Federal Judicial Center

memorandum

DATE: March 26, 1992

TO: Participants in the CJRA Seminar in St. Louis, MO, April 6-7, 1992

FROM: Richard Mandelbaum, Judicial Education Division

SUBJECT: Agenda and Materials for Use at Seminar

Enclosed are an agenda for the CJRA seminar in St. Louis and a set of hypothetical examples of various segments of reports that advisory groups might prepare pursuant to the Civil Justice Reform Act.

1. Why did we prepare these materials? We prepared them because the responses to our pre-seminar survey indicated that

- most groups think it is important that we devote time in Chicago to analyzing cost and delay and their causes, developing recommendations, and writing reports and plan; and

- most groups are currently involved in these stages of the process.

Consequently, the bulk of the agenda in St. Louis will be devoted to these issues. We thought we could best help you by putting together some different approaches to the report and using these examples as a launching pad for discussion. We are assuming a good deal of exchange among group members on experiences to date, problems perceived, and solutions contemplated or used.

2. What are these materials and what are they not? The attached samples are prepared roughly along the lines of the "Recommended Format" for advisory group reports approved by the Judicial Conference Court Administration and Case Management Committee, which is included with these materials. The samples consist of

- several alternative approaches to section II ("Assessment of Conditions in the District"), including four examples of docket assessment and three of analyses of the causes of cost and delay; and

- three alternative approaches to section III ("Recommendations and Their Basis"), including one proposed District Court Plan.

The samples include some questions and explanatory notes and use brackets and ellipses to indicate that a complete report would carry more text than we have presented here.

These samples are not templates or models that you should simply revise to reflect your court's particular situation. They all have strong and weak points (and what is strong and weak is obviously relative to some degree).

3. What should you do with these materials? We suggest you

- read the "Recommended Format" for advisory group reports;
- review these various samples, consider the questions, mark them up as you wish as to strong points, weak points, and ambiguities;
- consider how you would write a report and what kinds of recommendations your group might make; and
- be prepared to offer your opinions in St. Louis.

4. Opportunity for Small Group Discussions

Note that the seminar will end with an optional set of open discussion groups. We expect these to convene after the break on the second morning of the seminar, roughly around 10:30. The format will be flexible and participants should feel free to move from one group to another as they wish (or not to participate at all). The purpose of the sessions is to enable participants to consult with each other, as well as with FJC and AO staff, on specific problems they have encountered in implementing the Act. If you have a particular docket analysis problem you wish to discuss, consider bringing the relevant information or data with you. Likewise, if you have developed questionnaires or other data collection instruments you would like to discuss with others, whether to ask for their opinion or to offer advice, please bring those as well.

5. Other Materials Enclosed

Also enclosed are the following documents:

- The "Recommended Format" referred to above.
- An opinion from the General Counsel's Office of the Administrative Office, addressing the question whether arbitration may be adopted by courts other than the ten mandatory pilot courts and ten additional voluntary courts designated by statute.
- Guidelines recommended by the Judicial Conference Committee on Court Administration and Case Management for use by the circuit committees in their review of the reports and plans (with appendix 3).
- A list of courts who submitted reports and plans by December 31, 1992, thereby qualifying for consideration as Early Implementation Districts.
- A short paper on the use of caseload statistics, titled "How Caseload Statistics Deceive".

FEDERAL JUDICIAL CENTER
SEMINAR FOR NON-EID COURTS IMPLEMENTING
THE CIVIL JUSTICE REFORM ACT OF 1990

AGENDA

The seminar will convene at 8:30 a.m. Monday, April 6th, and continue until around 4:00 p.m. that day. We will begin at 8:00 a.m. on Tuesday, April 7th and will adjourn formally by 12:00, although those who wish to stay for informal discussions may do so. A continental breakfast will be available in the meeting room on both days at 8:00 a.m.

This agenda provides a list of discussion topics and questions. The topics and their order can be adjusted to reflect the group's interests. Small groups will be assembled if the need emerges.

MONDAY AND TUESDAY, APRIL 6-7, 1992

Brief report from each court on current status of its efforts, e.g.:

- docket analysis
- examination of causes of cost and delay
- recommendations and report
- plan

Analysis of conditions of the dockets

1. Does the statute require a quantitative analysis of the dockets? Does it require a judgment concerning whether the docket is in "good" or "bad" condition?

2. Is it adequate to rely primarily on advisory group and bar opinion in reaching a judgment about docket conditions?

3. 28 U.S.C. § 475 requires that the court, in consultation with its advisory group, conduct annual assessments of the condition of its dockets. Will or should the initial docket assessment be such that it can feasibly be repeated annually?

4. What should be considered in the advisory group's analysis of the court's criminal docket?

Assessing problems of excessive cost and delay in civil litigation and identifying their principle causes

1. How do you determine that cost and delay are excessive? How do you identify the causes?

2. If your group believes there is no problem, must it provide a convincing demonstration of this? How?

3. How can your group determine the causes attributable to attorneys and litigants?

4. What kinds of investigation did you employ in your analysis of the causes of cost and delay (e.g., examinations of caseload data, a sample of cases, or of individual judge's practices; surveys, formal or informal, of attorneys, litigants, law enforcement agencies)?

5. What is a sufficient sample of cases to support an empirical analysis of causes of cost and delay? When do you know you have enough responses to a questionnaire to come to reliable conclusions?

6. What constitutes an adequate analysis of the "impact of new legislation on the courts"?

7. To adequately analyze the causes of excessive cost, should an advisory group consider attorneys' fees or fees arrangements?

8. What other analyses might your group undertake as part of the annual assessments required by 28 U.S.C. § 475?

Developing recommendations and writing a final report

1. Is an advisory group responsive to the Act's mandates if it concludes that the pace of litigation should not be accelerated and recommends only that the court continue to operate as it does?

2. Can the advisory group direct recommendations to entities other than the district court (e.g., the circuit judicial council, Congress, the court of appeals)?

3. Should the advisory group propose specific implementation programs, such as a continuing legal education program or methods for recruiting and training neutrals?

4. How can the advisory group ensure that it writes a practical report - i.e., that its recommendations are realistic, that the resources of the court and the bar are sufficient to ensure success of the proposed changes?

5. How should the advisory group address problems perceived to be caused by individual judges?

6. How should the advisory group handle judicial opposition to particular recommendations, e.g., proposing alternative report language that precludes assessment of individual caseloads and dockets?

7. Is it better for the advisory group to recommend what it sincerely believes is needed, even if it know the court disagrees, or rather to trim its recommendations to those the court is more likely to adopt?

Writing and implementing a plan

1. Should the advisory group report include an actual cost and delay reduction *plan,* which it recommends the court adopt (see 28 U.S.C. § 472(b)(4))?

2. What, if anything, should the plan do to demonstrate that it has considered the recommendations of the advisory group (see 28 U.S.C. § 472(a))? Is an explanation necessary if the court has chosen not to adopt a recommendation?

3. What, if anything, should the plan do to demonstrate that it has in fact "considered" the principles, guidelines, and techniques set out in §§ 473(a) and (b)?

4. What level of detail should the plan provide regarding the court's plans for implementing the procedures and programs adopted? Should it, for example, include the details of a differentiated case management program or only note that it plans to adopt such a program?

5. How can the court's plan demonstrate that the measures adopted are likely to reduce litigation delay and cost?

6. Should the advisory group be concerned about evaluating the effectiveness of the procedures adopted?

Open discussion and consultation in small groups (optional)

Analyzing the caseload

Designing data collection instruments and procedures for evaluating programs

Developing responsive and realistic recommendations

Budgeting for current and future CJRA activities (the Administrative Office)

ADVISORY GROUP REPORTS

Hypothetical Examples for Discussion

The following pages are examples of various segments of reports that might be prepared by advisory groups pursuant to the Civil Justice Reform Act. The Federal Judicial Center prepared these examples for use at its seminars in St. Louis, April 6-7 and April 8-9, 1992. They are hypotheticals intended to stimulate discussion. They are not model reports.

The examples are structured to conform with the Recommended Format for Advisory Group Reports, which was prepared by the Center and the Administrative Office of the U.S. Courts at the request of the Judicial Conference Committee on Court Administration and Case Management. The Recommended Format is included in the materials accompanying these examples.

This document is organized under four headings.

1. Description of the court (p. 1) - no examples
2. Condition of the docket (pp. 2-7) - four examples
3. Cost and delay (pp. 8-16) - four examples
4. Recommendations and their basis (pp. 17-28) - three examples

Discussion questions and in one instance explanatory notes follow most of the particular examples.

1. Description of the Court

The Advisory Group Report to the Court: Recommended Format . . .

. . . .

I. Description of the Court
- **A. Number and location of divisions; number of district judgeships . . .**
- **B. Special statutory status, if any (e.g., pilot court, early implementation district)**

II. Assessment of Conditions in the District
- A. Condition of the Docket . . .
- B. Cost and Delay
  1. Is there excessive cost and delay in civil litigation in this district? What is the supporting evidence for the group's finding?
  2. If there is a problem with cost and delay, what are its "principal causes" (§ 472(c)(1)(C))? . . .

III. Recommendations and Their Basis
- A. State the "recommended measures, rules, and programs" (§ 472(b)(3)) . . .
- B. Explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys" (§ 472(c)(3)).
- C. Explain (as required by § 472(b)(4)) how the recommendations comply with § 473 . . .
- D. Make a recommendation that the court develop a plan or select a model plan and state the basis for that recommendation (§ 472(b)(2)) . . .

Appendices
- A. Membership of the Advisory Group . . .
- B. Operating Procedures . . .
- C. Cost and Delay Reduction Plan . . .

The first task in writing the report is to describe the district. This is not a statutory task, but it will assist the readers of individual reports by setting a context for later analysis and will facilitate comparative review of all the reports from a circuit and national basis. No examples are provided for this section.

The Federal Judicial Center prepared these materials for use in its April 6-7 and April 8-9, 1992, seminars concerning Civil Justice Reform Act implementation. The materials are hypotheticals created for discussion purposes; they are not model reports.

2. Condition of the Docket

The Advisory Group Report to the Court: Recommended Format . . .

. . . .

I. Description of the Court
   A. Number and location of divisions; number of district judgeships . . .
   B. Special statutory status, if any (e.g., pilot court, early implementation district)

II. Assessment of Conditions in the District
   A. Condition of the Docket . . .
   B. Cost and Delay
      1. Is there excessive cost and delay in civil litigation in this district? What is the supporting evidence for the group's finding?
      2. If there is a problem with cost and delay, what are its "principal causes" (§ 472(c)(1)(C))? . . .

III. Recommendations and Their Basis
   A. State the "recommended measures, rules, and programs" (§ 472(b)(3)) . . .
   B. Explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys" (§ 472(c)(3)).
   C. Explain (as required by § 472(b)(4)) how the recommendations comply with § 473 . . .
   D. Make a recommendation that the court develop a plan or select a model plan and state the basis for that recommendation (§ 472(b)(2)) . . .

Appendices
   A. Membership of the Advisory Group . . .
   B. Operating Procedures . . .
   C. Cost and Delay Reduction Plan . . .

The first step in assessing conditions in the district is to examine the condition of the court's docket.

The Federal Judicial Center prepared these materials for use in its April 6-7 and April 8-9, 1992, seminars concerning Civil Justice Reform Act implementation. The materials are hypotheticals created for discussion purposes; they are not model reports.

Condition of Docket—Example 1

II. Assessment of Conditions in the District

A. Condition of the Civil and Criminal Docket and Filing Trends

see Question 1

Over the last decade, the condition of the civil docket in the District Court has been quite good, with the average civil case taking about 13 months from filing to disposition. Owing to the district's heavy concentration of major commercial and financial concerns, its caseload includes high proportions of relatively complex cases. Hence the 13 month average case duration is an impressive accomplishment, which the advisory group attributes to the competence and diligence of the district's judges and magistrate judges.

Despite the advisory group's generally positive impression of the condition of the civil docket, there is at least superficial evidence of some deterioration of that condition, beginning in 1987 and continuing through 1990 (the latest year for which we have complete data). During that period, average case duration has increased from 13 to 17 months, while annual civil case filings have decreased by 17% and the number of pending cases has increased by 14%. The explanation for these changes is not clear, but the advisory group believes they reflect changes in both the character of the civil caseload and in the volume of criminal case filings.

Prior to 1985, criminal defendant filings had averaged about 1300 per year, with about 25% involving drug offenses. Since 1985, criminal defendant filings have averaged about 1700 per year, with drug offenses representing over 40% of these filings. This has resulted in a significant increase in the demands imposed by the criminal caseload, which unavoidably decreases the time available for work on civil cases.

Also beginning in 1985, the district has experienced a general shift toward a civil caseload containing higher proportions of cases that characteristically take longer to reach disposition. Most notable among several changes of this type is an influx of asbestos product liability cases: none were filed prior to 1985, but filings have

averaged over 400 per year since 1987. The increase in amount in controversy required for diversity jurisdiction has caused a decrease in the absolute number of contract and personal injury actions, but the increased average stakes in these cases means that a higher proportion reach trial and thus that the average case duration for diversity cases has increased. Similarly, increases in the number or complexity of RICO, securities, and ERISA cases, and of appeals in bankruptcy cases have all contributed to an increase in average case duration. It is important to understand that these changes have increased <u>average</u> case duration due to changes in the character of the caseload. We do not believe that a <u>particular</u> case filed in the early 1980s would have been disposed of more quickly than an identical or similar case would take if filed today, except to the extent that the increased criminal caseload may have slowed all civil cases to a modest degree.

