United States District Court
District of Utah

Markus B. Zimmer
Clerk of the Court

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September 15, 1994

Ms. Donna Stienstra
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Mr. Duke Argetsinger
Court Administration Policy Staff
Office of Court Programs
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Donna and Duke:

Pursuant to Abel Mattos' memorandum of September 1, 1994, I have enclosed the first and, in all likelihood, last written annual CJRA assessment for the District of Utah. As will become clear to you on reviewing the assessment, the impact in this district of the process set forth in the CJRA appears to have been minimal for two reasons. First, although the District of Utah was selected as a CJRA pilot court, the process of developing and implementing the Advisory Group's recommendations was rather protracted; the court elected to adopt only a portion of the recommendations, and they did not take effect until March 1993. Within ten months of that time, in January 1994, the court took action to implement on an experimental basis virtually all of the December 1993 amendments to the Federal Rules of Civil Procedure; no opt out provisions were exercised and where there is a conflict between the local rules and the new amendments, the amendments govern. It makes little sense to conduct annual assessments where there appears to be little, if any, discernable impact.

As attachments to the assessment statement, we have included the 1993 annual statistical report for the District of Utah and the preliminary CJRA impact report of the Rand Institute for Civil Justice. As you may know, the District of Utah is one of twenty included in Rand's study.

The periodic statistical reports mandated under the CJRA will be transmitted under separate cover. Please call if you have questions or need additional information.

Yours sincerely,

Markus B. Zimmer

Enclosures

cc: Honorable David K. Winder

ASSESSMENT OF THE DISTRICT OF UTAH CIVIL JUSTICE REFORM ACT PLAN AND ITS IMPLEMENTATION

SECTION ONE HISTORICAL BACKGROUND

LEGISLATIVE MANDATE: Under the 1990 Civil Justice Reform Act (CJRA), the District of Utah was designated as one of ten pilot courts tasked with accelerated implementation of the CJRA provisions. Under that accelerated schedule, the court was required to appoint a Civil Justice Reform Act Advisory Group that would be responsible for (i) analyzing the state of the civil docket in the District of Utah and (ii) making recommendations to the court as to how its processing of civil litigation might be improved to reduce the cost and minimize any delay. Moreover, the court was required to develop, based on the work of the Advisory Group, a Civil Justice Expense and Delay Reduction Plan (Plan) and to implement that plan by December 31, 1991. Finally, the CJRA specified that plans developed by the ten pilot courts must -- as opposed to may -- consider the six "principles and guidelines of litigation management and cost and delay reduction" set forth in the legislation. For the non-pilot courts, such inclusion was optional.

CREATION OF ADVISORY GROUP: In early 1991, the court selected and appointed a 12-member Civil Justice Reform Act Advisory Group (Advisory Group) representing a variety of perspectives and professional experience in the local legal and business communities. The Advisory Group commenced meeting in April 1991. Then-Chief Judge Jenkins did not appoint a chair; he acted as the Advisory Group facilitator and appointed the court clerk to serve as reporter.

ADVISORY GROUP ISSUES REPORT: In December 1991, the Advisory Group issued an 83-page report with appendices. The report included a variety of recommendations relating to the processing of civil litigation on topics, including differentiated case management, discovery and pretrial procedure, motion practice, alternative dispute resolution, and judicial controls.

CHIEF JUDGE PREPARES AND COURT APPROVES PLAN: Following receipt of the report, then-Chief Judge Jenkins drafted the court's plan and submitted it to the other judges for their review and comment. Following their review and discussion of it, the other judges approved the plan.

SECTION TWO
COURT'S CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

The court's plan focuses on and is organized along the six principles and guidelines of litigation management and cost and delay reduction as set forth in the CJRA. In the plan, the court formally adopts those principles, noting that for the most part, they reflect practices and procedures already in effect in the District of Utah. Specifically, the plan provides for the following:

SYSTEMATIC, DIFFERENTIAL CASE MANAGEMENT: The recommendations of the Advisory Group notwithstanding, the court elected in its plan to not adopt fixed categories of treatment for fixed categories of cases. It simply is not clear that creation of such categories would expedite or otherwise render more efficient the processing of civil cases. As the plan notes, the court prefers to retain the flexibility to treat each case according to its particular characteristics as revealed in the initial status and scheduling conference. Thus, as specified in the plan, no change in current practice is required.

EARLY AND ONGOING CONTROL BY THE JUDGE OF THE PRETRIAL PROCESS: The posture of the court vis-a-vis "early and ongoing control of the pretrial process " is that the practices suggested under this principle have long been a part of the practices in the District of Utah and are reflected in the requirements set forth in the court's local rules regarding the pretrial and discovery processes. To that extent, the recommendations of the Advisory Group notwithstanding, the court determined that no change in current practice is required, and the plan so provides.

DISCOVERY/CASE MANAGEMENT CONFERENCES TO CONTROL COMPLEX CASES: As is set forth in its local rules, the court places great emphasis on the initial status and scheduling conference as the framework for case management. Working with the attorneys at these conferences, the district or magistrate judge reviews the case, analyzes its particular characteristics, and sets the appropriate schedules. Again, because this approach permits the flexibility to deal with each case on an individual basis without unduly consuming judicial time or resources, no change in current practice is required.

VOLUNTARY EXCHANGE OF DISCOVERY AMONG PARTIES: As a matter of practice, the court encourages the voluntary exchange of information; its local rules provide for exchange of exhibits, lists of witnesses, etc. as a part of the final pretrial order. To further promote voluntary exchange, the notice form for the initial pretrial scheduling conference was modified to advise counsel to (i) communicate prior to the initial status and scheduling conference, and (ii) exchange relevant documents at the initial status and scheduling conference or indicate when they might be available.

With regard to the recommendations made by the Advisory Group on discovery matters, the court took the unusual step of referring them to its Local Rules Advisory Committee (Rules

Committee) with the mandate that it review the recommendations and advise the court as to which it might adopt via local rule. The court also asked the Rules Committee to (i) include in the scope of its review the proposed amendments to the Federal Rules of Civil Procedure that were being circulated for public comment at the time, and (ii) make some determination of how those amendments would mesh with the Advisory Group's recommendations.

CERTIFICATION OF DISCOVERY MOTIONS THAT PARTIES HAVE MADE GOOD FAITH EFFORT TO RESOLVE THE ISSUES ON THEIR OWN: The court pointed out in its plan that local rule 202(h) already requires such certification by counsel; because the essence of this principle reflects what the court already is doing under current procedures, existing practices in this matter are reaffirmed as part of the court plan.

DEVELOP ALTERNATIVE DISPUTE RESOLUTION PROGRAMS AND REFER APPROPRIATE CASES TO THEM: As is stated in the plan, although the court expressed some reservations about court-sponsored alternatives to the litigation process, it agreed to experiment with court-supervised mediation, arbitration, mini-trials/summary jury trials for a limited period and to evaluate the results. Although the court did not implement the programmatic recommendations made in the Advisory Group's report, it indicated in the plan that it would consider the group's recommendations.

FURTHER ROLE OF THE ADVISORY COMMITTEE: Following approval of the plan by the court, a copy of it was sent to each member of the Advisory Committee with a note from the Chief Judge expressing appreciation for their efforts in assisting the court to improve the civil litigation process. Because the follow-up work on the recommendations was assigned by the court to the Rules Committee, the formal work of the Advisory Group was essentially completed when it supplied the court with its report. The Advisory Group last met in December 1991, and the court does not anticipate calling any subsequent meetings.

SECTION FOUR
IMPLEMENTATION OF THE PLAN

Of the six principles of litigation management on the basis of which the court's plan is formulated, only two required any subsequent follow-up action on the part of the court: numbers four and six.

PRINCIPLE FOUR: PROMOTING THE VOLUNTARY EXCHANGE OF INFORMATION: As was noted earlier, the court asked its Rules Committee to review the Advisory Group's recommendations and advise the court accordingly. The Rules Committee commenced meeting in February 1992 and completed its work in this area in August 1992.

A major topic was whether to propose that the court adopt local rules amendments regarding discovery reform, as recommended by the Advisory Group, if within a short time following, the

proposed amendments to the Federal Rules of Civil Procedure regarding discovery would be enacted, thus creating the need for a second series of local rules amendments regarding discovery. What would be the impact on the bar of having to wrestle with two sets of discovery procedure changes within a relatively short time? Might it not be more prudent to wait until such time as the federal rules amendments are enacted before promulgating amendments to the local rules? Following the latter course of action would obviate the need for promulgating two sets of discovery-related local rules amendments, an alternative that would benefit the public and the bar. An alternative proposal was to implement via amendments to the local rules all of the changes reflected in the proposed federal amendments. However, there being no guarantee that the Congress would implement the federal rules changes in precisely the form they were transmitted by the Supreme Court, such implementation might necessitate subsequent amendments if changes were made to the federal rules amendments during the Congressional review period. In view of widespread uncertainty as to whether the far-reaching proposed amendments to the Federal Rules of Civil Procedure would be enacted as transmitted with the opt-out provisions, the Rules Committee determined that it would be premature to implement via local rule most of the discovery-related recommendations of the Advisory Group. The Rules Committee's subsequent recommendations to the court reflected that position. The court essentially adopted the recommendations of the Rules Committee, and the amended local rules were promulgated in March 1993. Most of the changes were of technical or administrative in nature, and few had anything to do with pretrial procedure or changes to the discovery process. The position of the court vis-a-vis the Federal Rules amendments was largely wait-and-see.

PRINCIPLE SIX: ALTERNATIVE DISPUTE RESOLUTION PROGRAM: The Rules Committee essentially adopted the ADR Rule proposed by the Advisory Group. The court subsequently incorporated major changes into the rule, then promulgated it in March 1993 with the other local rules amendments. Because operational responsibility for the ADR program was delegated by the court to its clerk, the clerk prepared materials publicizing the court's new program, conducted training programs for the arbitrators and mediators appointed by the court, and hired an ADR Administrator to run the program.

SECTION FIVE
IMPACT OF THE PLAN ON THE LITIGATION PROCESS

OTHER ACTIONS TAKEN BY THE COURT: The March 1993 amendments to the local rules had been in effect for approximately ten months when the new amendments to the Federal Rules of Civil Procedure went into effect in December 1993. In view of the significant changes to existing procedure and in an effort to provide the courts with some flexibility as to their implementation, these new amendments included provisions whereby courts could opt out of specified procedures and substitute their own.

Early in 1994, at the request of the court, the Rules Committee commenced another series of meetings to determine, among other matters, whether to recommend to the court that it exercise any of those opt out provisions. It concluded that neither the court nor the bar had sufficient experience with, or enough information concerning the effect of, the provisions on which to base an opt-out decision. Subsequently, on the recommendation of the Rules Committee, the court determined that with two minor exceptions, it would not opt out of any of the new civil rules amendments for an experimental period of nine months. During that nine-month period, it would study the amendments and assess their impact on the bar and on the civil litigation process in the District of Utah. If there proved to be negative effects, the court then would have useful and reliable evidence on the basis of which an opt out decision reasonably could be made.

Essentially, then, the court's position is that although the local rules remain in effect, wherever there was a conflict between them and the new civil rules amendments, the latter would take precedence. At the end of the nine-month experimental period -- on September 30 -- the Rules Committee would recommend to the court whether to opt out of any of the amendments. The court would take the recommendation under advisement and make its decision accordingly.

At its July 1994 meeting, the Rules Committee discussed whether the experimental period which was scheduled to end on September 30 was sufficient to produce the type of feedback the court would find useful. Concluding that it was not sufficient, the Rules Committee determined that it would recommend to the court that the nine-month period of experimentation be extended by another six months for a total of 15 months to ensure that it would have reliable data on the basis of which to make its recommendation to the court. Nine months is not sufficient time, for example, for most cases subject to the new requirements to have progressed to a point at which the new provisions affecting expert witnesses have played themselves out. The recommendation of the Rules Committee to extend the experimental period by six months will be transmitted to the court shortly, and the expectation is that the court will concur.

DIMINISHED SIGNIFICANCE OF THE PLAN: In effect, then, the changes to court procedures and processes -- and their impact on the civil litigation process -- that were proposed by the Advisory Group pursuant to the Civil Justice Reform Act in the District of Utah were substantially diminished in scope and potential impact by the court and its Rules Committee. As has been noted, the plan essentially confirmed that no changes to the court's civil adjudication process were required in four of the six primary areas addressed by the CJRA. Of the two remaining areas of the CJRA, discovery reform and ADR, the court adopted changes to the local rules. The discovery-reform changes were more modest than the Advisory Group would have preferred. Moreover, they were in effect for only ten months, March - December 1993. In January 1993, the court provisionally adopted all of the new federal civil rules amendments, thus dramatically altering the procedural landscape of the civil litigation discovery process. That ten-month period was insufficient to generate any reliable data that could be used as the basis for drawing some conclusions about the extent to which those discovery-related rules changes promoted the goals of the Civil Justice Reform Act.

The changes adopted by the court vis-a-vis alternative dispute resolution were more dramatic and led to the implementation of a experimental ADR Program. Operation of that program has not been affected by the new civil rules amendments. The ADR Program has been in operation for approximately 18 months. The number of cases referred by the court into the ADR program is approximately 5% of the eligible caseload, and of those, approximately 70% are successfully resolved. In another 10% of the eligible cases, at least one of the parties has elected to have the matter referred to ADR while the other party(ies) have elected to have the case adjudicated through the traditional litigation process. Thus, the CJRA provisions encouraging experimentation with mechanisms of alternative dispute resolution have had an impact on civil case litigation in the District of Utah. The secondary impact of implementing an ADR program has been in the state court system which currently is in the process of developing a statewide ADR program whose motivation and structure rely in part on the program in this court.

EVALUATION BY THE RAND INSTITUTE FOR CIVIL JUSTICE: As one of 10 CJRA pilot courts, the District of Utah is participating in an extensive study of court caseflow by the Rand Institute for Civil Justice. The basic purpose of the study is to compare civil case processing, based on the standards set forth in the CJRA in the ten pilot districts against ten counterpart districts not designated as pilots. Presumably, the outcome of the evaluation will show that the ten pilot courts, having implemented their plans on an accelerated basis, have achieved greater progress toward reducing cost and delay in civil litigation than the ten non-pilot courts whose CJRA implementations schedules call for a more leisurely timetable. The study will extend through December of 1994; a Rand report on the effort to date, "Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990" by Terence Dunworth and James S. Kakalik, was presented to the Judicial Conference of the United States in mid-June 1994. A copy of that report is annexed to this assessment as Attachment A. In performing their analyses, the representatives from Rand are reviewing multiple sources of data, including court statistics, interviews and surveys of judges, magistrate judges, lawyers, litigants and ADR providers for a selected sample of cases. A portion of the study will focus on cases adjudicated prior to the adoption of CJRA; another focuses on cases adjudicated after the adoption of the courts' CJRA plans. The majority of cases being studied are civil, but a limited number of criminal cases have also been added to the study to determine the impact, if any, of criminal case processing requirements on judges' efforts to process civil litigation.

The Rand study is compiling extensive, detailed data on case structure and processing, and it includes an analysis of case processing times. The size of the sample for the District of Utah involves almost a quarter of the civil cases filed in statistical year 1992-1993. From the court's perspective, for it to engage in a separate, extensive statistical analysis of its civil and criminal dockets, as called for by the CJRA, would be duplicative of the Rand effort. General statistical data on civil case processing has been extracted from the court's statistical records by the Federal Judicial Center. Moreover, an extensive report was done for the court regarding calendar year 1993 data which is annexed as Attachment B. These data serve as a preliminary analysis of the current status of the civil docket in this district. As to the specifically measurable impact of the CJRA and the court's plan on civil case processing in the District of Utah, the court will await the final Rand Institute Report.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
ANNUAL STATISTICAL REPORT
CALENDAR 1993

I. CASELOAD

A. CIVIL CASELOAD

1. **Cases Filed:** In calendar 1993, a total of 1,244 civil cases were filed with the court. This compares with 1,189 in 1992, 1,206 in 1991, and 1,250 in 1990, reflecting a relatively stable civil caseload over the past four years. Chart A, which is attached to this report, plots the four-year caseload. The distribution of these cases by nature of suit for each of the past four years is plotted in Charts B - E, also attached to this report.

2. **Single-/Multi-defendant Cases:** The number of multi-defendant civil cases filed in calendar 1993 exceeded the number of single-defendant cases. Chart F plots the comparison for each of the past four calendar years.

3. **Cases Pending:** The court began calendar 1993 with a pending civil caseload of 1,423 cases and ended the year with a pending caseload of 1,465 cases, yielding an overall increase of 42 cases or 3%. Chart G plots the pending caseload by district judge in terms of starting number, ending number, and gain/loss. The numbers are set forth on Chart G(1).

B. CRIMINAL CASELOAD

1. **Cases Filed:** In calendar 1993, a total of 394 criminal cases were opened. Of these, 293 were felonies, 49 were misdemeanors, and 31 were petty offenses. Chart H plots this distribution. By year end, there were 11 criminal cases under court seal. During the course of the calendar year, jurisdiction for a total of eight probation supervision cases was transferred to the District of Utah. The two remaining cases are accounted

for by one transferred from another district and one based on an information improperly filed by the U.S. Attorney.

2. **Counts Filed:** In calendar 1993, a total of 1,482 individual criminal counts were filed: 1,346 felony-level, 73 misdemeanor-level, and 63 petty-offense-level. Chart I plots the 1993 criminal caseload by broad categories of felony counts.

