STATEMENT ON THE INTRODUCTION OF THE CIVIL JUSTICE REFORM ACT OF 1990

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UNITED STATES SENATE
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I am introducing today the Civil Justice Reform Act of 1990. I believe that this comprehensive legislation will go a long way toward reducing the escalating costs and excessive delays that characterize so much of the civil litigation conducted today in our nation's federal courts. And if costs and delays are reduced, we will have succeeded in securing for all of our citizens the right to have their civil disputes resolved in a just, speedy and inexpensive manner.

I am pleased to be joined in introducing this legislation by my very good friend and distinguished colleague and the ranking minority member of the Judiciary Committee, Senator Thurmond. I am also pleased that Senator Heflin, the distinguished chairman of the Judiciary Committee's Courts Subcommittee, as well as several other members of the Judiciary Committee, are joining me in its co-sponsorship. I appreciate their support and the time they have already devoted to this important subject.

I am also pleased that Congressmen Brooks and Fish, the Chairman and ranking minority member of the House Judiciary Committee, and Congressmen Kastenmeier and Morehead, the Chairman and ranking minority member of the Courts Subcommittee, are introducing a companion to this bill in the House today. I very much appreciate their interest in and sponsorship of this legislation, and I look forward to working closely with them.—

It is a rare occasion, as my colleagues know, for the chairmen and ranking minority members of the Senate and House Judiciary Committees to join in introducing legislation of this kind. Our joining together attests, in my view, to the severity of the problem of litigation costs and delays, and to the critical need for the reform measures proposed in the Civil Justice Reform Act of 1990.

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Litigation costs and delays may, to some, be a curious subject of legislation. After all, litigation costs and delays are not problems we read about on the front pages of our newspapers; they don't dominate our news shows or television documentaries; they aren't the problems discussed day-in and day-out in the halls and meeting rooms of Congress and our state legislatures. But that doesn't mean that litigation costs and delays aren't real problems in need of real solutions:

- Talk to the elderly woman seeking to recover her life savings in a simple federal diversity case;
- Speak with the young professional seeking damages because she was the victim of sex discrimination by her boss;
- Spend some time with our nation's CEOs and general counsels -- whether they run a Fortune 100 corporation in Manhattan or Chicago, or a small family-owned business in Dover, Delaware;
- Talk to a member of the insurance industry, or, for that matter, talk to a claimant suing an insurance company.

What will all these conversations have in common, Mr. President? If they're like the ones I've had during the past several years, you'll hear one common theme over and over: My case costs too much money and takes too much time to resolve. Or, even worse, you'll hear from some people that they never even got into court in the first place, because they just couldn't afford to bring their case or run the risk if they did bring it that it would drag on for years as costs skyrocketed.

Mr. President, a survey of more than 2,000 Americans in 1987 showed that 71 percent believe that the over-all cost of lawsuits is too high, and that 57 percent believe that the system fails to provide resolution of disputes without delay.

Quite simply, the civil justice system as we know it today is not fulfilling its basic objectives of providing the "just, speedy and inexpensive" resolution of disputes. As Judge Jon Newman has written:

> "Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike."

And as an American Bar Association task force put it: "In a word, the public's perception is that excessive costs and delay render the law and lawyers incapable of performing the basic services for which they exist."

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High litigation costs and excessive court delays, as one litigator has put it, "burden everyone and serve no one" -- rich or poor, individual or corporation, plaintiff or defendant.

When it comes to the poor and middle class of this country, the courthouse door is rapidly being slammed shut. Many simply cannot afford to enter our current system or, if they can enter it, to afford to stay in. Quite simply, the system is operating in such a way that many people have found they are unable to make effective use of the courts to vindicate their legal rights. Meanwhile, many others who are in the system are often compelled by high costs and delays to settle early for less than adequate amounts. Former judge Marvin Frankel put it well when he said: "The colossal problem of paying for lawyers and lawsuits...is, in the last analysis, at the heart of the evil of unequal justice."

A recent survey conducted by Louis Harris and Associates asked more than one thousand everyday participants in the civil justice system -- private litigators representing plaintiffs and defendants, "public interest" litigators, corporate counsel and federal trial judges -- whether the high cost of civil litigation unreasonably impedes access to the courts by the ordinary citizen. Of the total respondents surveyed, strong majorities of each group said "yes" -- use of the system by the ordinary citizen <u>is</u> impeded. Of the corporate general counsels, 67 percent said that access by the ordinary citizen is impeded.

These same respondents were asked whether, considering the legal resources of small and large interests, the civil justice system fairly balances those interests. Again, majorities of every group said that the system gives an unfair advantage to large interests.

The cold, hard fact is that the high price of litigating even simple cases is squeezing middle America out of the civil justice system. Although I'm sure we'll debate certain aspects of this legislation, there can be little disagreement at all about the effect of litigation costs on the average American's ability to afford a legal remedy. There are simply too many cases in which litigation costs are staggering.

The implications to America's future of these questions of access to the courts are obvious. Judge Learned Hand warned us decades ago that "If we are to keep our democracy, there must be one commandment: Thou shall not ration justice."

American businesses also suffer under the heavy weight of high litigation costs. Our businesses spend too much on legal expenses at a time when they are confronted with increasingly intense international competition. Litigation results in lost business opportunities; it leads to the destruction of business relationships; and it requires a substantial investment of executive time -- time and resources that could otherwise be devoted to productive business endeavors. More and more resources are diverted from the essential functions of making better products and delivering quality services at the lowest possible cost. In short, the burden of litigation costs -- not liability or settlement outcomes, but the <u>costs of litigation</u> -- cuts dramatically into the corporate bottom line.

The high cost of litigation is not the only problem that plagues the civil justice system. Delay, too, haunts the system. Indeed, delays throughout the course of litigation not only often inure to the benefit of one side over another, but also increase court backlog, inhibit the full and accurate determination of the facts, interfere with the deliberate and prompt disposition and adjudication of cases, and thereby contribute to high litigation transaction costs.

As one court put it more than a decade ago, delay

> postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of courts, increasing the costs for all litigants, pressuring judges to take shortcuts, interfering with the prompt disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and judicial determination.

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Ten years ago, Justice Lewis F. Powell, Jr. foresaw the problems we are witnessing today. Dissenting from the 1980 amendments to the federal discovery rules promulgated by the Supreme Court, Justice Powell criticized them as "inadequate" and expressed concern that real reform would be delayed for years by what he described as "tinkering" changes. He warned that without substantial change, the rules will "continue to deny justice to those least able to bear the burdens of delay, escalating legal fees and rising court costs."

Justice Powell's words were prophetic. High costs and excessive delay do combine to deny justice. They do combine to forestall the deliberate and prompt adjudication of disputes. And they do combine to ration commodities that a democracy should never ration -- fairness, justice and access to the courts. Justice Powell's conclusion -- that "litigation costs have become intolerable, and they cast a lenthening shadow over the basic fairness of our legal system" -- is one I share.

That is why I began approximately 18 months ago to look seriously at these problems and to try to develop some comprehensive, long-range and consensual solutions. As part of that analysis, I asked the Brookings Institution to convene a task force of authorities from throughout the United States to develop a set of recommendations to alleviate the problems of excessive cost and delay. The task force that eventually gathered at Brookings comprised leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors.

After several all-day meetings and thorough discussion and debate, the task force developed a comprehensive set of — — consensus recommendations. Those consensus recommendations are reflected in the task force's report, Justice For All. Reducing Costs and Delay in Civil Litigation. I commend this report to anyone who is interested in improving our civil justice system. The legislation that I, Senator Thurmond and others are introducing today is based, in large part, on the task force's recommendations.

In introducing this legislation I don't claim that it offers a "quick fix" or that it is the "Holy Grail" of civil litigation reform. In fact, many of the key elements of the legislation have been advanced before by other groups and experts who have studied our civil justice system. In the past decade, numerous individuals and groups have carefully examined the discovery process, the management of cases by judges, the courts' adjudicatory role and a host of other important civil justice issues. The American Bar Association, the Association of Trial

Lawyers of America, the American Law Institute, Senators Heflin and Grassley and Congressmen Kastenmeier and Morehead, to name just a few, have all made important contributions to improving the efficiency of the civil justice system while maintaining the essential requirements of justice, fairness and due process and preserving our commitment to the adversarial ideal.

