L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

August 16, 1991

MEMORANDUM TO DUANE LEE

Subject: Civil Justice Reform Act Advisory Committee Activities at the District Court in Utah

On July 15th, I visited the district court in Salt Lake City, Utah and received a thorough briefing on their activities as a pilot court to implement the Civil Justice Reform Act. I reviewed the work that had been done by the advisory committees and the subcommittees that had been appointed. I also asked to be provided with minutes and activities of the committees and subcommittees both before and after my visit. Attached is a copy of the material sent in response to that request.

My impression is that they are moving effectively and with expedition to perform their responsibilities as a pilot court. Chief Judge Jenkins is taking a strong leadership role in which he is joined by the other judges of the court and by their advisory committee which I think is exceptionally strong in its composition.

L. Ralph Mecham

Attachment
cc: Peter McCabe
Noel Augustyn

MEMORANDUM

August 5, 1991

TO: Judge David K. Winder
Judge J. Thomas Greene
Judge David Sam
Senior Judge A. Sherman Christensen
Senior Judge Aldon J. Anderson

RE: August 12 Meeting of the Civil Justice Reform Act Advisory Committee

The Civil Justice Reform Act Advisory Committee has scheduled its next meeting for August 12 in the new first-floor conference room. The meeting will begin at 1:30 p.m.

If your time permits, you might find this an interesting meeting. All of you are invited and more than welcome to attend. The primary function of the meeting will be to review the recommendations of the subcommittee chaired by Sidney Baucom. His group is tasked with reviewing the civil litigation process, and it already has made several preliminary recommendations regarding discovery. We have arranged for Professor Richard Marcus of the Hastings Law School to meet with us and to discuss discovery controls, early neutral evaluation, the new proposed amendments to the Federal Rules of Civil Procedure, and related topics. Professor Marcus was an associate reporter on the Federal Courts Study Committee and is an expert in civil procedure. It should be an interesting meeting.

Bruce S. Jenkins
Chief Judge

CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

April 10, 1991

MINUTES OF THE APRIL 4, 1991 MEETING

Chief Judge Bruce S. Jenkins called to order the initial meeting of the Civil Justice Reform Act Advisory Committee at approximately 3:45 p.m. on April 4, 1991. All active members of the committee were present except for Mr. Benson who asked Mr. Walz to substitute for him.

Judge Jenkins briefed the members on the general mission of the advisory groups as set forth in the Civil Justice Reform Act -- to determine whether a need exists to implement civil justice cost and delay reduction actions in the District of Utah and, if it does, what specific kinds of actions are required and how should they be implemented for the benefit of diverse clientele that is served by the court. He subsequently referred to the materials prepared for each committee member, noting that they included the text of the Act. He followed this with a brief review of the geography and vital statistics of the District of Utah, then turned to a description of three major court projects in the final stages of completion: the major first-floor renovation project to provide new quarters for the clerk's office and the probation office; the revision of the district court's rules of practice; and the automation of the civil docket.

Judge Jenkins then provided the committee with an overview of the three major areas of endeavor with which the committee had been tasked as a result of the legislation. The first he described as **substantive** clientele-related obligations. By definition, federal trial courts exist to provide services and assistance to a broad range of clientele that extends from the poor and disenfranchised to members of the bar, the business sector, the government sector, and the public in general. Are there other, less-obvious consumers of such justice? To what extent do the wheels of civil justice, as they currently turn, affect the justice-related interests of all of these groups? Are some of them served better than others, and if so, what

measures relating to vague notions of cost and delay should be taken to distribute the benefits more equitably? The issue raises more fundamental questions such as how do we define the "cost" of pursuing civil justice and does the notion of "delay" in civil litigation have a positive as well as a negative side to it. For purposes of reference, we can refer to this first group as the *Consumer Subcommittee*.

The second he described as an inquiry into **sequence** and likened it to the legal profession's rough equivalent of a time-and-motion study in an industrial environment. Are there ways in which the frequently complex and sometimes cumbersome process of civil litigation can be rendered more time- and cost-efficient while improving -- or at least without detracting from -- the quality of justice that is achieved as a result of that process? Are there adjustments to the new rules -- such as constraining discovery by imposing general limitations on the numbers of depositions and interrogatories -- that should be made? Are the court's case management practices and initiatives sufficiently aggressive in dealing with counsel? Should sanctions for abuse of process be strengthened or imposed more frequently? For purposes of reference, we might refer to this second group as the *Process Subcommittee*.

The third he described as alternatives to judge-proctored arbitration.[1] Here the task is to explore various techniques of and approaches toward alternative dispute resolution (ADR) and to determine whether adoption of them by the court as a supplemental means for achieving the goals of the Civil Justice Reform Act is desirable and practicable. The inquiry might explore the range of options noted in the legislation, bearing in mind that a number of federal trial courts have experimented with various approaches with differing levels of success. Judge Jenkins drew the committee's attention to the publication, *Court-Annexed Arbitration in Ten District Courts*, which is included in the materials provided for each member. Published this month by the Federal Judicial Center, it is an evaluation of a mandatory court-annexed arbitration pilot program in ten federal trial courts and provides a wealth of information on the relative levels of success trial courts have had with this form of ADR. For purposes of reference, we might refer to this third group as the *ADR Subcommittee*.

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[1] It is worth noting that the District of Utah, apart from its status as one of ten pilot courts under the Civil Justice Reform Act of 1990, also is one of ten courts selected under separate legislation passed earlier by the Congress to participate in a voluntary non-binding arbitration experiment. Because the two pilot efforts, although technically separate projects, compliment each other so well, the court plans (1) to pull the arbitration experiment under the larger umbrella of the civil justice cost and delay reduction effort, and (2) solicit the help of the ADR Subcommittee in developing guidelines for a pilot arbitration program in the District of Utah.

Judge Jenkins then proposed staffing for the subcommittee chairs and membership. He asked Dean Teitelbaum to chair and Messrs. Van Dam and Davis along with Ms. Milne to staff the Consumer Subcommittee. He asked Mr. Baucom to chair and Ms. Clawson along with Messrs. Benson and Kipp to staff the Process Subcommittee. He asked Professor Williams to chair and Messrs. Cassity and Wilkins to staff the ADR Committee. All members agreed to serve in the capacities noted. He suggested that the chairs of the subcommittees plan to meet with their respective members in approximately 30 days; the full committee will meet next on July 10, 1991 at 3:30 p.m. A reminder notice will be mailed as the date draws nearer.

Judge Jenkins asked Reporter Zimmer to comment on what is available in the way of services. He noted that the court would provide statistical information and clerical assistance, and that arrangements could be made with local colleges to negotiate research and other kinds of internships with enterprising students. In addition, Congress would soon be appropriating funds for use by the pilot and demonstration districts to get things moving, and that might mean an additional position or two on the staff of the court.

Committee members were asked to comment briefly at this stage of the inception of the committee and its work on their perceptions of the effort that Judge Jenkins had outlined. Mr. Wilkins agreed that there is a general need to examine these matters of cost and delay in civil litigation, and he thought it a useful effort to undertake. He expressed an interest in ADR and would like to see it work in this district. Although the common impression of it is negative, it is clean, saves money, and yields solutions. He commented on the enormous abuse of the discovery process and hopes to examine that as well. Ms. Milne explained for the benefit of the group the nature of her organization and the categories of work in which it engages. Professor Williams cautioned the group that court delay, notwithstanding the bad name it has earned in the media and elsewhere, has some positive and beneficial functions. He also noted that cost and delay are not the only reasons for experimenting with alternative dispute resolution. Ms. Clawson asked whether the rules revision project which is in its final stages, will constrain the committee's efforts to respond to its mandate. Judge Jenkins indicated that it would not, that the committee's work may well lead to additional revisions to the rules and that the court was prepared to entertain recommendations to that effect. Mr. Van Dam echoed Professor Williams' remarks about the usefulness of some delay, adding that the provisions of the Speedy Trial Act exert great pressure that does not always serve the interests of efficient use of public revenues. Mr. Davis also echoed Professor Williams' remarks, noting that delay can be productive. Mr. Walz commented on the differences between civil and criminal litigation, noting that where a civil case might generate numerous lengthy depositions, a two-page interview suffices for a criminal lawyer. Mr. Baucom indicated that cost is a major factor in civil litigation and needs to be addressed if the average American is to have legitimate access to the courts. He hopes his subcommittee could examine a means for compelling settlements and for

limiting discovery. Mr. Cassity, as a non-lawyer, feels responsible for ensuring that the non-laywer's perspective -- and the emotional point of view -- is brought to bear on the committee's deliberations. Mr. Kipp cautioned that the language of the legislation sounds good but may not be workable in the real world of lawyers and courts. He expressed some frustration at having civil litigation repeatedly preempted by criminal pursuant to the provisions of the Speedy Trial Act and suggested that there may be an important constitutional question that needs to be resolved. He also commented that abuse of the civil discovery process is indefensible, and he looks forward to addressing it. Dean Teitelbaum expressed great interest in the mission of the committee, noting that a number of important issues and questions would be addressed as it commences its work.