3. **Cases Pending:** The court began calendar 1993 with a pending criminal caseload of 256 cases and ended the year with a pending caseload of 279 cases, yielding an overall increase of 20 cases or 8%. Chart J plots the pending caseload by district judge in terms of starting number, ending number, and gain/loss. The numbers are set forth on Chart J(1).

C. **SEALED MISCELLANEOUS CASES:** The clerk's office opened a total 119 sealed miscellaneous cases. Chart K plots their type and number.

II. **SUMMARY OF DOCKETED EVENTS IN 1993:** These numbers reflect the docketing entries made on the automated CIVIL/CRIMINAL system during calendar 1993. However, the entries apply to all cases currently maintained on the automated system, including active pre-1993 cases. To that extent, the numbers in several instances do not correspond to the 1993 case statistics reflected elsewhere in this report.

A. **CIVIL:** The following were filed and docketed:

1. 1,217 complaints
2. 19 sealed complaints
3. 270 in forma pauperis applications
4. 60 sixty judicial recusal memoranda
5. 79 petitions
6. Inter-district transfers: 14 cases in/3 cases out

B. CRIMINAL: The following were filed and docketed:

1. 181 indictments
2. 61 sealed indictments
3. 70 indictments that were unsealed during the year
4. 53 felony informations
5. 83 misdemeanor informations
6. 18 superseding indictments
7. 23 superseding informations
8. 491 CJA appointments
9. 663 initial appearances -- including some arraignments
10. 318 arraignments on defendants who had previously appeared
11. 283 magistrate judge detention hearings
12. 500 magistrate judge orders of detention
13. 253 statements in advance of pleas

C. GENERAL: The following civil/criminal matters were filed and docketed:

1. 3,036 notices of hearings
2. Minute entries for 3,144 hearings
3. 4, 837 motions; of these, 1,325 sought to extend time.
4. 1,710 stipulations
5. 7,103 orders (non-scheduling)
6. 534 scheduling orders.
7. 521 orders of reference
8. 284 magistrate judge reports and recommendations for cases referred
9. 84 magistrate judge reports and recommendations for motions referred
10. 121 objections filed to the reports and recommendations
11. 171 district judge memorandum decisions
12. 55 findings of fact
13. 5 consents from civil parties to magistrate judge trials
14. 51 consents from criminal parties to magistrate judge trials
15. Daily minute entries for 76 bench and 59 jury trials -- civil and criminal

III. JURY

A. **PETIT:** Sixty-six panels of jurors were summoned to serve on petit juries. Payments were made to 2,406 people. As noted above, 59 jury trials were conducted.

B. **GRAND:** Northern and Central Division grand juries were convened for a total of 49 days during calendar 1993 and handed down 231 indictments charging 445 defendants with a variety of felony charges. They also handed down 18 superseding indictments. Although the grand juries continue to meet four days per month, the number of defendants named and indictments generated recently has declined; generally this reduction appears to coincide with the appointment of the new U.S. Attorney. As is plotted on Chart L, the number of (i) defendants indicted and (ii) indictments returned over the past four calendar years increased steadily from 1990 through 1993. However, based on late 1993 and early 1994 statistics, which are reflected in Chart M, they now appear to be decreasing.

IV. ALTERNATIVE DISPUTE RESOLUTION:

Rule 212, which authorizes and sets forth the court's experimental ADR program, went into effect on March 1, 1993. During the ten-month period from March 1 to December 31, parties in civil cases filed 299 certificates of election. Of that number, 24 cases were referred into the ADR program at the parties' request.

A. **ARBITRATION:** Of the 24 cases, five were referred to arbitration.

B. **MEDIATION:** Of the 24, 19 were referred to mediation. Eight of these 19 cases have completed mediation; five have progressed to settlement.

C. **LITIGATION:** Sixty-three other parties filed certificates requesting ADR, but at least one opposing party opted for litigation.

V. JUDGMENTS:

One-hundred-twenty-three default certificates were entered. Default judgments were entered in 65 cases. The clerk's office entered 23 consent judgments, two foreclosures, and 603 other judgments.

VI. **APPEALS:** The clerk's office docketed 173 notices of appeal in civil actions and 25 of appeals in criminal cases. Mandates were received in 145 cases.

