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SPECIAL ISSUE ON PRO SE LITIGATION: NEW LEGISLATION, NEW CHALLENGES

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The Center welcomes comments and suggestions for topics that could be addressed in future issues of *FJC Directions*. Please send correspondence to Genevra Kay Loveland, Editor, *FJC Directions,* Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

New Statutes Add to Challenges Posed by Pro Se Cases in the Federal Courts

RYA W. ZOBEL

As this issue of *Directions* devoted to pro se litigation was going to press, Congress enacted two statutes that will make significant changes in how federal courts respond to suits filed by prisoners—the Prison Litigation Reform Act (PLRA),[1] which prescribes detailed procedures for handling prisoner civil rights cases, and the Antiterrorism and Effective Death Penalty Act,[2] which includes a title on habeas corpus and a subtitle on mandatory victim restitution. While not all pro se cases are brought by prisoners—a point emphasized in this issue—a large proportion of them are. Thus, the requirements of the new statutes will directly affect how federal courts process and dispose of much of their pro se caseload, adding to the challenge these cases already pose.[3]

In light of the PLRA, four articles in this issue—one describing the District of Nevada's early case-evaluation telephonic hearings procedure for prisoner pro se actions, another reporting a pre-PLRA survey of many courts' requirements for partial payment of filing fees, and two outlining some courts' experiences in the use of videoconferencing for hearings on prisoner civil rights complaints—are especially timely. Although none of the articles can provide detailed guidance as districts implement the new law, their description of procedures and experiences before its enactment will be helpful to courts faced now with the new statutory requirements. In response to the requests of judges and others to develop programs to help courts understand and implement the two new statutes, the Center is planning a number of educational programs and publications, which are described in the box on page 2.

A common theme of the articles here is that the federal courts must handle an increasing number of cases filed, and sometimes defended, by litigants representing themselves. We suspect that state courts are confronting a similar situation. If solutions are to be found, the implications of this phenomenon must be explored and documented. This publication is one step toward that end.

Discussions regarding pro se litigation generally emphasize the burdens placed on judges and support staff by unrepresented litigants who are unfamiliar with rules and procedures for pursuing civil actions in the federal courts. In a recent online conference on pro se issues conducted by the Center for selected magistrate judges, district clerks, and other court staff, the participants explored concerns about giving information and advice to pro se litigants, dealing with incomplete complaints or failure to file completed in forma pauperis forms, and filing of multiple motions that are often unclear. (See page 33.) Other frequently mentioned problems include determining whether and when a case may be dismissed as frivolous, obstacles to the efficient conduct of discovery and motion practice, and difficulties posed by the pro se litigant's lack of legal competence. A common assumption is that these litigants, particularly if they are inexperienced, may be less receptive to or less able to take advantage of settlement opportunities or alternative dispute resolution programs than litigants represented by counsel, and that—for this and other reasons—pro se cases may take longer to reach disposition.

Articles provide new data and describe innovative approaches

An analysis by Center researchers David Rauma and Charles Sutelan of data on almost 60,000 pro se cases filed over a four-year period in ten district courts with large numbers of civil filings provides new information on the volume of pro se cases and their progress through the courts. (See page 5.) In particular, the research showed that on average pro se cases take less time from filing to disposition than cases represented by counsel, and the authors suggest that procedures already in place for processing pro se cases in some districts may account for the shorter disposition time. Even more surprisingly, prisoner pro se cases, which made up nearly two-thirds of all pro se filings studied, had shorter disposition times than did nonprisoner pro se cases.

It is the case, however, that many courts are experiencing a heavy volume of prisoner pro se litigation, and the difficulties engendered thereby challenge courts to try new approaches to case management, such as that proposed by Senior District Judge William W Schwarzer (N.D. Cal.), former Center Director. (See page 13.) In an abbreviated version of an article that first appeared in the March–April 1995 issue of *Judicature*, Judge Schwarzer suggests that courts pilot-test an expedited docket for pro se and small-stakes civil cases. We have reprinted the piece here in the hope that it will stimulate further discussion and perhaps experimentation. At this point, a sensible next step would seem to be an evaluation of the procedure as implemented in a few districts.

As noted above, several of the articles deal with prisoner pro se litigation and are particularly timely. In seeking ways to

comply with the PLRA, courts may find pertinent the District of Nevada's innovative use of early case-evaluation ("triage") telephonic hearings for prisoner pro se civil rights complaints, as described by Center researcher Marie Cordisco. (See page 18.) Statistics reported by the district indicate that the pilot program has resulted in efficient processing of prisoner cases and has reduced the time spent on frivolous claims. A second article by Ms. Cordisco provides important information about court programs requiring plaintiffs to pay some portion of the fees for filing civil actions. Since the PLRA creates new requirements for paying these fees, the experience of courts with these programs may be instructive as others implement the new statute. The study, done at the request of the Judicial Conference Committee on Federal–State Jurisdiction, is based on analysis of forty-seven districts that had adopted formal or informal provisions for imposing partial filing fees in civil cases before the new statute was enacted.

The Prison Litigation Reform Act also requires the use of videoconferencing, telephone conferences, or other types of telecommunications, to the extent practical, in order to avoid having to bring inmates into the courthouse for hearings. Before passage of the Act, the Judicial Conference had authorized three courts to use videoconferencing technology to conduct pretrial proceedings and some trials in prisoner civil rights cases. At its March 1996 meeting, the Conference approved videoconferencing as a case-management tool in prisoner civil rights pretrial proceedings and authorized expansion of the program, as funding permits. One article reports on these developments, while another provides a more detailed sketch of the program in the Western District of Missouri. (See pages 22–24.) These reports may be of interest to courts preparing to implement the PLRA.

Bankruptcy courts face their own set of problems with pro se debtors and creditors. The Administrative Office has estimated that over 80,000 chapter 7 petitions were filed by pro se debtors in 1992.[4] In 1995, the Judicial Conference Committee on the Administration of the Bankruptcy System, with assistance from staff of the Center and AO, published the *Case Management Manual for United States Bankruptcy Judges.* It includes a section that describes techniques that can be used in processing cases with pro se parties and offers suggestions for developing district-wide programs to address the needs of litigants who represent themselves. An excerpt from that section is reprinted in this issue. (See page 37.)

Educational programs and publications will address requirements of new laws

Here is a summary of the Center's plans, as of early June, for educational programs and publications dealing with the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act.

First, we will continue to adapt our regular educational programs and reporting services to reflect the statutory changes. For example, to take account of the new statutes we are revising the curriculum for the Center's June conference of chief probation and pretrial services officers (the Antiterrorism Act also affects mandatory restitution), the August capital case management workshop for appellate clerks, this summer's programs for magistrate judges, and next September's seminar on pro se litigation.

The *Chambers to Chambers* serial publication, currently running a series on federal capital prosecutions, will share court- and case-management innovations that judges have used in light of the new statutes. Our *Resource Guide for Managing Prisoner Civil Rights Litigation,* which has been in draft status pending the new legislation, will now move to final publication.

Second, we are planning some special steps, including:

- a nationally broadcast videoprogram, probably in August or September, to analyze the new habeas provisions and how the courts have been interpreting them, with some attention also to the Prison Litigation Reform Act; and
- a newsletter, *Habeas & Prison Litigation Case Law Update,* to summarize relevant appellate and district court decisions under the statutes. It is patterned after our *Guideline Sentencing Update,* but will have a shorter life span. The goal is to provide help during the most intense period of judicial interpretation.

A note about state courts and other interested groups: We prepare and distribute our programs, manuals, and other services primarily for and to federal judges and federal court staff, but we are pleased to make them available to state courts, the bar, and other federal agencies when we can do so consistent with our statutory mandate and our budget. For example, state judges will be welcome to participate to the degree feasible in our videoprogram (and, if we proceed by satellite, probably to receive it directly through their own downlinks). And, as with our *Guideline Sentencing Update,* we will make available single copies of *Habeas & Prison Litigation Case Law Update* to appropriate groups outside the federal judiciary for whatever duplication and distribution they wish. In addition, the materials will be available on the Center's World Wide Web homepage. (We will also include information about the new legislation in a manual on state–federal cooperation to be published jointly with the National Center for State Courts this summer and distributed to selected federal and state judges and to state–federal judicial councils.)

The activities above reflect the work of Center pro se and capital case workgroups created in 1994 and 1995. We welcome your comments about our responses to the statutes and other suggestions you have. We will try to be as flexible as possible in our assistance to the courts.

Other Center projects to assist courts

In addition to the efforts outlined in these articles, the Center has undertaken a number of other projects to help the federal courts manage pro se litigation. All of these endeavors are coordinated by a pro se work group that brings together the expertise and resources of all Center divisions. One of the first tasks of the work group was to build a reliable database, and as reported in this issue, valuable new information has already been gleaned from this undertaking. The work group is also collecting information that describes the full range of case-management practices in pro se cases employed by the various districts. A number of districts, like the Northern District of Indiana, have adopted local rules requiring that all complaints filed on behalf of parties representing themselves be on forms supplied by the clerk of court. We hope to determine whether other districts require similar form complaints in pro se cases and the extent to which the practice appears to be an effective case-management tool.

In addition to the research projects discussed in this issue of *Directions*, the Center, at the request of the Judicial Conference, is conducting an evaluation of the congressionally mandated three-year experiment with in forma pauperis procedures in six bankruptcy courts. The study will evaluate pilot court experiences in permitting qualified chapter 7 debtors to proceed in forma pauperis. Although the experiment is only half completed, it is already clear that the flood of increased and abusive bankruptcy filings by prisoners and others that was anticipated by some critics has not materialized.[5] Other Center research will analyze a sample of recently terminated nonprisoner pro se cases to develop a more detailed picture of the nature and extent of the demands posed by these cases, as well as the courts' screening and case-management responses.

Center staff are available to provide technical assistance to courts in examining their experiences with various aspects of their pro se dockets. Most recently, staff assisted the Ninth Circuit's Task Force on Prisoner Remedy Procedures. The Center has also helped the District Court for the District of Columbia develop an interactive kiosk that will provide the public, and particularly pro se litigants, with a range of information and aid in dealing with the court. The kiosk system includes all the features normally associated with information booths in public places, such as locations of functions and activities, daily schedules, building staff roster with telephone numbers, and so on. It also provides direct access to case docket information. If certain rather difficult technical problems can be solved, litigants could fill out official forms electronically and file them directly from the kiosk. As an intermediate step, the system may be enhanced to allow users to fill out the forms on line and print them at the kiosk site. They would then file the papers with the court in the traditional fashion.

A March 1995 Center workshop for 102 participants—17 district and 59 magistrate judges, and 26 pro se staff attorneys from 65 districts—used a draft of the Center's forthcoming *Resource Guide for Managing Prisoner Civil Rights Litigation* as a means of focusing discussion on critical case-management issues and facilitating the exchange of useful experiences and ideas. Much valuable information about innovative procedures being used in some district courts came out of the workshop and will be incorporated—along with other comments and suggestions from participants—into the guide, which builds on the Center's earlier *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts*, published in 1980. The Center is especially appreciative of the assistance provided by a number of judges, including Chief Judge Charles Wolle (S.D. Iowa), and Magistrate Judges John Moulds (E.D. Cal.), Ila Jeanne Sensenich (W.D. Pa.), Celeste Bremer (S.D. Iowa), William A. Knox (W.D. Mo.), David Piester (D. Neb.), and others who offered substantive comments on the manual, publication of which is moving forward to reflect the provisions of the PLRA.

At the request of many judges who could not attend the first prisoner litigation workshop, a second one is scheduled for the fall of 1996. Following the workshop, participants will take part in an on-line conference to develop further the issues raised. Apart from these special workshops, all Center seminars and workshops for newly appointed district, magistrate, and bankruptcy judges now include at least one segment on pro se litigation. Also, optional sessions on pro se litigation will be offered at the Center's 1996 regional workshops for magistrate judges. (As indicated in the box on page 2, curricula for these seminars and workshops are being revised to reflect the new statutory mandates.)

Planning for the future

Implementation Strategy 33a of the Long Range Plan for the Federal Courts calls on the courts, in conjunction with efforts by the Federal Judicial Center, to: (1) gather and study additional statistical data on pro se litigation for the purpose of forecasting the impact of such litigation on the future caseload of the federal courts; and (2) find better ways of addressing the disputes underlying these cases. The need for additional data on pro se litigation is clearly related to the larger question of what kind of data the federal courts should be collecting on all aspects of their caseloads. In light of the Long Range Plan's directive, it is clear that more systematic and thorough attention must be directed at quantitatively establishing the extent

and nature of all pro se litigation in the federal courts, including the courts of appeals. While data on prisoner cases—most of which are filed pro se—are routinely reported to the Administrative Office, this was not true until recently for other civil pro se cases filed in district and bankruptcy courts. The Administrative Office took a major step to improve our understanding of pro se cases with its recent revision of the judiciary's data collection to require districts to report routinely on all pro se civil filings and bankruptcy petitions. This will enable the Judicial Conference, the Administrative Office, and others to better gauge the extent of such litigation and the related demands placed on the federal courts. Since most districts were already collecting this information, the burden imposed on individual courts should be minimal.