B. Trends in Court Resources

Until 1988, the Court had no more than one vacant judgeship at any one time, and the average duration of the vacancies was 13 months. Since 1988, the court has had at least 2 vacancies at all times.

Questions on Example 1

1. The advisory group said the civil docket is in "quite good" condition. What are its criteria for that judgment? How can its assessment be compared with those in other districts, or with future assessments of the docket in this district?

2. Does the report offer an adequate analysis of the court's criminal docket? If not, what more should be covered?

Condition of Docket—Example 2

II. Assessment of Conditions in the District

A. Condition of the Civil and Criminal Docket and Filing Trends

Both the civil and criminal dockets in the district have been deteriorating for the past several years. Although neither docket can yet be said to be in bad condition, the current trend is clearly problematic. During the period from statistical year (SY) 1986 through SY90, while total case filings decreased 18%, from 11,665 to 9,568, case terminations have also decreased 18%, from 11,384 to 9,298, and the backlog has increased 14%, from 11,943 to 13,647. The increasing backlog and decreasing rate of case terminations has resulted in increases in median time from filing to disposition: from 4.6 to 7.9 months for felony criminal cases, and from 7 to 9 months for civil cases. The average time to trial in civil cases has increased from 16 to 19 months, and the percentage of civil cases over three years old has gone from 8.4% to 12.8%. At the end of SY90, nearly 55% of all criminal cases were ready to be tried but had not yet reached trial.

Comments on Example 2

This example, based on the same district as that examined in Example 1, uses statistics from the 1990 Federal Court Management Statistics. This example is rife with misconceptions about the implications of the statistics.

1. A decreasing rate of case terminations is not necessarily a negative sign. It is natural that terminations decrease as filings decrease.

2. Using the increased median times in 1990 exaggerates the trend of increasing case duration. All three median time measures increased significantly between 1989 and 1990, very likely as an artifact of significant decreases in both civil and criminal filings. As filings decrease, the supply of "young" cases in the pending caseload decreases, while the supply of old cases does not. This is reflected in a lowered proportion of young cases among current terminations, which in turn results in an increase in median time to termination.

3. The last sentence misconceives the "triable defendants in pending criminal cases" statistic. It is best interpreted as the "true number of pending criminal defendants." It excludes criminal defendants with pending charges who are fugitive, mentally incompetent to stand trial, or in other ways in a "pending but not triable" status. The percentage of pending defendants in triable status therefore has virtually no bearing on the "condition of the docket."

Condition of Docket—Example 3

II. Assessment of Conditions in the District

A. Condition of the Civil and Criminal Docket and Filing Trends

The civil docket has remained in approximately the same condition throughout the last decade. Civil case filings and terminations average about 6000 per year (450 per judge), pending caseload averages about 8500 (650 per judge), and civil case life expectancy averages about 17 months.

The criminal docket has undergone major changes over the past decade, with total annual criminal defendant filings rising from a pre-1986 average of about 2400 per year to 4200 in statistical year 1990. Drug cases have played a major role in the increase, accounting for about 25% of defendants prior to 1986, and for about 50% of defendants in 1990.

The statistical data provide a quantitative measure of the condition of the civil and dockets, but cannot reveal whether that condition is "good" or "bad." The consensus of the advisory group and comments received from members of the bar suggests that neither docket is "backlogged." Put differently, cases need not wait for extended periods before reaching trial, nor are hearings or decisions on motions unduly delayed. This suggests a docket that is in satisfactory condition.

Questions on Example 3

1. Is this an adequate assessment of the condition of the dockets? How are future assessments (28 U.S.C § 475) to be made?

2. Is it a reasonable approach to rely primarily on advisory group and bar opinion in reaching a judgment about docket conditions? Is it necessary to offer a judgment like the word "satisfactory"?

Condition of Docket—Example 4

II. Assessment of Conditions in the District

A. Condition of the Civil and Criminal Docket and Filing Trends

> *In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall:*
>
> *(A) determine the condition of the civil and criminal dockets.*
>
> *(B) identify trends in case filings and in the demands being placed on the court's resources; ..." (28 U.S.C. § 472(c)(1))*

This language is basically a directive to determine the condition of the court's civil and criminal dockets, including assessments over time and in relation to changes in the court's resources. We believe that the following criteria provide the best measures of the dockets' conditions, in relationship to court resources: (a) the civil and criminal caseload per judge; (b) the median time from "at issue" status to trial for civil cases, and the median time from filing to disposition for criminal cases; and (c) the ratio of trials to total dispositions. These measures are set out in the table below.

Table A
Measures of Docket Condition

	1975	1983	% change	1990	% change
Civil case filings per judgeship	294	470	+59.9	406	−13.6
Criminal felony filings per judgeship	108	47	−56.5	53	+12.7
Median time from issue to trial (civil)	11	7	–	14	–
Median time from filing to disposition (criminal)	3.6	5.0	–	5.0	–
Trials as percentage of dispositions	12.9	7.7	–	7.7	–

Questions on Example 4

1. Do the criteria selected as measures of docket condition make sense? Assuming for the sake of argument that they do, is it satisfactory simply to lay out the numbers without offering a qualitative judgment (e.g., "good") of the condition of the docket?

3. Cost and Delay

The Advisory Group Report to the Court: Recommended Format . . .

. . . .

I. Description of the Court
   A. Number and location of divisions; number of district judgeships . . .
   B. Special statutory status, if any (e.g., pilot court, early implementation district)

II. Assessment of Conditions in the District
   A. Condition of the Docket . . .
   B. Cost and Delay
      1. Is there excessive cost and delay in civil litigation in this district? What is the supporting evidence for the group's finding?
      2. If there is a problem with cost and delay, what are its "principal causes" (§ 472(c)(1)(C))? . . .

After assessing the condition of the docket, the Advisory Group should turn to an analysis of cost and delay.

III. Recommendations and Their Basis
   A. State the "recommended measures, rules, and programs" (§ 472(b)(3)) . . .
   B. Explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys" (§ 472(c)(3)).
   C. Explain (as required by § 472(b)(4)) how the recommendations comply with § 473 . . .
   D. Make a recommendation that the court develop a plan or select a model plan and state the basis for that recommendation (§ 472(b)(2)) . . .

Appendices
   A. Membership of the Advisory Group . . .
   B. Operating Procedures . . .
   C. Cost and Delay Reduction Plan . . .

The Federal Judicial Center prepared these materials for use in its April 6-7 and April 8-9, 1992, seminars concerning Civil Justice Reform Act implementation. The materials are hypotheticals created for discussion [illegible] not model reports.

Cost and Delay—Example 1

II. Assessment of Conditions in the District

B. Cost and Delay

The statute directs the Advisory Group to examine the causes of cost and delay in this district (§ 471(c)(1)(C)). To carry out this responsibility, we conducted a number of inquiries: 1) We examined the results of the docket assessment; 2) we interviewed the judges and magistrate judges; 3) we held discussions among ourselves and with our colleagues in the bar; 4) we examined the criminal caseload statistics of the state courts of this jurisdiction; and 5) we studied the docket sheets of all drug cases filed in the District Court in 1989 and 1990.

Is There Excessive Delay or Excessive Cost in Civil Litigation in this District?

Before we could examine the causes of excessive cost and delay, we had to determine whether, in fact, the court or the bar was experiencing either of these problems. Based on the information we gathered, we found substantial evidence of excessive delay in civil cases but little evidence of excessive cost.

The Evidence for Excessive Delay in this District

We base our conclusion that there is excessive delay on the following evidence:

1. Life expectancy in civil cases, which had been stable at 11 months from 1981 to 1987, has risen steadily over the last three years, to 19 months in 1990.
2. The median time from issue to trial in civil cases, which had averaged around 13 months between 1981 and 1987, jumped to 20 months in 1989 and 24 months in 1990.
3. Many members of the bar have had civil cases ready for trial yet have not been able to get a trial date.
4. When asked how soon they would be able to schedule trial for a civil case ready for trial, the judges estimated 12 months.[1]

The Causes of Excessive Delay in this District

The Advisory Group has concluded that the delay in civil cases has been caused by changes in the criminal caseload. These changes, in turn, are due to two things: (1) changes in sentencing laws, *viz.*, the Sentencing Reform Act of 1984, and the establishment of mandatory minimum sentences for minor drug cases, and (2) changes in prosecutorial practices to take advantage of the statutory amendments. Our evidence is as follows.[2]

Between 1987 and 1990, the criminal caseload increased by 120%, rising to 28% of the overall docket in this district. In 1990 drug cases made up 40% of the criminal caseload, whereas they constituted only 10% of that caseload before 1988.

1. Twelve months is an average of the four judges' responses.

2. Before attributing all the delay in civil cases to the criminal caseload, we must ask whether some delay might not be due to changes in the mix of civil cases, in the case management practices of the court's judicial officers, or in the litigation practices of the district's bar. We found no evidence for such changes. Our analysis of the docket showed no change in civil case mix, and our interviews and discussions revealed no significant changes in case management or litigation practices.

Over the past decade the district, though small and primarily rural, has become a drug market for a nearby metropolitan area. The rise in the number of drug cases became noticeable in state caseload statistics in 1982. There was no comparable rise in the federal criminal caseload until 1988. At that point it began to rise rapidly. The state caseload, on the other hand, stabilized after 1988. We believe these changes demonstrate a shift of drug cases out of the state court into the federal court.

We believe this shift is due to the changes in sentencing law and procedure mandated by the 1984 Sentencing Reform Act and by the sentencing guidelines promulgated pursuant to the Act, both of which apply to crimes committed after October 31, 1987.[3] These guidelines, which generally require longer sentences than are typically imposed in state courts for the same underlying offense, create an incentive to prosecute in federal court. As a result, prosecutors are bringing into federal court cases that they would have earlier left for state prosecution.

The Advisory Group believes the U.S. Attorney's Office in this district has too often chosen to prosecute in federal court. We found that of the drug cases filed in this district in 1989 and 1990, 47% involved four grams or less of cocaine. Another 20% involved five to nine grams of cocaine. When we examined the cases themselves we found that in at least half of them the individuals charged were not major drug dealers or drug lords, but only small time distributors or occasional users.

To our surprise, we found that many of these cases proceeded to trial. From discussions among the Advisory Group and with members of the bar, we learned that under the sentencing guidelines the incentive to plead guilty has diminished because the sentence imposed at trial may not be significantly different from the sentence imposed after a guilty plea. Since there is not a substantial reduction in sentence after a guilty plea, and given the chance that a jury may acquit (about 17% of drug trials result in acquittal), there is now a greater incentive to go to trial.

To summarize, we found that not only are there more criminal cases in federal court than five years ago, but the same type of case demands more judge time now than previously. The Advisory Group believes these cases do not belong in federal court. We believe, as well, that these cases would not be in federal court except for the sentencing guidelines and mandatory minimum sentences.[4]

3. Sentencing Reform Act of 1984, as amended. See especially 18 U.S.C. § 3551 et seq., 28 U.S.C. § 991 et seq., and Fed. R. Crim. P. 32 and 35.

4. The U.S. attorney for District Court, who by statute is a member of the Advisory Group, does not join the group in this finding. A separate statement from the U.S. attorney is attached as Appendix D.

Questions on Example 1

1. Has the Advisory Group collected enough data, and the right kind of data, to support its criticism of the Sentencing Reform Act and the guidelines as a cause of excessive civil cost and delay?

2. Does footnote 2 constitute adequate analysis?

3. Are the recommendations on page 18 responsive to the problems identified here?

Cost and Delay—Example 2

III. ASSESSMENT OF CONDITIONS IN THE DISTRICT

B. Cost and Delay

* * *

8. We believe that some of the unnecessary cost and delay in the district is caused by specific statutory ambiguities that have had a particular impact in this district. To the degree litigation is caused by statutory ambiguity (as opposed to factual and legal differences needing judicial resolution), that litigation by definition presents excessive cost and, because some impact on other litigants is inevitable, some unnecessary delay.

The recent development of Port City as a modern shipping center has resulted in a significant amount of litigation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (hereafter, LHWCA). Much of this litigation and the time it demands arises needlessly as a result of the vagueness of the act's definition of the persons entitled to compensation under the act, which is compounded by the technologically sophisticated nature of Port City's cargo handling facilities. A person injured in the course of longshoring or harbor work at Port City may be entitled to compensation either under the state's worker's compensation act or under the LHWCA. In some instances, the LHWCA will afford superior compensation, while worker's compensation provides superior compensation in other instances. Whether a person is entitled to LHWCA compensation or state worker's compensation depends on whether that person is an "employee" within the definition of the LHWCA (33 U.S.C. § 902(3)).

Much of the LHWCA litigation in this district arises because of the vagueness and ambiguity of § 902(3). Such litigation is quite pointless from a social policy point of view, because there is usually no question that the claimant is entitled to compensation, but only the question of which of two different but equally reasonable compensation schemes are applicable. Most if not all of this pointless and time-

consuming litigation could be avoided if the definitions in § 902(3) were made clear. In many older ports with less modern longshoring operations, the definitional problems have largely been overcome through a series of appellate decisions that make clear whether particular jobs at these older ports are or are not within the scope of § 902(3). It is regrettable that definition of § 902(3) had to evolve through a lengthy series of appellate decisions. Earlier legislative resolution of the problems would have saved considerable judicial time. For the older ports, the problem is nonetheless resolved and no longer a cause of needless litigation. The modern facilities at Port City, however, with jobs that have no parallel in traditional longshoring (e.g., much of the actual loading and unloading of ships at Port City is done by robot cranes operated by computer, with human control only in the form of fine-tuning by computer technicians), create a need to resume the definitional task once again. And once again the statute's vagueness has begun to create significant and pointless demands on the courts.

