifications.

EXHIBIT LISTS

7. By _____, the plaintiff(s) shall provide defendant(s) its final exhibit list, containing the proposed number and a brief description of each exhibit which is intended to be offered. The list shall be in conformity with the format set forth in Appendix III of the Local Rules. By _____, the defendant(s) shall provide plaintiff its final exhibit list in the same fashion.

This rule contemplates that the exhibits will be in existence for examination by opposing counsel at the time the exhibit list is filed. Generalized descriptions of exhibits to be prepared in the future are not

in compliance with this rule, unless the parties have mutually agreed to a delayed exchange of certain exhibits pursuant to paragraph 2 of this order. To avoid credibility contests over the existence or non-existence of any such agreement, it must be reduced to writing in order to be enforced or recognized by the Court. Absent compelling reasons, exhibits which have not been provided pursuant to this paragraph will not be received at trial.

The Court expects that the parties will narrow, rather than expand, their exhibit lists as the case approaches trial. All exhibits which are intended to be offered into evidence at trial shall be premarked and reviewed by the parties at least ten (10) days prior the commencement of the trial. The Clerk will supply gummed labels for this. No trial time will be used for the marking of exhibits.

DISPOSITIVE MOTIONS

8. All dispositive motions shall be filed by the parties by _____ _____. Responses to said motions shall be filed by _____, and the replies to said responses, if permitted by the Court upon application, shall be filed within seven (7) days of the response filing date.

SETTLEMENT

9. Plaintiff's counsel is directed to initiate settlement discussions with the defendant(s) immediately and report the status of such discussions to the Court by letter no later than _____. No monetary figures are to be referenced in the letter. A Settlement Conference in this matter shall be held before the Settlement Conference Magistrate at a date to be set by the Magistrate and the parties after coordination with the Clerk's office, but no later than _____. The parties shall take the initiative in making sure that the above deadlines are met.

TRIAL DATE

10. The trial date for this matter shall be set for the _____ trial docket. The case will be tried to (a jury, the Court). A jury demand has been made by _____.

FINAL PRE-TRIAL FILINGS

11. Any motions in limine shall be filed by _____. Responses shall be filed by _____ and replies, if permitted by the Court upon application, shall be filed within seven (7) days of the response filing date.

12. On _____, one week prior to the trial of this matter, the parties shall file suggested voir dire, requested jury instructions, and, if desired, trial briefs. Any objections (optional) to the above referenced trial submissions shall be filed five (5) days thereafter. In non-jury matters, proposed findings of fact and conclusions of law are to be submitted no later than _____.

13. By _____, a final pretrial order approved by all counsel in conformity with Local Rule 17(b) and the format set forth in Appendix IV of the Local Rules of this district, shall be submitted to the Court. The parties in particular are directed to page iii of Appendix IV with regard to the specification of all objections to proposed exhibits, with said specifications containing the evidentiary rule or rules relied upon. Exhibits which are not objected to in the final pretrial order shall be deemed admitted at trial without the necessity of a further evidentiary foundation or hearing. The Court will not tolerate "shotgun" or "blanket" authenticity objections or other such objections appearing in the final pretrial order. Each objection lodged in the final pretrial order must be able to withstand the "reasonable inquiry" test of Rule 11 of the Federal Rules of Civil Procedure.

14. This case referred to Mandatory Arb. under Local Rule 43 [ ].

This case referred to Consensual Arb. under Local Rule 43 [ ].

The proposed Arbitration Hearing date is _____.

The Court exempts the case from Arb. [ ].

EXTENSIONS OF TIME

15. The Court also advised counsel that it will not favor motions to alter the schedule set forth above, with the exception of proposed schedule changes which (1) are agreed upon by the parties, and (2) which will not alter the trial date or dispositive motion deadline date. Scheduling matters involving discovery which meet both of these requirements do not require Court approval. See paragraph 2 supra. Any other motion to alter the schedule set forth in this order which does not meet both of the requirements set forth in this paragraph must be accompanied by a strong showing setting forth in detail the compelling circumstances justifying the proposed schedule changes.

16. The parties were also advised that motions which are not responded to within the specified period of time "shall be deemed confessed." See Local Rule 14(A) of the Western District of Oklahoma. Failure to comply with the deadlines set forth in this order will in all likelihood result in the imposition of sanctions. See Fed. R. Civ. P. 11, 16(f), 26(g) and 37. Roberts v. McRory 693 F. Supp. 998 (W.D. Okla. 1987).

Counsel were provided a copy of General Order to Attorneys Appearing Before Judge Layn R. Phillips, Court Exhibit #1.

17. Other: _____

_____.

Time Started: _____
Time Ended: _____

BY ORDER OF THE COURT.

_____
LAYN R. PHILLIPS
United States District Judge

Counsel Appearing for
Plaintiff(s)

Counsel Appearing for
Defendant(s)

E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Plaintiff(s),	)	
vs.	)	No. CIV-
Defendant(s).	)	

O R D E R

IT IS SO ORDERED that the following Certificate be signed and filed by plaintiff and plaintiff's counsel, or pro se plaintiff, within 10 days of filing a complaint and by defendant and defendant's counsel, or pro se defendant, upon filing the first responsive pleading, or as otherwise ordered by the Court.

RALPH G. THOMPSON
United States District Judge

CERTIFICATE

We, and each of us, being both counsel and party(ies), or pro se party, certify as follows:

1. Rule 11, Federal Rules of Civil Procedure, has been read and understood as establishing standards for both factual and legal representations and claims, and providing that the Court shall impose sanctions for a party's or counsel's violation of such rule.

2. It is understood that, depending on the case, the losing party will be required to pay the costs (including deposition expenses of the winning party) and may also be required to pay the winning party's attorney's fees.

3. Counsel and party have discussed (or pro se party understands) realistically the time and expense of litigation.

including costs of pre-trial preparation, trial, and the time and costs of appeal.

4. Counsel (or pro se party) acknowledges responsibility to comply with the Federal Rules of Civil Procedure, Federal Rules of Evidence and the Local Rules of this Court.

5. Counsel and party (or pro se party) understand(s) the necessity of adhering to all schedules and deadlines established by statutes, rules and orders of the court, and further understand(s) that consequences for noncompliance may be the imposition of sanctions, including fines or payment of expenses, default judgment or dismissal of the case.

DATED _____, 19____.

_____ _____
COUNSEL PARTY

_____ _____
COUNSEL PARTY

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

F

NOTE

YOU HAVE JUST FILED A CIVIL ACTION THAT HAS BEEN ASSIGNED TO THE DOCKET OF JUDGE THOMAS D. LAMBROS. ALL PROCEEDINGS IN THIS ACTION SHALL BE CONDUCTED IN ACCORDANCE WITH THE DIRECTIVES SET FORTH IN THE CASE MANAGEMENT ORDER ATTACHED HERETO. PLAINTIFF'S COUNSEL IS RESPONSIBLE FOR PROVIDING ALL DEFENSE COUNSEL WITH A COPY OF THE ATTACHED ORDER.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORDER RE:)
)
CASE MANAGEMENT PLAN)
and)
CASE MANAGEMENT BUDGET)
FOR NEWLY FILED ACTIONS)

LAMBROS, DISTRICT JUDGE

Fed. R. Civ. P. 1 provides that the Rules of Civil Procedure shall be construed to secure the just speedy, and inexpensive determination of every action. In his 1984 Year-End Report on the Judiciary, Chief Justice Warren E. Burger stated that judges must act as litigation managers to regulate discovery and the litigation process in general. Consistent with these mandates, the rules prescribed in this Order shall apply to the cases on the docket of Judge Thomas D. Lambros for the purpose of promoting their fair, efficient, and inexpensive resolution.

Counsel for plaintiff is hereby entrusted with the responsibility for providing all defense counsel with a copy of this order as soon as possible. Pursuant to Fed. R. Civ. P. 12(a), a defendant must serve a responsive pleading within twenty (20) days of the filing of the complaint. Plaintiff's counsel shall therefore serve a copy of this order on all defense counsel immediately after learning their identity. Counsel for all parties are expected to be fully aware of the

directives set forth herein, and plaintiff's counsel shall be held accountable for a defendant's failure to comply with this order because of that defendant's lack of knowledge concerning the contents of this order.

In order to provide a schedule of proceedings for this action, counsel shall meet and jointly prepare a case management plan. This plan shall set forth in detail a schedule for discovery and motion practice that is tailored to fit the particular needs of the case and avoids any unnecessary delay. In carrying out discovery, counsel are expected to exercise restraint and to demonstrate an appreciation for the costs to be borne by the litigants. Discovery shall be conducted for the purpose of eliciting information necessary to facilitate a prompt resolution of the case and not for the purpose of preparing for a protracted trial. Counsel shall consider the use of "consolidated discovery requests" - that is forms which consolidate interrogatories, requests for production, and requests for admissions on a single document rather than as separate filings. In this way counsel can eliminate multiple filings and the flow of unnecessary paper. The number of interrogatories, requests for production, and requests for admissions contained in a consolidated discovery request shall not exceed thirty (30). This number may be expanded only by leave of court following the initial status conference conducted with respect to the case. Depositions shall be kept to a minimum. In order to eliminate the scheduling of unnecessary

depositions, counsel shall explore alternative methods of obtaining the needed information.

In formulating a discovery schedule counsel shall give serious thought to their respective discovery needs prior to drafting their requests. Discovery should proceed in stages calculated to elicit information necessary to resolve the case through settlement prior to the expenditure of substantial time and effort. Except in situations where there is a clear and obvious need to preserve information which may be irretrievably lost, intense discovery should be deferred until it is firmly established that the case will proceed to trial. Counsel are expected to act in a professional manner and cooperate with one another to avoid any unnecessary discovery disputes. It is the expectation of the Court that counsel are fully capable of managing discovery without extensive judicial intervention in the form of protective orders and orders compelling discovery.

Essential to the proper development of a case management plan is the establishment of a case management budget. The ever-increasing costs of litigation has limited the average individual's access to the court system. It has therefore become the duty of all members of the legal community to work diligently towards reducing the high costs of litigation. Accordingly, counsel shall meet with their respective clients and discuss in detail the costs expected to be incurred during the pendency of the lawsuit. In these discussions, counsel shall inform their clients of foreseeable attorneys' fees, court

costs, discovery expenses, witness fees, and all other expenses likely to arise. At the initial status conference, counsel shall represent to the Court that a case management budget has been prepared and that their clients have been fully apprised of the costs of the litigation.

Within thirty (30) days of the date on which the complaint was filed, counsel for all parties shall meet to discuss the case management plan. In cases where one or more of the parties reside outside the district, this meeting may be conducted telephonically. Within forty-five (45) days of the date of the filing of the complaint, counsel shall reduce the case management plan to writing and file a copy of the plan with the Court. At the same time counsel shall also jointly file a brief synopsis of the case (not to exceed two pages except in the instance of a complex case) setting forth the relevant facts and salient legal issues. The case management plan developed by counsel shall assure that the case is prepared for trial within six (6) months of the date on which action was filed. Exceptional cases shall be placed in a state of trial readiness within nine (9) months. Cases that are complex and may reasonably require a longer period of preparation may be exempted from these time limits by leave of court at the initial status conference. However, such leave shall be granted only if the case management plan provides that trial of the action shall be conducted within a reasonable period of time and counsel represents to the Court that their respective clients have

reviewed the plan and have approved the case management budget. The fact that a defendant files a motion pursuant to Fed. R. Civ. P. 12(b) or (c) will not relieve the parties of the obligation to meet and develop a case management plan.

The Court shall conduct the initial status conference on this case fifty (50) days after the complaint has been filed. At this conference, counsel shall inform the court if they perceive a need to expand the scope of discovery beyond the thirty (30) requests permitted in the consolidated discovery request. In those cases in which counsel wish to expand discovery, counsel shall have a detailed discovery plan prepared and shall represent to the Court that their clients have been apprised of the costs of the desired discovery. To facilitate the Court's monitoring of case progress, counsel shall jointly file a brief status report (not to exceed two (2) pages) concisely summarizing the development of the case every twenty-one (21) days following the initial status conference.

All motions shall be filed in accordance with the schedule established for motion practice in the case management plan. Requests for extensions of time in which to respond to motions shall not be granted inasmuch as counsel shall be given the opportunity to set response dates in the case management plan. When briefing motions, counsel are encouraged to avoid filing lengthy memoranda containing unnecessary verbage. If counsel find it imperative to file a brief in excess of twenty (20) pages, attached to that brief shall be a short synopsis

(not to exceed five (5) pages) highlighting the significant issues raised in the brief.

In drafting the case management plan, counsel shall, in accordance with Fed. R. Civ. P. 16(c)(7), seriously consider the use of alternative dispute resolution procedures. Cases in which a jury demand has been made shall be assigned to Summary Jury Trial in accordance with the recent resolution of the Judicial Conference of the United States endorsing the use of Summary Jury Trial as an effective means of promoting settlement. In non-jury cases, counsel shall explore the use of arbitration, mediation, or any other extrajudicial method of dispute resolution. Cases involving a dispute between two business entities are good candidates for resolution through the use of the mini-trial, a procedure separate and distinct from Summary Jury Trial. In a mini-trial, corporate decision-makers are given the opportunity to observe the strength and weakness of their positions in a private trial conducted by a neutral advisor outside of court.

The Court is mindful that this order places substantial responsibility for the management of the case in the hands of counsel. The purpose of this order, however, is not to burden counsel, but to provide them with the opportunity to manage the case in a manner which best accommodates their particular needs as well as the interests of their clients. The effective implementation of this order necessarily compels a substantial degree of cooperation among counsel. Nonetheless, this Court

firmly believes that the lawyers of this community aspire to the highest standards of the legal profession and will work enthusiastically to carry out the directives set forth herein. An implicit corollary to the Federal Rules of Civil Procedure is the rule of candor, which lawyers must allow to guide them through the various stages of the development of the case. Obstinacy and dilatory behavior should not infiltrate the proceedings. The recent amendments to Fed. R. Civ. P. 7, 11 and 26 impose a mandatory duty on the trial judge to impose sanctions upon lawyers who fail to comply with the Court's directives. In summary, it is the conviction of this Court that the fair, efficient, and inexpensive administration of justice can best be achieved by allowing counsel to work with the judge in creating a management plan that best serves the needs of the individual case.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

UNITED STATES DISTRICT COURT
Northern District of Ohio
CLEVELAND, OHIO 44114

THOMAS D. LAMBROS
Chief Judge

March 25, 1991

Judge Lee R. West
Western District of Oklahoma
Attn: Ann Marshall, Law Clerk
3001 United States Courthouse
200 N.W. 4th Street
Oklahoma City, Oklahoma 73102

Dear Ms. Marshall:

I have enclosed a copy of the Case Management and Budget Order utilized in cases assigned to Chief Judge Thomas D. Lambros. Although it is anticipated that this order will be revised in light of the Civil Justice Reform Act of 1990, some of the same concepts, such as alternative dispute resolution, budgeting, phased discovery and differentiated case management, will be incorporated. I hope you will find components of this order useful in formulating case management plans for the Western District of Oklahoma. Please let me know if I may be of further assistance.

Sincerely,

Joan E. Pettinelli
Law Clerk

Enclosure

G

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-528
United States Courthouse
Tulsa, Oklahoma 74103

John Leo Wagner
Magistrate

(918) 581-7976
(FTS) 745-7976

March 19, 1991

Ms. Ann Marshall
ADR Law Clerk
United States District Court
Western District of Oklahoma
3011C U. S. Courthouse
200 N. W. 4th
Oklahoma City, Oklahoma 73102

Re: Northern District of Oklahoma - Scheduling Procedures

Dear Ann:

I enjoyed comparing notes the other day on the telephone. As you requested, I enclose the following:

1. Our current Scheduling Order.
2. Our current Settlement Conference Order.

During our initial status conferences, we generally ask the lawyers to help us design a settlement plan. Such a plan will include deadlines for communications between the lawyers and the filing of a settlement report; a date for requesting a settlement conference; or the immediate request for a settlement conference at a time when it will be of optimum effectiveness. If the latter route is pursued, my clerk then follows up by sending out the Settlement Conference Order, which sets the specific date and time for the settlement conference, the dates for the Settlement Conference Statements, and indicates who the settlement magistrate judge or adjunct settlement judge will be.

Oftentimes, as an alternative to this procedure, the lawyers and I discuss settlement during the initial status conference and, based on those discussions, I make a recommendation for settlement and require the attorneys to pass that recommendation on to their clients. The lawyers are then expected to call my office within forty-eight (48) hours or so and indicate whether or not their clients are willing to accept the settlement proposal. If both sides accept, the case is settled. If one side does not accept, then the case proceeds along the course set out in the Scheduling Order, which had been prepared at the initial scheduling conference.

I hope these materials are of some assistance to you. Please let me know if I can do anything else to help.

Very truly yours,

John Leo Wagner
United States Magistrate Judge

JLW/ka

Enclosures

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

_____	)	
	)	
Plaintiff(s),	)	
	)	
v.	)	No. __-C-____-_
	)	
_____	)	
	)	
Defendant(s).	)	

SETTLEMENT CONFERENCE ORDER

PLEASE READ THIS ORDER CAREFULLY! It has been revised. The latest revisions appear in bold print.