Center efforts to assist courts will involve exploring new processes. Frequently mentioned are programs that enhance the role of pro se staff attorneys. Proposals that staff attorneys review all pro se cases immediately upon filing and provide general legal information in response to telephone and letter inquiries from pro se litigants[6] may reduce the burden on other court personnel, ensure that all pro se litigants receive consistent information, and thereby enhance the courts' capacity to respond to these cases.

It may be feasible to examine whether other remedies that do not involve the civil litigation process—perhaps administrative in nature—should be encouraged in most prisoner pro se cases. At least one district has called for the federal judiciary to support appropriate legislation to encourage administrative remedies for many of the cases filed in the federal courts, including the creation of a corps of administrative law judges who would adjudicate all pro se prisoner cases.[7]

It is critical that the Center, the Judicial Conference, and the Administrative Office continue their efforts to identify, assess, and promote every promising avenue of response to the distinctive problems presented by pro se litigation, while at the same time seeking to ensure fairness and due process rights to unrepresented litigants. As the articles in this issue of *Directions* indicate, the Center is committed to continuing to work jointly with the Judicial Conference, the Administrative Office, the courts, and others to achieve greater understanding of the nature of the pro se caseload and its impact on the judicial system, and to develop the most effective procedures for meeting the challenge confronting the courts.

Notes

1. The Prison Litigation Reform Act of 1995 is part of the Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996). The public law is not available as of this writing, and an enrolled version of the bill was not printed. The most recent version of the law signed by the President can be found in Title VIII, §§ 801–810 of H.R. Rep. No. 104-537, 104th Cong., 2d Sess. (Apr. 25, 1996) (Conference Report to Accompany H.R. 3019: Making Appropriations For Fiscal Year 1996 To Make A Further Downpayment Toward A Balanced Budget, And For Other Purposes).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

3. *See* Recommendation 33, Long Range Plan for the Federal Courts, Judicial Conference of the United States, December 1995.

4. *See* Mary M. Testerman, *Bankruptcy Paralegal Regulation and the Bankruptcy Reform Act of 1994: Legitimate Legal Assistance Options for the Pro Se Bankruptcy Debtor,* 23 Cal. Bankr. J. 37 (1996).

5. *See IFP Pilot Project Debunks Many Myths,* 28 Bankr. Ct. Decs., Mar. 19, 1996.

6. *See* Recommendations for Expediting Pro Se Litigation, Pro Se Law Clerks and Staff Attorneys Association, 1994.

7. *See* Report of the Special Study Committee on Pro Se Litigation, U.S. District Court for the District of Nevada, May 26, 1995.

Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information

DAVID RAUMA
CHARLES P. SUTELAN

Despite the interest in pro se litigation, there is very little information about what kinds of cases unrepresented litigants are involved in and what happens to those cases. For that reason, when the Center's pro se work group was formed to focus on issues involving pro se litigation, one of its first tasks was to establish a reliable database that could be used to start answering basic questions about the volume and nature of cases in which one or more litigants is proceeding without counsel. This article is an initial step in using that database to provide judges and court managers with the kind of information they need in order to design the special procedures that pro se cases may require.

The Center collected data from ten federal court districts with the largest total number of civil cases filed between 1989 and 1994, with an eye toward geographic diversity. Courts selected for the survey were the Eastern District of Louisiana, the Southern District of Florida, the Southern District of New York, the District of New Jersey, the Eastern District of Pennsylvania, the Northern District of Texas, the Eastern District of Michigan, the Northern District of Ohio, the Northern District of California, and the Central District of California.

These are some of the highlights from the findings:

- Nine of the ten districts in the database experienced increases in the number of pro se filings between fiscal 1991 and 1994.
- More than one-third of pro se cases in the database were nonprisoner filings. In almost 70% of these cases, the median time from filing to disposition was shorter than it was in represented cases in the same categories.
- Civil rights cases made up the largest category of nonprisoner pro se cases (42%). Twenty percent of nonprisoner cases were filed under miscellaneous statutes; 14% were contract cases.
- Prisoner filings made up almost two-thirds of the pro se caseload. They were predominantly civil rights cases (60%) and habeas corpus petitions (30%); 9% were requests to vacate sentence.
- The proportion of prisoner cases filed pro se was roughly consistent across the ten districts.
- Property rights, forfeiture and penalty, real property, contract, labor law, and personal injury cases represented almost 30% of the cases brought by nonprisoners. These cases had longer median times from filing to disposition when at least one of the parties was proceeding pro se.
- The percentages of dismissals, settlements, trials, or any other disposition did not vary greatly between pro se prisoner cases and represented prisoner cases.
- Among nonprisoner cases, the percentage of cases settled or voluntarily withdrawn was greater in represented cases than in pro se cases.
- One-third of all pro se and represented prisoner cases were dismissed before trial.
- Prisoner cases are less likely to settle than nonprisoner cases.
- In prisoner cases, the likelihood of dismissal or of judgment on a motion before trial was greater in pro se cases than in represented cases.
- Pro se cases went to trial as infrequently as represented cases.
- In pro se cases, the median time from filing to disposition was less for prisoner cases than for nonprisoner cases. This difference was found in nine of the ten districts in the database, but there was great variability in the amount of that difference. In three of the nine districts, the median time for prisoner pro se cases was only slightly less than for nonprisoner pro se cases.
- Overall, median time from filing to disposition was less for cases in which one or more litigants was pro se than for those in which all parties were represented by counsel.

Data gathered from ten of largest courts

The Center obtained the data analyzed here based on the assumption that larger district courts would have sufficient numbers of both prisoner and nonprisoner pro se cases for study. The data thus provide valuable information about the state of pro se litigation in larger courts, but it cannot be assumed that they shed light on the situation in smaller districts.

The ten districts reported 63,250 pro se cases filed between

July 1, 1989, and November 1, 1994. (Data from the Eastern District of Louisiana include only cases filed on or after October 1, 1992.) Additional processing and other information for these cases was obtained by linking the data from the districts with data provided by the Administrative Office of the U.S. Courts. Identifying information such as name, docket number, and filing date was obtained for just over 94% of the cases. Cases that could not be linked were not used in the analysis. The resulting database consists of 59,641 pro se cases.

Because of concerns over the completeness of the pre-1990 data, and because 1994 is the last year for which a substantial number of the cases have been terminated, most of the analysis uses the 52,885 cases filed in fiscal years 1991 through 1994. Of those cases, 48,259 (91%) had been terminated by June 30, 1995. (For the purpose of comparison, we also analyed 204,597 represented cases filed in these ten districts during the same time period.)

How many pro se cases filed?

Pro se cases filed in the ten districts between October 1, 1990, and September 30, 1994, constituted 21% of all filings in these courts. Of the 52,885 pro se cases we analyzed, 63% (33,064 cases) were prisoner petitions and 37% (19,821 cases) were nonprisoner civil actions. (For nonprisoner cases, the database does not include information on whether plaintiffs, defendants, or both were proceeding pro se. Beginning with cases filed in late 1995, data identifying nonprisoner pro se plaintiffs and defendants began to be reported routinely by the courts to the Administrative Office.) Figure 1 shows the civil caseload, comparing the number of cases filed pro se with the number filed by counsel. It also illustrates the percentage of all cases filed pro se. Most of the districts fell consistently within the 16–23% range, with the exception of the Northern District of Ohio (12%) at the low end and the Central District of California (30%) and Northern District of Texas (33%) at the high end of the distribution. Figures 2 and 3 contain the same information, but separately for prisoner and nonprisoner cases, respectively. The percentage of prisoner cases filed pro se ranged from 70–90%, while 6–11% of nonprisoner cases were filed pro se. Exceptions to the pattern of nonprisoner filings were the Eastern District of Michigan (5.5%), the Northern District of Texas (19.5%), and the Northern District of California (14.6%).

Figure 1
Civil caseload in ten district courts, fiscal 1991–1994, comparing represented and pro se cases

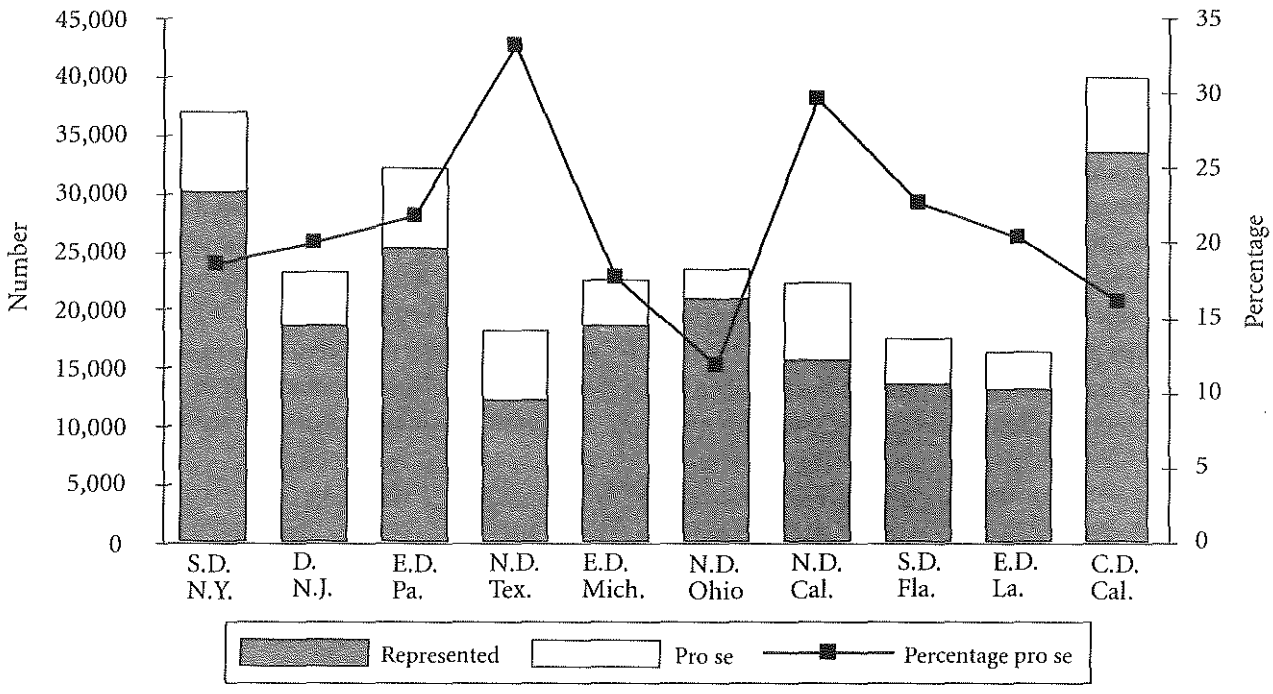


Figure 2
Prisoner cases filed in ten district courts, fiscal 1991–1994, comparing represented and pro se cases