My legislation builds upon these efforts, and combines what I and the many experts who gathered at Brookings believe to be the essential ingredients for a comprehensive program for change. In my view, we have the two critical elements of any successful reform program: good ideas, and widespread support for those ideas.

The recommendations on which this legislation is largely based have the strong and active support of many key participants in the civil justice system -- people with intimate knowledge of the problems and keen insights into the solution.

Commenting on the recommendations advanced in the Brookings Task Force report, the Consumer Federation, for example, said:

> "This is the only reform proposal presented to the Congress that would clean up our judicial system without denying the public essential legal rights. If Congress and the legal community implement the task force's civil justice reforms, legal costs will fall significantly and justice will be expedited in federal courts."

The Association of Trial Lawyers of America said that the procedural recommendations

> "would fairly and in a balanced manner expedite the resolution of civil claims and, in a balanced manner reduce the costs of reaching fair and just solutions for all parties to civil litigation."

Similarly, Marcia Greenberger, Managing Attorney for the National Women's Law Center, said:

> "The Task Force's report is an effort to avert...a growing danger that unless we control the length of time and expense involved when turning to the courts, our justice system will burden everyone and serve no one....[The report] suggests a series of steps which could facilitate the more efficient operation of the federal civil courts."

The business community also strongly supported the Brookings task force recommendations and the need for legislation to implement those recommendations. For example, The Business Roundtable said:

> "The civil litigation report...takes a major step toward reform of civil litigation in the United States....Once implemented, this proposal will profoundly affect civil litigation within the...federal court system...."

Added Frank McFadden, chairman of The American Corporate Counsel Association and former chief judge of the U.S. District Court for the District of Alabama:

> "I heartily endorse these proposals and hope that the Congress and the courts will make every effort to implement those recommendations to create a better system of justice for the citizens of this country."

Similarly, the American Insurance Association said that the Brookings task force recommendations make

> "significant progress in achieving our shared goals. It attacks some of the major sources of run-away legal costs, including excessive or abusive discovery, [and] the need for active judicial case management....We hope that the...recommendations will speedily be enacted into law...."

It should come as no surprise to any member of this body that these and other individuals and groups who were part of the Brookings task force usually disagree on legal and policy matters. Importantly, however, when it comes to the condition of our civil justice system and on the means of improving it, they find common ground.

We have, then, a window of opportunity to implement truly meaningful change in the civil justice system -- change that will reduce costs and delays and that will improve access to the courts and the over-all fairness of the system.

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Before highlighting some of the legislation's specific provisions, I want to identify and discuss four cornerstone principles upon which the legislation is built.

- o First, the principle that reform must come from the "bottom up" through the development and implementation in each U.S. district court of "Civil Justice Expense and Delay Reduction Plans;"

- o Second, the principle that every district court should develop and implement a system of "Differentiated Case Management," or case tracking;

- o Third, the principle that judicial case management should be applied in all federal district courts; and

- o Fourth, the principle that courts need adequate funding to do the job our citizens rightly expect of them.

I. REFORM FROM THE "BOTTOM UP."

The legislation I introduce today is based on the principle that reform must come from the "bottom up" -- that is, from those who must live with the civil justice system on a regular basis. This principle is implemented in two significant ways.

First, the Civil Justice Reform Act of 1990 directs that within 12 months of enactment, each federal district court must develop a "Civil Justice Expense and Delay Reduction Plan." The plans are to be developed by a planning group or similar advisory committee that will be convened in each district with membership from the bench, the public and the bar. Each planning group will be chaired by the chief judge of the district court. Since court personnel will play an important role in the development of the plans, the district court clerk must also be a member of the planning group.

This broad membership will ensure that the public, the court and the litigating community share in the development of the plans. I agree with the view of the Brookings Task Force that

> the wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, the bar, and client communities about methods for streamlining litigation practice.

Second, while section 471(b) of the bill identifies the core elements that must be included in each district court plan, each district is authorized to determine, through its planning group, how to apply those core elements in light of its particular needs and demands. Thus, Congress shapes each plan according to certain well-defined and uniformly applied parameters, and the districts then exercise their best judgment in carefully molding the plans to reflect their own image.

II. DIFFERENTIATED CASE MANAGEMENT.

The centerpiece of the district court plans is a system of "Differentiated Case Management," or "DCM." Section 471(b)(1) directs the inclusion of such a system in every district court plan.

Differentiated Case Management is a program for court supervision of case progress that is designed to:

- make an early assessment of each case filed in terms of the nature and extent of judicial and other system resources required for preparation and disposition of the case;
- assign cases on this basis to appropriate processing paths that operate under distinct and explicit rules and procedures;
- apply the necessary level of court supervision and resources to each case consistent with its management requirements;
- establish appropriate monitoring mechanisms to track case progress and assure observance of deadlines for completion of case events; and
- assure the expeditious processing of each case by counsel and judicial system officials in accordance with the tasks required.

A DCM system, therefore, combines three core concepts. First, it is "event-oriented," so that certain events in each litigation are viewed as important benchmarks in ascertaining case progress. Second, it controls the periods of time between case events and incorporates methods to supervise and control those intervals in order to make them more predictable. Third, it recognizes that while cases may be classified by broad definitions, each case is unique; thus, procedures are accommodated to fit the characteristics of each case. As Robert Lipscher, Administrative Director of the New Jersey courts and a

leading expert in this area, has said, DCM is "a case management system where judges and case management teams employ mulitiple tracks to accommodate the special procedural and managerial requirements of different case types."

On an informal basis, differentiated case management is already being utilized in some federal district courts. Judges uses their existing authority to manage their docket on a case-by-case basis, with procedures tailored to particular cases. I commend the district court judges who have exercised their authority in this fashion. In my view, in the view of the task force of authorities who prepared the Brookings report and in the view of other system experts, the time has come to formalize and regularize DCM concepts by channeling cases according to their needs and probable litigation "careers" to differentiated procedural treatments.

DCM, then, is a non-mechanistic approach to case processing. There is less reliance, in the words of Maurice Rosenberg, Professor of Law at Columbia University and a leading advocate of case tracking, "on a single set of monolithic rules of universal applicability." Instead, as Sections 471(b)(1) and (b)(2) make clear, cases will be considered individually according to their relative complexity, anticipated trial length, anticipated need for judicial supervision and time required for discovery and preparation. Cases will then be assigned to appropriate processing tracks that correspond to their management and adjudicatory needs, with each track having specially tailored procedures and time standards.

Courts that have implemented case tracking systems generally use three tracks. Track One is for "expedited" cases and is designed to accommodate the special needs of cases that can be processed quickly because, in part, they will involve minimal pretrial discovery and other pretrial proceedings and will require little or no judicial intervention. Track Two is for "complex" cases and is designed to accommodate cases whose timely disposition is likely to require more intensive judicial intervention and control. Track Three is for "standard" cases -- cases that do not fall into the other two categories. Under DCM, "[c]adillac-style procedures," in Professor Rosenberg's words, will no longer be used to process "bicycle-size lawsuits."

As the legislation introduced today makes clear, implementation of a case tracking system involves time standards. As set forth in Sections 471(b)(1)(B) and (b)(6), each DCM system adopted by the district courts must assign cases to appropriate tracks that operate under distinct time frames for the completion of discovery, for the preparation and adjudication of motions and for trial. Judges would apply these time frames in the "typical" case falling within each track. The legislation

allows each district, through the planning group mechanism, to develop the time standards that best suit its caseload and docket demands.

The DCM system that has been implemented in Bergen County, New Jersey establishes general time frames as follows: For expedited cases, discovery should be completed within 100 days and the case disposed of within six months; for standard cases, discovery should be completed within 200 days and the case disposed of within 12 months; for complex cases, the time frames for discovery and for case disposition are subject to the discretion of the individual judge.

Time standards, implemented as part of an over-all case management system, have been identified in extensive research as an important means for reducing litigation costs and delays. For example, a recent study by the National Center for State Courts found that while time standards are

> "not a panacea,...they can be an important part of a comprehensive program to reduce or prevent delays. First, they express an important concept: that timely disposition of the courts' business is a responsibility of the judiciary. Second, they provide goals for the court and the participants in the litigation process to seek to achieve, both in managing their total caseloads and in handling their individual cases. Third, they can lead directly to the development of systems for monitoring caseload status and the progress of individual cases, as participants in the process seek to manage their dockets more effectively in order to achieve their goals."