Judge _____ has referred this case for a settlement conference and directed the Clerk to enter this Order. _____ will act as a settlement judge who will not be involved in the actual trial of the case and who will assist in an objective appraisal and evaluation of the lawsuit. The following are mandatory guidelines for the parties in preparing for the settlement conference.

1. FULL SETTLEMENT AUTHORITY REQUIRED

In addition to counsel who will try the case being present, a person with full settlement authority must likewise be present for the conference. This **requires** the presence of your client or, if a corporate entity, an authorized **non-lawyer** representative of your client. For a defendant, such representative must have final settlement authority to commit the company to pay, in the representative's discretion, a settlement amount recommended by the settlement judge up to the plaintiff's prayer (excluding punitive damage prayers in excess of $100,000.00) or up to the plaintiff's last demand, whichever is lower. For a plaintiff, such representative must have final authority, in the representative's discretion, to authorize dismissal of the case with prejudice, or to accept a settlement amount recommended by the settlement judge down to the defendant's last offer.

The purpose of this requirement is to have representatives present who can settle the case during the course of the conference without consulting a superior. A governmental entity may be granted permission to proceed with a representative with limited authority upon proper application pursuant to Local Court Rule 17.1A.

2. EXCEPTION WHERE BOARD APPROVAL REQUIRED

If Board approval is required to authorize settlement, attendance of the entire Board is requested. The attendance of at least one sitting member of the Board (preferably the Chairman) is absolutely required.

3. APPEARANCE WITHOUT CLIENT PROHIBITED

Counsel appearing without their clients (whether or not you have been given settlement authority) will cause the conference to be canceled and rescheduled. Counsel for a government entity may be excused from this requirement upon proper application under Local Court Rule 17.1A.

4. AUTHORIZED INSURANCE REPRESENTATIVE(S) REQUIRED

Any insurance company that is (1) a party, (2) is contractually entitled to indemnity or subrogation out of settlement proceeds, or (3) is contractually required to defend or to pay damages, if any, assessed within its policy limits in this case must have a fully authorized settlement representative present at the conference. Such representative must have final settlement authority to commit the company to pay, in the representative's discretion, an amount recommended by the settlement judge within the policy limits. The purpose of this requirement is to have an insurance representative present who can settle the outstanding claim or claims during the course of the conference without consulting a superior. An insurance representative authorized to pay, in his discretion, up to the plaintiff's last demand will also satisfy this requirement.

5. ADVICE TO NON-PARTY INSURANCE COMPANIES REQUIRED

Counsel of record will be responsible for timely advising any involved non-party insurance company of the requirements of this order.

6. PRE-CONFERENCE DISCUSSIONS REQUIRED

Prior to the settlement conference, the attorneys are directed to discuss settlement with their respective clients and insurance representatives, and opposing parties are directed to discuss settlement so the parameters of settlement have been explored well in advance of the settlement conference. **This means the following: Such discussions must occur no less than twenty (20) calendar days before the scheduled settlement conference. If neither party has previously made any offer to settle, Plaintiff must, no less than twenty (20) days before the conference tender to Defendant a written settlement offer. Thereafter Defendant must make and deliver a written response within five (5) calendar days. That response may either take the form of a written substantive offer, or, a written communication that Defendant declines to make any offer.**

If either party declines to make any offer as required above, it shall instead, within the time restrictions set out above, move to continue or strike the conference, setting forth therein the reasons(s) for such motion.

If either party declines to make an offer yet still wishes a settlement conference, it must specify with particularity the reasons it yet desires a conference in its Settlement Conference Statement delivered to the Court. Silence or failure to communicate as required is <u>not</u> itself a form of communication which satisfies these requirements.

7. SETTLEMENT CONFERENCE STATEMENT

A settlement conference statement of each party must be submitted directly to the settlement judge no later than _____ _____ setting forth the relevant positions of the parties concerning factual issues, issues of law, damages, and the settlement negotiation history of the case, including a recitation of any specific demands and offers that may have been conveyed. Copies of your settlement conference statement are to be promptly transmitted to all counsel of record. Pertinent evidence to be offered at trial should be brought to the settlement conference for presentation to the settlement judge if thought particularly relevant. The settlement conference statement may not exceed five (5) pages in length and will not be made a part of the case file.

8. PURPOSE OF CONFERENCE

The purpose of the settlement conference is to permit an informal discussion between the attorneys, parties, non-party indemnitor or insurers, and the settlement judge of every aspect of the lawsuit bearing on its settlement value, thus permitting the settlement judge to privately express his views concerning the settlement value of the parties' claims. The settlement judge may, in his or her discretion, converse with the lawyers, the parties, the insurance representatives or any one of them outside the hearing of the others.

9. CONFIDENTIALITY STRICTLY ENFORCED

Neither the settlement conference statements nor communications of any kind occurring during the settlement conference can be used by any party with regard to any aspect of the litigation or trial of the case. Strict confidentiality shall be maintained with regard to such communications by both the settlement judge and the parties.

10. CONTINUANCES

Applications for continuance of the settlement conference will not be entertained unless such application is submitted to the settlement conference judge in writing at least eleven (11) days prior to the scheduled conference. Any such application must contain both a statement setting forth good cause for a continuance and a recitation of whether or not the continuance is opposed by any other party.

11. SETTING

The settlement conference is set on _____, the _____ day of _____, 19 91, at ____ o'clock p.m., in Tulsa, Oklahoma, Magistrate's Courtroom #2, on the Third Floor of the Federal Courthouse.

12. NOTIFICATION OF PRIOR SETTLEMENT REQUIRED

In the event a settlement between the parties is reached before the settlement conference date, parties are to notify the settlement judge immediately.

13. CONSEQUENCES OF NON-COMPLIANCE

Upon certification by the Settlement Judge or Adjunct Settlement Judge of circumstances showing non-compliance with this order, the assigned trial judge may take any corrective action permitted by law. Such action may include contempt proceedings and/or assessment of costs, expenses and attorney fees, together with any additional measures deemed by the court to be appropriate under the circumstances.

Dated this ____ day of _____, 19 91.

JACK C. SILVER, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

By: _____
Deputy Clerk

cc: ALL COUNSEL OF RECORD

Revised 1-8-91

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

_____ Plaintiff(s),	)	
v.	)	No.
_____ Defendant(s).	)	

SCHEDULING ORDER

1. _____ TRIAL DATE ( ) JURY ( ) NON-JURY
2. _____ ESTIMATED TRIAL TIME
3. _____ PRETRIAL CONFERENCE AT _____ o'clock
4. _____ MOTIONS FOR JOINDER OF ADDITIONAL PARTIES &/OR AMENDMENT
5. _____ DISCOVERY CUTOFF (NOTE: Interrogatories & R. 34 requests must be made 30 days in advance of this date.)

5a. _____ DOCUMENT
5b. _____ DEPOSITION
6. _____ DISPOSITIVE MOTION CUTOFF
6a. _____ RESPONSES
7. _____ REQUESTED JURY INSTRUCTIONS, VOIR DIRE, (JURY)
8. _____ PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW
9. _____ MOTIONS IN LIMINE
9a. _____ RESPONSES
10. _____ TRIAL BRIEFS
11. _____ AGREED PRETRIAL ORDER

11a. _____ AGREED PRETRIAL MEMO
11b. _____ FINAL PRETRIAL ORDER

12. _____ SETTLEMENT REPORT (Filed - Include date of meeting, persons present, and results.)
13. _____ REQUEST FOR SETTLEMENT JUDGE
14. SETTLEMENT CONFERENCE REQUESTED AFTER _____ (MONTH & YEAR)
15. CONSENT TO ADJUNCT SETTLEMENT JUDGE ( ) YES ( ) NO
16. _____ EXCHANGE OF WITNESS LIST, FILED OF RECORD

16a. _____ EXPERT WITNESS EXCHANGE, FILED OF RECORD

17. _____ EXCHANGE OF PREMARKED EXHIBITS
18. _____ DEPOSITION/VIDEOTAPE/INTERROGATORY DESIGNATIONS

18a. _____ COUNTER-DESIGNATIONS
18b. _____ WRITTEN OBJECTIONS TO DESIGNATIONS OR COUNTERDESIGNATIONS

19. STIPULATIONS/ADDITIONALLY ORDERED: _____

_____

IT IS ORDERED that no date set by this Order can be changed except for good cause and upon written Order of this Court prior to the date scheduled.

This Ordered is entered this _____ day of _____, 198___.

_____
Attorney for Plaintiff

_____
UNITED STATES DISTRICT JUDGE/MAGISTRATE

_____
Attorney for Defendant

H

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	NO. CR-
Defendant(s).	)	

ORDER FOR DISCOVERY AND INSPECTION IN CRIMINAL CASES

In order to obviate unnecessary motions for discovery in criminal actions, proceedings, matters or cases assigned to the undersigned Court for trial,

IT IS ORDERED:

A. DISCOVERY BY DEFENDANT

1. Within ten (10) days hereof with respect to any defendant who has entered a plea of not guilty to the indictment filed in this case, the United States Attorney, or one of his assistants, and the defendant's attorney shall meet and confer, and upon request of the attorney for the defendant the Government shall:

a. Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or may become known, to the attorney for the Government.

b. Provide defendant's attorney with the substance of an oral statement made by the defendant in response to any interrogation by an employee or agent of any governmental agency, local, state or federal, involved in the investigation or reporting of the offense(s) charged in the indictment, whether or not reduced to writing.

c. Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or may become known to the attorney for the Government, and which are material to the case.

d. Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury which relates to the offense(s) charged in the indictment.

e. Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the Government.

f. Permit defendant's attorney to inspect and copy all books, papers, documents, photographs, tangible objects, demonstrative exhibits, charts or copies or portions thereof relevant to the offense(s) charged in the indictment within the possession, custody or control of the Government. This will

include, but is not limited to, all exhibits which the Government intends to utilize as evidence in chief at trial.

g. Make known to defendant's attorney the defendant's prior criminal record in the possession of the attorney for the Government.

h. Make known to defendant's attorney the prior felony convictions of any witness the Government intends to call in its case-in-chief. The disclosure required by this paragraph, under appropriate circumstances, may be declined in accordance with paragraph E(1).

i. Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant within the meaning of Brady v. Maryland, 173 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) and related cases.

j. Provide defendant's attorney a written resume or statement of the qualifications of any expert witness which the United States Attorney intends to call in its case in chief, together with a statement of the substance of such expert's expected testimony.

k. Advise defendant's attorney of the existence or nonexistence of any evidence in the possession of the Government obtained as the result of any electronic surveillance or wiretap.

l. Advise defendant's attorney of the contemplated use of informer testimony (fact of informer only, not name or testimony).

m. Disclose to defendant's attorney its intent to use any statements or confessions made by the defendant to law

enforcement officials. If defendant questions the admissibility of such statement or confession, defendant shall file an appropriate motion no later than seven (7) days subsequent to the discovery conference and the hearing required by Jackson v. Denno, 378 U.S. 368 (1964), will be held prior to the opening statements of counsel.

B. DISCOVERY BY GOVERNMENT

1. The defendant's attorney shall at the conference disclose to the United States Attorney:

a. A written resume or statement of the qualifications of any expert witness which the defendant intends to call in his case in chief, together with a statement of the substance of such expert's expected testimony.

b. The results, by the original or a copy, of any scientific or medical report which defendant intends to use in the presentation of his case in chief.

c. Defense of alibi. The United States Attorney shall at the conference notify defendant in writing of the specific time, date and place at which the offense(s) charged in the indictment is/are alleged to have been committed.

Defendant shall, in writing, within three (3) days thereafter notify the United States Attorney of the specific place at which he claims to have been at the time of the alleged offense(s) to which a defense of alibi will be addressed and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

Within five (5) days thereafter or such other time as the Court may direct, the United States Attorney shall inform the defendant of the names and addresses of the witnesses upon whom the Government intends to rely to establish defendant's presence at the scene of the alleged offense(s).

Failure to comply with the time limits set forth herein may result in the imposition of the sanction provided in Federal Rules of Criminal Procedure Rule 12.1(d).

d. Defense based on mental condition. The defendant shall notify the Government in writing that the defendant will rely upon the defense of insanity at the time of the alleged crime, or of mental disease, defect, or other condition bearing upon whether he had the mental state required for the offense(s) charged. Notice of such claimed defense shall also be filed with the Clerk.

Failure to give such notification in writing may result in the imposition of the sanction set forth in Federal Rules of Criminal Procedure Rule 12.2(d).

e. Entrapment. The defendant shall notify the Government in writing that defendant will rely on the defense of entrapment by government employees or agents to commit the offense(s) charged in the indictment.

f. Permit Government's attorney to inspect and copy all exhibits, including, but not limited to, books, papers, documents, photographs, tangible objects, demonstrative exhibits, charts or copies or portions thereof relevant to the offense(s) charged in the indictment within the possession, custody or

control of the defendant which the defendant intends to utilize as evidence in chief at trial.

C. OBJECTIONS TO EVIDENCE

1. Unless specific objection to the evidentiary foundation of any exhibit disclosed by the required conference of counsel (or the ongoing duties set forth in this Order), is made in writing to the Court at least one week prior to trial by the party opposing the admission of the exhibit, it shall be deemed that the requirement of foundation (including chain of custody) for the introduction of such evidence at trial is waived. This Order shall not affect the right of any party to object at the time of trial to the introduction of an exhibit other than on the basis of foundation.

2. If a report produced at the required conference of counsel contains the result of a scientific test, performed by a competent expert witness (as shown by a resume or written statement of qualifications) is not objected to within seven (7) days subsequent to the discovery conference, an objection to the admissibility of said report in lieu of the testimony of the expert performing such scientific test shall be deemed to have been waived.

D. JOINT STATEMENT

1. The day following completion of the conference required herein, the parties shall file a joint statement:

a. That the prescribed conference was held;

b. The date of said conference;

c. The name of the Assistant United States Attorneys with whom the conference was held, as well as the name of all defense counsel who participated in the conference;

d. The contested matters of discovery and inspection and any additional discovery or inspection desired by the defendant or the Government;

e. The fact of disclosure of all materials favorable to the defendant or the absence thereof within the meaning of Brady v. Maryland, 373 U.S. 83 (1963) and related cases;

f. The resolution of foundational objections to documentary evidence proposed to be used by both parties (except for the purposes of impeachment);

g. The resolution of chain of custody (where in issue);

h. The resolution of the admissibility of scientific analysis without need of calling the expert at the trial.

E. DISPUTED MATTERS

1. If, in the judgment of the United States Attorney or defense counsel, it would not be in the interests of justice to make any one or more disclosures set forth above and requested by opposing counsel, disclosure may be declined, and opposing counsel advised.

2. Any party requesting a ruling upon any contested matter of discovery shall file a motion and a memorandum setting forth the legal and factual reasons for nondisclosure within seven (7) days after the discovery conference. The opposing party shall respond within seven (7) days. In cases involving witness

security matters or otherwise sensitive situations, such memoranda may be filed under seal.

F. CONTINUING DUTY TO DISCLOSE

1. It shall be the joint duty of counsel for the defendant and the United States Attorney to schedule and hold the conference contemplated herein. The United States Attorney shall assure time and availability for such conference within the time herein provided unless the discovery conference is waived in writing by defendant and his counsel and such waiver filed with the Court.

2. Any duty of disclosure and discovery set forth herein is a continuing one upon both parties. It requires prompt disclosure of any and all matters called for by this Order which come into the possession of either party after the conference called for by this Order is held.

3. When the term "possession, custody or control of the Government" is used herein, it shall include, but not be limited to, those items in the actual possession, custody or control of the United States Attorney, as well as those items which may be acquired by inquiry of law enforcement officials, local, state and federal, involved in the transaction or transactions surrounding the offense(s) charged in the indictment.

G. WITNESS STATEMENTS

Counsel for the Government shall file with the Court in camera (under seal) a list of all witnesses to be called by the Government in its case in chief who made statements. Such list

shall be filed no later than twenty (20) days subsequent to the discovery conference.

H. MISCELLANEOUS

1. This Order shall also apply to any matter in which the United States proceeds by information rather than indictment.

2. This Order is not intended to preclude discovery by either the Government or defendant pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

I. MOTIONS

All pretrial motions shall be filed not later than seven (7) days subsequent to the discovery conference. The party opposing the motion shall file a response within seven (7) days after service of the motion.

The parties are otherwise ordered to comply with the Federal Rules of Procedure.

IT IS SO ORDERED this 22 day of JANUARY, 1991.