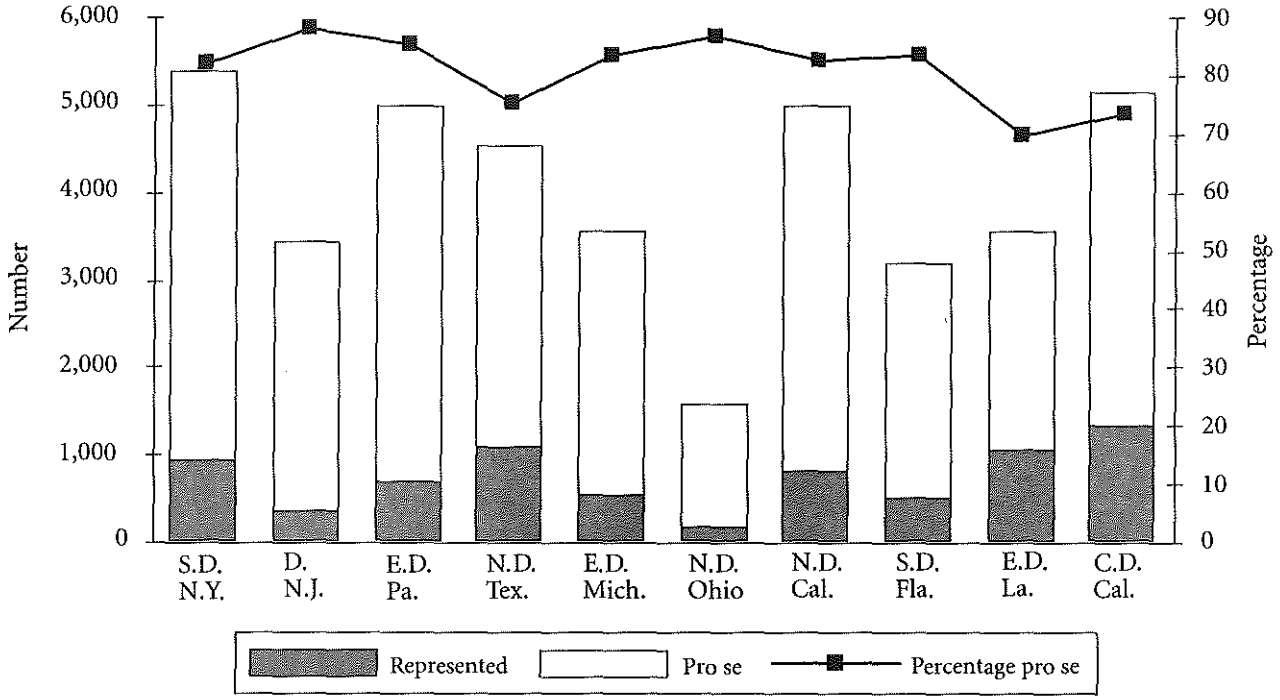
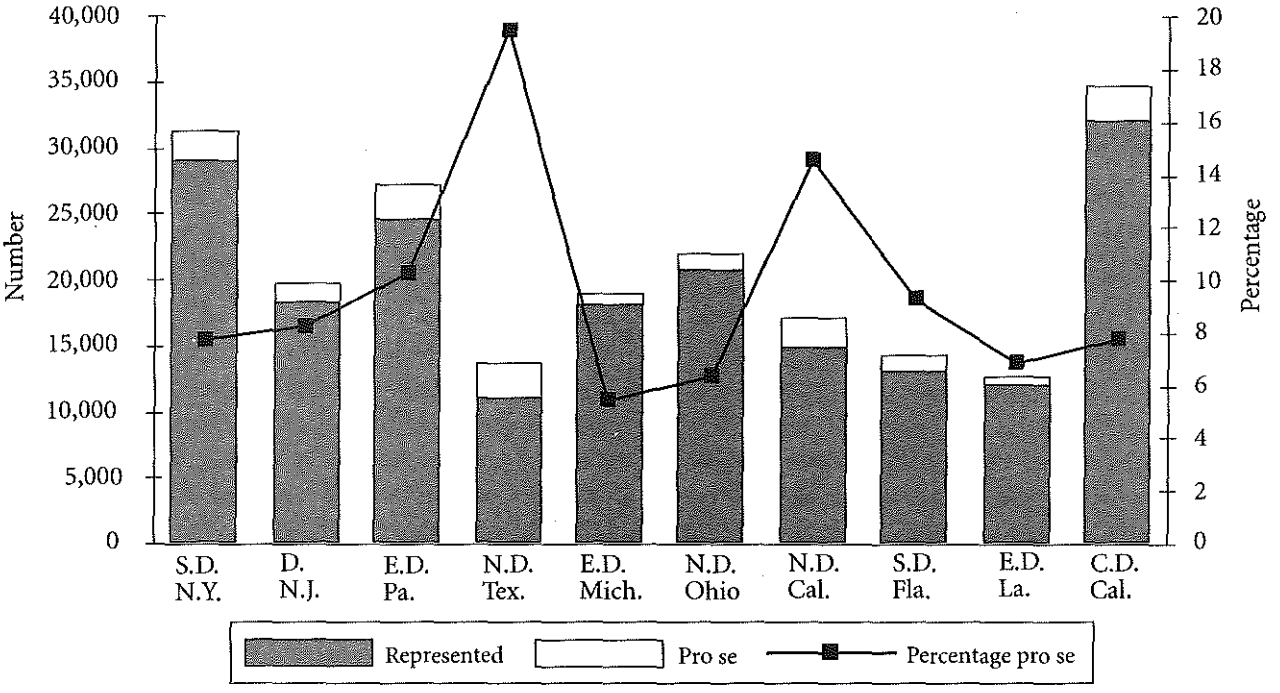
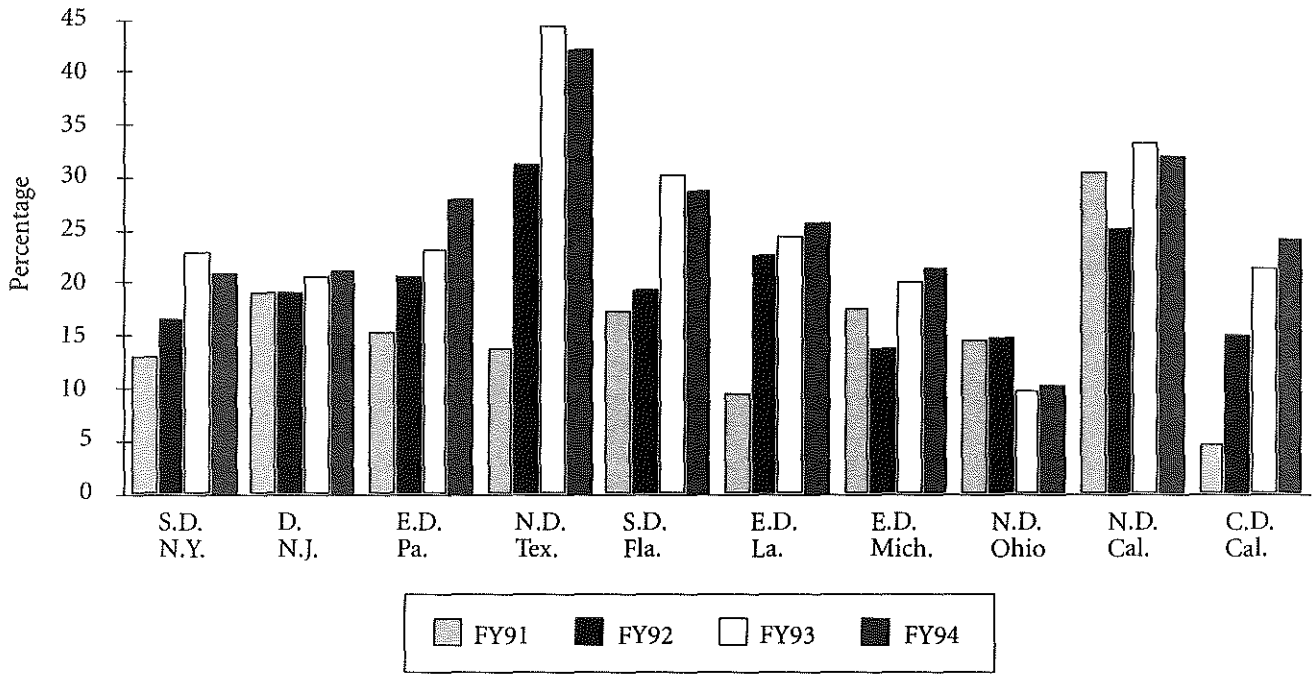


Figure 3
Nonprisoner cases filed in ten district courts, fiscal 1991–1994, comparing represented and pro se cases



Taking the ten districts as a whole, the percentage of pro se filings increased steadily from 15% of all civil filings in 1991 to 24% in 1994. A breakdown by district in Figure 4 shows increases over this period in nine of the ten districts. Only the Northern District of Ohio experienced a decrease in the percentage of cases filed pro se. However, the percentage of pro se filings in the District of New Jersey, Eastern District of Michigan, and Northern District of California increased only slightly over the four-year period.

Figure 4
Changes in percentage of pro se filings, fiscal 1991–1994, in ten district courts



What kinds of pro se cases filed?

Figures 5 and 6 show the distributions of case types for prisoner and nonprisoner pro se cases in standard Administrative Office categories. In prisoner cases, the largest category consisted of civil rights actions (60%), followed by habeas corpus petitions (30%). Motions to vacate a sentence (9%) and writs of mandamus (1%) were the other two types of prisoner cases in the database.

Nonprisoner pro se cases present a very different mix of types. However, as with prisoner cases, the largest category of nonprisoner cases was civil rights actions (42%). The remaining cases were contract cases (14%), personal injury torts (7%), bankruptcy appeals (7%), labor actions (5%), Social Security cases (4%), property damage torts (3%), real property cases (2%), property rights cases (2%), and tax suits (2%). A large number of cases were filed under miscellaneous statutes (11%), including forfeiture and penalty cases, securities cases, and RICO actions. These latter categories each represent less than 1% of the nonprisoner pro se cases filed.

Figure 5
Nature of suit in prisoner pro se cases, fiscal 1991–1994, in ten district courts

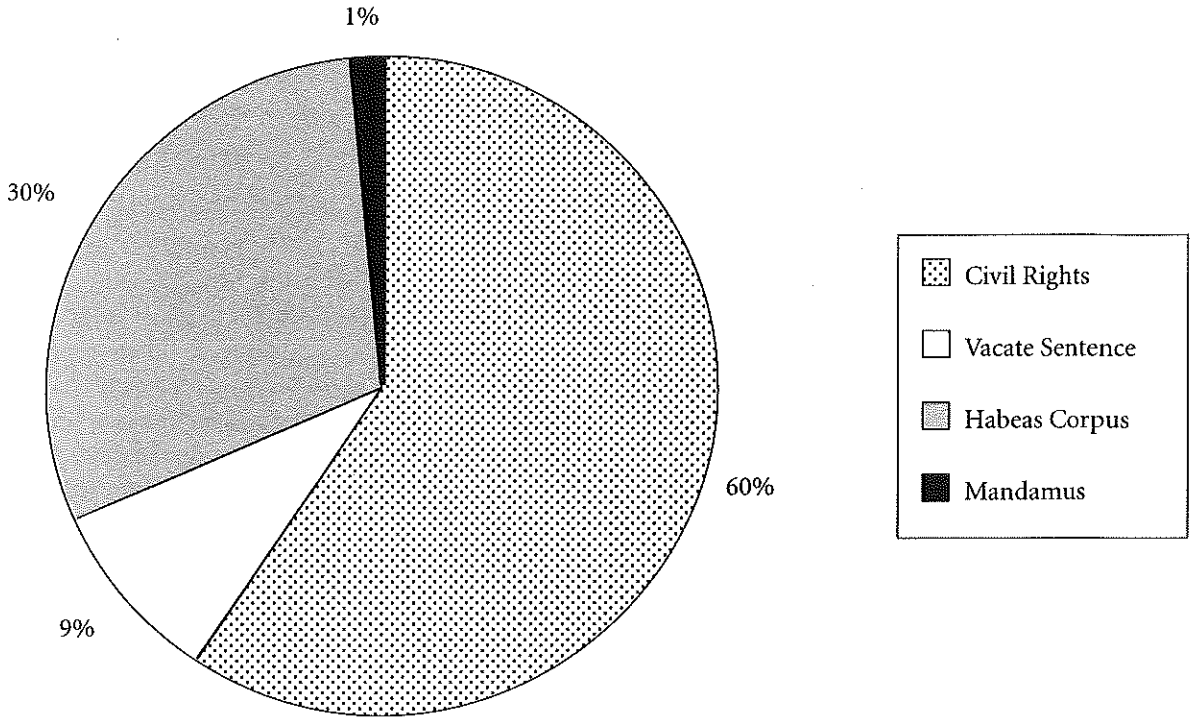
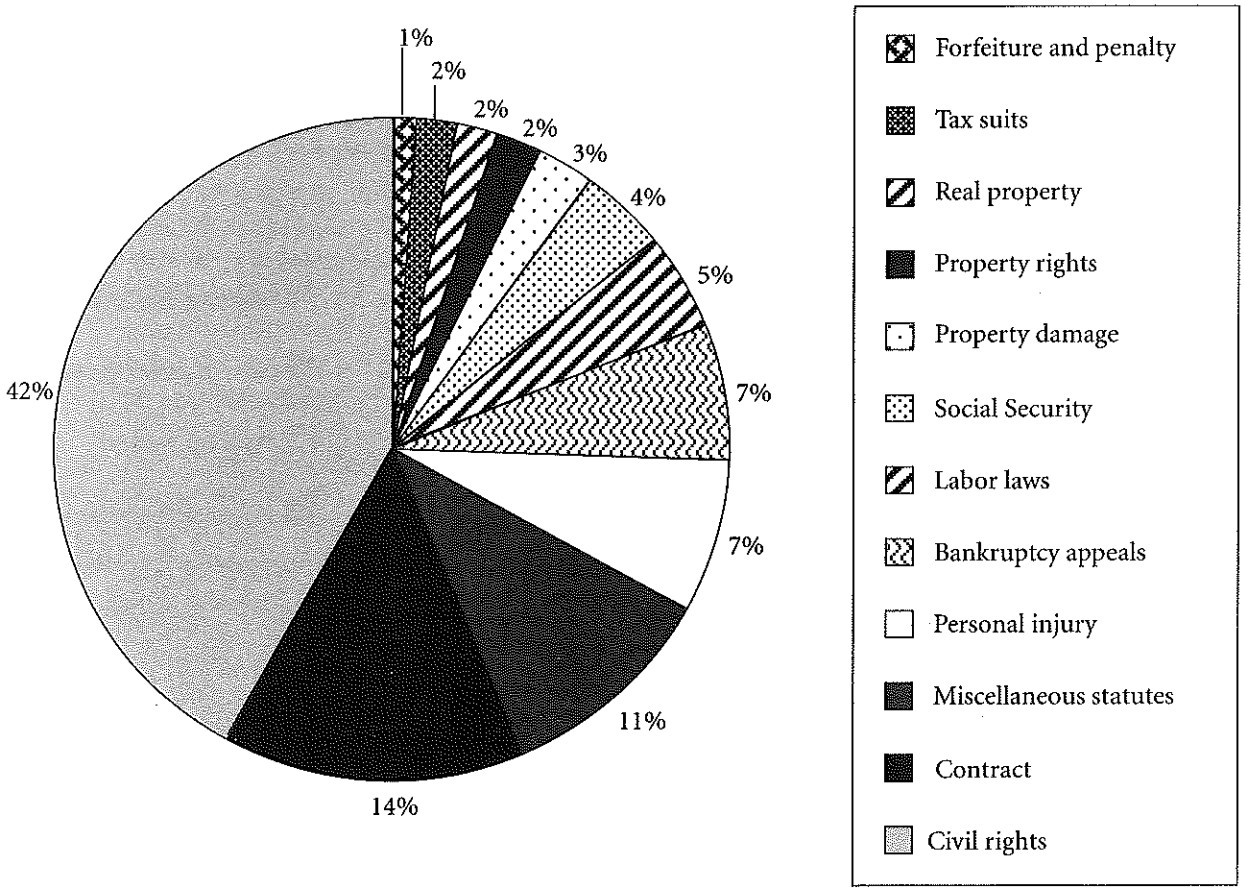


Figure 6
Nature of suit in nonprisoner pro se cases, fiscal 1991–1994, in ten district courts



How long to disposition?