A 1981 Government Accounting Office report is consistent with these findings. After reviewing 782 files on cases that took a year or more to terminate in nine federal district courts, the GAO found the establishment of time standards for different stages of the cases to be the critical factor in effective case management.

The adoption of time standards does not mean that speed will have somehow displaced justice as the primary judicial goal in the adjudication of cases. Quite the contrary -- justice remains the primary judicial goal, with courts encouraged to take a more pro-active role in guarding against unnecessary or excessive costs and delays. The case processing time standards to be established by each district will serve as guides for the disposition of cases, with the understanding that the plan will have sufficient flexibility [see Sections 471(b)(5) and (b)(6)] to accommodate different problems that may arise from time to time in litigation.

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Case tracking, both in theory and in practice, has received strong and widespread support.

The Harris survey of more than 1,000 participants in the civil justice system showed remarkably strong support for case tracking: 90 percent of plaintiff's and defense litigators, 89 percent of public interest litigators, 87 percent of corporate general counsel and 78 percent of the federal trial judges surveyed support it.

Furthermore, in its December 22, 1989 Tentative Recommendations, the Federal Courts Study Committee encouraged tracking cases by level of complexity.

Finally, a survey of lawyers who had participated in the DCM system in Bergen County indicated their strong support. The survey showed that 93.5 percent believed that the track assignments had been appropriate; more than 70 percent felt that the discovery periods developed for the three tracks were appropriate; more than half noted that monitoring of discovery deadlines enhanced the probability of timely case dispositions, a response that was consistent across all three tracks; and 54 percent felt that DCM substantially raised their expectations of reaching trial and having their cases disposed of within the week of the trial date.

Some may be critical of DCM because, in their view, it sacrifices quality for quantity -- justice for efficiency. Nothing could be further from the truth. DCM has several qualitative aspects, including customized procedures for case categories; consensus development to the extent possible on the elements of the case plan -- among the court and the attorneys; facilitating access to the court in a timely manner to resolve problems that develop; and increased judicial time for the adjudication of pending issues. DCM ensures that the unique characteristics of each case are recognized and respected. In sum, DCM has great potential to enhance the quality of justice through greater individual attention to cases from the time they are filed until their final adjudication or other disposition.

DCM also improves over-all system "fairness." In some courts, cases are heard according to the "bakery shop" concept, as one court administrator puts it, of "first in, first out." Each case is given a docket number when it is filed, and called to trial based on that number sequence without regard to the nature of the case and its demand for court time. As a result, cases that need only a short hearing are held up behind more complicated matters, solely because they were filed after the complex case. In contrast, under a DCM system, cases that have little discovery and require little judicial intervention will

get expedited treatment -- not short treatment, but expedited treatment -- and the parties will not have to wait simply because their docket number is lower than a more complex case. This means that the current logjam in many courts can be unplugged, with more cases being freed up for earlier disposition.

III. JUDICIAL CASE MANAGEMENT.

During the last two decades, we have seem major developments in the field known as judicial case management. As the number of cases has increased and the cases themselves have become increasingly complex, judges, court administrators and civil justice system experts have recognized the importance of courts exercising early, active and continuous control over case progress. Indeed, as the Supreme Court recently said in an opinion by Justice Kennedy in Hoffman-La Roche Inc. v. Sperling: "One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation."

As early as the late 1970s, studies demonstrated the importance of exercising early and active judicial control over cases. The Federal Judicial Center, for example, studied the median disposition times of six urban trial courts. The primary finding was that greater and earlier judicial control over civil cases yields faster rates of disposition. The courts with the least amount of delay characteristically kept stricter control of the case by precise scheduling of the discovery cut-off date and other deadlines. The study concluded: "We found that a court can handle its caseload rapidly only if it takes the initiative to require lawyers to complete their work in a timely fashion."

A recent study of 26 urban trial courts by the National Center for State Courts also indicated that early and continuous control over case events was the best predictor of faster case processing times. Indeed, there is now a substantial body of data to support the notion that judiciallly imposed controls on the progression of even modest-sized cases can measurably improve efficiency without sacrificing the quality of justice rendered.

Some argue that judicial case management is inconsistent with our notions of due process and the proper functioning of the adversarial system. They urge the courts to maintain a "laissez faire" attitude, and argue that lawyers -- not the court -- should control the pace and conduct of litigation.

I reject this laissez-faire approach. I would argue that the movement toward greater judicial oversight is an attempt to preserve notions of fairness and maintain the adversary ideal. As Judge Robert F. Peckham, Chief Judge of the U.S. District Court for the Northern District of California, has said: "Case supervision is not a fundamental departure from the adversarial model but rather a modification that facilitates its meaningful operation. It does not detract from lawyers' traditional function, but instead assists attorneys in planning the efficient progress of lawsuits."

Judge Alvin B. Rubin, a circuit court judge on the U.S. Court of Appeals for the Fifth Circuit, has offered a compelling statement of why judicial case management is both appropriate and necessary:

> The judicial role is not a passive one. A purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. It is impossible to consider seriously the vital elements of a fair trial without considering that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice. Judge Learned Hand wrote, '[a] judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.'
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> And as Judge Peckham has concluded:
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> Judges cannot remain safely on their remote pedestal but must work with attorneys to place reason and civility before contentiousness and resistance....[T]he cause of justice can no longer be served by a laissez faire judicial model. Our controlled inaction is an affirmative choice, an abdication of our responsibility to use our power to assist in restoring the health of our system....[W]e cannot remain blind to the fact that the court's traditional remoteness contributes to the devasting abuses which threaten to subvert our system of due process.

While the principle of judicial case management runs throughout the legislation I'm introducing today, it is perhaps most apparent in Section 471(b)(3). That section directs each district to include as an element of its plan a "discovery-case management conference" in all cases except those assigned to the track designated for expedited litigation. Most important, this conference will ensure that all of our federal district courts conduct an early examination of the case, focus the key issues and fix key dates that will enable him or her to monitor the pace

of the case's development. The judge should explain to counsel the devices he or she intends to use to monitor the action and the long-range plan for monitoring case development. Section 471(b)(3) identifies in detail the range of issues that should be addressed at the discovery-case management conference.

For cases assigned to the track designated for complex litigation, the plan should require the court to build into its management plan at the outset a structured, regular procedure for monitoring intermediate case events and for narrowing and refining outstanding issues.

A central objective of the mandatory discovery-case management conference is to minimize discovery costs. Delineating the issues at an early stage of the litigation will minimize such costs, since the parties can then be steered away from aimless or redundant discovery. More than a decade ago, Judge William W. Schwarzer, of the U.S. District Court for the Northern District of California, has commented on the importance of a compulsory status conference, which, by setting discovery guidelines tailored to the case, can "reduce subsequent discovery disputes and piecemeal motions to compel or for protective orders, and tend to nip in the bud any notion by a party to wage an attrition campaign using discovery as a weapon."

The mandatory discovery-case management conference can also help the parties focus on possible grounds for dismissal or summary judgment. If it seems that motions are probable, the court should dates and briefing schedules.

Judge Peckham has highlighted certain intangible benefits of the early conference. He has found that the conference itself warns the lawyers that they have a vigilant judge. It also gives a judge a "feel" for the case and for the lawyers. In the end, since this conference will often be the first contact between the court and the attorneys, "the judge can use his considerable influence to set the tone of the relationship in which he and the attorneys are likely to be engaged for the duration of the litigation."

Some might argue that these conferences will themselves be costly, particularly in terms of judicial time they will require. This concern, in my view, is unfounded. Indeed, the best answer to it is provided by Judge Peckham, chief judge of one of our nation's busiest courts. Judge Peckham estimated that a judge could "easily conduct all status conferences for a full caseload in one day per month and certainly in no more than two." As he put it, "[t]his is very little time to expend in facilitating the prompt and fair disposition of cases."

