M-505

September 12, 1991

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

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

SUBJECT: **Report of results to date**

The ADR Subcommittee was assigned to explore the pros and cons of various methods of alternative dispute resolution (ADR) and make recommendations about offering one or more Court-sponsored dispute resolution processes for use in appropriate cases.

The most daunting aspect of our task is getting access to, and finding time to adequately digest, the large amounts of information that ought to be taken into account, ranging from local questions about "the particular circumstances of the district that affect cost and delay"[1] to the almost overwhelming amounts of experience and written information that have been accumulating over the past ten years on the national scale with respect to ADR and the courts.[2]

We have a great deal of work to do before our final recommendations will be ready for the Committee to consider. Our hope in the meantime is to keep the Committee and the Court informed about our progress and to invite your continuing guidance and feedback.

A listing of available ADR processes is given in Appendix I and definitions are given in Appendix II below. Based on our delibrations to date, **we are inclined to recommend only two or three basic processes for annexation by the Court: mediation,**

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[1] It not only makes good sense to learn the particulars; it is also mandated by the Section 472 (b) (2) of the Act.

[2] In addition to the periodical literature, recent published books, and the papers prepared for the recent national conference on ADR, several major organizations are assembling data and recommendations for the benefit of Civil Justice Reform Advisory Comittees. These organizations include the Judicial Conference, the Federal Judicial Center, the Administrative Office of the Courts, and the Center for Public Resources (CPR).

arbitration, and possibly summary jury trial. For the immediate future, all of our work will focus on these three methods.

I. The District of Utah's Docket. See further statistics and accompanying charts in Appendix III below.

1. Cases filed in the District of Utah

a. 1990: cases filed 1,478 (1,240 civil 84%, 238 criminal 16%)

b. 1991: cases filed 1,383 (1,143 civil 83%, 235 criminal 17%)

2. Civil cases that have been pending for longer than three years (8 .3%).

3. Case by case breakdown (1991) (see figure 1b)

a. Social Security 14 (1.2%)
b. Recovery of Overpayments & Enfrcmt Judgemts 18 (1.6%)
c. Civil Prisoner Petitions & Complaints 161 (14.1%)
d. Forfeitures and Penalties & Tax Suits 121 (10.6%)
e. Real Property 54 (4.7%)
f. Labor Suits 44 (3.8%)
g. Contracts 230 (20.1%)
h. Torts 145 (12.7%)
i. Copyright, patent, and Trademark 30 (2.6%)
j. Civil Rights 126 (11%)
k. Antitrust 6 (0.5%)
l. All other Civil 194 (17%)

II. Can we identify problem cases or categories in terms of costs or delay?

1. Cases that go to trial

2. Cases that settle

a. early

b. late (eve of trial)

3. Cases older than 3 years

4. Other

III. Can we identify problems cases or categories in terms of process or outcome?

1. Distributive vs. Integrative Solutions (concept of

joint gains, or dove-tailing interests)

2. Preserving long term relationships between parties

3. Streamlined and less costly discovery

IV. What are we seeking to accomplish? What are our objectives with respect to ADR?

LIST OF APPENDICES

Appendix I. Listing of ADR Processes

A. Overview of ADR Processes

1. The Basic Processes:

   a. Neutral Fact Finding

   b. Early Neutral Evaluation

   c. Settlement Conference

   d. Mediation

   e. Arbitration

2. Variations:

   a. mandatory vs. voluntary

   b. binding vs. non-binding

3. The Hybrids:

   a. Med-Arb. (mediation & arbitration)

   b. Summary Jury Trial (non-binding, abbreviated trial to jurors)

   c. Summary Court Trial (non-binding, abbreviated trial to judge)

   d. Mini-Trial (abbreviated presentation of evidence to 3rd party neutral & corporate executives, plus negotiation & mediation, plus advisory opinion if requested)

   e. Other

Appendix II. Glossary of ADR Terminology

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.[3]

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**).

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

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[3]. 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.

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.[4]

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.

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[4]. 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".

Appendix III.
Assessing the Court's Dockets

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

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

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

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

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

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

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

1. Measures for Determining the Condition of the Civil Docket

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

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

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

UTAH

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1990	1989	1988	1987	1986	1985		
OVERALL WORKLOAD STATISTICS	Filings*		1,478	1,552	1,474	1,519	1,615	2,814		
	Terminations		1,404	1,515	1,959	1,683	1,752	1,778		
	Pending		1,923	1,852	1,815	2,300	2,463	2,600		
	Percent Change In Total Filings Current Year	Over Last Year. . .		-4.8					43	3
		Over Earlier Years. . .			.3	-2.7	-8.5	-47.5	93	8
	Number of Judgeships		4	4	4	4	4	4		
	Vacant Judgeship Months		.0	.0	.0	.0	4.0	16.1		
ACTIONS PER JUDGESHIP	FILINGS	Total	370	388	369	380	404	704	72	7
		Civil	310	336	316	342	364	662	71	7
		Criminal Felony	60	52	53	38	40	42	41	4
	Pending Cases		481	463	454	575	616	650	37	3
	Weighted Filings**		405	426	411	421	385	539	50	6
	Terminations		351	379	490	421	438	445	76	7
	Trials Completed		30	25	26	22	19	24	64	8
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	5.3	4.8	4.6	4.5	4.4	3.4	42	6
		Civil	11	11	23	16	10	10	57	6
	From Issue to Trial (Civil Only)		14	19	17	16	19	17	36	5
OTHER	Number (and %) of Civil Cases Over 3 Years Old		218 12.3	176 10.2	132 7.9	170 7.7	169 7.1	108 4.3	72	8
	Triable Defendants** in Pending Criminal Cases Number (and %)		95 (48.2)	113 (68.9)	96 (50.8)	56 (47.1)	72 (57.1)	87 (75.0)		
	Jurors**	Avg. Present for Jury Selection	40.12	54.25	43.04	40.29	44.63	45.80	68	8
		Percent Not Selected or Challenged	24.9	41.6	34.4	21.7	39.7	39.0	31	5

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

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

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	1240	16	51	190	102	49	58	238	187	41	148	5	155
Criminal*	225	11	6	28	2	33	17	33	8	44	5	9	29

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

Key To Table At Left

Weighted filings

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

Civil median time

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

Triable felony defendants in pending criminal cases

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

Key to nature of suit and offense

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

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

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

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

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

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

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

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

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

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

Chart 1: Distribution of Case Filings, SY88-90

District of Utah

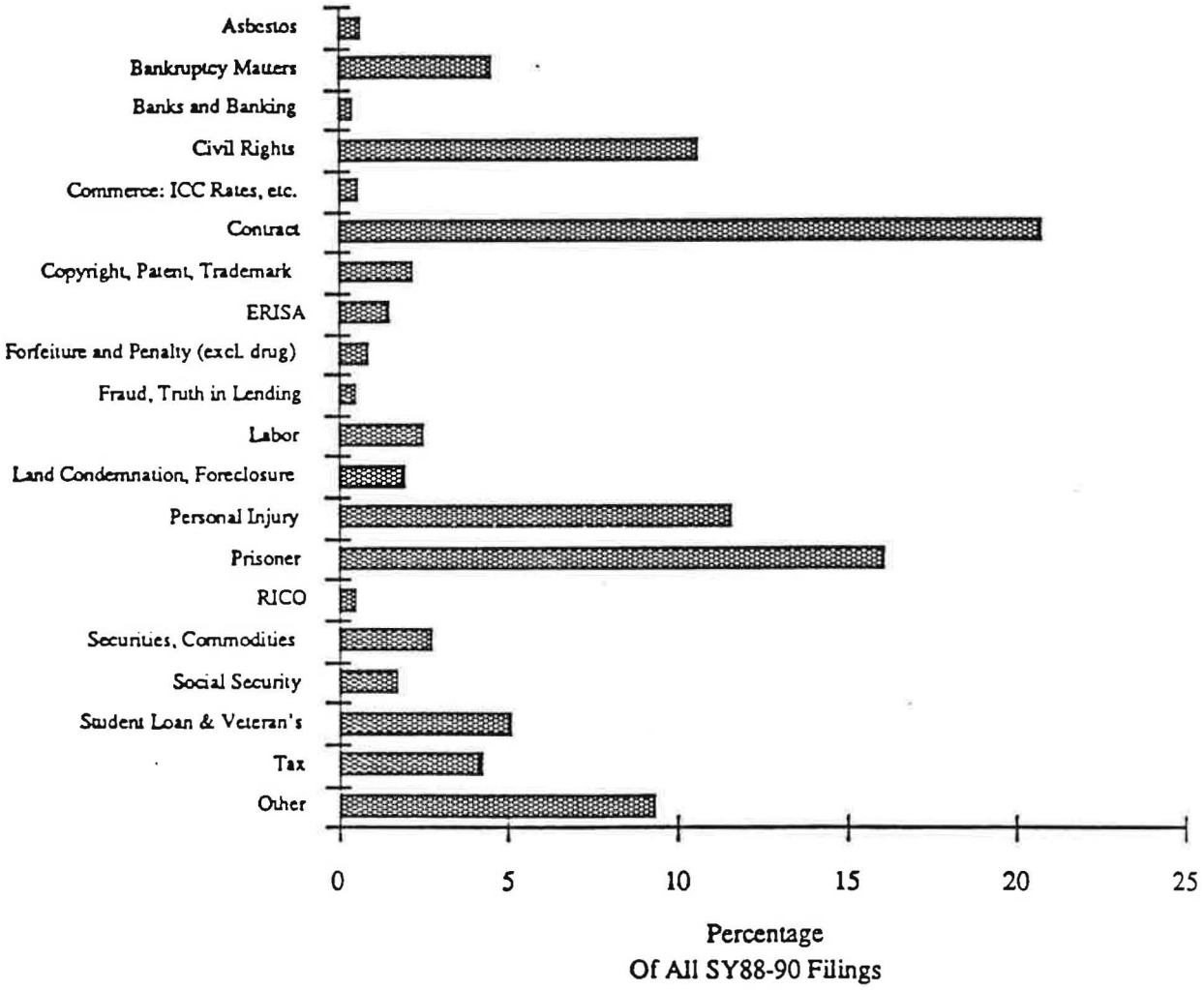


Chart 2 shows the trend of case filings over the past ten years for the Type I and Type II categories. Table 1 shows filing trends for the more detailed taxonomy of case types.