Observers of the federal courts often express concern that pro se litigants, unfamiliar with court procedures, will require additional time for all stages of case processing. In particular, there is concern that their unfamiliarity and inexperience with the law will cause them to be unwilling to settle or, at least, to settle early. The data shed some light on the time it takes for courts to process pro se and represented cases, although this is also shaped by procedures that differ among districts.

As of June 30, 1995, 91% of the prisoner pro se cases and the nonprisoner pro se and represented cases in the database had been disposed of; 83% of the prisoner represented cases had reached disposition. The median time from filing to disposition for the pro se cases was 141 days, in contrast to the longer median time of 173 days for the represented cases. (Median disposition times rather than average or mean times are used because the median is influenced less by extreme values of disposition time.) The median time for prisoner pro se cases was 131 days, while the time for nonprisoner pro se cases was 161 days. (Median time for habeas corpus actions—both pro se and represented—was approximately one month longer than for other prisoner cases. Habeas cases follow a different procedural route than prisoner civil rights cases, which may help explain the difference.) Differences in median times may be due in part to differences in procedures courts used to process prisoner or pro se cases in general. For example, the shortest median time to termination for prisoner pro se cases was 56 days in the Southern District of New York, which takes a number of steps to expedite processing. In this district, a pro se law clerk screens prisoner complaints and, for cases without an adequate basis in law or fact, prepares a sua sponte order of dismissal and judgment for the chief judge's signature. If the case is not dismissed, the pro se office recommends that in forma pauperis status be granted, prepares all necessary papers for filing, and, after docketing, sends a complaint package to the litigant. Differences among the districts in the volume and types of cases are almost certainly reflected in median times from filing to disposition, as well. Without specific information about case content, it is not possible to judge the efficacy of any district's procedures for handling cases, whether pro se or represented, prisoner or nonprisoner.

Figure 7
Median time from filing to disposition in ten district courts, fiscal 1991–1994

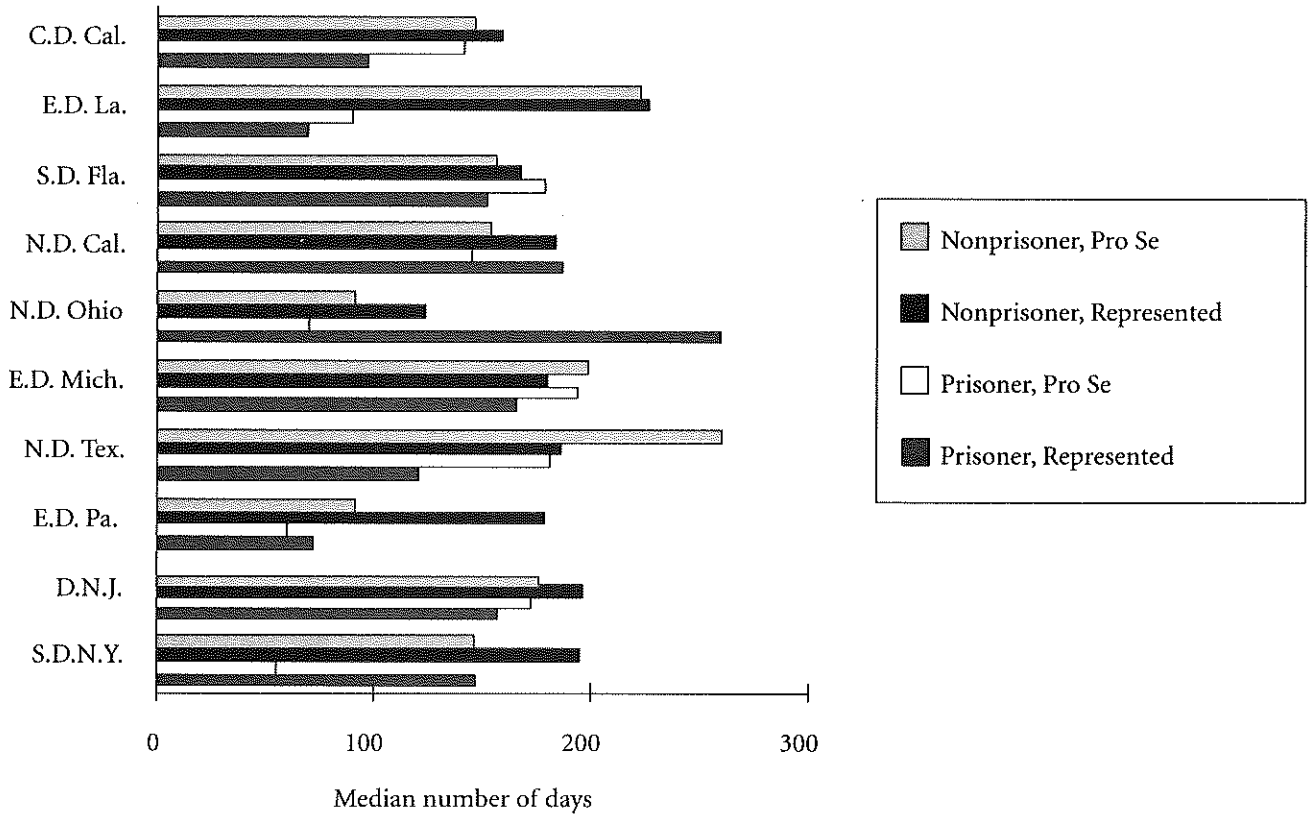
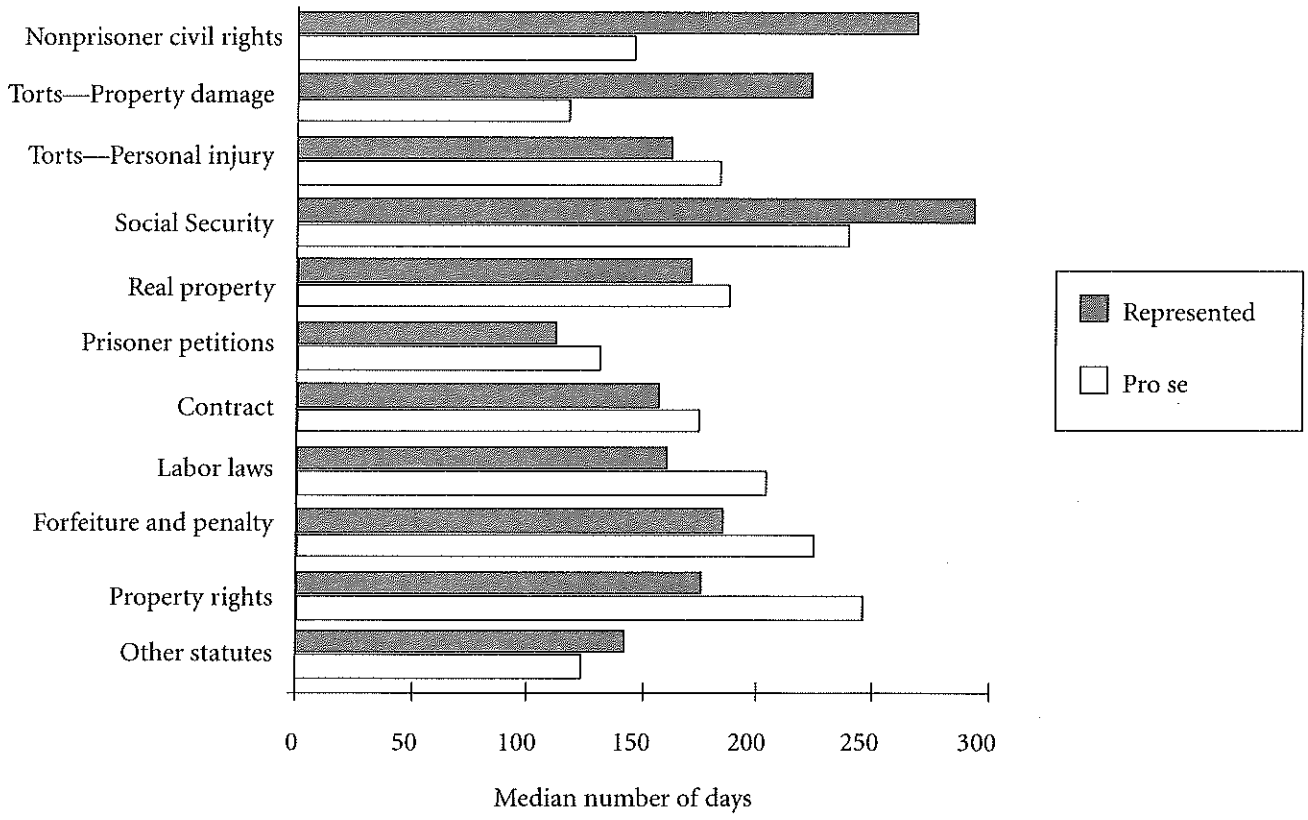


Figure 7 provides a district-by-district breakdown of the median time from filing to disposition for prisoner and nonprisoner cases according to whether they were pro se or represented cases. It shows that there is variation both within and across districts in disposition times for these four types of cases. For example, nonprisoner cases in the Eastern District of Louisiana had median times from filing to disposition of 228 days for represented cases and 224 days for pro se cases. In that same district, prisoner cases had median times from filing to disposition of 70 days for represented cases and 91 days for pro se cases. In contrast, in the District of New Jersey median times to disposition had a narrower range—from 197 days for represented nonprisoner cases to 158 days for represented prisoner cases.

Figure 8 shows the median number of days from filing to disposition according to case type for prisoner and nonprisoner pro se and represented cases. In four categories of nonprisoner cases—Social Security, civil rights, property damage, and other statutes—the median time to disposition was longer for represented cases than for pro se cases. As reflected in Figure 6, these case types were almost 70% of nonprisoner pro se filings in the database. Although this finding seems to be at odds with the conventional view that pro se cases take longer to reach disposition because of litigants' unfamiliarity with court procedures, the observed results cannot be explained based on the data available. Figure 8 also indicates that both pro se and represented prisoner petitions had the shortest median time to disposition overall.

Figure 8
Median time from filing to final disposition in ten district courts, fiscal 1991–1994, arranged by type of case, comparing represented and pro se cases



Most common types of dispositions

The type of disposition a case reaches determines in part the time to disposition (e.g., cases that go to trial generally take more time than cases that settle or go through a court's ADR procedures). The table below presents information on some of the most common and relevant types of dispositions for pro se and represented prisoner and nonprisoner civil cases. The most striking finding is that the percentage of prisoner cases reaching any given disposition was virtually the same whether the prisoners were represented or were proceeding pro se. Specifically, the data indicate that pro se cases went to trial as infrequently as cases represented by counsel.

Selected dispositions for pro se and represented cases, fiscal 1991–1994, in ten district courts

	Prisoner Cases		Nonprisoner Cases	
Disposition by AO reporting category	Pro Se (N =30,179)	Represented (N =6,569)	Pro Se (N = 18,080)	Represented (N =179,134)
Dismissed for lack of prosecution	5.9%	4.4%	5.7%	2.5%
Dismissed for lack of jurisdiction	3.4%	3.7%	3.7%	2.0%
Dismissed for other reasons	28.4%	31.0%	20.3%	10.7%
Voluntarily withdrawn	2.8%	3.4%	6.4%	11.3%
Settled	16.0%	17.9%	24.6%	30.8%
Judgment on consent	0.1%	0.1%	2.3%	3.2%
Judgment on default	0.1%	0.1%	3.0%	8.8%
Judgment on motion before trial	26.7%	26.9%	17.3%	8.8%
Judgment on directed verdict	0.1%	0.1%	0.1%	0.1%
Judgment on court trial	0.7%	1.0%	0.8%	0.6%
Judgment on jury verdict	0.3%	0.2%	0.8%	1.1%
Judgment for other reasons[a]	8.1%	4.8%	6.0%	2.6%
All other dispositions[b]	7.5%	6.3%	8.9%	17.5%

[a] Includes arbitration awards.

[b]Includes remanded to state courts or to agencies, transferred to another district, and cases closed by the AO for lack of information.

Note: The districts surveyed are S.D.N.Y., D.N.J., E.D. Pa., N.D. Tex., E.D. Mich., N.D. Ohio, C.D. Cal., N.D. Cal., S.D. Fla., and E.D. La.