Finally, the legislation provides that the judge, and not a magistrate, preside over the discovery-case management conference. Given the importance assigned to and the range of decisions to be made at the conference under this legislation, it should be conducted by an Article III judge. Furthermore, the conference may lose some of its significance in the minds of the attorneys if presided over by a magistrate, since the unfortunate fact is that many attorneys seem to be far more willing to take frivolous positions before a magistrate than they would be to take the same positions before the judge who will try the case. Furthermore, magistrates may themselves be more reluctant than judges to frame the contours of the litigation, limit discovery, establish a date certain briefing schedule and address the full panoply of discovery-case management conference issues.

IV. ADEQUATE FUNDING.

There's no doubt that for the courts to do the job our citizens rightly expect of them and for this legislation to be successful, additional funding is necessary. Some funds must be appropriated to the federal district courts to carry out the initial phases of planning and implementation of the civil justice expense and delay reduction plans. Furthermore, a differentiated case management system is very information-intensive. To be effective, therefore, it needs some form of automated support. Automation is necessary to provide information on: (1) case categorization; (2) case tracking through all events and processing stages in each track; (3) reporting to provide operational support to court personnel; (4)communications, particularly between the court and attorneys and litigants; (5) scheduling with some degree of sophistication to monitor court resources and maximize their utilization; and (6) statistical and exception reports for monitoring and evaluation.

The Federal Judicial Center is also assigned new tasks under the bill, and it will require some modest amount of additional funds to carry them out.

Section 479 of the bill mandates the expansion of training of district court judges, magistrates and key court personnel in the techniques of case management. While some funding is already provided for training, some modest increase will be necessary to pay for this all-important additional training.

To fund these and other aspects of the legislation, a total of $16,000,000 is authorized.

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In the rest of my statement, I intend to highlight some other key parameters within which the district plans must be adopted. As I noted earlier, I believe that the legislation provides a degree of national uniformity while leaving sufficient flexibility to the district courts to respond to their particular needs.

Setting Early, Firm Trial Dates. The legislation directs that each district's plan include a requirement for setting early, firm trial dates at the mandatory discovery-case management conference or, if no such conference is held, in the discovery-case management order. For cases assigned to the track designated for complex litigation, it is suggested that the court, to the maximum extent possible, give the parties an idea at the outset of the litigation how soon after discovery is completed that the trial will occur, and courts are directed to set the trial date no later than 120 days before the discovery cut-off date.

Several experts and substantial data indicate that setting early, firm trial dates is one of the most effective tools in case management. In Professor E. Donald Elliott's words: "Perhaps the most important single element of effective managerial judging is to set a firm trial date....This creates incentives for attorneys to establish priorities and 'narrow the areas of inquiry and advocacy to those they believe are truly relevant and material' and to 'reduce the amount of resources invested in litigation.'"

Similarly, Wayne Brazil, currently a magistrate in the U.S. District Court for the Northern District of California and one of the leading court reform experts, reported in 1981 that

> "data produced by our interviews and by other studies indicate that fixing early and firm dates for the completion of trial preparation and for the trial itself is probably the single most effective device thus far developed for encouraging prompt and well-focused case development."

A recent study of 26 urban trial courts by the National Center for State Courts found that a firm trial date policy is related to faster case processing times.

An American Bar Association task force on litigation costs and delay concluded that a firm trial date is an absolutely vital feature of any case management system. The task force identified five reasons "why judges, lawyers and academics agree on this concept:"

- o Settlement probabilities are increased dramatically when enforced early evaluation devices are backed by a certain trial date;

- o Where the court requires counsel to adhere to schedules for the completion of events, credibility is enhanced when the court also complies with time deadlines;

- o No attorney wants or will assemble a cast of witnesses and parties only to be frustrated when the trial does not begin when scheduled; and

- o A firm trial date is cost-effective for the trial attorney because it allows efficient and predictable scheduling of the only commodity the attorney has to sell -- time.

The Harris survey of more than 1,000 particpants in the civil justice system also found strong support for scheduling early and firm trial dates: 79 percent of the plaintiffs' litigators, 76 percent of defendants' and public interest litigators, 85 percent of the corporate counsel and 89 percent of the federal judges agreed with this view.

Discovery Controls. Discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics -- and not the merits -- govern discovery decisions. Litigants of moderate means are often deterred through discovery from vindicating just claims or defenses, and the litigation process all too often becomes a war of attrition for all parties -- rich or poor, plaintiff or defendant. As Professor Maurice Rosenberg has written:

> "Costs of discovery can be so high that they force settlements that would not occur, or, more likely, force settlements on different terms than would othewise have been reached....Discovery practice in federal litigation has taken on a life of its own. The first principle is 'when in doubt, discover.'"

Excessive and abusive discovery has been recognized as a serious problem for some time. More than 10 years ago, a study of federal trial judges in two district courts found that they perceived "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation." In 1980, a study of lawyers in Chicago found that 49 percent of those practicing in federal courts believe that "overdiscovery" is a major abuse of the discovery process."

More recently, the Harris survey of more than 1,000 participants in the civil justice system found that the most important cause of high transaction costs or delays that increase those costs is perceived to be lawyers who abuse the discovery process. Lawyers who "over-discovey" cases rather than focus on controlling issues and lawyers and litigants who use discovery as an adversarial tool or tactic to raise the stakes for their opponents were the most frequently cited causes of high transaction costs.

The legislation attacks the discovery problem from several directions.

First, as I've mentioned, the tracking systems to be implemented in each district will include time periods for the completion of discovery. Specifically, Section 471(b)(6) requires "that each processing track in the district's tracking system establish presumptive time limits for the completion of discovery so that parties are apprised upon track assignment of the time within which discovery must be completed."

It's important to recognize that the discovery time limits are presumptive. This ensures that sufficient flexibility is retained for those cases warranting extentions of time. One example of a showing of "good cause" warranting an extention would be if additional discovery would not delay the trial. Absent such special circumstances, however, discovery should be limited according to the time frame set forth in the guidelines for the particular track to which the case has been assigned.

Second, Section 471(b)(7) requires that each district court include in its plan procedures for making the discovery process "track specific." Specifically, each district is to consider identifying and limiting the volume of discovery available, and phasing the use of discovery into two or more stages.

With respect to phasing discovery, I have been taken with the approach first suggested by Judge Peckham. The first stage is limited to developing information needed for a realistic assessment of the case. If the case does not terminate then, a second stage of discovery would commence, this one for the purpose of preparing for trial. Limiting discovery initially to those crucial issues that highlight the essential strengths and weaknesses of a case will often lead to considerable savings of time and money for clients and the court system. The information derived from the first stage should suffice for the disposal of many cases, without having to incur the expense of discovery that merely amplifies and cumulates already available evidence or that is directed to peripheral issues.

Another means of phasing discovery is to divide the use of interrogatories according to the stage of the case. The U.S. District Court for the Southern District of New York currently utilizes such a rule, which limits the type of interrogatories that may be served at particular stages of the litigation.

I should not that imposing discovery limitations is entirely consistent with the 1983 amendments to the Federal Rules of Civil Procedure. Rule 26(b)(1)(iii) was amended to permit the court to limit discovery where it would be "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources and the importance of the issues at stake in the litigation." This was an extremely valuable addition to the rules, but for whatever reason, it has not been utilized to any great extent.

Third, Section 471(b)(8) requires that each district adopt as an element of its plan a rule that the parties attempt to resolve all discovery disputes informally before filing motion papers with the court.

I believe that these and other measures that the district courts may adopt will assist in reducing the costs of discovery.

Expanded Use of Alternative Dispute Resolution. As many of my colleagues know, the term "alternative dispute resolution," or "ADR," covers a broad range of approaches to dispute processing apart from the traditional adversary system. Those approaches include arbitration, mediation, the summary jury trial and the mini-trial. Section 471(b)(10) of the legislation directs each district court to include in its plan a comprehensive alternative dispute resolution program covering the full panoply of ADR mechanisms. Section 473(a)(6) requires that the Federal Judicial Center advise and report on the use of ADR through the district court plans.

The authorization for expanded use of ADR, together with a reporting requirement, is predicated on the view, as expressed most recently by the Federal Courts Study Committee in its Tentative Recommendations, that ADR "is at a mid-point in its development, beyond the stage at which it should be limited to local experiments but not so advanced as to permit the formulation of uniform national rules...."