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

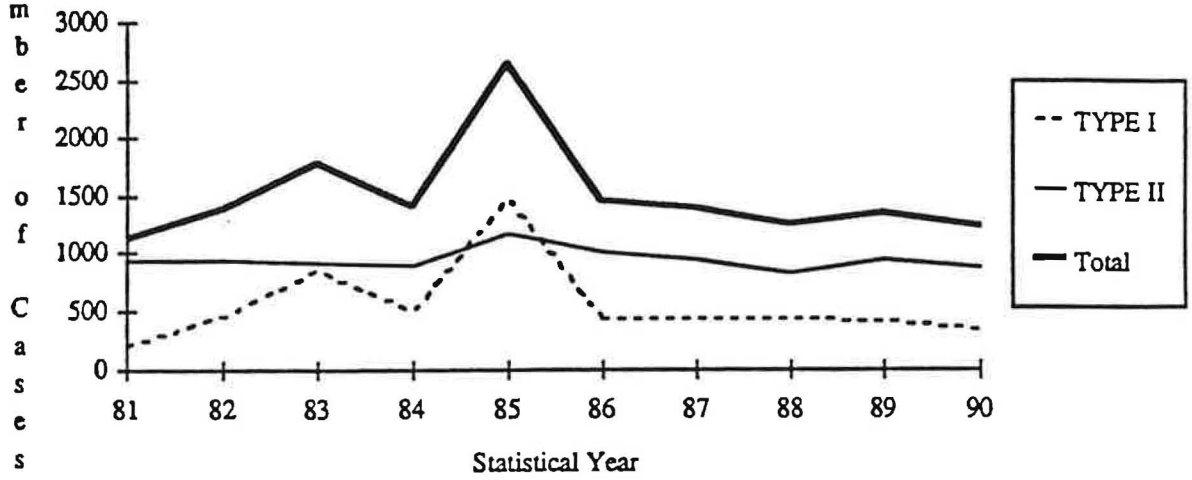


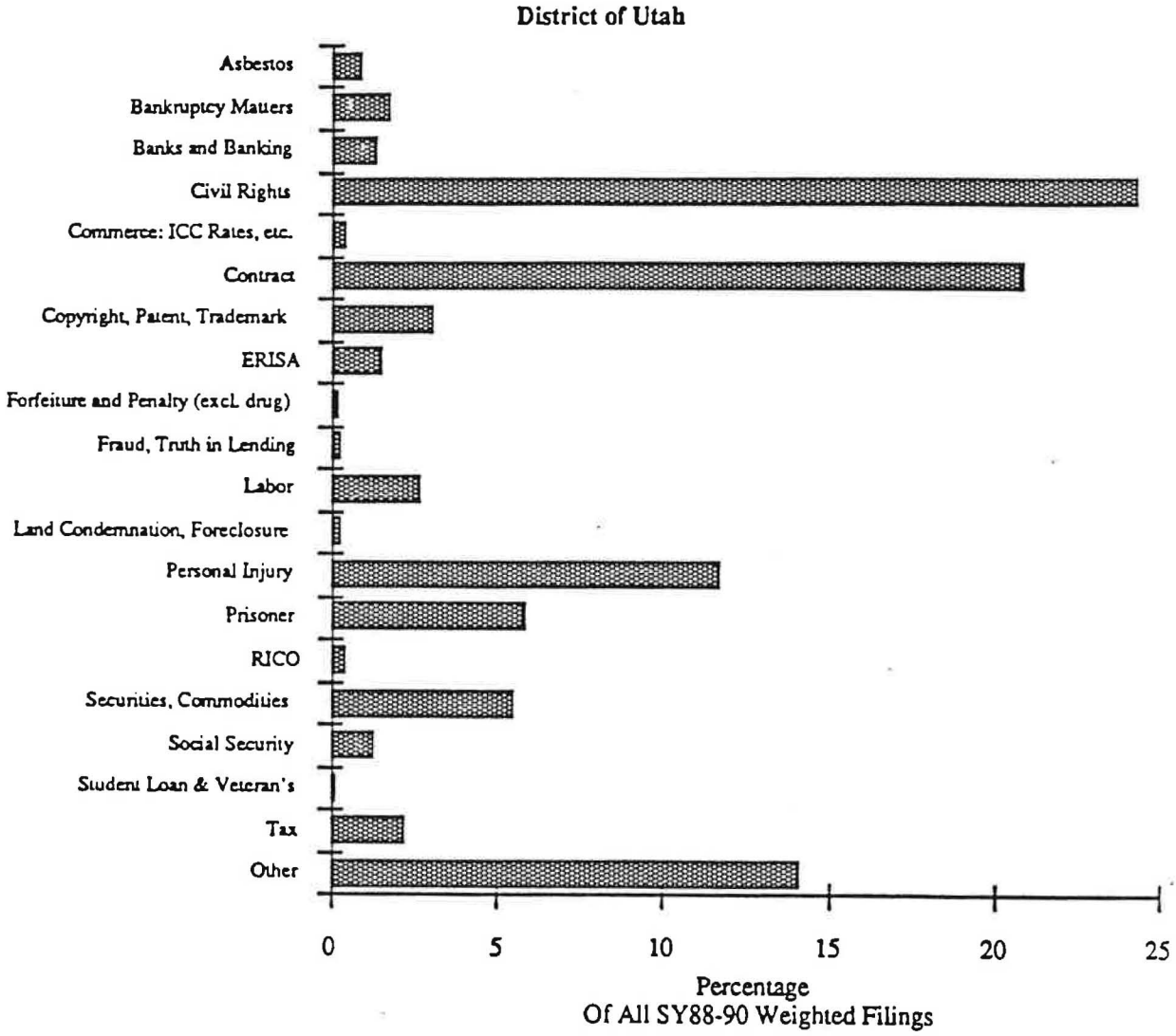
Table 1: Filings by Case Types, SY81-90

District of Utah

	81	82	83	84	85	86	87	88	89	90
Asbestos	1	0	0	2	0	0	0	0	14	15
Bankruptcy Matters	11	57	69	132	1154	104	87	65	57	53
Banks and Banking	1	5	2	1	0	7	3	5	5	10
Civil Rights	83	87	107	118	131	111	149	136	128	148
Commerce: ICC Rates, etc.	4	3	3	3	6	7	6	9	7	10
Contract	212	251	270	281	320	292	307	280	283	234
Copyright, Patent, Trademark	11	27	42	52	33	26	27	15	30	41
ERISA	3	0	9	19	18	11	18	13	22	25
Forfeiture and Penalty (excl. drug)	15	3	11	8	10	3	14	14	9	15
Fraud, Truth in Lending	7	14	8	5	10	12	11	6	7	10
Labor	49	29	30	28	30	32	30	35	32	33
Land Condemnation, Foreclosure	16	125	58	15	8	32	45	36	20	23
Personal Injury	134	153	154	152	154	135	149	135	157	154
Prisoner	137	64	101	52	63	101	176	213	229	177
RICO	0	0	0	0	0	2	3	4	6	11
Securities, Commodities	28	84	87	74	59	50	60	40	41	26
Social Security	19	35	57	43	27	9	16	36	16	16
Student Loan and Veteran's	8	173	552	251	215	194	112	74	75	49
Tax	93	96	79	62	77	49	36	27	51	86
All Other	299	179	122	100	317	262	120	106	150	104
All Civil Cases	1131	1385	1761	1398	2632	1439	1369	1249	1339	1240

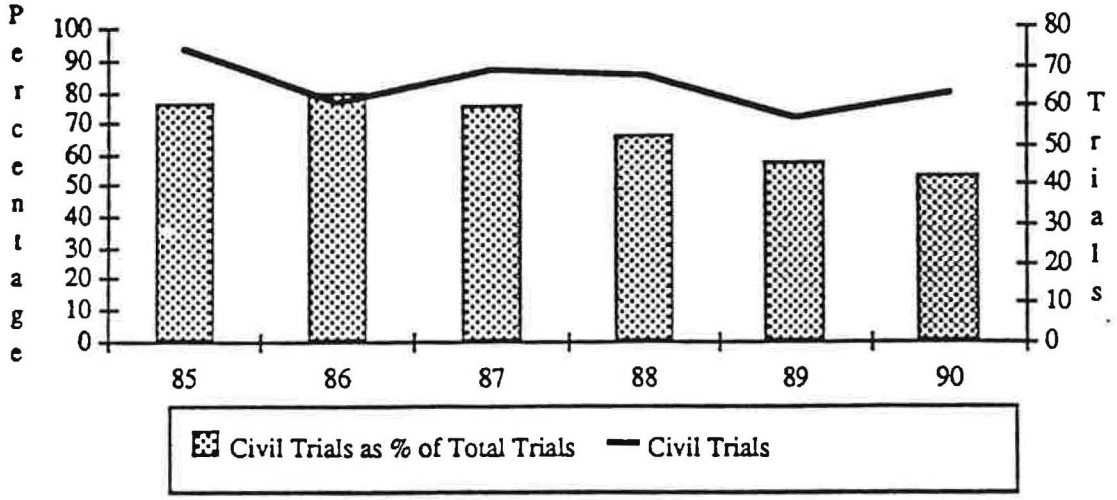
c. Burden. While total number of cases filed is an important figure, it does not provide much information about the work the cases will impose on the court. For this reason, the Judicial Conference uses a system of case weights based on measurements of judge time devoted to different types of cases.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