VII. **INTERPRETERS**: Interpreter services were required in 58 cases.

Attachments

CIVIL CASES FILED
CALENDAR YEARS 1990 - 1993
DISTRICT OF UTAH

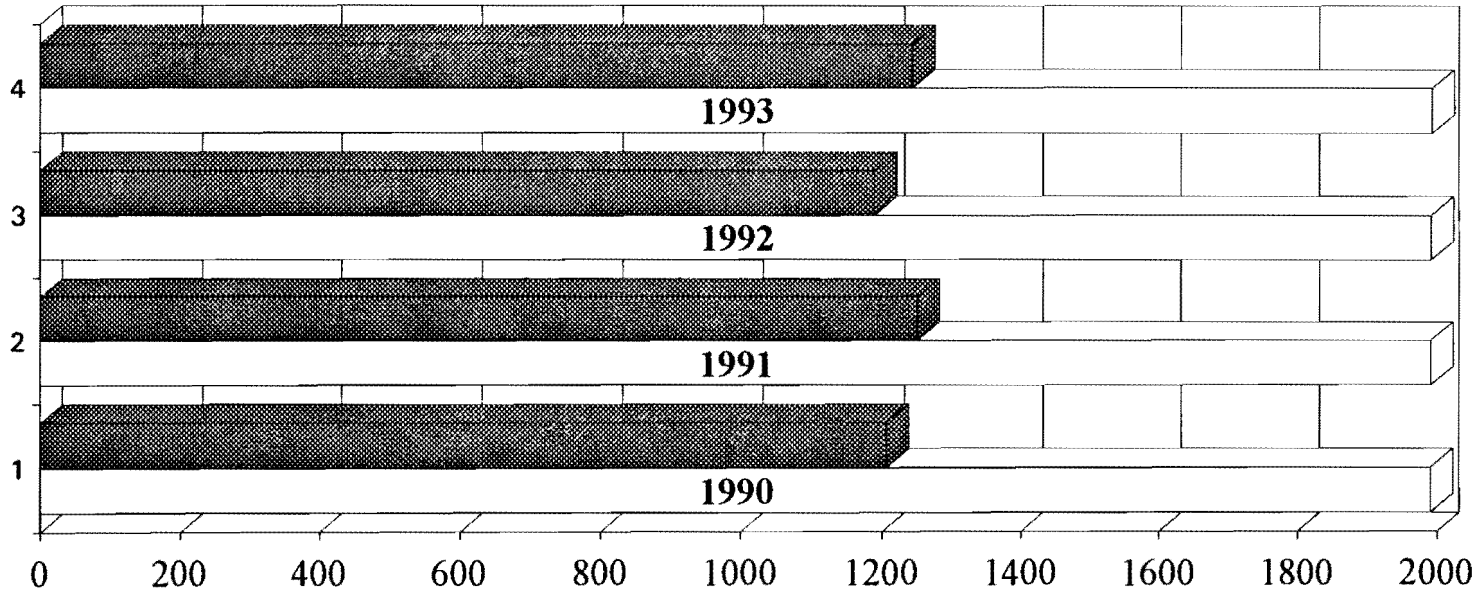

CHART A

CIVIL CASES FILED IN 1993
BY NATURE OF SUIT
DISTRICT OF UTAH

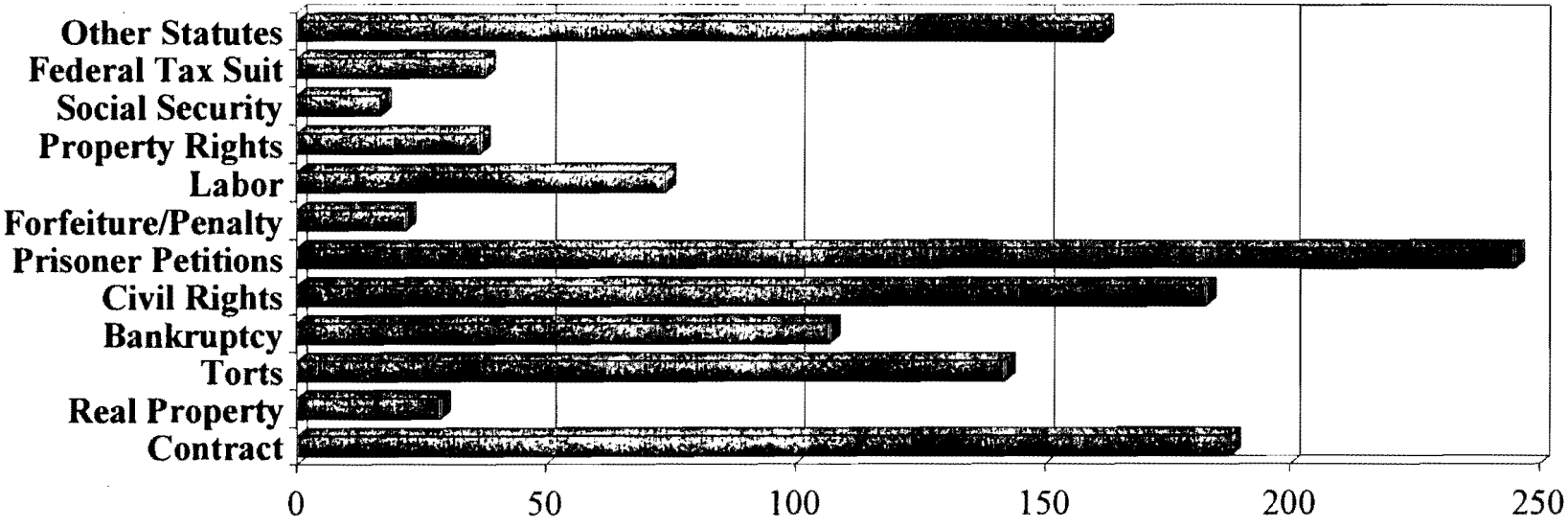

CHART B

CIVIL CASES FILED IN 1992
BY NATURE OF SUIT
DISTRICT OF UTAH

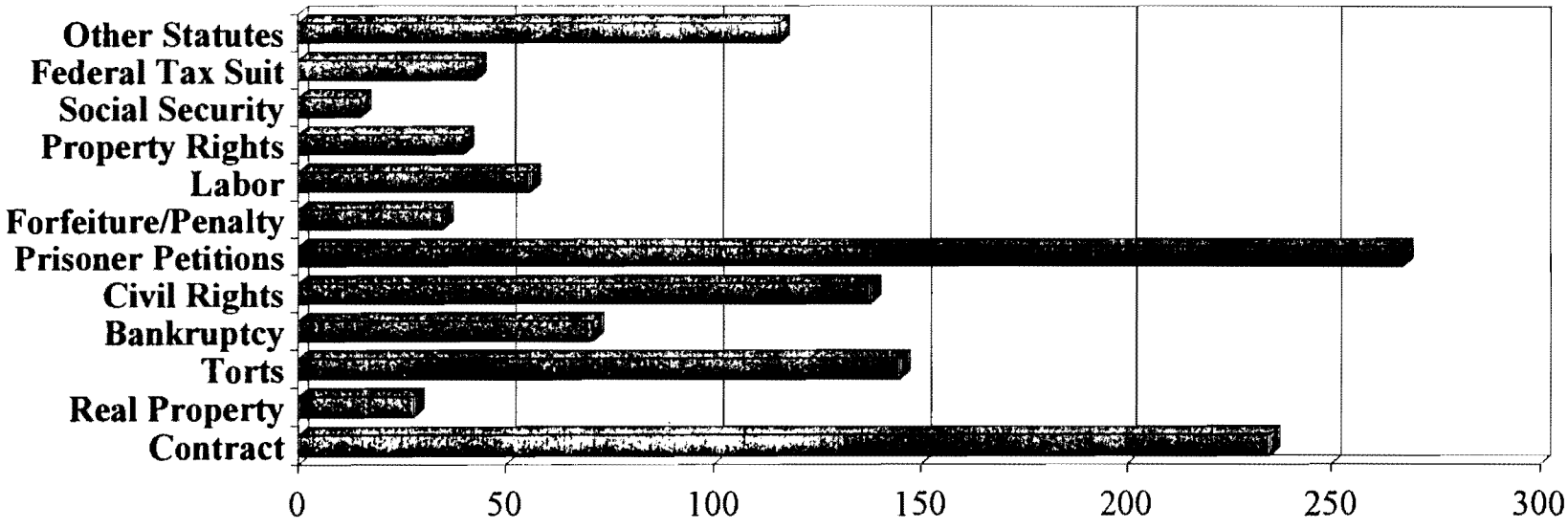

CHART C

CIVIL CASES FILED IN 1991
BY NATURE OF SUIT
DISTRICT OF UTAH

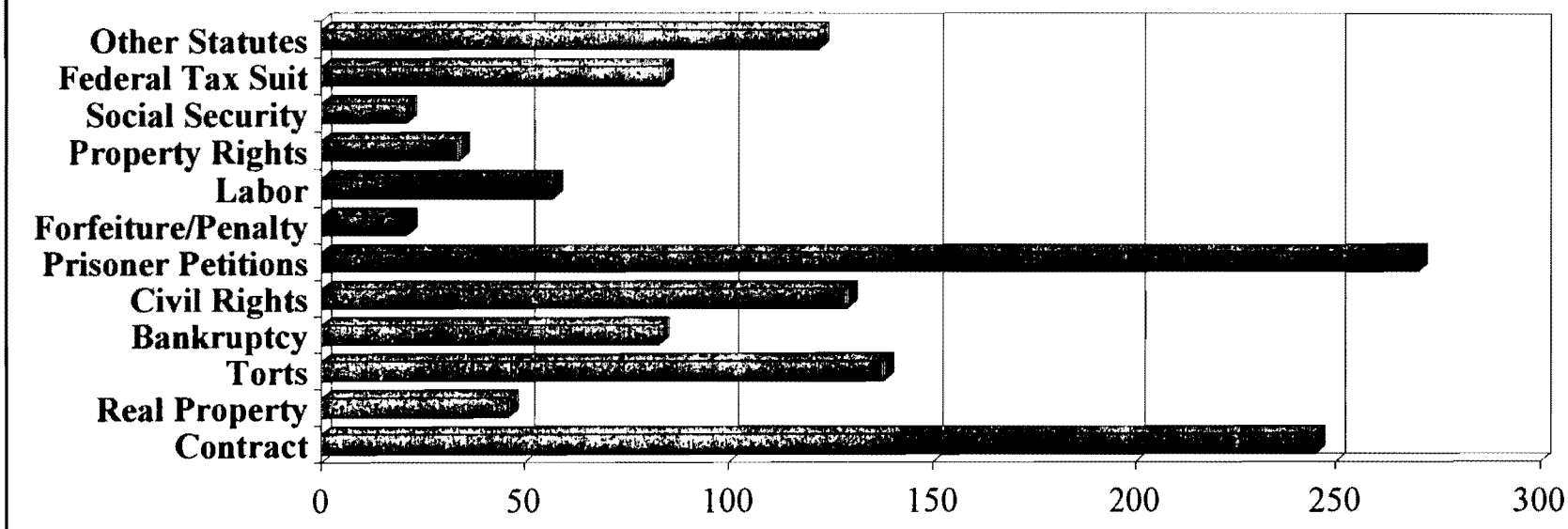

CHART D

CIVIL CASES FILED IN 1990
BY NATURE OF SUIT
DISTRICT OF UTAH

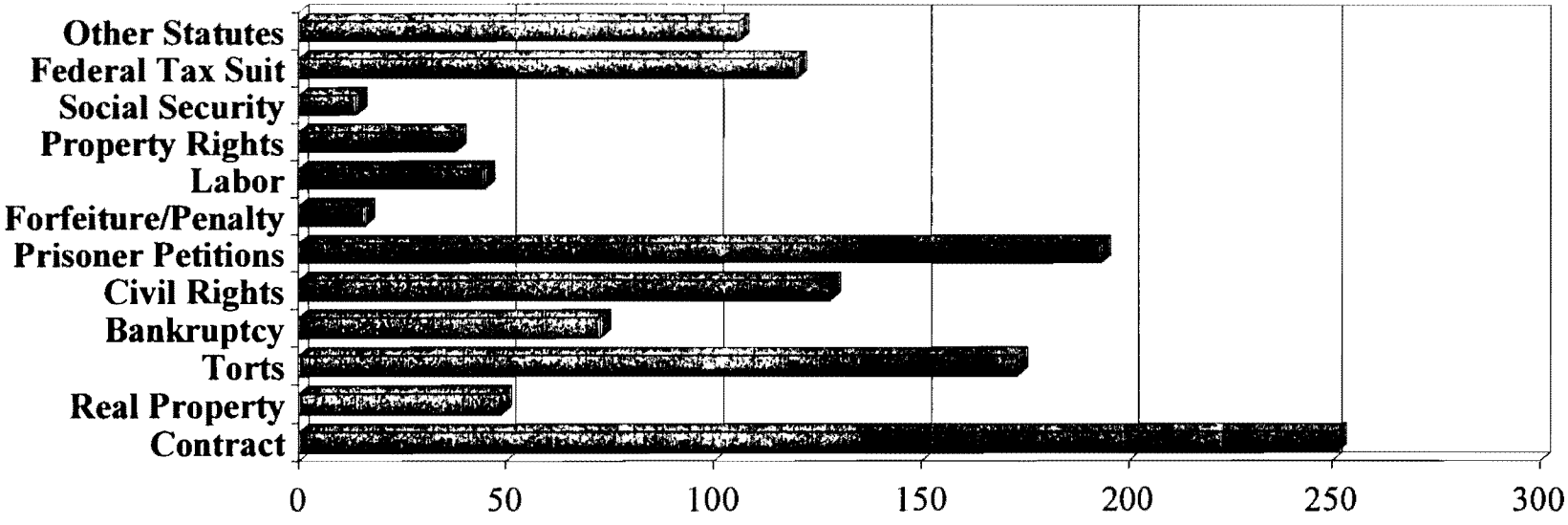

CHART E

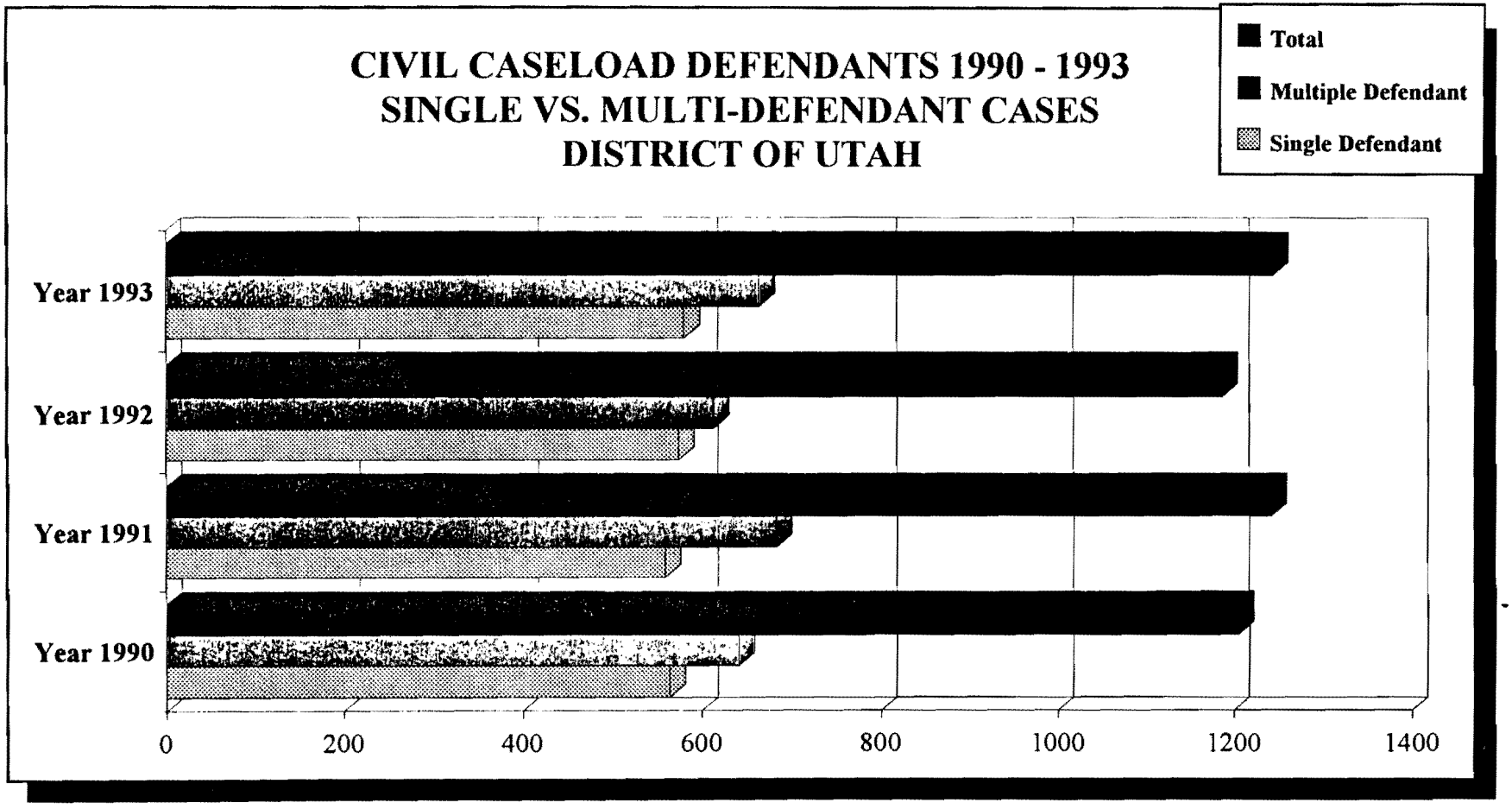
CIVIL CASELOAD DEFENDANTS 1990 - 1993
SINGLE VS. MULTI-DEFENDANT CASES
DISTRICT OF UTAH
Total
Multiple Defendant
Single Defendant
Year 1993
Year 1992
Year 1991
Year 1990
0
200
400
600
800
1000
1200
1400

CHART F

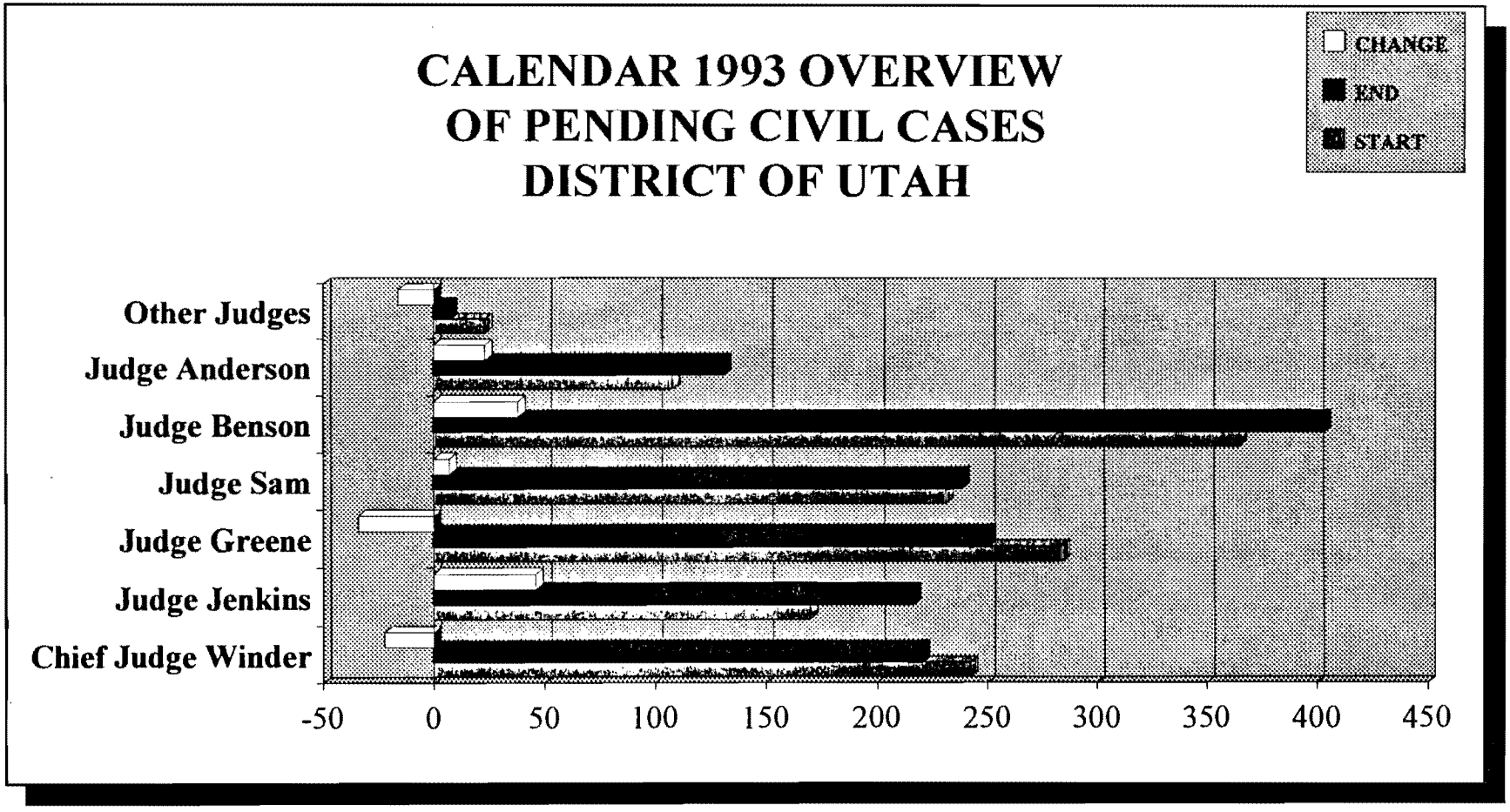
CALENDAR 1993 OVERVIEW
OF PENDING CIVIL CASES
DISTRICT OF UTAH
CHANGE
END
START
Other Judges
Judge Anderson
Judge Benson
Judge Sam
Judge Greene
Judge Jenkins
Chief Judge Winder
-50
0
50
100
150
200
250
300
350
400
450

CHART G

JUDGE	START PENDING	END PENDING	CHANGE
Chief Judge Winder	242	220	-22
Judge Jenkins	170	216	46
Judge Greene	284	250	-34
Judge Sam	231	238	7
Judge Benson	365	403	38
Judge Anderson	108	131	23
Other Judges	23	7	-16
Total	1423	1465	42

CHART G(1)

CALENDAR 1993
DISTRIBUTION OF CRIMINAL CASELOAD
DISTRICT OF UTAH

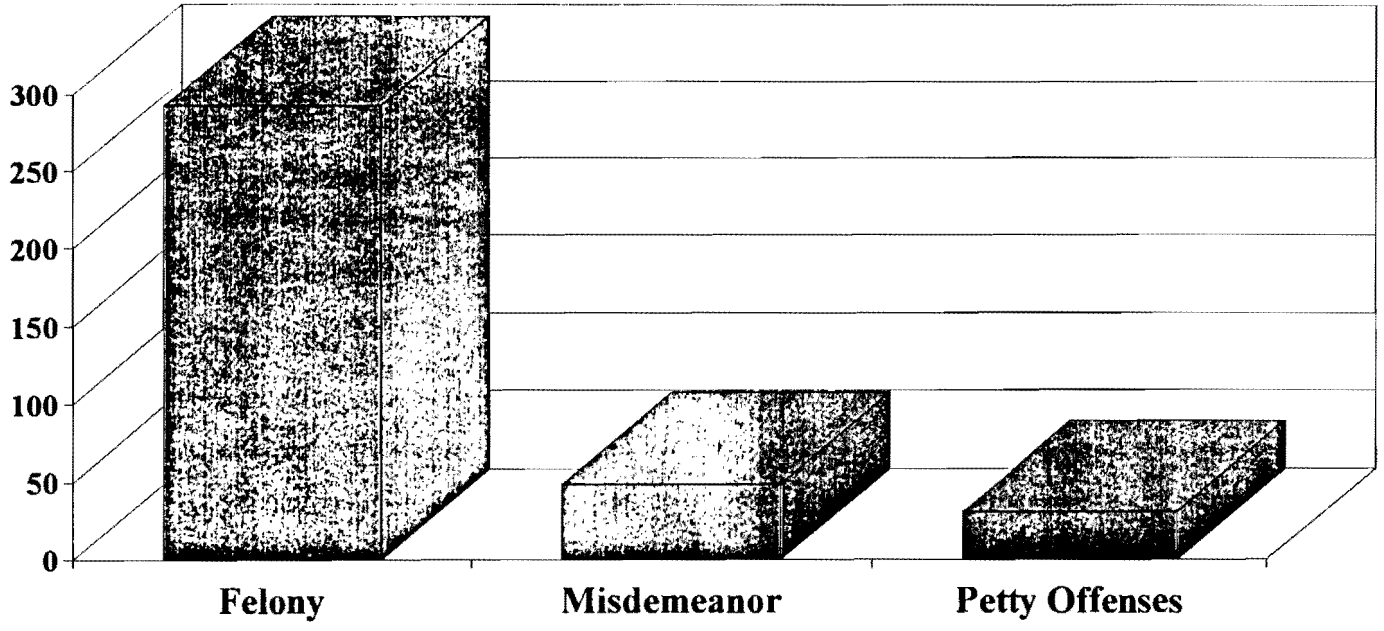

CHART H

SUMMARY OF FELONY COUNTS
CALENDAR 1993
DISTRICT OF UTAH

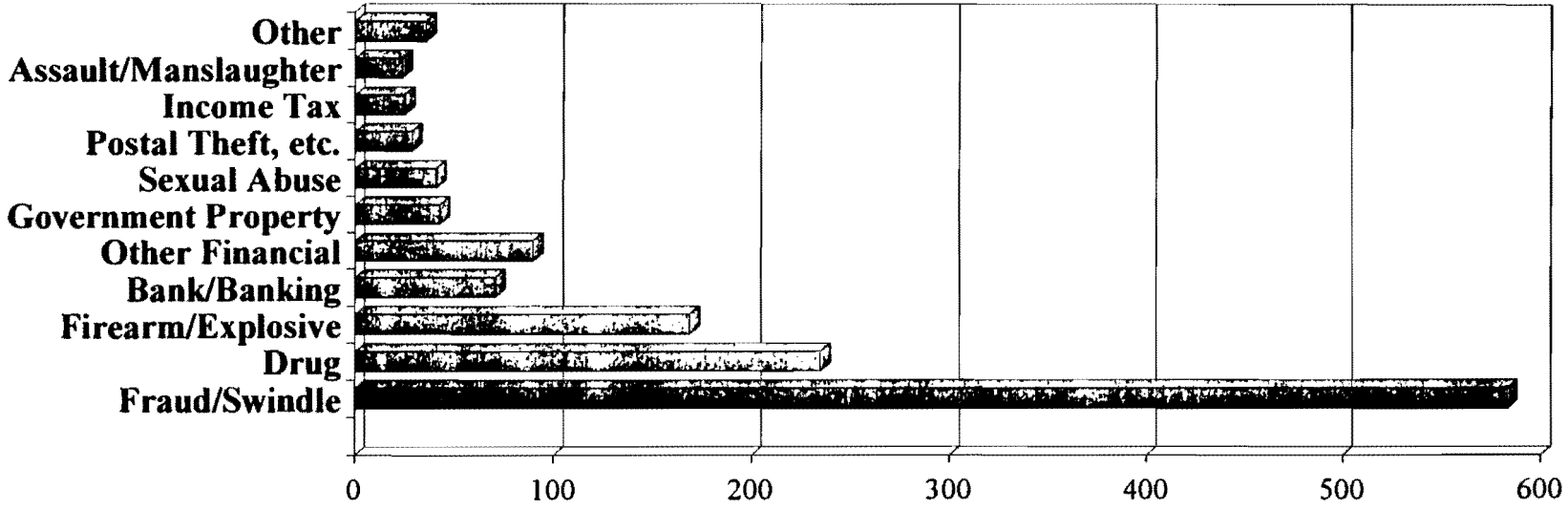

CHART I

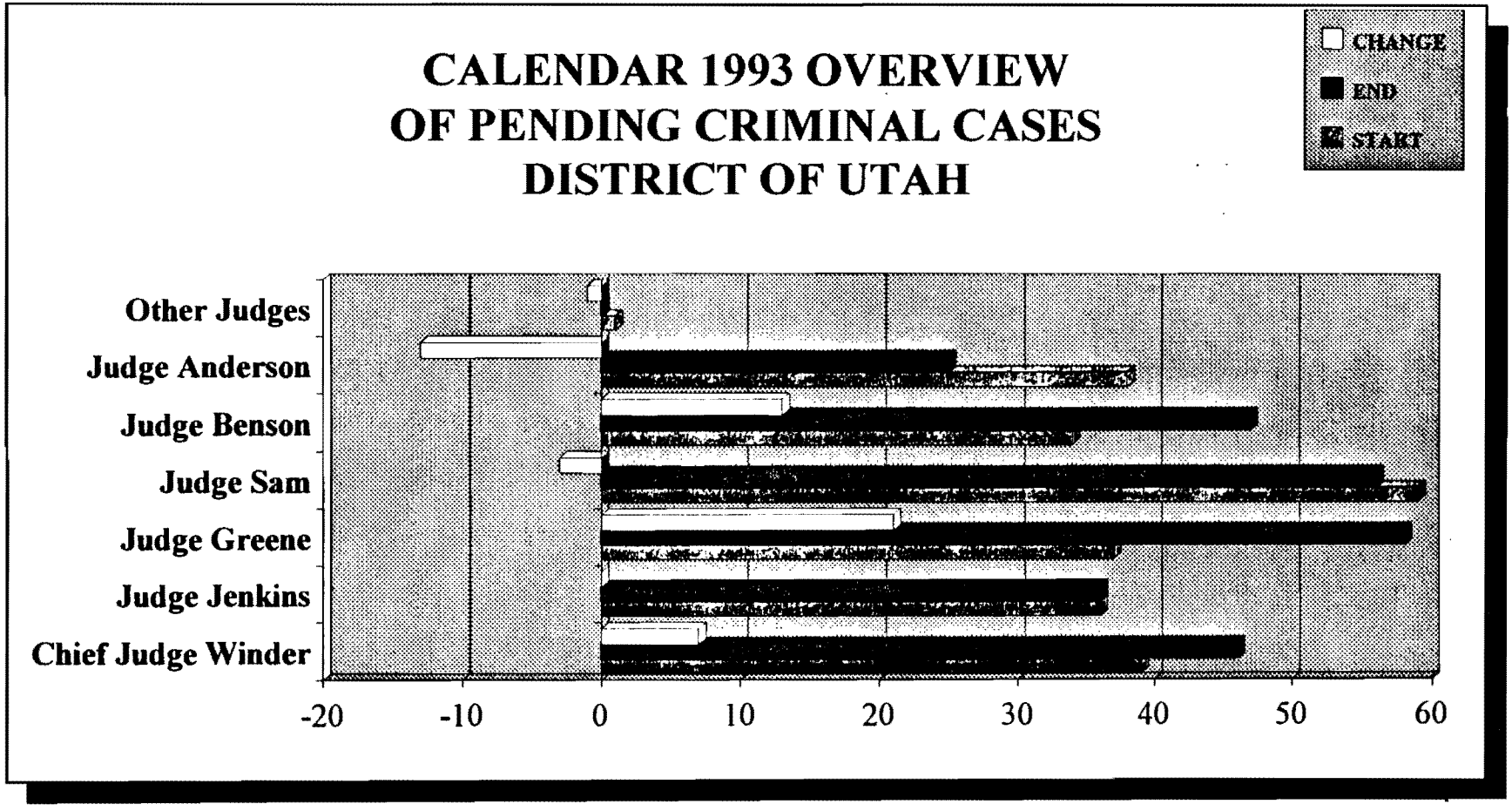
CALENDAR 1993 OVERVIEW
OF PENDING CRIMINAL CASES
DISTRICT OF UTAH
CHANGE
END
START
Other Judges
Judge Anderson
Judge Benson
Judge Sam
Judge Greene
Judge Jenkins
Chief Judge Winder
-20
-10
0
10
20
30
40
50
60