UNITED STATES DISTRICT JUDGE

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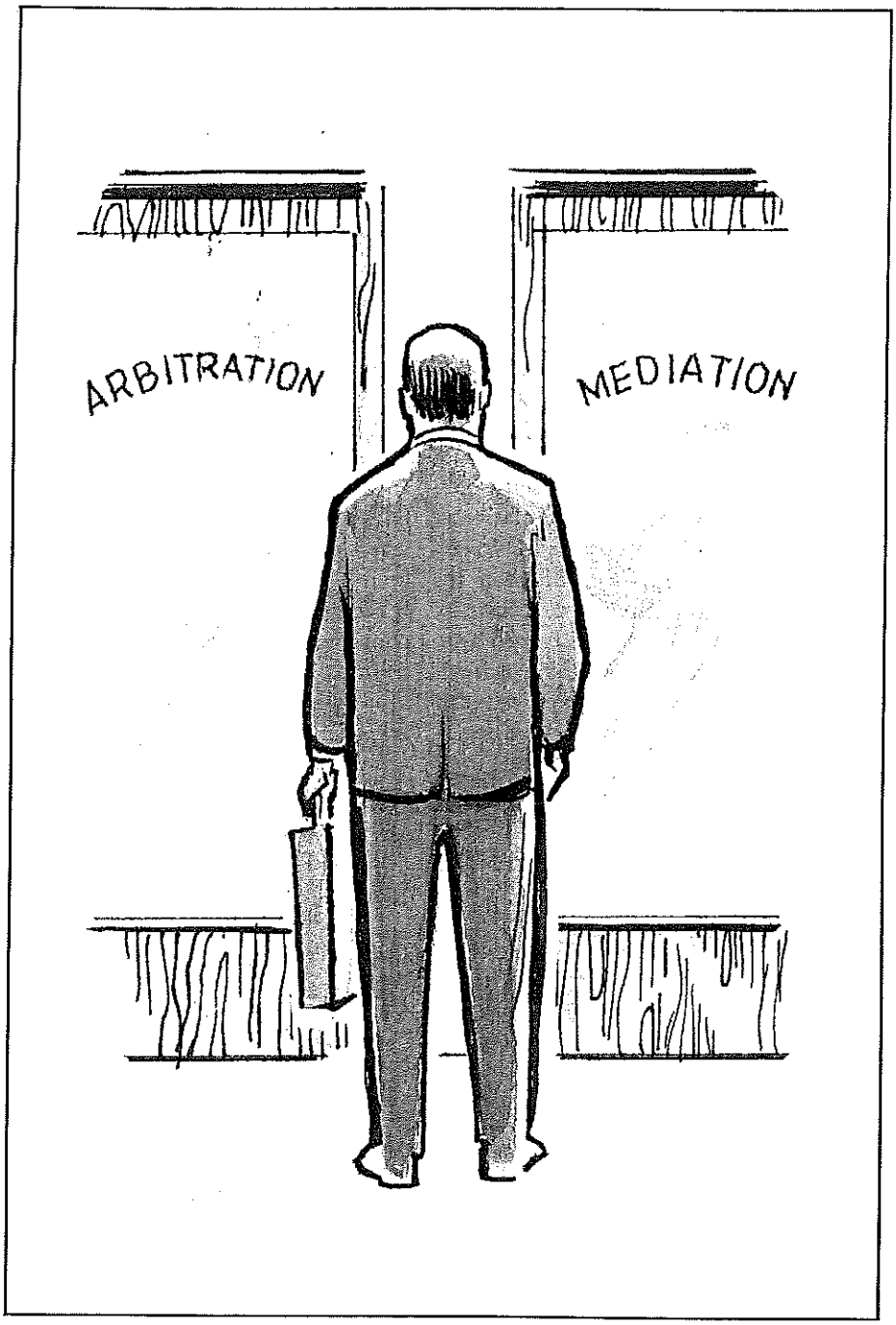

Arbitration vs. mediation—explaining the differences

by John W. Cooley

This article is adapted from a version that appeared in the CHICAGO BAR RECORD (January-February, 1985).

1. Robins, A GUIDE FOR LABOR MEDIATORS 6 (Honolulu: University Press of Hawaii, 1976).
2. *Id.*
3. Elkouri and Elkouri, HOW ARBITRATION WORKS 24 (Washington, D.C.: BNA, 3rd ed. 1973).
4. *Id.* at 25.

An amazing number of lawyers and business professionals are unaware of the differences between arbitration and mediation. Their confusion is excusable.

In the early development of the English language, the two words were used interchangeably. The *Oxford English Dictionary* provides as one historical definition of arbitration: "to act as formal arbitrator or umpire, to mediate (in a dispute between contending parties)." The Statutes of Edward III (1606) referring to what today obviously would be called a commercial *arbitration* panel, provided: "And two Englishmen, two of Lombardie and two of Almaigne shall (be) chosen to be mediators of questions between sellers and buyers."[1]

Modern labor relations statutes tend to perpetuate this confusion. As one commentator has observed:

> Some statutes, referring to a process as "mediation" describe formal hearings, with witnesses testifying under oath and transcripts made, require reports and recommendations for settlement to be made by the neutral within fixed periods, and either state or imply the finality of the "mediator's recommendations." In one statute the neutral third parties are called, interchangeably, mediators, arbitrators and impasse panels.[2]

The Federal Mediation and Conciliation Service (note the absence of "arbitration" in its title) performs a basic arbitration function by maintaining a roster from which the Service can nominate arbitrators to the parties and suggest "certain procedures and guides that [the Service believes] will enhance the acceptability of arbitration."[3]

The National *Mediation* Board (emphasis added) performs important functions in the promotion of arbitration and the selection of arbitrators for the railroad and airline industries.[4]

Libraries also assist in perpetuating the arbitration/mediation definitional charade. Search under "mediation" and you will invariably be referred to "arbitration." In the midst of this confusion—even among congressional draftsmen—it is time to explain the differences between the processes.

The most basic difference between the two is that arbitration involves a *decision* by an intervening third party or "neutral;" mediation does not.

Another way to distinguish the two is by describing the processes in terms of the neutral's mental functions. In arbitration, the neutral employs mostly "left brain" or "rational" mental processes—analytical, mathematical, logical, technical, administrative; in mediation, the neutral employs mostly "right brain" or "creative" mental

processes—conceptual, intuitive, artistic, holistic, symbolic, emotional.

The arbitrator deals largely with the objective; the mediator, the subjective. The arbitrator is generally a passive functionary who determines right or wrong; the mediator is generally an active functionary who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.

Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, the ability to perceive subtle psychological and behavioral indicators, in addition to logic and rational thinking, it is much more difficult than the arbitrator's role to perform effectively.[5] It is fair to say that while most mediators can effectively perform the arbitrator's function, the converse is not necessarily true.

Besides these differences the two processes are generally employed to resolve two different types of disputes. Mediation is used where there is a reasonable likelihood that the parties will be able to reach an agreement with the assistance of a neutral. Usually, mediation is used when parties will have an ongoing relationship after resolution of the conflict. Arbitration, on the other hand, is generally appropriate for use when two conditions exist: there is no reasonable likelihood of a negotiated settlement; and there will not be a continuing relationship after resolution.[6]

If the two processes are to be used in sequence, mediation occurs first, and if unsuccessful, resort is made to arbitration.[7] Viewed in terms of the judicial process, arbitration is comparable to a trial and mediation is akin to a judicial settlement conference. They are as different as night and day.[8] The differences can best be understood by discussing them in terms of the processes of arbitration and mediation.

The arbitration process

Arbitration has had a long history in this country, going back to procedures carried over into the Colonies from mercantile England. George Washington put an arbitration clause in his last will and testament to resolve disputes among his heirs. Abraham Lincoln urged lawyers to keep their clients out of court and himself arbitrated a boundary dispute between two farmers. Today, arbitration is being used more broadly for dispute settlement both in labor-management relations and in commerical transactions.

Aside from its well-known use in resolving labor disputes, arbitration is now becoming widely used to settle intercompany disputes in various industries, including textile, construction, life and casualty insurance, canning, livestock, air transport, grain and feed and securities.[9]

Simply defined, arbitration is a process in which a dispute is submitted to a third party or neutral (or sometimes a panel of three arbitrators) to hear arguments, review evidence and render a decision.[10] Court-annexed arbitration, a relatively new development, is a process in which judges refer civil suits to arbitrators to render prompt, non-binding decisions. If a particular decision is not accepted by a losing party, a trial *de novo* may be held in the court system. However, adverse decisions sometimes lead to further negotiation and pre-trial settlement.[11]

The arbitration process, court-annexed or otherwise, normally consists of six stages: initiation, preparation, prehearing conferences, hearing, decisionmaking, and award.

Initiation. The initiation stage of arbitration consists of two sub-stages: initiating the proceeding, and selecting the arbitrator. An arbitration proceeding may be initiated either by: submission; "demand" or "notice;" or, in the case of a court-annexed proceeding, court rule or court order.

A submission must be signed by both parties and is used where there is no previous agreement to arbitrate. It often names the arbitrator (or method of appointment), contains considerable detail regarding the arbitrator's authority, the procedure to be used at the hearing, statement of the matter in dispute, the amount of money in controversy, the remedy sought and other matters.

On the other hand, where the description of a dispute is contained in an agreement and the parties have agreed in advance to arbitrate it, arbitration may be initiated unilaterally by one party serving upon the other a written "demand" or "notice" to arbitrate.

However, even where an agreement contains a "demand" or "notice" arbitration clause, parties sometimes choose also to execute a submission after the dispute has materialized. In the court-annexed situation, a lawsuit is mandatorily referred to an arbitration track and the parties must select an arbitrator from a court-maintained roster or otherwise by mutual agreement.[12]

Several types of tribunals and methods of selecting their membership are available to parties who wish to arbitrate. Parties may choose between the use of a "temporary" or "permanent" arbitrator. They can also choose to have single or multiple arbitrators. Since success of the

5. As one American professional mediator put it, the mediator "has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing, at most, a few guiding stars and depending mainly on his personal power of divination." Meyer, *Function of the Mediator in Collective Bargaining*, 13 INDUS. & LAB. REL. REV. 159 (1960).

6. In labor relations arbitrations, of course, condition (2) is normally not present. Labor disputes are generally divided into two categories: rights disputes and interest disputes. Disputes as to "rights" involve the interpretation or application of existing laws, agreements or customary practices, disputes as to "interests" involve controversies over the formation of collective agreements or efforts to secure them where no such agreement is yet in existence. Elkouri and Elkouri, *supra* n. 3, at 47.

7. Because of ethical considerations, the arbitrator and mediator normally are different persons. It should also be noted that mediation is frequently effective when it is attempted, with the concurrence of the parties, during the course of an arbitration with a neutral other than the arbitrator serving as the mediator. Often the unfolding of the opponent's evidence during the course of arbitration leads to a better appreciation of the merits of their respective positions and hence an atmosphere conducive to settlement discussions.

8. The stark distinction between mediation and arbitration was well made by a professional mediator who became chairman of the New York State Mediation Board: "Mediation and arbitration... have conceptually nothing in common. The one [mediation] involves helping people to decide for themselves, the other involves helping people by deciding for them." Meyer, *supra* n. 5, at 164, as quoted in Gulliver, DISPUTES AND NEGOTIATIONS, A CROSS-CULTURAL PERSPECTIVE, 210 (New York: Academic Press, 1979).

9. Cooley, *Arbitration as an Alternative to Federal Litigation in the Seventh Circuit*, REPORT OF THE SUBCOMMITTEE ON ALTERNATIVES TO THE PRESENT FEDERAL COURT SYSTEM, SEVENTH CIRCUIT AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION, 2 (July 13, 1978).

10. *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, Appendix 2 (Washington, D.C.: National Institute for Dispute Resolution, October, 1983).

11. *Id. See also* EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Washington, D.C.: Federal Judicial Center, 1981).

12. Cooley, *supra* n. 9, at 4, Elkouri and Elkouri, *supra* n. 3, at 183-86. Domke on Commericial Arbitration. §§14:00-14:05 (Rev. Ed. 1984). Arbitrators, if chosen from a list maintained by an arbitration organization or court-maintained roster, are normally compensated at the daily rate fixed by the organization or the court. Arbitrators selected independently by the parties are compensated at the daily or hourly rate at which they mutually agree. In such cases, the parties equally share the expense of the arbitrator's services.

arbitration process often hinges on the expertise of the tribunal, parties generally select a tribunal whose members possess impartiality, integrity, ability and experience in the field in which the dispute arises. Legal training is often helpful but not indispensable.

Information concerning the qualifications of some of the more active arbitrators is contained in the *Directory of Arbitrators*, prepared by the Bureau of National Affairs, Inc., and in *Who's Who* (of arbitrators) published by Prentice-Hall, Inc. Also, the Federal Mediation and Conciliation Service (FMCS), the National Mediation Board (NMB) and the American Arbitration Association (AAA) provide biographical data on arbitrators.[13]

Preparation. The parties must thoroughly prepare cases for arbitration. Obviously, a party must fully understand its own case to communicate effectively to the arbitrator. Depending on the nature of the case, prehearing discovery may be necessary and its permissible extent is usually determined by the arbitrator. The advantages of simplicity and utility of the arbitration mode normally weigh against extensive discovery. During this stage, the parties also enter into fact stipulations where possible.[14]

Ordinarily, most or all of the arbitrator's knowledge and understanding of a case is based upon evidence and arguments presented at the arbitration hearing. However, the arbitrator does have some "preparation" functions. Generally, where no tribunal administrator (such as AAA) is involved, the arbitrator, after accepting the office, designates the time and place of the hearing, by mutual agreement of the parties if possible. The arbitrator also signs an oath, if required in the particular jurisdiction, and determines whether the parties will have representation, legal or otherwise, at the hearing.[15]

Prehearing conferences. Depending on the complexity of the matter involved, the arbitrator may wish to schedule a prehearing conference, which is normally administrative in nature.[16] Briefing schedules, if necessary, are set on motions attacking the validity of claims or of the proceeding. But generally, briefing is minimized to preserve the efficiency of the process. Discussion of the underlying merits of claims or defenses of the parties are avoided during a prehearing conference. *Ex parte* conferences between the arbitrator and a party are not permitted.[17]

Arbitration is a process in which a dispute is submitted to a third party to render a decision.

The hearing. Parties may waive oral hearing and have the controversy determined on the basis of documents only. However, an evidentiary-type hearing in the presence of the arbitrator is deemed imperative in virtually all cases. Since arbitration is a private proceeding, the hearing is not open to the public as a rule but all persons having a direct interest in the case are ordinarily entitled to attend.

A formal written record of the hearing is not always necessary; use of a reporter is the exception rather than the general practice. A party requiring an interpreter has the duty to arrange for one. Witnesses testifying at the hearing may also be required to take an oath if required by law, if ordered by the arbitrator, or on demand of any party.[18]

Opening statements are made orally by each party in a brief, generalized format. They are designed to acquaint the arbitrator with each party's view of what the dispute is about and what the party expects to prove by the evidence. Sometimes an arbitrator requests each party to provide a short written opening statement and issue statement prior to the hearing. Occasionally, a respondent opts for making an opening statement immediately prior to presenting initial evidence.[19]

There is no set order by which parties present their cases in arbitration, although in practice the complaining party normally presents evidence first. The parties may offer any evidence they choose, including personal testimony and affidavits of witnesses. They may be required to produce additional evidence the arbitrator deems necessary to determine the dispute. The arbitrator, when authorized by law, may subpoena witnesses or documents upon his or her own initiative or by request of a party. The arbitrator also decides the relevancy and materiality of all evidence offered. Conformity to legal rules of evidence is unnecessary. The arbitrator has a right to make a physical inspection of premises.[20]

The parties make closing arguments, usually limited in duration. Occasionally, the arbitrator requests post hearing briefs. When this occurs, the parties usually waive oral closing arguments.[21]

Decisionmaking. When the issues are not complex, an arbitrator may render an immediate decision. However, when the evidence presented is voluminous and/or time is needed for the members of an arbitration panel to confer, it might require several weeks to make a decision.

The award is the arbitrator's decision. It may be given orally but is normally written and signed by the arbitrator(s). Awards are normally short, definite, certain and final as to all matters under submission. Occasionally, they are accompanied by a short well-reasoned opinion. The award is usually issued no later than 30 days from the closing date of the hearing. When a party fails to appear, a default award may be entered.[22] Depend-

13. Elkouri and Elkouri, *supra* n. 3, at 24-25.
14. Elkouri and Elkouri, *supra* n. 3, at 197; (for preparation checklist *see* pp. 198-99); Domke, *supra* n. 12, §§24:01 and 27:01.
15. *Id.*
16. Some of the matters which might be discussed at a prehearing conference are: whether discovery is needed and, if so, scheduling of same; motions that need to be filed and briefed or orally argued; and the setting of firm oral argument and hearing dates.
17. Cooley, *supra* n. 9, at 4-5; Elkouri and Elkouri, *supra* n. 3, at 186-90.
18. Cooley, *supra* n. 9, at 5.
19. Elkouri and Elkouri, *supra* n. 3, at 224-25.
20. Cooley, *supra* n. 9, at 5; Elkouri and Elkouri, *supra* n. 3, at 223-28.
21. Elkouri and Elkouri, *supra* n. 3, at 225.
22. Cooley, *supra* n. 9, at 6.

ing on the nature of the award (i.e., binding), it may be judicially enforceable and, to some extent, reviewable. The losing party in a court-annexed arbitration is entitled to trial *de novo* in court.

The mediation process

Mediation is a process in which an impartial intervenor assists the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behavior.[23] The process generally consists of eight stages: initiation, preparation, introduction, problem statement, problem clarification, generation and evaluation of alternatives, selection of alternative(s), and agreement.[24]

Initiation. The mediation process may be initiated in two principal ways: parties submit the matter to a public or private dispute resolution organization or to a private neutral; or the dispute is referred to mediation by court order or rule in a court-annexed mediation program.

In the first instance, counsel for one of the parties or, if unrepresented, the party may contact the neutral organization or individual and the neutral will contact the opposing counsel or party (as the case may be) to see if there is interest in attempting to mediate the dispute.

Preparation. As in arbitration, it is of paramount importance that the parties to a dispute in mediation be as well informed as possible on the background of the dispute, the claims or defenses and the remedies they seek. The parties should seek legal advice if necessary, and although a party's lawyer might attend a typical nonjudicial mediation, he or she normally does not take an adversary role but is rather available to render legal advice as needed.