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



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

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



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

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

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

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

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

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

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

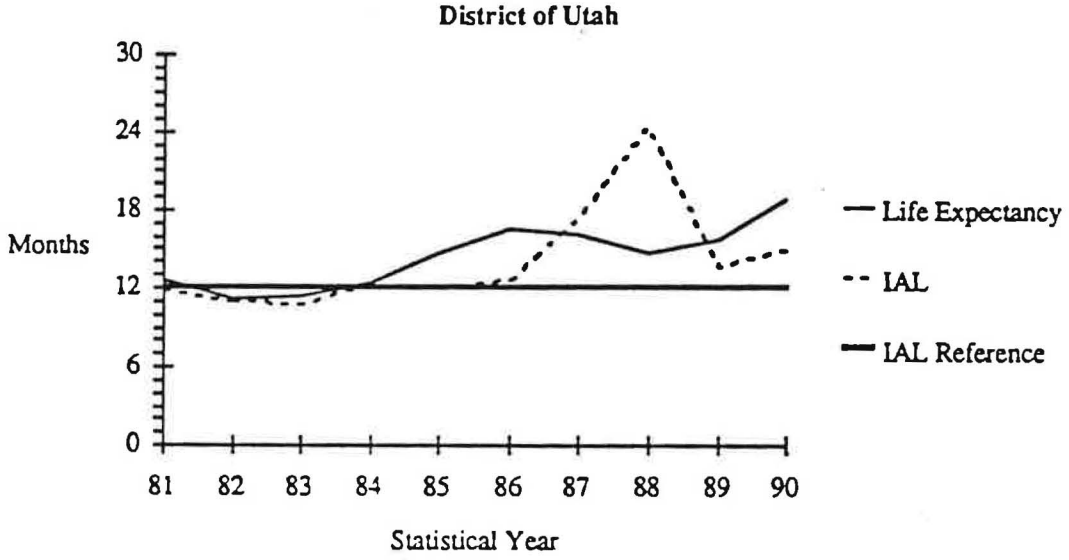
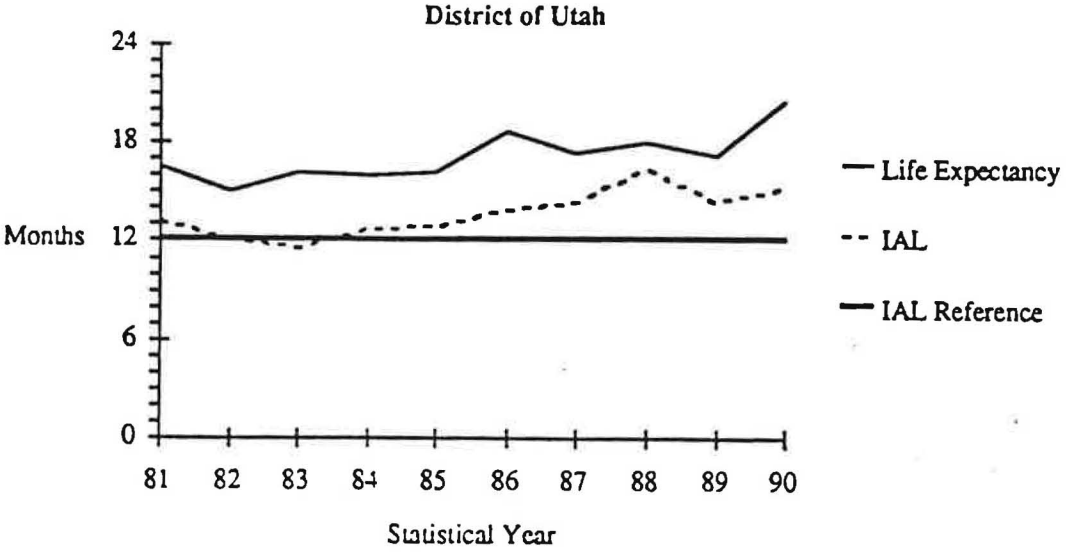


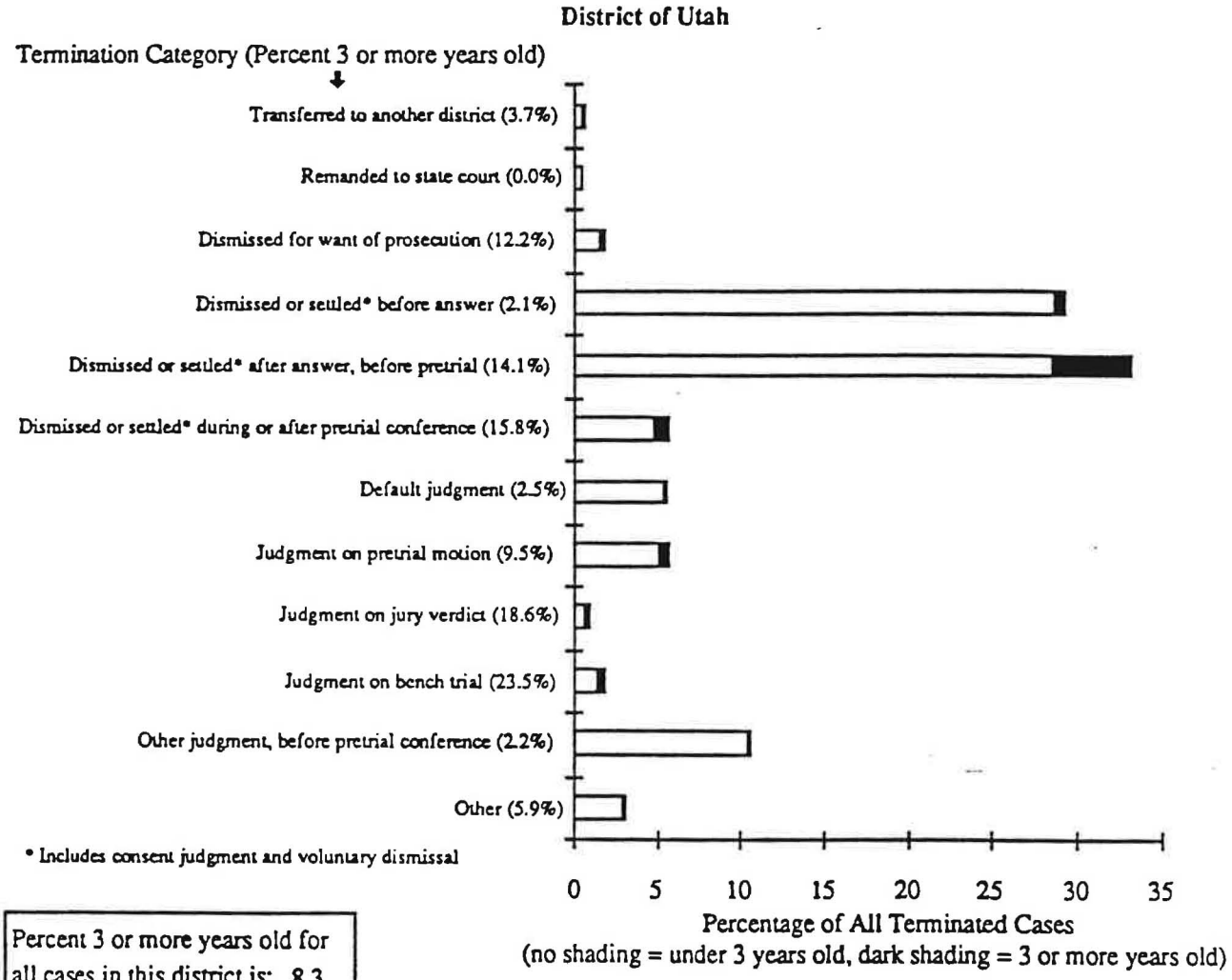
Chart 6: Life Expectancy and Indexed Average Lifespan, Type II Civil Cases SY81-90