CHART J

JUDGE	START PENDING	END PENDING	CHANGE
Chief Judge Winder	39	46	7
Judge Jenkins	36	36	0
Judge Greene	37	58	21
Judge Sam	59	56	-3
Judge Benson	34	47	13
Judge Anderson	38	25	-13
Other Judges	1	0	-1
TOTAL	256	279	20

CHART J(1)

SEALED MISCELLANEOUS CASES
CALENDAR 1993
DISTRICT OF UTAH

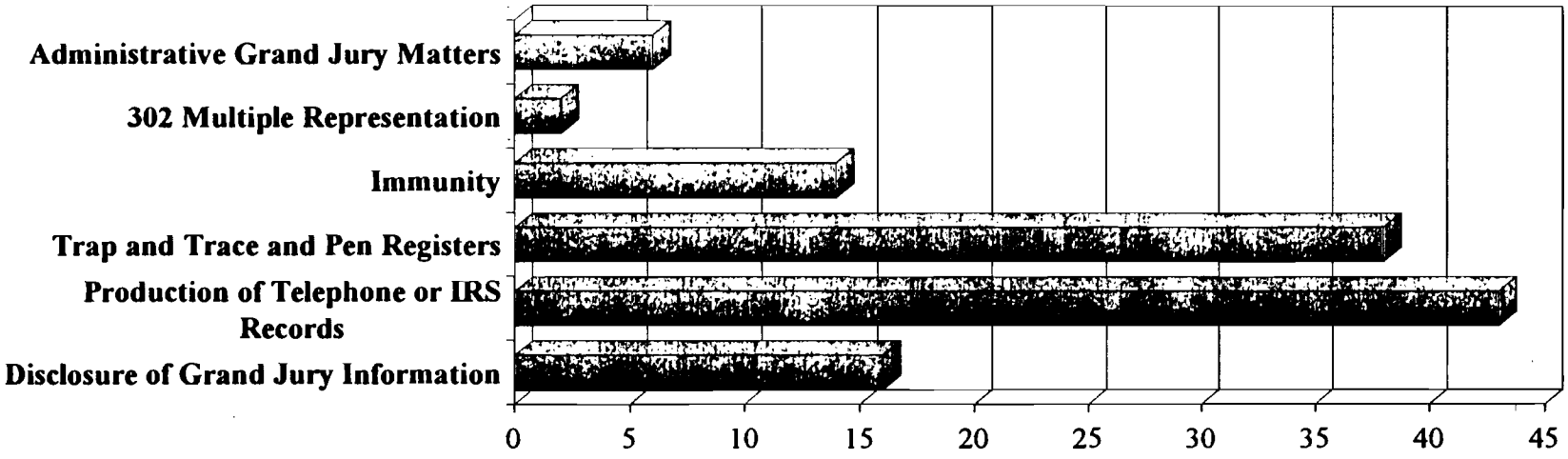

CHART K

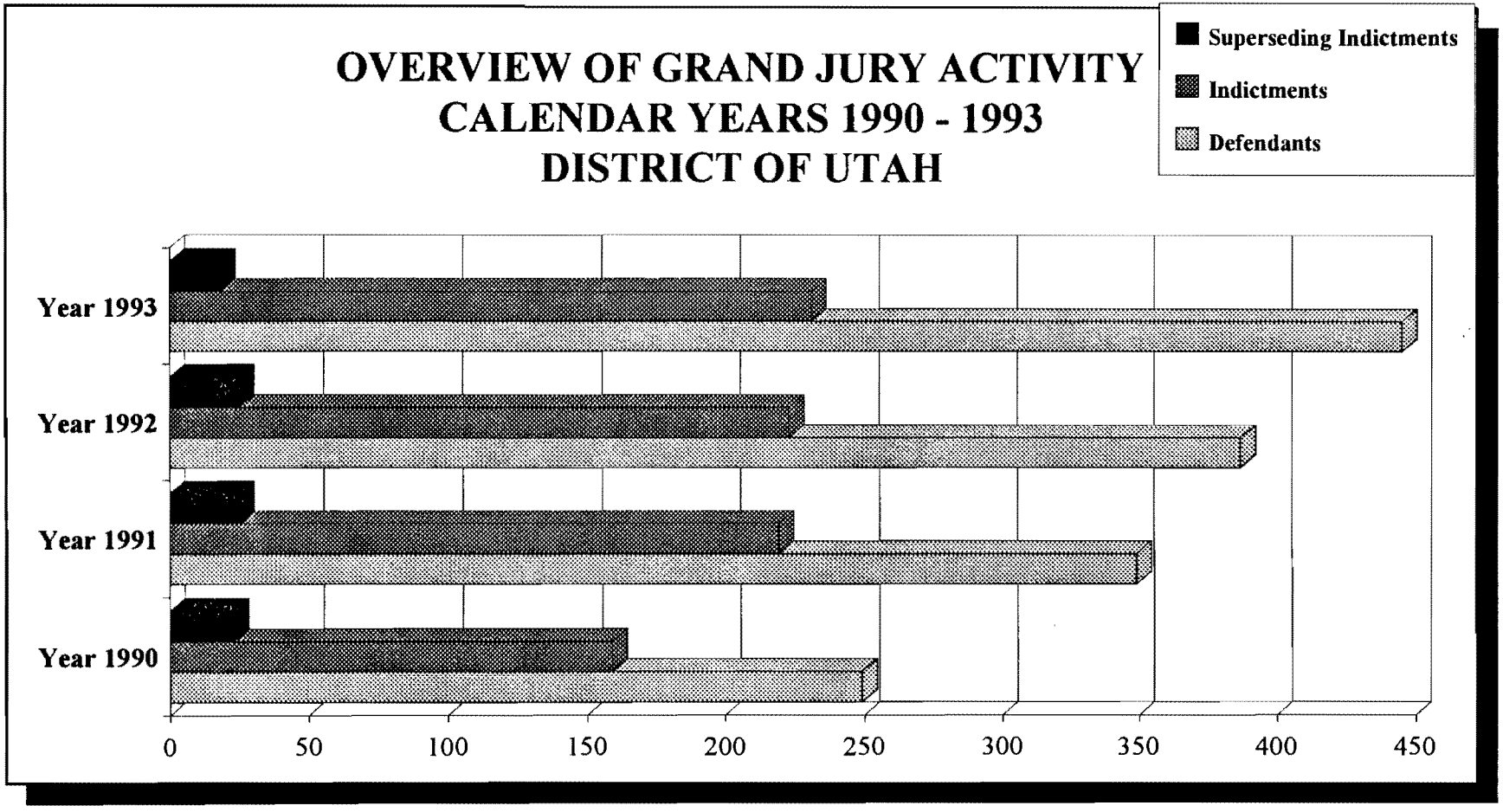
OVERVIEW OF GRAND JURY ACTIVITY
CALENDAR YEARS 1990 - 1993
DISTRICT OF UTAH
Superseding Indictments
Indictments
Defendants
Year 1993
Year 1992
Year 1991
Year 1990
0
50
100
150
200
250
300
350
400
450

CHART L

OVERVIEW OF GRAND JURY ACTIVITY
DISTRICT OF UTAH

Year	Days in Session	Defendants	Productivity Yield	Indictments	Productivity Yield	Superseding Indictments
Year 1990	27	249	9.22	159	5.89	23
Year 1991	31	349	11.26	219	7.06	25
Year 1992	50	387	7.74	223	4.46	25
Year 1993	49	445	9.08	231	4.71	18
Jan.1994	4	18	4.5	9	2.25	3

RAND

Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990

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RAND Institute for Civil Justice

CONTENTS

1. INTRODUCTION

RAND is evaluating the Pilot Program of the Civil Justice Reform Act of 1990. This document reviews the design of this evaluation and provides preliminary observations about the implementation of the pilot program.

BACKGROUND TO THE LEGISLATION

Perceived Problems With The Civil Justice System

Concerns that civil litigation costs too much and takes too long have been at the forefront of the civil justice reform debate for more than a decade. Both federal and state courts are thought by many to be overburdened, and the situation is believed to be deteriorating. Consequently, according to the oft-heard indictment of the civil justice system, individuals are denied access to justice, and U.S. businesses face difficulty competing with foreign adversaries.

Actors alleged to be creating these problems include:

- Congress--for passing laws that have significantly expanded federal jurisdiction in criminal and civil matters, and for adopting mandatory minimum sentences and sentencing guidelines that have increased the time that judges must spend on criminal cases;
- The executive branch--for periodically targeting particular areas of criminal and civil litigation, thereby affecting district court caseloads in fluctuating, burdensome, and unpredictable ways;
- Lawyers--for exacerbating the already adversarial nature of litigation and abusing existing rules of litigation, especially regarding discovery, in strategic and tactical efforts to reap profits and damage opponents;
- Litigants--for increasingly seeking redress from the courts rather than considering alternative ways to settle their disputes, and for increasingly demanding compensation for even minor injuries;
- The judiciary--for not actively managing cases and for failing to control the burdens that lawyers and litigants are imposing.

Even if the situation has worsened in recent years, comments and observations about all these problems are of hoary vintage. Many annual addresses by the Chief Justices of the U.S. Supreme Court have featured the complaint that federal courts have been asked to handle more cases without allocating them a concomitant increase in resources. The abuse of discovery, the decline of civility among lawyers, and the transformations of legal practice from profession to business, have long sat at the forefront of discussions about the alleged breakdown of the legal system.

All three branches of government focused on these perceived problems in the 1980s prompting extensive and sometimes vehement political debate. In the rush to propose solutions during the late 1980's, detached empirical research on the impact of cost and delay often took a backseat to political rhetoric. Unnoticed in the debate, for example, was research indicating that the time required to move a case through the system had changed little during the last two decades.[1] In addition, while studies had shown that the price of litigation seemed high indeed (with lawyers' fees and other litigation expenses roughly equal to the net compensation received by injured parties in tort cases for example),[2] there was little or no detailed information about the costs and benefits of litigation to involved parties. And, there was virtually no information that might allow an assessment of the impact on parties' costs and on time-to-disposition that could result from proffered reforms. Nevertheless, the debate continued, reaching higher and higher levels, until finally all three branches of government began to formally address the problems and formulate proposals to do something about them.

All Three Branches of Government Propose Reform

In 1988, Senate Judiciary Committee Chairman Joseph Biden requested that the Foundation for Change and The Brookings Institution convene a task force of authorities to recommend ways to alleviate the excessive cost and delay attending litigation. Practitioners, business representatives, public interest advocates, and academics participated in meetings, and a separate survey conducted for the Foundation bolstered the belief that the federal courts urgently needed reform. In its final report, the Brookings task

[1] Dunworth, Terence, and Nicholas M. Pace, Statistical Overview of Civil Litigation in Federal Courts, The RAND Corporation, R-3885-ICJ, 1990.

[2] Kakalik, James, et al., Costs and Compensation Paid in Tort Litigation, The RAND Corporation, R-3391-ICJ, July 1986.

force made extensive recommendations for expanding federal judicial resources and for instituting procedural reform.[3]

The Federal Courts Study Committee, appointed by the Chief Justice at the behest of Congress, also began work in 1988 on a fifteen-month study of the problems facing the federal courts.[4] Rather than focus on changes in the substantive law, the Committee explored institutional and managerial solutions. Specifically, the Committee recommended: reallocating cases between the state and federal systems; creating non-judicial branch forums for business currently in the federal courts; expanding the capacity of the judicial system; dealing with the appellate caseload; reforming sentencing procedures; protecting against judicial bias and discrimination; improving federal court administration; reducing the complexity of litigation; and expediting the movement of cases through the system. To achieve the last objective, the Committee recommended sustained experimentation with alternative and supplemental dispute resolution techniques. To control the pace and cost of litigation, it also encouraged early judicial involvement, phased discovery, the use of locally developed case management plans, and additional training of judges in techniques of case management.

Concurrently, President Bush created a Council on Competitiveness to propose reforms, although its formal report was not issued until after Congress enacted the Civil Justice Reform Act. That report[5] recommended reforming expert evidence procedures; creating incentives to reduce litigation; reducing unnecessary burdens on federal courts; eliminating litigation caused by poorly drafted legislation; reducing punitive damage awards; improving the use of judicial resources through efficient case management techniques; streamlining discovery; making trials more efficient; and increasing the use of voluntary alternative dispute resolution programs.

Whatever their differences, the studies by each branch of government stood together in their singular emphasis on case management techniques and procedural reform. In the end, it was the Brookings Institution report, deriving from initiatives largely sponsored by Senator Biden, that detailed many of these procedural and managerial reforms and in time formed the blueprint for draft legislation. Its goal, in brief, was to prompt the federal courts

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[3] The Brookings Institution, Justice for All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force, Washington DC, (1989).

[4] The Federal Courts Study Committee, Report of the Federal Courts Study Committee (1990).

[5] President's Council on Competitiveness, Agenda for Civil Justice Reform in America (1991).

to impose rules and procedures on themselves and on lawyers that would ameliorate the perceived twin problems of cost and delay.

The ensuing debate about the draft legislation was energetic, to say the least. It resulted in a compromise under which the main themes of procedural reform were sustained but some of the detailed statutory controls contemplated by the Brookings task force were deleted. Replacing them was an agreement that each district court would accept the responsibility for developing a cost and delay reduction plan tailored to its own needs.

Congress did, however, create a Pilot Program requiring ten districts to incorporate six specific principles of case management into their plans. Ten other districts, though left free to develop their own plans, were included in the program so as to permit comparisons. In order to generate reliable information on results, Congress provided for an independent evaluation of the activities of these districts.

OVERVIEW OF THE PILOT PROGRAM

The Six Case Management Principles

The Act directs each pilot district to incorporate the following principles into its plan:

1. Systematic, differential case management tailored to the characteristics of different categories of cases (the Act specifies several factors such as case complexity that may be used to categorize cases);
2. Early and ongoing control of the pretrial process through involvement of a judicial officer in assessing and planning the progress of the case, setting an early and firm trial date, controlling the extent and timing of discovery, and setting timelines for motions and their disposition;
3. For complex and other appropriate cases, judicial case monitoring and management through one or more discovery and case management conferences (the Act specifies several detailed case management policies, such as scheduling and limiting discovery);
4. Encouragement of cost effective discovery through voluntary exchanges and cooperative discovery devices;
5. Prohibition of discovery motions until the parties have made a reasonable, good faith effort on the matter; and
6. Referral of appropriate cases to alternative dispute resolution programs.

Pilot districts *must* incorporate these principles, while other districts *may* do so.

Predictably, opposing views have arisen about the merits of these ideas. Some commentators think that they are a overly rigid and controlling--a type of assembly-line justice--thus inhibiting the system from adapting to the needs of individual cases. Others find them so vague and permissive--particularly regarding differential case management, judicial involvement in case management, and alternative dispute resolution--that pilot districts can comply with legislative requirements by retaining most of their existing policies and arguing that they conform to the thrust of the six principles.

Selection of Pilot and Comparison Districts

The ten pilot districts were selected by the Committee on Court Administration and Case Management of the Judicial Conference of the United States. Chaired by Judge Robert Parker, Chief Judge of the Eastern District of Texas, the Committee sought to identify districts representative of the federal system. Factors such as caseload type, filing volume, and whether the district was fast or slow relative to other districts were all taken into account. The districts selected were: California (S), Delaware, Georgia (N), New York (S), Oklahoma (W), Pennsylvania (E), Tennessee (W), Texas (S), Utah, and Wisconsin (E).