Following some brief closing remarks, Judge Jenkins invited the committee members to accompany him on a tour of the new physical facilities under construction for the court on the first floor. The meeting was adjourned at approximately 5:20 p.m.

CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

May 3, 1991

PROCESS SUBCOMMITTEE

MINUTES OF THE MAY 2, 1991 MEETING

Subcommittee Chairman Baucom called the meeting to order at 4:00 pm on May 2, 1991. Subcommittee members Carman Kipp and Carol Clawson were present along with Committee Reporter Markus B. Zimmer and Chief Deputy Clerk Louise York. Mr. Benson previously notified the Chairman that he would be unable to attend.

Mr. Baucom reviewed the subcommittee's charge and outlined the nature of the task before it, including possible revisions to the local rules. In the course of the discussion, Ms. Clawson asked of Mr. Zimmer about the scope of the revisions to the Rules of Practice in specific areas which were under discussion by this subcommittee. Mr. Zimmer informed the subcommittee that the rules were close to final adoption with a planned implementation date of June 1, 1991. He noted that numerous proposed changes had been accepted by the Court, but that modifications with regard to constraints on discovery, to motion practice, to sanctions, etc. had not been undertaken with the principles of the Civil Justice Reform Act of 1990 (CJRA) in mind. Most of the work of the Rules Committee had been completed when the President signed into law the Judicial Improvements Act of 1990 of which the CJRA is one portion. Ms. Clawson asked if the subcommittee members could have copies of the new rules as soon as possible in order to consider them when proposing further modifications in court procedures. Mr. Zimmer agreed to send the rules in draft form out to the subcommittee members.

Chairman Baucom then asked the members present for suggestions concerning procedural reform that the subcommittee might pursue. Mr. Kipp suggested that the subcommittee operate as an open exchange and freely explore all available ideas. Mr. Zimmer noted that the Chief Judge had encouraged the subcommittee to approach the court cost and delay problem creatively and aggressively.

Mr. Kipp recounted a positive summary jury trial experience he'd had in a complex matter litigated in the District of New Jersey. The court had seated an advisory jury and allowed introduction of the case by proffer of testimony with strictly enforced time limitations for the presentation of each party's case. Essentially, a rather complex matter was settled in two days, avoiding what would have been a lengthy and very costly trial.

The subcommittee discussed aspects of the summary jury trial technique, including the role of the advisory jury, the assignment of judges, constraints on the discovery process, and the timing of the summary trial. Noting that summary jury trials were generally recognized as an alternative dispute resolution (ADR) technique and may also be considered by the ADR Subcommittee chaired by Gerald Williams, the subcommittee determined to study summary trials further as a possible optional step in the adjudicative process. Mr. Zimmer indicated that he had available a short videotape on summary jury trials for review by the subcommittee. All members agreed that viewing the tape might be informative, and Mr. Kipp offered to host a noon hour viewing.

Ms. Clawson suggested that the subcommittee also review discovery abuse and propose, where possible, procedures and controls for the court to consider. She observed that the redundancy of discovery could be addressed by compelling litigants to select from among several discovery devices. As an example, she recommended that the use of interrogatories be limited if a witness also were going to be deposed. Generally, everyone agreed, the most efficient use of interrogatories is to identify early on in the litigation process who has the relevant information and/or documents. A cost-efficient discovery plan can then be determined by each party. Mr. Zimmer also mentioned the option of a two-stage discovery process and promised to send members copies of two articles by former Chief Judge Robert Peckham of the Northern District of California on the topic.

All subcommittee members agreed that the discovery process is often abused and that the intent of the **Rules of Civil Procedure** -- to provide for adequate preparation of the case for trial and to avoid surprise at the time of trial -- frequently is subverted by massive paperwork exchanges and endless depositions. A variety of options was discussed, including limiting the number of interrogatories and depositions, limiting the amount of time a witness can be deposed, imposing presumptive time limits on the discovery process, requiring early preparation and submission of a discovery plan, and encouraging more aggressive and active judicial case management early in the development of a case. Ms. Clawson suggested that the imposition of time limits on the discovery process be flexible enough to allow for counsel to stipulate for modest extensions of time. The use of sanctions for discovery abuses also was discussed, although, as Mr. Kipp noted several times, beating up on attorneys typically has limited results. It was noted that discovery differed for certain types of civil cases. The practicality of holding an initial discovery conference as early as thirty days after the filing of the answer was discussed. In some types of litigation, Ms. Clawson proposed, a list of relevant documents and the names of all proposed witnesses might be required for submission

at the time of filing the complaint. Other types of litigation rely upon the discovery process to identify people with relevant information. The ability of counsel to finalize a discovery plan early in the process will vary according to the type of case.

The subcommittee members agreed that limitations on the discovery process should be studied further by the subcommittee and that recommendations for changes be made freely for consideration by the full committee. Any substantial changes that render the discovery process more efficient would have a considerable positive effect on reducing court costs and delay. Chairman Baucom commented that the subcommittee should have considerable freedom to look at modifications in the discovery process, keeping in mind the basic purposes of the rules to adequately prepare cases and to avoid surprises at trial. When the discussion turned to interrogatories and how to control them, Mr. Zimmer offered to provide the subcommittee members with copies of rules from other federal district courts on limitations on the number of interrogatories by the next meeting.

Turning to the role of magistrates in the adjudicative process, Mr. Baucom related a personal and positive experience with efficient case management. An extremely complex case in which he was involved had been transferred from the District of Utah to the Southern District of California which, with its substantial criminal caseload, relies heavily on magistrates for the resolution of civil cases. Once there, the case was assigned to a magistrate judge whose primary function is to facilitate the settling of cases. The magistrate judge began by aggressively instituting scheduling and taking a very active role in managing the case. Counsel from Utah were caught by surprise to some extent, but the matter was handled in a very prompt and expeditious manner. Moreover, counsel were well pleased with the results. The cost to the litigants was reduced and what might have been a lengthy, complex, and drawn-out matter was handled relatively quickly. The subcommittee discussed the relative merits of modifiying the role of the magistrate judges in managing civil cases prior to trial. Mr. Baucom asked Mr. Zimmer to obtain some information about the number of magistrate judges in San Diego, relative to the number of judicial positions. Mr. Zimmer noted that the District of Utah recently requested that the part-time magistrate's position be upgraded to full time and that the subcommittee should feel free to recommend to the court that it consider adding to the functions magistrates currently perform. Ms. Clawson recounted her experience with Chief Judge Jenkins as a law clerk and expressed some reservation about delegating too many matters to the magistrate judges. All agreed that more aggressive case management by judges and magistrates in the early stages of the case would be very helpful in curbing discovery abuse.

The subcommittee briefly touched upon the issue of ruling on dispositive motions early in the proceeding, including judgments on the pleadings, when appropriate but deferred further discussion until the next meeting.

Ms. Clawson asked about the timetable for the subcommittee to meet in the future

in order to be prepared to report to the full committee at the July 10, 1991 meeting. The subcommittee discussed the issue and agreed to propose some general recommendations/ modifications as building blocks for new approaches to reducing court delay and costs.

The next meeting will be held over the lunch hour at the offices of Kipp and Christian. Mr. Kipp will provide sandwiches. The subcommittee will view the videotape of the summary jury trial. Messrs. Zimmer and Kipp will coordinate scheduling.

Mr. Baucom adjourned the meeting at 5:15 p.m.

11-505

CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

Minutes of the Consumer Subcommittee Meeting

July 1, 1991

Present: Chairman Lee Teitelbaum, Paul Van Dam, Anne Milne, Jan Graham, and Louise York. James Davis was excused.