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

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

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

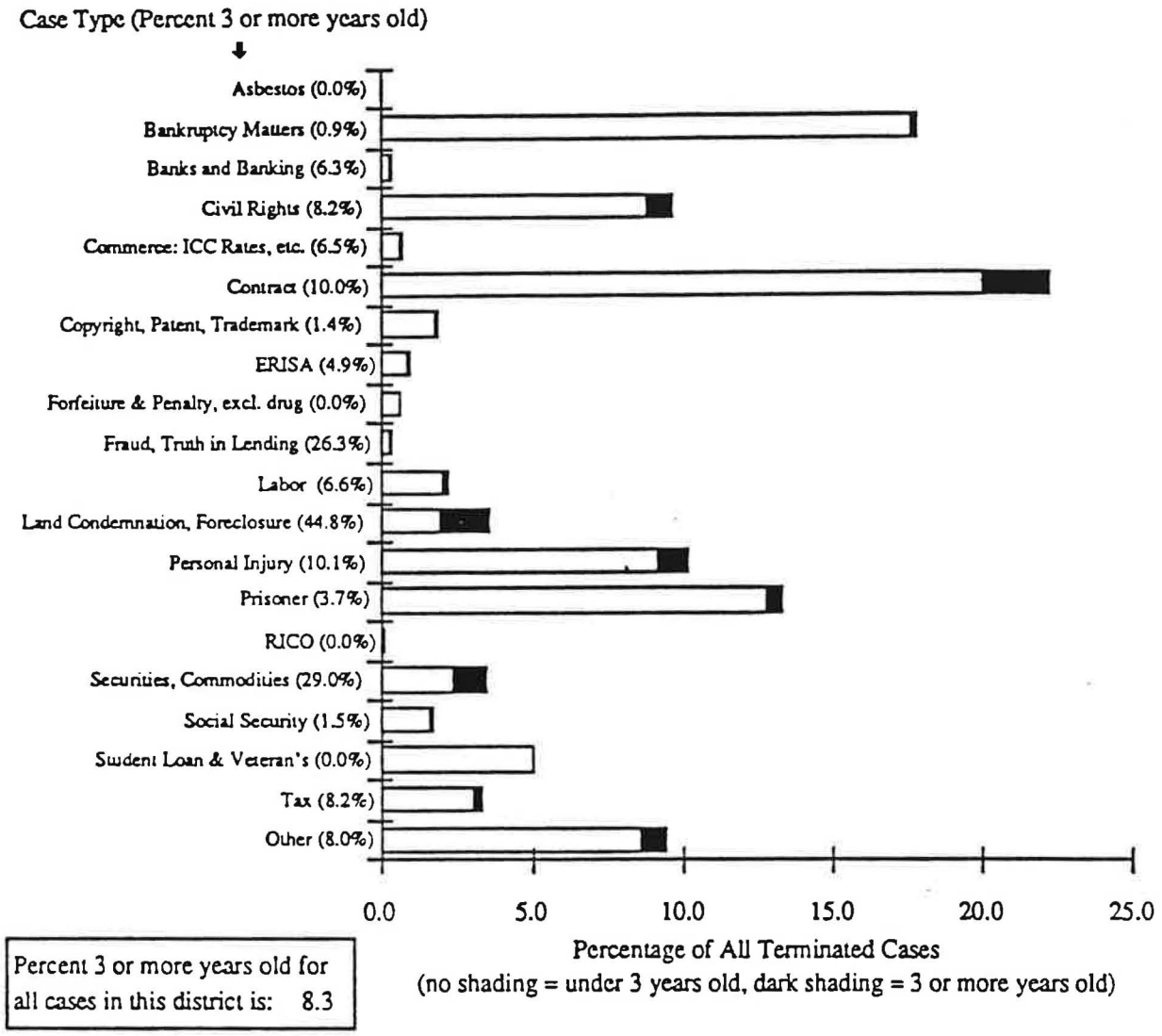


Percent 3 or more years old for all cases in this district is: 8.3

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

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

District of Utah



Percent 3 or more years old for all cases in this district is: 8.3

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

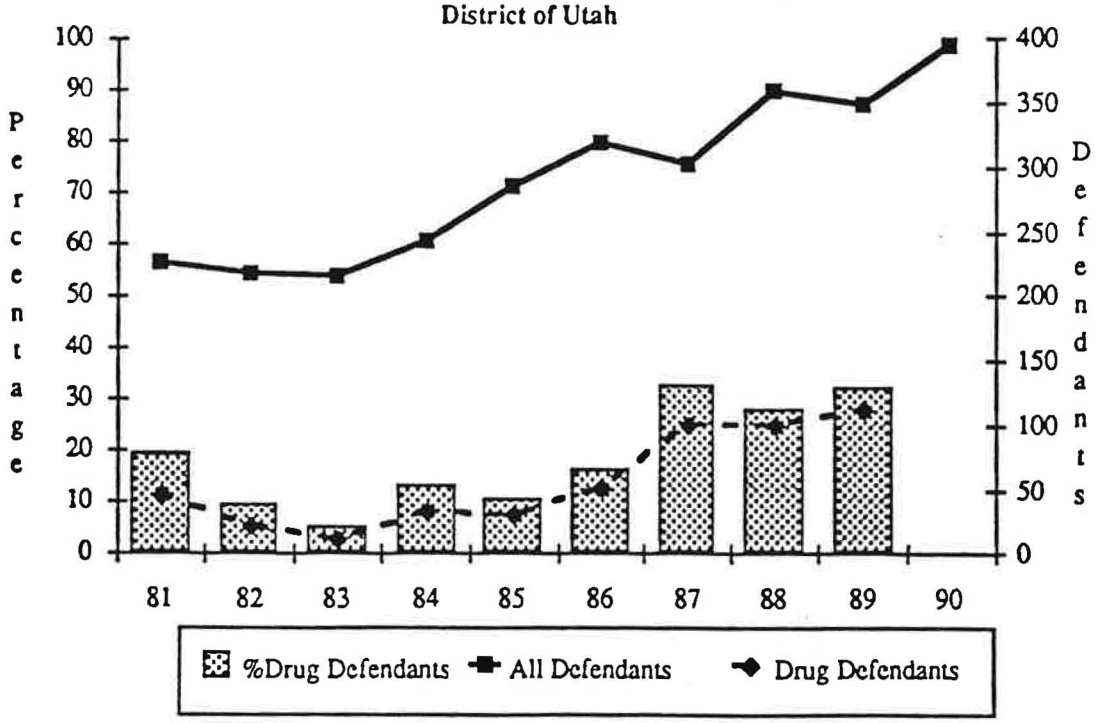
there are senior judges contributing to the work of the district. Because of the varying contributions of senior judges, however, there is no standard by which to take account of their effect on the workload of the active judges.

2. The Criminal Docket

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

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

Chart 9: Criminal Defendant Filings SY81-90, With Number and Percentage Accounted for by Drug Defendants, SY81-89
(Drug filings data not available for SY90)
District of Utah



Appendix IV.
Institutionalizing ADR Programs in Courts
A List of Issues to Consider

Wayne D. Brazil Institutionalizing Court ADR Programs prepared for the National Conference on Emerging ADR Issues in State and Federal Courts (April 19, 1991). Draft. Not for publication or attribution.

INSTITUTIONALIZING ADR PROGRAMS IN COURTS

A LIST OF ISSUES TO CONSIDER

1. Is there a source of authority under which we may establish an ADR program?

   Legislative? Boundaries?

   Judicial Conference of the United States?

   State wide or regional judicial council?

   Inherent judicial authority?

   Does the answer to the authority question depend on the kind of program contemplated? e.g., whether participation in it would be voluntary or mandatory, or whether it is offered for free or a fee is charged?

2. Is approval of higher courts or judicial bodies necessary?

   At what stages?

3. Who should decide:

   whether to establish any ADR programs?

   what the goals of any such programs should be?

   what the programs should consist of (what kinds of cases they should reach, size of anticipated caseload, what process should be used, when, how the program should be administered, etc.)

4. What should the goals of the ADR program be? Which goals should be given priority if pursuing some threatens to compromise others?

In identifying and prioritizing goals, should the primary focus be on potential benefits to the courts or to users of the court system?

Court-oriented goals might include:

Reduce backlogs?

Reduce costs to courts of case-processing?

Reduce length of time cases remain pending?

Reduce amount of judicial attention cases require before disposition?

Shift nature of judicial work (e.g., toward more pretrial and settlement, away from dominance by trial work?)

User-oriented goals might include:

Reducing the expense of resolving disputes?

Accelerating the pace of the process?

Shortening the time to disposition?

Improving the reliability of the information on which decisions are based.

Improving the quality (rationality) of the thinking that informs each side's decisions about how to proceed and on what terms to resolve the matter?

Reducing party alienation from the process by, e.g., increasing their understanding of procedural and substantive matters, reducing formalities and procedural rigidities, increasing the level of participation by the parties, and/or giving the parties more power (informal and/or formal) than they are likely to have in formal adjudication?

Improving communication between parties and their own counsel?

Improving communication across party lines?

Improving communication between parties/counsel and the court?

Reducing distrust between the parties?

Helping forge better relations between the parties?

Enhancing the parties' ability to protect their privacy interests?

Creating opportunities for wider ranges of solution options, or injecting more creativity into the design of possible solutions?

Providing a lower-cost, semi-formal, quasi-adjudicatory alternative to full blown trial (attempting to offer parties satisfactions akin to those delivered by "a day in court.")?

5. Who should participate in the research and design stages?

who should be consulted? where should we look for expertise?

6. How can the different courts in our region (state and federal, multiple counties, etc.) coordinate their ADR research and implementation work?

7. What role should be played in both the conceptual stages and in administering and staffing the program by:

bar associations

ADR experts

private providers of ADR services

individuals

organizations

not for profit

for profit

law school faculty and students

client groups (e.g., association of corporate counsel; consumers union).

institutional litigants

public interest bar

non-lawyer community groups (e.g., chamber of commerce).

representatives of other branches of government (legislative and executive)

In addressing this issue, keep in mind the importance of building policy support for the program from the outset, reducing ignorance-based resistance to new programs, and possible needs for funding.

8. What sources of funds might be available and appropriate?

public sources (legislative grants; discretionary money within judicial budgets, etc.)

user fees

private foundations

law firms

corporations

income from educational programs the court sponsors

income from filing or other fees paid into court by litigants/attorneys

9. How can interest/support be built in from the outset?

How should support of judges be pursued?

Should judges participate directly in program design?

How should support of bar and client groups be pursued?

How should support of other branches of government be pursued?

10. Should a court begin with a modest experiment, or has enough been learned in other places to justify launching a program with a broader reach?

If a court begins with an experiment, should there be a control group?