After recommendations from RAND, the Judicial Conference also selected the following ten comparison districts: Arizona, California (C), Florida (N), Illinois (N), Indiana (N), Kentucky (E), Kentucky (W), Maryland, New York (E), and Pennsylvania (M).

Ideally, pilot and comparison districts would be similar in every respect except case management policies--thus illuminating the contrast between districts following the six principles and those not following them. Unfortunately, at the time of selection, the case management practices and CJRA plans of the comparison districts were unknown and the six principles had not been implemented in the pilot districts. In short, case management practices were not and could not have been a factor in the decisions. The Judicial Conference was therefore left to focus primarily on district size, workload per judge, the number of criminal and civil filings, and the time to disposition in civil cases, as points of comparison between pilot and comparison districts.

Representativeness and Comparability of Pilot and Comparison Districts

Since the program involves only twenty of the ninety-four federal districts, the representativeness of the pilot and comparison districts becomes critical. Obviously, the more representative they are, the greater the likelihood that they will yield valid generalizations about the system as a whole. A second concern is whether the ten pilot and ten comparison districts are sufficiently similar to be considered comparable. Using data from Statistical Year 1990--the year used to select the comparison districts--we present the characteristics of the two groups in Table 1.1.

Table 1.1

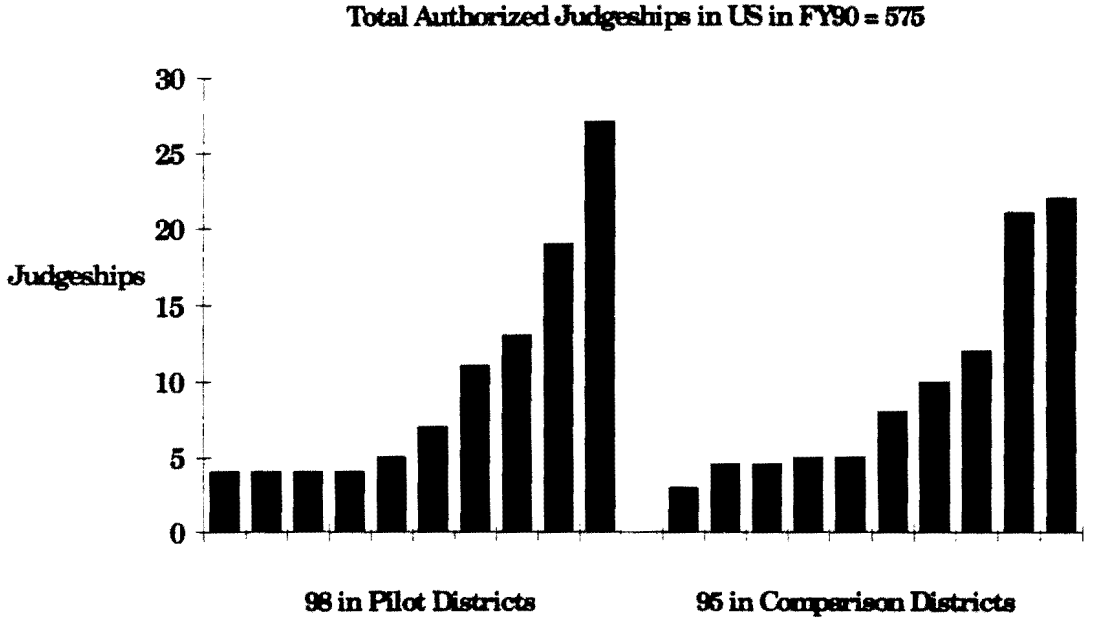
Pilot and Comparison Districts For The CJRA Pilot Program (Data Used To Select Districts Are From SY 1990)

Pilot and Comparison Districts	District	Number of Judgeships	Weighted Filings		Raw Filings Per Judgeship			Median Civil Time Intervals (months)		Pct of Civil Cases over 3 Yrs old
			Total	Per Judgeship	Civil	Felony Criminal	Pending	Filing to Dispos	Issue to Trial	
Pilot	CA(S)	7	3080	440	275	131	591	12	18	12.7
Comparison	AZ	8	3296	412	358	104	538	9	20	11.5
Pilot	DE	4	924	231	195	28	249	10	17	8.6
Comparison	FL(N)	3	984	328	358	70	454	9	23	7.3
Pilot	GA(N)	11	4169	379	312	35	350	10	19	4.0
Comparison	MD	10	4000	400	350	38	378	9	11	10.2
Pilot	NY(S)	27	11043	409	325	29	505	9	19	12.8
Comparison	IL(N)	21	10248	488	380	36	346	5	12	11.6
Pilot	OK(W)	5	2220	444	458	49	287	7	11	3.2
Comparison	PA(M)	5	2305	461	447	53	380	8	10	5.3
Pilot	PA(E)	19	12122	638	488	26	537	7	12	2.1
Comparison	CA(C)	22	10714	487	401	48	471	7	12	8.6
Pilot	TN(W)	4	1408	352	325	78	514	14	30	14.5
Comparison	KY(W)	4.5	1503	334	361	35	442	13	19	11.7
Pilot	TX(S)	13	7631	587	460	181	816	11	23	13.2
Comparison	NY(E)	12	5940	495	369	80	589	9	19	13.1
Pilot	UT	4	1620	405	310	60	481	11	14	12.3
Comparison	IN(N)	5	1530	306	277	41	325	12	15	12.0
Pilot	WI(E)	4	1684	421	369	61	386	7	20	6.0
Comparison	KY(E)	4.5	1606	357	385	48	389	8	18	5.0

Because no two federal districts are identical, perfect representativeness and comparability are illusory ideals. But having considered three important characteristics--judicial resources, number of filings, and time to disposition--we find sufficient similarity and representativeness to warrant generalizations about the potential effectiveness of system-wide reform.

First, Figure 1.1 depicts the number of authorized judges in each of the pilot and comparison districts in 1990. Pilot districts are on the left, comparison districts are on the right, and each group is sorted from smallest to largest.

Fig. 1.1: Number of Judgeships in Pilot and Comparison Districts



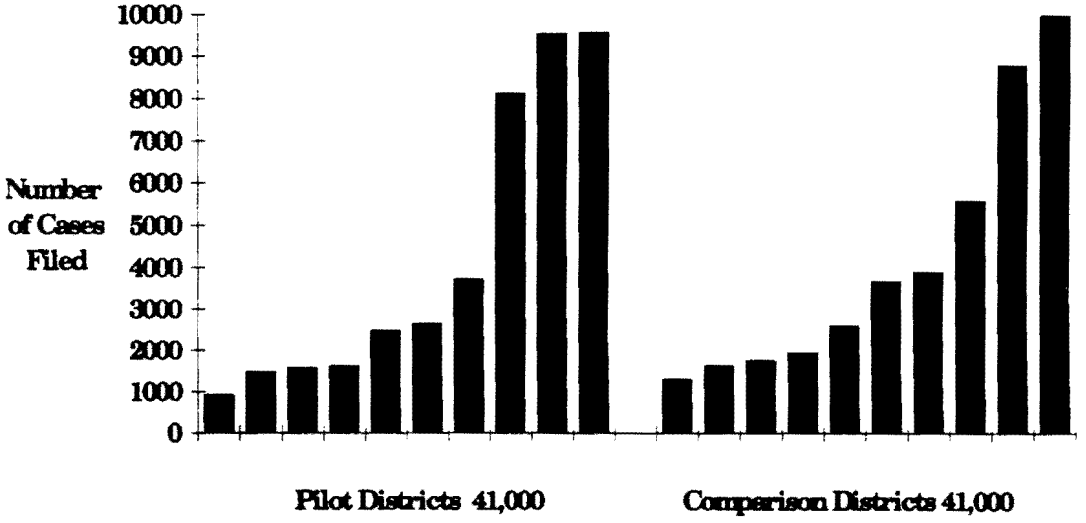
The two groups had 193 authorized positions in 1990-about one third of the 575 judgeships authorized for the entire district court system in that year.[6] There is a roughly even split between the pilot and comparison groups with respect to both the total number of positions and the variation in size between the districts in each group. The four largest districts in the federal court system are participants in the program (two pilot, two

[6] The CJRA of 1990 increased the number of authorized judgeships to 649. Note that there are always some authorized judgeships unfilled due to the length of time consumed in the selection and confirmation process. For example, of the 649 authorized in FY1992, 109 positions remained open nationwide.

comparison, each with 19 or more positions), and smaller districts (less than 5 judges) are also represented.

Next, Fig. 1.2 shows the workloads in the districts, as measured by the total number of civil and criminal cases filed in 1990. The number of filings nationally was about 251,000 in FY1990, of which about 32,000 were felony criminal cases. The study districts contained about one third of the total filings, split roughly equally between pilot and comparison districts. Again, some of the largest and smallest districts are found in both the pilot and comparison groups. Along this dimension also then, the pilot and comparison districts look comparable to each other and to the system as a whole. Had we presented other workload measures--just civil filings, just criminal filings, case mixture, or filings per judgeship--the picture would look much the same.

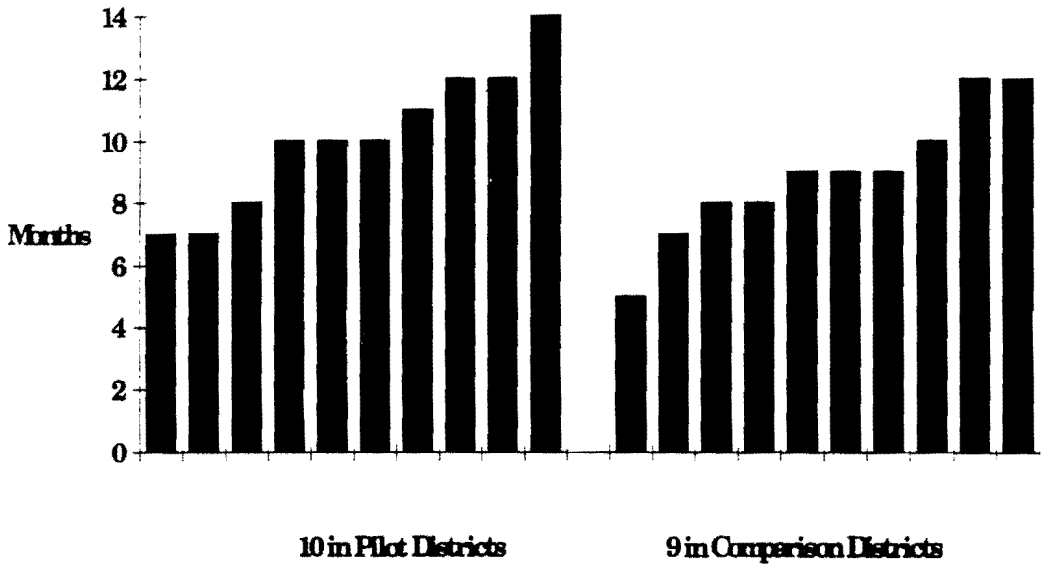
Fig. 1.2: Civil and Criminal Cases Filed in Pilot and Comparison Districts



Finally, since this study concerns itself with time to disposition, among other factors, we looked at the median time to dispose for civil cases. As Fig. 1.3 shows, the median was nine months nationally in 1990, and was about the same for both pilot and comparison groups. But also note the wide variation among the 20 districts, ranging from a low of five

months to a high of fourteen. This provides a range that is representative of the differing times to disposition in all federal districts. Again, we could have displayed other statistics, with similar results. For example, about 10.6 percent of the civil cases pending nationally in 1990 were over three years old, and the averages for both pilot districts (9.2 percent) and comparison districts (9.7 percent) approximate the national figure.

Fig. 1.3: Median Time to Disposition in Pilot and Comparison Districts



This examination of aggregate 1990 data pertaining to judgeships, filings, and time to disposition in the twenty districts suggests that they well represent the range of districts in the U.S. Furthermore, the pilot and comparison district groups are reasonably comparable to each other at least along these dimensions. We next consider the method and timing of case disposition procedures in these 20 districts from 1980 through 1993.

METHOD AND TIMING OF DISPOSITION: 1980-1993

Between 1980 and 1993, more than 3.1 million civil cases were brought to disposition in federal district courts. The ten pilot districts handled 15.6 percent of these; the ten comparison districts handled 16.7 percent. Table 1.2 presents a summary of the paths by which these cases reached disposition.

Table 1.2

Method of Disposition in Pilot, Comparison, and Other Federal Courts: 1980-1993

Method of Disposition	District Group							
	All Federal Districts		Pilot Districts Only		Comparison Districts Only		All Other Districts	
	N	%	N	%	N	%	N	%
Jury or Bench Trial	121,276	4	16,502	3	14,607	3	90,167	4
Judgment Without Tria	1,049,026	34	140,645	29	191,501	37	716,880	34
Dismissals/Settlements	1,722,415	55	299,667	62	284,749	55	1,137,999	54
Transfers/Remands	213,629	7	28,899	6	28,937	6	155,793	7
Totals	3,106,346	100	485,713	100	519,794	100	2,100,839	100

NOTE: Differences in totals in Tables 1.2 and 1.3 are due to missing data.

Trials, of course, occur only in a small percentage of cases. Nationwide, 3.9 percent of federal civil cases go to trial; in pilot and comparison districts, the numbers are 3.4 percent and 2.8 percent respectively.[7] About a third of all dispositions are judgments without trial, including summary judgments, consent judgments, judgments on motion, and so forth. All other cases terminate without adjudication, many without even joinder of the issue. Some the courts dismiss for inactivity, some after motion by one of the parties, and some the court closes to clear the docket (usually without prejudice). When a court dismisses a case, the reasons are often unrecorded. In addition, court records tell us neither why parties chose not to proceed nor about the outcome of cases that are dropped. Many cases simply

[7] These percentages are based on all case terminations, including transfers to other federal districts because of multi-district-litigation consolidation and remands to state court (usually for want of federal jurisdiction). This can produce distortions in the trial percentages as calculated here. For instance, when asbestos cases were closed in the original filing district and then consolidated in the Eastern District of Pennsylvania in 1991, the number of cases involved was greater than the total number of civil trials in the entire federal district court system in that year. Including these "dispositions" in the calculation of trial percentages is obviously problematic. Eliminating them from consideration, however, can also be misleading because it tends to conceal the fact that such cases have been subject to some pre-trial processing in the district of original filing. Since the objective of this table is primarily to compare across district groups, we have chosen to include transfers and remands in the calculations.

terminate without detectable causes for the most part after having consumed only a small amount of the court's attention.

When we look at time to disposition, presented in Table 1.3, we see that during the last fourteen years, two thirds of all civil cases have been closed within one year of filing another 20 percent within two years, and another 7 percent within three years. The remainder--about six percent in each group of districts--have run more than three years.

Table 1.3

Time to Disposition in Pilot, Comparison, and Other Federal Courts: 1980-1993

Time to Disposition	District Group							
	All Federal Districts		Pilot Districts Only		Comparison Districts Only		All Other Districts	
	N	%	N	%	N	%	N	%
Within 1 Year	2,080,006	67	321,103	66	370,113	71	1,388,790	66
1-2 years	615,074	20	96,823	20	90,481	17	427,770	20
2-3 years	219,084	7	35,752	7	30,493	6	152,839	7
More than 3 Years	192,194	6	32,034	7	28,707	6	131,453	6
Totals	3,106,375	100	485,713	100	519,794	100	2,100,852	100

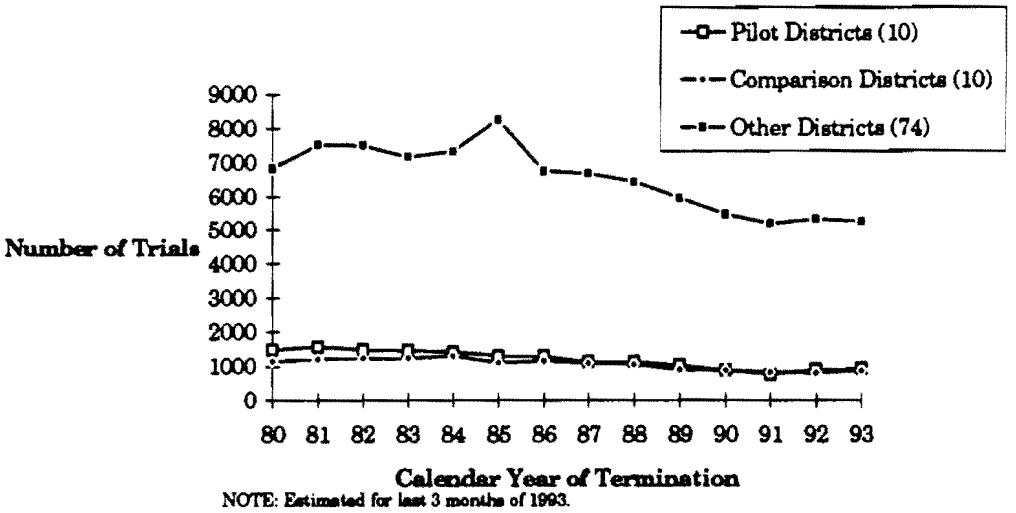
Of course, the impetus for the Civil Justice Reform Act came in large part from the belief that the situation has deteriorated in recent years. The time needed to take a civil case through federal court was thought to be taking longer and longer. Fewer and fewer litigants were believed to be getting a satisfactory response from the courts. So, though aggregate statistics of the type presented in the above two tables provide a useful contextual statement for the Pilot Program, we must also consider trends over time. Are litigants less and less likely to get their "day-in-court"? Is civil litigation taking longer and longer?