Early Neutral Evaluation Programs. Section 471(b)(11) directs each district court to develop an Early Neutral Evaluation Program as part of the implementation of its civil justice expense and delay reduction plan. "ENE," as it commonly referred to, is a specific form of alternative dispute resolution that has achieved great success, particularly in the U.S. District Court for the Northern District of California. Its

success, I might add, is due in large part to the great effort of commitment of one of the district's magistrates, Wayne Brazil.

The centerpiece of the ENE program is a confidential, non-binding case evaluation conference, attended by all counsel and their clients, and hosted by a neutral member of the private bar who has substantial litigation experience and who is an expert in the principal subject matter of the lawsuit. This conference takes place early in the pretrial period so that the parties will be in a position to use what they learn and accomplish during the proceeding to make the case development and settlement processes more rational, less expensive and less time-consuming.

In a survey of lawyers who particpated in the ENE program in the Northern District of California, strong majorities found that it contributed to communciation across party lines, to issue clarification, to prospects for settlement and to setting the groundwork for cost-effective discovery. Indeed, almost 90 percent of the lawyers whose cases had been compelled to participate in ENE expressed the view that the program should be expanded to more cases in the federal courts.

Section 471(b)(11) directs each district to develop an Early Neutral Evaluation Program.

Firm Policies on Continuances. A firm policy on granting continuances is critical to date certain scheduling. Indeed, where judicial enforcement of scheduled dates is the norm, the entire set of expectations and attitudes of the trial bar will adjust to that norm.

Section 471(b)(6) of the bill directs the districts to develop firm rules on continuances in their plans. One element of those rules must be that the party, as well as the lawyer, sign requests for continuances. By requiring the party to sign and thus requiring the lawyer to explain the reasons for his request to his client, it is hoped that the number of unfounded requests will be reduced.

Procedures for the Disposition of Motions. In my discussions about this subject, I have been startled by the extent to which lawyers and their clients are concerned about the time that it often takes the court to decide fully briefed motions. Some of those motions relate to discovery issues, while others relate to issues that would be dispositive for some or all of the claims in the case. If their experiences are broadly representative of others -- and I believe that they are -- something must be done at the federal district court level to reduce delays in deciding motions, without, of course, sacrificing the quality of the decision-making. And I believe there is room to reduce delays without sacrificing justice.

Section 471(b)(9) directs the district courts to adopt procedures for resolving motions necessary to meet the applicable trial dates and discovery deadlines. Furthermore, to enhance judicial accountability, Section 474 provides for expanded publication of statistics on motion decisions. This information will be published and made available to everyone -- citizens, legislators and the media -- as well as to the judiciary. By increasing the visibility of the linkage between the standards, statistics and judicial performance, the importance of all three should be increased as well.

Transition Programs. In those districts with large case backlogs, it will be necessary to develop and implement a transition program. As set forth in Section 474, that program should include assessment of current caseload; analysis of productivity; utilization of special expertise, where appropriate; and a scheduled termination of the transition program, with interim goals resulting in full implementation of the district court's plan.

Model Plans. To give the district courts some guidance in the development of their plans, Section 472 provides for the development of a model plan by the Federal Judicial Center within six months of enactment of the legislation. I anticipate that while the districts will use this model plan for guidance, none will adopt it in its entirety, since the districts will want to provide for the own unique demands and needs.

If, for some reason, a district does not develop a plan under this legislation, the model plan would automatically go into effect.

Case Management Training. Section 479 provides for the expansion of current judicial training programs to include a new curriculum and emphasis on case management. Training will also be made available to magistrates and district court clerks.

This expanded training is necessary for several reasons. First, with the development and implementation of the district court plans, new information -- descriptive and statistical -- will be generated and will need to be transmitted to the courts. Second, there are many judges who have experimented successfully wth various procedural approaches outlined in this legislation. In addition, there are law professors and other independent experts on judicial management who have examined these issues. Expanded training will enable the accumulated learning on the subject to be better transmitted throughout the federal judiciary.

Review in Five Years. Section 478 provides that after five years, the Federal Judicial Center shall report on the effectiveness of the civil justice expense and delay reduction plans in reducing litigation costs and delays and in securing the just, speedy and inexpensive resolution of civil actions. If the report determines that the plans have not been effective, we are committing to review the statute and assess whether some modifications are warranted.

* * * * *

Mr. President, I will announce shortly dates for hearings on this legislation. Once those hearings are completed and we determine whether, based on the testimony we receive, any changes in the bill are warranted, I intend to move this bill quickly. I look forward to working with the nation's judiciary on this important subject. Their support will undoubtedly be an important ingredient in the success of this effort to reduce litigation costs and delays, and I look forward to the presentation of their views in a timely fashion.

In the final analysis, when cases cost so much and take so long that some people can't use the courts at all and that those who can use them find their pocketbooks depleted at record pace, we have a problem of major dimensions that demands our attention. It's a problem that's not subject to quick fixes or easy solutions. Only hard work, careful study, sound ideas and long-term commitment will make our system of civil justice a system of which all of us can be proud. I believe the Civil Justice Reform Act of 1990 combines the elements necessary for comprehensive and meaningful change, and that if enacted, the legislation will help ensure that disputes are resolved fairly, promptly and inexpensively. That is what our citizens rightly expect, and that is what they rightly deserve.

PROPOSED REVISION
April 2, 1990
[Underlining highlights the differences between [illegible] March 13 draft]

SEC. 3. AMENDMENT TO TITLE 28, UNITED STATES CODE.

(a)(1) Civil Justice Expense and Delay Reduction Plans and Case Management Training.--Title 28, United State Code, is amended by adding at the end of part I the following new chapter:

"CHAPTER 23--CIVIL JUSTICE EXPENSE AND DELAY REDUCTION

"SUBCHAPTER I--CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"SUBCHAPTER II--CASE MANAGEMENT TRAINING

"SUBCHAPTER I--CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"S 471. Model civil justice expense and delay reduction plans

"(a) The Judicial Conference of the United States shall develop one or more model civil justice expense and delay reduction plans. Each such plan shall provide for facilitating deliberate adjudication of civil cases on the merits,

streamlining discovery, improving judicial case management, and ensuring just, speedy, and inexpensive resolutions of civil actions.

"(b) In developing each model plan under subsection (a), the Judicial Conference shall consult with an advisory committee appointed in accordance with section 477 of this title.

"§ 472. Requirement for a district court civil justice expense and delay reduction plan

"(a) There shall be in effect for each United States district court, in accordance with this subchapter, a civil justice expense and delay reduction plan. [REVISED]

"(b)(1) The Judicial Conference of the United States may waive the requirement under subsection (a) of this section in the case of any district court if the Judicial Conference determines that--

"(A) the expense generally experienced by litigants in connection with civil cases in such court does not exceed a reasonable level and civil cases are generally disposed of by such court on a timely basis; or

"(B) the ability of the court to process civil and criminal cases has been substantially reduced as a result of--

"(i) the existence of a vacancy in one or more judgeships on such court for an extended period;

"(ii) an unusual burden in the number or complexity of criminal cases filed in such court in

relating to the judicial [illegible] resources of such court;

"(iii) any other temporary condition considered material by the Judicial Conference.

"(2) A waiver under paragraph (1) shall be in effect for a district court only during the period in which the court is experiencing the condition or conditions on which the waiver is based.

"(3)(A) The Judicial Conference shall prescribe specific guidelines for making determinations under paragraph (1).

"(B) Not later than 30 days after the date on which the Judicial Conference prescribes or amends guidelines under this paragraph, the Secretary of the Judicial Conference shall transmit a report on such guidelines or amendments to the Committee on the Judiciary of the Senate and the House of Representatives. The report shall include each temporary condition defined by the Judicial Conference pursuant to paragraph (1)(B)(iii).

"(4) The Judicial Conference may delegate the authority to make determinations and grant waivers under paragraph (1), but any authority so delegated may be exercised only in accordance with the guidelines prescribed under paragraph (3).

"§ 473. Development and implementation of a civil justice expense and delay reduction plan

"(a) A United States district court required to have in effect a civil justice expense and delay reduction plan pursuant

to section 472 of this title shall implement such a plan by local rule in accordance with the provisions of section 2071 of this title. The plan may be a model plan developed by the Judicial Conference of the United States or a plan developed by such court.