Question on Example 2

Does this analysis complywith the statutory charge to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts" (28 U.S.C. § 472(c)(1)(D))? If not, what would be an appropriate analysis?

B. Delay and Cost

In this section we turn to the issues of delay and cost in litigation. From our analysis of the dockets, above, we concluded that the overall condition of the civil docket over the past decade has been quite good, with little evidence of backlog or delay. Nonetheless, other data collected by the Advisory Group reveal two problems in the district, the first involving undue delay and the second involving excessive cost. First, there are individual cases that take too long to reach disposition because of the practices of several judicial officers. Second, litigants are dissatisfied with the cost of litigation and identify the bar's discovery practices as the source of their dissatisfaction. We believe these practices also impose excessive and unnecessary demands (i.e., costs) on the court's judicial officers.

Delay

The advisory group conducted a detailed examination of a sample of 150 cases that lasted at least three years.[1] In about half of these cases, there were very good reasons for the lengthy disposition time, including the inherent complexity of the issues or the need to stay action in the district to await resolution of related litigation in other jurisdictions. But the remaining half of the lengthy cases were delayed for avoidable reasons. These cases, though infrequent, may be said to take too long.

see Question 1

After examining the data collected by each of its various methods, the Advisory Group concludes that there are four related causes of the delay in these cases:

- unnecessary and burdensome discovery requests;
- delay in ruling on motions regarding these requests;
- inadequate use of magistrate judges by one judge; and
- failure of two magistrate judges to limit discovery abuse.

In the cases that took too long, the Advisory Group found that counsel on one or both sides filed discovery requests that were unreasonable or burdensome.[2] These requests usually provoked additional motions, producing lengthy and contentious disputes.

see Question 2

About a third of these cases were on the docket of a single judge, who generally did not rule on these motions until nine to twelve months after they were filed. Furthermore, this judge, unlike most judges on the court, does not refer discovery disputes or other pretrial matters to the magistrate judges.

The other two-thirds of the delayed cases also involved unnecessary discovery filings, but these cases came from the dockets of many different judges. The common feature of these cases is that they all came from the dockets of two magistrate judges, to whom the cases had been referred for resolution of dis-

see Question 3

[1] The Advisory Group selected a random sample of 300 cases for close examination. Half of these cases were more than three years old, half were less than three years old. The Advisory Group examined the docket sheets of these cases and sent surveys to the attorneys and litigants involved in the cases. See Appendix B.2 for an explanation of the methods used and for copies of the forms and surveys. See Appendix D.1 for tables summarizing the findings from the docket analysis. The Advisory Group also interviewed all the judges and magistrates and held two public hearings. See Appendix B.3 for a copy of the interview protocol and Appendix B.4 for the agendas and list of attendees for the public hearings.

[2] *See* Fed. R. Civ. P. 26(g)(3).

see Question 4

covery issues. These magistrate judges generally did not prohibit the unnecessary discovery requests, which resulted in the filing of additional motions on the part of the opposing party and may have encouraged additional unnecessary requests on the part of the initiating party.

The conclusions outlined above were reached after our examination of the docket sheets and our interviews with the judges and magistrates. Further support for these conclusions comes from the survey responses of attorneys and litigants, as well as the evidence from the public hearings. In those cases where attorneys and litigants believed there had been unnecessary delay in their case, they identified discovery abuse as the cause of the problem. These responses are found more often than not in the cases involving the judicial officers mentioned above.

Cost

see Question 5

In addressing the costs of litigation, the Advisory Group took the position that it would be inappropriate for it to address the issues of the fees charged by attorneys or of the nature of the fee arrangement between attorney and client (e.g., hourly fees, contingent fee). Moreover, the group believes that the best and most useful measure of litigation cost is time expended by counsel, as well as time expended by parties, their employees, and by investigators or experts hired to aid the litigation. In addition, and despite considerable disagreement between advisory group members concerning whether and how some fee arrangements create a conflict of interest between attorney and client, the group agreed to define "excessive cost" to mean attorney time expenditures that exceed what either the attorney or client believe to be reasonable in light of the matters at issue and the complexity of the case. Hence excessive costs can occur for one party to a case but not for the other, and when a party incurs excessive costs they may be due to initiatives of that party's own attorney (e.g., unnecessary resistance to discovery) or to initiatives of opposing counsel (e.g., unnecessary and burdensome discovery requests).

The Advisory Group used two methods to examine the question of cost: a questionnaire was sent to attorneys and litigants and two public hearings were held.[3] Both reveal that the bar has a different view of the cost of litigation than do litigants and the general public. Testimony from the public hearings first made this point, and the survey results underscored it. From attorney comments at the hearings and their questionnaire responses, one would conclude that excessive cost is not a problem in this district. The survey results provide a quantitative measure: Only 5% of the attorneys who responded to the questionnaire thought the cost of litigation in the case they had handled was excessive; the remaining 95% thought the cost was reasonable. In contrast, 40% of the litigants who responded thought the cost was excessive.

The litigants' responses showed a clear relationship between cost and discovery practices. That is, the litigants who thought the cost of their case was excessive were involved in cases that had a large number of discovery events (as revealed by our analysis of the docket sheets). In addition,

[3] From the 300 cases in which questionnaires were sent, 200 attorneys and 120 litigants responded. Several hundred attorneys and citizens attended the hearings.

the litigants' survey responses identified discovery as the major cause of excessive cost in their cases.

We did not find, however, a strong relationship between cost and delay. That is, the cases in which litigants thought the cost was too high were not necessarily the same cases as those which took too long because of unresolved discovery disputes. In other words, a case may proceed at a reasonable pace, but it may nonetheless cost too much in the litigant's eyes. Vice versa, a case may take too long because of delay in deciding discovery motions, yet not result in costs thought by the litigants to be excessive.

Based on public hearings, interviews with judges and magistrate judges, and discussions held at Advisory Group meetings, the Advisory Group believes that some members of the bar in this district pursue discovery in an exceedingly vigorous and contentious manner. Based on our analysis of the docket sheets and interviews with judges and magistrate judges, we believe many requests for discovery and for judicial assistance in resolving disputes arising from these requests are unnecessary and do not conform to the standards of Fed. R. Civ. P. 26. Nevertheless, the mode in which discovery is conducted has become a taken-for-granted feature of the legal culture in this district. Consequently, the bar has become sanguine about the consequences of its practices for litigants.

Furthermore, the district's judicial officers have not succeeded in containing these practices. Rather, the court has willingly assisted attorneys in resolving discovery issues. We have found, for example, that attorneys often use status conferences as an opportunity to seek judicial assistance in resolving discovery issues and that the judicial officers provide the sought-after assistance. While the bar accords the judicial officers high praise for their handling of these issues (and, indeed, their willingness to assist is probably a significant factor in the court's admirable case duration time), the Advisory Group believes these benefits come at a substantial cost to the court in judge time. Not only have the judicial officers given much of their personal life to their work, but their involvement in discovery issues has taken their attention and time from other important parts of the judicial role.

[The report then discussed a variety of judicial duties that had suffered inattention.]

Finally, the Advisory Group believes some of the problems in the discovery area may be traced to Rule 26(g)(3). This rule affords no useful guidance concerning what constitutes discovery that is "unreasonable or unduly burdensome or expensive." Consequently, the judges and magistrates necessarily exercise broad discretion, each having different and unpredictable standards, which simply adds to the incentive for over-reaching discovery requests and excessive discovery disputes.

Questions on Example 3

1. To the Advisory Group, how long is "too long"?

2. Is there a basis for the Advisory Group's determination that some discovery requests were "unreasonable or burdensome"?

3. The Advisory Group surveyed attorneys and litigants in 300 cases, receiving responses from 200 attorneys (at most 33% of all attorneys involved) and 120 litigants (at most 20%) and reported that 5% of the attorneys and 40% of the litigants thought costs were excessive. Is this a valid basis for conclusions about the costs of litigation?

4. Did the Advisory Group provide fair treatment of the judge and magistrate judges whom it specifically referenced? How precise is the phrase "more often than not"? Should they have been given an opportunity to comment on the allegations?

5. Was the Advisory Group correct to take the position that it should not address attorneys' fees or fee arrangements?

6. Are the recommendations on page 21 responsive to this analysis?

Cost and Delay—Example 4

B. Cost and Delay

1. Delay

In the final analysis, there is no objective basis for saying that the pace of litigation in a district is "too slow" or possibly "too fast." There is no reason why a case should move quickly through litigation unless as least one party desires that it move quickly. In any event, the timetable for litigation in any case clearly needs to afford adequate time for all parties to conduct a complete investigation and development of the case. To push a case too quickly to completion of discovery or to a deadline for filing pretrial motions presents a serious risk of denying access to justice. While there is some truth in the proposition that "justice delayed is justice denied," it is at least equally true that justice is denied when the courts demand a rush to judgment because of obsessive concern with the court's statistical standing.

The statistical data provide an overview of the duration of the average civil case, but cannot tell us whether cases ought to move faster or slower. The statistics reveal the number of cases pending, but not whether there is any "backlog." We think that the most telling and useful assessment of the court's docket is that provided by the responses to our attorney questionnaire: fully 80% said the time required to dispose of civil cases in the district is reasonable, only 16% said that cases take too long to reach disposition, and 4% said cases are moved to disposition too quickly. Those opinions characterize a docket that is in very satisfactory condition. Any change in current practices, whether by speeding up or slowing down the pace of litigation, is likely to increase the currently low level of dissatisfaction among the members of the bar.

Question on Example 4

Is this responsive to the statutory charge?

4. Recommendations and Their Basis

The Advisory Group Report to the Court: Recommended Format . . .

. . . .

I. Description of the Court
   A. Number and location of divisions; number of district judgeships . . .
   B. Special statutory status, if any (e.g., pilot court, early implementation district)

II. Assessment of Conditions in the District
   A. Condition of the Docket . . .
   B. Cost and Delay
      1. Is there excessive cost and delay in civil litigation in this district? What is the supporting evidence for the group's finding?
      2. If there is a problem with cost and delay, what are its "principal causes" (§ 472(c)(1)(C))? . . .

III. Recommendations and Their Basis
   A. State the "recommended measures, rules, and programs" (§ 472(b)(3)) . . .
   B. Explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys" (§ 472(c)(3)).
   C. Explain (as required by § 472(b)(4)) how the recommendations comply with § 473 . . .
   D. Make a recommendation that the court develop a plan or select a model plan and state the basis for that recommendation (§ 472(b)(2)) . . .

Appendices
   A. Membership of the Advisory Group . . .
   B. Operating Procedures . . .
   C. Cost and Delay Reduction Plan . . .

After assessing the condition of the docket, the Advisory Group should set out its recommendations and the basis for them.

Recommendations—Example 1

III. Recommendations

A. After considering the results of our analyses and the principles and guidelines set forth in 28 U.S.C. § 473(a), we make the following recommendations:

1. That the court adopt a plan for random assignment of no more than 10% of all civil cases to a procedure for the "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as * * *" (see 28 U.S.C. § 473(a)(1)).

2. That the court adopt, with modifications as appropriate, a mandatory court-annexed mediation procedure modeled on that established in the District of _____.

3. That the court adopt local rules and directives to the clerk's office to authorize and encourage civil trials before magistrate judges pursuant to 28 U.S.C. § 636(c)(2), as recently amended.

4. That the court propose to the circuit judicial council and to the Judicial Conference of the United States that both adopt resolutions endorsing Recommendation A of Chapter 2 of the REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2, 1990), concerning federal prosecution of narcotics cases.

5. That the court invite the U.S. Attorney to attend its weekly court meetings in order to discuss the impact on the court of the U.S. Attorney's policies.

B. HOW THE RECOMMENDATIONS REQUIRE SIGNIFICANT CONTRIBUTIONS BY AND REFLECT NEEDS AND CIRCUMSTANCES OF BENCH, BAR, AND PARTIES

1. * * * The differentiated civil case management system will require major contributions by the clerk's office, which is already suffering under budget restraints that require below-full strength staffing levels.

* * *

7 * * * We commend the Congress for the statutory amendment that dismantles barriers to referring civil trials to magistrate judges and for the creation of the three-branch Federal Court Study Committee that recommended this change.

C. COMPLIANCE WITH § 473

1. The advisory group has considered the guidelines, principles, and techniques set forth in 28 U.S.C. § 473, and believes that two of these--differential case management (§ 473(a)(1)) and mediation (§ 473(a)(6))--would be helpful in this district. We recommend only limited implementation of a differential case management system, however, because we believe that the crushing burden of the court's current criminal caseload would make it counterproductive to impose this requirement on the entire civil docket at this time.

Note: Regarding Recommendation 7, § 636(c)(2) provides that full-time magistrate judges may conduct civil trials "when specially designated to exercise such jurisdiction by the district court or courts he serves." Section (3), which was recently amended, directs the clerk of court in districts that have so designated, to notify the parties when the case is filed that magistrate judges are available to conduct civil trials, and provides that the district judge and clerk may continue so to advise the parties, and they are to advise them as well that the parties are free to withhold their consent.

Questions on Example 1

1. Is it responsive to the statute to recommend that systematic, differential case management be applied only to a randomly chosen 10% of the civil caseload rather than to the entire docket?