Figures 1.4 and 1.5 provide some information pertaining to these issues. At this point we stress that the information presented in these charts does not provide definitive answers to the questions raised by the CJRA. We intend only to further define the context within which the Pilot Program is functioning.

Trends in the volume and rate of trials have some bearing on the day-in-court issue. Figure 1.4 plots the number of trials in each year from 1980 to 1993. The absolute number of civil trials has been steadily declining, for pilot districts, comparison districts, and all other districts alike. And, though this is not shown in the figure, the percentage of all dispositions occurring after trial has also declined between 1980 and 1993--from 5.7 percent

to 2.4 percent in pilot districts, from 4.6 percent to 2.2 percent in comparison districts, and from 5.7 percent to 3.5 percent in all other districts.

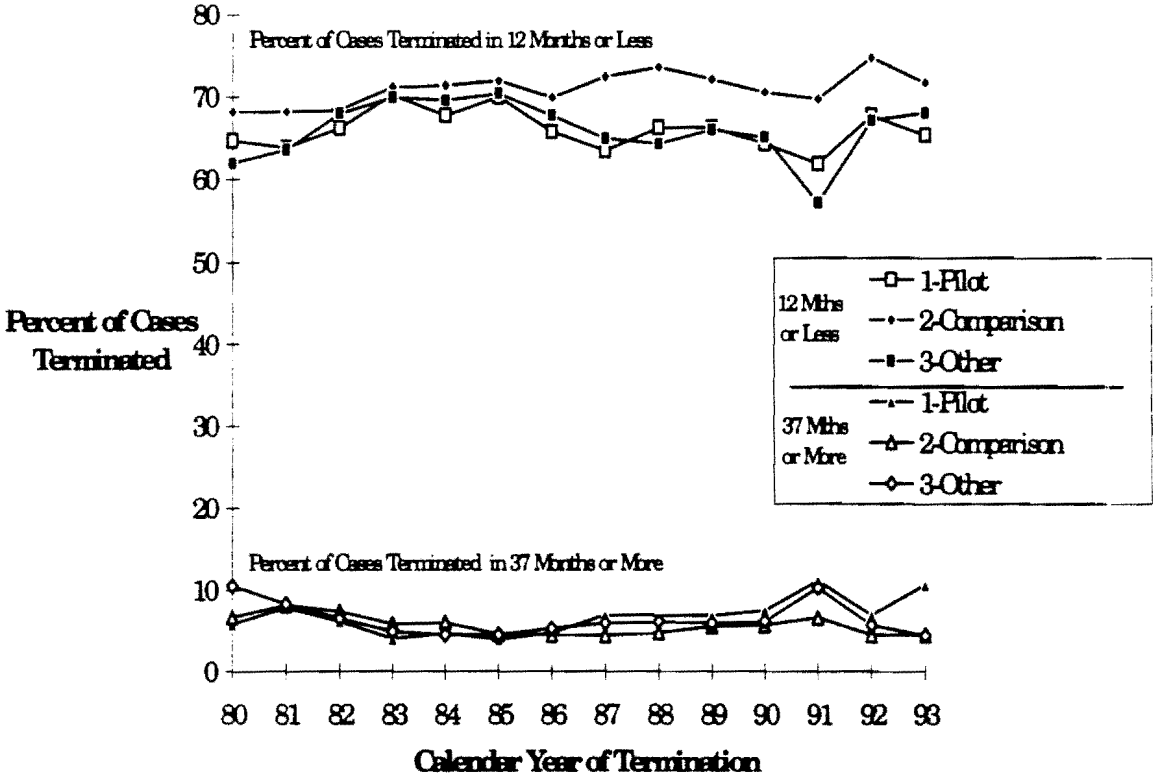
Fig. 1.4: Number of Trials for Pilot, Comparison, and Other Districts from 1980 - 1993



NOTE: Estimated for last 3 months of 1993.

In Figure 1.5, we switch to two time-to-disposition measures: the percent of all terminations that occurred within one year of filing, and the percent of all terminations that took more than three years from filing. From the earlier discussion we already know that, in the aggregate, about two-thirds of all cases reach disposition within one year and that about 6 to 7 percent take longer than three years. This chart indicates that these percentages hold true for most years between 1980 and 1993 for all three groups of districts. Deviations from those ranges occurred primarily in 1991, which is mostly attributable to the transfer of asbestos cases to the Eastern District of Pennsylvania. Most of these cases were older than three years, so the transfer (accompanied by a case "closure" in the district from which the transfer was being made) brought about an artificial surge in three-year-old closures.

Fig. 1.5: Time to Disposition for Pilot, Comparison, and Other Districts from 1980 - 1993



NOTE: Estimated for last 3 months of 1993.

Without knowing a good deal more about the characteristics of the cases that belong to the different categories, interpreting these trends in disposition paths and times proves difficult. For instance, the decline in the number and percent of trials could support two completely opposing views. One could argue that since the number of trials a judge conducts proves a good index of his workload, a reduction in trial rate and volume means that the system is not in trouble after all. Alternatively, one might argue that this same evidence is exactly what we would expect to see from a system in trouble. Civil trials, this logic suggests, are declining in rate and number because judges simply have insufficient time to hold them. And litigants--having been denied their "day-in-court"--may choose other, perhaps less suitable, means of disposition.

In conclusion, the information presented in the charts is clearly inadequate to confidently identify the underlying causes of these trends. It seems clear that a more in-depth assessment of civil cases and their characteristics is needed before procedural patterns of this type can be understood. Taking this step is a primary objective of the evaluation mandated by the CJRA. In the next section, we turn to the details of this evaluation.

2. DESIGN OF THE EVALUATION

OVERVIEW

The CJRA mandates that pilot districts adopt "civil justice expense and delay reduction plans," for the purpose of facilitating deliberate adjudication of civil cases on the merits, monitoring discovery, improving litigation management, and ensuring just, speedy, and inexpensive resolution of civil disputes.[8] We wish to stress at the outset that the focus of this evaluation is not only on cost and delay, but also on "justice" as measured by participant satisfaction with the process and the outcomes.

The CJRA also establishes an experimental Pilot Program intended to test the effect of six specific case management principles in ten districts. The program includes ten other districts with similar characteristics for comparative purposes. Both groups must create cost and delay reduction plans, though under different guidelines and time requirements.

As prescribed by the CJRA, the test runs from January 1991 to December 1994. By December of 1995, following the completion of this evaluation, the Judicial Conference of the United States will submit a report to Congress documenting the results of the test. That report is to include Judicial Conference recommendations about which, if any, of the CJRA Pilot Program principles should be adopted in the federal district court system.

To assess the impact of the policies and procedures instituted by the pilot and comparison districts, and the views of judges, lawyers, and litigants about them, information must be compiled in a variety of areas and from a number of sources. We need to know about costs, time to disposition, outcomes, and satisfaction levels, and how they differ from one policy to another. While the federal court system already keeps some of the required information, most of it must be generated by the evaluation.

The sources of data to be used include the following:

- General court records;
- Records and reports of CJRA Advisory Groups;
- The districts' cost and delay reduction plans;

[8] 28 U.S.C §471

- Detailed case processing and outcome information on a sample of cases;
- Reports by judicial officers on their activities, time expenditures, and views of CJRA;
- Surveys of attorneys and litigants about costs, time, and satisfaction with the process and case outcomes.

Most of the information compiled will pertain to the civil caseload, though some data will also be developed on the criminal caseload and its possible impact on civil case processing. In federal district courts, civil and criminal case processing are interdependent. Assignment of both types of cases is normally made on a rotating basis across all active judges in a court. Accordingly, each federal judge has a criminal as well as a civil caseload. Other things being equal, it follows that an increase in either the number or the workload demand of criminal cases will likely result in less judicial time being available for civil cases.[9] Therefore, this evaluation will consider the possible effects of the criminal caseload on the civil caseload.

In addition to the evaluation of the case management policies introduced during the pilot program, we are also conducting a supplementary evaluation of alternative dispute resolution programs in six of the twenty districts--four that have formally structured ADR programs with neutral lawyers and a sufficient number of participating cases to permit empirical evaluation, and two that have formally expanded the role of the magistrate judges to include active management of civil pretrial processing and early neutral evaluation and settlement efforts. Generally, the design principles discussed below apply to the supplementary evaluation in the same way they apply to the primary evaluation. In each, the same kind of information will be collected.

[9] In the debate about civil case processing, federal judges have long argued that criminal cases--particularly drug cases--significantly reduce the time they can devote to civil cases. This is partly attributed to the fact that there has been a substantial increase in such cases in recent years, and partly to sentencing guidelines and mandatory minimum sentences which have made criminal cases more difficult and time consuming. Research into this issue has tended to substantiate this view, and, though there is considerable interdistrict variation with respect to the impact, there are some districts in which the effect is severe (Dunworth, Terence and Charles D. Weisselberg, "Felony Cases and the Federal Courts: The Guidelines Experience", Southern California Law Review, Vol. 66, No. 1, 1992).

DESIGN ISSUES

Although the evaluation focuses on the effects of the specific case management policies implemented in the ten pilot districts, examining those policies in isolation would be of limited value. Standard design principles for evaluation research[10] require that two other dimensions be incorporated. First, the experience of the pilot districts prior to implementing the new policies must also be measured and documented so as to permit assessment of any changes that may occur. Second, a comparison of the ten pilot districts with other similar districts must be made so as to ensure that any resulting changes can be attributed to the new policies rather than to other factors that are affecting all districts in similar ways. These considerations were largely built into the Act, and were prominent in the design discussions that involved the Committee on Court Administration and Case Management of the Judicial Conference, staff of the Administrative Office of the U.S. Courts, and the RAND evaluation team.

Of course, research in real-world settings faces difficulties in establishing the control that these two principles require. Unlike laboratory settings, court environments are not amenable to manipulation, and they are not static. Baseline information--the situation before the introduction of the new policies--is often difficult to obtain because it involves reconstructing events long since over, and all of the needed information may not be available.

Particular complications are introduced in the Pilot Program evaluation by the different implementation schedules established for pilot and comparison districts, and by the freedom given to the latter in adopting their own implementation plans.

With respect to timing, the Act required pilot districts to institute plans by January 1992, whereas comparison courts could implement any time before the December 1993 deadline. Consequently, the "before" and "after" periods are not the same for the two

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[10] Campbell, D. and J. Stanley, "Experimental and Quasi-Experimental Designs for Research on Teaching," in N. Gage, ed., Handbook of Research on Teaching, Skokie, IL: RAND McNally, 1963, Chap. 5.

groups. And while pilot districts were given six specific principles to follow, comparison districts were unrestricted, as long as some kind of plan was developed.[11] Consequently, comparison districts may or may not have instituted plans changing their pre-CJRA practices, and may or may not have adopted plans similar to those found in pilot districts. Finally, the December 1993 amendments to the Federal Rules of Civil Procedure further complicate the picture. Some of these changes were similar to rules implemented earlier by pilot districts, some were not. And, districts were allowed to opt out of some of the rule changes.[12]

Nevertheless, the effects on this evaluation of the nonuniform rules and implementation dates are somewhat mitigated by the fact that neither factor had much impact on the district courts until late 1993. It was therefore possible to select a sample of the 1992-93 filed cases for intensive study that was usually several months old before the new rules and plans took effect. More details on this process now follow.

DATA SOURCES

In this evaluation, we will use multiple sources of data, including court statistics, interviews, and, (for a sample of cases) surveys of judges, magistrate judges, lawyers, litigants, and ADR providers. Table 2.1 presents a summary of the number of cases selected for intensive study (more than 10,000) and the number of people we expect to survey (more than 60,000).

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[11] Ideally, we would have liked comparison districts to be excused compliance with CJRA requirements so that they could maintain their prior policies for the duration of the evaluation. However, that would have required revising the CJRA, and this proved to be infeasible.

[12] See Donna Stienstra, Federal Judicial Center, *Implementation of disclosure in federal district courts, with specific attention to court's responses to selected amendments in Federal Rule of Civil Procedure 26*, March 3, 1994.

Table 2.1

Expected Sample Size for Intensive Data Collection

Survey Type	Before	After	Total
Cases			
- Main Evaluation	5,000	5,000	10,000
- ADR Evaluation		1,800	1,800
Judicial Officers	-	200	200
Lawyers	10,000	10,000	20,000
Litigants	20,000	20,000	40,000
ADR Providers	-	1,100	1,100

In the aggregate, these numbers may seem large, but consider the logic that drives them to the levels indicated in the table. In this evaluation, we consider the district court to be the primary unit of analysis, and we expect to aggregate information by participating district. It is therefore necessary to include in the study enough cases from each district to satisfactorily represent the activities of that district. The number must be large enough to allow for inter-district comparisons with respect to variables such as case type, method of disposition, and case management policy. And, it must be possible to do this for cases filed before and after passage of the CJRA.

These considerations convinced us to select a stratified random sample of 250 cases from each time period and for each district. There are twenty districts and two time periods, thus resulting in a 10,000 case study. Since we wish to collect information on case costs and the perceptions of lawyers and litigants on both sides of these cases, we must survey the lawyers and litigants in all the cases selected for the sample. Litigants are more numerous than lawyers because some lawyers represent more than one litigant, and some litigants have no lawyers.

Quantitative case data that will supplement the information identified in Table 2.1 are being collected from existing federal court data systems such as the Integrated Federal Courts Data Base, the automated version of the JS-10 trial reports, and automated dockets to the extent implemented under ICMS in the study districts. When necessary, we also use paper records such as docket sheets and staffing level reports.

Data collection began in 1992 when the 5,000-case pre-CJRA sample was drawn from cases that terminated in 1991. Selection of the 5,000 CJRA cases and the 1800 ADR cases began with cases filed in 1992 and 1993. The reason it did not begin earlier was that, although each of the pilot districts met the January 1, 1992 deadline, the full implementation of plan provisions did not occur in most districts until well into the year.

We will track the 6800 cases filed after the CJRA became law until they reach disposition, or for as long as the Congressional-established reporting deadlines permit. After a case concludes and the period allowed for appeal expires, surveys will be sent to judges, lawyers, and litigants. We anticipate sending final surveys at the end of 1994. Data must be collected for a two to three year period because, although the median time to disposition for private civil cases has been about nine months for some years, a significant number of cases remain in the courts much longer.[13] Since cases with longer lives may be those most affected by the CJRA, the study oversamples that group. Even with this seemingly long time-frame, a significant and troublesome proportion of the CJRA case sample will still be open when, under the present timetable, data collection must end at the close of 1994.

MAJOR EVALUATION TOPICS

Development and Implementation of the CJRA Case Management Policies

Cost and delay reduction plans under CJRA came into being through a three step process:

- development;
- adoption;
- implementation.

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[13] Dunworth and Pace, op. cit., supra note 1.

The first step in development was for each district to set up an Advisory Group, with membership consisting of judges (sometimes ex officio), the U.S. Attorney, lawyers, and other persons who are representative of litigants. The Advisory Group's responsibility was to assess the state of civil litigation in the district, determine the nature of the problems that existed (if any), and recommend an approach to cost and delay reduction to the Court.

The adoption phase then began, with the Court accepting, modifying, or rejecting the Advisory Group's recommendations, and ultimately finalizing the district's plan. This was submitted for review and comment by a committee of the Circuit Court, and the Court Administration and Case Management Committee of the Judicial Conference of the United States.

After that hurdle was cleared, the plan was adopted, and implementation began.

All 94 districts--not just the Pilot and Comparison groups--have gone through this process, according to the differing timetables established by the legislation. In the evaluation of the Pilot Program, each of the three steps will be assessed in some detail. Particular attention will be paid to the manner in which implementation took place.

The same plan, implemented differently in two districts, will yield different results. For example, two plans might both invest judges with discretion to refer a case to ADR. The effects of each plan will be different, however, depending on the extent to which the district implements a well structured and administered program to facilitate the referrals, the extent to which the referrals are mandatory, and the extent to which judges actually exercise their discretion.

Time to Disposition

Recent work on time to disposition and delay in both federal and state courts has demonstrated the complexity of reducing time to disposition. Many of the commonly proffered explanations for intercourt variation in time to disposition--e.g., simple measures

of case mixture, level of resources, and general case processing characteristics--seem to have limited ability to explain why some courts take longer than others.[14]

For the most part, however, such prior research relied upon aggregate data rather than the detailed case-specific information and case management practices individual courts actually use. In this evaluation, we hope to overcome this limitation by collecting extensive and more detailed data on case structure and processing than has previously been available, and by assessing time to disposition (and costs, outcomes, and satisfaction) in the light of that new information.

Litigant Costs and Judicial Resource Requirements

We plan to focus on two types of costs: those borne by litigants, on one hand; and those borne by the federal court system, on the other. Litigant costs include attorney fees, whether contingent or hourly, time spent working on the case by parties and direct dollar expenditures. Litigant costs include attorney fees, whether contingent or hourly, direct dollar expenditures for expert witnesses, filing fees, copying services and the like, and time spent working on the case that could have been used in other ways. The obvious issues of concern here are whether the cost of litigation to litigants is affected by the type of management practiced by the court. Are litigants better off, financially, when the court manages the progress of a case or when the court leaves the progress of the case primarily in the hands of attorneys? Is earlier disposition of a case less costly than later disposition, all other things being equal? Does ADR reduce the cost of litigation or increase it? This information to answer these questions will be developed through surveys of up to 40,000 litigants involved in the 10,000 case sample discussed above.