Other patterns discernible from the data

Dismissal before trial

Approximately one-third of pro se and represented prisoner cases and one-third of nonprisoner pro se cases were dismissed for lack of prosecution, lack of jurisdiction, or other reasons before trial. Another quarter of all prisoner cases were decided on motions before trial. (There was no significant difference in timing or manner of dismissal between pro se habeas corpus cases and other prisoner pro se actions. However, represented habeas cases were more frequently decided on motions than were other represented prisoner suits.) In contrast, only about 15% of represented nonprisoner cases were dismissed before trial, and around 9% of represented and 17% of pro se nonprisoner cases were decided on motions before trial. These patterns suggest that judges tend to find prisoner cases (both pro se and represented) and nonprisoner pro se cases to be without merit more often than represented nonprisoner cases. These patterns are consistent with many of the anecdotal reports received from courts around the country.

Settlement and voluntary withdrawal

Prisoner cases, even when represented by counsel, were less likely to settle than nonprisoner cases: 16-18% of prisoner pro se and represented cases settled versus 25-31% of nonprisoner pro se and represented cases. (Of represented prisoner cases, habeas corpus actions were the least frequently settled.) Prisoner suits also were less apt to be withdrawn voluntarily than nonprisoner cases; and among nonprisoner cases, pro se actions were withdrawn less frequently than represented cases.

Conclusion

The number of pro se filings in these ten districts has increased overall from 1991 to 1994, and it seems likely that this trend will continue, although the habeas corpus and prisoner litigation statutes enacted in April 1996 may have an impact on any trend. Because of the special problems these cases create, courts are finding it necessary to develop special policies and procedures for them. Recently, the Ninth Circuit's Task Force on Prisoner Remedy Procedures reported that pro se prisoner litigation is a problem for the federal courts not only because the courts are "an inappropriate forum for the vast majority of the complaints filed," but also "because the federal courts have yet to develop procedures appropriate for the timely and efficient resolution of the cases which do raise substantial federal claims." Ninth Circuit Task Force on Prisoner Remedy Procedures, Effective Prisoner Remedy Procedures: Report to the Judicial Council of the Ninth Circuit (August 1995), at iii. The task force recommended that district courts in the Ninth Circuit consider various screening and case-management procedures, and it further recommended that the training of district judges and magistrate judges include those procedures. In light of the volume of nonprisoner pro se cases, courts should consider the applicability of these recommendations to those cases as well.

Further reading

For information about pro se cases in the circuit courts, see Marilyn M. Ducharme, Pro Se Appeals: Pro Se Case Processing in the U.S. Courts of Appeals (Administrative Office of the U.S. Courts 1995)

For information about how districts handle pro se and prisoner filings under the Civil Justice Reform Act of 1990, see David Rauma & Donna Stienstra, The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook (Federal Judicial Center 1995).

Nonprisoner Pro Se Cases Filed in Ten District Courts Fiscal Years 1991–1994

The profile of nonprisoner pro se litigation in the federal courts is less complete than that of prisoner pro se litigation, due largely to the lack, before December 1995, of a centralized database that identified nonprisoner pro se cases. For that reason, the Center was especially interested in the information on nonprisoner pro se cases filed by pro se plaintiffs in the ten district courts that provided data. As the following table indicates, these cases constituted a significant percentage of pro se filings (ranging from about 25% to around 50%) in each district every year. In two districts—N.D. Ohio and N.D. Texas—nonprisoner filings were more than half of pro se filings for one or more of the fiscal years analyzed. In all but two districts (N.D. Ohio and D.N.J.) nonprisoner pro se filings grew in relation to all filings, and in three districts the increase was by 7% or more (C.D. Cal., E.D. Pa., N.D. Texas).

	Cases Filed			
District	FY91	FY92	FY93	FY94
C.D. Cal. – # of nonprisoner pro se cases	193	693	865	968
% of pro se cases – all cases	43% – 2%	41% – 6%	42% – 9%	41% – 10%
N.D. Cal. – # of nonprisoner pro se cases	529	543	825	678
% of pro se cases – all cases	34% – 10%	36% – 9%	44% – 14%	38% – 12%
S.D. Fla. – # of nonprisoner pro se cases	261	327	450	331
% of pro se cases – all cases	33% – 6%	32% – 6%	34% – 10%	35% – 9%
E.D. La. – # of nonprisoner pro se cases	165	284	261	195
% of pro se cases – all cases	38% – 4%	30% – 7%	26% – 6%	18% – 5%
E.D. Mich. – # of nonprisoner pro se cases	250	281	256	274
% of pro se cases – all cases	26% – 5%	27% – 4%	25% – 5%	26% – 6%
D.N.J. – # of nonprisoner pro se cases	385	408	482	408
% of pro se cases – all cases	35% – 7%	37% – 7%	39% – 8%	30% – 6%
S.D.N.Y. – # of nonprisoner pro se cases	357	593	766	762
% of pro se cases – all cases	36% – 5%	36% – 6%	35% – 8%	37% – 8%
N.D. Ohio – # of nonprisoner pro se cases	371	442	348	253
% of pro se cases – all cases	58% – 8%	60% – 9%	46% – 5%	36% – 4%
E.D. Pa. – # of nonprisoner pro se cases	500	574	691	1084
% of pro se cases – all cases	40% – 6%	34% – 7%	39% – 9%	44% – 13%
N.D. Texas – # of nonprisoner pro se cases	349	740	940	735
% of pro se cases – all cases	55% – 8%	49% – 15%	45% – 20%	37% – 16%
Total – # of nonprisoner pro se cases	3360	4885	5884	5688
% of pro se cases – all cases	38% – 6%	38% – 7%	38% – 9%	36% – 9%

Let's Try a Pro Se and Small-Stakes Civil Calendar in the Federal Courts

WILLIAM W SCHWARZER

With filings by self-represented parties approaching 50% of all civil filings in some districts, there is an urgent need to lighten the burdens pro se cases impose on the courts. A related problem involves the increasing number of counseled cases filed in district courts for which the stakes are too small to make it economically feasible to proceed through discovery and trial. While ADR in various forms can help parties resolve such cases, often it is not a realistic option. Thus, expediting the disposition of small-stakes cases will help ease docket pressures. For both categories of cases, there is an equally urgent need to improve accessibility and quality of justice.

One solution may be for federal district courts to establish an expedited calendar to further the fair and efficient disposition of some portion of their pro se and small-stakes civil litigation.

Addressing the problems

No comprehensive information on the courts' efforts to deal with these types of cases is available. From the limited information at hand, it appears that courts have only recently realized the magnitude of the pro se problem, and their attempts to address it are still episodic and fragmentary. Some courts have included provisions in their local rules or civil justice expense and delay reduction plans, such as exempting pro se cases from certain pretrial requirements, creating a separate litigation track with streamlined discovery and motion practice, providing pro se litigants with information, and simplifying the paper work. A few courts have attempted to provide pro bono counsel to at least some indigent litigants, reimbursing some of the discovery costs out of the court's attorneys' admission or library funds. Some individual judges have devised case-management techniques intended to facilitate the efficient resolution of pro se and small claims cases.

The expedited calendar proposed here is intended to achieve three objectives: expedite the resolution of cases; reduce the amount of activity required to resolve them; and promote fair outcomes and litigant satisfaction. The calendar would give the parties the choice of a substantially streamlined process of resolution, in which some traditional elements are exchanged for early and less costly adjudication and a ceiling on exposure. With the consent of the parties, discovery, motion practice, jury trial, and the right to an Article III judge are waived in exchange for a speedier and less costly judicial resolution. For the courts, the incentive is the accelerated yet fair termination of cases with minimal expenditure of judicial resources.

People concerned that such a calendar may provide second-class justice to parties with small claims and to pro se litigants may challenge the concept. But the response is that it is entirely voluntary, requiring the consent of both parties. Rather than providing second-class justice, the calendar offers an additional option, an economical alternative for all litigants willing to accept the procedure. It also provides quick and unconditional access to a final and binding adjudication.

How the calendar would work

The details of an expedited calendar will vary with the circumstances of a particular court and the court's preferences, but here in broad outline is how it might operate:

Establishing the calendar

A court would establish an expedited calendar by local rule or general order; no further authority would be required. Although the use of general orders has been discouraged by the Judicial Conference's Standing Committee on Rules of Practice and Procedure, if the calendar is established as a pilot, and particularly if it has a sunset provision, a general order may be preferable to a local rule.

The calendar could be assigned on a rotating basis to the court's district and magistrate judges, perhaps for a month at a time for each judge. Depending on how the assignment procedure is handled, litigants would not know with certainty what judge will try the case. To show the importance the court attaches to the calendar and to encourage consents, enough district judges (preferably all judges on the court) should participate to have a fair proportion of the trials before an Article III judge. To encourage consents, a court might also consider permitting the parties to stipulate to the judge to hear their case.

The judge assigned to the calendar would set cases as the need appears. For the period that the judge has the calendar, it would be given priority as necessary to achieve a trial date

within thirty days of the filing of consent. Since trials would be brief and since any judge should have the calendar for only a month, this should be feasible. Although a single court-wide expedited calendar with all judges participating would be preferable, individual judges could establish their own calendars for their cases incorporating features similar to those discussed here. Upon the parties' consent, the judge would offer an early streamlined trial and prompt judgment by either the judge or a magistrate judge.

Jurisdiction

The local rule or order would provide that any civil case may be transferred to the calendar with the written consent of all parties. The amount a plaintiff could recover, and a defendant could lose, would be capped to induce consent. The cap amount would be specified in the consent form and set by the court in light of local circumstances and preferences. It should be high enough to capture a significant number of small claims cases but low enough to be suitable for adjudication by streamlined procedures. The amount suggested here is $75,000. Neither punitive damages nor injunctive or other specific relief (such as habeas corpus) could be awarded.

Transfer of cases to the calendar

All civil cases would continue to be assigned to individual judges, the assignment remaining in effect until termination. Upon execution by all parties, any case could at any time be transferred to the expedited calendar without further action by a judicial officer. Parties could consent at any time during the litigation, but early consents should be encouraged to maximize savings in time and money for litigants and to minimize judicial involvement.

Procedures need to be designed with care to ensure that consent will be informed. To avoid manipulation of the process, it is essential that once consent has been given it cannot be withdrawn. The expedited calendar judge hearing the case, however, would have discretion to remand it to the assigned judge if for any reason the case did not appear to be suitable for the calendar.

Pretrial proceedings

Once the consent has been filed, all pretrial proceedings would end except as otherwise agreed by the parties. No discovery would take place except by stipulation. Since the parties would have consented to the calendar, they could be expected, though not compelled, to voluntarily exchange relevant documents and make key witnesses available for interviews, and the judge may order such disclosures once the case comes to trial. No motion practice would occur, but parties could agree that specified motions, such as a Rule 12 motion, could first be submitted for a ruling by the assigned judge and that the case would be transferred to the calendar in the event the motion is denied.

Trial

Because an objective of the calendar is early disposition of cases with minimum cost, it should be managed to assure that cases will come to trial within thirty days of the filing of consent. The expedited calendar judge should grant requests for continuances only if necessary to prevent injustice. While this accelerated procedure without discovery would not be suitable for many cases, there are others in which the critical facts are well known and the evidence and testimony are readily at hand. Not so long ago, after all, many cases went to trial without discovery. Even now, in a fair number of cases, little or no discovery takes place.

Although the rules of evidence should generally apply at trial, in the absence of a jury the judge would have wide discretion to apply them liberally. The judge should control the proceeding to develop the material facts quickly and bring about a speedy yet fair resolution of the pivotal factual disputes. The judge could subpoena witnesses and the production of documents if that appears necessary. If legal questions arise that would delay disposition of the case, it could be remanded to the assigned judge.

Inevitably the judge's role will be more inquisitorial than usual. There may be times when the judge must assist an unrepresented party in presenting the case. Judges, however, encounter that need even now in cases tried by pro se litigants. To protect the integrity of the proceedings, they should be on the record unless both parties waive it. Formal findings of fact and conclusions of law would be waived by the consent, but the judge would be expected to give a statement of reasons for the decision sufficient to help the parties understand the outcome.

Assistance of counsel and others

Since the calendar would be open to all consenting cases, parties could appear through counsel even if their opponents are unrepresented. Represented plaintiffs in civil rights cases would be entitled to recover an aggregate of attorneys' fees and damages that does not exceed the specified jurisdictional limit stipulated to in the consent (here suggested to be $75,000). At the judge's discretion, an unrepresented party would be permitted the assistance of a lay person such as an interpreter, where appropriate, but lay assistants would not be entitled to an award of attorneys' fees.

Appeals

Although termination of cases would be expedited and costs reduced if consent also waived appeal rights, waiver of appeal should probably not at first be required since this could be a substantial deterrent to consents. While the scope of any appeal would be narrow, preserving a measure of protection against serious error at trial may help overcome some resistance to the calendar.

Questions to consider

The proposal raises a series of questions that warrant further consideration.

Litigant consent

Ensuring that consent is informed is critical. The consent form that litigants receive must explain clearly and concisely the rights waived. It must also explain that the case will go directly to trial before a district or magistrate judge who will control the presentation of evidence and render a decision promptly. It must give a fair and balanced statement of the advantages and disadvantages of consent. Parties could also be advised that they can defer giving consent until after the case has been called for an initial conference (which, in prisoner cases, could be held by telephone). The court would probably need to provide means for responding to questions from litigants, such as a pamphlet that answers commonly asked questions; a person (perhaps a volunteer) in the clerk's office to provide information (but not to give legal advice); and, if the numbers warrant, an interactive electronic kiosk or an informative videotape. Parties could also be advised that they can defer giving consent until after the case has been called for an initial conference (which, in prisoner cases, could be held by telephone), giving them an added opportunity to receive information.