2. Is mandatory mediation, as recommended here, a good solution to the problem described in Example 1 of the Cost and Delay Problems section (i.e., alleging that civil delay and cost is caused by prosecution policies)?

3. With respect to Recommendation 4, must the Advisory Group direct all its recommendations specifically to the court? See § 472.

4. With respect to Recommendation 7, should the Advisory Group propose specific implementation programs, such as, for example, a continuing legal education program on magistrate judge utilization?

Recommendations—Example 2

III. RECOMMENDATIONS AND THEIR BASIS

A. RECOMMENDED MEASURES, RULES, AND PROGRAMS

* * *

8. Better assessment of legislative impact — Given that most state worker's compensation acts afford compensation that, while differing is certain particulars, is generally comparable to LHWCA compensation, the problems caused by § 902(3) could be satisfactorily resolved by any of a number of definitions, provided that the definition is clear. The advisory group does not believe it appropriate that it should recommend any particular amendment to § 902(3), although it does strongly recommend that the Congress undertake such a task. Failure to do so has created litigation that is too costly and too delayed in the most extreme sense, because it is litigation that has no useful purpose and that occurs simply because the law is unclear. Simply as one illustration of an amendment that would solve this problem, the advisory group notes that the statute would serve its purpose if "employee" were defined to include only those persons injured as a proximate consequence of work that is required by the employer to be done in the actual process of loading or unloading cargo, equipment, or supplies. This would include loading supervisors and safety workers, as well as deckhands and dockhands, but would exclude the computer technicians who monitor and occasionally adjust the otherwise automatic robotic loaders, as well as clerical workers and general supervisors.

B. SIGNIFICANT CONTRIBUTIONS AND PARTICULAR NEEDS

* * *

8. The legislative change suggested above will require no contributions from the court's judges, lawyers, or litigants. It does, however, reflect what the legislative findings describe as "contributions ... by the Congress" (§ 102(3)).

III. Recommendations and Their Basis

The excessive cost and undue delay problems that we reported in section II.A are limited but nevertheless problematic, and are rooted in two fundamental and interrelated problems: discovery abuse by the bar and toleration of that abuse by the bench. We recommend that the court respond to this problem by adopting the Civil Justice Expense and Delay Reduction Plan presented in Appendix C of this report. Committee commentary within the plan elaborates on those recommendations that constitute changes in the court's current procedures.

Section A, immediately below, summarizes the plan's provisions and describes how each would help reduce excessive cost and delay.

Section B describes the "significant contributions [that these recommendations will require from] the court, the litigants, and the litigants' attorneys" (as specified in 28 U.S.C. § 472(c)(3)) and explains how the recommendations "take account of their particular needs and circumstances of the district court, litigants in [the] court, and the litigants' attorneys" (as specified in 28 U.S.C. § 472(c)(2)).

Section C explains, as required by 28 U.S.C. § 472(b)(4), how the recommended Plan set forth in Appendix C complies with 28 U.S.C. § 473.

Section D contains certain other recommendations concerning the proposed plan.

A. Recommendations and How They Would Reduce Excessive Cost and Delay

1. We recommend that the court:

   (a) Record and refine by proposed Local Rule 15 the procedures it already has in place for assigning civil cases to several different tracks, each of which provides the appropriate level of court resources for the needs of the court.

   (b) Continue in place:

      (1) Its aggressive, court-wide policy of early judicial involvement in each civil case except those exempted by Local Rule 24 and

      (2) Its pretrial discovery and case management conferences for complex cases, as described by Local Rule 16(a).

   These procedures are already limiting excessive cost and delay and help explain the favorable assessment of the court's civil docket reported in Section II.A, above.

2. We recommend that the court adopt proposed Local Rule 26(c), which would

   (a) require attorneys to accompany each discovery motion with a certification that the attorney has made a good faith effort to reach agreement with opposing counsel on the matters addressed in the motion,

   (b) require attorneys to present a joint discovery plan at the initial pretrial conference, and

   (c) require that the requesting attorney and party sign all requests to extend discovery completion deadlines.

   As reported in Section II.B, above, abusive discovery and some judges' and magistrate judges' toleration of that abuse are the major causes of excessive cost and delay in civil litigation to the degree it exists in the court. Requiring the lawyers to engage in good faith efforts to resolve disputes before seeking action by the court, to present a joint discovery plan, and to obtain the party's assent to requests for extensions of discovery deadlines will reduce the amount of lawyer time devoted to discovery contests, reduce the number of discovery requests made to the court, with their attendant costs and delay, and relieve the court of the burden of ruling on such requests.

3. We recommend that the court (a) adopt proposed Local Rule 16(f), establishing a voluntary "Early Neutral Evaluation" procedure, and (b) take the implementation steps outlined in the plan to put the procedure into place.

   This voluntary "alternative dispute resolution" procedure will similarly help curb the discovery abuse and the results of that abuse, by encouraging early examination of the case and narrowing of issues before extensive and intensive discovery begins.

4. We recommend that the court create a Task Force on Magistrate Judge Selection and Orientation to review the court's formal and informal procedures for selecting magistrate judges and for indoctrinating the magistrate judges so selected into the court's procedures for discovery control and management.

5. We recommend that the court embrace fully the letter and spirit of 28 U.S.C. § 476(a), and we commend Congress for enacting that provision, which directs the Administrative Office of the U.S. Courts to publicize, for each judge affected, the number and case names of motions and bench trials pending for more than six months and cases unterminated for more than three years.

B. Contributions that the Recommendations Would Require, and How they Account for the Particular Needs and Circumstances of the Court, the Lawyers, and the Litigants

1. The court's procedures already in place for differentiated case management, and early judicial intervention and conferencing, help explain the generally favorable assessment of the docket reported in Section II.A and the court's ability to provide access to all litigants who need the federal district court. These procedures are effective only because the judges of the court take an activist approach to case management and because the bar has adapted to the court's expectations for attorney behavior. These efforts represent significant contributions, as do the monitoring and case tracking required by the clerk's office.

   These procedures take account of the particular needs and circumstances in the court in that their design reflects the wide variation in civil case mix in the district.

2. The proposed changes in discovery procedures will require contributions from both lawyers and judges as they adapt to the new procedures, and from lawyers, as they attempt to resolve disputes themselves rather than seek judicial relief. The requirement for party certification of requests for discovery extensions and trial postponement will require greater party inquiry into the merits of the requests and greater party responsibility for the conduct of the litigation.

   These procedures take account of the particular needs and circumstances in the court in that abusive discovery and its toleration is a major cause of the excessive delay and cost that exists.

3. The voluntary neutral evaluation procedure will require contributions from the court and the bar in establishing the procedure and seeing to the necessary orientation and evaluation training necessary to make the procedure work. The procedure itself will require initial contributions from the bar and the parties as they consider the costs and benefits of engaging in another step in the litigation process.

   The early neutral evaluation procedure is particularly appropriate for this court's needs and circumstances because its bar, although much larger than it used to be, is still committed to maintaining cordiality and civility. The early neutral evaluation procedure provides a forum that encourages and takes advantage of existing cooperative relations.

4. The proposed Task Force of Magistrate Judge Selection and Orientation will require a significant contribution from the court in studying the situation, and developing and implementing any proposed changes.

   The Advisory Group's analysis of the court's magistrate judge corps makes clear the need for special attention to their selection and orientation.

C. **How the Recommended Plan Complies with 473's Guidelines, Principles, and Techniques**

1. In formulating its recommended Plan, the advisory group must consider and may include the guidelines, principles, and techniques listed in 28 U.S.C. § 473(a). This plan complies with § 473(a) in the following way:

   a. We recommend that the court continue its existing procedures for differentiated case management and for early judicial intervention (see A.1, *supra*). (§ 473(a)(1)-(3))

   b. Our recommended plan does not include a procedure for voluntary exchange of information. We believe that an attorney's proper ethical duties to his or her client preclude effective operation of such a procedure, and would lead to increased cost and delay by increasing rather than decreasing the incidence of discovery disputes. (§ 473(a)(4))

   c. We recommend discovery management procedures in A.2, *supra*. (§ 473(a)(5))

   d. We recommend an early neutral evaluation procedure recommended in A.3, *supra*. (§ 473(a)(6))

2. The Advisory Group also considered the six techniques for litigation management and cost and delay reduction contained in 28 U.S.C. § 473(b). It recommends adoption of the following techniques

   a. Requiring parties to present a joint discovery plan at the initial pretrial conference (II.A.2);

   b. Requiring lawyer and party signature on all requests for discovery extension (II.A.3.d); and

   c. Authorizing a voluntary neutral evaluation system (II.A.3).

   After careful consideration, we believe that the other techniques in § 473(b) would either compound and confuse the discovery changes we propose above or would otherwise detract from the court's efforts to implement the ambitious cost and delay reduction effort summarized above and described below.

D. **We Recommend Adoption of the Draft Plan in Appendix C.**

Rather than recommend adoption of a model plan, the advisory group has formulated a plan suitable to local conditions, which is set out in Appendix C. We recommend that the court adopt that plan.

Respectfully submitted,

Charlene Clark
For Civil Justice Reform Advisory Group

APPENDIX A

MEMBERS OF THE ADVISORY GROUP

* * *

APPENDIX B

OPERATING PROCEDURES

* * *

APPENDIX C

Plan for Civil Justice Delay and Expense Reduction

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

Draft, August 1, 1991

As Proposed by the Civil Justice Reform Advisory Group

The District Court,

> after considering (1) the recommendations of the Civil Justice Reform Advisory Group appointed pursuant to 28 U.S.C. § 478, (2) the principles and guidelines of litigation management and cost and delay reduction listed in 28 U.S.C. § 473(a), and (3) the litigation management and cost and delay reduction techniques listed in 28 U.S.C. § 473(b),

and

> after consulting with the Civil Justice Reform Advisory Group, pursuant to 28 U.S.C. § 473(a), (b),

adopts and implements this Civil Justice Delay and Expense Reduction Plan, pursuant to 28 U.S.C. §§ 471 et seq.

1. *Findings* — Based on this court's view of the Report of the Civil Justice Reform Advisory Group and this court's independent assessment of the condition of its docket, we find:

a. Except as noted in subsections b and c, below, this court is meeting its responsibility to litigants and the public to provide a "just, speedy, and inexpensive determination of every [civil] action."

b. The "ways in which litigants and their attorneys approach and conduct litigation" (28 U.S.C. § (c)(1)(C)), particularly discovery, is a principal cause of excessive civil litigation cost and delay to the degree they exist in this district.

c. Certain "court procedures" (28 U.S.C. § (c)((1)(C)), including discovery processes used within the court, and its methods of selecting and supervising magistrate judges, are a principal cause of excessive civil litigation cost and delay to the degree they exist in this district. Specific behaviors by specific judges and magistrate judges are primary contributors to the court's aggregate delay and cost problems, and publication of their overdue pending cases and motions will help relieve this problem.

see Question 4

2. *Actions* — The court hereby ORDERS or notes the following, as appropriate:

a. *Continuation of Court's Procedures on Differentiated Case Management and Early Judicial Intervention* — [This section presents a local rule that embodies informal civil case differentiation procedures already in place and notes the value of the court's local rules 24 and 16.]

b. *Discovery* —

1) COOPERATIVE DISCOVERY — The Court proposes for adoption pursuant to 28 U.S.C. § 2071 the following local rule:

Local Rule 26(c)

(1) Joint discovery plan

Counsel shall as part of their case management conference report or case management plan prepare and submit a joint discovery plan, scheduling the time and length for all discovery events. The plan shall conform to the obligation to limit discovery under Fed. R. Civ. P. 26(b). Discovery events shall, unless the court for good cause orders otherwise, be limited for each side (or groups of parties with common interest) to

5 depositions 15 interrogatories 2 requests for production.

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

Any request to extend the time provided by the plan for discovery events shall be signed by counsel for all parties and by the parties themselves.

(2) Resolution of discovery disputes

Counsel shall meet and confer to resolve discovery disputes. Any dispute not so resolved shall be presented by telephone call to a judicial officer. No motion may be filed without leave of court. Any motion permitted will bear the parties' certification that they have met in a good faith effort to resolve the dispute.

c. *Early Neutral Evaluation* —

1) *Rule Amendment* — [The draft plan included a proposed local rule pursuant to 28 U.S.C. § 2071, establishing an early neutral evaluation mechanism to assist parties in certain types of cases in identifying issues and developing a discovery plan.]

2) *Implementation* —

a) The court, in cooperation with the Civil Justice Reform Advisory Group and the Continuing Legal Education Committee of the District Bar Association, will sponsor an "Early Neutral Evaluation Orientation Session" for all members of the bar. Its purpose is to familiarize the lawyers with the procedure * * *

b) Eligibility to serve as evaluators in the Early Neutral Evaluation procedure is restricted to attorneys who have been admitted to practice before this court for two years, and who have completed the training session prescribed in section (c), *infra.*

c) [This section described the training program for would-be evaluators.]

Committee Comment: The Early Neutral Evaluation program recommended above responds to the problem of unnecessary discovery requests by helping the parties, early in the litigation process, to identify the strengths and weaknesses of their case and make a realistic determination of their discovery needs. Empirical studies have shown that attorneys and litigants who have participated in these procedures give them high approval ratings.

d. *Selection and orientation of magistrate judges.*— [This section ordered the creation, within the court of a Task Force of Magistrate Selection and Orientation, as proposed by the Advisory Group.]