Chairman Teitelbaum opened the meeting by reviewing the charge to the subcommittee given by Chief Judge Jenkins. He brought the attention of the subcommittee to the materials which had been distributed to them by Markus Zimmer. He mentioned that, for him, the most interesting article relating to the subcommittee's work was the article concerning the cost reductions resulting from instituting restrictions on the discovery process. He noted that the costs saving of these measures was primarily found in the area of attorney time and that the cost savings were not necessarily passed on to the client. He observed that the role of this subcommittee was to look at the issues of court costs and delay from the perspective of the consumer, which is a different focus than the emphasis of the other subcommittees which focus on the court and the court process. The surveys and questionnaires which been provided in the handout materials were not specifically related to the concern of this subcommittee on the effect of expense on clients and the issue of accessibility to the court and to justice.

Ms. Milne noted that the litigant consumer was often not aware of differences between federal court and state court and generally did not choose the federal forum in which to take their cause of action. She noted that there were some causes of action which must be brought in the federal court and also a variety of other actions which could be brought in either the federal or the state court system. Client satisfaction with a judicial system was based on personal feelings of how well they were treated and whether there was an opportunity to tell their side of the controversy.

Mr. Van Dam then raised the question about the identity of litigants of the federal

court and what information was available to the subcommittee about the litigants. Ms. York presented two summaries of the caseload in the District of Utah. The first was a summary, by case type of the filings in the court from 1971 through 1990. This summary also differentiated between cases which involved the United States of America as either plaintiff or defendant and cases involving other parties, designated as private cases. The second report was an analysis of the cases pending in the court, sorted by cause of action and by characterization of the litigant, as an individual or corporation, represented or appearing pro se, multiple or single, etc.

The subcommittee members reviewed these reports and discussed the areas in which the greatest number of cases appeared and the areas which showed the largest concentration of pro se plaintiffs. The subcommittee specifically noted contracts, personal injury and prisoner claims as the largest categories of cases pending in the court.

The subcommittee discussed the pro se plaintiff as a client who may have valuable information concerning access to the federal court. Represented litigants would not have the same concerns. The subcommittee members noted their primary difficulty in defining barriers to court access which prevent litigants from bringing their cases to the federal court is a direct result of the inability to identify who these potential litigants are and what were the factors which blocked their access to the court. A secondary aspect of access is the merits of the claim which has been blocked from the court. Ideal access to justice would dictate that the meritorious claims are fully presented to the court. Efficiency of the justice system would be demonstrated when non-meritorious, frivolous complaints are dealt with quickly without excessive use of limited court resources.

The subcommittee members discussed their perceptions of the process currently used in the District of Utah in dealing with pro se prisoner complaints, one of the three largest categories of cases involving pro se litigants. The subcommittee felt that the role of the magistrate judge was one of the key elements of the success of the current process. The general consensus was that the procedure followed in this court balanced efficiency and access needs and could well provide a model for other jurisdictions to follow. Key elements in the process include screening of complaints by the magistrate judge assigned and the use of pro bono attorney assignments which correlate the level of complexity of the complaint and the expertise of the attorney eventually appointed to litigate the matter. The subcommittee had questions about the flow of these cases and the criteria used by the magistrate judge in making pro bono assignments in these cases. The members also had some questions about the criteria for approving applications to waive court filing fees and to proceed in forma pauperis. Chairman Teitelbaum agreed to invite Magistrate Judge Boyce to a subsequent subcommittee meeting to outline the general process for handling pro se prisoner petitions.

The subcommittee members then addressed the personal injury case category. This discussion led into the reasons why a litigant (or most commonly the litigant's attorney) would choose a federal court forum rather than the state court forum. Ms. Graham noted some of the general beliefs held among members of the bar in Utah that personal injury awards were higher in the federal court, that case outcomes were more predictable and that

cases will take longer to complete in federal court. The subcommittee also questioned whether there was a tendency for cases which originated in rural counties in which there is only one state court judge to be removed whenever possible to the federal court to avoid that judge. The subcommittee agreed that very few litigants were aware of these elements of the local legal culture and that attorneys were the best sources of information as to the current beliefs as to the advantages and/or disadvantages to litigation in the federal court. The subcommittee identified two potential sources of information - those attorneys who appeared on a regular basis in the federal court and those who litigated only in state courts. The subcommittee members felt that the results of the recent registration of attorneys could yield two groups of attorneys for survey, those who registered as active and those who chose to register as inactive. The subcommittee members also identified a survey of those involved in removal cases as a possible source of information as to the reasons why a federal court forum might be chosen in preference to a state court forum.

The subcommittee looked at the third large group of cases, the contracts cases and identified the large corporation which frequently litigated in the federal court as an additional source of information concerning the factors which would lead litigants to choose the federal forum.

The subcommittee concluded that the best method of addressing the question as to whether the federal court system in Utah was meeting the needs of identifiable consumer groups in its clientele would be to ask the clients who can be identified by means of a poll. Chairman Teitelbaum suggested that the poll or questionnaire could be easily developed by the subcommittee and administered to the groups which the subcommittee identified as possible sources of information. The results of the survey may suggest some modifications to the approach of the justice system. Ms. Milne noted that the justice system was traditionally a very "user-unfriendly" system and that her experience suggests that clients had a far more positive view of the process when the court gave reasons for its rulings and when the litigant felt that he had been heard, regardless of the direction of judgment on the merits. The quality of justice issues which will be examined by the subcommittee would encompass the perceived quality of the process as well as the result.

Chairman Teitelbaum suggested this concern would also relate to the work of the ADR subcommittee. It was suggested that even a superior mandatory arbitration which resulted in a decision which was uniformly fair to the litigants would not be regarded as satisfactory to the litigant who wants to have his case heard in a court before a judge. The observation of most committee members was that clients are satisfied with the legal process, regardless of whether they won or not, if they felt that they had an opportunity to be heard and were given the basis of the judge's decision. The subcommittee felt that a further study of the elements of the process which lead to client satisfaction needs to be done. The results of this study will provide a means by which to measure the potential utility of changes in the court process and ADR process in furthering the public's access to justice.

REPORT

July 9, 1991

TO: **Civil Justice Reform Act of 1990 Advisory Committee**

FROM: **ADR Subcommittee**
Burton F. Cassidy
D. Frank Wilkins
Gerald R. Williams, Chair

SUBJECT: **Summary of our results to date**

The ADR Subcommittee was assigned to explore various methods of alternative dispute resolution (ADR) and to make recommendations about using ADR as a supplemental means for achieving the goals of the Civil Justice Reform Act in the District of Utah.

Background Information

The District of Utah has agreed to serve as an experimental site for implementing ADR under two separate legislative provisions: (1) under Title IX of the Judicial Improvements Act of 1990,[1] to participate as one of ten districts authorized to implement non-mandatory (voluntary) court-annexed arbitration, and (2) under the Civil Justice Reform Act, to participate as one of ten "pilot districts" which have agreed to include ADR as part of their plan and to implement their plans by December 31, 1991. Our Subcommittee has been asked to extend its mandate to include both of these provisions.

The first legislative provision calls for non-mandatory (voluntary) court-annexed arbitration, meaning non-binding arbitration that is sponsored and funded by the District Court, and which the parties voluntarily agree to use.[2] The second provision is more general, specifying only that the Court's plan should include "authorization to refer appropriate cases to alternative dispute resolution programs that — (A) have been

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[1]. Since the Civil Justice Reform Act is also a component of the Judicial Improvements Act (Title I), both legislative provisions come under the umbrella of the same larger Act.

[2]. See the definition section below for more information on these terms. The Clerk of the Court, Markus Zimmer, has already undertaken significant preliminary work on a plan for non-binding arbitration, including drafting a set of proposed court rules to implement it.

designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial.[3]

Several advantages flow from the Court's decision to be a test site for ADR. One advantage is that some supplementary funding is available to courts who take the lead in ADR.[4] Another is that the Court has saved us from the necessity of deciding whether to include ADR in its plan, and permitted us to focus on which method or methods ADR should be included, and what is the best way to proceed with them. Finally, the fact that the Court is an experimental site means that many the eyes of the Judicial Conference and the Congress will be upon us to learn from the results of our work.[5] This is a powerful incentive to all concerned (the Subcommittee, the Advisory Committee, the Court, the Bar, and litigants themselves) to put for their best

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[3]. Section 473(a)(6)) of the Civil Justice Reform Act of 1990 (italics added).