Relationship to ADR programs

ADR is rarely practical or successful in cases brought by prisoners and other pro se litigants, and most ADR programs specifically exclude pro se cases since, under the circumstances, ADR would merely add a layer to the litigation and the neutral's role could be compromised by the need to advise or assist the pro se litigant. Although ADR is suitable for counseled small-stakes cases that cannot be economically litigated, it does not offer a complete answer because it does not lead to final, binding disposition. The expedited calendar offers another alternative.

Pro bono legal assistance

It could be argued that providing pro bono legal assistance to indigent litigants is preferable to the "rough and ready" justice of the expedited calendar. But, with some exceptions, the experience of courts that have attempted to provide pro bono aid is not encouraging. The major obstacles to success have been lack of interest among most of the bar and lawyers' well-founded fear of malpractice claims brought by disgruntled litigants. Even under the best of circumstances, volunteer legal assistance cannot be expected to provide representation to more than a small fraction of pro se litigants.

The judge's role

Judges trying pro se cases would be thrust into a much more activist role than normal. When a litigant appears to have a potentially meritorious case, the judge might need to help develop the legal theory and bring out the facts. To keep trials brief, the judge would need to exercise firm control to ensure that the parties streamline their presentations. If additional facts are needed, the judge might order the parties to produce documents and witnesses. Although the subject of settlement or compromise is likely to come up, the calendar should not become another settlement conference. It is important that litigants who seek adjudication see the calendar as a legitimate opportunity to obtain it.

Incentives for litigants

A crucial question is whether an expedited calendar would attract cases in sufficient numbers to justify it. Only a pilot program could give the answer. In many kinds of cases the calendar should offer an attractive alternative. Many prisoner cases, for example, involve disputes over a minor altercation, medical treatment, discipline, food, or the conditions in a cell. The prisoner might well be attracted by the prospect of prompt access to a judge who will decide the case and the chance of recovering up to $75,000. For lawyers representing the state, the inordinate amount of time and paperwork normally required to defend prisoner cases could be reduced. The burden of motion practice and other pretrial activity would be eliminated. The $75,000 ceiling and exclusion of injunctive relief would limit exposure, and the risk of reversal when a case is dismissed on motion would be avoided.

Similar incentives should operate in nonprisoner cases. The cathartic effect of telling one's story to a judge should attract plaintiffs even when the amount of recovery is limited. The substantial reduction in litigation cost and time and the limit on exposure should encourage some represented defendants to forego the dubious advantages of technical procedures and delay and give the expedited calendar a try.

Even where both sides are represented, the calendar could be attractive. Consider the routine Federal Tort Claims Act case (which would in any event be tried without a jury), the small-stakes civil rights claim, or a commercial dispute in which recovery of more than $100,000 is unlikely. Lawyers may find it attractive (and profitable) to return to the earlier practice of taking such cases to trial quickly without discovery or motion practice.

A court considering establishment of an expedited calendar should make a study of its pro se and small-stakes litigation for a representative period to provide a basis for estimating the volume and kinds of cases that might be suitable. With this information in hand, the court should seek the reaction of the bar and other groups interested in the types of litigation for which the calendar is designed and solicit their views and suggestions about the various features of the calendar (such as the recovery cap and right to appeal). Since most pro se cases involve an attorney on one side, the calendar must be made

sufficiently attractive that lawyers will be willing to consent. Surveying the bar may provide information the court can use to design a scheme that will attract consents.

Incentives for the court

Whether the expedited calendar will bring about a net saving of judicial resources can only be determined after experience with a pilot program. There is reason to believe that it could, however. A case transferred to the calendar would no longer require expenditure of judge and staff time in motion practice, discovery management, pretrial conferences, and sometimes lengthy trials. These savings could well exceed the judge time demanded by trials of cases on the calendar, and many cases might not go to trial at all since the imminent and certain trial date would induce parties to settle —and perhaps settle sooner than otherwise.

Many pro se cases would still be disposed of by motion because opponents will not consent when cases are frivolous or the lack of legal grounds is clear. But cases in which the grounds for dismissal are doubtful could be more efficiently decided by a trial, saving the time and effort required to deal with motions and reducing the risk of reversible error.

The unknown in the benefits-versus-burdens equation is how much time trials will take. The premise of the proposal is that many cases could be tried quickly—perhaps half in about an hour, most of the rest in a morning or an afternoon, and only a few in as much as a day. Experience in state small claims courts, although involving generally simpler cases, suggests that these time estimates may be reasonable. The experience in Rule 16 conferences in which the legal issues and essential evidence in a case can often be fully discussed in less than an hour can also be instructive.

The innate caution and conservatism of the bar is likely to cause the expedited calendar to get off to a slow start. A pilot program would need to allow enough time for the bar to gain experience and build up confidence. However, even if only a few parties consent, the availability of the calendar should have no adverse impact on the court. While nothing will be lost, there could be a gain in increased public approval from the court's demonstration of its commitment to easing access to justice for litigants with fewer resources.

If the calendar were to become successful, some might say that some of the cases it attracts would not otherwise be filed or, if filed, might otherwise settle. One answer, of course, is that if the effect of the calendar is to facilitate access to justice, that should not be a ground for criticism. It does not follow, however, that the burden on the court will be increased. The overall demand on judges' time may be decreased due to a decline in pretrial activity. And this may be associated with a decline in the court's caseload, indicating an increase in the speed with which cases are disposed.

An idea worth trying

Obviously there are unknowns. Answers to the questions posed can come only through carefully designed and controlled pilot programs followed by a thorough assessment of the results. There is reason to believe, however, that an expedited calendar may help the courts deal with the flood of pro se and small-stakes civil cases. It also has the potential of being a useful experiment in the administration of justice: Can the courts provide an acceptable quality of justice without some of the procedural encumbrances that now make the civil justice process so costly and slow? Can lawyers and parties, many of whom have themselves objected to the present cost and delay, be weaned from the expensive accoutrements of the process?

The expedited pro se and small-stakes civil calendar is not held out as a panacea, but as an idea worth a try, a try that would cost nothing. So long as the choice is left to the litigants, giving them this additional option should improve the quality of justice.

Judge Schwarzer's article first appeared in slightly different form in *Judicature*, the journal of the American Judicature Society, vol. 78, no. 5 (March–April 1995). The Center thanks the publisher for permission to print it here.

District of Nevada Uses Early Hearings to Cope with State Prisoner Pro Se Civil Rights Caseload

MARIE CORDISCO

Complaints brought by state prisoners in federal district courts alleging violations of their constitutional rights under 42 U.S.C. § 1983 constitute a rapidly increasing segment of the civil caseload. The Administrative Office of the U.S. Courts reported only 218 cases in 1966, the first year state prisoners' rights cases were listed as a category. By 1994, the number had risen to 39,065.[1]

These cases impose additional burdens on district courts. Because they are usually filed pro se, docket clerks often have to spend more processing time per complaint. Further, since many prisoner civil rights complaints are submitted with a motion for leave to proceed without prepayment of filing fees, the court must use a screening process to determine whether the petitioner qualifies to proceed in forma pauperis under 28 U.S.C. § 1915(a) and, if so, whether the merits of the complaint are strong enough to avoid dismissal under 28 U.S.C. § 1915(d) as "frivolous or malicious."

Concern over the increase in these cases explains in part why Congress enacted the Prison Litigation Reform Act of 1996 (PLRA). In the PLRA, Congress made significant changes in important aspects of prisoner litigation, including limitations on remedial relief in prison condition cases; new requirements for such cases brought under 42 U.S.C § 1983, such as exhaustion of administrative remedies; circumstances in which dismissal is required; use of technology to avoid in-court pretrial hearings; and obligations of defendants to reply.[2] (PLRA amendments to the in forma pauperis statute (28 U.S.C. § 1915) affecting prisoner plaintiffs are discussed at page 25.)

The Act probably will intensify the search that many federal courts began before its passage to find more effective methods of dealing with their increasing state prisoner civil rights caseloads. This article focuses on one potentially promising approach that has been used in the District of Nevada, where 24% of all civil cases filed in 1994 were state prisoner civil rights actions. The District of Nevada's experience may be helpful to other districts as they prepare to implement the 1996 statute.

Background

The District of Nevada is divided into unofficial southern and northern divisions located in Las Vegas and Reno, respectively. The northern division has a much higher percentage of section 1983 filings because the state's only maximum security correctional facility is located there. In 1994, prisoner civil rights cases constituted 40% of the northern division's civil filings, compared with 12% of the southern division's. In 1993, the district's Civil Justice Reform Act Advisory Group Report identified growth of prisoner filings and insufficient means of managing them as principal causes of cost and delay. Before instituting its pilot program of early case-evaluation telephonic hearings (informally called triage hearings), the court generally took two to three years to resolve cases that could not be disposed of quickly.[3]

The district currently has four district judges in active service, divided evenly between the two divisions, and one senior district judge based in the northern division, who has a caseload equal to 60% of an active district judge's. The judges travel regularly between Reno and Las Vegas to keep the workload balanced and the two divisions coordinated. There are three magistrate judges in Las Vegas and two in Reno. At present three of the district judges and the magistrate judge in the northern division hold triage hearings, but the district has plans to involve all of the magistrate judges in such hearings. Three pro se law clerks assist with processing prisoner cases.

Triage hearings get pilot test

Of particular concern to the district has been the time expended getting the cases ready for a decision on the merits. Often, many months would pass as U.S. marshals attempted to effectuate service on named defendants, some of whom were dismissed later because, for example, it was discovered that they were not the proper defendants. To expedite the

processing of these cases, in March 1994 the district court, the Nevada Attorney General's Office, and the Nevada Department of Prisons (NDOP) began conducting triage hearings in selected inmate civil rights cases filed in forma pauperis and pro se.[4] The ten- to-fifteen-minute hearings bring the court and the pro se prisoner plaintiff together soon after the complaint is filed so that the court can eliminate frivolous claims, counts, or defendants and move meritorious cases toward resolution as quickly as possible.

In the fall of 1994, I visited the court on behalf of the Center to learn more about the procedure. Although a full empirical evaluation was not done, interviews with pro se law clerk Richard Owens, review of documentation, and observation of several hearings indicated that triage hearings have resulted in several benefits, including early dismissal of a significant number of cases, narrowing of counts and defendants, and reduction in the number of summonses issued.

How the procedure works

The plan provides that when the district court receives a civil rights complaint and in forma pauperis application from a prisoner plaintiff, the pro se law clerk reviews the merits of the complaint for the judge's consideration. If not dismissed sua sponte under section 1915(d) because all counts are completely frivolous, many of the cases are scheduled for a telephonic triage hearing, usually to be held in seven to ten days.

Before the scheduled hearing, the pro se law clerk prepares a bench memo summarizing the counts and factual allegations in the complaint and identifying which, if any, of the counts or named defendants should be dismissed. The Nevada deputy attorney general to whom the hearing is assigned determines, before the hearing, which defendants are current employees for whom service can be accepted. With the cooperation of the NDOP, the deputy attorney general also attempts to investigate the merits of the inmate's allegations.

On the day of the hearing, court personnel establish a conference call between the district or magistrate judge to whom the case is assigned, the plaintiff inmate, an officer of the NDOP where the inmate is housed, and the deputy attorney general. A court reporter records the otherwise informal proceedings. Holding the hearings by telephone anticipated requirements of the PLRA that, to the extent practicable, pretrial proceedings in which prisoners are required or permitted to participate be conducted by telephone, videoconference, or other telecommunications technology.[5]

After explaining the purpose of the hearing, the judge informs the prisoner plaintiff of the judge's interpretation of the allegations and brings obvious defects in the complaint to the plaintiff's attention, inviting additional information to cure the misinterpretation or defect. The hearing may have several different outcomes depending on the particular circumstances of the case, including voluntary or involuntary dismissal of the entire complaint without prejudice or voluntary or involuntary dismissal of certain counts or defendants.

After determining which counts and defendants should remain in the plaintiff's complaint, the judge asks the deputy attorney general to accept process for defendants who are current employees of the NDOP.

At the close of the hearing, the judge summarizes the status of the complaint by going over dismissed and remaining causes of action and defendants, lists defendants for whom the deputy attorney general has accepted service, informs the plaintiff inmate whether an amended complaint is necessary and what is needed to proceed, and gives the deputy attorney general a time period in which to file a responsive pleading.

Hearings show positive results

Although it is still too early to tell whether the triage pilot program will offer the best approach for dealing with the District of Nevada's high volume of prisoner pro se civil rights complaints—particularly if the PLRA creates additional duties for the court—all of the parties participating in the program believe the hearings have been very effective. Preliminary findings from the hearings show positive results in providing pro se prisoner plaintiffs with meaningful access to the courts, achieving efficient processing of claims, and reducing the time spent on frivolous counts or defendants, all significant criteria in gauging effectiveness.