3. *Disposition of the Plan*

a) Pending further action by the court, this plan will be in effect until [three years from date of adoption]. The court may revise the plan as it sees fit, subject to statutory requirements, and will provide due notice of any such revisions.

b) Pursuant to 28 U.S.C. §§ 472(d) and 474, the court hereby ORDERS that this plan, and the Report of the Civil Justice Reform Advisory Group, be submitted t o
(1) the circuit executive for distribution to the chief judges of this circuit sitting as a committee and submission to the Judicial Council, and (2) to the director of the Administrative Office of the U.S. Courts and, through him as secretary, to the Judicial Conference of the United States for review by the Conference.

Adopted and Implemented By the Court,

_____, 1991

_____

_____

_____

Questions

1. Must the Advisory Group include a plan? The statute directs the group to explain the manner "in which the recommended plan complies with section 473 . . ." 28 U.S.C. § 472(b)(4). But see §472(b)(2).

2. Should an Advisory Group's proposed plan lay out the details of recommended procedures and implementation?

3. How should the Advisory Group address problems of particular judges?

4. How should the Advisory Group respond if judge members of the group propose a substitution like the following:

c. Variations among individual judges in the time between filing and ruling on discovery motions results from the exercise of sound judicial discretion, and accordingly is an improper subject for examination and regulation by the Court as a body.

5. Is this plan responsive to the problems identified in Example 3 of Part III (pp. 13-15)? Are the measures proposed here likely to reduce discovery abuse and litigation costs? If not, what procedures might be better?

The Advisory Group Report to the Court: Recommended Format and Summary of Statutory Requirements

The Civil Justice Reform Act of 1990 requires each district court advisory group to submit to the court a report of its work. This report will be reviewed by several different bodies, and thus the Judicial Conference Committee on Court Administration and Case Management recommends that to the extent possible advisory groups follow the same format in preparing their reports. This will greatly facilitate the work of the courts, the circuit judicial councils and review committees, the Judicial Conference, the Federal Judicial Center, and the Administrative Office. Those who use your reports will be most appreciative.

Recommended Format for Advisory Group Reports

Please consider using the following outline in preparing your report to the court. The examples given are illustrative only. Each advisory group will decide which issues it must address for its district. We hope, however, that the group will address those issues in the basic sequence outlined below, although you may well find that the nature of your analysis requires integrating the treatment of topics designated by arabic numbers as well as those listed under III.

I. Description of the Court
   A. Number and location of divisions; number of district judgeships authorized by 28 U.S.C. § 133; number of magistrate judgeships authorized by the Judicial Conference (use II.A.3 to comment on judicial vacancies and II.B.2 to comment on the consequences of these vacancies for cost and delay)
   B. Special statutory status, if any (e.g., pilot court, early implementation district)

II. Assessment of Conditions in the District
   A. Condition of the Docket
      1. What is the "condition of the civil and criminal dockets" (28 U.S.C. § 472(c)(1)(A))?
      2. What have been the "trends in case filings and in the demands being placed on court resources" (§ 472(c)(1)(B))?
      3. What have been the trends in court resources (e.g., number of judgeships, vacancies)? (Use II.B.2 to comment on the impact of these trends and III.A to make recommendations regarding the need, if any, for additional resources.)
   B. Cost and Delay
      1. Is there excessive cost and delay in civil litigation in this district? What is the supporting evidence for the group's finding?
      2. If there is a problem with cost and delay, what are its "principal causes" (§ 472(c)(1)(C))?

a. How are cost and delay in civil litigation affected by the types of cases filed in the district?
b. What is the impact of court procedures and rules (e.g., case scheduling practices; motions practice; jury utilization; alternative dispute resolution procedures such as arbitration and mediation)?
c. What is the effect of court resources (numbers of judicial officers; method of using magistrates; court facilities; court staff; automation)?
d. How do the practices of litigants and attorneys affect the cost and pace of litigation (e.g., discovery and motion practice; relationships among counsel; role of clients)?
e. To what extent could cost and delay be reduced by a better assessment of the impact of legislation and of actions taken by the executive branch (§ 472(c)(1)(D))?

III. Recommendations and Their Basis

A. State the "recommended measures, rules, and programs" (§ 472(b)(3)), such as recommended local rules, dispute resolution programs, or other measures, and for each explain how it relates to an identified condition and how it would help the court reduce excessive cost and delay.
B. Explain how the "recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys" (§ 472(c)(3)).
C. Explain (as required by § 472(b)(4)) how the recommendations comply with § 473, which requires the court, when formulating its plan, to consider six principles and six techniques for litigation management and cost and delay reduction.
D. Make a recommendation that the court develop a plan or select a model plan and state the basis for that recommendation (§ 472(b)(2)). If the advisory group has drafted a formal plan, please attach it as appendix C. If the recommendations stated under III.A. serve as the recommended plan, please make this clear at III.A.

Appendices

A. Membership of the Advisory Group (e.g., list of members, their affiliation, name of reporter(s) and chair)
B. Operating Procedures (e.g., how group was organized, methods used to collect data on caseload and on causes of cost and delay, copies of forms used for collecting information)
C. Cost and Delay Reduction Plan (if a formal plan is part of the report, please include it here)

Add any other appendices required by the advisory group's analysis and recommendations.

Summary of Statutory Requirements

The Civil Justice Reform Act of 1990 requires the advisory group to submit a report to the court (§ 472). The statute, which requires that the report be made available to the public, specifies the content of the report:

1. The report must assess each of the following (28 U.S.C. § 472(b)(1)):
   a. the condition of the civil and criminal dockets;
   b. trends in case filings and demands on the court's resources;
   c. the principal causes of cost and delay in civil litigation; and
   d. the extent to which cost and delay could be reduced by better assessment of the impact of new legislation.
2. The report must state the basis for its recommendation that the court develop a plan or select a model plan (§ 472(b)(2)).
3. The report must include recommended measures, rules, and programs (§ 472(b)(3)).
4. The report must provide an explanation of the manner in which the recommended plan complies with § 473 (consideration of the principles and techniques of litigation management and cost and delay reduction) (§ 472(b)(4)).

Each district court is required by the statute to implement a "civil justice expense and delay reduction plan" (§ 471). The court may develop its own plan or it may adopt a model plan developed by the Judicial Conference of the United States. In either instance, the chief judge of the district must (§ 472(d)) submit the plan *and the report* prepared by the advisory group to:

1. the director of the Administrative Office of the U.S. Courts;
2. the judicial council of the circuit in which the district is located; and
3. the chief judge of each district court in the circuit.

The district court's plan and the advisory group's report will then be reviewed by the following two bodies:

1. a committee made up of each district chief judge in the circuit and the chief judge of the court of appeals for that circuit, who may suggest that additional actions be taken to reduce cost and delay in civil litigation (§ 474(a)(1)); and
2. the Judicial Conference, which may request a district court to take additional action if it "has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group" (§ 474(b)).

By December 1, 1994, the Judicial Conference must prepare a comprehensive report on all the plans (§ 479(a)), which is to be submitted to the district courts and to the Committees on

the Judiciary of the Senate and the House of Representatives. The directors of the Federal Judicial Center and the Administrative Office may make recommendations regarding this report to the Judicial Conference.

A special requirement is specified for the Early Implementation Districts (§ 482(c)(3)–(4)). By June 1, 1992, the Judicial Conference must prepare a report on the plans developed by these courts. This report, along with the plans developed by the courts and the reports prepared by the advisory groups, must be transmitted by the Administrative Office to the district courts and the Committees on the Judiciary of the Senate and the House of Representatives.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: July 5, 1991

FROM: William R. Burchill, Jr., General Counsel

SUBJECT: Impact of the Civil Justice Reform Act on the Federal Rules of Civil Procedure and Arbitration Statutes

TO: Abel J. Mattos, Court Administration Division-CPB

This is in response to your request for our views as to whether the Civil Justice Reform Act (CJRA), Pub. L. No. 101-650, as a general matter authorizes rules or procedures that are inconsistent with the Federal Rules of Civil Procedure and, if not, whether the CJRA specifically provides for deviations from any of the civil rules. You have also asked whether the CJRA would allow use of arbitration in courts not otherwise authorized by statute to conduct arbitration. It is my view that the CJRA must be read in pari materia with both the civil rules and the arbitration statutes, 28 U.S.C. § 651 et seq., giving meaning to both. Where the CJRA does not provide for additional or different procedures than available under the civil rules or arbitration statutes, those statutes control and Fed. R. Civ. P. 83 would prohibit development of local rules inconsistent with the civil rules. However, in those few instances where the CJRA expressly provides for expansion of the civil rules, mainly as regards discovery, and clarifies the authority to hold summary jury trials as a type of alternative dispute resolution (ADR), the CJRA, as the later specific statute, would control.

In response to questions concerning the constitutional authority to enact rules for the Federal courts, the legislative history to the CJRA has a lengthy discussion of Congress' broad power to make both procedural and substantive rules, advancing the argument that the Supreme Court's authority to enact rules of procedure is solely that delegated by Congress under the Rules Enabling Act. Senate Report No. 101-416, 101st Cong., 2nd Sess. 8-12 (Aug. 3, 1990). While Congress broadly asserted the right to make rules, neither the plain language of the CJRA nor the legislative history supports an argument that Congress intended to allow a wholesale revision to the civil rules or encouraged development of local rules across the board that are inconsistent with the Federal Rules of Civil Procedure. By contrast, there are several instances in which the CJRA explicitly, but narrowly, expands and clarifies the civil rules. While it is an important purpose of this Act to encourage creativity and innovation, it appears to me that Congress intended such approaches to be consistent with the civil rules unless it expressly said otherwise.

As you note in your memorandum, section 473 of the CJRA authorizes procedures that go beyond those provided for in the civil rules. Section 473(a)(2)(C) gives the court additional control on the timing and extent of discovery. The section-by-section analysis in the Senate Report[1] explains:

> The authority in this subsection is intended to supplement the authority to limit discovery currently provided for in the Federal Rules of Civil Procedure, principally in Rule 26(b)(1). The 1983 amendments to this rule were clearly a step in the right direction in the effort to control discovery. But the problems of excessive and abusive discovery remain substantial, and additional measures are necessary. . . .
>
> As a result, subsection (a)(2)(C) gives judges and magistrates the additional authority to control discovery. The tools they might use include phasing discovery into several stages and phasing the use of interrogatories. With this clear statutory mandate, it is hoped that judges and magistrates will no longer be unsure about the degree to which they can act to reduce discovery expenses.

(Emphasis added.) Id. at 55.

Similarly, section 473(a)(3)(C) provides authority to set presumptive time limits for discovery, especially in complex cases. Again the section-by-section analysis states that this is an intentional addition to the civil rules. "The Federal Rules establish consistent and uniform time limits for several procedures (see, e.g., rule 6 (time limit for amending the pleadings); rule 56 (time limit for summary judgment)), and it is appropriate for the district courts to consider additional time limits for discovery." Id. at 56.

Section 473(a)(5) requires that discovery motions be accompanied by a certification that the moving party has made a good-faith effort to reach agreement with opposing counsel. While this is permissible under the civil rules, section 473(a)(5) makes such certification mandatory. The drafters recognized that a majority of district courts already had local rules that required a conference between the parties prior to the filing of discovery motions and found this to be a procedure meriting nationwide compliance. Id. at 57.

---

[1] The section-by-section analysis of House Report No. 101-732, 101st Cong., 2nd Sess. 1-30 (Sept. 1, 1990) is almost identical to the Senate Report.

Finally, section 473(b)(3) adds a provision that the court plan may require that all requests for extensions of deadlines for completion of discovery or trial be signed by the attorney and the party making the request. According to the Senate Report, this provision is intended to supplement the existing requirements of Rule 11. Id. at 58.

Each of these provisions is a clear statement of Congress' intention to provide the courts with additional tools to control expenses and delays in civil litigation, particularly as it involves discovery. Given the plain language of the Act and the equally clear explanation of that language in both the Senate and House Reports, there can be no doubt that the Act expands the civil rules in these discrete areas. Correspondingly, in areas other than these, I see no authority for development of local rules that are inconsistent with the Federal Rules of Civil Procedure.

Having said all this, you should know that the Advisory Committee on Civil Rules has recommended to the Standing Committee on Rules that Rule 83 be amended to provide for experimental local rules that are inconsistent with the civil rules if they are not inconsistent with the provisions of title 28 of the United States Code (copy of amended Rule 83 attached). The proposed Advisory Committee note to this amendment states that the purpose of the amendment is to enable experimentation, particularly in light of the CJRA, and to ensure that the rules not "be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity." Such experimental local rules would require the approval of the judicial council, be effective for five years or less, and be accompanied by a plan for evaluation of the experiment. If the Advisory Committee on Civil Rules believed that the CJRA generally allowed for development of rules that are inconsistent with the civil rules, I do not think they would have bothered to suggest this amendment on limited experimental rules.

The question of whether the CJRA allows for arbitration in courts other than those authorized to use arbitration in 28 U.S.C. § 658 can also be answered by a review of the language of the CJRA and consideration of the legislative history. The CJRA provides at section 473(a)(6) that courts have:

> authorization to refer appropriate cases to alternative dispute resolution programs that--
>
> (A) have been designated for use in a district court; or
>
> (B) the court may make available, including mediation, mini-trial, and summary jury trial.