[4]. Under Title IX (Arbitration), the ten experimental courts have access to funding to help cover the costs of implementing a non-mandatory arbitration program.

Under the Civil Justice Reform Act, the provision for funding is less direct. The Act provides that each Pilot District "shall be designated as an Early Implementation District Court under section 103(c)." In turn, section 103(c) states that "[t]he chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 106(a)." Finally, section 106(a) authorizes the appropriation of an amount "not more than $15,000,000 for the fiscal year 1991 to carry out the resource and planning needs necessary for the implementation of section 103(c)."

[5]. Judging from the Act, Congress — to say nothing of judges, lawyers, and litigants across the United States — wants ten highly respected District Courts to quickly gain direct, hands-on experience with ADR, so that other courts, the Judicial Conference, and the Congress can make an informed assessment of ADR's effectiveness. Procedures for this learning process built into Judicial Improvements Act of 1990. For example, section 105(c)(1) specifies that after the first three years of operation, the Judicial Conference shall conduct a study that compares the results of the Pilot District plans with the results in ten similar Districts where the six principles and guidelines were discretionary. The Judicial Conference must submit that report to the Congress.

efforts in designing and implementing alternatives. In all of these ways, then, the Court has established an unusually favorable climate for the Subcommittee to carry out it's assigned work.

Although ADR is still experiment, the field is now sufficiently developed that the basic methods have been identified and various state and federal courts have begun to accrue some experience in applying them. The challenge for our Subcommittee (and, of course, for the Advisory Committee and the Court itself) is three-fold:

1. Gain a basic familiarity with the spirit of ADR and substance of various alternatives;

2. Learn enough about particular circumstances in the District of Utah to allow us to support an informed assessment of which alternatives will be most responsive to local needs;

3. Design and carry out a plan that has qualities such as these:

   A. is equal to the task (can survive the uncertainties of start-up),

   B. is open enough, and includes sufficient built-in feedback mechanisms, that the Court, litigants, legal counsel, and the public can learn from experience over time, and

   C. is flexible enough that it can be adapted or modified in response to problems and needs as they become evident over time.

<u>Questions currently before the Subcommittee</u>

We do not have many answers yet, but we do have a good list of hard questions which we feel will benefit from the findings of the other subcommittees and from discussion by the Advisory Committee as a whole.

1. What is "alternative dispute resolution", and how do the various ADR options work?

2. What kinds of cases in this District will most likely benefit from ADR? In particular, what are the other subcommittees learning about caseload, case make-up, and other specifics in the District of Utah that will help us tailor our proposal?

3. What are the specific goals or objectives to be accomplished with ADR? What benefits do we expect to see?

4. What are the anticipated startup costs? Costs to consider include the following:

   A. Costs of designing a good plan (fact-finding, expert assistance, learning from the experience of other courts, obtaining participation and input from interested groups in the District, drafting the plan and supporting rules of court, etc.)

   B. Costs of implementing the plan (personnel, printed and other materials, training, building space, etc.)

5. What are the anticipated long term costs of maintaining an ADR program?

6. Are there sufficient community resources to respond to the programs we propose? For example, are there enough people trained and experienced in various ADR methods to adequately meet to the anticipated demand?

7. What are the risks of implementing ADR? What mistakes do courts typically make? How can we avoid or minimize them?

8. What do the key participants presently know about ADR (i.e. federal judges, court administrators, lawyers, litigants)? What are their present attitudes toward ADR? To what extent are key participants willing to go through the learning curve required for effective implementation? What are the best ways of providing necessary information and training?

9. Is it better to recommend a rich variety of ADR options, or to focus on just one or two methods?

10. What national resources are available to help with planning and implementation? Are they adequate, <u>especially taking into account the accelerated schedule we're on</u>?

    a. Has Congress carried through with its intention to appropriate $15 million for the Judicial Conference to help with this process?

    b. How much help can the Court reasonably useful input can be expected from the Judicial Conference, and from other support sources, such as the Federal Judicial Center, the CPR Judicial Project, etc? In what forms will the help come (for example, will it be photocopies of materials, or in-kind help, or money, or what)?

Obstacles to ADR; Proposed Definition of Terms

In our experience, the greatest obstacle to appropriate use of alternative dispute resolution (ADR) methods is they remain in an intellectual and experiential "twilight zone". Lawyers and judges and attorneys are not completely in the dark; rather, they are somewhat familiar with the terminology, yet not yet sure what it really means. Their attitude toward ADR often the attitude of one Subcommittee member's attitude about gardening: "he only knows enough to know he never wants to try it". But unlike gardening, ADR has a potential to make the legal system more responsive to the wide variety of cases brought into it. This potential cannot be satisfactorily tapped or evaluated in the District of Utah until sufficient numbers of participants follow the Court's lead in making up their minds to face the learning curve and actually built ADR methodologies into their repertory of professional tools and skills.

To facilitate the shift from "familiarity with the words" to "knowing the specific meanings", we are compiling a list of commonly used ADR terms or procedures, and a brief working description of each. There is a danger that definitions will be taken too literally; we hope they will be taken in a more open way; ADR processes are intended to be flexible; it is considered good practice for judges and lawyers to adapt ADR methods to meet particular needs of the parties. In this spirit, we assume flexibility, and have not attempted to describe the many ways they can be modified.

Alternative Dispute Resolution, or "ADR". Means "alternatives" to a court trial; covers a broad spectrum of procedures, ranging from evaluation and issue defining techniques; through mediation and other "assisted negotiation" conferences; to various forms of arbitration; to the so-called "hybrid" procedures such as summary jury trial and mini-trial.[6]

Arbitration. A form of adjudication in which an expert (or a panel of three experts), selected by the parties, hears the case and renders a decision. The proceeding is less formal and time-consuming than a trial, because it does not require adherence to court rules of procedure, rules of evidence, etc. When ordered by the court, it is **non-binding** on the parties (see definition of **non-binding**).

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[6]. Paraphrase of Judge William W. Schwarzer, in his remarks on "Implementation of the Civil Justice Reform Act", at the Chief District Judges Conference in Naples, Florida, on May 13-16, 1991, page 3. Judge Schwarzer is Director of the Federal Judicial Center.

Mediation. A form of "assisted negotiation" in which a neutral third person (the mediator) meets jointly, and sometimes separately, with the parties to facilitate communication and help them move toward a mutually agreeable outcome. Parties are under no obligation to agree; they retain full control over the process and outcome; the mediator has no authority to impose a solution on them. Judges and lawyers frequently confuse it with **arbitration** (see definition above).

Moderated Settlement Conference. Similar to neutral evaluation, but used when the case is closer to a trial date, intended to help the two sides toward a negotiated solution. Counsel, with the parties present, give their best summary of the case to a panel of neutral third parties (usually lawyers), who render a non-binding decision.

Negotiation. The most frequently used method of dispute resolution, in which counsel for the parties communicate by letter, telephone, and sometimes face-to-face to work out a mutually acceptable agreement. Clients are sometimes present during negotiations. The resulting agreement is typically entered by stipulation into the court record. In the District of Utah, about 97% of the federal civil docket is resolved in this manner.

Neutral Fact-Finding. A form of "assisted negotiation" in which an a neutral expert is appointed to investigate disputed facts or technical issues in a case and report the findings to the parties. The results are typically not binding on the parties; depending on prior agreement, they may be admissible in the event of trial.

Neutral Evaluation. A form of "assisted negotiation" and "reality testing" typically used early in the litigation process. Lawyers with expertise in the subject area provide litigants and their counsel with an early, non-binding expert assessment of liability and dollar values of claims.

Non-Binding. Means that parties do not surrender their right of access to the courts when they agree to participate in ADR procedures; if they are not satisfied with the ADR result, they are entitled to a de novo trial of their case in District Court.[7]

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[7]. As a general rule, court-related ADR procedures are non-binding on the parties unless the parties themselves decide otherwise, and assuming they otherwise meet the procedural requirements. In my opinion, this is good policy, and it is directly responsive to the Act's mandate that the plan should, among other things, "facilitate deliberate adjudication of civil cases on the merits".