11. Should the court establish more than one ADR program, or make available more than one ADR process/tool?

If so, who should decide which cases go to which program?

the parties?

fear tactical decision-making (e.g., which process requires the party to divulge the least information or trial strategy, or which process is likeliest to offer the more powerful party advantages over the less powerful)?

the court?

an administrative organization outside the court?

12. Should the program be voluntary or mandatory?

If mandatory, by what mechanism should parties be permitted to petition to have their case removed? Who should make such decisions (administrator? assigned judge? centralized judicial officer?)

If voluntary, what steps should be taken to actively encourage use of the program?

13. Should it be free (to users) or should a fee be charged?

If a fee is charged, how should its size be fixed?

14. Should the court try to build in economic or other incentives or disincentives (for good faith participation)?

sanctions for failure to participate in good faith? meaning?

rewards for productive work in the process?

e.g., move up in line for trial date or judicially hosted settlement conference, or receive accelerated attention to a motion that might resolve or significantly reduce the case (the latter incentive might be offered to parties who use the ADR program to isolate a motion that they agree might well dispose of the case, either formally or because of its impact on settlement negotiations).

15. What criteria should be used to identify cases that are appropriate for the program? cases that are not appropriate?

The answer to this question will depend in part on what the goals of the program are, what kind of service it is designed to provide, and on what kinds of services are offered, or needs met, by other programs or procedures that are available in the court.

subject matter?

complexity? need for specially tailored case development planning/monitoring?

how difficult it is to find the center of the dispute from the pleadings or other formal papers?

number of parties?

form of action; e.g., exclude class actions?

nature of parties (e.g., parties in pro per, institutional litigants, repeat litigants, insurance carriers, etc.)

relationship between parties? (e.g., some need or incentive to preserve or build an on-going relationship).

amount in controversy?

nature of principal relief sought? (equitable, damages, declaratory?)

character of relationships between counsel (fractious? uncommunicative?)

age of case (old, immobile)?

level of interest in settlement?

parties or attorneys who appear to be unrealistic?

parties or attorneys who appear to lack confidence in their ability to reliably assess the merits/value of the case?

parties who appear to lack confidence in their own lawyers?

cases where fees and costs seem out of proportion to value?

parties with special concerns about privacy/confidentiality?

politically sensitive/high profile cases (should they be excluded?)?

cases that implicate important public policies (should they be excluded?)?

cases in esoteric subject matter where neutrals with expertise and without conflicts of interest might be especially hard to find?

nature of dispute: fact intensive or law intensive?

16. At what juncture should the cases be identified or designated for the program?

17. Who should do the designating?

Judges?

Court staff?

Counsel/parties self-select?

Combination?

18. At what juncture or junctures should the ADR event, process, or session take place?

early?

after core discovery?

after ruling on key motion?

after close of discovery?

right before or after some other specified event?

19. Should some follow-up event or procedure be built into the ADR program (e.g., to capitalize on momentum, progress, made at first event?)?

10. What should the content of the ADR program or procedure consist of?

early neutral evaluation?

arbitration?

mediation?

summary bench or jury trials?

settlement conferences/weeks?

mini-trials?

joint fact-finding?

special masters for case development planning?

hybrid or sequenced combinations?

other?

11. What rules should govern the program?

How formal/informal should it be?

Should the rules of evidence apply? loosely? not at all?

Should the event be "on the record"? or should parties be permitted to create a record of it? confidentiality?

If a record is made, what uses of it should be permitted later?

Should parties be required to submit briefs/written statements in advance?

If so, what should they be required to include in such papers?

Should parties be permitted/encouraged to present documentary evidence? oral testimony? narratives?

Should parties present percipient witnesses?

What role, if any, should experts play?

party's experts?

neutral experts?

panels of experts, variety of backgrounds?

22. To what extent, if any, should all or part of the ADR process in given cases be confidential?

Should parties have some power to affect the answer to this question on a case by case basis?

What, if anything, should the assigned judge or the court be told or able to learn about what happened at the ADR event?

23. Should clients be required/permitted to attend/participate?

What form should client participation take?

What mechanism should be established to permit clients to petition to be relieved of a duty to attend?

24. Should the lawyers ever be excluded? Should their roles be limited?

25. How should the rules that govern the program be articulated (standing orders, general orders, local rules, rules of court, etc.)?

26. How should the rules that govern the program be publicized?

27. Should the court administer the program directly or should the court delegate some or all of the responsibility for administering the program to outside organizations, e.g., bar associations?

28. Where should the ADR sessions/hearings be held?

in the courthouse?

at the private offices of the neutral?

at the offices of an outside organization administering the program?

at the site of the key events underlying the dispute?

29. Who should perform the services as the neutrals in the program?

private attorneys?

selection criteria, qualifications?

law professors?

non-lawyer dispute resolution specialists?

private providers of dispute resolution services?

retired judges?

magistrates or commissioners?

active judges? from which court?

30. How should prospective neutrals be recruited? by whom?

31. Who should determine which people are eligible to serve as neutrals, or which applicants/nominees should be included in the pool of neutrals?

32. What role(s) during the ADR process should the neutrals play?

simply facilitate communication?

identify underlying interests?

identify issues?

analytical?

evaluative (e.g., of evidence, arguments, settlement value)

find common ground/stipulations

proliferate solution options

case development planning (discovery, motions, informal exchanges of information)

classic mediation?

quasi-adjudicatory (non-binding)?

settlement negotiator/facilitator?

combination?

33. Is the neutral's capacity to perform one role/function likely to be seriously compromised by requiring him/her also to perform some additional function or play some additional role (e.g., can effectiveness in facilitating settlement be combined with quasi-adjudicatory power?)?

34. How many neutrals should serve in each ADR event? should parties have options (e.g., one neutral or three, supplemented by non-lawyer expert?)

35. Should neutrals have subject matter expertise?

36. Should neutrals have process expertise? special process training?

7. How should neutrals be assigned to cases?

random?

by court, based on subject matter expertise?

after inputs from parties?

selected from pools by parties (striking systems?)

combination?

38. How should the neutrals be trained?

What provisions should be made for periodic re-training and updating the neutrals re adjustments in programs, lessons learned/insights gained by others serving in the same role?

39. What powers should the neutrals be given?

subpoena witnesses/documents?

compel appearances by parties?

enter procedural orders?

adjust rules/procedures of the ADR event to fit the situation of the parties in particular cases?

impose or recommend sanctions?

report failures to comply with rules to the court, or to an administrating organization, or to bar authorities?

40. Should neutrals have any responsibilities if they perceive clear malpractice?

41. What, if anything, should a neutral do if he/she sees a potentially quite significant theory, claim, or source of evidence that no one has mentioned?

Must she disclose it?

May she disclose it?

To whom?

In presence of all parties/counsel?

What rules should determine whether the neutrals should be qualified because of conflicts of interest?

who should rule on such matters?

should responsibility for ruling on conflicts be centralized in one person/judicial officer?

. What systems should be established for detecting potential nflicts of interest (in the neutrals)? (or for clearing for sence of conflicts)?

. Should the neutrals be paid?

By whom?

Court?

Parties?

Legislative body?

Foundation?

Bar association?

How much?

On what basis?

hourly?

per case?

by result/productivity?

45. How can the work of the neutrals be monitored and their performance evaluated?

What means should be used to ascertain when neutrals fail to follow rules or when they act inappropriately?

Should a system be set up to discipline neutrals? or to remove them from pools/eligibility lists?

Should means be established to reward or recognize service by :rals? to create extra incentives to perform conscientiously 'or to express the appreciation of the court and the users?

Should the neutrals be appointed as special masters or erwise formally made agents of the court?

Should the neutrals enjoy any special protection from suit by :rs of the program?

quasi-judicial immunity? how conferred?

. What relationship should be established between the program and e pretrial procedures and rules the court/judge normally follows?

How can friction and delays be avoided?

How can litigants be prevented from inappropriately using the ADR process as an excuse for not timely complying with normal pretrial requirements?

Can duplication of effort be avoided? by parties? by the court?

0. Should some effort be made to capitalize in the formal aspects f the litigation process on what occurs in the ADR process?

Can this be done without compromising values the ADR program is designed to promote or promises that have been made to the participants (e.g., confidentiality)?

51. How should the program be introduced and explained to the public, the bar, client groups, etc.?

What plans should be made for **periodic** re-introductions, explanations, updates, promotions, etc.?

52. Should the court sponsor training for **users** of the program?

if so, what should that training consist of and who should do it?

w can we build in, from the outset, ways to collect the data 'ill be needed to:

ıonitor the program on an on-going basis

ɟauge how users are reacting to it

ѕystematically analyze it at various stages of its life

ho should monitor the program?

'ho should analyze its effects? its net utility?

the court?

outside professionals?

user groups?

funding sources/legislative bodies?

Who should pass judgment on the program? who should determine .her to modify, expand, or abandon it?

court?

higher judicial body?

legislative body?

funding source?

users?

How can protections against the possible negative)ects/effects of institutionalization be built in from the :set?

on courts: abdication of judicial functions? laziness? subtle shifts of energy/resources to other matters/tasks/cases?

on users?: retreat into passivity, especially with respect to early settlement efforts.

on programs/processes/neutrals: rigidity, aridity, waning energy/enthusiasm, loss of creativity and responsiveness to particular situations/needs/personalities.