S. 2027, the precursor to the current Act, had a broader provision on ADR requiring at section 471(b)(10) that each plan have:

> a comprehensive program providing for adjudication and, in appropriate cases, alternative dispute resolution, which make available to the parties and their counsel the full range of alternative dispute resolution mechanisms, including mediation, arbitration, mini-trial, and summary jury trial. If such program includes the mandatory reference of certain cases to an alternative dispute resolution mechanism, provision shall be made for motions to exempt a case from the mandated procedure.

While the ADR provisions of S. 2027 clearly expanded the availability of arbitration nationwide, the provision finally enacted in section 473 of the CJRA omits arbitration from the list of available ADR techniques and further limits, in 473(a)(6)(A), ADR programs to courts that have been designated for such programs. This appears to be a reference to the designations of arbitration programs in 28 U.S.C. § 658. Thus, in my view, the CJRA should be read as not expanding arbitration beyond that already statutorily provided.[2]

Interestingly, while the Senate Report does not specifically mention arbitration, the section-by-section analysis to section 473(a)(6) does discuss the availability of summary jury trials, making clear that there is authority for such an approach. "Some doubt has been raised as to whether the summary jury trial is an authorized procedure permissible in the Federal courts. . . . While the authority for a summary jury trial does appear to lie in Rule 1 and Rule 16 of the Federal Rules of Civil Procedure and in the court's 'inherent power to manage and control its docket,' . . . subsection (a)(6) eliminates any doubt that might exist in some courts." Id. at 57. If the drafters were concerned enough to resolve issues about the availability of summary jury trials, one would expect them to have at least made mention of the fact if they intended expansion of the authority to conduct arbitration.

I hope this answers your question. Please contact me if I can be of further assistance in this matter.

Attachment

---

[2] While I generally eschew such maxims, this seems too clear an example of "expressio unius est exclusio alterius" to avoid saying so.

Rule 83. Rules by District Courts; *Standing Orders*

(a) Local Rules. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent~~ consistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(b) Experimental Rules. With the approval of the judicial council of the circuit in which the district is located, a district court may adopt an experimental local rule inconsistent with these rules if it is not inconsistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less.

(c) Standing Orders. In all cases not provided for by rule, the district judges and magistrates *judges* may regulate their practice *by standing order* in any manner ~~not~~ inconsistent with these rules ~~or~~ *and with* those of the district in which they act.

(d) Enforcement. Rules and standing orders promulgated pursuant to this rule shall be enforced in a manner that protects all parties against forfeiture of substantial rights as a result of negligent failures to comply with a requirement of form imposed by such a local rule or standing order.

COMMITTEE NOTES

PURPOSE OF REVISION. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and these rules. At various places within these rules (e.g., Rule

16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar authorization in other rules should not be viewed as by precluding by implication the adoption of a local rule subject to the constraints of this Rule 83.

SUBDIVISION (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071.

SUBDIVISION (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with these rules should be permitted only with approval of the judicial council for the circuit in which the court is located, and then only for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment.

SUBDIVISION (c). This revision of the existing text is technical, incorporating the term now in common use to describe orders regulating practice before particular judicial officers and conforming the language to that contained in 28 U.S.C. § 2071.

SUBDIVISION (d). This provision is new. Its aim is to protect parties against loss of substantive rights in the enforcement of local rules and standing orders against litigants who may be unfamiliar with their provisions.

The bulk of local rules and standing orders is now quite substantial. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by the elaboration of local rules enforced so rigorously that attorneys might be reluctant to hazard an appearance or clients reluctant to proceed without local counsel fully familiar with the intricacies of local practice. *Cf. Kinder v. Carson*, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local rules poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the substantive rights of the parties.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

January 21, 1992

L. RALPH MECHAM
Secretary

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES COURTS OF APPEALS
CHIEF JUDGES, UNITED STATES DISTRICT COURTS

SUBJECT: Circuit Committee Reviews Under the Civil Justice Reform Act

I am writing with regard to certain review requirements of the Civil Justice Reform Act of 1990. The Act requires, in § 474, two separate reviews of the advisory group reports and court plans. One review is to be conducted by a committee composed of the chief judges of each district court in a circuit and the chief judge of the circuit (or those chief judges' designees). The other review is to be conducted by the Judicial Conference.

The statute does not specify the timetable, procedures, or standards for these reviews. The Court Administration and Case Management Committee, which I chair, has been delegated oversight of the implementation of the Civil Justice Reform Act and decided at its meeting on December 9, 1991, to prepare a set of guidelines on these matters. Enclosed is a manual containing these guidelines.

Over the next two years all district court plans and reports must be reviewed, but the immediate task is to review the documents from the courts seeking Conference designation as "early implementation districts" (i.e., districts that implement their plans by 1/1/92). For two reasons, there is some urgency regarding this task. First, the Committee wishes to designate the early implementation districts promptly. Second, the statute requires the Judicial Conference to report to Congress by June 1, 1992, on the experience of the early implementation districts. Therefore, the Committee has adopted the following timetable for the circuit committee and Judicial Conference reviews:

- circuit committee review completed March 31, 1992
- Judicial Conference review completed April 30, 1992

The Court Administration and Case Management Committee asks that each circuit committee organize itself for its review process and call on staff assistance from within the circuit. Because the statute requires each district to send a copy of its report and plan to the district chief judges and the judicial council within the circuit, the circuit committee members should each receive copies of the documents they are to review.

If you have any questions regarding the CJRA review process, I suggest you contact Donna Stienstra at the Federal Judicial Center (FTS/202 633-6341) or Abel Mattos at the Administrative Office (FTS/202 633-6221). Of course, I would also be happy to speak with you.

Robert M. Parker

GUIDELINES FOR REVIEW OF CJRA ADVISORY GROUP REPORTS AND COURT PLANS

Prepared for the Circuit Review Committees

and

Recommended by the Judicial Conference Committee on Court Administration and Case Management

January 1992

Contents

Prepared by Donna Stienstra, Federal Judicial Center

GUIDELINES FOR REVIEW OF CJRA ADVISORY GROUP REPORTS AND COURT PLANS

I. PURPOSE OF THIS MANUAL

This manual provides a timetable and guidelines for review of the cost and delay reduction plans and reports adopted under the Civil Justice Reform Act of 1990. It has been prepared for use by the circuit review committees mandated by the Act. The guidelines set forth in the manual are recommended by the Court Administration and Case Management Committee of the Judicial Conference of the United States, under authority delegated by the Executive Committee of the Judicial Conference.

The guidelines in this manual are derived from statutory requirements but are not themselves specifically mandated by the Act, which does not provide timetables, procedures, or specific standards for review. However, at its meeting in December 1991, the Committee decided to develop a set of guidelines for the review process in the belief that they will ease the task of the review committees and that the reviewing bodies, the courts, and Congress will benefit from application of basic guidelines for review.

The manual includes the following items:

- a brief statement of the statutory requirements relevant to the review process;
- a recommended timetable and procedure for conducting the review;
- recommended guidelines for reviewing the advisory group reports and court plans; and
- a recommended reporting form.

If you have any questions about the use of this manual, please contact Donna Stienstra at the Federal Judicial Center (phone: FTS/202 633-6341; FAX: FTS/202 633-6335) or Abel Mattos at the Administrative Office (phone: FTS/202 633-6221; FAX: FTS/202 786-6561).

Please Note: Because of a special statutory provision, described below, it is important that the circuit committees act by March 30, 1992, to review the reports and plans of the early implementation districts (see II.D and III.B).

II. THE REQUIREMENTS OF THE ACT

II.A. Advisory Group Report and Court Plan.

The Civil Justice Reform Act, at 28 U.S.C. § 471, requires each federal district court to adopt an expense and delay reduction plan (see Appendix 1 for a copy of the Act). Except as noted below in II.D., each court must adopt a plan by December 1, 1993 (Sec. 103(b), Pub. L. 101-650). The plan is to be adopted after consideration of recommendations made by an advisory group that is representative of litigants in the district (28 U.S.C. §§ 472(a), 478(b)).

II.B. Review of the Report and Plan.

The Act requires two reviews of the advisory group reports and court plans, one by a committee composed of the chief judges of each district court in the circuit and the chief judge of the appellate court of that circuit (or the chief judges' designees), the other conducted by the Judicial Conference (28 U.S.C. § 474). Courts may implement their plans before review by the circuit committee or Judicial Conference.

II.C. Actions to be Taken After the Review.

After completing its review, the circuit committee may "make ... suggestions" (28 U.S.C. § 474(a)(1)(B)) for such additional actions or modified actions as it believes appropriate for reducing expense and delay in a district. The Judicial Conference may "request" (28 U.S.C. § 474(b)(2)) a district court to take additional action if the Conference determines that the court has not adequately responded to the conditions relevant to the civil or criminal dockets or to the recommendations of the advisory group.

II.D. Special Requirements Regarding Pilot Courts and Early Implementation Districts.

The statute requires ten district courts, selected by the Judicial Conference, to implement expense and delay reduction plans by December 31, 1991 (Sec. 105, Pub. L. 101-650) and encourages all other courts to implement plans by this date and thus become eligible for designation as "early implementation district courts" and for additional resources to implement the plan (Sec. 103(c), Pub. L. 101-650). Because the statute requires the Judicial Conference to report to Congress by June 1, 1992, on the plans adopted by the early implementation districts (Sec. 103(c)(3), Pub. L. 101-650), the guidelines set out below provide a special timetable for review of these districts' reports and plans (see III.B). Also, because the Judicial Conference adopted a formal definition of

"implementation" and because the statute imposes additional requirements on the pilot courts, the recommended standards for review differ somewhat for the early implementation districts and the pilot courts (see IV.B).

III. Recommended Timetable and Procedures for Review

III.A. Timing of the Review.

The Committee believes the reviews it conducts on behalf of the Conference will benefit from the circuit committees' reviews and therefore recommends a sequential review process. To provide each court prompt review of its plan, the Committee asks that each circuit committee complete its review of each report and plan within three months of the circuit committee's receipt of the district's plan. The Committee will complete its review on behalf of the Conference within one month of receipt of the circuit committee's review. This recommended timetable is summarized below:

• circuit committee review	completed within three months of receipt of court plan
• Court Administration and Case Management Committee review	completed within one month of receipt of circuit committee's review

III.B. Special Timetable for Early Implementation Districts.

Because the Judicial Conference must prepare a report to Congress on the plans of the early implementation districts, the review timetable for these districts is linked to the June 1, 1992, deadline for that report. The Committee asks that the circuit committees complete their review of each early implementation district's report and plan by March 30 (see Appendix 2 for a list of the districts intending to be early implementation districts). The Committee will complete its reviews by April 30. Because the Committee will have to review approximately 35 plans in a short time span, each circuit committee should send its reviews to the Committee as they are completed, rather than waiting until March 31 to submit all the reviews from that circuit.

The table below summarizes the timetable for review of the early implementation districts' reports and plans:

• circuit committee review	completed by March 31, 1992
• Court Administration and Case Management Committee review	completed by April 30, 1992

III.C. Providing a Written Review to the Courts and the Court Administration and Case Management Committee.

The circuit committee should provide its review to the court in written form, including in the review any suggestions in response to the provisions of 28 U.S.C. § 474(a)(1)(B). The circuit committee should also send a copy of its review to the Court Administration and Case Management Committee at the following address:

Committee on Court Administration and Case Management
% Robert Lowney
Administrative Office of the U.S. Courts
Mail Code OCP-CAD
Washington, DC 20544

Upon completion of its review, the Committee will send the district court a written review, along with any requests pursuant to 28 U.S.C. § 474(b)(2).

The Committee recommends use of the reporting form included at Appendix 3, which provides both a standardized report format as well as opportunity for written comments. Use of this form will greatly assist those, including other courts and the Committee, who subsequently consult the circuit committees' reviews.

III.D. Organizing the Review Process Within the Circuit.

The Committee asks each circuit committee to organize itself for its review process and to call on staff assistance from within the circuit. Because the statute requires each district to send a copy of its report and plan to the district chief judges and the judicial council within the circuit, each circuit committee member should already have received copies of the documents they are to review.

IV. GUIDELINES FOR REVIEW

IV.A. The Basis for the Committee's Recommended Guidelines for Review.

The Court Administration and Case Management Committee has developed guidelines for review of both the advisory group reports and court plans. Although some have questioned the necessity of reviewing the advisory group reports, the Committee decided for two reasons to provide guidelines for review of these reports. First, the statute plainly calls for such a review (28 U.S.C. §§ 474(a)(1)(A), (b)(1)). Second, the plan-making process depends in part on the adequacy of the advisory group report. The plan may not, for example, include adequate cost and delay reduction provisions because the advisory group report did not identify them, or the plan may not respond adequately to docket conditions because the report did not properly analyze them.

Because the Act provides no explicit review guidelines, the Committee looked to the Act's implicit guidelines. Regarding the courts' plans, the statute directs the circuit committees to "make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation" (28 U.S.C. § 474(a)(1)(B)). The directive suggests that the circuit committees assess whether a court's plan includes sufficient and appropriate actions, if such are necessary, for reducing cost and delay.

Guidelines for reviewing the advisory groups' reports - and additional guidelines for reviewing the courts' plans - can be found in other sections of the statute. Section 472 states with some specificity the matters to be addressed in the advisory group report. Likewise, 28 U.S.C. § 473 sets out the contents of the court plan. These requirements form the basis for the review guidelines recommended by the Committee.

In addition to the review guidelines implied by the statute's requirements, the Committee has included in its recommended guidelines several questions it believes may be helpful to the circuit committees in assessing whether the reports and plans achieve the goals of the Act. The Committee invites the circuit committees to address these questions.

The guidelines for review are presented at IV.D.