Mini-Trial. Another private, consensual, non-binding process designed to assist the parties toward a negotiated outcome; originally used in disputes between corporations or other large entities. The lawyers present their best summary of the case to a panel that consists of a neutral expert, plus an officer and inside counsel of the disputing organizations. After hearing presentation of the case and asking questions, the officers and inside counsel retire to a conference room to see if they can work out a practical or "business solution" to the case. If they wish, they may call in the neutral expert and ask for an advisory opinion or otherwise benefit from his or her impressions of the case.

Summary Jury Trial, or Summary Bench Trial. An abbreviated form of adjudication intended to assist the parties toward a negotiated outcome. The lawyers, with the parties present in the courtroom, present their best summary of the case to a jury or judge. The jury or judge then renders a **non-binding** decision, and the parties and their counsel are encouraged to talk with the jurors and with the judge to learn their perception of the merits of the case.

Some Further Considerations

The Act instructs advisory committees to identify "the principal causes of cost and delay". As to "delay", we have the luxury of a very well-managed court, a favorably high settlement rate, and no significant backlog of cases. If ADR's only purpose is to reduce an unmanageable backlog of cases, we don't need it. As Judge Schwarzer put it in his remarks on "Implementation of the Civil Justice Reform Act" (May 1991):

> In formulating recommendations for a district plan, the group should follow the principle that "if it ain't broke, don't fix it". To the extent the civil litigation process in the court is operating without avoidable cost and delay, the plan should embody existing practices and procedures.[8]

Thus, our interest in ADR relates more to "cost" than "delay"; we're looking for ADR procedures that will help reduce costs of litigation and otherwise "ensure just, speedy, and inexpensive resolutions of civil disputes".[9] One of the significant "costs" of litigation is the effect the process has

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[8]. Judge William Schwarzer is Director of the Federal Judicial Center. He made his remarks at the Chief District Judges Conference, Naples, Florida, May 13-16, 1991, page 3.

[9]. Civil Justice Reform Act, §471.

upon the parties and upon the quality of the outcome. We will want to pay particular attention to ADR procedures that may offer the parties a better process or a better solution than trial typically provides.

As a matter of strategy, we should acknowledge that Utah's experience with a poorly designed mandatory medical malpractice panel system has given many Utah attorneys and judges and citizens a bad impression of "ADR". We may need to help Utah lawyers, judges, and the public to differentiate between that ill-advised program and any initiatives the District Court may decide to go forward with.

In thinking about the range of ADR offerings we might recommend, we can see at least two good arguments for limiting ADR to the bare minimum, such as non-binding arbitration and nothing else. It would require less effort, expense, and risk to implement, and it would allow the Court to wait for the results of experience in other courts as they implement their Civil Justice Reform Act plans over the next few years.[10]

There are substantial reasons for offering a richer menu of offerings as well. Given the up-to-date docket, the Court has an uncommon opportunity to offer ADR processes purely on their merits. It can be guided by the principle that judges and lawyers should only recommend or agree to ADR when they believe it offers a better alternative in particular cases. In this sense, the richer the variety of offerings, the greater variety of needs can be met outside of a courtroom trial. A richer menu would also permit to Court to compare the desirability and effectiveness of the various ADR processes.

The Subcommittee has not yet answered the many questions raised by this Report, and is not yet ready to make firm recommendations about ADR. However, at present we are leaning toward a richer menu of ADR offerings that would include most, if not all, of the ADR methods identified in the above list.

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[10]. We assume that, as District Courts around the country begin implementing their plans under the Civil Justice Reform Act of 1990, there will be a flood of new ADR programs and a steep learning curve. Because the District of Utah has no significant docket backlog and no loud voices of discontent, the Court might reasonably decide to sit back and wait until other District Courts have learned by trial-and-error, then apply their experience in developing its own program.

CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

July 21, 1991

MINUTES OF THE JULY 10 MEETING

Mr. Zimmer opened the meeting by noting that Chief Judge Jenkins had indicated he would be detained by a change-of-plea hearing, preparations for which were taking longer than anticipated. He asked that Mr. Baucom lead the meeting in his absence. All members of the committee were present except Mr. Benson who asked Mr. Sorenson to represent him, and Mr. Van Dam, whose office called and indicated he would be unable to attend because of a last-minute emergency at the office.

Mr. Baucom indicated that it was his recollection that this meeting's primary purpose was for the subcommittee chairs to provide progress reports. He began by distributing copies of the a semi-final draft of the Process Subcommittee recommendations. Mr. Kipp indicated that the recommendations represented a beginning, an initial effort on the subcommittee's part, and he invited comments from the other members of the committee. Mr. Baucom noted that he did not expect to have everyone read the recommendations at that time but asked that they review the draft. He then turned to Professor Williams and asked that he report on the ADR Subcommittee's efforts to date.

Professor Williams distributed a "thinking paper" that he hoped would function as a kind of progress report on the work of his subcommittee. He noted that because the District of Utah is a Civil Justice Reform Act (CJRA) pilot court, it has an obligation to experiment with various ADR techniques and devices. Moreover, because the District of Utah also has been designated as a pilot court under separate legislation authorizing experimentation with non-mandatory court-annexed arbitration, his committee has a double mandate from the Court to develop recommendations for practicable ADR programs. The weight of that mandate is a substantial one, and his subcommittee welcomes guidance from the other committee members. Referring to the paper, he noted that it includes a list of challenges (page 3), of questions (page 4) and of definitions (page 5) for purposes of

promoting a common understanding of ADR terminology. He, too, welcomed comments on the paper and on the progress of his subcommittee's work. By this time Chief Judge Jenkins had arrived. At his suggestion, Mr. Baucom turned to Dean Teitelbaum for his subcommittee report.

Dean Teitelbaum indicated that his subcommittee had not yet developed a working paper or draft recommendations, but that it had met and had reviewed some data prepared by the Clerk's Office with regard to categories of parties and categories of cases in which those parties were litigants. The caseload report indicated that the majority of cases fall under the categories of contracts, personal injury, and prisoner pro se. Most appear to involve individuals rather than corporate litigants, and the number of pro se cases vis-a-vis represented cases is substantially larger than he anticipated. He noted that the research he's reviewed indicates that the results of implementing procedures designed to reduce both cost and time investments in litigation -- for courts as well as for counsel -- appear to have no direct and limited indirect correlation and with costs and time invested by clients. Most cost and delay studies appear to focus on courts and lawyers, and there is a great deal of research available. Where you deviate from that focus, however, to look at questions of client satisfaction, access, cost, etc, and it has found that there is little data available, and what is available indicates that the results do not clearly trickle down to the level of clients.

Mr. Kipp noted that he found questionable the assertion that there was no direct and immediate correlation. Dean Teitelbaum noted that based on materials that had been distributed by Mr. Zimmer, lawyer cost is not significantly affected by cost and delay reduction initiatives. There is no linear relationship between modifications to the process and ultimate cost to the client. Mr. Baucom expressed astonishment at the lack of correlation. If it is indeed true, he noted, then the committee should be disbanded and the Biden legislation, which ultimately presupposes such a correlation, should be repealed. He went on to note that it would be useful if the Consumer Subcommittee could develop some specific recommendations with regard to its findings to which the full committee could respond.

Chief Judge Jenkins noted that all subcommittees should feel free to call on and to utilize all court resources -- judges, magistrates, clerk's office staff, etc. Mr. Zimmer distributed a compilation of bar/client questionnaires he has gathered from some of the other federal districts. Chief Judge Jenkins also noted that the Court had requested and been authorized funds for purposes associated with the committee's work such as consultants, travel, etc. Turning to scheduling, he noted that the implementation plan called for under the legislation should be ready for submission to the Court's judges no later than December 10, 1991. He then turned to the Consumer Subcommittee and asked when it might have specific recommendations for presentation to the full committee. Dean Teitelbaum indicated that the subcommittee planned to develop and distribute a survey

questionnaire in an attempt to gather useful data. The questions might be ready within four to six weeks and, in the interest of saving time, the survey might be conducted by telephone. Does that mean results and recommendations to the committee would be available by September 15, Chief Judge Jenkins asked. Between the 15th and the 30th the Dean answered.

Mr. Davis indicated that the number and quality of responses would be substantially higher if Chief Judge Jenkins were to prepare and sign a survey cover letter. The judge indicated he would do so. Mr. Zimmer noted that if the other subcommittees planned to use survey instruments, it would be best to consolidate surveys to ensure that no one received more than one questionnaire. Mr. Baucom indicated that the Process Subcommittee is not interested in participating in a survey.