The mediator should also be well-informed about the parties and the features of their dispute and know something about:

- the balance of power;
- the primary sources of pressure exerted on the parties;
- the pressures motivating them toward agreement as well as pressures blocking agreement;
- the economics of the industry or particular company involved;
- political and personal conflicts within and between the parties;
- the extent of the settlement authority of each of the parties.

In mediation, an impartial intervenor helps the parties reach a voluntary settlement.

The mediator sets the date, time and place for the hearing at everyone's convenience.[25]

Introduction. In the mediation process, the introductory stage may be the most important.[26] It is in that phase, particularly the first joint session, that the mediator establishes his or her acceptability, integrity, credibility and neutrality. The mediator usually has several objectives to achieve initially. They are: establish control of the process; determine issues and positions of the parties; get the agreement-forging process started; and encourage continuation of direct negotiations.[27]

Unlike a judge in a settlement conference or an arbitrator who wields the clout of a decision, a mediator does not, by virtue of position, ordinarily command the parties' immediate trust and respect; the mediator earns them through a carefully orchestrated and delicately executed ritual of rapport-building. Every competent mediator has a personal style. The content of the mediator's opening remarks is generally crucial to establishing rapport with the parties and the respectability of the mediator and the process.

Opening remarks focus on: identifying the mediator and the parties; explaining the procedures to be followed (including caucusing),[28] describing the mediation function (if appropriate) and emphasizing the continued decisionmaking responsibility of the parties; and reinforcing the confidentiality and integrity of the process.[29] When appropriate, the mediator might invoke the community and public interest in having the dispute resolved quickly and emphasize the interests of the constituents in the successful conclusion of the negotiations.[30]

Finally, the mediator must assess the parties' competence to participate in the process. If either party has severe emotional, drinking, drug, or health problems, the mediator may postpone the proceeding. If the parties are extremely hostile and verbally abusive, the mediator must endeavor to calm them, by preliminary caucusing if necessary.[31]

Problem statement. There are essentially two ways to open a discussion of the dispute by the parties: Both parties give their positions and discuss each issue as it is raised; or all the issues are first briefly identified, with detailed exposition of positions reserved until all the

23. Salem, *Mediation—The Concept and the Process*, in INSTRUCTORS MANUAL FOR TEACHING CRITICAL ISSUES (1984, unpublished). *See generally* Simkin, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25 (BNA, 1971). Court-annexed mediation is a process in which judges refer civil cases to a neutral (mediator or master) for settlement purposes. It also includes in-court programs in which judges perform the settlement function full-time.

24. *See generally* Ray, *The Alternative Dispute Resolution Movement*, 8 PEACE AND CHANGE 117 (Summer 1982). The process of mediation and the roles and strategies of mediators have been generally neglected in studies of negotiation. As one author remarked, "Mediation still remains a poorly understood process." Gulliver, *supra* n. 8.

25. Meagher, "Mediation Procedures and Techniques," 18-19 (unpublished paper on file in the Office of the General Counsel, FMCS, Washington, D.C.). Mr. Meagher is a former commissioner of FMCS.

26. The success of the introductory stage is directly related to two critical factors: (1) the appropriate timing of the mediator's intervention, and (2) the opportunity for mediator preparation. A mediator's sense of timing is the ability to judge the psychological readiness of an individual or group to respond in the desired way to a particular idea, suggestion or proposal. Meagher, *supra* n. 25, at 5, *see also* Maggiolo, TECHNIQUES OF MEDIATION IN LABOR DISPUTES 62 (Dobbs Ferry, NY: Oceana Publications, 1971). The kinds of preparatory information needed by the mediator are discussed in the text *supra*. In many instances, such information is not available prior to intervention and thus it must be delicately elicited by the mediator during the introductory stage.

27. Meagher, *supra* n. 25, at 26-27. Wall, *Mediation, An Analysis, Review and Proposed Research*, 25 J. CONFLICT RES. 157, 161 (1981).

28. Caucusing is an *ex parte* conference between a mediator and a party.

29. Meagher, *supra* n. 25, at 28; Maggiolo, *supra* n. 26, at 42-44.

30. *Id.*

31. Ray, *supra* n. 24, at 121; Maggiolo, *supra* n. 26, at 52-54.

issues have been identified. The second procedure is preferred; the first approach often leads to tedious time-consuming rambling about insignificant matters, sometimes causing the parties to become more entrenched in their positions.[32]

Generally, the complaining party tells his or her "story" first. It may be the first time that the adverse party has heard the full basis for the complaint. The mediator actively and empathically listens, taking notes if helpful, using listening techniques such as restatement, echo and non-verbal responses. Listening is the mediator's most important dispute-resolving tool.[33]

The mediator also:

- asks open-ended and closed-ended questions at the appropriate time and in a neutral fashion;
- obtains important "signals" from the behavior and body movements of the parties;
- calms a party, as necessary;
- clarifies the narration by focused questions;
- objectively summarizes the first party's story;
- defuses tensions by omitting disparaging comments from the summary;
- determines whether the second party understands the first party's story;
- thanks the first party for his or her contribution.

The process is repeated with the second party.[34]

Problem clarification. It is in this stage that the mediator culls out the true underlying issues in the dispute. Often the parties to a dispute intentionally obfuscate the core issues. The mediator pierces this cloud-cover through separate caucuses in which he or she asks direct, probing questions to elicit information which one party would not disclose in the presence of the other party. In a subsequent joint session, the mediator summarizes areas of agreement or disagreement, being careful not to disclose matters which the parties shared with the mediator in confidence. They are assisted in grouping and prioritizing issues and demands.[35]

The arbitrator's function is quasi-judicial in nature.

Generation and evaluation of alternatives. In this stage, the mediator employs two fundamental principles of effective mediation: creating doubt in the minds of the parties as to the validity of their positions on issues; and suggesting alternative approaches which may facilitate agreement.[36] These are two functions which parties to a dispute are very often unable to perform by themselves. To carry out these functions, the mediator has the parties separately "brainstorm" to produce alternatives or options; discusses the workability of each option; encourages the parties by noting the probability of success, where appropriate; suggests alternatives not raised by the parties and then repeats the three previous steps.[37]

Selection of alternative(s). The mediator may compliment the parties on their progress and use humor, when appropriate, to relieve tensions; assist the parties in eliminating the unworkable options; and help the parties determine which of the remaining workable solutions will produce the optimum results with which each can live.[38]

Agreement. Before the mediation is terminated, the mediator summarizes and clarifies, as necessary, the terms of the agreement reached and secures the assent of each party to those terms; sets a follow-up date, if necessary; and congratulates the parties on their reasonableness.

The mediator does not usually become involved in drafting a settlement agreement. This task is left to the parties themselves or their counsel. The agreement is the parties', not the mediator's.[39]

A mediator's patience, flexibility and creativity throughout this entire process are necessary keys to a successful resolution.

The "neutral's" functions

To fully appreciate the differences (or the similarities) between the two processes, and to evaluate the appropriate use of either process, it is instructive to focus on considerations which exist at their interface—the function and power of the "neutral." This is a particularly important exercise to acquire a realistic expectation of the result to be obtained from each process.

The arbitrator's function is quasi-judicial in nature and, because of this, an arbitrator is generally exempt from civil liability for failure to exercise care or skill in performing the arbitral function.[40] As a quasi-judicial officer, the arbitrator is guided by ethical norms in the performance of duties. For example, an arbitrator must refrain from having any private (*ex parte*) consultations with a party or with an attorney representing a party without the consent of the opposing party or counsel.[41]

Moreover, unless the parties agree otherwise, the arbitration proceedings are private and arbitrators must take appropriate measures to maintain the confidentiality of the proceedings.[42] It has generally been held that an arbitrator may not testify as to the meaning and construction of the written award.[43]

In contrast, a mediator is not normally considered to be quasi-judicial, unless he or she is appointed by the court as, for example, a special master. Some courts have extended the doctrine of immunity to persons termed "quasi-arbitrators"—persons empowered by agreement of the parties to resolve disputes arising be-

32. Meagher, *supra* n. 25, at 30; Maggiolo, *supra* n. 26, at 47.
33. Ray, *supra* n. 24, at 121; Salem, *supra* n. 23, at 4-5; Robins, *supra* n. 1, at 27; Maggiolo, *supra* n. 26, at 48-49.
34. Ray, *supra* n. 24, at 121.
35. *Id.* at 121-22; Meagher, *supra* n. 25, at 57-58; Robins, *supra* n. 1, at 43-44; Maggiolo, *supra* n. 26, at 49-50.
36. Maggiolo, *supra* n. 26, at 12. Other basic negotiation principles which some mediators use to advantage throughout the mediation process are found in Fisher and Ury, GETTING TO YES, (New York: Penguin Books, 1983. Those principles are: (1) separate the people from the problem; (2) focus on interests, not positions; (3) invent options of mutual gain; (4) insist on using objective criteria.
37. Ray, *supra* n. 24, at 122. Meagher, *supra* n. 25, at 48-49, describes additional techniques of "planting seeds," "conditioning," and "influencing expectations."
38. Ray, *supra* n. 24, at 122.
39. *Id.*
40. Domke, *supra* n. 12, §23:01, at 351-53.
41. *Id.* §24:05, at 380.
42. *Id.*
43. *Id.* §23:02, at 355.

A mediator has little systemic-based power.

tween them.[44] Although the law is far from clear on this point, a very persuasive argument may be advanced that mediators are generally immune from lawsuits relating to the performance of their mediation duties where the agreement under which they perform contains a hold-harmless provision or its equivalent.

In absence of such contractual provision, it would appear that a functionary such as a mediator, selected by parties to perform skilled or professional services, would not ordinarily be immune from charges of negligence but rather is required to work with the same skill and care exercised by an average person engaged in the trade or profession involved.[45]

Of course, weighing heavily against a finding of negligence on the part of a mediator is the intrinsic nature, if not the essence, of the mediation process which invests the parties with the complete power over their destiny; it also guarantees any party the right to withdraw from the process and even to eject the mediator during any pre-agreement stage.[46]

Also, in contrast to arbitrators, certain ethical restrictions do not apply to mediators. Mediators are permitted to have *ex parte* conferences with the parties or counsel. Indeed, such caucuses, as they are called, are the mediator's stock-in-trade. Furthermore, while one of the principal advantages of a privately-conducted mediation is the non-public or confidential nature of the proceedings, and although Rule 408 of the Federal Rules of Evidence and public policy considerations argue in favor of confidentiality, the current state of the law does not provide a guarantee of such confidentiality.[47] However, in most cases a strong argument can be made that the injury from disclosure of a confidential settlement proceeding is greater than the benefit to be gained by the public from nondisclosure.[48]

Finally, unlike the arbitrator, the performance of whose function may be enhanced by knowledge, skill, or ability in a particular field or industry, the mediator need not be an expert in the field which encompasses the subject of the dispute. Expertise may, in fact, be a handicap, if the parties look wrongly to the mediator as an advice-giver or adjudicator.[49]

Comparative power

The arbitrator derives power from many sources. The person may be highly respected in a particular field of expertise or widely renowned for fairness. But aside from these attributes which emanate from personal talents or characteristics, the arbitrator operates within a procedural and enforcement framework which affords considerable power, at least from the perspective of the disputants. Under certain circumstances, arbitrators may possess broad remedy powers, including the power, though rare, to grant injunctive relief.[50] They normally have subpoena power, and generally they have no obligation to anyone, not even "to the court to give reasons for an award."[51]

In general, a valid arbitration award constitutes a full and final adjustment of the controversy.[52] It has all the force and effect of an adjudication, and effectively precludes the parties from again litigating the same subject.[53] The award can be challenged in court only on very narrow grounds. In some states the grounds relate to partiality of the arbitrator or to misconduct in the proceedings, such as refusal to allow the production of evidence or to grant postponements, as well as to other misbehavior in conducting the hearings so as to prejudice the interests of a party.[54]

A further ground for challenge in some states is the failure of the arbitrator to observe the limits of authority as fixed by the parties' agreement—such as determining unsubmitted matters or by not dealing definitely and finally with submitted issues.[55] In Illinois, as in most states, a judgment entered on an arbitration award is enforceable "as any other judgment."[56] Thus, from a systemic perspective, the arbitrator is invested with a substantial amount of power.

In striking contrast, with the exception of a special master appointed by the court or a neutral appointed by some governmental body, the mediator has little if any systemic-based power. Most if not all of a mediator's power is derived from experience, demonstrated skills and abilities, and a reputation for successful settlements.

Any particular mediator may wield power by adopting a particular role on what might be described as a continuum representing the range of strengths of intervention: from virtual passivity, to

44. See Craviolini v. Scholer & Fuller Associated Architects, 89 Ariz. 24, 357 P.2d 611 (1960), where an architect was deemed to be a "quasi-arbitrator" under an agreement with the parties and therefore entitled to immunity from civil liability in an action brought against him by either party in relation to the architect's dispute-resolving function. *Compare* Gammell v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955), where certified public accountants, selected for the specific purpose of making an examination and of auditing the books of a corporation to ascertain its earnings, were held not to have acquired the status of arbitrators so as to create immunity for their actions in the performance of such service, simply because the report was to be binding upon the parties.

45. Domke, *supra* n. 12, §23:01, at 352-53.

46. As two professional mediators have poignantly commented: "Unlike arbitration and other means of adjudication, the parties retain complete control...If they do not like the mediator, they get another one. If they fail to produce results, they may end the mediation at any time." Phillips and Piazza, *How to Use Mediation*, 10 A.B.A.J. OF SECT. OF. LIT. 31 (Spring, 1984).

47. *See* Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84 (E.D. N.Y. 1981) (Court granted a motion to enforce a subpoena *duces tecum* involving a report prepared by a neutral fact-finder on the effects of certain price-fixing activities). *See generally* Restivo and Mangus, *Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence? Alternatives to the High Cost of Litigation*, 2 LAW & BUS. INC./CTR. FOR PUBLIC RESOURCES, 5 (May, 1984). Parties can assist the preservation of confidentiality of their mediation proceedings by reducing to writing any expectations or understanding regarding the confidentiality of the proceedings and by being careful to protect against unnecessary disclosure both within their respective constituencies and the outside world, *id.* at 9.

48. *See, e.g.*, NLRB v. Joseph Macaluso, 618 F.2d 51 (9th Cir. 1980); Pipefitters Local 208 v. Mechanical Contractors Assn. of Colorado, 90 Lab. Cas. (CCH) ¶ 12,647 (D. Colo. 1980).

49. Phillips and Piazza, *supra* n. 46, at 33.

50. In re Ruppert, 29 LA 775, 777 (N.Y. Ct. App. 1958); In re Griffin, 42 LA 511 (N.Y. Sup. Ct. 1964). *See generally* Elkouri and Elkouri, *supra* n. 3, at 241-51.

51. Domke, *supra* n. 12, §29:06, at 436.

52. Donoghue v. Kohlmeyer & Co., 63 Ill. App. 3d 979, 380 N.E.2d 1003, 20 Ill. Dec. 794 (1978).

53. Borg, Inc. v. Morris Middle School Dist. No. 54, 3 Ill. App. 3d 913, 278 N.E.2d 818 (1972).

54. Domke, *supra* n. 12, §33:00, 463.

55. *Id.* In Illinois, the court's power to vacate or modify arbitration awards is narrowly circumscribed. *See* ILL. REV. STAT. ch. 10, ¶¶ 112, 113 (1981).