IV.B. Special Review Guidelines for Early Implementation Districts and Pilot Courts.

The Early Implementation Districts. The ten pilot courts selected by the Judicial Conference pursuant to Sec. 105 are required by statute to implement their plans by December 31, 1991. Any other district may elect to implement a plan by that date (Sec. 103(c), Pub. L. 101-650). The Judicial Conference adopted a formal definition of the term "implementation," which was sent to all courts on September 5, 1991 (see page 2 of the memorandum in Appendix 4) and has been incorporated into the guidelines for review presented below.

The Judicial Conference's definition does not require the pilot courts and early implementation districts to have all components of their plans in place by December 31, 1991. However, the definition does require each court's plan to contain a schedule for effectuating the plan that shows a "good faith effort" to make it "fully operational as promptly as feasible." The Judicial Conference statement indicates that circuit committee and Judicial Conference review are not required before implementation. The circuit committees may expect the plans of these courts to reflect a variety of stages of program implementation.

The Judicial Conference will designate as early implementation districts the courts that have met the requirements of the statute. To the Committee's knowledge, 25 courts have indicated their intention to be early implementation districts. These courts, along with the ten pilot courts, are listed at Appendix 2.

The Pilot Courts. In addition to the requirements above, Sec. 105(b) Pub. L. 101-650 states that the plans of the ten pilot courts "shall include the 6 principles and guidelines of litigation management and cost and delay reduction" set out in 28 U.S.C. § 473(a). These litigation management principles and guidelines are included in the standards for review given below. As noted above, however, these plans do not have to be fully operational on January 1, 1992, provided the court's plan includes a schedule showing a good faith effort to have the plan operational as soon as possible.

IV.C. Special Note Concerning the Demonstration Districts.

Sec. 104(b), Pub. L. 101-650, designates five courts as demonstration districts. Two are to experiment with differentiated case tracking. Three others are to experiment with such litigation management programs as they and the Judicial Conference select. At

this time the Conference, through the Court Administration and Case Management Committee, has concurred in the demonstration programs selected by Missouri Western and West Virginia Northern. The Committee expects to adopt the California Northern program shortly.

All five demonstration districts have indicated their intention to be early implementation districts. To receive that designation, those courts, like any others, must comply with the requirements of the statute and conform to the Judicial Conference definition of "implementation." Most of the demonstration districts intend to implement their demonstration programs in early 1992.

IV.D. The Guidelines for Review and How to Use Them.

The review guidelines ask for a simple assessment of whether each advisory group, in preparing its report, and each court, in developing and adopting its plan, carried out the tasks assigned by the statute. Thus, the guidelines comprise a minimum set of standards for evaluating the reports and plans. A circuit committee may wish to go beyond such a basic assessment in reviewing the reports and plans. If so, the Committee requests that the circuit committee indicate in its review any other standards relied on, so the courts reviewed by that committee and the Court Administration and Case Management Committee may understand on what basis the circuit committee reached its conclusions.

The review guidelines are presented as a set of questions. Those derived from the statute's requirements should be answered with a yes. If the answer to any question about a *court's plan* is not yes, the circuit committee should consider what suggestion to make to the court regarding revision of its plan (28 U.S.C. § 474(a)(1)(B)). If the answer to any question about the *advisory group's report* is not yes, the circuit committee may wish to keep this in mind when reviewing the court's plan. The circuit committee may also wish to make suggestions to the advisory group regarding its continuing responsibility to serve in an advisory capacity to the district court (28 U.S.C. § 475).

The guidelines below also present the additional questions suggested by the Court Administration and Case Management Committee. These questions are listed after those derived from the statute's requirements. Some of these questions may be answered with a yes or no, while others ask for a more substantive response. The answers to these questions may prompt the circuit committees to make additional suggestions to the court

or advisory group. The answers will also substantially assist the Judicial Conference in its review of the implementation of the plans.

The review guidelines are listed on the next four pages and have also been compiled into the reporting form at Appendix 3. This form, although not mandatory, will provide a uniform format that will greatly assist those who use the reviews for other CJRA-related efforts.

GUIDELINES FOR REVIEW OF DISTRICT COURT CJRA REPORTS AND PLANS

CIRCUIT REVIEW COMMITTEES

NOTE: These same guidelines are used in the form at Appendix 3.

I. Guidelines for Review of the Advisory Group's Report

Please answer each of the questions listed below. For each question, please answer yes, no, or not clear. It would be helpful if the circuit committee could provide the report's page or section number on which each answer is based. If the circuit committee finds it appropriate or necessary, it may provide a page or section citation when answering no or unclear, as well as when answering yes. Please provide additional written comment as necessary.

1. Does the advisory group report include, as required by 28 U.S.C. §§ 472(b)(1) and (c)(1), each of the following?

   1.a. a determination of the condition of the civil and criminal dockets

   1.b. identification of trends in case filings and in demands on court resources

   1.c. identification of the principal causes of cost and delay, including both court procedures and the way in which litigants and attorneys conduct litigation

   1.d. an examination of the extent to which costs and delays could be reduced by better assessment of the impact of new legislation

2. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(2), the basis for its recommendation that the court develop its own plan or select a model plan?

3. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(3), recommended measures, rules, and programs?

4. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(4), an explanation of the manner in which the advisory group's recommended plan, or its recommendations in whatever other form, complies with the requirements of 28 U.S.C. § 473?

5. In developing its recommendations, did the advisory group take into account, as required by 28 U.S.C. § 472(c)(2), the particular needs and circumstances of the district court, the litigants, and the litigants' attorneys?

Continued on next page

6. Do the recommendations of the advisory group ensure, in accordance with 28 U.S.C. § 472(c)(3), that significant contributions will be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay?

The Committee asks the circuit committees to consider the following additional question regarding the advisory group report.

7. Does the advisory group report adequately recognize and address any special conditions in the district, such as those listed below?

   7.a. disparate civil or criminal caseloads or filings among places of holding court in the district

   7.b. the necessity of travel over substantial distances by litigants and attorneys

   7.c. judicial vacancies or inadequate judicial power

   7.d. the impact of a high volume of complex cases, repetitive mass tort cases, or prisoner civil rights cases

   7.e. procedures, rules, or programs that meet the requirements of 28 U.S.C. § 473 and pre-dated the effective date of the Act

II. Guidelines for Review of the Court's Plan

Please answer each of the questions listed below. For questions 1-7, please answer yes, no, or not clear. Questions 8-11 require a more substantive response. It would be helpful if the circuit committee could provide the plan's page or section number on which each answer is based. If the committee finds it appropriate or necessary, it may provide a page or section citation when answering no or unclear, as well as when answering yes. Please provide additional written comment as necessary.

1. Has the court, in accordance with 28 U.S.C. § 471, implemented a cost and delay reduction plan?

2. Does the plan meet its statutory purpose, stated in 28 U.S.C. § 471, which is to "facilitate [the court's] deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes"?

3. Was the plan developed, as required by 28 U.S.C. § 472(a), after consideration of the recommendations of the court's CJRA advisory group? Note that "consideration of" does not necessarily mean "acceptance of."

Continued on next page

4. Does the plan reflect that the court, in consultation with its advisory group, considered the following six principles and guidelines of litigation management and cost and delay reduction set out in 28 U.S.C. § 473(a)?

   4.a. systematic, differential treatment of civil cases

   4.b. early and ongoing judicial control of the pretrial process, including case planning, early and firm trial dates, control of discovery, and deadlines for motions

   4.c. discovery/case management conference(s) for complex or other appropriate cases, at which the judicial officer and the parties explore the possibility of settlement; identify the principal issues in contention; provide, if appropriate, for staged resolution of the case; prepare a discovery plan and schedule; and set deadlines for motions

   4.d. encouragement of voluntary exchange of information among litigants and other cooperative discovery devices

   4.e. prohibition on discovery motions unless accompanied by certification by the moving party that a good-faith effort was made to reach agreement with opposing counsel

   4.f. authorization to refer appropriate cases to alternative dispute resolution programs

5. Does the plan reflect that the court, in consultation with its advisory group, considered the following litigation management and cost and delay reduction techniques set out in 28 U.S.C. § 473(b)?

   5.a. a requirement that counsel for each party present a joint discovery/case management plan at the initial pretrial conference

   5.b. a requirement that each party be represented at each pretrial conference by an attorney with authority to bind that party to all matters previously identified by the court for discussion at the conference

   5.c. a requirement that all requests for extension of discovery deadlines or for postponement of trial be signed by the attorney and party

   5.d. a neutral evaluation program for presentation of the legal and factual basis of a case to a neutral court representative at an early nonbinding conference

   5.e. a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during settlement conferences

   5.f. such other features as the district court thinks appropriate after considering the advisory group's recommendations

Continued on next page

6. Does the plan indicate, as required by 28 U.S.C. § 474, that the court has a plan for taking such action as is necessary to reduce cost and delay in civil litigation?

7. **Special requirements for pilot courts and early implementation districts:**

   7.a. If the court is one of the ten pilot courts, its plan must include the six principles and guidelines of litigation management required by 28 U.S.C. § 473(a) and listed under point 4 of these standards. Does it include these six principles and guidelines?

   7.b. If the court is a pilot court or is seeking designation as an early implementation district, its plan must have complied with the following Judicial Conference requirements by December 31, 1991 (see Judicial Conference memorandum of September 5, 1991, at Appendix 5 of this manual).

      7.b.1. Has an advisory group report been filed, as required by 28 U.S.C. § 472(b)?

      7.b.2. Has the court reviewed the advisory group report and adopted an expense and delay reduction plan, as required by Sec. 103(c)(1), Pub. L. 101-650?

      7.b.3. Does the plan contain a schedule for effectuating the various components of the plan that evidences a good-faith effort to make the plan fully operational as promptly as feasible?

The Committee suggests that the following additional questions may be helpful to the circuit committees in determining whether implementation of the plan under review is likely to achieve the goals of the Civil Justice Reform Act.

8. Does the plan require the court (judges, magistrate judges, and/or staff) to make significant contributions to reducing cost and delay in civil litigation? If yes, what significant contributions are required?

9. Does the plan require litigants to make significant contributions to reducing cost and delay in civil litigation? If yes, what significant contributions are required?

10. Does the plan require attorneys to make significant contributions to reducing cost and delay in civil litigation? If yes, what significant contributions are required? Please describe the contributions required of the various categories of attorneys, such as those who practice in the district and those from outside the district; in-house counsel and outside counsel; hourly fee and contingent fee attorneys, attorneys whose fees are set by statute or the fact finder, and attorneys paid on some other basis.

11. Are the principal components of litigation costs - such as attorneys' fees incurred during discovery, during motion practice, and for trial time; expert witness expenses; travel time; court reporting; and video expense - likely to be reduced under the court's plan?

APPENDIX 3

Recommended Report Form

Recommended for Use by the Circuit Committees for
Review of the CJRA Reports and Plans

Court Administration and Case Management Committee
of the Judicial Conference of the United States

January 1992

REPORT FORM

CIRCUIT COMMITTEE REVIEW OF CJRA REPORTS AND PLANS

This form is for use by the circuit review committees established by the Civil Justice Reform Act of 1990. Please use this form to review the advisory group report and court plan adopted pursuant to 28 U.S.C. §§ 471-473. Please use one form for each district court. If you have any questions about the use of this form, call Donna Stienstra at the Federal Judicial Center (FTS/202 633-6341) or Abel Mattos at the Administrative Office (FTS/202 633-6341). Upon completion, please send this form to:

The district court under review

and

Committee on Court Administration and Case Management
% Robert Lowney
Administrative Office of the U.S. Courts
Mail Code OCP-CAD
Washington, DC 20544

Name of district court being reviewed: _____

Date of this review: _____

Circuit committee contact person:

Name: _____

Address: _____

_____

Telephone: _____

Review of the Advisory Group's Report

After examination of the advisory group report prepared pursuant to 28 U.S.C. § 472, please answer the questions below. For each question, answer either yes, no, or not clear. It would be helpful if the circuit committee could provide the report's page or section number on which each answer is based. If the committee finds it appropriate or necessary, it may provide a page or section citation when answering no or unclear, as well as when answering yes.

If you wish, please provide written comments on additional sheets of paper and attach them to this form. Please key the written comments to the relevant question numbers.

1. Does the advisory group report include, as required by 28 U.S.C. §§ 472(b)(1) and (c)(1), each of the following items?

	Yes	No	Not Clear	Page or Section
1.a. a determination of the condition of the civil and criminal dockets	1	2	3	_____
1.b. identification of trends in case filings and demands on court resources	1	2	3	_____
1.c. identification of the causes of cost and delay due to court procedures	1	2	3	_____
1.d. identification of the causes of cost and delay due to the way litigants and their attorneys conduct litigation	1	2	3	_____
1.e. examination of the extent to which cost and delay could be reduced by better assessment of the impact of legislation	1	2	3	_____

2. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(2), the basis for its recommendation that the court develop its own plan or select a model plan?

1 Yes
2 No
3 Not clear

Page or Section _____

3. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(3), recommended measures, rules, and programs?

1 Yes
2 No
3 Not clear

Page or Section _____

4. Does the advisory group report include, as required by 28 U.S.C. § 472(b)(4), an explanation of the manner in which the advisory group's recommended plan, or its recommendations in whatever other form, complies with the requirements of 28 U.S.C. § 473?

1 Yes
2 No
3 Not clear

Page or Section _____

5. In developing its recommendations, did the advisory group take into account, as required by 28 U.S.C. § 472(c)(2), the particular needs and circumstances of each of the following?