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Appendix V.
Executive Summary, Court-Annexed Arbitration

Executive Summary

Background

Ten federal district courts have mandatory programs of court-annexed, non-binding arbitration that are funded by Congress. They are

Eastern Pennsylvania	Northern California
Middle Florida	Western Michigan
Western Missouri	New Jersey
Western Oklahoma	Eastern New York
Middle North Carolina	Western Texas

In 1988, Congress enacted legislation to authorize continuation of these mandatory pilot programs as well as to authorize additional pilot programs that would be voluntary. 28 U.S.C. §§ 651–658. The legislation directs that, not more than five years after enactment, the Federal Judicial Center shall submit to Congress a report on its implementation. This report is submitted pursuant to that requirement. It evaluates how well the mandatory programs have achieved their general purposes of reducing court burden and its associated costs and delays while maintaining or improving the quality of justice. More specifically, the report assesses how well the programs have met the following goals:

- increasing options for case resolution by providing litigants in cases that normally settle with an opportunity to accept a known adjudication by a neutral third party given at an earlier time than is possible for a trial;
- providing litigants with a fair process;
- reducing costs to clients;
- reducing the time from filing to disposition;
- lessening the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required.

Research design

At the request of the Administrative Office of the U S Courts, the Federal Judicial Center began an evaluation of the federal pilot programs in May 1985. The evaluation design, subsequently embodied as statutory requirements of the report to Congress, called for

- a description of the arbitration programs as conceived and as implemented in the judicial districts in which such programs are authorized;
- a determination of the level of satisfaction with the arbitration programs by a sampling of court personnel, attorneys, and litigants whose cases have been referred to arbitration;
- a summary of those program features that can be identified as being related to program acceptance both within and across judicial districts; and
- a description of the levels of satisfaction relative to the cost per hearing of each program.

The major research objective was to determine whether the litigants—particularly the parties—view arbitration as a form of second-class justice, an issue of concern to legislatures and courts contemplating adoption of such programs. The primary data for the evaluation were therefore the survey responses of 3,501 attorneys, 723 parties, and 62 judges indicating their perceptions of the arbitration process.

In addition to focusing on participant satisfaction, the study also examined how well the programs are addressing all of their goals. Therefore, the data we collected are organized by what they have to tell about each of the goals. It must be emphasized, however, that much of the information we present is attitudinal and therefore addresses only what those with experience with the programs believe to have been accomplished. Moreover, we do not address many other important, and still vague, questions about arbitration programs, including precisely how much time they may save litigants and the courts, or whether some other form of alternative or innovative case-management strategy might be an even better way to handle particular cases.

Program description

Program characteristics

The arbitration programs developed in the ten federal pilot district courts have a number of features in common.

- Particular types of cases, as specified by local rule, are mandatorily referred to the program to be heard either by a single arbitrator or by a panel of three arbitrators (lawyers who have volunteered to serve and are paid at levels specified by each district).
- Following a hearing at which each side presents its case, arbitrators issue a decision based on the merits of the case and, where appropriate, determine an award.
- Parties who are dissatisfied with the decision at arbitration then have a specified period of time to file a demand for trial de novo.
- If a demand is filed, the case goes back onto the regular docket for pretrial and trial before the judge assigned to the case.
- If a trial de novo is not demanded, the arbitration award becomes a non-appealable judgment of the court.

There are also important areas of variation that reflect each court's goals and resources as well as its local legal community.

Types and dollar amounts of cases defined as eligible for the program (see Tables 3A and 3B, pp. 32, 33)

Six of the pilot courts limit the types of cases eligible for the program, primarily to those involving contracts and torts. Four districts include all civil cases except agency appeals and prisoner petitions.

The dollar ceilings range from $50,000 to $150,000; six of the pilots have a $100,000 ceiling.

All limit eligibility to cases where the claim is either for money damages only or for money damages plus non-monetary claims determined by the court to be insubstantial.

Some exclude claims for punitive damages when assessing program eligibility for the program; others do not.

Timing of the hearing (see Table 3C, p. 34)

The pilot courts adopted periods ranging from 80 to 180 days between the time litigants are notified that a case has been referred to arbitration and the date of the hearing.

Degree of party input to selecting the arbitrator (see Table 3E, p. 36)

In four pilots, the clerk's office selects the arbitrator(s) and in four the parties may choose or strike names from a limited list of names selected by the clerk's office. In two of the pilots, the parties may choose from the full list of approved arbitrators.

Number of arbitrators (see Table 3F, p. 37)

Some pilots use a panel of three attorneys, some a single arbitrator; some specify a panel unless the parties request otherwise, and some specify a single arbitrator unless the parties request a panel.

Arbitrator fees and hearing cost (see Table 3G, p. 38)

Fees for individual arbitrators range from $75 to, at the time the study was done, a potential $500 per case, with approximate average per hearing costs from $125 to $300 depending on the number of arbitrators, their fees, and whether they are paid by day of hearing or per case.

Up-front posting of fees to accompany trial de novo demands (see Table 3I, p. 40)

Seven courts require any party who demands trial de novo to post the arbitrators' fee at the time of the demand. The fee is returned if the party betters its position at trial. In the other pilots, there is no consequence unless and until the party demanding trial de novo fails to better its position at trial.

Composition of arbitration caseloads

The most common types of cases included in arbitration programs are diversity contract and tort cases with prayers for relief under $50,000 that involve disputes over the facts and/or value of the case (see Tables 5–7, pp. 43–46).

The proportion of the civil caseload diverted to arbitration varies from 5% to 27% (see Table 4, p. 42). Program eligibility requirements have an effect on, but do not by themselves determine, the proportion of the civil caseload diverted to arbitration (see Table 4) and the composition of the arbitration caseload (see Table 5).

Disposition of arbitration caseloads (see Table 9, p. 49)

The majority of cases close before reaching an arbitration hearing, and over two-thirds do not return to the court's regular trial calendar.

The trial rate of the arbitration caseloads is similar across the districts, ranging from less than 1% in Eastern New York to 4% in Middle North Carolina.

De novo demand rates as a proportion of the arbitration caseload range from a low of 7% in Northern California and Eastern New York to a high of 32% in Western Michigan, nine percentage points higher than in any other district.

The low de novo rates result primarily from the low proportion of the arbitration caseload that reaches hearing rather than from frequent acceptance of an arbitration award. In eight of the ten pilot courts, over half of the arbitrations result in a demand for trial de novo. The lowest de novo demand rate (as a proportion of hearings held) was 46% in Eastern New York. Few of these cases reach trial, however.

Goal achievement

Providing increased options for litigants

There are parties who seek arbitration adjudications in cases that would otherwise have settled without any response from a neutrally positioned official. Arbitration programs can provide for these adjudications at an earlier time than is possible for trial adjudication.

Depending on the district, cases that are resolved by arbitration close from two to eighteen months sooner than cases resolved by trial (see Table 13B, p. 60).

Although the majority of parties in all districts exercise their option to settle before the hearing, parties also let their cases reach arbitration adjudication far more often than they permit cases to reach trial adjudication (see Table 13A, p. 60).

The fact that less than half of the arbitration awards were accepted in eight of the ten pilot courts indicates that the hearing did not give many litigants all that they wanted. Nevertheless, even most litigants in de novo demand cases found the experience useful, with majorities indicating that the award was a useful starting point for settlement negotiations and disagreeing when asked if the hearing was a waste of time (see Table 14, p. 61).

Providing procedural fairness

Most parties and attorneys do not think that arbitration is a form of second-class justice.

Eighty-four percent of the attorneys in cases referred to arbitration said that they approved of both the concept of arbitration (see Table 21, p. 78) and the programs that were implemented in their districts (see Table 22, p. 80).

Eighty percent of the parties in cases referred to arbitration believed that the procedures used to handle their cases were fair (see Table 15, p. 64).

Eighty-one percent of the parties reported that the hearing was fair (see Table 16, p. 66). Ninety-two percent of the attorneys in arbitrated cases reported that the hearing was fair (see Table 17, p. 68).

The characteristics that define a fair hearing for parties are an opportunity to tell their side of the story and bring out all of the important facts to prepared arbitrators at a reasonable expenditure of time and money (see Table 16).

The characteristics that define a fair arbitration for attorneys are a hearing of appropriate formality at which there is enough time to present their case before impartial and prepared arbitrators, with the whole procedure resulting in time and cost savings for themselves and their clients (see Table 17).

Half of the parties (see Table 18, p. 70) and a plurality of attorneys (see Table 19, p. 71) in arbitrated cases selected arbitration as their preferred method of proceeding when asked whether, considering cost, time, and fairness, they would prefer that their case be decided by a judge, jury, or arbitration.

Cost savings

Arbitration programs can reduce the cost of litigation and provide for a hearing on the merits at a cost that parties see as reasonable.

Majorities of attorneys in all districts reported cost savings. Highest time and cost savings were reported by lawyers in successfully arbitrated cases. Involvement in cases with no dispute over applicable law also increased the chances that attorneys would report savings (see Tables 23–25, pp. 86–88).

Cost and time savings were not reported by the majority of attorneys in cases where trial de novo was demanded (see Tables 23–25). The majority of the parties in these cases, however, report that the time and money costs were reasonable (see Tables 26 and 27, pp. 90, 92).

Reducing time to disposition

Arbitration programs can, but do not always, reduce disposition times. However, the programs do not appear to delay resolution of de novo demand cases, and parties report reasonable case-processing times.

The evidence suggests that arbitration programs in Middle Florida, Western Michigan, and Western Missouri have reduced disposition time (see Graphs 3–5, pp. 98–99), but such evidence was not present in the other new pilot courts (see Graph 1, p. 96, and Graphs 6–9, pp. 100–01).

There is only lukewarm attorney support for the suggestion that arbitration expedites settlement discussions and settlements before the hearing. A majority of attorneys in arbitrated cases that closed before the hearing agreed that referring the case to the program resulted in earlier settlement discussions (see Table 29, p. 104), but a majority also reported that the case had not settled more quickly than expected at the outset (see Table 30, p. 105).