56. ILL. REV. STAT. ch. 10, ¶114 (1981).

Table 1: A comparison of arbitration/mediation processes

Arbitration	Mediation
1. Initiation	**1. Initiation**
Submission	Submission
Demand or notice	Court rule or order
Court rule or order	Assignment or selection of mediator
Selection of arbitrator	
2. Preparation	**2. Preparation**
Discovery	Usually, no discovery
Prehearing conference	Parties obtain background information on claims, defenses, remedies
Motions	Mediator obtains information on parties and history of dispute
Stipulations	Usually, no mediator oath
Arbitrator's oath	
Arbitrator's administrative duties	
Arbitrator does not seek out information about parties or dispute	
3. Prehearing conference	**3. Introduction**
Administrative	Mediator:
Scheduling	Conducts *ex parte* conferences, if necessary, for calming
No discussion of underlying merits of claims or defenses	Gives opening descriptive remarks
No *ex parte* conferences	Develops trust and respect
	Emphasizes importance of successful negotiations
	Helps parties separate the people from the problem
4. Hearing	**4. Problem statement**
Not generally open to public	Confidential proceeding, no written record
Written record, optional	Parties do not speak under oath
Witnesses and parties testify under oath	Issues identified
Opening statement	Issues discussed separately; stories told
Made orally	Mediator listens; takes notes
Sometimes also in writing	Mediator asks questions; reads behavioral signals
Order of proceedings and evidence	Mediator calms parties; summarizes stories; defuses tensions
Complaining party usually presents evidence first	Mediator determines whether parties understand stories
Arbitrator may subpoena witnesses	Mediator usually has no subpoena power
Evidence rules relaxed	
Arbitrator rules on objections to evidence; may reject evidence	**5. Problem clarification**
Closing arguments	Mediator:
Oral arguments normally permitted for clarification and synthesis	Culls out core issues in caucus
Post-hearing briefs sometimes permitted	Asks direct, probing questions
	Summarizes areas of agreement and disagreement
	Assists parties in grouping and prioritizing issues and demands
	Helps parties focus on interests, not positions
5. Decisionmaking	**6. Generation and evaluation of alternatives**
If issues non-complex, arbitrator can issue an immediate decision	Mediator:
If issues complex, or panel has three members, extra time may be required	Creates doubts in parties' minds as to validity of their positions
	Invents options for facilitating agreement
	Leads "brainstorming;" discusses workability; notes probability of success of options
	7. Selection of alternative(s)
	Mediator:
	Compliments parties on progress
	Assists parties in eliminating unworkable options
	Helps parties to use objective criteria
	Helps parties determine which solution will produce optimum results
6. Award	**8. Agreement**
Normally in writing, signed by arbitrator(s)	Mediator:
Short, definite, certain and final, as to all matters under submission	Summarizes and clarifies agreement terms
Occasionally a short opinion accompanies award	Sets follow-up date, if appropriate
Award may be judicially enforceable or reviewable	Congratulates parties on their reasonableness
	Usually does not draft or assist in drafting agreement
	Agreement is enforceable as a contract and subject to later modification by agreement

"chairman," to "enunciator," to "prompter," to "leader," to virtual arbitrator.[57] The mediator who can adopt different roles on this continuum, changing strategies to fit changing circumstances and requirements of both the disputants and himself, is inevitably more effective in accumulating and wielding power which is real, yet often not consciously perceptible by the disputants themselves.[58]

Since, in the ordinary case, the result of the mediation process is an agreement or contract not reduced to a court judgment,[59] the result is binding on the parties only to the extent that the law of contracts in the particular jurisdiction requires. And to the same extent, the result is enforceable by one party against another. As a practical matter, where a party breaches an agreement or contract which is the product of mediation and the agreement is not salvageable, prudence would seem to dictate that in most cases the underlying dispute—and not the breach of agreement—should be litigated.

Summary

It is clear that both the functions and the levels of power of the arbitrators and mediators are dramatically different. Counsel must assess the nature of the dispute and the personalities of the disputants prior to determining which process, arbitration or mediation, has the best chance to achieve a successful resolution of the particular conflict.

For example, arbitration would probably prove to be the better dispute resolution choice where the dispute involves highly technical matters; a long-standing feud between the disputants; irrational and high-strung personalities; and no necessity of a continued relationship after resolution of the conflict.

On the other hand, mediation may prove to be the most effective choice where disputants are stubborn but basically sensible; have much to gain from a continued relationship with one another; and conflict resolution is time-critical.

Arbitration and mediation are two separate and distinct processes having a similar overall goal (terminating a dispute), while using totally different methods to obtain dissimilar (decisional vs. contractual) results. These differences are best understood by viewing the processes side-by-side in Table 1.

The benefits of arbitration and mediation to litigants, in terms of cost and time savings, are just beginning to be recognized by lawyers and business professionals alike. It is hoped that this discussion of the arbitration and mediation processes and their differences will help lawyers feel more comfortable with these two methods of dispute resolution and to use them to their clients' advantage in their joint pursuit of swift, inexpensive, simple justice. □

57. Gulliver, *supra* n. 8, at 220.
58. *Id.* at 226.
59. Where a settlement agreement is reduced to a judgment, for example, through intervention and assistance of a special master, the "consent judgment" is generally enforceable, if necessary, before the court in which the consent judgment is entered.

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J

DISPUTE RESOLUTION PROCEDURES IN THE NORTHERN DISTRICT OF CALIFORNIA

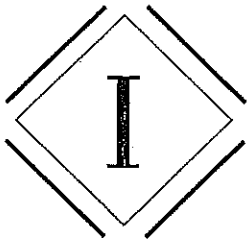
UNITED STATES DISTRICT COURT

B Court-Sponsored Dispute Resolution Processes

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

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

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



Early Neutral Evaluation

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

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

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

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

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

> Contract (including business contracts, insurance coverage, Miller Act, negotiable instrument, stockholders suits, and contract product liability); Torts (including motor vehicle, motor vehicle product liability, personal injury, personal injury — product liability, and fraud); Civil

Rights (employment); Intellectual Property; Antitrust; Racketeer Influenced and Corrupt Organizations; and Securities/Commodities Exchange.

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

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

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

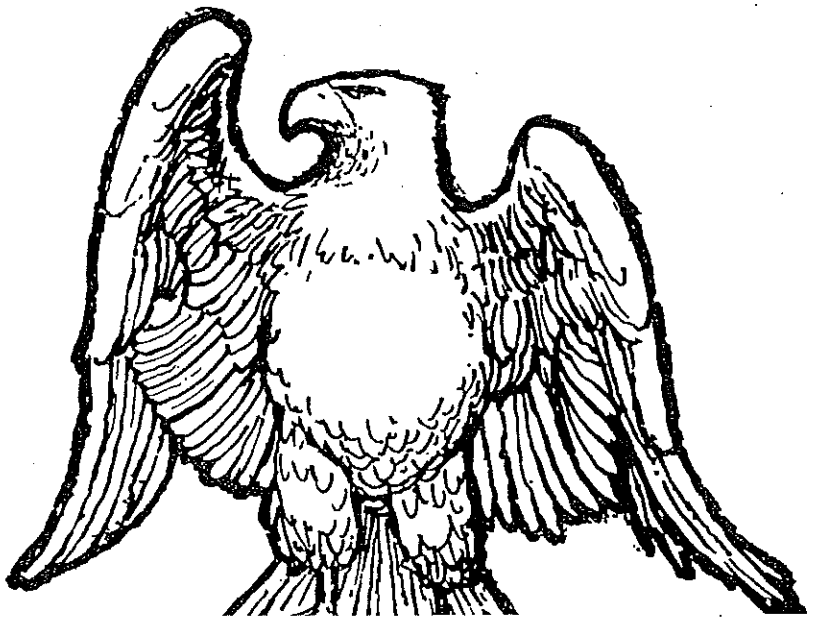
In addition, civil actions may be assigned to ENE on motion by a party and approval by the court or *sua sponte* by the judge to whom the action is assigned.

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

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

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

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



K

Oklahoma And Canadian County Judges Encourage ADR And Provide For Referral To Mediation In Pending Cases

©*By Nancy K. Anderson And Gloria C. Bates*[1]

The district judges of Oklahoma and Canadian counties have endorsed alternative dispute resolution (ADR) procedures and established rules governing cases they refer to mediation.

The judges of the Seventh Judicial Administrative District took these steps by adopting two new local court rules[2] for the Seventh (Oklahoma County) and Twenty-sixth (Canadian County) Judicial Districts.[3]

The new rules represent the most comprehensive commitment to ADR by any of the district courts in Oklahoma.[4]

Court Rule (CR)-7-90-4[5] authorizes the referral of any civil case[6] at any time for ADR procedures, such as mediation and non-binding arbitration. The rule declares that it is the policy of the two districts "to encourage the use" of ADR procedures "for the early disposition of pending litigation. Such informal procedures can achieve the just, efficient, and economical resolution of controversies while preserving the right to a full trial on demand."

Court Rule (CR)-7-90-5 sets out the rules for court-annexed mediation,[7] a process that generally results in settlement of a majority of cases.[8] As described in the rule, mediation is a private and confidential proceeding in which a neutral third party, the mediator, facilitates efforts by the parties and their attorneys to resolve a dispute themselves. Unlike a judge or arbitrator, a mediator does not settle the dispute.

CR-7-90-5 governs mediations by volunteers in public programs under the Oklahoma Dispute Resolution Act,[9] as well as mediations by other providers, public or private, nonprofit or for profit, who are not subject to the Act.

The two rules were adopted by the judges at their judicial conference October 25, 1990, and took effect December 1, 1990. The rules were proposed in mid-September by a drafting subcommittee of the ADR Committee of the Oklahoma County Bar Association (OCBA),[10] and were immediately presented to the judges by District Judge Bana Blasdel,[11] who served on the subcommittee.[12]

The rules are applied through a standard Order of Referral to Mediation that is available from the courts, as provided in CR-7-90-4.[13] In addition, to gauge the impact of mediation, two brief forms are to be completed for each case to allow the collection of statistical information on the results of mediation. A third form specifies information to be provided by the parties in advance of mediation.[14]

The new rules, the Order of Referral and the forms were drafted after extensive review of statutes, court rules and forms in other jurisdictions.[15] By design, the rules and order do not attempt to answer all foreseeable questions, including some rather obvious ones. The drafters expect attorneys and judges to deal with specific issues as the use of mediation expands.[16]

The underlying principle of the mediation process is good faith. "Parties commit to participate in mediation in good faith, without any time constraints, and to put forth their best efforts with the intention to settle if possible. Even if they do not reach a complete settlement, they may reach agreement on various issues," CR-7-90-5 ¶3 states. The Order of Referral directs: "Parties and counsel shall proceed in a good faith effort to resolve this case."

CR-7-90-5 ¶1 defines mediation as "a process in which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation, and settlement. Participants include the mediator, the parties and interested non-parties, their representatives, and all others present."

The court is authorized by CR-7-90-4 to refer a case to mediation at any time. The referral may be

made in response to agreement of the parties, a motion by any party, or by the court on its own motion. The timing will vary with the case. For example, referral could occur in connection with a temporary restraining order,[17] a discovery dispute, a summary judgment motion, or as part of a scheduling order or pretrial conference order.[18] An order of referral could even be obtained as soon as a petition is filed. The standard Order of Referral should be filed in every case, even when mediation is entered into by agreement of the parties.

Mediation differs from a settlement conference[19] primarily because the process involves a mediator, rather than a judge. A qualified mediator has been trained in special techniques. "The skills of a mediator are different from those of a judge, I learned that!" a Dallas judge commented after training.[20] He added: "I thought that because I was a lawyer, I would know how to mediate; I was very surprised."[21]

The responsibilities of a mediator are described in CR-7-90-5 ¶2: "The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential areas of agreement. The mediator does not serve as a judge: the mediator has no authority to render any decisions on any disputed issues, or to force a settlement."

Selection of a mediator is left to the parties. The issue of who will make the selection — the judge or the parties — is not addressed by the rules. However, the Order of Referral directs the parties to "select and contact a mediator within five business days to make arrangements."

A list of individual, private mediators and mediation services, both private and public, is available at the judges' offices, as stated in the order. The list is compiled as a service to the court by the OCBA Mediation Subcommittee.[22] Attorneys and non-attorneys are listed.

The Order of Referral requires the parties to a dispute to pay mediation fees equally unless they agree otherwise. Fees charged for mediation range upward from the nominal five dollars per party[23] for mediation by volunteers under the Dispute Resolution Act.

Other provisions of the rules and order recognize two elements crucial to the success of the mediation process: 1) everyone necessary to resolution of a dispute needs to participate, and 2) the environment must be confidential, to allow uninhibited discussion.

Concerning participation, the Order of Referral mandates attendance at the mediation "by persons with full settlement authority. In domestic relations cases, both parties shall participate in mediation; attorneys may participate as agreed by the parties and the mediator.[24] In cases other than domestic relations, named parties shall be present, except for a named party who has no interest in the outcome and no settlement authority.[25] Each party who is represented by counsel shall be accompanied at mediation by an attorney who is fully familiar with the case. In addition, any interested non-party, *e.g.*, any insurance company or other person or entity that is contractually required to defend or to pay damages, shall be represented by a person with full settlement authority. Counsel shall timely advise any such non-party of this order."

As to confidentiality, the mediation process is private and confidential, under CR-7-90-5 ¶¶5 and 6 and the Order of Referral. "Persons other than the parties, interested non-parties, and their representatives may attend (a mediation session) only with the consent of the parties, interested non-parties and the mediator," Rule CR-7-90-5 ¶5 states.[26] "No participant may disclose, without consent, any confidential information acquired during mediation. There shall be no stenographic or electronic record, *e.g.*, audio or video, of the mediation process, unless it is agreed upon by the parties, interested non-parties and the mediator, and it is not prohibited by statute," states Rule CR-7-90-5 ¶6.

Even the court is not privy to details about a mediation. The Order of Referral directs the plaintiff to advise the court in writing "whether the case settled, settled in part, or did not settle." A standard form is to be used for this purpose.[27]

The Oklahoma statute protecting the confidentiality of settlement negotiations is incorporated in CR-7-90-5 ¶7:[28]

"Discussions, representations and statements made during or in connection with the mediation by any participant shall be considered offers to compromise pursuant to 12 O.S. §2408."[29] Thus, evidence of conduct or statements made in connection with mediation proceedings is not admissible.[30]

Other provisions include CR-7-90-5 ¶8, which prohibits service of process upon anyone attending a mediation session, and CR-7-90-5 ¶12, which requires a court order to delay other proceedings when a case is referred to mediation.

Conclusion of mediation is achieved in one of two ways, under CR-7-90-5 ¶11: "a) by resolution of the dispute by the parties, or b) upon declaration by the mediator that further efforts to resolve the dispute are no longer worthwhile."

Success in court-annexed mediation is apt to be measured by the number of cases settled. Parties are satisfied because their dispute has ended and judges appreciate the reduction in their caseloads.

However, the rate of settlement is not the only measure of success. As one Dallas judge observed, "'success' is hard to measure. Often, cases which get past the mediation session will either settle or be narrowed so they will take less time to try."[31]

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1. The authors co-chair the Mediation Subcommittee of the Alternative Dispute Resolution (ADR) Committee of the Oklahoma County Bar Association. Ms. Anderson is an attorney-mediator whose law practice is limited to free-lance research and writing in connection with litigation, including appeals. Ms. Bates is an attorney-mediator engaged in general practice.

2. Authority for the adoption of the rules is found in 20 O.S. §23 (2); 20 O.S. Ch. 1, App. 2, Rules on Administration of Courts, Rule 8, and District Court Rules for Oklahoma-Canadian Counties, Rule 56. The text of the two new rules and of the Order of Referral follow the endnotes.

3. Under 20 O.S. Supp. 1983 §22, Oklahoma and Canadian counties are combined into one district, Number Seven, for administrative purposes. Under the statutes creating judicial districts, Oklahoma County is District Number Seven (20 O.S. §92.8) and Canadian County is District Number Twenty-Six (20 O.S. §92.27).

4. In Tulsa County, 14 volunteer attorneys serve as adjunct settlement judges for the district court in a limited project that began in June 1990 under the Tulsa Early Settlement program. LeiLani Armstrong, program director, said 17 cases had been referred by late November; the initial plan called for 84 settlement conferences in the first year. Small claims courts in several other areas are served by volunteer mediators in Early Settlement programs. See endnote 9.

Use of mediation is at various stages of development in other states. In Colorado, for example, cases filed in Denver District Court after July 1, 1990 are subject to a court order requiring the parties to engage in some form of alternative dispute resolution. 4 ADR Report 220 (BNA)(July 5, 1990).

Some states provide for mediation in domestic relations cases. In California, mediation is mandatory for custody and visitation issues. Cal. Civ. Code §4607.

Judges in Hennepin County District Court, Minneapolis, Minnesota, experimented with mediation in a pilot program pursuant to Minn. Stat. §484.74. More than 200 cases involving claims in excess of $50,000 were referred to mediation. "(T)he parties have reached settlement in approximately 65 percent of the cases which have reached a conclusion." *Dispute Resolution*, ABA, Iss. No. 25, p.2 (Spring/Summer 1989).

A task force of the New Jersey Supreme Court developed a comprehensive plan for the use of ADR procedures in most courts throughout the state. *Blue-Ribbon N.J. DR Task Force Advocates A Systematic, Statewide, Judicial Approach*, Alternatives, Vol. 8, No. 6, p. 95 (June 1990).

In Texas, responsibility to carry out the state's policy to encourage early settlement of pending litigation is placed on the courts and their administrators; the courts may refer cases for ADR procedures, and appoint neutral third parties to preside. Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Prac. & Rem. Code §§154.002-154.003, enacted in 1987.

5. The two new rules will be assigned standard numbers when the District Court Rules for Oklahoma-Canadian Counties are revised, according to Robert Martin, court administrator for Oklahoma County.

6. The rules have no effect on criminal cases or on cases that have not been filed in district court.

7. Specific rules for other ADR procedures, such as non-binding arbitration, may be proposed as the need arises.

8. For example, of 1,264 cases mediated, 993 settled - a settlement rate of 79 percent — according to a report by the Association of Attorney-Mediators, Inc., in Dallas County, TX. The Caucus, Vol. 1, No. 3, p.1 (September 1990).

9. The Dispute Resolution Act, 12 O.S. Supp. 1983 §§1801 *et seq.*, provides for the establishment of community-based dispute resolution centers. "To establish and maintain an alternative dispute resolution system" a $2.00 fee is collected when any civil case is filed in Oklahoma district courts. 12 O.S. Supp. 1983 §1809-B-1. Volunteers are trained as mediators through the state's Early Settlement program under the act.

10. Another concern of the subcommittee was the lack of a community-based program in Oklahoma City after the city-sponsored program was terminated June 30, 1990. Efforts by the subcommittee led to the decision by Oklahoma City Community College (OCCC) to sponsor such a program, which was approved by the Dispute Resolution Advisory Board (DRAB) on November 16, 1990. The college hopes to receive a $25,000 grant from the Oklahoma Bar Foundation that had been approved for the city program previously. "We are pleased that you thought of bringing your ideas for a community mediation center" to OCCC, Dr. Kenneth P. Walker, college president, wrote to Gloria Bates, who had first contacted him on behalf of the subcommittee in late October.