Pro se prisoner plaintiffs often fail to state clearly the elements of a legitimate civil rights violation. A triage hearing held soon after a complaint is filed can provide an opportunity for a prisoner to explain the allegations more fully to a judge. If there is a defect in the complaint, the judge may be able to remedy it quickly by ascertaining the necessary facts from the prisoner plaintiff during the hearing.

Although telephonic access may not be as effective as having the parties present in person, the inmates themselves seem to view the hearings as a useful mechanism for resolving their disputes. Eighty percent of the respondents to a questionnaire distributed to all known prisoner law clerks and prisoners working in prison law libraries in Nevada said they believed civil rights cases could be resolved through the hearing process. The hearings also eliminate the expense and security problems associated with in-person hearings. In the future, the court may consider video teleconferencing.

The triage hearings have significantly streamlined the procedure for processing these cases. Under former procedures, after the complaint was filed the court tried to effectuate service of process on *all* of the defendants validly named by the prisoner plaintiff, which was often problematic when the prisoner couldn't provide full names and addresses or when the persons were no longer employees of the NDOP. Now the hearings give the court the opportunity to examine the complaint carefully for any defects before time and resources are

spent serving process on defendants who will eventually be dismissed. The number of summonses that must be served by the marshal was reduced considerably immediately following implementation of the hearings. Comparison of a six-month period before initiation of the pilot program with a comparable six-month period after it began revealed a reduction in the number of summonses from 700 to 274.

Under previous procedures, typically three to nine months would have passed by the time service was accomplished on all defendants named in the complaint and the Attorney General was ready to respond, most often with a Rule 12(b)(6) motion. The 12(b)(6) motion usually addressed defects in the complaint, which are now brought to the plaintiff inmate's attention at the triage hearing and dismissed from the complaint if warranted. After a complaint has been "cleaned up" in the hearing, the judge sets a strict time frame to move the case toward resolution. If necessary, the judge will give the prisoner plaintiff a specified number of days (usually thirty) to file and serve an amended complaint on the Attorney General and then specify when the Attorney General must file a responsive pleading, which now is more commonly a Rule 56 summary judgment motion or an answer rather than a 12(b)(6) motion. The PLRA may alter this process because it allows a defendant to waive the right to reply to a prisoner's civil rights complaint, although the court may require the defendant to reply if it finds that the plaintiff has a "reasonable opportunity to prevail on the merits."[6]

Thus, the hearings help move the case expeditiously to the point where the court can take decisive action to dismiss the complaint outright under a Rule 56 motion or schedule the case for trial if required. Even if a plaintiff inmate is given additional time after a triage hearing to amend the complaint,

Unusual programs help Southern District of Florida deal with pro se cases

Judge Lenore Carrero Nesbitt (S.D. Fla.) reports that as a result of a determination by the Southern District of Florida's Civil Advisory Group that civil actions by unrepresented litigants were clogging the system (28% of civil filings in 1995) and were not addressed as readily as cases in which plaintiffs were represented by counsel, the court developed two unusual programs to deal with these problems. First, it created a Pro Se Division consisting of one magistrate judge, four pro se staff attorneys, and a pro se clerk who performs both clerical and secretarial functions. All pro se prisoner cases are stamped at initial filing with both a district judge's name and the Pro Se Division magistrate judge's name. Pursuant to a standing order, the division handles all cases referred to it in their entirety, except that reports and proposed final orders in nonconsent cases are submitted to district judges to enter final disposition upon interim dispositive motions. When the parties consent, both jury and nonjury civil rights cases are tried by the Pro Se Division magistrate judge.

The division handles all paperwork, often without the necessity for any action by a district judge. At the start of each case, it enters a general order of instructions to pro se litigants. It prepares the paperwork necessary to obtain service of process on all defendants and assists plaintiffs in moving cases along through orders explaining their rights and responsibilities at every stage of the proceedings. To facilitate this process, the division has developed more than 100 forms dealing with routine procedures.

Every district judge receives a separate monthly computer printout of his or her cases assigned to the Pro Se Division, showing the filing date and current status of each. Software developed by the division tracks cases on a daily basis. All litigants who have filed more than three pro se suits are identified, and a list of all his or her cases, their subject matter, and status is provided in reports on dispositive motions. As a result, prisoners can no longer present the same claims in multiple cases before different judges. The list also makes it easy to pinpoint plaintiffs who have filed numerous cases that were dismissed as frivolous. In addition, every report prepared by the division is indexed and cross-referenced so that research need not be repeated, and a databank of current law on issues frequently raised in pro se litigation is maintained.

The division originally received all pro se prisoner cases filed in the district, but it discontinued processing motions to vacate that attacked federal convictions when the numbers became prohibitive. More than 5,500 cases have been referred to the Pro Se Division since its inception. Of these, fewer than 10% were pending in spring 1996.

In addition to establishing the Pro Se Division, the court also instituted the Volunteer Lawyers' Project to provide for the payment of counsel and expenses in noncriminal pro se indigent litigation. Cases are drawn not only from the Pro Se Division but also from a variety of other pro se civil filings. Faced with the serious problem of cases ripe for trial in which plaintiffs had no funds for discovery or to subpoena witnesses, let alone to pay counsel, the court's Civil Justice Advisory Group created the project, which is supported by a revolving loan fund administered by the Florida Justice Institute. Seed money for the project was obtained through a stipulation by lawyers that part of a civil contempt penalty be allocated for the fund. A $25 voluntary annual assessment on all members of the bar supplements the fund. When a case results in a monetary judgment, costs that were paid by the fund are repaid and successful counsel donate 25% of their fees. Local law firms not only provide attorneys who undertake representation of pro se litigants but also contribute additional financial support to the project. A pro bono coordinator supervises the project's day-to-day operations.

the hearing procedure has shortened on average by at least six months the time between the filing of a complaint and submission to a judge for decision on either a Rule 12(b)(6) or Rule 56 motion. Not to be overlooked, either, is the fact that every motion, opposition and reply, extension of time, and order has to be docketed, processed, and mailed by the clerk's office. Eliminating a single motion generally results in five documents that the clerk's office does not have to process. Considering that these documents are being eliminated in hundreds of cases, the triage procedure spares court personnel from a considerable amount of paperwork.

Preparation and cooperation enhance efficiency of hearings

To speed up the processing of prisoner pro se civil rights complaints, the hearings themselves also must be conducted efficiently. Integral to this is cooperation between the court, the Nevada Attorney General's office, and the NDOP in coordinating all of the necessary parties. The preparation before the hearings is also important, so the judge can hold several of these hearings in a short period of time and accomplish everything possible within that time period. The pro se law clerk's ability to prepare bench memos quickly and accurately is a significant factor in achieving this goal, because the memos spell out the plaintiff's allegations and direct the judge's attention to counts or defendants that appear to be frivolous. These hearings are labor-intensive up front, but if they result in the dismissal of frivolous claims, counts, and defendants a few weeks after the complaint is filed and before service of process, they save the court and the state time and money in the long run.

Even when the entire action is not dismissed, the hearing often allows the judge to focus the court's resources on the allegations that have an arguable basis in law or fact. A recent study of section 1983 cases found that, on average, a single-issue complaint is resolved a month and a half sooner than a two-issue case and five-and-a-half months sooner than a three-issue case.[7] The study's findings provide support for the proposition that narrowing the number of issues in a civil rights complaint can significantly reduce the time it takes for a court to arrive at a final disposition of the case. Of the cases that have undergone triage hearings, 29% of cases with more than one count were reduced from multiple counts to a single count. This does not include cases in which multiple issues in a single count were reduced to a single issue. In addition, during the first nine months of the project (March 1994 through December 1994), of 232 original causes of action, 111 remained after more than 90 hearings. And of 393 original defendants, 214 remained after the hearings. This represents a reduction of 51% of the original counts and 45% of the original defendants. Thus, before service of process, on average about half the counts and defendants were dismissed for *each* prisoner civil rights complaint assigned to a triage hearing. According to a review at the end of 1995, the triage procedures continued to reflect the same effectiveness showed by the above statistics.

Conclusion

At this time, the District of Nevada intends to keep the triage hearings as a permanent part of its procedures for processing state prisoner pro se civil rights complaints. The court is presently assessing what, if any, procedural changes are necessary under the PLRA.The district plans to undertake further evaluation of the hearings, including feedback from the Attorney General's office, NDOP, and the prisoners themselves to allow the district to determine whether adjustments are required to further improve pro se prisoners' access to the judicial process for legitimate civil rights claims, while eliminating time spent on frivolous claims, counts, or defendants. Further information about the pilot program and the form orders used can be obtained by contacting the district's senior pro se law clerk, Richard Owens.

Notes

1. Administrative Office of the U.S. Courts, Annual Report of the Director, 1975, Table 24 and Judicial Business of the U.S. Courts, 1994, Table C-2.

2. *See* H.R. Rep. 104-537, 104th Cong., 2d Sess. 68-80 (1996).

3. In a recent report on section 1983 litigation, researchers found the median processing time in a sample of cases to be 181 days, with issues in the cases that were disposed of quickly being resolved in 13 days or less and issues in the slowest 10% of cases sampled requiring more than two years (714 days or more) to be resolved. Roger A. Hanson & Henry W. K. Daley, U.S. Dep't of Justice, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation 22–24 (1995).

4. Not all prisoner civil rights cases are sent to triage hearings. Cases in which all counts and all defendants are dismissable immediately under section 1915(d) are not sent. Neither are cases randomly assigned to the one district judge who chose not to participate in the hearings. In addition, cases are not sent to hearings if there are no named state employee defendants for whom the Nevada Attorney General could accept service of process.

5. *See* Amendments to Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(f)(1), in H.R. Rep. No. 104-537, 104th Cong., 2d Sess. 75 (1996).

6. *Id.* (amendments to 42 U.S.C. § 1997e(g)(1) & (2)).

7. Hanson & Daley, *supra* note 2, at 25.

Congress and Judicial Conference Endorse Videoconferencing in Prisoner Civil Rights Pretrial Proceedings

GENEVRA KAY LOVELAND

The Prison Litigation Reform Act of 1996 imposes new obligations on federal courts regarding where and how to hold pretrial proceedings and hearings in prisoner suits concerning prison conditions.[1] The Act provides that pretrial proceedings in which the prisoner's participation is required or permitted "shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the" institution.[2] It further provides that, subject to the agreement of prison officials, "hearings may be conducted in the facility in which the prisoner is confined" and, to the extent practicable, the court should allow counsel to participate by telephone, video conference, or other technologies.[3]

Before enactment of the PLRA in April 1996, some federal courts were already conducting proceedings by means of videoconferencing technology as a result of pilot programs that were authorized by the Judicial Conference of the United States between 1991 and 1994. In March 1996, based on an Administrative Office examination of these pilot efforts and a favorable recommendation by the Court Administration and Case Management Committee, the Judicial Conference endorsed videoconferencing as a case-management option in prisoner civil rights pretrial proceedings while expressing reservations about its use for trials.[4] The Conference approved continued funding of the videoconferencing program in one pilot district and the expenditure of funds to expand videoconferencing of prisoner civil rights pretrial proceedings to other district courts meeting certain criteria.

The pilot programs were instituted in four district courts and one bankruptcy court. Three of the courts—the Eastern District of Texas, Western District of Missouri, and Middle District of Louisiana—tested videoconferencing for prisoner civil rights proceedings.[5] (The Eastern District of North Carolina held one prisoner mental competency hearing by videoconference.) In the tests, videoconferencing enabled the three district courts to identify and dispose of frivolous prisoner claims at an early stage. The Western District of Missouri also used videoconferencing in several jury trials to transmit testimony of prisoner witnesses. (See the story on the Western District of Missouri program on page 24.) The experience of these courts may be helpful to other districts as they prepare to implement the PLRA's requirements.

The Administrative Office reported that, overall, the pilot programs were considered a success by participating judges and courts and demonstrated that videoconferencing has the potential to offer net benefits to courts, depending on workload and business practices. The most important advantages mentioned by the courts were the reduction of unproductive travel time, the ability to schedule and manage cases (particularly prisoner civil rights cases) more efficiently, and an increase in courthouse, prison, and public safety. While equip-

The federal courts are increasing their use of videoconferencing for judicial proceedings and for administrative and educational purposes. In addition to the civil and bankruptcy pilot projects mentioned in this article:

- The districts of Oregon and Eastern Pennsylvania have each established a video link between the courthouse and a prison facility for the purpose of holding pretrial criminal hearings, excluding arraignments. The Bureau of Prisons and Marshals Service provided the equipment, and the Federal Judicial Center is evaluating the effectiveness of the programs.
- The Southern District of Texas will conduct some prisoner hearings, judges' meetings, and in-district training by videoconferencing, using the less expensive medium of digital telephone lines (rather than ordinary dedicated lines).
- In June 1996, the Second Circuit is instituting a test program for oral argument by videoconferencing from three remote facilities in New York and Connecticut linked to a Manhattan courtroom.
- The Federal Judicial Center is increasing the amount of education and training it will provide through both landline and satellite video broadcasts.