Seventy percent of the parties in arbitration cases reported that the time required to resolve the dispute was reasonable (see Table 32, p. 108).

Parties in cases closed either before or as a result of the arbitration hearing were the most likely to agree that the time to disposition was reasonable, but even in de novo demand cases a majority responded favorably (see Table 32).

Seventy percent of the attorneys in de novo demand cases did not think that the arbitration hearing delayed resolution (see Table 31, p. 107).

Reducing court burden

The large majority of judges in the pilot courts support their own program (see Table 33, p. 112) and agree with its particular features (see Table 34, p. 113); there is no widely held view about what characteristics constitute a good program.

Judges agree that other courts would do well to adopt arbitration programs (see Table 35, p. 114).

The strength of judges' positive attitudes toward their programs varies significantly with the strength of their agreement that arbitration reduces their caseload burden (see Tables 33 and 35). Ninety-seven percent of the judges agreed that burden was reduced, with 58% agreeing strongly (see Table 36, p. 115).

The factors that were significantly associated with judges' burden assessments were the proportion of the civil caseload that their district diverts to the arbitration program and the frequency with which arbitration cases require their attention before the hearing (see Table 36).

Neither the actual nor perceived rate of de novo demands in arbitration cases affected judges' burden reduction assessments, a finding attributed to the fact that less than a third of the arbitration caseload returns to the regular trial calendar in every pilot court.

The case least likely to return to the regular trial calendar is a U.S. plaintiff contract case in a program that provides for a longer answer-to-hearing period and a panel of arbitrators paid relatively lower fees (see Table 38, p. 126).

We do not know whether the pilot arbitration programs reduce the number of trials.

Lessons for program developers

Although all of the pilot programs can be considered successes, some took more time than others to generate support and some were more enthusiastically embraced than others. A key to successful program planning is a full working knowledge of the local legal culture into which the program will be introduced. What attorneys are used to will influence their perceptions. Program implementation may be eased by incorporating some features of successful state programs, while a lack of experience or a history of unsuccessful state programs must be recognized as obstacles to be overcome.

It is also necessary to plan how court-annexed arbitration programs will relate to other existing alternatives and to the broader case-management practices of the court. The arbitration program in Western Michigan, which had the least favorable—although still high—approval ratings among attorneys, seems to have suffered from unfavorable comparison with a preexisting mediation program that provides for attorneys' fees sanctions if a rejected award is not bettered at trial. Here, far from finding the program a barrier to trial, the comments offered by attorneys showed dissatisfaction with the lack of meaningful sanctions for rejecting the arbitration award. There were also complaints from attorneys and parties whose cases went through both arbitration and mediation procedures.

These experiences should not be taken to mean that multiple alternatives cannot work. Northern California and Western Oklahoma, the new pilot with the highest proportion of "strongly approve" program ratings from attorneys, have successfully integrated their arbitration programs with other forms of innovative dispute resolution by clearly designating the separate purposes of each. The key is selecting the right cases for the right forum and avoiding too many different attempts to resolve any particular case short of trial.

Effects of and recommendations regarding program characteristics

This research found no program characteristic that either guaranteed satisfaction, or resulted in overall dissatisfaction, with arbitration, so there is no empirical basis for requiring any particular way of structuring arbitration programs. There were, however, a number of program design or implementation features that had a relatively small, but significant, influence on particular program goals (see Tables 37 and 38, pp. 124, 126).

Program eligibility criteria

There was some evidence that tort and civil rights cases might benefit from arbitration in terms of increasing litigants' options. Since the current legislation exempts all civil rights cases from mandatory referral to arbitration, courts are advised to explore the option of arbitration with litigants in civil rights cases involving only money damages to see if they are interested in consenting to arbitration.

Arbitration programs that diverted less than 15% of the civil caseload to the program were less likely to result in a perceived reduction of court burden. Courts considering adoption of a court-annexed arbitration program should first do a thorough caseload analysis to determine which eligibility requirements will divert enough cases (at least 10%) to make the effort worthwhile, and at the same time limit the size of the program to available resources.

Timing of the hearing

Shorter answer-to-hearing time periods were significantly associated with lawyers' reports of quicker settlements before the hearing, but also with fewer attorneys' selecting arbitration as their preferred procedure and higher probabilities that the case would both reach hearing and result in a de novo demand.

The choice of an answer-to-hearing time should depend on the primary purpose the program is to serve. If the idea is to speed settlements in the bulk of the cases that close before the hearing, short periods may assist

in this goal. Longer periods are more consistent with the goal of reducing court burden.

Number of arbitrators

Programs that supply only one arbitrator may appear somewhat less satisfactory to the bar in general (as indicated by lower approval ratings among all attorneys), but they do not result in less satisfaction among those who avail themselves of the opportunity for a hearing, i.e., this feature had no effect on the ratings of those attorneys and parties who actually participated in an arbitration. In fact, Middle North Carolina—a one-arbitrator pilot—had the highest hearing fairness ratings among attorneys.

In programs that supply only one arbitrator, there is a higher likelihood that a case will be arbitrated and thereafter result in a de novo demand.

Courts designing arbitration programs are advised to balance the negative appearance factor associated with using only one arbitrator with the administrative and dollar costs associated with panels. They should also consider the mixed method used in five of the pilot courts, which allows for hearings by either one or three arbitrators depending on what the parties request. Mixed-model rules that specify one-arbitrator hearings unless parties request otherwise result in the large majority of hearings being conducted by one arbitrator. The reverse is true where the mixed-model rule specifies a panel unless parties request otherwise.

Arbitrator fees

There is no evidence that higher arbitrator fees enhance the quality of arbitration programs. Higher fees should not be expected to translate into either litigant satisfaction or lesser burden on the court. Higher fees

- were negatively associated with attorneys' approval of both the concept of arbitration and the particular program;
- led fewer attorneys in arbitrated cases to select arbitration as their preferred procedure; and
- did not discourage litigants from either proceeding to arbitration or demanding trials de novo.

Courts designing arbitration programs are advised to engage in realistic discussions with their local bars to determine what fees are necessary to attract attorneys to their program, and to explore alternative non-monetary incentives to serving as an arbitrator. As examples, two of the current pilot programs, Western Oklahoma and Western Texas, exempt arbitrators from certain Criminal Justice Act appointments.

Participation in arbitrator selection

While litigant input to the arbitrator selection process appears to enhance the appeal of arbitration hearings, and the parties do not seem to think that the extra time it requires of them is unreasonable, the process appears cumbersome to some attorneys, creates an administrative burden on the clerk's office, and neither increases nor decreases the probability of de novo demands. Therefore, while litigant input may be beneficial in terms of increasing options, it is not likely to reduce cost or court burden.

Mandatory vs. voluntary referral

All of the current pilot court-annexed arbitration programs mandate the referral of selected cases to arbitration, so this research does not directly address the relative merits and drawbacks of voluntary and mandatory referral. We do, however, have information that is relevant to the debate.

The current disincentives to pursue trial de novo are not seen as significant barriers to trial.

There is no evidence that litigants in cases mandatorily referred to arbitration see themselves as receiving second-class justice.

Voluntary alternative programs in other jurisdictions have been notably unsuccessful in attracting cases. Programs that do not attract cases are unlikely to have any overall effect on the cost of litigation or court burden.

Although there is a clear distinction between voluntary and mandatory programs in the authority of the court to require litigant participation, there are a number of approaches to voluntariness that may affect the level of participation (e.g., whether participants must "opt-in" or "opt-out" of the program). We recommend that districts entering the voluntary pilot programs adopt somewhat different patterns of "voluntariness" so that the programs can serve as laboratory models to assess program participation and litigant satisfaction.

Recommendation for legislation

Congress instructed the Federal Judicial Center to include in its report "Recommendations to the Congress on whether to terminate or continue Chapter 44, or, alternatively, to enact an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts."

H.R. 4807 § 901(b). In light of our generally favorable findings in regard to the mandatory programs, it is recommended that the Judicial Conference of the United States propose that

- Congress enact an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary in the discretion of the court; and
- the Federal Judicial Center continue to study and report on arbitration in courts using voluntary programs.

It is also recommended that the Judicial Conference monitor, through the Center's reports and otherwise, the continuing operation of arbitration in federal courts in order to formulate rules and policies to guide and support the program, and to develop more specific recommendations to Congress as to appropriate arbitration legislation.

Chapter 1
Background

Introduction and Recommendation

The federal district courts have been experimenting with mandatory, nonbinding court-annexed arbitration since 1977. In 1988, Congress enacted legislation to authorize continuation of these pilot mandatory programs as well as to authorize additional pilot programs that would be voluntary. 28 U.S.C. §§ 651–658. The legislation directs that, not more than five years after enactment, the Federal Judicial Center shall submit to Congress a report on its implementation. H.R. 4807 § 901(b).

In prescribing the features of this report, Congress incorporated the focus and design of the Center research project that was already under way, and added a requirement that the Center include "Recommendations to the Congress on whether to terminate or continue Chapter 44, or, alternatively, to enact an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts." This report and the recommendations it contains are submitted pursuant to that requirement.

While no courts have yet established and conducted arbitration programs under the voluntary feature prescribed by the legislation, it seems beyond question that the level of satisfaction and acceptance required to support continuance of a mandatory program would be at least as high as the level required to support a voluntary program. In light of the generally favorable findings detailed in this report on the mandatory programs, it is therefore recommended that the Judicial Conference of the United States propose that Congress enact an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary or a combination of both in the discretion of the court. It is further recommended that the Federal Judicial Center continue to study and report on arbitration in courts using voluntary programs. And it is recommended that the Judicial Conference monitor, through these reports and otherwise, the continuing operation of arbitration in federal courts in order to formulate rules and policies to guide and support the program, and to develop more specific recommendations to Congress as to appropriate arbitration legislation.