"(b) The civil justice expense and delay reduction plan for a district court shall be selected or developed, as the case may be, after consideration of the recommendations of an advisory committee appointed in accordance with section 477 of this title.

"(c) The judicial council of the circuit in which a district court is located shall review and evaluate and may modify or abrogate, in accordance with section 2071(c)(1) of this title, any civil justice expense and delay reduction plan of such court that does not meet the requirements of section 474(a) of this title.

"(d) The Judicial Conference of the United States may review and evaluate any determination of a circuit judicial council under subsection (c) of this section.

"§ 474. Content of civil justice expense and delay reduction plans

"(a) Subject to subsection (d) of this section, a model civil justice expense and delay reduction plan developed pursuant to section 471 of this title and a civil justice expense and delay reduction plan in effect pursuant to section 472 of this title--

"(1) shall include the features described in

subsection (c).

"(2) may include such features as those described in subsection (c).

"(b) The required features referred to in subsection (a)(1) are provisions for the following:

"(1) Management of civil cases that is individualized and case-specific.

"(2) Early involvement of a judicial officer in planning the progress of the case, controlling discovery, and scheduling necessary events, including completion of discovery and commencement of trial.

"(3) An ongoing program for training all judicial officers, clerks of court, and courtroom deputy clerks in case management techniques.

"(c) The features referred to in subsection (a)(2) are the following:

"(1) A system of differentiated case management that provides for the following:

"(A) An early court assessment of each case filed in such court, considering such criteria as--

"(i) case complexity determined on the basis of the number of parties involved, the number of claims and defenses raised, the legal difficulty of the issues presented, the factual difficulty of

the subject matter, and any other appropriate factors;

"(ii) the amount of time reasonably needed to prepare the case;

"(iii) the anticipated trial length; and

"(iv) the judicial resources and other resources necessary for the preparation and disposition of the case.

"(B) Allocation of the level of court supervision and resources necessary for each case consistent with the circumstances of the case.

"(C) Establishment of appropriate procedures for monitoring case progress and for ensuring compliance with deadlines established for the completion of case events.

"(D) Expeditious processing of each case by counsel and judicial system officials consistent with the necessary tasks.

"(2) A requirement that counsel for each party to a case jointly propose a discovery-case management plan for the case at the initial pretrial conference provided for under Rule 16 of the Federal Rules of Civil Procedure.

"(3) A requirement that, within a specified period after issue is joined in a case, counsel for the parties exchange--

"(A) [illegible] of all persons that, to the counsel's [illegible] knowledge of matters relevant to the assertions contained in such complaint or anwer;

"(B) all documents that, to the counsel's knowledge or belief, support the positions of the party; and

"(C) a certification that the counsel has made a good-faith effort to identify all such persons and documents.

"(4) A requirement that a discovery-case management conference be held in each complex case, and in each case in any other category of cases subject to such requirement as specified in the plan, within 120 days after the date on which the issues are joined.

"(5) Requirements that the judicial officer presiding at a discovery-case management conference--

"(A) explore the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

"(B) attempt to identify or formulate the principal issues in contention and, in appropriate cases, provide for the staged resolution or bifurcation of issues consistent with Rule 20(b) of the Federal Rules of Civil Procedure;

"(C) prepare a discovery schedule and plan consistent with the complexity of the case, the amount in controversy, and the resources of the parties;

"(D) establish at the conference--

"(i) the dates or deadlines for the filing, hearing, and deciding of motions;

"(ii) the date or dates of additional pretrial conferences, including the final pretrial conference; and

"(iii) the date for trial or, in a complex case, a deadline for the commencement of the trial specified in terms of a period after completion of discovery;

"(E) in each complex case, establish a series of monitoring conferences for the purposes of establishing the focus and pace of discovery, refining issues, and developing stipulations; and

"(F) address any other appropriate matters.

"(6) A requirement that, in each complex case, each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters.

"(7) Authority to permit some or all participants in a [illegible] by telephone if the case is not a complex case.

"(8) Procedures for waiving any discovery case management conference in any case--

"(A) which is not complex or is otherwise suitable for expedited disposition; and

"(B) in which the court can issue, within the period specified in the plan, a standard order scheduling--

"(i) a trial date;

"(ii) discovery, including discovery deadlines; and

"(iii) dates for filing and deciding substantive and discovery motions.

"(9) Procedures for providing, on the basis of the complexity of the case, for--

"(A) identifying and limiting the volume of discovery available in order to avoid unnecessary or unduly burdensome or expensive discovery;

"(B) phased use of depositions upon oral examination, depositions upon written questions, interrogatories to parties, production of documents and things and entry upon land for inspection and other purposes, and requests for admissions;

"(C) voluntary exchange of information; and

"(D) new and more cooperative discovery devices.

"(10) Provisions that--

"(A) each discovery motion, except a motion brought by a person appearing pro se or brought pursuant to Rule 26(c) of the Federal Rules of Civil Procedure by a person who is not a party, must be accompanied by a statement that counsel for the movant has made a reasonable, good-faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

"(B) attorneys fees may be awarded against a party if the party's counsel has not made such an effort.

"(11) Procedures for resolving motions necessary to meet established trial dates and discovery deadlines, including the adoption of time guidelines for the filing and disposition of substantive and discovery motions.

"(12) Procedures for ensuring that the parties to a civil case have the opportunity to consent to trial of the case by a United States magistrate.

"(13) An alternative dispute resolution program for use in appropriate cases.

"(14) A neutral evaluation program for the presentation of the legal and factual bases of a case to a neutral court representative at a non-binding conference conducted early in the litigation.

"(15) A requirement that upon notice by the [illegible] in settlement decisions be present or available by telephone during any settlement conference.

"(16) Procedures for enhancing the accountability of each judge in a district court through--

"(A) regular reports of the judge's pending undecided motions and caseload progress to the other judges in the judicial circuit in which such district court is located; and

"(B) to the extent provided for by the judicial council of such circuit in the discretion of the council, public disclosure of any such report.

"(17) Procedures for identifying, and reviewing from time to time, functions performed in a district by magistrates with a view to determining which functions within constitutional and statutory limits can best be performed by judges or by magistrates.

"(18) Procedures for judges to exchange information about their roles in adjudicating contested motions and other matters.

"(19) Such other features as the district court considers appropriate after considering the recommendations of the advisory committee referred to in section 474(b) of this title.

"(d) The features of a civil justice expense and delay reduction plan implemented under this subchapter shall be consistent with the Federal Rules of Civil Procedure.

"§ 475. Judicial Conference continuing review of civil case management

"The Judicial Conference of the United States shall review, on a continuing basis, civil case management by the United States district courts and shall develop such additional case management procedures as the Judicial Conference determines, on the basis of its review, are appropriate. The Judicial Conference may require any district court to implement any such additional case management procedure that the Judicial Conference considers necessary in the interest of effective civil case management.

"§ 476. District court periodic review of civil case management

"(a) Each district court shall review biennially the civil case management procedures for such court and revise the rules of such court as appropriate to improve court management of civil cases. In performing the review, the court shall consult with an advisory committee appointed in accordance with section 477 of this title.

"(b) The court shall perform the review in accordance with guidelines prescribed by the Judicial Conference of the United States and shall transmit to the Judicial Conference a report on each review.

"§ 477. Advisory committees

"(a) Each advisory committee required by this chapter shall consist of--

"(1) At least one district court judge.

"(2) At least one United States magistrate.

"(3) At least one district court clerk.

"(4) Such representatives of the public as the advisory committee appointing authority considers appropriate.

"(5) Such attorneys as the advisory committee appointing authority determines necessary to ensure that major categories of United States district court litigants are represented on the advisory committee.

"(b) The advisory committee appointing authority shall designate a reporter for each advisory committee.

"(c) The advisory committee appointing authority--

"(1) in the case of an advisory committee referred to in section 471 of this title, shall be the Chairman of the Judicial Conference of the United States; and

"(2) in the case of an advisory committee for a district court under section 472 or 476 of this title, shall be the chief judge of such court.