Chief Judge Jenkins asked when the subcommittees would be in a position to present more specific recommendations to the full committee. Professor Williams indicated he saw two choices. First, develop a skeletal plan with few recommendations and implement it on schedule in anticipation of making enhancements to it in the future. The Court appears to be in fairly good shape from a case management perspective, and the committee could wait a few years until some hard data was available from other courts implementing CJRA on an accelerated schedule on which to base our own proposals. Alternatively, the committee could take a more active, leading role in which case his subcommittee would develop proposals for an ADR program with which the Court could begin to experiment. In addition to the work of his subcommittee, the Court might wish to hire someone who could work with and learn with the subcommittee. Such person then might be tasked with administration of the program through the experimental and operational stages.

Mr. Zimmer indicated that the Court already had authorization for a full-time temporary position but hadn't yet filled it. Chief Judge Jenkins noted that he felt it was important that the Court establish a need before it establishes a structure, primarily because structures once in place, tend to become self-perpetuating and are difficult to dismantle. Mr. Zimmer noted that there was an alternative. The Court might hire someone for a fixed three- to six-month period. If the results of the experiment were not promising, the experiment could be terminated. Professor Williams noted that in many instances needs exist which simply have not been articulated, citing as a simple example the restaurant business where someone creates a menu and seeks to generate interest. Chief Judge Jenkins agreed and, noting that he would appreciate seeing a menu from the ADR subcommittee, asked how soon the committee might have one. Professor Williams agreed to have something prepared for review by the committee by September 15.

Chief Judge Jenkins then moved to the Process Subcommittee and asked Mr. Baucom when his subcommittee might have more specific recommendations. Mr. Baucom noted that

he didn't think the subcommittee recommendations would be much more specific than they now are. Chief Judge Jenkins then asked which of the recommendations should be given priority. Mr. Baucom suggested the discovery limitations which he then listed. Mr. Kipp noted that some of these discovery recommendations anticipate an active role on the part of the judge, for example, apportioning discovery. Here the judge should take an early and active role. This can and should be done in a positive way -- establishing limits on discovery and developing a schedule for it. Ms. Clawson indicated that the subcommittee also proposed a more radical recommendation -- that the rules of practice promote and the judges stimulate and oversee the voluntary exchange of discovery. Chief Judge Jenkins responded that although he agreed, his experience is that it has been difficult to compel such voluntary exchanges. Sanctions, he acknowledged, are an avenue for compelling it. A more useful device he occasionally has used is, when counsel for one party complain about burdensome requests, to ask the opposing counsel whether they actually need everything they are requesting. If they affirm that they do, he asks producing counsel to maintain cost records and to invoice requesting counsel when the requested discovery is delivered.

Mr. Kipp reiterated his suggestion that the judge's role be as friendly and positive as possible. In his judgment, the bureaucratic aspects of the process should be minimized. It should not be paper intensive; neither should the judge feel inclined to beat attorneys over the head.

Dean Teitelbaum noted that he has met many attorneys, all of whom claim to have been victimized by discovery abuses and none of whom confess to perpetuating it. Why do they abuse the process, he asked rhetorically. To soften the opposition, replied Mr. Baucom, to maximize their fees. Moreover, added Mr. Kipp, younger attorneys learn early in their careers -- perhaps even in law school -- that more is better. Where 10 pages of discovery requests are good, 100 will be better.

Professor Williams indicated that properly administered ADR programs have the virtue of eliminating many of these excesses. They minimize discovery; they assist and stimulate the process of negotiation. They serve as an alternative in cases where it is difficult to mandate good faith.

Chief Judge Jenkins suggested that on occasion, delay and inaction have positive functions by permitting heightened emotional states to recede. One of the difficulties with the CJRA is that it does not address the possibility of diminishing the quality of judicial decision making by subjecting it to productivity quotas, by addressing what might be lost if a decision for which two weeks of consideration are required is compressed into one. Professor Williams wondered whether the process could be improved without impairing the quality? How, he asked, can we help attorneys and clients to maximize the purpose of the process while minimizing the time and cost factors?

Chief Judge Jenkins noted that the history of courts as institutions is predicated upon the general willingness of individuals to live with it, to subordinate themselves to it, to accept the process of adjudication as something that is inherently different from a supermarket. Professor Williams noted that the ability of individuals to live with it appears to be diminishing with the substantial increases in the past ten years of the proportion of cases that are appealed and of the increasing use of a variety of ADR devices, particularly by certain elements in the corporate sector. Chief Judge Jenkins noted that the courts are not given sufficient credit for the tremendous number of settlements they induce, whether directly or indirectly. More than 90% of civil cases filed in the District of Utah, he noted, are settled and never go to trial.

In conclusion, Chief Judge Jenkins noted that the committee might begin its review effort by having everyone look with some care at the recommendations of the Process Subcommittee. Comments and suggestions should be submitted to Mr. Zimmer no later than July 29. He, in turn, will distribute them to all members of the committee for discussion at the next meeting which was scheduled for August 12, 1991 at 1:30 p.m. in Room 158 of the new Clerk's Office. Recommendations of the other two committees will be reviewed at subsequent meetings. Chief Judge Jenkins also noted that he may invite one or two guest experts or speakers to the next meeting.

CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

August 15, 1991

MINUTES OF THE AUGUST 12 MEETING

The meeting began under the direction of Chief Judge Jenkins at approximately 1:40 p.m. in Room 158. All members or their representatives were present except for Messrs. Davis and Kipp, both of whom previously asked to be excused because of scheduling conflicts. Mr. Steven Roth represented Mr. Benson and Mr. Creighton Horton represented Mr. Van Dam. Also present was Senior Judge A. Sherman Christensen and guest speaker Richard Marcus, Professor of Law at the University of California's Hastings School of Law.

Chief Judge Jenkins introduced Professor Marcus, noting that the Court had invited him to address the Committee from his perspective as an expert in civil procedure and his role as associate reporter for the Federal Courts Study Committee.

Professor Marcus began with a brief overview of the history of the legislative effort that led to passage of the Civil Justice Reform Act, highlighting the tension between the Judicial Conference of the United States and the Senate Judiciary Committee over which branch has the authority to stimulate systemic reform in the federal judicial system. The Senate's position was based on the assumption that although the federal courts have rule-making authority, more rigorous and fundamental reform is the province of the Congress. Moreover, in the area of improving civil litigation, the Congress specifically adopted a bottom-up approach by creating legislation that authorizes individual federal trial courts to tailor their civil litigation reform agendas to local circumstances and requirements based on broad principles of litigation management. That approach differs substantially from the more traditional, top-down process where the Judicial Conference adopts rule amendments that apply across the board to all courts irrespective of local demographics and peculiarities. In effect, under this legislation the Congress granted individual trial courts significant authority comparable to that vested in the rules advisory committees by the Judicial Conference. What is unusual is the flexibility factor that is reflected in the legislation.

The tension between these conceptual approaches -- top-down, rule-oriented reform versus bottom-up, individually tailored reform -- can be applied to some of these litigation

management principles. For example, differentiated case management (DCM) might proceed according to a rigid up-front structure where cases are analyzed, categorized, and placed onto one of several tracks by non-judicial personnel who determine the level of judicial attention through a fairly mechanical process. Alternatively, in the absence of such a structure, new cases can be sent directly to a judicial officer for review and an initial, individualized determination of the appropriate level of judicial attention. The same analogy applies to discovery controls; a court might impose a series of across-the-board rules whose intent is to control discovery and minimize its abuse. Alternatively, the progress of each case might include an early discovery conference at which the judicial officer and counsel review the case and, again, establish an individualized schedule and appropriate constraints based on the case's individual characteristics. Nothing prohibits meshing these two approaches based on the level of demand on judicial time in a particular court. What is important is that measures to control cost and delay in civil litigation reflect a flexible approach that ensures the integrity of process, is geared toward existing court resources, and meets the needs of the litigants.