In addition to the price that litigants pay for litigation, costs imposed on the courts deserve attention. The premise of CJRA is that more active, early management by the court is likely to be better management. Increased court involvement in the early stages of civil litigation is explicitly called for by the Act. It seems inevitable that this will require more

[14] Dunworth and Pace, op. cit., supra note 1. See also Mahoney, Barry, et al., Changing Times in Trial Courts, National Center for State Courts, Williamsburg, Virginia, 1988, pp. 67-68.

time and effort by judges, magistrate judges, and clerical staff early in the life of a case. Whether this early judicial effort is offset by a reduction in the level of judicial effort required later in the life of the case is unknown[15], and this merits inquiry. Furthermore, if a system-wide implementation of the CJRA principles follows the exploratory period of the Pilot Program, an understanding of the likely impact of such a development on judicial and clerical resource requirements will be useful.

While currently there is insufficient empirical information to make such an estimate, we can envision three possible scenarios. First, there might be little change, because existing resources may be sufficient to institute the new case management policies. Second, the new policies might reduce the resources needed to handle a given caseload, by increasing efficiency. A third scenario contemplates the expenditure of additional judicial resources.

To develop some information pertaining to these issues, an agreement has been reached between the Judicial Conference, the Federal Judicial Center, and the twenty participating districts to continue the judicial time survey that the Center has been conducting in recent years. Begun in 1989 with a nationwide data collection effort, that survey involves the development of "case weights" for the district court system. During the study judges reported how much time they spend on each case--from filing to final disposition. We use an identical methodology for 5,000 of the cases selected for the CJRA evaluation. Almost without exception, the roughly 200 judges and magistrate judges responsible for those cases have agreed to cooperate. The Federal Judicial Center is assisting in administering and managing the extended survey. In addition, with the agreement of the judiciary, the FJC will provide its earlier data to RAND to assist in establishing baseline measures for the CJRA evaluation. Data collected during the evaluation will then be incorporated into the FJC case-weighting system.

[15] Such a later reduction might occur if the case closes earlier, or fewer motions are filed, or fewer cases go to trial.

Satisfaction with Case Outcomes and Case Management Procedures

Increasing the judicial management of civil litigation is not universally accepted as the most appropriate way to deal with perceived cost and delay problems. Some commentators are concerned about the negative effects that may result if judges try to push cases through the courts at a faster pace, and exert pressure on litigants to settle early. It is argued that litigants and their lawyers are the best judges of the speed at which a case should move because they and only they have the knowledge about the case that is necessary to determine the most suitable pace. And with respect to settlement, the argument is made that if the parties to a case wish to settle, they will do so. If they do not, the court should not pressure the parties to settlement. Such pressure, it is said, will often favor one side or the other and may produce a case outcome different than it otherwise would have been.

We do not propose to provide a definitive philosophical or doctrinal answer to these difficult questions. But, in the debate about managerial judging, there has been an absence of sound empirical information on the views of judges, lawyers and litigants. It is not known whether litigants favor or oppose more control by judges, and it is not known how variation in the degree of judicial case management actually affects case outcomes and litigant and attorney attitudes.

We will address these issues in the surveys of judges, attorneys, and litigants that will be conducted during the evaluation. Comparisons will be made between low judicial management cases and high judicial management cases in the areas of outcome, and sense of satisfaction with the outcome and the case management process.

3. PILOT DISTRICT PLANS AND CASE MANAGEMENT POLICIES

In this section, we turn to the actual implementation of the pilot program that has taken place since the beginning of 1991. The focus is on the ten pilot districts only, because few of the comparison districts have had their CJRA plans in operation long enough for any kind of useful assessment to be made.

The information in this section is based on several sources: a review of pilot district CJRA plans and advisory group reports; court records and statistics; and interviews with several judges, clerks, lawyers, and advisory group members in each district. The observations made here are preliminary. The full impacts of CJRA plans and policies will be reported after the evaluation is completed in 1995.

PROCESS OF CREATING AND IMPLEMENTING A PLAN

The Civil Justice Reform Act required each district, after having considered the recommendations of an advisory group, to institute a civil justice expense and delay reduction plan that included certain specified case management principles.[16] The advisory group, whose membership must be balanced and representative of the actors involved in litigation,[17] was appointed by the court. Its mandate was to assess the condition of the civil and criminal dockets, identify principal causes of cost and delay, and make recommendations for dealing with these problems.[18] The court then considered the advisory group report and recommendations, though it remained free to develop any CJRA plan it wished as long as it embodied the principles specified in the Act. Once the plan was developed, committees of the Circuit Court and the Judicial Conference reviewed it. The resulting pilot plan was to be implemented by December 31, 1991.

How did this process actually work?

The advisory groups were created in a timely fashion, with most members drawn from the federal bar. The chairperson was usually a senior member of the bar, though in two pilot districts, a judge chaired the advisory group. Judges sometimes served as ex officio members of the committee, and even when this was not the case, one or more judicial officers often attended meetings but not as voting members.

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[16] 28 U.S.C. §472.
[17] 28 U.S.C. §478.
[18] 28 U.S.C. §472.

As we interviewed members of the advisory groups, we were impressed by the dedication and conscientiousness with which they approached their tasks. Most districts held meetings frequently, and the minutes of the meetings testify to the open and exhaustive way in which issues pertaining to case processing in federal courts were discussed. Final reports were both thorough and thoughtful, generally reflecting considerable independence from the court.

To the extent permitted by preexisting court data (usually information like that presented in the Annual Reports of the Director of the Administrative Office of the U.S. Courts), groups comprehensively analyzed the court dockets with respect to time to disposition. Many groups supplemented court data with interviews of judges and court clerks, and with surveys of attorneys and, occasionally, litigants. The latter were sometimes considered to have produced unsatisfactory results due to difficulties in locating litigants and getting them to respond. Not surprisingly, findings on the issue of cost proved highly subjective, since no group had preexisting data with which to work, and neither the advisory groups nor the courts had the staff, time, and expertise needed to develop new cost information.

The Act gives district courts the authority to accept, reject, or modify the recommendations of their advisory groups. The pilot courts generally appear to have given the reports careful consideration, resulting in one of the following three responses:

(1) Adoption of the advisory group recommendation with little or no change;
(2) Acceptance of the intent of the advisory group recommendation, but rejection or modification of specific procedures;
(3) Refusal to adopt the recommendation.

In most districts, the courts responded positively to most or all of the recommendations, while only a small number of the pilot courts rejected most of their advisory groups' recommendations. It appeared as though the more the advisory group interacted with the court while developing its plan, the more likely the court would adopt a plan closely corresponding to the group's recommendations. Following formal court adoption of a plan, Circuit and Judicial Conference review of the plans took place, resulting in few changes.

Technically, all pilot districts had adopted a plan by the Act's December 31, 1991 deadline. Those districts that made few changes from pre-CJRA to post-CJRA usually had implemented their plans by January 1992, though most other pilot districts did not fully

implement their plans until later in the year. A variety of reasons explain the delay. In some instances, new local rules had to be promulgated, which required discussion and publication before taking effect. Others had to hire new personnel to manage the CJRA program. Consider, for instance, the difficulty involved in instituting a formally structured ADR plan, which requires developing detailed procedures and forms, selecting and certifying ADR providers and informing and educating members of the bar about the new program. And, even when this was not the case, districts found that fleshing out the details of new policies and procedures took a good deal more time than originally envisioned by CJRA legislative drafters or the courts. There are even a few circumstances under which some plan provisions have still not yet been implemented.

In the remainder of this section, we discuss the provisions of pilot district plans in detail. Though all six principles of the Act pertain to pre-trial activities and are thus inexplicably intertwined, we simplify the presentations by categorizing them into three groups. Principles 1-3 are grouped together in the discussion of case management procedures; principles 4-5 are grouped together in the discovery discussion; and principle 6 is covered in the discussion of ADR initiatives.

The policies are summarized for two time periods: before and after implementation of the CJRA pilot program.

CASE MANAGEMENT PROCEDURES

Background

The first three principles set forth a court's responsibilities with respect to the management of its caseload:[19]

> (1) Systematic, differential treatment of civil cases that tailors the level of 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 by a judicial officer;
>
> (3) For all cases a court thinks are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences.

[19] 28 U.S.C. §473(a)(1)-(3). This listing extracts only a portion of the language of the Act. The Act also speaks to setting schedules, exploring settlement, overseeing discovery plans, and so forth.

Generally speaking, these principles embody both active judicial case management and what has come to be known as Differential or Differentiated Case Management (DCM).[20] DCM is a concept that a number of state criminal and civil courts have adopted in recent years--particularly those flooded with cases.

The DCM idea posits that some cases need different levels of judicial attention than others, different schedules for case events, and different treatment. For example, not every case needs extensive discovery. Not every case requires a Rule 16 conference with a judicial officer. And only a small fraction of the cases require a trial.

Some would argue that, by and large, this is precisely the way court systems--both state and federal--worked before the CJRA. Every one of the pilot districts had special differential management procedures for certain "minimal management" cases involving prisoner petitions, Social Security appeals, government loan recovery, and/or bankruptcy appeals. For those cases not subject to the minimal management procedures in the district, virtually all federal judges interviewed as part of the pilot program evaluation have stressed that they have always managed cases individually and differentially. In support of this position, judges note that most cases do not go to trial, that discovery is often minimal, that some cases do not require Rule 16 Conferences, and that many lawsuits end with little or no judicial involvement. And, at the opposite end of the spectrum, complex cases receive specialized management within a framework enunciated in the Federal Manual on Complex Litigation.

In other words, there is a lot of inter-case variation in procedure, and the variation is a manifestation of a tailored approach to case management that, in its effects, is not unlike the objectives of the general differential case management concept. In the balance of this section, we shall call this approach the "judicial discretion model" of case management.

Clearly, the Act neither requires nor even contemplates the abandonment of judicial discretion, and one interpretation of the CJRA holds that the judicial discretion model satisfies the "differential-treatment-of-civil-cases" principle.

Another interpretation is that the CJRA's differential-treatment-of-cases principle requires something different than the traditional judicial discretion method of individualized case management. As noted, the DCM track approach is a frequently mentioned alternative.

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[20]For a recent overview of differentiated case management, see Alliegro, et al, Beyond Delay Reduction: Using Differentiated Case Management, The Court Manager, winter, spring, and summer, 1993.

The DCM track approach involves formalization of a number of discrete and well-structured approaches to case scheduling and management, followed by early assignment of cases to them. It may be decided to assign cases at the outset according to objective criteria, or simply to allow attorneys to choose the track into which their case will fit. Within each track, judges will use different case management techniques and schedules that are at least partially predetermined.

One possible benefit of the DCM track approach is a reduction in litigation cost and time by actions such as establishing firm schedules and discovery limits early in the life of a case. Early is important because the potential benefits of DCM tracking will be maximized if the events that DCM might affect have not yet taken place.

A second possible benefit of the DCM track approach and its concomitant standardization of procedures is that it can bring greater predictability to litigation and reduce judge-by-judge variation in management style, forms, schedules and procedures. But, differential case management will not necessarily require two judges to manage the same type of cases identically.

Third, it is expected that the DCM track approach will limit the incidence of litigant disputes about procedure, thus allowing cases to reach final dispositions more quickly.

In sum, then, advocates argue that the DCM track approach will reduce the uncertainty, costs, and time of processing and increase court efficiency, litigants' satisfaction, sense of fairness and acceptance of the legal system.

Overview of District Policies Before and After Pilot Plan Implementation

Prisoner Petitions and Minimal-Demand Cases.

All district courts whose case management procedures we have reviewed (and almost certainly all those that we have not), have adhered to long-standing minimal judicial management approaches for certain kinds of cases that correspond closely to the DCM track model. While the exact types of cases included vary from district to district, they almost always include prisoner petitions and what we term "minimal-demand" cases. The latter involve government loan collection cases, and review of bankruptcy-court decisions and the decisions of administrative agencies on questions of government benefits. These cases often occupy a significant portion of a court's docket.

On the whole, these cases impose different requirements on courts than almost any other type of suit. Prisoners often file petitions on a *pro se* basis and they are initially processed by a *pro se* law clerk using standardized procedures and schedules. Such cases

often involve review of a request for a waiver of court fees and require some correspondence and motions activity, but need few court appearances and little judicial case management. Other minimal-demand cases, such as appeals from denials of Social Security benefits, often go through the entire litigation process without much judicial management of any kind.

In this sense, then, all pilot districts used a formal and standardized process to manage these sorts of claims prior to the passage of the CJRA. Subsequently, all ten districts continued that approach, or introduced a slightly modified version of it.

General Civil Litigation

Of course, the CJRA does not focus primarily on prisoner petitions and minimal demand cases. The greatest potential for improvement lies in easing the burdens of general civil litigation on litigants, and the courts. In this area, the differentiated case management model, to the extent that it differs from the judicial discretion model, usually entails the establishment of a tracking system under which a court matches a case with a pre-established management approach.

Most commonly, court systems that have adopted a DCM tracking system place cases into one of three categories: (1) expedited (sometimes called simple), (2) standard (sometimes called normal), (3) or complex (sometimes called special). Other specialized tracks may exist for cases destined for arbitration, mediation, or other types of alternative dispute resolution.

But no matter what tracks are actually established, every DCM tracking system must overcome the hurdle of deciding how to assign particular cases to particular tracks--a decision needed early in the life of a case if cost and time to disposition are to be reduced as much as possible. But how should courts make this assignment decision?

Cases at either extreme of the complexity spectrum are easily fit into a track. Consider first a personal injury suit involving an automobile accident, few questions of liability, and well-defined damage claims. Next, consider a patent infringement suit, with multiple parties, many documents, and a high potential for interrogatories and depositions. For a simple case, such as the first example, or a complicated one, such as the second, the tracking decision--expedited and complex, respectively--can be made without much confusion or risk of error. But, the majority of cases are less clear cut, and tend to be grouped together in the middle track. Since some of these cases should actually be handled in expedited fashion and others in complex fashion, some of the potential benefits of DCM tracking may well be lost.

Most of the Advisory Groups struggled with this issue, and their reports reflect a fundamental dilemma. A decision to track a case made early in its life will often be made on the basis of a sparse record--perhaps resulting in an unsuitable assignment. But if the decision is delayed to allow for a full record to develop, the potential savings in time, cost, and aggravation may well be lost.

Table 3.1 summarizes how the pilot districts have actually addressed the differential case management issue. In general terms, it identifies four different approaches to differential case management, and indicates how many districts have opted for each, both before and after implementation of the CJRA.

Table 3.1

Number of Districts With Each Type of Case Management Approach

Type of Management	Before	After
Judicial Discretion	10	6
Rule Based Tracking	-	1
Attorney Selected Tracking	-	2
PreTrial Control by Magistrate Judge	-	1

Judicial discretion means that--with the exception of the special management of prisoner petitions and minimal-demand cases--judges make case management decisions on a case-by-case basis according to their own schedules and procedures. As their plans attest, most pilot districts have interpreted the CJRA's case management requirement to embrace this model.

Rule-based tracking involves assigning a case on the basis of its objective characteristics--usually the nature of suit--known at the time of filing. One pilot district has done this using standardized discovery periods of zero, four, or eight months for different track assignments. The zero month-discovery track contains the types of cases that were minimal management cases before CJRA.

Attorney-selected tracking usually requires the filing attorney to opt for a particular track--expedited, standard, or complex--after which the opposing attorney has an opportunity to dissent. The judge then has the final say. As part of their CJRA plans, two districts have done this. One district has a twelve-month-to-trial schedule for standard

cases and eighteen-month schedule for special cases; the lawyers' choice of the track is accepted unless the judge changes the track, which seldom happens. The other district has three tracks, but a judge must act on the lawyers' request before the track assignment is accepted. In one of these districts, then, the tracking decision effectively occurs at the time of filing; in the other district, it occurs several months after filing.

Pre-trial control by a magistrate judge refers to a system under which all cases are automatically assigned to a magistrate judge, who manages a case through all its pre-trial phases. Note that this differs from the usual practice in federal district courts under which a judge delegates discrete facets of pre-trial processing to a magistrate judge. This district also directs the magistrate judge to conduct a neutral evaluation conference before the Rule 16 Conference.

DISCOVERY POLICIES

Background

The CJRA requires pilot districts to adopt, and other districts to consider adopting, some policies for managing discovery. Specifically, the Act mandates:

> "(2) early and ongoing control of the pretrial process through involvement of a judicial officer in ... (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion....
>
> (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;...."[21]

[21] 28 U.S.C. §473(a).

Regarding discovery, two issues have arisen: (1) To what extent should the court control the volume, sequencing, and timing of discovery, rather than leaving this in the hands of the litigants' attorneys; and (2) What information should be voluntarily or mandatorily exchanged early in a case without a formal discovery request.