"S 478. Automated semiannual report on caseload processing

"(a)(1) On January 15 and July 15 of each year each United States district court shall make available to each judge in the judicial circuit of such court a report on caseload processing by each judge of that court. [The judicial council of that circuit

may, in the discretion of the council, direct that any such report be made available to the public.]

"(2) The report shall contain, for each judge, the following information as of the first day of the month of the report:

"(A) The motions that have been under advisement for more than 90 days, stated as a total number for each 90-day period.

"(B) Data indicating the aging of the judge's caseload in each category provided for by the district court.

"(C) The number of written opinions issued by the judge during the 6-month period ending on the date of the report.

"(D) The number of bench trials completed during such period.

"(E) The number of jury trials completed during such period.

"(b) The Director of the Administrative Office of the United States Courts shall ensure that the United States district courts' automated dockets have the program capability readily to retrieve the information necessary for the semiannual report required by subsection (a) of this section.

"(c) In order to facilitate the reporting required under subsection (a), the Director shall standardize court procedures for categorizing or characterizing judicial actions, including defining what constitutes a dismissal and how long a motion has been pending.

§ 479. Manual for litigation management

"The Director of the Administrative Office of the United States, under the direction of the Judicial Conference of the United States shall prepare a manual for litigation management. The manual shall contain the following:

"(1) A discussion of civil justice expense and delay reduction plans, including the rationale for using such plans, the effectiveness of the use of such plans for increasing the availability of time for trials and deliberate adjudication of cases on the merits, and the advantages of using such plans.

"(2) Basic case management procedures, a discussion of the effectiveness of such procedures, and model local rules for case management.

"(3) Other litigation management matters considered appropriate by the Judicial Conference.

"SUBCHAPTER II--CASE MANAGEMENT TRAINING

"§ 481. Judicial case management training programs

"The Director of the Federal Judicial Center shall take such action as may be necessary to expand current judicial training programs to include a new curriculum and emphasis on case management so that the accumulated learning on management and adjudicatory techniques is communicated on a regular and formal basis to all district court judges, magistrates, clerks of the district courts, and other court personnel the Director considers appropriate.".

(2) Table of Contents.--Part I of the table of contents of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil Justice Expense and Delay Reduction.....471".

(b) Effective Date.--(1) Except as provided in paragraph (2), chapter 23 of title 28, United States Code (as added by subsection (a)), shall take effect on the date of the enactment of this Act.

(2) Sections 471 through 475 of title 28, United States Code (as added by subsection (a)), shall take effect on July 1, 1995.

SEC. 4. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION DEMONSTRATION PROGRAM.

(a) In General.--The Judicial Conference of the United States shall conduct a civil justice expense and delay reduction demonstration program for the purpose set out subsection (b).

(b) Purpose of Demonstration Program.--The purpose of the demonstration program is to test various case management techniques in order to determine the effectiveness of such techniques in reducing expense and delay in the processing of civil cases in United States district courts.

(c) Period of Demonstration Program.--The demonstration program shall be conducted during the 4-year period beginning on July 1, 1991.

(d) Structure of Demonstration Program.--(1) Not later than September 30, 1991, the Judicial Conference shall--

(A) develop several civil justice expense and delay reduction plans containing various combinations of features consistent with the purpose of the demonstration program under subsection (b) and the provisions of chapter 23 of title 28, United States Code, set out in section 3(a) of this Act; and

(B) identify at least two groups of not less than three and not more than five United States district courts to participate in the demonstration program.

(2) Not later than July 1, 1992, the district courts in each group identified by the Judicial Conference under paragraph (1)(B) shall implement a civil justice expense and delay reduction plan developed by the Judicial Conference under paragraph (1)(A).

(e) Report Requirements.--(1) The Judicial Conference of the United States shall submit to the Committees on the Judiciary of the Senate and the House of Representatives an interim report and a final report on the demonstration program.

(2) The interim report shall be submitted not later than January 1, 1992. The interim report shall contain a plan for the conduct of the demonstration program, each model civil justice expense and delay reduction plan developed by the Judicial Conference, and the district courts covered by the demonstration program.

(3) The final report shall be submitted not later than September 30, 1994. The final report shall contain the following:

(A) The number of United States district courts that have implemented civil justice expense and delay reduction plans.

(B) The content of such plans.

(C) The number of courts implementing a model civil justice expense and delay reduction plan developed by the Judicial Conference of the United States.

(D) For each plan a discussion of how the plan addressed each of the following matters:

(i) The acquisition of initial case information.

(ii) Development of a case disposition plan and timetable.

(iii) Trial scheduling.

(iv) Use of alternative dispute resolution techniques.

(v) Notification and communication among the court and attorneys, including means by which judges and administrators within and outside the court consult concerning management and administrative issues affecting the court.

(vi) Management and monitoring of case progress.

(vii) The means for data input and case recordkeeping.

(viii) Procedures for evaluating system performance.

(E) For each plan providing for case tracking, a discussion of the manner in which the plan addressed each of the matters referred to in paragraph (4)(C) with respect to such matters (in addition to a discussion of how the plan addressed each of the matters referred to in paragraph (4)):

(i) The creation of a case tracking record.

(ii) The number of case processing tracks.

(iii) The criteria for differentiating among cases and assigning cases to one of the tracks.

(F) An analysis of the impact of the plans on the time available to judges to address complex, novel, or difficult issues of law or fact.

SEC. 5. FIRST PERIODIC DISTRICT COURT REVIEW.

The first periodic review by United States district courts pursuant to section 476 of title 28, United States Code (as added by section 3), shall be completed not later than 1 year after the date of the enactment of this Act.

SEC. 6. DISCOVERY CASE MANAGEMENT RULES.

The Supreme Court of the United States shall consider, in accordance with the provisions of chapter 131 of title 28, United States Code, whether it is desirable to amend the Federal Rules of Civil Procedure--

(1) to require counsel for each party to a case jointly to propose a discovery-case management plan for the case at the initial pretrial conference provided for under Rule 16 of such rules; or

(2) to require counsel for each party in a civil case, within a specified period after the issue is joined, to exchange--

(A) a list of all persons that, to the counsel's knowledge or belief, have knowledge of matters relevant to the assertions contained in such complaint or anwer;

(B) all documents that, to the counsel's knowledge or belief, support the positions of the party; and

(C) a certification that the counsel has made a good-faith effort to identify all such persons and documents.

SEC. 7. AUTHORIZATION.

(a) Civil Justice Expense and Delay Reduction Demonsration Program.--There is authorized to be appropriated not more than $_____ for the civil justice expense and delay reduction demonstration program under section 4 of this Act.

(b) Civil Justice Expense and Delay Reduction.--There is authorized to be appropriated for fiscal year 1994 not more than $_____ for the implementation of subchapter I of chapter 23 of title 28, United States Code (as added by section 3).

(c) Judicial Case Management Training.--There is authorized to be appropriated for the Federal Judicial Center not more than $1,000,000 for implementation of section 481 of title 28, United States Code (as added by section 3).

STATEMENT OF PRINCIPLES

RE S.2027

The subcommittee of the Judicial Conference's Executive Committee endorses the following concepts:

1. The chief judge in each district court should appoint a representative advisory committee to:

a. assess the state of the court's civil and criminal dockets, describing not only current conditions, but also trends both in the nature of filings and in the kinds of demands being placed on the court's resources, and

b. recommend ways of reducing the cost of civil litigation and of shortening the time between filing and disposition.

2. In preparing such recommendations, the advisory committees should consider the following:

a. the problems of cost and delay in civil litigation cannot be considered in isolation; rather, they must be examined in the context of the full range of demands made on the district court's resources.

b. all of the major players in the litigation community share responsibility for the problems of cost and delay in civil litigation; thus, for solutions to be effective and equitable, they must include significant contributions not only by courts, but also by lawyers and clients.

3. In determining how lawyers and clients can contribute to solving these problems, especially the excessive costs often associated with civil discovery, advisory committees and courts should consider whether it would be appropriate, prior to the initial status or scheduling conference under Rule 16, to require counsel to meet and confer, and file a statement designed to limit discovery and prepare the case expeditiously for resolution by settlement, motion, or trial.

4. In proposing solutions to cost and delay problems, advisory committees and courts should assess, among other things, the settlement process, including the advisability of implementing or experimenting with ADR programs.