Professor Marcus then briefly discussed some of the new proposed amendments to the Federal Rules of Civil Procedure, noting that if they are approved by the appropriate rules advisory committees and the Judicial Conference, the earliest they could become effective is December 1993. One amendment calls for the informal exchange of discovery early in the progress of a case. Another amendment limits interrogatories to fewer than 20 questions with no subparts. Another requires the preparation and submission of written reports in civil cases detailing what expert testimony will be offered at trial. Yet another amendment requires preparation and submission of lists of witnesses, documents, and exhibits that will be called upon or entered into evidence. To the issue of enforcement of these provisions, the amendments provide for motions to compel, appropriate sanctions such as refusing the admission of testimony or evidence not previously listed, and outright refusal by the court to admit evidence not previously disclosed. Another amendment specifies that claims of privilege offered in response to discovery disputes must be justified and backed up with appropriate supporting documentation. Another proposes to make supplementation of discovery mandatory.

Professor Marcus also noted that under the 1991 Federal Court Study Committee Implementation Act, the minimum amount required for filing diversity jurisdiction cases in federal court will increase from $50,000 to $75,000 subject to future indexing, and that the jurisdictional amount claimed shall not include punitive damages, pain and suffering, or emotional distress.

Turning back to DCM, he noted that the District of Utah already has some mechanisms in place that route cases by type to differing processes and that those mechanisms might be construed as meeting the general requirements of the DCM principle.

The DCM models mentioned in the Brookings report and other documentation related to the legislation are based on practices in state courts in Minnesota and New Jersey that categorize cases into three broad areas -- expedited, normal, and complex -- and set them on appropriate tracks. There is less to this process, however, than the literature suggests. In New Jersey, for example, some 80% of the cases are classified as normal, thus are not affected by DCM.

An important question, in considering new procedures, rules, and mechanisms, is how they are to be evaluated, how their success is to be determined. It simply is not clear that traditional social science evaluative models that rely on the generation of valid empirical evidence are the best tools for such assessments. There may be instances in which the attempt to generate such evidence is harmful to the litigants, to counsel, or to the pursuit of justice. Is it appropriate, for example, to subject one group of cases to an ADR device but to bar, for control group purposes, use of such a device to clients in another group of cases? Notwithstanding the urge to produce valid evidence with which to justify adoption of particular rules or procedures, a court might have the obligation to avoid such evaluative efforts or, alternatively, to employ less scientifically valid evaluative tests.

Professor Williams noted that even if the committee's work does produce empirical data that a particular procedure or device will speed things up, faster is not necessarily better. He urged the committee members to consider the emotional cycle through which typical litigants pass, a cycle in which time frequently serves a healing function.

Chief Judge Jenkins thanked Professor Marcus for his useful remarks, then turned to Mr. Baucom and asked that he review with the committee the recommendations of the Process Subcommittee. Mr. Baucom began by noting that the subcommittee had received no comments, written or other, addressing its initial draft of recommendations. He then turned to the first recommendation regarding the voluntary exchange of documents. Professor Williams thought the language "strongly urge" might not be sufficient to prompt such exchanges and wondered if other terminology would be more appropriate. Chief Judge Jenkins noted that discovery materials have to be exchanged in the long run and that his practice was to advise counsel to "do it now." Professor Marcus reported that the Northern District of California requires counsel to meet together to discuss the exchange of discovery and to submit reports to the court on such voluntary discovery exchanges prior to the initial status and scheduling conference. Thereby the court knows what's going on and can make inquiry as to problems. Ms. Clawson agreed that such a written report would be useful, but asked that such requirements provide for subsequent disclosure of new information that becomes available only later in the history of the case; she cited personal injury and medical malpractice cases as examples. Mr. Baucom, noting that the intent of the legislation is to foster effective case management, indicated that these requirements, if properly phrased in a local rule amendment, would be useful. Chief Judge Jenkins agreed and instructed the

Process Subcomittee to embellish the first two recommendations under Discovery and Pretrial Procedure to include those recommendations, appropriate time limits, etc.

Professor Williams suggested that as an alternative to DCM, the Court consider DAM -- differentiated attorney management -- noting that generally two thirds of the attorney population comply voluntarily throughout the discovery process while the remaining third is recalcitrant and needs judicial prodding. Perhaps the Court might focus on individual attorney performance rather than implementing across-the-board changes to the rules. Chief Judge Jenkins responded that judges can -- and frequently do -- take a more aggressive role with less-compliant attorneys. The intent is to eliminate unnecessary discovery, and spending an extra 15 minutes at an initial conference, when a case is in its infancy, may save hours down the road.

Judge Christensen noted that in his settlement work for the Court, he increasingly is drawn toward an approach that combines mediation, a variation of the summary jury trial, and a dash of arbitration. In his experience, less than 10% of attorneys are obstructionist. His approach to stimulating settlements is to place the opposing parties in an informal setting, to provide an alternative dimension to the adversarial process. Each side then has the opportunity to plainly state its case, a process he has found works better than the formal discovery process. Occasionally he will indicate, after listening to both sides, where he stands on the issues under consideration. Where achieving settlement used to be his first priority, it now is his last. He feels it is more important to give the litigants a sense of (1) satisfaction through participation in this alternative form of dispute resolution, and (2) certainty that doing so does not interfere with the trial process should they return to it. Of the 130+ cases referred to him for settlement conferences to date, fewer than 30 have not settled and reverted back to the formal adversarial process. Based on this level of success, he favors experimentation with alternative dispute resolution techniques.

Mr. Cassity asked whether the numerical limitations on interrogatories and requests preclude later submissions. Chief Judge Jenkins noted that it depends. Certainly the numerical limits can function as leverage; judges can and should impose sanctions on attorneys who attempt to exploit provisions that permit exceptions. Ms. Clawson noted that requiring an early discovery meeting between counsel, a follow-up report, numerical limitations on discovery, and voluntary exchange would motivate counsel to frame discovery requests that are less ponderous and global. In response to Mr. Cassity, Professor Marcus noted that that the proposed amendments to the civil rules specify voluntary disclosure as a continuing, ongoing duty throughout the entire pretrial process; whenever counsel become aware of relevant new information, they are obligated to reveal it. The amendments also propose that a party's failure to disclose relevant information, in some instances, may be revealed to a jury. Ms. Clawson agreed with the continuing disclosure requirement, noting that the Process Subcommittee has been reluctant to propose hard and fast time limitations

because of variations not only among cases but among attorneys. Moreover, to the extent that the new proposed amendments specify a maximum of 15-18 interrogatories with no subparts, the Process Subcommittee may reduce its recommendation accordingly. Mr. Wilkins agreed, noting that the time is ripe for instituting some fairly radical measures regarding the discovery process. He expressed support for the maximums set forth in the proposed amendments and suggested that the Committee adopt them. Chief Judge Jenkins offered a market approach; attorneys who exceed the maximum should be charged and compelled to pay a fixed sum -- say $50 -- for each interrogatory that exceeds the limit. To the question of how many typically are posed, no one had specific information, although Chief Judge Jenkins noted that the number in large medical malpractice cases can exceed 2,000.

Dean Teitelbaum noted that his subcommittee may expand the scope of its inquiry to a fourth category of clients -- those who are not parties but somehow are related to the parties and are pulled into the process by being deposed. Is it possible to protect them by imposing limits on depositions?

Chief Judge Jenkins asked whether anyone was opposed to limiting the number of interrogatories. Mr. Roth expressed some concern that uncooperative attorneys may lead judges to schedule more appearances to compel compliance, thus increasing rather than diminishing the Court's burden. Professor Marcus suggested that the committee consider a more radical proposal -- the elimination of interrogatories altogether because other Process Subcommittee recommendations provide for the voluntary exchange of information. The committee briefly discussed the suggestion.

Chief Judge Jenkins asked for committee reactions to the proposal to limit the number of hours for taking depositions. Mr. Roth suggested that the DCM approach might work here: impose a general rule that applies to normal cases but include an exception for complex and protracted cases. Professor Marcus asked who will be responsible for tracking time? The attorneys taking the deposition? Ms. Clawson noted it was a difficult question, that the subcommittee had discussed defining the limit in terms of a day but encountered difficulty in specifying what constitutes a "day". Reporter Zimmer noted that the District of Colorado was taking an alternative approach to deposition control by proposing to limit the number of depositions that each side in a dispute is entitled to take. Mr. Cassity urged that in making its discovery control recommendations, the Committee should err on the side of low numbers if those recommendations are to include escape hatches. Moreover, those hatches should be strictly defined.