11. The proposal was reviewed and recommended by a study committee consisting of Judges William Henderson, Eugene Mathews and Carolyn Ricks, in addition to Judge Blasdel.

12. Other subcommittee members were the authors of this article; Robert W. Raftery, of Spradling, Alpern, Friot and Gum, who is Chairman of the OCBA's ADR Committee; Annita Bridges of Kerr-McGee Corp.; and Ann D. Marshall, ADR law clerk, U.S. District Court — Western District of Oklahoma. This group formed the nucleus of the new Mediation Subcommittee.

13. Copies of the Order of Referral, as well as the rules and other forms, are available at the Court Administrator's Office, 6th floor, Oklahoma County Court House.

14. Each party must provide the Memorandum for Mediation to the mediator and all other parties at least seven days before mediation in all civil cases except those on the small claims docket. CR-7-904-4¶10.

15. The drafters borrowed liberally from the statutes, rules and forms of other jurisdictions. The impetus for development of the proposal came from Oklahoma City attorney Robert Amis, whose brother, J. Michael Amis, is an attorney-mediator in Dallas. Professor Ted Roberts, College of Law, University of Oklahoma, suggested the proposal be in the form of local rules.

Among the statutes and court rules reviewed were: Colo. Rev. Stat. §§13-22-301 *et seq.* ("Dispute Resolution Act"), Fla. Stat. §§44.101 *et seq.* ("Mediation Alternatives to Judicial Action"), Mich. Ct. Rule 2.403 (Mediation); Wayne (Mich.) Cir. Ct. Rule 403 (Mediation); Minn. Stat. §484.74; 1989 Ohio Laws File 111 (establishing the Ohio Commission on Dispute Resolution and Conflict Management and enacting §§179.01 *et seq.* of the Ohio Rev. Code); Texas Civ. Prac. and Rem. Code §§154.001 *et seq.*; Rule Governing Mediation of Civil Cases, U.S.D.Ct. - E.D. Wash.; and Local Civil Rule 39.1, U.S.D.Ct. - W.D. Wash.

16. *E.g.*: What if a party objects to an Order of Referral to mediation? That party could file an objection stating the grounds, which the court could then schedule for hearing. The order gives parties five business days to choose a mediator and initiate arrangements. What if they cannot agree on a mediator? In keeping with the requirement for good faith, each of the parties could name a nominee; the nominees then could choose the mediator. As to fees, the order directs the parties to pay equally unless agreed otherwise; nothing prevents one party from paying the entire cost.

17. In Dallas, judges and attorneys have discovered that mediation can be effective promptly after the request for a temporary restraining order because of the danger of immediate damage or destruction of the subject of the order. Comments by Michael Amis to Nancy Anderson.

18. 12 O.S. Supp. 1987 Ch. 2, App., Rules for District Courts of Oklahoma, Rule 5-C-7, E-5 and G-10. Rule 5-C provides: "As soon as any civil case is at issue, the Court may schedule any conference it deems appropriate and enter a scheduling order which establishes, insofar as feasible, the time: ...7. for accomplishing any other matters appropriate in the circumstances of the case." Rule 5-E includes as an objective of pretrial conferences: "The scheduling and conduct of the conferences and the scheduling of matters to be accomplished should be designed to:...5. facilitate the settlement of the case." Rule 5-G-10 includes "such other matters as may aid in the disposition of the action" among the subjects to be discussed at pretrial conferences.

19. Settlement conferences are governed by 12 O.S. Supp. 1987 Ch. 2, App., Rules for District Courts of Oklahoma, Rule 5-L.

20. Judge Mark Whittington of the 160th District Court, Dallas County, Texas, quoted in an interview for The Caucus, Vol. 1, No.1, p. 3 (January 1990), a newsletter published by the Association of Attorney-Mediators, Inc.

21. *Id.*

22. To obtain a copy of the list and criteria for inclusion on the list, send a self-addressed envelope stamped with 45 cents in postage, with your request to the Oklahoma County Bar Association, 119 N. Robinson, Ste. 240, Oklahoma City, OK 73102.

23. Title 12 O.S. Supp. 1983 §1809-B-1. "Except for the court costs and fees provided for in this subsection, dispute resolution services shall be provided without cost to participants." *Id.* at §1809-B-2. See also, 12 O.S. Supp. 1989 Ch. 37, App., Rules and Procedures for the Dispute Resolution Act, Rule 4-G. Neither the act nor the rules implementing it appears to prohibit payment to mediators for their services.

24. The goal is to excuse attorneys from attending domestic relations mediations where that is helpful to the process.

25. An example of a party with no interest in the outcome and no settlement authority might be an insured where the claim is within policy limits. Participation by such a party can be detrimental to the mediation process. In any event, the insurer has the true financial interest in the outcome and settlement authority.

26. Mediations by volunteers under the Dispute Resolution Act are governed also by 12 O.S. Supp. 1983 §1805-A and B (confidentiality) and by Rule 10, Rules of Conduct for Outside Parties Attending Mediation Hearing. 12 O.S. Supp. 1989 Ch.37, App., Rules and Procedures for the Dispute Resolution Act.

27. The Results of Mediation form reports whether or not a case settled, and whether a settlement occurred before mediation, by mediation, or in part (the parties reached agreement on one or more issues or claims, or some but not all parties settled).

28. In at least one state, the statute concerning settlement negotiations has been amended specifically to protect mediation proceedings. Evidence of conduct or statements made in mediation proceedings is not admissible. Hawaii Rev. Stat. §626-1, Rule 408.

29. Title 12 O.S. §2408 does not extend to evidence that can be discovered through other means, or where evidence is offered for purposes other than compromise negotiations.

30. Any information received by a volunteer mediator under the Dispute Resolution Act also is privileged. 12 O.S. Supp. 1983 §1805-A. No mediator or party may be compelled to disclose information obtained during mediation proceedings. 12 O.S. Supp. 1983 §1805-C.

31. Judge Anne Packer of the 134th District Court, Dallas County, Texas, quoted in an interview for The Caucus, Vol. 1, No.3, p.3 (September 1990).

COURT RULE (CR)-7-90-4
ALTERNATIVE DISPUTE RESOLUTION (ADR)

It is the policy of the Seventh and Twenty-sixth Judicial Districts to encourage the use of alternative dispute resolution (ADR) procedures for the early disposition of pending litigation. Such informal procedures can achieve the just, efficient, and economical resolution of controversies while preserving the right to a full trial on demand.

The Court in its discretion, on its own motion, the motion of any party or by agreement of the parties, may refer any civil case, or any portion thereof, for ADR procedures, and make any order necessary to implement such procedures. Such procedures shall include, but are not limited to, mediation and non-binding arbitration. A referral may be made at any time. More than one referral may be made in any case. For example, if the parties fail to reach an agreement through mediation, the Court may order non-binding arbitration.

The order of referral shall be entered on a standard form for each type of ADR procedure. The standard form, with the rules for the applicable ADR procedure, will be provided by the Court. The Judicial Conference shall prescribe the applicable rules and standard forms and make such changes to the forms and rules as may be necessary.

[Adopted October 25, 1990, effective December 1, 1990]

COURT RULE (CR)-7-90-5. SEVENTH AND TWENTY-SIXTH JUDICIAL DISTRICTS RULES FOR MEDIATION

1. **Definition of Mediation** - Mediation is a process in which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation, and settlement. Participants include the mediator, the parties and interested non-parties, their representatives, and all others present. The mediator may meet with participants all together, and separately ("caucus").

2. **Responsibilities of Mediator** - The mediator is an advocate for settlement and uses the mediation

process to help the parties fully explore any potential areas of agreement. The mediator **does not** serve as a judge: the mediator has no authority to render any decisions on any disputed issues, or to force a settlement.

3. **Responsibilities of Parties** - The parties themselves are responsible for negotiating any resolution(s) to their dispute(s). Parties commit to participate in mediation in good faith, without any time constraints, and to put forth their best efforts with the intention to settle if possible. Even if they do not reach a complete settlement, they may reach agreement on various issues.

4. **Conflict of Interest** - No person with any financial or personal interest in the result of the mediation may serve as mediator. Prior to agreeing to mediate a dispute, the mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties.

5. **Privacy** - Mediation sessions are private. Persons other than the parties, interested non-parties, and their representatives may attend only with the consent of the parties, interested non-parties and the mediator.

6. **Confidentiality** - Mediation is a confidential process. No participant may disclose, without consent, any confidential information acquired during mediation. There shall be no stenographic or electronic record, e.g., audio or video, of the mediation process, unless it is agreed upon by the parties, interested non-parties and the mediator, and it is not prohibited by statute.

7. **Settlement Negotiations** - Discussions, representations and statements made during or in connection with the mediation by any participant shall be considered offers to compromise pursuant to 12 O.S. §2408. No participant shall be subject to process requiring the disclosure of any matter discussed or any information obtained in connection with the mediation proceedings.

8. **No Service of Process** - No subpoena, summons, complaint, petition, citation or other process of any sort may be served upon any person who is at or near the site of any mediation session and is there because of the mediation.

9. **Time and Place** - The mediator shall notify the parties of the time and place of each mediation session.

10. **Memorandum** - At least 7 days before mediation in all civil cases except those on the small claims docket, each party shall provide to the mediator and all other parties a Memorandum for Mediation. The memorandum shall state the name, address, telephone number and role of each person expected to attend the mediation, and identify each person with full authority to settle. The memorandum shall include a concise summary of the party's claims/defenses/counterclaims, etc., relief sought, and contentions concerning liability and damages. The summary shall not exceed 5 pages (8-1/2 by 11 in.). The mediator may require any party to supplement the memorandum.

11. **Conclusion of Mediation** - The mediation shall be concluded: a) by resolution of the dispute by the parties, or b) upon declaration by the mediator that further efforts to resolve the dispute are no longer worthwhile.

12. **Delay of Proceedings** - Referral to mediation shall not delay or stay other proceedings, unless so ordered by the court.

[Adopted October 25, 1990, effective December 1,1990

IN THE DISTRICT COURT OF_____COUNTY,
STATE OF OKLAHOMA

_____
Plaintiff,

vs. Case No._____

_____
Defendant.

ORDER OF REFERRAL TO MEDIATION

This case is ordered to mediation pursuant to Court Rule (CR)-7-90-4 of the District Court Rules for Oklahoma-Canadian Counties. Parties and counsel shall proceed in a good faith effort to resolve this case.

A list of mediators and mediation services is available from the judge's office. The parties shall select and contact a mediator within 5 business days to make arrangements. Mediation shall be completed within__days from today.

The mediation session(s) shall be private and confidential. Upon conclusion, the plaintiff shall advise the Court in writing whether the case settled, settled in part, or did not settle.

Court Rule (CR)-7-90-5, Rules for Mediation for Oklahoma-Canadian Counties, is incorporated herein.

The mediation shall be attended by persons with full settlement authority. In domestic relations cases, both parties shall participate in mediation; attorneys may participate as agreed by the parties and the mediator. In cases other than domestic relations, named parties shall be present, except for a named party who has no interest in the outcome and no settlement authority. Each party who is represented by counsel shall be accompanied at mediation by an attorney who is fully familiar with the case. In addition, any interested non-party, *e.g.* any insurance company or other person or entity that is contractually required to defend or to pay damages, shall be represented by a person with full settlement authority. Counsel shall timely advise any such non-party of this order.

The parties shall pay mediation fees equally unless agreed otherwise.

IT IS SO ORDERED this_____day of_____, 19____.

_____
JUDGE

NOTE: This Order must be accompanied by a completed form "CASE ORDERED TO MEDIATION." [Effective: 12-01-90]

New ADR And Mediation Rules — A View From The Bench

©By Bana Blasdel[1]
District Judge, Oklahoma County

The judges of Canadian and Oklahoma Counties unanimously approved the new local district court rules regarding alternative dispute resolution. We have for some time successfully used the settlement conference conducted by retired, active judges. We believe ADR procedures, particularly mediation, will provide additional means of effectively resolving disputes short of trial.

The civil caseload for each of the 13 judges with general trial jurisdiction in Oklahoma County is about 1,000 pending cases. Each district judge in Oklahoma and Canadian counties also carries a full criminal trial docket. Therefore, each judge's docket time for civil jury trials amounts to only four or five months of the year. In Oklahoma County each district judge tries about 25 to 35 civil jury trials and five to 10 non-jury trials every year.

These numbers do not even take into account the caseload of the 16 special judges in Oklahoma County, including domestic relations, probate, and small claims.

In 1989, the new cases filed in Oklahoma County totaled 84,785 — an average of 7,065 per month. This figure included 19,484 small claims cases — an average of 1,624 a month.

Obviously, the majority of cases must be resolved in some manner other than trial, and the judiciary believes mediation will provide an effective alternative. New Court Rule (CR)-7-90-4 authorizes the referral of any civil case at any time for ADR procedures, such as mediation and non-binding arbitration. Court Rule (CR)-7-90-5 contains the rules for court-annexed mediation.

The availability of mediation early in the course of litigation is one concern regarding the effective use of mediation. Obviously, the earlier a dispute is resolved, the greater the time and money savings to the parties and the courts. Because the litigation process often serves to further alienate rather than reconcile the parties, the chances of a successful mediation are enhanced when the process is initiated before the litigants become too entrenched and inflexible in their positions, and before the litigation fees and costs become too great.

Responsibility for bringing the court's attention to cases appropriate for mediation will fall upon the attorneys. Most civil cases are attorney-driven — filed and taken through discovery without the involvement of the trial judge. The pretrial conference is often the first time the trial judge becomes directly involved with a case. Much of the potential benefit of the ADR process may be lost if it is not implemented before the pretrial conference, since most cases are essentially ready for trial by then.

Therefore, at least initially, the judges will rely on attorneys to recognize cases that are appropriate for mediation and to bring them to the court's attention. The court then could enter an Order of Referral to mediation pursuant to the provisions of CR-7-90-4.

Effective use of ADR procedures will require a commitment by members of the bench and bar alike to educate ourselves on the procedures available under the new rules and a willingness to avail ourselves of such procedures. By adopting these new rules, the judiciary has demonstrated a commitment to ADR. The judges of Oklahoma and Canadian counties encourage participation by the bar in the continued development of ADR procedures, which may provide a less expensive, quicker, and ultimately more satisfactory resolution of many disputes.

1 Judge Blasdel is a member of the Mediation Subcommittee of the ADR Committee of the Oklahoma County Bar Association and was on the subcommittee that proposed the rules.

COURT RULE (CR)-7-90-4
ALTERNATIVE DISPUTE RESOLUTION (ADR)

It is the policy of the Seventh and Twenty-sixth Judicial Districts to encourage the use of alternative dispute resolution (ADR) procedures for the early disposition of pending litigation. Such informal procedures can achieve the just, efficient, and economical resolution of controversies while preserving the right to a full trial on demand.

The Court in its discretion, on its own motion, the motion of any party or by agreement of the parties, may refer any civil case, or any portion thereof, for ADR procedures, and make any order necessary to implement such procedures. Such procedures shall include, but are not limited to, mediation and non-binding arbitration. A referral may be made at any time. More than one referral may be made in any case. For example, if the parties fail to reach an agreement through mediation, the Court may order non-binding arbitration.

The order of referral shall be entered on a standard form for each type of ADR procedure. The standard form, with the rules for the applicable ADR procedure, will be provided by the Court. The Judicial Conference shall prescribe the applicable rules and standard forms and make such changes to the forms and rules as may be necessary.

[Adopted October 25, 1990, effective December 1, 1990]

IN THE DISTRICT COURT OF _____ COUNTY, STATE OF OKLAHOMA

_____
Plaintiff,

vs. Case No. _____

_____
Defendant.

ORDER OF REFERRAL TO MEDIATION

This case is ordered to mediation pursuant to Court Rule (CR)-7-90-4 of the District Court Rules for Oklahoma-Canadian Counties. Parties and counsel shall proceed in a good faith effort to resolve this case.

A list of mediators and mediation services is available from the judge's office. The parties shall select and contact a mediator within 5 business days to make arrangements. Mediation shall be completed within _____ days from today.

The mediation session(s) shall be private and confidential. Upon conclusion, the plaintiff shall advise the Court in writing whether the case settled, settled in part, or did not settle.

Court Rule (CR)-7-90-5, Rules for Mediation for Oklahoma-Canadian Counties, is incorporated herein.

The mediation shall be attended by persons with full settlement authority. In domestic relations cases, both parties shall participate in mediation; attorneys may participate as agreed by the parties and the mediator. In cases other than domestic relations, named parties shall be present, except for a named party who has no interest in the outcome and no settlement authority. Each party who is represented by counsel shall be accompanied at mediation by an attorney who is fully familiar with the case. In addition, any interested non-party, e.g. any insurance company or other person or entity that is contractually required to defend or to pay damages, shall be represented by a person with full settlement authority. Counsel shall timely advise any such non-party of this order.

The parties shall pay mediation fees equally unless agreed otherwise.

IT IS SO ORDERED this _____ day of _____, 19____.

_____
JUDGE

NOTE: **REPORT FORM NO. 1 - REPORT OF CASE REFERRED TO MEDIATION** must be completed and [illegible] on the form before this Order is filed.