Status of court-annexed arbitration in the federal courts

The 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference) marked the beginning of the current interest in court-sponsored alternative dispute resolution programs to reduce cost and delay in civil litigation. Advocates believe that these programs can relieve the burden on congested court systems while improving the delivery of justice services to parties.[1]

A 1986 survey reported 458 alternative programs operating in the courts of twenty-two states and the District of Columbia.[2] Approximately 200 trial courts feature court-annexed arbitration, an alternative begun in the Pennsylvania state system in 1952.[3]

The federal courts began experimenting with mandatory court-annexed, non-binding arbitration in three districts in 1978 in response to encouragement from then Attorney General Griffin Bell. The programs in the Eastern District of Pennsylvania and the Northern District of California are still in place.[4]

A 1982 evaluation of the effect of arbitration in the first three pilot courts reported that court-annexed arbitration could reduce time from filing to disposition, that most attorneys who had experience with the program gave it favorable marks, and that this approach to dispute resolution warranted further experimentation.[5]

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1. Levin, *Court-Annexed Arbitration*, 16 J.L. Reform 537 (Spring 1983); McEwen & Maiman, *Mediation and Arbitration: Their Promise and Performance as Alternatives to Court*, in P. Dubois (ed.), The Analysis of Judicial Reform 72 (Lexington Books 1982).

2. Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, State Ct. J. 6–8 (Spring 1988). The article also points out some interesting patterns in how alternative dispute resolution programs spread, noting that the steady increase in numbers from the mid-1970s through 1983 has since slowed, and that alternative programs are operating in a very small minority of courts.

3. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 Judicature 271 (February–March 1986).

4. Eastern Pennsylvania began its program Feb. 1, 1978. The Northern California program began May 1, 1978. The third original federal pilot court was the District of Connecticut, which disbanded its program in 1982. It appears that that court preferred a pre-existing mediation program which involved essentially the same types of cases. The District of Connecticut remains very active in alternative dispute resolution, using special masters to facilitate settlement, binding and non-binding mediation and mini-trials, judicially supervised settlement conferences, and summary jury trials.

5. *See* E. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center rev. ed. 1983).

Given both continued interest and many unanswered questions, in 1985 the Administrative Office of the U.S. Courts obtained funding from Congress for pilot implementation of court-annexed arbitration programs in additional courts. From eighteen applicants, eight new pilot districts were selected: Middle Florida, Western Michigan, Western Missouri, New Jersey, Western Oklahoma, Eastern New York, Middle North Carolina, and Western Texas.[6]

As the new pilots were getting under way, Congress had before it a number of bills to authorize court-annexed arbitration in some or all of the federal district courts. It was not until November 1988, however, that authorizing legislation was enacted, as title IX of the Judicial Improvements and Access to Justice Act of 1988.[7] The bill, effective May 19, 1989, authorized programs of mandatory, non-binding arbitration in the ten courts already serving as pilots, and provided that ten additional courts could adopt programs of non-binding arbitration with the consent of the parties. The ten voluntary pilots have been selected, but funding is not yet available.[8] No new program is expected to commence operations until 1991.

This report evaluates the ten mandatory court-annexed arbitration programs. It is based on the programs as they were originally implemented rather than as they have been modified to conform to program requirements set forth in the 1988 Act.[9] As none of the voluntary pilots has begun operation, an examination of the effects of voluntary participation must be deferred.

6. The dates these districts began their programs are in Table 1 (see p. 22). Two other districts, the Northern District of Illinois and the Southern District of Texas, initially applied for funding but later withdrew their requests.

7. H.R. 4807, adding Chapter 44 to 28 U.S.C.

8. The courts are Western New York, Utah, Middle Georgia, Southern Indiana (bankruptcy court), Western Washington, Eastern Texas, Western Kentucky, Northern New York, and Western Pennsylvania. Of these, only Western Pennsylvania had previously applied for pilot status.

9. Appendix A summarizes the local rules for each district and shows later changes to each program's local rule.

Goals of court-annexed arbitration programs

The general goals of all alternative dispute resolution programs are to reduce court burden and its associated costs and delays while maintaining or improving the quality of justice by assuring that cases receive the attention that litigants expect and deserve from the court system.

Various types of programs lumped under the rubric of alternative dispute resolution have different ways of seeking to accomplish these goals. It is important to compare court-annexed arbitration with other types of programs to define the specific objectives against which the arbitration pilots should be evaluated.

There are two methods of resolving disputes: adjudication and negotiation.[10] The outcome of an adjudication is a decision based on the application of a rule of law. The outcome of negotiation is whatever the litigants are willing to accept.[11] "Alternative dispute resolution" does not refer to a new method of resolving disputes, but rather to the involvement of different people in the resolution process or the employment of different procedures or techniques to arrive at either an adjudicated or negotiated outcome.

Once a case is filed in court, the traditional adjudicative technique is trial by judge or jury.[12] The traditional negotiation technique is bilateral settlement discussion. Court-annexed arbitration and summary jury trials are the most common forms of alternative adjudicative techniques; court-sponsored settlement conferences and court-annexed mediation are examples of alternative negotiation techniques.[13]

In the absence of an alternative procedure, most civil cases are resolved by attorney-controlled settlement. Negotiation alternatives offer neutral assistance in facilitating earlier or better settlements, either through input as to the settlement value of a case or by direct assistance in the communication process among litigants. Adjudicative alternatives offer the opportunity for an advisory judgment on the merits in lieu of settlement, without the delay and cost associated with going to trial.[14]

These differences in approach imply somewhat different goals. Alternative negotiation strategies, particularly those that rely on shuttle diplomacy between parties, often have an explicit goal of providing better settlements that will increase both parties' satisfaction with the outcome of the case and preserve ongoing relationships.[15] A collateral consequence should be reduced demands for future judicial resources because of fewer post-settlement disputes among litigants. But under adjudicative alternatives such as arbitration, there is always a loser. There, litigant satisfaction with the process is more important than maximizing both parties' satisfaction with the outcome.

Despite clear differences in what adjudicative and negotiation approaches offer, they share a number of objectives. A court should experience reduced caseload burden from any program that diverts cases from the normal processing track. Both types of alternative aim to reduce costs and delay, and strategies for accomplishing these goals can be adopted by either type of program. For example, having a date by which attorneys must be familiar with their cases is popularly assumed to be a catalyst for meaningful settlement discussions. An alternative hearing date—be it for arbitration or mediation—set relatively early in the processing of a case should stimulate earlier settlements before the hearing. Furthermore, either type of hearing can be conducted under less formal procedures than are required by the Federal Rules of Evidence, thereby saving some of the time and cost that would be involved in trial.

Regardless of specific procedures, litigants who go through any alternative process, even if they reject the result, have gained information—be it a determination on the merits, an appraisal of settlement value, or a creative settlement package—that was not available under traditional procedures. This new information should enable litigants to better predict the outcome of their cases and ensure that both sides are operating on the same information. This, in turn, may narrow the issues in controversy and spur further negotiation, thereby leading to more settlements or to shorter, more focused trials.

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10. We are referring to disputes that the litigants pursue. Many cases are simply dismissed when plaintiffs fail to prosecute their claims, or end in judgment for the plaintiff when the defendant does not resist.

11. Throughout this paper, the term "party" is used to refer to a disputant excluding counsel, while "litigants" includes both parties and counsel.

12. There are many other forums for resolving disputes before filing suit, some of which have great impact on the court system because they provide remedies that must be exhausted prior to filing a case in court (e.g., arbitration under 9 U.S.C.; agency adjudications; grievance procedures). Although the use and expansion of these other forums are important topics, they are not a focus of this paper.

13. For a description of each of these programs as used in the federal courts, see D. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

14. For a discussion of the respective roles of mediators and arbitrators, see Cooley, *Arbitration vs. Mediation—Explaining the Differences,* 69 Judicature 263–69 (1986).

15. *See, e.g.,* J. H. Wilkinson (ed.), Donovan Leisure Newton & Irvine ADR Practice Book 18, 19–20 (1990).

The court-annexed arbitration programs in the federal courts are adjudicatory in outcome, are designed to intervene within the first six months of a dispute, and feature hearings with relaxed rules of evidence at the end of which an explicit award is announced.[16] Their specific goals are these:

1. To increase options for case resolution by providing litigants in cases that normally settle with an opportunity to accept a known adjudication by a neutral third party given at an earlier time than is possible for a trial.
2. To provide litigants with a fair process.
3. To reduce costs to clients.
4. To reduce the time from filing to disposition.
5. To lessen the burden on the court by reducing the number of cases that require judicial attention, or by reducing the amount of attention required.

Although all of the pilot courts embrace these goals to some extent, they differ in which goals receive primary emphasis. For some courts, particularly those with overcrowded criminal dockets, the emphasis is on reducing court burden, with the benefits to case participants seen as a hoped-for and desirable side-effect. In others, the emphasis is reversed. These general differences in emphasis are mirrored in the specific procedures adopted by each district, described in Chapter 3.

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16. Given these features, Judge Raymond J. Broderick, the spokesman for the program in the Eastern District of Pennsylvania, has suggested that the title "Speedy Civil Trials" better describes what the programs have to offer. Broderick, *Court-Annexed Compulsory Arbitration: It Works,* 62 Judicature 218 (1989). Eastern Pennsylvania, in the 1989 amendments to its local rule, changed the name of its program to "Speedy Civil Trials."