	Yes	No	Not Clear	Page or Section
5.a. the district court	1	2	3	_____
5.b. the litigants	1	2	3	_____
5.c. the litigants' attorneys	1	2	3	_____

6. Do the recommendations of the advisory group ensure, in accordance with 28 U.S.C. § 472(c)(3), that significant contributions will be made by each of the following?

	Yes	No	Not Clear	Page or Section
6.a. the district court	1	2	3	_____
6.b. the litigants	1	2	3	_____
6.c. the litigants' attorneys	1	2	3	_____

The Committee asks the circuit committees to consider the following additional question regarding the advisory group report.

7. Does the advisory group report adequately recognize and address any special conditions in the district, such as those listed below?

	Yes	No	Not Clear	Page or Section
7.a. disparate civil or criminal caseloads or filings among places of holding court in the district	1	2	3	_____
7.b. the necessity of travel over substantial distances by litigants and attorneys	1	2	3	_____
7.c. judicial vacancies or inadequate judicial power	1	2	3	_____
7.d. the impact of a high volume of complex cases, repetitive mass tort cases, or prisoner civil rights cases	1	2	3	_____
7.e. procedures, rules, or programs that meet the requirements of 28 U.S.C. § 473 and pre-dated the effective date of the Act	1	2	3	_____

8. If you have any other comments about the advisory group report, please write them on a separate sheet of paper and attach it to this form.

Review of the Court's Plan

After examination of the court's expense and delay reduction plan prepared pursuant to 28 U.S.C. §§ 472-473, please answer the questions below. For questions 9-15, answer either yes, no, or not clear. Questions 16-19 require a more substantive response. It would be helpful if the circuit committee could provide the plan's page or section number on which each answer is based. If the committee finds it appropriate or necessary, it may provide a page or section citation when answering no or unclear, as well as when answering yes.

If you wish, please provide written comments on additional sheets of paper and attach them to this form. Please key the written comments to the relevant question numbers.

9. Has the court, in accordance with 28 U.S.C. § 471, implemented a cost and delay reduction plan?

   1 Yes
   2 No
   3 Not clear

   Page or Section _____

10. Does the plan meet its statutory purpose, stated in 28 U.S.C. § 471, which is to "facilitate [the court's] deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes"?

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

11. Was the plan developed, as required by 28 U.S.C. § 472(a), after consideration of the recommendations of the court's CJRA advisory group? Note that "consideration of" does not necessarily mean "acceptance of."

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

12. Does the plan reflect that the court, in consultation with its advisory group, considered the six principles and guidelines of litigation management and cost and delay reduction set out in 28 U.S.C. § 473(a) and listed below?

If the court is a pilot court, does the plan reflect that the court, as required by Sec. 105(b), Pub. L. 101-650, included the six principles and guidelines of litigation management and cost and delay reduction set out in 28 U.S.C. 473(a) and listed below?

	Yes	No	Not Clear	Page or Section
12.a. systematic, differential treatment of civil cases	1	2	3	_____
12.b. early and ongoing judicial control of the pretrial process, including:				
b.1. case planning	1	2	3	_____
b.2 early and firm trial dates	1	2	3	_____
b.3 control of discovery	1	2	3	_____
b.4 deadlines for motions	1	2	3	_____
12.c. discovery/case management conference(s), at which the judicial officer and the parties explore the possibility of settlement; identify the principal issues in contention; provide, if appropriate, for staged resolution of the case; prepare a discovery plan and schedule; and set deadlines for motions	1	2	3	_____
12.d. encouragement of voluntary exchange of information among litigants and other cooperative discovery devices	1	2	3	_____
12.e. prohibition of discovery motions unless accompanied by certification by the moving party that a good faith effort was made to reach agreement with opposing counsel	1	2	3	_____
12.f. authorization to refer appropriate cases to alternative dispute resolution programs	1	2	3	_____

13. Does the plan reflect that the court, in consultation with its advisory group, considered the following litigation management and cost and delay reduction techniques set out in 28 U.S.C. § 473(b)?

	Yes	No	Not Clear	Page or Section
13.a. a requirement that counsel for each party present a joint discovery/case management plan at the initial pretrial conference	1	2	3	_____
13.b. a requirement that each party be represented at each pretrial conference by an attorney with authority to bind that party to all matters previously identified by the court for discussion at the conference	1	2	3	_____
13.c. a requirement that all requests for extension of discovery deadlines or for postponement of trial by signed by the attorney and party	1	2	3	_____
13.d. a neutral evaluation program for presentation of the legal and factual basis of a case to a neutral court representative at an early nonbinding conference	1	2	3	_____
13.e. a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during settlement conferences	1	2	3	_____
13.f. other features the district court thinks appropriate after considering the advisory group's recommendations	1	2	3	_____

14. Does the plan indicate, as required by 28 U.S.C. § 474, that the court has a plan for taking such action as is necessary to reduce cost and delay in civil litigation?

1 Yes
2 No
3 Not clear

Page or Section _____

15. **If the court is a pilot court or is seeking designation as an early implementation district,** does its plan comply with the following Judicial Conference requirements?

	Yes	No	Not Clear	Page or Section
15.a. An advisory group report was filed by December 31, 1991.	1	2	3	_____
15.b. The court reviewed the advisory group report and adopted an expense and delay reduction plan by December 31, 1991.	1	2	3	_____
15.c. The plan contains a schedule for effectuating the various components of the plan that evidences a good-faith effort to make the plan fully operational as promptly as feasible.	1	2	3	_____

The Court Administration and Case Management Committee suggests that the following four additional questions may be helpful to the circuit committees in determining whether implementation of the plan under review is likely to achieve the goals of the Civil Justice Reform Act.

16. Does the plan require the court (judges, magistrate judges, and/or staff) to make significant contributions to reducing cost and delay in civil litigation?

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

    If yes, what significant contributions are required?

17. Does the plan require litigants to make significant contributions to reducing cost and delay in civil litigation?

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

    If yes, what significant contributions are required?

18. Does the plan require attorneys to make significant contributions to reducing cost and delay in civil litigation?

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

    If yes, what significant contributions are required? Please describe the contributions required of the various categories of attorneys, such as those who practice in the district and those from outside the district; in-house counsel and outside counsel; hourly fee and contingent fee attorneys, attorneys whose fees are set by statute or the fact finder, and attorneys paid on some other basis.

19. Are the principal components of litigation costs - such as attorneys' fees incurred during discovery, during motion practice, and for trial time; expert witness expenses; travel time; court reporting; and video expense - likely to be reduced under the court's plan?

    1 Yes
    2 No
    3 Not clear

    Page or Section _____

20. Has the circuit review committee made suggestions to the court regarding such "additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay" (28 U.S.C. § 474(a)(1)(B))?

    1 Yes
    2 No

    If yes, please attach a copy of the circuit committee's communication to the court.

21. If you have any additional comments about the court's plan, please write them on a separate sheet of paper and attach it to this form.

THANK YOU

DISTRICTS SUBMITTING REPORTS AND PLANS BY 12/31/91 AND THEREBY QUALIFYING FOR CONSIDERATION AS EARLY IMPLEMENTATION DISTRICTS

(includes the ten pilot districts, which were statutorily required to adopt plans by 12/31/92)

First Circuit	Massachusetts
Second Circuit	New York Eastern New York Southern (P)
Third Circuit	Delaware (P) New Jersey Pennsylvania Eastern (P) Virgin Islands
Fourth Circuit	Virginia Eastern West Virginia Northern (D) West Virginia Southern
Fifth Circuit	Texas Eastern Texas Southern (P)
Sixth Circuit	Michigan Western (D) Ohio Northern (D) Tennessee Western (P)
Seventh Circuit	Illinois Southern Indiana Northern Indiana Southern Wisconsin Eastern (P) Wisconsin Western
Eighth Circuit	Arkansas Eastern
Ninth Circuit	Alaska California Eastern California Northern (D) California Southern (P) Idaho Montana Oregon
Tenth Circuit	Kansas Oklahoma Western (P) Utah (P) Wyoming
Eleventh Circuit	Florida Southern Georgia Northern (P)

P Pilot Court
D Demonstration District

How Caseload Statistics Deceive

Prepared by John Shapard, Federal Judicial Center

August 9, 1991

(NOTE: A draft of this paper dated May 2, 1991, contained an error in the parenthetical at the end of the first paragraph on page 3: the word "divided" should have been "multiplied". The only difference between this version and that of May 2 is correction of that error.)

How Caseload Statistics Deceive

Despite the various adages concerning statistics and lies, statistics don't lie. Instead, we often mislead ourselves by misinterpreting statistics. Court caseload statistics present numerous opportunities for this sort of self-deception. Obvious ways of looking at caseload data and obvious nostrums about assessing a court's caseload are sometimes just simply wrong. Their flaws are unappreciated not because they are hard to grasp, but because we are conditioned to think about statistics using apples-and-oranges or dice-throwing examples. Because significant time elapses over the life of many court cases, the better statistical analogy is that of human populations. Failure to appreciate how the lifespans of cases affect caseload statistics causes numerous misunderstandings. The purpose of this paper is to illustrate three closely related misunderstandings about caseload statistics, in the hope that a basic understanding of the problem can help prevent mistakes on the part of the various parties charged under the Civil Justice Reform Act with trying to improve the condition of court dockets .

Here is an example, to illustrate the problem. The standard index of case duration in a district is the median time from filing to disposition for cases disposed of in the most recent year. Suppose that the judges of a district , responding to increases in this median time index, decide to improve the situation by working especially hard to clean up the backlog of older pending cases. The judges begin working overtime trying cases that have been awaiting trial, expediting or dismissing cases that have languished too long in the pretrial process, and generally moving along or moving out all cases that they deem overdue for some such movement. The effort and its results are impressive: annual case dispositions increase, the number of cases pending decreases, and the median time from filing to disposition goes way **up**! The key indicator of the court's "speed" indicates that it has gotten slower than ever. The reason is not hard to see. Exactly as it intended, the court disposed of a lot more old cases last year than it had in previous years. Because the cases terminated last year include an unusually large number of old cases, but only the usual number of young cases, the median age of terminated cases went up. The statistics are not lying. We are deceiving ourselves in thinking that the median age of terminated cases is a reliable indicator of average case duration.

1. Statistics based on terminated cases do not tell us about current caseloads.

The basic flaw in our thinking is this: **terminated cases are not representative of the court's caseload.** The reason can be seen by considering the analogy to human populations. In human populations as well as court caseloads, the life expectancy of newborns or of newly filed cases is not necessarily the same as the average age at death of persons who died last year or of cases disposed of last year. There is a connection, but it is diffused, sometimes greatly, by the passage of time between birth and death or filing and disposition.

Consider a district that has for many years enjoyed a very stable caseload: each year 2000 cases are filed, 2000 cases are terminated, and 2000 cases remain pending at the end of the year. The median time from filing to disposition has long been 8 months. The average[1] time from filing to disposition has long been 12 months, and cases reaching trial

[1] Average is used here to represent the arithmetic average, or mean--the sum of the ages of terminated cases divided by the number of cases. Annual reports from the Administrative Office of the U.S. Courts usually

of cases faster--and if it increases, the court is falling behind. The ratio of pending cases to annual case terminations is a good **estimate** of the true average duration (or life expectancy) of a court's cases (the ratio gives average case duration in years; if multiplied by 12 the result is average case duration in months).

It is useful to understand why the ratio of pending to terminated cases is a good estimate of average case duration. The key point is that there is an absolute, albeit rough arithmetic relationship between pending caseload and average case duration. To see that relationship, consider a very simple example of a court that handles a single type of case, each of which lasts exactly one year. Suppose the court receives exactly one case per month, filed on the first of each month. This court must have exactly 12 cases pending at any time (the case filed on the first of this month and those filed on the first of the preceding 11 months). If instead each case lasts exactly six months, then the court will have exactly six cases pending at any time. Although it is not intuitively obvious, the same relationship exists--and can be mathematically proven--in respect to **average** case duration. Provided that the mix of cases of varying durations remains constant and case filings are continuous (i.e., they are not all filed in January, but are filed in roughly equal numbers throughout the year), the pending caseload will equal average case duration (in years) multiplied by annual case terminations. This point is key to the next and final topic.

3. The "momentum" of court caseloads.

Suppose a court that now has an average case duration of 24 months adopts a plan for expediting case dispositions, with the goal of reducing average case duration to 12 months. What will this require? Consider the relationship explained in the previous section. If average case duration is approximately equal to the ratio of pending cases to annual case terminations, and if average case duration is 2 years, then the pending caseload must include about twice as many cases as are annually terminated. To reduce average duration to 1 year, the pending caseload must be cut in half. To accomplish that in the next year, the court must dispose next year of twice as many cases as it did last year (provided that annual filings do not change). To do it in two years requires that case terminations be maintained for two years at a pace fifty per cent higher than current pace.

Are such accomplishments really possible? Probably not, although the answer depends on how an increased pace of case terminations can be achieved. If it can be done by methods that impose little additional demand on court resources, then it might be possible to halve the pending caseload in a year or two. If instead the necessary methods require a drastic increase in trials or other activities that place major demands on court resources, then the pending caseload cannot be quickly cut in half without a major increase in those resources.

Caseloads have momentum. The pending caseload is a heavy weight, and a court can only be as fast as that weight will allow. To get faster, the court must shed weight. Prescriptions and decisions about dieting will lead to disappointment if they are not based on realistic goals and timetables.