Complicating this inquiry are the 1993 revisions to the Federal Rules of Civil Procedure. The CJRA directs pilot districts to develop and implement discovery control policies. The new federal rules require certain changes in discovery practice and management that may conflict with the discovery programs of some pilot districts. For instance, the new Rule 26 requires lawyers to meet and confer before the scheduling conference, to develop a proposed joint discovery plan, and to automatically disclose certain basic relevant information without awaiting a formal discovery request. And the new Rules 30, 31, and 33 place limits on depositions and interrogatories. Districts may opt out of some of the rule changes, however, as some pilot districts have done to avoid conflicts with their pilot plans.[22]

Overview of District Policies Before and After Pilot Plan Implementation

First, consider the policy of requiring lawyers to certify good faith efforts to resolve discovery disputes before filing motions. Before the CJRA, local rules in most pilot districts required the filing attorney to undertake such efforts prior to involving the court. The CJRA plan may have slightly modified the wording of the local rule in some districts, though most retained their rules unchanged.

Next, consider judicial control of discovery volume. Before the CJRA, a minority of the pilot districts had some blanket control on discovery volume (e.g., no more than thirty interrogatories and no more than thirty requests for admission) but most districts left this to individual judges on a case-by-case basis. After adoption of the plans, we observed some districts instituting new or tightened local rules limiting the number of interrogatories or requests for admissions or depositions. One district, for instance, limited deposition length to six hours unless lawyers stipulated or the judge approved additional hours. Most districts, though, did not adopt blanket limitations on discovery volume as part of their plans.

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[22]Donna Stienstra, Federal Judicial Center, Implementation of Disclosure in Federal District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, March 1, 1994.

Third, consider judicial control of discovery timing. Before the CJRA, all districts allowed cut-off dates, but most left the decision to the judge in each case. Some districts, however, had rules allowing discovery only to a certain point in a case; other districts had standardized schedules limiting discovery for cases referred to arbitration or those handled on a minimal management track. The pilot districts' CJRA plans have not changed the landscape much, except in two districts. One of these districts has adopted a tracking system under which cases are grouped by nature of suit, and discovery is cutoff after either zero, four or eight months. Another district places cases into standard or special tracks and sets trial dates within twelve or eighteen months respectively, thus automatically limiting discovery time. Under this system, judges nevertheless retain some discretion to adjust discovery schedules.

Finally, consider the early disclosure of information without formal discovery requests. Before the CJRA, only one district required it for a limited subset of cases. After the CJRA, all pilot districts have adopted one of four very different policy models, as shown in Table 3.2. Three use the voluntary model, which encourages lawyers to cooperate in exchanging information. Based on our interviews, lawyers do not object to this arrangement, though the actual impact on the exchange of information remains unclear. Three follow a mandatory model on a limited subset of cases and a voluntary model on other cases. Of these three, one required mandatory disclosure for ten or twenty cases per judge, one for expedited track cases only, and one for injury, medical malpractice, employment discrimination, and RICO cases only. Two districts require lawyers to mandatorily disclose certain information, including anything bearing significantly on their sides' claims or defenses.[23] Two other districts have a similar mandatory requirement, but apply it to all information bearing significantly on both sides' claims or defenses.[24] All of these approaches appear to meet the requirements of CJRA.

[23]The actual wording is similar to the newly enacted version of Rule 26.

[24]The actual wording is similar to an earlier draft of the new Rule 26 that was so hotly contested by some lawyers.

Table 3.2

Number of Districts with Each Type of Exchange of Information Before and After Pilot Plan Implementation

Type of Exchange of Information in Pilot Districts	Before	After
Voluntary Exchange	9	3
Mandatory Exchange for Limited Types of Cases, or a Limited Number of Cases	1	3
Mandatory Exchange of Info Bearing Significantly on ANY Claim or Defense, Plus Other Items	0	2
Mandatory Exchange of Info Bearing Significantly on YOUR Claim or Defense, Plus Other Items	0	2

The early mandatory disclosure approach has prompted criticism on a number of grounds. Many lawyers consider it distasteful or threatening--believing it to be an assault on the adversarial model of Anglo-American litigation. They are especially concerned about having to do the other side's work and about potential conflict of interest if they must provide everything that bears significantly on both sides of the case, even if the other side has not asked.

More practically, many lawyers are not certain exactly what they must disclose, how extensively they must search to satisfy a request, how to get information from the litigant in a timely fashion, whether it is reasonable to incur the cost of disclosure for all cases when many cases never have any formal discovery, and what ancillary litigation and motion practice may arise.

When compliance is insufficient, a lawyer may ignore the problem, make a formal discovery request, or file a motion requesting the court to force compliance. According to judges we have interviewed in pilot districts, such motions are rare. Generally, most lawyers we have interviewed have emphasized that the impact of the new disclosure rules will turn on whether they are effectively enforced. If attorneys are unwilling to seek sanctions for violations and/or judges are unwilling to impose them, then mandatory disclosure rules may have little effect on lawyer behavior--no matter how strongly written.

Thus far, we have observed no explosion of ancillary litigation and motion practice related to disclosure in any of the pilot districts using mandatory disclosure. At this point,

we do not know whether lawyers are complying with the disclosure requirements fully or only pro forma. Our ongoing surveys address that issue.

ALTERNATIVE DISPUTE RESOLUTION POLICIES

Background

The CJRA requires pilot districts to adopt, and other districts to consider adopting, some type of alternative dispute resolution program. Specifically, it authorizes courts "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."[25] However, the Act fails to define the term "ADR" with any specificity, and districts may therefore choose from a number of approaches: arbitration, neutral evaluation, mediation, settlement conferences, as well as the use of special masters, minitrials, and summary jury trials.

Arbitration is analogous to a trial, except that a third party--not a judge or jury--reviews facts and hears arguments presented by both sides and then renders a decision. Sometimes this decision is binding by stipulation or prior contract, sometimes not. Like arbitration, neutral evaluation usually involves a third party assessment of a suit; unlike arbitration, however, the third party may discuss and review ways of settling the case with the parties. In practice, mediation can be exactly the same as neutral evaluation, but more commonly, the emphasis is on discussing the case with the disputants in an attempt to settle or simplify it; the third party often does not attempt to evaluate the case. Abbreviated minitrials or summary jury trials, and the use of special masters to manage discovery, are rare and tend to be used in complex cases only. Finally, some judges and attorneys consider settlement discussions with a judge and requirements that lawyers certify that they have conducted private settlement efforts as forms of ADR. Support for this view has been provided recently by the seventh U.S. Circuit Court of Appeals, which ruled that a magistrate judge had properly acted as an arbitrator, after stipulation by the parties.[26]

Whatever form an ADR program takes, the traditional emphasis has always been on taking a dispute out of the courts and submitting it to an independent third party. This now appears to be undergoing modification as judicial officers increasingly take on ADR-like functions.

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[25]28 U.S.C. §473(a).

[26]See Wall Street Journal, March 22, 1994, page B5, for commentary).

The rationale for all ADR programs is, of course, the hope that they are faster, cheaper, and more satisfactory than formal court adjudication. While the research has yet to confirm these putative benefits of ADR, it does seem to suggest that litigants are more satisfied when ADR has taken place, even if they settle their case. Perhaps this is because they have had their "day in court" without the expense of a formal trial. Whether ADR saves judges' time is also unclear. Because most ADR is non-binding, it offers an alternative to settlement, not trial. Therefore, it may not reduce the actual number of trials.

Overview of District Policies Before and After Pilot Plan Implementation

In this section, we summarize the main themes of pilot districts' CJRA plans with respect to ADR and the way they have been implemented. These two things are not necessarily the same. For instance, virtually all pilot districts have an ADR program of one kind or another, but some have only a few cases in the program, while others have hundreds. Table 3.3 summarizes the number of pilot districts with a substantial number of cases in ADR before and after implementation of the pilot program. Districts are dichotomized along this measure. Either the annual volume of cases is at least 150, or it is less than 50.

Table 3.3

Pilot Districts with Various Types of ADR Before and After Pilot Plan Implementation

Number of Pilot Districts	1991 Before CJRA	1993 After CJRA
More than 150 ADR Cases per Year	2	5
Fewer than 50 ADR Cases per Year	8	5
Number of ADR Programs in Pilot Districts with More than 150 Cases		
Mandatory Arbitration	2	2
Mandatory Mediation	1	2
Voluntary Mediation	0	2
Early Neutral Evaluation	0	1
Other Types of ADR	0	0

Note: Some districts have more than one type of ADR.

Before CJRA, at least some judges in all pilot districts held settlement conferences to a greater or lesser degree. Occasionally, judges asked another judge to conduct the conference so as to avoid the risk that information presented during settlement discussions would influence decisions made at trial. Sometimes a magistrate judge might be asked to conduct a settlement conference. Eight of the ten pilot districts, however, had no formally-structured ADR program involving a substantial number of cases, although some had local rules allowing a judge to refer a case to some type of ADR, usually upon stipulation by the parties. Such referrals occurred in only a few cases each year.

Two pilot districts had formally structured arbitration programs for a substantial number of cases before the CJRA, requiring mandatory early arbitration for certain cases involving damages less than $100,000. One pilot district had a formally structured mediation program for a substantial number of cases, requiring mandatory pro bono meditation for certain types of cases by a court appointed mediator early in the life of the case.

After implementation of the pilot program, five of the ten pilot district's allowed individual judges to refer cases to some type of ADR on a voluntary basis, but few such referrals have been made and they do not have a formally-structured ADR program.

Following implementation of the pilot program, five of the ten pilot districts have instituted one or more formally-structured ADR programs involving a substantial number of cases. Two of these pilot districts continued to have mandatory arbitration pursuant to a statutorily-authorized program. Two have mandatory pro bono meditation for certain types of cases early in the life of the case. Two have voluntary paid mediation, with 150 to 300 cases per year. And one requires mandatory neutral evaluation/settlement efforts by a magistrate judge early in a case, coupled with early pretrial management by the same magistrate judge. We are supplementing our primary CJRA evaluation with an in-depth look at the ADR programs of these five districts. We have similarly undertaken an in-depth study of one comparison district that has a substantial number of cases in a magistrate-judge-administered ADR program.

Consider the two mandatory mediation programs. Being mandatory, they both involve hundreds of cases per year, and provide a rich source of data for analysis. Still better from an evaluation standpoint, both have an experimental design. Some cases go to mediation, while others do not. Done on a random basis, both programs have built-in control groups against which to compare the mediated cases. But not all district courts feel that they can or should order unwilling parties to ADR because mediation costs the parties money. Even if the mediator works for free, the parties must still spend their own time and

cases. Both appear to meet the loosely-defined requirements of the CJRA. But it is the well structured programs that represent a marked shift in the pilot districts toward utilization of ADR procedures.

4. SUMMARY OF PRELIMINARY OBSERVATIONS

Having provided some detailed observations about the implementation of the CJRA pilot program, we now step back and provide an overview of our interim findings.

DIFFERENTIAL AND ACTIVE CASE MANAGEMENT IN PILOT PROGRAM

As the pilot program has been implemented, we find most districts adhering to their pre-CJRA policies regarding differential case management, although some have adopted new approaches.

Continuation of pre-CJRA policies include the following:

(1) using special procedures or "tracks" for certain types of cases that have traditionally required only minimal management--typically prisoner petitions, Social Security appeals, government loan recovery cases, and bankruptcy appeals; and
(2) using individualized case management for all other cases.

Among the new approaches adopted to one degree or another in four pilot districts are:

(1) Requiring lawyers to indicate at the time of filing whether the case should receive standard or special track processing;
(2) Assigning prescribed discovery cutoff times depending on the nature of suit; and
(3) Delegating all pretrial management to a magistrate judge in most cases.

Both the traditional approach and the new approaches appear to meet the CJRA's loosely-defined requirements for differential case management, since all districts explicitly or implicitly employ tracking systems for certain types of minimal management cases, and at least provide individualized tailoring of management for the rest of the cases. However, the pilot programs involve less tracking than might have been anticipated. Our interviews suggest two reasons. First, it is difficult to define tracks based on the limited information available at the time of filing. And second, the rigidity inherent in a tracking system

conflicts with the desire of judges and lawyers to have schedules and other management procedures tailored to the needs of each case.

Regarding early active case management, we have found all districts claiming to have had policies in place well before the passage of the CJRA. The pilot plans continue the pre-CJRA policies and enhance them in most districts. Some districts have increased their use of magistrate judges, assigning them some or all cases for pretrial processing. Other districts have expanded the use and importance of pretrial conferences. Several districts have standardized court practices by instituting uniform procedures. Moreover, several districts have indicated that judges are now less likely to grant continuances. The area of early active case management is difficult to assess, however, simply by reading plans and conducting interviews. Information is needed from the judge, lawyer, and litigant surveys that are being administered before a final assessment can be made on this topic.

DISCOVERY IN THE PILOT PROGRAM

The requirement that lawyers certify good faith efforts to resolve discovery disputes before filing motions has undergone little or no change. Most districts had pre-CJRA local rules covering this area and these have either been continued or strengthened.

With respect to judicial control of discovery volume and timing, we observed some new or tightened local rules limiting the number of interrogatories, requests for admissions, and depositions. In addition, some districts limited the length of time per deposition or prescribed time limits for discovery for certain types of cases. These were exceptions, however. Most judicial control of discovery timing or volume still appears to be done on a case by case basis. Again, future analysis of survey responses and docketed events will be required to assess the extent of reform.

With respect to early disclosure without formal discovery, we note substantial changes in local rules, since only one district required such disclosure before CJRA, and then only for certain types of cases. After CJRA, all ten pilot districts have adopted one of four very different policy models. Some use the voluntary model, which encourages lawyers to exchange information cooperatively. Some use a mandatory model on a limited subset of cases and a voluntary model on all other cases. Some use a mandatory model and require lawyers to give the other side information that has any significant bearing on their side of the case. Others use a mandatory model and require lawyers to give the other side information that has any significant bearing on either side of the case. It was this latter version of the early disclosure provisions that led to predictions of increased ancillary litigation and motions practice--which, so far as we can determine, has not yet occurred. All

of these models appear to meet the requirements of the CJRA, and the differences between districts should be a good test of various ways of implementing this pilot program principle.

ADR IN THE PILOT PROGRAM

As districts have implemented the pilot programs, we have found two very different effects of the various ADR procedures that have been implemented. Half the districts have formally structured programs with a substantial volume of cases, and half have programs that permit some sort of ADR but do not generate much ADR activity. Both appear to meet the loosely-defined requirements of the CJRA. These courts that used arbitration before CJRA have continued to do so. Significantly, however, there has been a marked shift in half of the pilot districts toward other formally structured ADR programs--especially mandatory or voluntary mediation--and several of these are handling significant numbers of cases. In addition, some districts have authorized intensive settlement efforts by magistrate judges. The absence of a substantial number of ADR cases in the other half of the pilot districts will inevitably compromise our ultimate assessment of the effectiveness of the ADR principle in those districts. However, we do expect to be able to satisfactorily evaluate the mediation programs and the expanded role of magistrate judges.

The strong message here is that the effects of an ADR program depend greatly on the details of how it is designed and implemented.

CONCLUSIONS

In general, this interim review of pilot district policies and procedures has indicated that inter-district variation with respect to case management is large and has increased since the pilot district programs went into effect. This variation is the consequence of more aggressive approaches by some districts and the continuation of relatively low key approaches by others.

For example, at the highly structured end of the case management scale, one of the pilot districts uses several standardized differential case management tracks, imposes early and active judicial management with uniform procedures on nearly all cases, mandates early disclosure of information without formal discovery requests, and assigns a substantial number of cases to mandatory ADR programs of one kind or another.

This contrasts sharply with the much less structured approach taken by another pilot district--individualized case management with high potential for inter-judge and inter-case variation, encouragement of voluntary disclosure of information but little enforcement, and ADR allowed but not required and not supported with a formally structured program.

The remaining districts tend to cluster near these two different approaches, with half having at least one type of structured case management approach that is actively pursued and the other half adhering closely to the judicial discretion model.

Differences in case management are not always as evident in the plans the districts have created as they are in the execution of the plans. A variety of reasons account for this. Some districts felt that the implementation of one or more components of their plans would require funding and personnel resources over and above those already being provided either for normal court operations or for the implementation of the CJRA. When it became clear that such extra resources were not forthcoming, some districts did not operationalize the component of the plan that would have used them. Other districts intended to fully implement certain procedures, such as ADR or DCM tracking, but had difficulty working out the practical details of implementation. Whatever the reasons, pilot programs in practice sometimes differ significantly from the pilot programs on paper.

Though the explicit policy changes summarized above are important, the implicit policy changes made in a district may be just as important. For instance, many judges and lawyers have commented in interviews that the process of implementing the pilot program plan has raised the consciousness of lawyers, judges, and clerks, with the result that subtle changes are underway -- perhaps shorter deadlines, fewer continuances, more attention to the cost of discovery, and more effort to settle cases. We have recorded these observations even in districts whose dominant mode of case management continues to be unconstrained judicial discretion.

Ultimately, of course, the questions of greatest significance are whether the variation between districts and between different case management procedures make any difference to the factors of most interest to the CJRA -- cost, time to disposition, and litigant, attorney, and judge satisfaction with the process and outcomes. Does proactive case management reduce costs? Are litigants more satisfied when ADR procedures are provided as an overlay to traditional court processing? Are structured programs more effective than judicial discretion in getting cases through the courts on a timely and cost effective fashion? In other words, did the Pilot Program work as intended?

To date, there are no definitive answers to these questions because many of the 5000 cases that we are following to study the effects of the pilot district programs have not yet closed and information on them is incomplete. Therefore, we must await their closure and the results of the surveys before such questions can be answered.