COURT RULE (CR)-7-90-5. SEVENTH AND TWENTY-SIXTH JUDICIAL DISTRICTS
RULES FOR MEDIATION

1. **Definition of Mediation** - Mediation is a process in which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation, and settlement. Participants include the mediator, the parties and interested non-parties, their representatives, and all others present. The mediator may meet with participants all together, and separately ("caucus").

2. **Responsibilities of Mediator** - The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential areas of agreement. The mediator **does not** serve as a judge: the mediator has no authority to render any decisions on any disputed issues, or to force a settlement.

3. **Responsibilities of Parties** - The parties themselves are responsible for negotiating any resolution(s) to their dispute(s). Parties commit to participate in mediation in good faith, without any time constraints, and to put forth their best efforts with the intention to settle if possible. Even if they do not reach a complete settlement, they may reach agreement on various issues.

4. **Conflict of Interest** - No person with any financial or personal interest in the result of the mediation may serve as mediator. Prior to agreeing to mediate a dispute, the mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties.

5. **Privacy** - Mediation sessions are private. Persons other than the parties, interested non-parties, and their representatives may attend only with the consent of the parties, interested non-parties and the mediator.

6. **Confidentiality** - Mediation is a confidential process. No participant may disclose, without consent, any confidential information acquired during mediation. There shall be no stenographic or electronic record, e.g., audio or video, of the mediation process, unless it is agreed upon by the parties, interested non-parties and the mediator, and it is not prohibited by statute.

7. **Settlement Negotiations** - Discussions, representations and statements made during or in connection with the mediation by any participant shall be considered offers to compromise pursuant to 12 O.S. § 2408. No participant shall be subject to process requiring the disclosure of any matter discussed or any information obtained in connection with the mediation proceedings.

8. **No Service of Process** - No subpoena, summons, complaint, petition, citation or other process of any sort may be served upon any person who is at or near the site of any mediation session and is there because of the mediation.

9. **Time and Place** - The mediator shall notify the parties of the time and place of each mediation session.

10. **Memorandum** - At least 7 days before mediation in all civil cases except those on the small claims docket, each party shall provide to the mediator and all other parties a Memorandum for Mediation. The memorandum shall state the name, address, telephone number and role of each person expected to attend the mediation, and identify each person with full authority to settle. The memorandum shall include a concise summary of the party's claims/defenses/counterclaims, etc., relief sought, and contentions concerning liability and damages. The summary shall not exceed 5 pages (8 1/2 by 11 in.). The mediator may require any party to supplement the memorandum.

11. **Conclusion of Mediation** - The mediation shall be concluded: a) by resolution of the dispute by the parties, or b) upon declaration by the mediator that further efforts to resolve the dispute are no longer worthwhile.

12. **Delay of Proceedings** - Referral to mediation shall not delay or stay other proceedings, unless so ordered by the court.

L

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA CITY, OKLAHOMA

DATE:

^F1^

	)	
Plaintiff(s),	)	
	)	
vs.	)	NO. ^F2^
	)	
^F3^		
	)	
Defendant(s).	)	

ENTER ORDER:

This case is set on the Court's _____ civil jury docket commencing on ^F4^ at ^F5^.m. and will be reached for trial thereon unless settled or dismissed.

Counsel for all parties will confer forthwith for the purpose of:

(1) Resuming maximum settlement efforts;

(2) Insuring all requirements of the Pre-Trial Order have been met;

(3) Pre-marking all exhibits;

(4) Agreeing on the admissibility of all exhibits to which there is no reasonable objection;

(5) Stipulating to all facts which are not disputed or reasonably disputable so as to eliminate unnecessary witnesses and exhibits; and

(6) Accomplishing all other necessary and appropriate steps to reduce the number of objections and other delays, and otherwise streamline and reduce the time of trial.

ABOVE ORDER ENTERED BY THE DIRECTION OF JUDGE RALPH G. THOMPSON.

CLERK

By: Deputy

Copies to parties of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. CIV-86-1401-W
)
ROYAL N. HARDAGE, et al.,)
)
Defendants.)

DOCKETED

CASE MANAGEMENT ORDER

In order to promote the orderly and efficient conduct of the instant litigation, this Court hereby enters the following Case Management Order:

I. Admission of Attorneys

Each attorney who is not of the bar of this Court shall, upon application to this Court, be deemed admitted pro hac vice to practice before this Court in this proceeding.

II. Liaison Counsel

A. Counsel for Defendants Advance Chemical Distribution, Inc.; Allied-Signal, Inc.; AT&T Technologies, Inc.; Ashland Oil, Inc.; Atlantic Richfield Company; Borg-Warner Corporation; Cato Oil & Grease Company; Dal-Worth Industries, Inc.; Double-Eagle Refining Company; Exxon Corporation; The Firestone Tire & Rubber Company; Foster Feed & Seed Co.; Gencorp, Inc.; Honeywell, Inc.; J.O.C. Oil Exploration Company, Inc.; Kerr-McGee Refining Corporation; L & S Bearing Company; Magnetic Peripherals, Inc.; Maremont Corporation; McDonnell-Douglas Corporation; Mobil Chemical Corporation; Nalco Chemical Company; Oklahoma Gas and

Electric Company; Oklahoma National Stockyards Company; The Oklahoma Publishing Company; Rockwell International Corporation; Texaco, Inc.; Texas Instruments, Inc.; Uniroyal, Inc.; UOP, Inc.; Westinghouse Electric Corporation; and Weyerhaeuser Company (hereinafter collectively referred to as "Generator Defendants") shall appoint a liaison counsel.

B. Counsel for Defendants Powell Sanitation Service, Inc.; Samuel L. Bishkin individually, and d/b/a Eltex Chemical & Supply Company; and United States Pollution Control, Inc., (hereinafter collectively referred to as "Transporter Defendants"), shall appoint a liaison counsel.

C. Counsel for Royal N. Hardage need not appoint liaison counsel.

D. Respective liaison counsel shall be appointed within ten days of entry of this Case Management Order and the Court and all parties shall be notified promptly of the name, address and telephone number of such liaison counsel.

E. Duties of Liaison Counsel

1. General Responsibilities

The respective liaison counsel shall be responsible for:

a. coordination of the defense of defendants on common issues;

b. communication with the Court and with the government on behalf of their respective group of defendants;

c. organization of joint and uniform discovery and other pleadings and papers on behalf of defendants.

2. Communications with the Court

All communications from the Court shall be directed to the liaison counsel. Liaison counsel will be responsible for notifying each counsel representing defendants within its respective group of defendants of all communications from the Court.

3. Pleading Files

Each liaison counsel shall maintain complete files containing copies of all documents served by or upon defendants, which files shall be reasonably available for inspection and copying by counsel for all defendants within its respective group of defendants.

4. Certificate of Service

a. Service List

Each liaison counsel shall file with the Court, and maintain and distribute to all counsel, up-to-date official service lists of its respective group of defendants. It shall be the responsibility of each defense counsel within the respective group of defendants to notify the liaison counsel of any changes necessary to maintain the service list up-to-date.

b. Form of Certificate

Whenever any document is filed with the Court, it shall be sufficient for the certificate of service to state the particular document was served upon counsel for all parties at the address given in the latest official service list (specifying the date thereof) filed with the Court and maintained by liaison counsel.

5. Service

a. Pleadings and documents directed to all defendants

Any document which is directed to all defendants within a respective group of defendants can be served by sending a copy of that document to the liaison counsel. Liaison counsel has the responsibility for distributing copies of such documents to each defendant within his or her respective group of defendants. The time allowed for responding to any document served under this provision shall be extended by five days to allow for distribution of the document by liaison counsel.

b. Pleadings or documents directed to less than all defendants

Liaison counsel is not responsible for and is not authorized to accept service of any

pleadings or other documents directed to fewer than all of the defendants within his or her respective group of defendants. Any party wishing to serve such a pleading or document may perfect that service only by serving copies on counsel of record for each party to whom the document is directed and on liaison counsel.

6. Additional Responsibilities

The liaison counsel, or his or her designee, shall perform such other duties as may be expressly authorized or directed by further order of this Court.

7. Court Appearance

To promote the efficiency of court proceedings, the defendants are directed to coordinate their presentations and argument before the Court through the liaison counsel for their respective group of defendants or his or her designee, to the maximum extent feasible and practicable. Argument will be presented by only one representative from each group of defendants selected by the group to present argument, to the maximum extent feasible and practicable. Additional attorneys representing individual defendants may argue upon leave of the Court, for good cause shown.

8. Separate Counsel

The designation of liaison counsel shall not preclude counsel for any party from participating in this action through its own individual counsel, to the extent necessary to represent the individual interest of that party, and subject to the conditions set forth in this Case Management Order.

III. Motions

A. To avoid duplicative motions practice, it is hereby directed that all motions, briefs and other papers shall be filed whenever possible by the Generator Defendants jointly and by the Transporter Defendants jointly, through their liaison counsel or his or her designee, to the maximum extent feasible and practicable. Motions on behalf of Defendant Royal N. Hardage need not be filed jointly with other defendants.

B. Whenever a defendant wishes to file pleadings or motions separate from those of liaison counsel, that defendant shall do so only after first attempting to have its pleadings or motions presented through the liaison counsel and within ten (10) days of the filing of a related pleading, if any, by the liaison counsel. Separate motions filed by defendants shall contain a statement that such defendants have complied with this provision.

IV. Cross-claims

The filing of all cross-claims for indemnification or contribution among defendants shall be stayed until sixty (60) days after the signing of this Order. This shall not prevent

some or all of the defendants from agreeing among themselves to stay or to prevent the filing of cross-claims. The Court and parties recognize that claims for relief may be filed in the future among defendants and that such future claims will not be barred by this stay. Any cross-claim filed prior to the entry of this Order also shall be stayed until sixty (60) days subsequent to the signing of this Order.

V. Bifurcation of Trial

A. The trial of this action is bifurcated into two phases. Phase I, which shall be tried first, shall determine whether defendants are liable to plaintiff under Section 7003 of RCRA, 42 U.S.C. § 6973, and under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607. Phase II, which will be tried following the trial of Phase I, at a date to be designated by this Court, will relate to the issues of appropriate response-remedial measures and damages.

B. Any trial of cross-claims or third-party claims for contribution shall be separate from the United States' action and shall not commence until the trial in Phases I and II has been completed. Any trial of insurance carrier responsibility issues shall occur during Phase I.

VI. Discovery

A. Stay

Discovery shall proceed upon all issues related to liability (Phase I) and on issues relating to response measures and damages (Phase II).

B. Discovery Scheduling Order

The parties will meet within thirty (30) days of the entry of this Case Management Order and will agree upon a schedule for all discovery for Phase I and Phase II. This schedule will be submitted to the Court for approval and issuance of a Discovery Scheduling Order. If such a schedule cannot be agreed upon within forty (40) days of the entry of this Case Management Order, the parties will notify the Court and will submit proposed schedules for the Court's review, so the Court may enter a Discovery Scheduling Order. Any Discovery Scheduling Order submitted by the parties shall include, at a minimum, the following: (1) the number of interrogatories permitted; (2) a schedule for service of interrogatories, requests for production of documents and requests for admissions; (3) a date by which all depositions shall be completed; and (4) a date by which all discovery shall be completed.

Except as otherwise provided in the Discovery Scheduling Order, whenever a defendant wishes to file discovery requests, pleadings, or motions separate from those of liaison counsel, that defendant shall do so only after first attempting to have its discovery requests, pleadings, or motions presented through the liaison counsel and, in any event, within ten (10) days of the filing of a related request, pleading, or motion, if any, by the liaison counsel.

C. Written Discovery

1. Written discovery, including interrogatories, requests for production and for admissions, shall be submitted jointly on behalf of their respective defendants by liaison counsel, or his or her designee, to the maximum extent feasible and practicable. Other defense counsel for individual defendants may submit their ideas, drafts or other work product to liaison counsel for incorporation into written discovery to be filed by liaison counsel. Joint discovery will reflect both the common and particular needs of each defendant. Independent discovery by individual defense counsel will be permitted only by leave of Court, upon representation that liaison counsel has refused to incorporate into its discovery the requests of individual defense counsel, and that such requests are unique to and essential to the defense of that individual defendant.

2. Plaintiff may file interrogatories to each defendant whose cumulative total to each defendant may not exceed that set forth in the Discovery Scheduling Order described above. Each representative group of defendants (Generator Defendants and Transporter Defendants) and Royal N. Hardage may file interrogatories whose cumulative total may not exceed that set forth in the Discovery Scheduling Order described above. Each subpart of an interrogatory shall be counted as a separate interrogatory, except that interrogatories inquiring as to the existence, location and custodian of documents or physical evidence shall be construed as one interrogatory. Any interrogatories in excess of

the foregoing must be approved by this Court. In responding to discovery, Plaintiff need provide only one copy of its response to each liaison counsel and one copy to the attorney for Royal N. Hardage. Each liaison counsel will be responsible for distributing to counsel within their respective group of defendants all answers to discovery.

D. Depositions

At depositions, liaison counsel or other defense counsel designated by liaison counsel, shall have the opportunity to begin and to complete his or her examination of each witness at a deposition. Such counsel shall ask all questions on behalf of his or her respective group of defendants. Other defense counsel may ask questions only upon representation on the record that either the liaison counsel has refused to inquire into the area to be explored, or that the area is unique to and essential to the defense of the individual defendant. An objection by counsel for any of the Generator Defendants made at a deposition shall be deemed made by all Generator Defendants. Similarly, an objection by counsel for any of the Transporter Defendants made at a deposition shall be deemed made by all Transporter Defendants.

VII. Third Party Defendants

Third party defendants may be added as follows:

(1) The defendants are granted until sixty (60) days after the signing of this Order to file third-party complaints.

Thereafter, leave of Court on motion upon notice to all parties to the action is required.

(2) Service of the third-party summons and third-party complaint shall be made promptly, and also shall be accomplished by service of a copy of this Case Management Order. This Case Management Order shall be binding upon each third-party defendant as though they were presently a defendant, unless relief is sought upon motion filed by the third-party defendant within twenty (20) days of service of the third-party complaint. Third-party defendants shall appoint a liaison counsel. Third-party defendants shall have sixty (60) days from service of the third-party complaint in which to file a response.

(3) In the event of the withdrawal or removal of a third-party from any private agreement which stayed or prevented the filing of third-party claims, the defendant shall be allowed thirty (30) days following a withdrawal or removal within which to file a third-party complaint against the withdrawing or removed party.

VIII. Settlement Organization

A. Due to the number of parties, all defendants and third-party defendants are directed to organize themselves for purposes of settlement discussions and to report to this Court and to Plaintiff's attorneys within fifteen (15) days of the entry of this Case Management Order, or their joinder in the case, on their chosen manner of organization. The Report shall include, at a minimum, the identity of designated representatives

(no more than six) who shall represent the group or sub-group of parties in settlement discussions. The make-up, structure, authority and compensation (if any) of this Settlement Committee shall be determined by defendants and third-party defendants.

B. Defendants will select from among the members of the Settlement Committee a spokesperson to be designated as "Negotiation Counsel." The "Negotiation Counsel" shall be the spokesperson for defendants during negotiations. Defendants may select as "Negotiation Counsel" the person who is "Liaison Counsel."

C. Representatives of plaintiff and all defendants and all third-party defendants shall meet within thirty (30) days of the entry of this Case Management Order to identify and to discuss those matters which may be resolved through the settlement process.

IX. Cooperation Among Defendants and Exchange of Information

A. The cooperation among defendants for the purpose of coordinating discovery, trial, sharing counsel, or otherwise minimizing expenses in the instant litigation shall not constitute, by itself, evidence of conspiracy, concerted action or any other wrongful conduct.

B. All information and/or documents exchanged among defendants and third-party defendants (and their agents, consultants, experts and attorneys) is communicative for the limited purpose of assisting in a common defense effort, and shall not constitute

a waiver of the attorney-client privilege, work-product exception to discovery, trade secret, or other privilege.

X. Extensions

Any opposed application for an extension of the foregoing deadlines must be in writing and served upon counsel for each party having an interest in the extension. Any opposed application must disclose (1) the precise relief sought; (2) good cause for such extension; (3) a statement regarding the positions of counsel for other parties regarding the applications; and (4) a statement that counsel have conferred in good faith and are unable to agree upon an extension.

XI. Modification or Supplementation

This Case Management Order may be further modified or supplemented for good cause shown.

ENTERED this 26th day of March, 1987.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et al.,

Hardage Steering Committee Defendants and Third-Party Plaintiffs,

vs.

ABCO, INC., et al.,

Third-Party Defendants.

Case No. CIV-86-1401-P

O R D E R

A. INTRODUCTION

On January 9, 1989, the Court conducted a hearing on defendants' motion to reconsider the Court's November 23, 1988 order permitting interlocutory appeal. For the reasons set forth on the record at the hearing, the Court withdrew its previous certification order, dated November 23, 1988, and entered a new order denying the government's September 14, 1988 motion to permit interlocutory appeal pursuant to 28 U.S.C. § 1292(b). See Minute Order issued January 11, 1989.

This case has had a lengthy history of litigation resulting in extensive discovery and numerous motions and other pleadings

When faced with a lengthy, complex trial such as this one, the Court has found it to be beneficial to require the parties to do some additional preparation for trial. Certain procedures used by the Court serve to streamline the issues and delete unnecessary presentation of evidence. Accordingly, no continuances or departures from the following schedule will be permitted.