5. Each district court should consider the recommendations made by its advisory committee and should implement appropriate measures through established procedures for adopting local rules.

6. The Judicial Conference should conduct a demonstration program in three to five districts in order to experiment with and assess the relative effectiveness of various methods of reducing cost and delay and various case management techniques. After thorough evaluation, the results of such experiments should be made available to every district court and to the committees of the Judicial Conference that are charged with responsibility for considering and recommending additions to federal procedural rules.

7. The Congressionally-mandated rulemaking process should be used for implementing any cost or delay reduction measures that are proven successful through the demonstration programs and that are suitable for national implementation by procedural rule.

8. Substantial additional resources should be committed to training judicial officers in case management techniques.

9. District courts cannot experiment with and identify the most effective and appropriate measures for reducing cost and delay, and cannot implement the most successful case management techniques, without infusions of substantial additional resources. Effective systems for containing costs and reducing delay cannot be established without fully automated dockets, ready access to more complete data about the status of each case, more support personnel, and the appointment of a truly adequate number of new judicial officers.

10. Effective case management requires full and flexible use of all judicial personnel. It would be counter-productive to impose artificial restraints on the roles magistrates can play in case management.

11. It is essential that any system of case management that is adopted preserve in district judges the authority and flexibility to tailor procedures and schedules that are appropriate to the needs of each suit.

The subcommittee of the Judicial Conference's Executive Committee *cannot* agree to the following:

1. The notion that there is a single case management system or plan that will satisfy the needs of every district.

2. The case tracking system provided for in S.2027 (many of the problems with which are set forth in the Description and Preliminary Analysis adopted by the Judicial Conference on March 13, 1990), including the requirement for clerical tracking coordinators.

3. Statutory limitations on the use of U. S. magistrates.

4. The notion that local advisory groups can be empowered to impose procedural rules or schedules on district courts.

5. The criteria for measuring judicial productivity set forth in S.2027. Any effort to assess the productivity of individual judicial officers or courts must be based on a sophisticated, comprehensive set of data that takes into account the full range of relevant quantitative and qualitative factors.

need for removal based on diversity of citizenship may well be greatest when the plaintiff tries hardest to defeat it. This right would be an illusory one indeed if a plaintiff could defeat it by the simple expedient of assigning a fractional interest in the outcome of the suit to an agent performing what is essentially litigation support on a contingent fee basis. We accordingly hold that federal district courts have both the authority and the responsibility, under 28 USC 1332 and 1441, to examine the motives underlying a partial assignment that destroys diversity and to disregard the assignment in determining jurisdiction if it be found to have been made principally to defeat removal.—Gee, J.

SETTLEMENT—

Federal courts lack authority to summon jurors for summary jury trials designed to facilitate settlement.

(*Hume v. M & C Management*, DC NOhio, C87-3104, 2/15/90)

After unsuccessful settlement discussions, the parties in this action moved for a summary jury trial. A summary jury trial is conducted before six persons drawn at random from the court's jury pool, normally used for petit juries, who are summoned under the threat of fine or imprisonment. The proceeding consists of opening and closing arguments with an overview of expected trial evidence. No direct testimony is taken from witnesses, and the verdict is non-binding. A summary jury trial, therefore, is a settlement tool.

This procedure was established by Judge Lambros of this court, and according to him, the foundation for it is firmly routed in Fed.R.Civ.P. 1 and 16, as well as in the court's inherent power to manage and control its docket. However, there is no authority in law for using persons as summary jurors, summoned pursuant to 28 USC 1866(a). Therefore, such a procedure is not permissible in the federal courts.

Congress has clearly said that except for advisory juries, the only purpose for which a citizen may be required to serve as a juror, and thus the only authority vested in the federal district courts to summon a juror, is to sit on a "grand" or "petit" jury. The first section of the 1968 Jury Selection and Service Act states: "It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." 28 USC 1861.

To imagine that Congress meant the phrase "petit juries" to include a summary jury is to disregard the fundamental distinction between these bodies. A petit jury is the ordinary jury for the trial of a civil or criminal action. A summary jury, on the other hand, is assembled for settlement purpose only and not for the trial of a civil or criminal action. Due largely to this distinction, the Sixth Circuit has held that the First Amendment right of public access does not apply to summary jury trials. *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F2d 900 (CA 6 1988).

Judge Lambros is of the opinion that Fed.R.Civ.P. 39(c) provides the theoretical underpinning for the use of jurors on a summary jury. Rule 39(c) permits the use of jurors for service on an advisory jury. He has stated that the clear purpose behind the rule is to give the court and the parties the opportunity to utilize a jury's particular expertise and perception when a case demands those special abilities. However, his interpretation of the rule is overbroad. It merely allows a judge to have the assistance of a jury in deciding cases, but does not provide the basis for giving a party such assistance in order to reach settlement. As Judge Posner has stated: "[T]he summary jury is not an advisory jury. It does not advise the judge how to decide the case, but is used to push the parties to settle. It is therefore outside the scope of Rule 39(c), which deals with advisory juries." *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U.Chi.L.Rev. 366 (1986); see also *Strandell v. Jackson County*, 838 F2d 884, 56 LW 2428 (CA 7 1987).

In addition to the difference in purpose between a summary jury trial and a real trial, a summary jury hears no direct testimony and, therefore, does not pass on the credibility of witnesses, one of the primary functions of a petit jury. A summary jury listens only to lawyers' arguments, which, unless corroborated, are never to be regarded as trial evidence. In addition to the lack of live witnesses, evidentiary objections are discouraged, thus further increasing the likelihood that evidence disclosed to the summary jury would be inadmissible at a real trial. Most importantly, unlike an ordinary jury verdict, a summary jury "verdict" is not binding.

Clearly, a summary jury composes a different entity than the jury referred to in the Seventh Amendment, which states that "no fact tried by jury, shall be otherwise reexamined in any Court of the United States." Since a summary jury renders only a non-binding "verdict," it is the antithesis of the jury contemplated by the amendment.—Battisti, J.

Criminal Law and Procedure

DISTURBING THE PEACE—

Application of Maryland statute that makes it crime for anyone to disturb neighborhood with "loud and unseemly noises" to anti-abortion protester who delivered speech on public street outside abortion clinic in loud but unamplified voice does not violate First Amendment.

(*Eanes v. Maryland*, Md CtApp, No. 1-1989, 2/8/90)

Eanes was convicted of violating Md. Code Art. 27, Section 121 (1987), which makes it a crime for anyone to "wilfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises . . . ." Eanes was part of a small group that had gathered in front of an abortion clinic to protest against abortion. The clinic is located on a congested, oneway thoroughfare. The building that houses the clinic also houses two other businesses and at least one residential apartment. Across the street from the clinic is a residential apartment building. On the morning in question, Eanes was opposing abortion by, in his words, "preach[ing] the gospel of Jesus Christ" to the entire neighborhood in a loud voice, unaided by artificial amplification.

A state may enforce regulations of the time, place, and manner of expression that are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample channels of communication. Eanes does not question that as applied to protected speech Section 121 can be read as content-neutral. Indeed, because we are working in the area of protected speech, the statutory phrase "loud and unseemly noise" should be construed in a content-neutral fashion in order to remain in conformity with First Amendment jurisprudence.

We interpret "unseemly" as directly modifying the volume level of "loud." It requires the meaning of "loud" to be informed by the circumstances. It does not act as a blanket proscription against loud speech. If the other statutory elements are met, Section 121 can be enforced only if the speech is unreasonably loud under the circumstances. Construed in this manner, "loud and unseemly" is clearly content-neutral.

In *Ward v. Rock Against Racism*, 57 LW 4879 (1989), the U.S. Supreme Court upheld a regulation that gave New York City broad authority to control the volume level of concerts and other performances (recognized as protected speech) at a Central Park bandshell, on the justification that the City sought "to avoid undue [noise] intrusion into residential and other areas of the park." In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the court upheld a city ordinance that prohibited the use of sound trucks that emitted "loud and raucous" noise.

Ward and *Kovacs* reflect judicial concern with balancing the right of free speech with the individual's right to be free from unwanted communication. This has often been expressed in terms of the "captive audience." Within the home, the individual's right to be left alone plainly outweighs the