At the request of Chief Judge Jenkins, Ms. Clawson reviewed the Process Subcommmittee's motion practice recommendations. Chief Judge Jenkins asked whether the Committee was in favor of the Court instituting regularly scheduled motion days.

Preference was expressed for leaving things as they currently are. Mr. Roth and Ms. Milne expressed some concerns about the proposed five-page summary of overlength summary judgment memoranda, noting that it may generate additional costs that would be passed on to the client, thus frustrating the overall goal of the Civil Justice Reform Act. Professor Marcus suggested in reference to the referral of dispositive motions to a magistrate judge, the Court might wish to follow the practice in some other federal trial courts where magistrate judges are utilized for comprehensive civil case management. Doing so would limit the extent to which individual cases are fractured between district and magistrate judges.

Chief Judge Jenkins asked Dean Teitlebaum and Professor Williams to report on the progress of their respective subcommittees. Dean Teitlebaum noted that his subcommittee has developed questionnaires for attorneys and clients to obtain the kinds of information it needs with regard to forum preference, costs, etc. It will be administered telephonically. He expects the survey to be completed in early September and will be prepared to report on it, at least preliminarily, at the next meeting. Professor Williams reported that the ADR Subcommittee has amassed substantial literature and now seeks authorization for assistance in collating it and developing a proposed ADR program. He, too, indicated that he would be prepared to report on his subcommittee's progress at the next meeting.

The next meeting was scheduled for Thursday, September 12, 1991 at 3:00 p.m. in Room 158 of the Frank E. Moss United States Courthouse.

RECOMMENDATIONS OF THE PROCESS SUBCOMMITTEE FOR CONSIDERATION BY THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE

A. INTRODUCTION:

Since the initial April 4 meeting of the full Committee, the Process Subcommittee has met three times to discuss ideas and formulate preliminary recommendations. Those recommendations and the assumptions on which they are based are set forth below.

B. ASSUMPTIONS:

In commencing its work, the Process Subcommittee viewed as its primary function the task of assessing the process of civil litigation and how modifications to the manner in which civil process is conducted in the District of Utah might serve the general objectives of reducing unnecessary cost and delay in such litigation. The framework for proposing modifications is defined in the Civil Justice Reform Act, in particular the six principles of litigation management:

1. Experimenting with systematic differential treatment of cases;

2. Exercising early and ongoing judicial control of the pretrial process;

3. Using discovery and other case management conferences to carefully monitor and control large and complex cases;

4. Encouraging the voluntary and cooperative exchange of discovery materials and information among counsel and litigants;

5. Requiring a showing of evidence of good-faith efforts to reach agreement with opposing counsel prior to considering motions compelling discovery; and

6. Experimenting with the referral of appropriate cases to alternative dispute resolution programs.

The Subcommittee determined that its recommendations should not rely solely on proposals for new rules or amendments to the existing rules that govern civil litigation. Unleashed rulemaking has the potential to diminish the legal profession and to detract judicial officers with bureaucratic minutia. Moreover, the Federal Rules of Civil Procedure and the new District Court Rules of Practice already provide a variety of judicial tools for minimizing unnecessary cost and delay. To that extent, the recommendations include, in addition to some modest proposals for amendments to the Rules of Practice, suggestions regarding internal operating procedures and, mindful of the distribution of tasks among the

three subcommittees, a proposal for use of an alternative dispute resolution technique that mimics in abbreviated fashion the civil trial process.

Finally, mindful that the "costs" of pursuing and dispensing justice cannot be quantified the way we quantify the "costs" of raising cattle or developing software, the Subcommittee has sought to formulate recommendations that balance cost- and delay-reduction measures against the less-quantifiable but more fundamental objectives of achieving justice, preserving rights, and giving litigants their day in court.

C. RECOMMENDATIONS:

The Subcommittee's recommendations fall into three categories: discovery and pretrial procedure; motion practice; and alternative dispute resolution.

1. Discovery and Pretrial Procedure:

The subcommittee recommends amending D.UT. 204 to include provisions that:

* Strongly urge counsel to exchange discovery documents on a voluntary and cooperative basis;

* Require counsel to bring to the initial scheduling conference a written description or designation of documents they are prepared to produce and the proposed time and method of production;

* Require counsel to identify and designate in writing prospective witnesses;

* Limit interrogatories to 25 and subparagraphs to four per interrogatory.[1] Absent a stipulation by all parties to additional interrogatories, in which case no court approval is required, there will be a presumption against approving requests for additional interrogatories unless accompanied by a showing of good cause and unusual circumstances that, in the court's judgment, justify making the exception; the court will endeavor to act on such requests within seven business days;

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[1] The subcommittee discussed the possibility of phasing discovery in lengthy and complex litigation such as class action cases. In such instances, under the direction of the trial judge, discovery would be phased and the limitations on interrogatories, requests for admissions and documents, etc., would be limited by phase, e.g. 25 interrogatories in phase 1, 25 in phase 2, and so forth. The subcommittee makes no recommendation on the phasing of discovery at this time but reserves the right to explore the topic in more depth in future meetings.

* Limit requests for admissions and for documents to 25. Same provisions regarding stipulations and requests for extensions apply as with interrogatories; and

* Specify that the maximum length of time for the taking of any deposition shall not a exceed a total of eight hours of interrogation.

2. **Motion Practice:**

a. Referral of Dispositive Motions to Magistrates:

The prevailing wisdom in case-management literature urges federal trial judges to delegate pretrial motion disposition in all but the most complex civil cases to magistrate judges. The subcommittee recognizes that mounting criminal case filings increasingly compel district judges to delegate civil matters to magistrate judges, but it takes mild exception to the referral of substantive dispositive motions because doing so may increase rather than diminish cost and delay in civil litigation. Where, for example, such motions are ruled on by the magistrate and a party wishes to appeal the ruling to an Article III judge, counsel for that party typically ends up (1) rebriefing the matter in its entirety for the appeal, and (2) waiting a second time for a response to the motion. Where two or three separate motions go through this appeal, rebriefing, and waiting process, the costs to the party and the delay in resolving the case are significantly enhanced. The Subcommittee recommends that procedural safeguards be developed to ensure that increased reliance on magistrate judges does not confound efforts to reduce undue cost and delay in civil litigation.

b. Summary Judgment Memoranda:

The subcommittee recommends amending D.Ut. 202(b)(3) to include a provision that requests to exceed the specified page limitations for summary judgment motions be accompanied by a five-page summary of the motion. Doing so will serve two purposes: First, the additional requirement will serve as an incentive to keep such motions within the specified number of pages. Second, the summary will provide the trial judge with a succinct overview of the proposed motion, thus giving him a more informed basis on which to decide whether to grant the request.

c. **Time Frames for the Disposition of Motions:**

The subcommittee recommends suggesting to the court that it adopt a general internal policy of:

1. Scheduling hearings on motions within two weeks of the completion of briefing;

2. Ruling on dispositive motions prior to the pretrial conference; when dates for such conferences are scheduled at the initial scheduling conference, counsel should be given dates for the submission of such motions sufficiently in advance to ensure time for review, hearing, and disposition prior to the pretrial conference;

3. **Alternative Dispute Resolution:**

A majority[2] of the subcommittee recommends that the court implement use of the summary jury trial (SJT) device under the following guidelines:

a. **Judicial Discretion:**

Determining when to use the SJT is left to the discretion of the trial judge to whom the case is assigned.

b. **General Requirement:**

Subject to the discretion of the assigned trial judge, any case headed for a jury trial of more than five days shall be a candidate for SJT.

c. **Role of Magistrate Judge:**

Subject to the discretion of the assigned trial judge, SJTs routinely will be conducted by magistrate judges.

d. **Duration:**

Barring a good cause showing of exceptional complexity, SJTs routinely

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[2] Mr. Benson dissented from the subcommittee's recommendation regarding the summary jury trial, indicating that at this time he was not persuaded that conducting such mini trials and producing non-binding verdicts was either an effective or an efficient use of a judicial officer's time. His initial reaction was that an Article III judge should not preside over such efforts and that jurors should be informed before rather than after the fact that their verdict would be non-binding. He did note that he would give the matter more thought.

will start and conclude on the same day.

e. **Verdict:**

Verdicts in SJTs shall be non-binding unless all counsel and parties stipulate prior to the SJT their agreement to a binding and non-appealable verdict.