B. FINAL WITNESS AND EXHIBIT LISTS

In addition to the witness and exhibit lists called for by this Court's previously issued scheduling order, plaintiff is to submit to defendants by 5:00 p.m. Monday, August 21, 1989 its final witness and exhibit list in this matter, setting forth those witnesses it actually intends to call in its case-in-chief in the actual order of anticipated appearance. The listing shall be filed with the Court on the same day. The listing shall be in conformance with the sample attached to this Order. This format also requires plaintiff to identify the specific exhibits to be introduced or discussed in connection with each witness, whether the witness has been deposed, and a time estimate for the direct examination of each witness.[1]

The exhibits referenced in the list shall have been previously marked, identified, and made available to opposing counsel so that the exhibit number on the chart will sufficiently

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[1]This time estimate should be the estimated time it would take for the direct examination of each witness in the absence of the affidavit procedure set forth in paragraphs E and F below.

identify the exhibit for opposing counsel.

Any witnesses or exhibits which surface at the time of trial but which have not been identified or made available for deposition or inspection by opposing counsel during the discovery period shall not be permitted at trial.[2]

By September 4, 1989, defendants are to file and submit to plaintiff a similar witness and exhibit list for their case-in-chief.

Hostile witnesses called by either side in the cases-in-chief are partially exempted from this rule in that affidavits, as well as the complete listing of exhibits to be used in connection with such witnesses, are not required. The hostile witnesses must, however, be identified as hostile witnesses on the chart filed with the Court along with their anticipated order of appearance and time estimate of their examination, as well as the other items called for on the attached chart.

C. STIPULATION OF UNCONTESTED FACTS

The parties shall enter into a comprehensive written stipulation of all uncontested facts in such form that it can be introduced as the first evidence at the trial. The comprehensive stipulation should include all facts intended to be

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[2]If any unnoticed witnesses or exhibits are identified on this list, counsel shall file an affidavit setting forth: (a) the reasons why the witness and/or exhibit was not previously noticed in accordance with the Scheduling Order; (b) the reasons why the evidence should be permitted at trial; and (c) the reasons why preclusionary and/or monetary sanctions should not be imposed.

proved by either side which the other side is not going to dispute either by a controverting witness or by cross-examination. It should include preliminary or background facts, as well as ultimate facts if they are not disputed. It is suggested that counsel for plaintiff list all facts intended to be proved at trial including those assumed to be in dispute. Defense counsel can then delete those facts to be controverted and add any additional facts they intend to prove. Counsel for plaintiff can then delete any additional facts which will be controverted. This technique should result in a stipulation of all uncontested facts, as well as a list of all contested facts. The parties may utilize their contentions and their drafts of the final pretrial order as a starting point for this stipulation. The stipulation must, of course, be organized in some logical order so that it will be intelligible when read by the Court as the first trial evidence. If the admissibility of some uncontested fact is challenged, the objecting parties, and the grounds for objection, must be stated. This stipulation will be filed with the Court by August 11, 1989.

D. DEPOSITION PROCEDURE

As to all depositions which the parties expect to offer at the time of trial the following procedure is adopted. The parties will designate all depositions to be read into evidence and attempt to agree as to those portions to be read. It is suggested that a four-color system of designation be used Plaintiff can use one color, e.g., green, to designate portio

it desires to read. Defendants can use a second color, e.g., red, to indicate those portions designated by plaintiff to which defendants object, stating the grounds for the objections. A third color, e.g., blue, can be used by defendants to designate any additional portions they desire to read, and plaintiff can use a fourth color, e.g., brown, to indicate portions designated by defendants to which plaintiff objects, stating the grounds for the objections. The Court will rule in advance of their use at trial. The depositions will be filed with the Court by November 24, 1989.

E. EXPERT WITNESSES

On October 2, 1989, plaintiff and defendants will file affidavits of each of their respective expert witnesses, if any. The affidavits shall contain the following: (a) an identification and description of the specific areas or fields in which the witness will be tendered as an expert; (b) an identification and description of each exhibit which will be introduced or discussed in connection with the expert's testimony with respect to each such exhibit, with an appropriate evidentiary foundation supporting the introduction and/or discussion of each such exhibit; (c) a separate listing and summary of every opinion to be rendered by the expert during his or her testimony; (d) a separate listing of the basis for each opinion set forth in (c above. The expert's curriculum vitae should be attached to the affidavit of the expert witness as an exhibit, and shall be

written form suitable for introduction into evidence. This vitae shall cover every item supporting the qualifications of the expert witness' testimony.

Because this is a non-jury trial, the expert witness affidavits and their attachments, subject to any proper objections, will be received in evidence as the direct examination of the experts at trial. The attorney sponsoring any expert witness will be given no more than thirty (30) minutes to highlight or emphasize any portions of the expert's testimony (though no new matters outside the affidavit may be raised absent a showing of just cause and compelling circumstances). The expert witness will then be tendered for cross examination.

Objections to any matters contained in the affidavits shall be filed by November 3, 1989. Affidavits of rebuttal witnesses, if any, shall be filed by November 10, 1989. Objections to rebuttal affidavits shall be filed by November 20, 1989.

F. NON-EXPERT WITNESSES

On October 2, 1989, plaintiff and defendants will file affidavits of all their remaining witnesses to be called in their cases-in-chief, with the exception of hostile witnesses.

The affidavits shall be prepared in accordance with the requirements set forth in Section E above with respect to any exhibits to be introduced and/or discussed in connection with each witness, and shall set forth the entire proposed direct examination of the witness.

Subject to objections, the affidavits will be received in evidence as the direct examination of the witnesses at trial. The attorney sponsoring any non-expert witness on direct examination will be given no more than fifteen (15) minutes to highlight or emphasize any portion of the witness' testimony under the procedure set forth in Section E above. The witness will then be tendered for cross examination.

Objections to any matters contained in the affidavits shall be filed November 3, 1989. Affidavits of rebuttal witnesses, if any, shall be filed by November 10, 1989. Objections to rebuttal affidavits shall be filed by November 20, 1989.

G. DISCOVERY CUTOFF

Discovery cutoff as to liability issues is May 15, 1989. As to other issues the discovery cutoff is August 1, 1989. The parties may conduct any additional discovery by agreement after those dates provided that any such discovery conducted after those dates will not be offered or submitted to the Court in connection with any dispositive motions filed.

All other deadlines established by this Court's previous scheduling order remain intact unless altered below.

H. DISPOSITIVE MOTIONS - PLAINTIFF AND DEFENDANTS

(1) Liability Issues

Dispositive motions shall be filed by June 1, 1989 Responses thereto shall be filed by June 30, 1989. Replies,

any, shall be filed by July 14, 1989.

(2) Other Issues

Dispositive motions shall be filed by September 1, 1989. Responses thereto shall be filed by September 29, 1989. Replies, if any, shall be filed by October 13, 1989.

Although the Court has permitted the parties to extend the previous discovery cutoff dates, this Court will not allow any agreed upon extensions of discovery to adversely impact the dispositive motion schedule set forth above. Had the Court not permitted the parties to extend discovery, the dispositive motion schedule set forth above would have been well after the termination of discovery. Accordingly, no extension of the dispositive motion schedule will be permitted based upon a claim that discovery is still ongoing. Similarly, the Court will not permit any dispositive motions to be supplemented by discovery conducted after the filing of dispositive motions and/or the responses.

I. DISPOSITIVE MOTIONS - THIRD-PARTY DEFENDANTS

The third-party defendants previously filed an application for an order permitting them to conduct limited discovery and to file dispositive motions prior to the trial of phase I and phase II issues. That application was denied by a short written order issued July 14, 1988. See docket sheet entry no. 1297.

The Court, however, has reconsidered the position of the third-party defendants and hereby modifies the July 14, 1988 order

to permit limited discovery and the filing of dispositive motions prior to the November 27, 1989 remedy trial, for any third-party defendants who desire to do so. This is entirely optional.[3]

Those third-party defendants who desire to file dispositive motions prior to the remedy trial will adhere to the following schedule:

(1) From March 22 through April 28, 1989 the third-party defendants may conduct discovery relative to the dispositive motions.

(2) The dispositive motions shall be filed by May 19, 1989.

(3) From May 22 through June 29, 1989, third-party plaintiffs may conduct discovery relative to any dispositive motions which are filed.

(4) The responses to the dispositive motions shall be filed by July 14, 1989.

(5) Replies, if any, shall be filed by July 21, 1989.

(6) A hearing on any dispositive motions filed by Third-parties in accordance with this schedule will be held August 25, 1989 at 8:00 a.m.

J. SITE VISIT

The parties shall make appropriate arrangements for the Court and the Special Master to visit the Hardage disposal site on

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[3]Any third-party defendants who do not desire to file dispositive motions prior to the November 27, 1989 remedy trial will be given an opportunity to conduct discovery and file dispositive motions after the remedy trial.

Monday, March 27, 1989.

K. SETTLEMENT CONFERENCE

A two-day settlement conference will be conducted April 26-27, 1989.

L. FINAL PRETRIAL ORDER, PRETRIAL STATUS CONFERENCE, OPENING STATEMENTS AND TRIAL

The trial is set on the Court's November 27, 1989 trial docket. The Final Pretrial Order shall be approved by all parties and submitted to the Court by November 17, 1989. A final pretrial conference will be held November 24, 1989 at 8:00 a.m. All proposed findings of fact, conclusions of law and trial briefs shall be filed by November 24, 1989. The parties may, if they desire, make opening statements on November 24, 1989. Given the submission of trial briefs and proposed findings, opening statements will be limited to thirty (30) minutes per side.

M. TOTAL AMOUNT OF TIME TO BE DEVOTED TO TRIAL

This case had been the subject of various and shifting trial estimates by the parties. On February 1, 1988, in the status report signed by counsel for all parties, and submitted to the Court, the parties made the following representation to the Court:

VII. ESTIMATED TRIAL TIME:

Phase II Remedy: 30 trial days

Status Report filed February 1, 1988.

In the briefs submitted to the Court of Appeals on the re-

aborted petition for interlocutory appeal the defendants stated:

> The Government agreed in principle with the Defendants in late November of [1988] to propose a scheduling order that included a 52-day trial for the entire "remedy phase" of the case.

Opposition of Generator and Transporter Defendants-Respondents to Application of the United States to Permit Interlocutory Appeal at 14, filed December 11, 1988, in U.S.A. v. Hardage, No. 88-8090 in the Tenth Circuit. See also Affidavit of Robert D. Tomlinson, attached as Exhibit A to the Memorandum in Support of Motion of Hardage Steering Committee Defendants for Reconsideration of Order Allowing Interlocutory Appeal, filed December 1, 1988 in this Court.

The government did not dispute that such an agreement had been reached.[4] Moreover, at the hearing on January 9, 1989, counsel for the government indicated that adoption of the procedures set forth in this order would cut the actual trial time by approximately one-half, and endorsed the affidavit, deposition and stipulation procedures outlined above. The parties' previous trial estimates assumed six (6) hours of trial every trial day, an estimate this Court exceeds on a regular basis.

The Court believes that it should be entitled to rely on the trial estimates the parties provided to the Court, and further believes that from the statements of the parties concerning the

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[4] See U.S. Memorandum in Response to Motion to Reconsider at 2, attached to U.S. Application to file Memorandum in Response filed December 12, 1988. The government on January 9, 1989 however, attached certain caveats to the 52 day trial "agreement" it reached with defendants. These caveats, however, were not disclosed to the Court by counsel for any party when the parties estimated in February, 1988 that the entire remedy trial would take 30 trial days, nor were these caveats disclosed to the Court of Appeals in connection with the 52 day trial estimate.

nature of their cases,[3] that much of the proffered evidence in this case is overlapping and duplicative. Accordingly, based on the previous representations of counsel, the Court has determined that it will allocate no more than thirty days to hear the total trial of this case. No departures from this total time period will be entertained or granted. This is the amount of time the parties previously told this Court it would take to try this case, and more time than necessary to try the case under the 52-day estimate provided to the Court of Appeals, when reduced by the procedures endorsed by the parties in this case.

The Court will, at a later date, issue further time restraints within the 30-day time period, to be determined after reviewing the submissions of the parties called for by this Order. For purposes of trial preparation at this time, however, counsel should assume that the government will be permitted 14-days to present its case-in-chief, the defense will be given 14-days to present its case-in-chief, the government will be given one day of rebuttal and the defense one day of sur-rebuttal. These limitations, of course, are subject to the Court's authority to curtail any evidentiary presentation upon proper objection.

Moreover, if it appears to the Court that any of the parties have taken unreasonable positions with respect to requiring proof of matters not in dispute, refusing to sign stipulations which eliminate unnecessary proof, or challenging the evidentiar

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[3]For example, both parties estimate that approximately two-thirds of their respective cases will be taken up by experts.

foundation of exhibits or testimony without adequate basis, the Court reserves the right to add to or subtract from any party's allocated evidentiary presentation, with the understanding that the total trial time of 30 days will remain unchanged. Given the fact that the government bears the burden of proof in this matter, the Court will not hesitate to reduce the defendants' evidentiary presentation if dilatory tactics are employed.

A typical trial day will begin at 8:45 a.m. and end at 5:15 p.m. There will be one hour and fifteen minutes for both lunch and the accommodation of other docket matters, as well as two twenty (20) minute breaks, one in the morning session and one in the afternoon session. Consistent with the parties' previous trial estimates, the parties are assured that there will be at least six (6) hours of trial on each of the thirty (30) trial days.

The time taken to argue all objections made by a party which are overruled by the Court shall be deducted from the objecting party's time. Time for objections which are sustained will be deducted from the time of the proponent of the evidence. Otherwise, the time spent in non-evidentiary presentations will be charged to the requesting party.

The total time devoted to cross examination of any witness will be limited to the time which would be necessary to present the witness' relevant and necessary direct examination in the absence of the affidavit procedure adopted by this Court. This determination will be made by the Court. If unusual circumstances

require cross examination to exceed the time which would have been devoted to the relevant and necessary direct examination, as determined by the Court, the excess time will be charged to the cross examining party.

The parties are directed to confer each evening prior to the next day of trial and to jointly review the exhibits to be offered during the direct examination of the upcoming witnesses in an effort to eliminate, wherever possible, objections to the anticipated exhibits. The presentation of each witness should begin with an announcement of the exhibits which may be received in evidence without objection.

Fed. R. Evid. 403 recognizes the power and duty of the Court to exclude cumulative evidence or evidence which consumes more time than its probative value justifies. See United States v. Algie, 502 F. Supp. 783, 793 (E.D. Ky. 1980), rev'd on other grounds, 667 F.2d 569 (6th Cir. 1982). Rule 611 directs the Court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time." In short, it is fundamental that a court has the power and duty to manage its docket and the individual cases before it to "secure fairness in administration, [and] elimination of unjustifiable expense and delay." Fed. R. Evid. 102. As stated by the Court in United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. K 1986):

> There is an unnamed party in every lawsuit -- the public . . . . The public's right to a "just, speedy, and inexpensive determination of every action" is infringed, if a court allows a case, civil or criminal, to preempt more than its reasonable share of the court's time.

The courts have discretion to place reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence. See Johnson v. Ashby, 808 F.2d 676 (8th Cir. 1987); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1171 (7th Cir. 1983). As stated by the court in Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 473 (7th Cir. 1984): "[I]n this era of crowded district court dockets federal district court judges not only may but must exercise control over the length of trial . . . . " See also United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1986); SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13-15 (D. Conn. 1977). As stated by one commentator: "All jury trials should have time limits less than the time now required." Kirst, Finding a Role for the Civil Jury in Modern Litigation, 64 Judicature 333, 337 (1986).

Under the circumstances of this case, the Court has no hesitation in placing a thirty day time limitation on the total length of this trial. Indeed, the Court believes that if this matter is diligently pursued by all counsel, it either will not be tried at all or will be tried in less than thirty days, due to the streamlining measures initiated by stipulations and this Order. The Court regrets, however, having to schedule this trial during the 1989 holiday season. Unfortunately, the month of December is

traditionally the only time the Court could conduct a continuous thirty-day trial without seriously affecting the Court's regular docket.

N. CONCLUSION

The Court will utilize the parties' submissions as a basis for resolving many of the disputed evidentiary issues in this case prior to trial. This Order is entered without prejudice to the Court entering sanctions pursuant to Rule 16(f) or other provisions of the Federal Rules of Civil Procedure for failure to comply with pretrial scheduling orders. See Roy v. American Professional Marketing, Inc., 117 F.R.D. 687 (W.D. Okla. 1987); Roberts v McCrory, 693 F. Supp. 998 (W.D. Okla. 1987); Lindsey v. United States, 693 F. Supp. 1012 (W.D. Okla. 1988).

As stated previously, no continuances or departures from the schedule set forth in this Order will be permitted.

IT IS SO ORDERED THIS 20th DAY OF JANUARY, 1989.

LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

WITNESS LIST

(In Anticipated Order of Appearance)

1. Witness No. 1: John Smith

   A. Exhibits to be offered or shown witnesses on direct examination;

   B. When witness was noticed and manner of notice;

   C. Was notice in compliance with scheduling order? If so, identify order;

   D. Exhibits not noticed in compliance with scheduling order (see affidavit of counsel attached);

   E. Detailed summary of expected testimony of witness if not deposed;

   F. Estimate of time for direct examination