As courts acquire videoconferencing equipment and decide where and how to use it in the courthouse, they should keep in mind potential multiple purposes of videoconferencing. It would be unfortunate for a court that outfitted itself to conduct judicial proceedings by this technology to learn later that with different decisions it could also have acquired capacities to use videoconferencing in additional ways, including receiving Center educational programs.

ment functioned reliably most of the time, courts reported experiencing some technical problems with the equipment and transmission and, in particular, pointed out difficulties in the presentation of documents. Cameras used in four of the five pilots were not designed to focus on documents, and the Administrative Office's report noted that even a document camera would be of limited benefit for longer documents. The lack of fax lines at some remote locations added to the difficulty.

The average cost for purchasing and installing a videoconferencing system in one courtroom included a one-time expenditure of approximately $55,000 for equipment and a recurring annual expenditure of about $18,000 in shared costs for telephone lines. The expense and quality of the line connections made it impracticable to connect more than one court site to one or more remote locations. The Court Administration and Case Management Committee expressed the hope that future technology will permit multiple court-site connections, which it believes will be more cost-effective.

Because of the innumerable intangible factors involved in conducting a cost-benefit analysis (such as quality of justice, speedy case resolution, case-management efficiencies, ability to assess a participant's demeanor, and enhanced security), the Administrative Office's review of each site focused on identifiable costs and benefits, and it primarily assessed programmatic feasibility rather than budgetary impact. The unique circumstances affecting each court also made it difficult to assess the potential impact of videoconferencing on a judiciary-wide basis. Nevertheless, the Administrative Office concluded that videoconferencing did show benefits to judges, corrections officials, and the Marshals Service by reducing the transportation-related expenses of either bringing prisoners to the courthouse or requiring a judge to travel to the prison.

The question of fairness to prisoner litigants was explored but not resolved. Although many prisoners did not respond to questionnaires they received (the response rate was 31%), many of those who did said they would prefer pretrial hearings to be held in person. They complained that videoconferencing hampered their ability to present their cases directly to judges and that intimidation by prison guards, which could not be seen by judges on the video monitor, occurred in prison hearing rooms. Three magistrate judges who generally favored videoconferencing voiced concern about prisoner intimidation, as well as about future use of the videotapes and diminished respect for the court. However, the AO reported that most participating judges said that videoconferencing, when used with proper precautions, can provide a fair medium for pretrial hearings. The committee cautioned courts to "remain mindful of the rights of litigants and the effect that videoconferencing might have on the fairness of the proceedings."

As a result of the Judicial Conference's decision to expand videoconferencing, all district courts have been invited to submit requests for funding. The committee will evaluate and rank the requests based on the following criteria:

- The court has a substantial volume of prisoner civil rights petition filings.
- The court conducts a substantial number of prisoner civil rights pretrial hearings on a regular basis and would be able to schedule a substantial number of such hearings at the videoconferencing site.
- The state prison authorities agree to install compatible equipment at a correctional facility and to share an appropriate percentage of the recurring transmission costs.
- A suitable number of the court's judges express interest in conducting prisoner hearings by videoconferencing and are comfortable with the concept of videoconferencing for such hearings.
- The court can establish from analyzing personnel hours, travel costs, security considerations, and scheduling efficiencies that it would obtain a cost-benefit from the use of videoconferencing instead of its current method of conducting such hearings, and that the court will endeavor to maximize the flexibility of the use of the equipment.

Notes

1. Specifically, the Act amends 42 U.S.C. § 1997e, adding section(f) on hearings in prisoner cases. *See* H.R. Rep. No. 104-537, 104th Cong., 2d Sess. 75 (1996).

2. *Id.*

3. *Id.*

4. Judicial Conference of the United States, Preliminary Report of Judicial Conference Actions (March 12, 1996), p. 4.

5. The Judicial Conference approved continued funding for the Eastern District of Texas, which has the highest prisoner civil rights caseload in the country.

Judges Find Videoconferencing Cuts Down on Risks and Costs of Prisoner Litigation

GENEVRA KAY LOVELAND

Magistrate Judge William A. Knox and Senior District Judge Scott O. Wright (W.D. Mo.), have conducted conferences, hearings, and a few jury trials with pro se prisoners by videoconference. They both offer positive assessments of their experience, agreeing that the most significant benefit is increased safety. "Prisoners most often escape when they're outside prison, especially if it's a maximum-security facility," Judge Knox explains. "The TV procedure cuts down dramatically on this risk, as well as the potential for violence in the courtoom and holding cell." It cuts down as well, he says, on the costs of transporting prisoners from the state maximum-security prison to the Jefferson City federal courthouse, reduces the number of security officers who must accompany prisoners, and frees U.S. marshals from the need to be in the courtroom or at the holding cell during the proceedings.

Judge Knox first requested money for a closed-circuit broadcast capability several years ago after being favorably impressed with a system operated by the state courts. When the Western District of Missouri became a CJRA pilot court, funding became available, and at a cost of about $63,000, the court installed a laser optic/line-of-sight system, which allows for direct transmission of the video signal without a telephone hookup (eliminating ongoing telephone line charges). This arrangement was possible because of the proximity of the courthouse and the prison (.6 miles) and the absence of taller buildings situated between them. The two courtrooms in the courthouse are equipped with wall-mounted cameras and monitors, with a smaller monitor at each bench. Microphones are tied in to the electronic court reporting system. All other equipment is located on a portable rack that can be moved (although with some difficulty) from Judge Knox's courtroom on the first floor to the second-floor courtroom where Judge Wright holds court when he visits from Kansas City. The prison already had a transmitter and a room designated as the prison courtroom, equipped with a television camera.

Judge Knox envisioned using the system to improve the processing of section 1983 cases, which at that time were being filed at a rate of more than 500 per year. He believes televised proceedings may have contributed to a significant recent decline in the prisoner civil rights caseload because "prisoners realize they won't get a trip outside if they bring suit."

For preliminary matters, Judges Knox or Wright may confer with prisoner plaintiffs via television to determine whether, for instance, an inmate's medical problem is serious enough to warrant a hearing. If a hearing is required, the plaintiff—and any prisoner witnesses he or she may call—can testify by two-way closed-circuit broadcast. In the prison courtroom are the plaintiff, a guard, and an inmate camera operator. (The judge can talk directly to the camera operator regarding the judge's wishes.) Witnesses may be brought into the prison courtroom when they are needed. Attorneys representing the government join the judge in his courtroom, and they may ask the plaintiff or witness questions just as if they were all in the same location. The judge controls the cameras and sound in his courtroom from the bench. It is possible to view and read documents by television, but copies of documents are provided in advance if feasible. If documents have not been made available in advance, they are sent after the hearing to the judge's clerk and other appropriate parties.

For trials, plaintiffs are brought to the judge's courtroom, but inmate witnesses (there may be three to eight per trial) testify via television. Judge Wright stresses that these witnesses do not have to be shackled and therefore make a better impression before juries. Judge Knox believes that prisoner plaintiffs benefit from having inmate witnesses testify on TV because they appear less threatening to jurors. As a matter of fairness, both judges believe it is important that prisoner plaintiffs, especially when they are pro se, be present in the courtroom with the jury during trial.

In addition to improving safety and reducing costs, televised proceedings also save time, Judge Knox says. Time is saved not only by eliminating the transport of prisoners to the courthouse, but also by decreasing the downtime between hearings that is necessitated by bringing prisoners up to the courtroom from the court's one holding cell. Time savings also result from the ability to schedule conferences and hearings in less than an hour if the need arises.

Neither judge sees any drawbacks to the system. Although technical problems may occur when storms disrupt the prison's microwave transmitter or as a result of ad hoc equipment maintenance, such problems are infrequent and pose no major difficulties. In Judge Wright's view, "other courts would find the procedure really helpful."

Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases

MARIE CORDISCO

Before enactment of the Prison Litigation Reform Act on April 26, 1996, 28 U.S.C. § 1915(a) authorized federal courts to waive all fees and costs for "a person who makes affidavit that he is unable to pay such costs or give security therefor."

The PLRA changed that provision of the in forma pauperis statute. Now an inmate who wishes to proceed in forma pauperis is required to submit an affidavit stating all his or her assets along with a copy of his or her trust fund account, and must pay the full filing fee. For prisoners with insufficient funds to pay the full fee, the Act contains a formula for payment of the filing fee in installments. Other amendments to section 1915 imposed by the PLRA require dismissal of the complaint under certain conditions and restrict prisoners from proceeding in forma pauperis after three prior dismissals.[1]

Even before the 1996 legislation mandated payment of filing fees by prisoners, about half the district courts had adopted rules or established informal policies providing for partial payment of filing fees by inmates who wished to proceed under section 1915. This article reports on the experiences of these courts before the PLRA and suggests some lessons learned from those experiences that may be useful to districts in implementing section 1915 as amended.

The court of appeals in each circuit except the District of Columbia (which had not addressed the issue) approved the use of partial filing fees under the former statute. Districts implemented procedures to assess partial fees based on local conditions, but the general aims were similar to Congress's apparent goal in amending section 1915: to discourage frivolous cases by requiring plaintiffs to consider the cost of their suits just as other civil litigants do, and to conserve court resources by reducing the time spent reviewing in forma pauperis applications.[2] Although some districts imposed partial fees on any petitioner seeking to proceed in forma pauperis, partial filing fees were most often ordered in prisoner civil rights cases. As the table on pages 28–32 reflects, most districts' pre-April 1996 local rules or standing orders regarding partial filing fees limited their application to prisoner cases; some districts further restricted the scope of their rules or orders to prisoner actions involving civil rights, habeas corpus, or post-conviction relief.[3]

The Center collected the data in the table at the request of the Judicial Conference Committee on Federal-State Jurisdiction, which wanted the information so it could assist districts considering instituting partial filing fee systems. The information was obtained in telephone interviews with district court staff familiar with the local rules and practices in their districts. Data gathered in the initial survey conducted in late 1994 were updated in early 1996 through follow-up phone interviews, which revealed that seven additional districts had adopted rules or orders imposing partial filing fees.

What the table shows

The table reflects the practice as of February 1996 in each U.S. district court that allowed imposition of partial filing fees. It distinguishes districts with a local rule or standing order from districts that used only an informal policy. The brief description of the local rule or standing order paraphrases the actual language contained in the rule or order and should not be quoted or cited as legal authority. The rule or order itself is the proper source to consult for a district's policy.

Before the PLRA, forty-seven districts (half of all federal district courts) required partial filing fees in some form (and one district, the Southern District of California, was drafting a local rule). In twenty-one of these districts, local rules or orders established a variety of procedures and formulas for assessing partial filing fees, as the table indicates. An additional twenty-six districts reported informal policies that allowed assessment of partial filing fees, almost always on an ad hoc basis, with the amount left to the judge's discretion after he or she reviewed the petitioner's financial affidavit. Some districts—e.g., the Southern District of Alabama and the Western District of North Carolina—used flexible guidelines or rules of thumb that might not have been followed by all judges within the district.

With the passage of the PLRA, all courts must conform their procedures, whether previously implemented by rules, orders, or informal policies, to the Act's requirement of a single formula for assessing partial filing fees. When a prisoner does not have sufficient funds to pay the full fee, a court must assess and, when funds exist, collect an initial partial filing fee of 20% of the greater of: (1) the average monthly deposits to the prisoner's account; or (2) the average monthly balance in

the prisoner's account for the prior six-month period. After the initial partial filing fee has been paid, the prisoner is required to make monthly payments of 20% of the preceding month's income.[4]

The rules and orders of the district courts listed in the table also differed as to their scope of application. For example, the rules of the Northern District of New York and the Eastern District of Virginia pertained to all prisoner civil rights and habeas corpus actions, while only section 1983 cases brought by pro se prisoner plaintiffs were subject to the rule of the Central District of Illinois. The rules of the Western District of Michigan and the Northern District of Indiana, on the other hand, covered all applications to proceed in forma pauperis regardless of the nature of the case. The PLRA applies only to prisoners who bring civil actions or file appeals in forma pauperis.[5] Thus, it would not affect a district's rule or order with respect to plaintiffs outside of that category.

Some districts cite reasons for discontinuing or abandoning efforts to adopt partial filing fee plans

In addition to the forty-seven districts listed in the table, a number of districts had contemplated adopting partial filing fee plans but decided not to. They cited these reasons: (1) review of data from courts with partial fee plans indicated that no significant decrease in the number of filings had occurred as a result of imposing the fees; (2) the increased administrative burden imposed on the clerk's office in coordinating inmate account information with penal institutions and collecting payments; (3) appellate court decisions limiting the court's ability to direct sua sponte section 1915(a) dismissals once a partial filing fee has been collected. In fact, the court resources required to compute and collect fees led some districts to abandon the practice altogether and others to seek ways to save court personnel time and administrative costs.

The District of Nevada took an unusual approach that had some similarities to the procedure required by the PLRA.[6] In the Nevada process, a prisoner civil rights plaintiff could not file an in forma pauperis application and complaint until an authorized officer of the state penal institution where the prisoner was held completed a financial certificate that specified the appropriate filing fee based on either the inmate's current account balance or average monthly net deposits for the preceding six months. The Nevada rule required the financial certificate to be submitted with the prisoner's motion for leave to proceed in forma pauperis, thus letting the prisoner know *before* submitting the complaint whether the court would order payment of a partial fee and the amount of the fee. If ordered to pay, the prisoner attached payment to the order.

Appellate decisions under the pre-PLRA version of section 1915 holding that after a plaintiff had paid a partial filing fee a district court could not sua sponte dismiss an action as frivolous deterred some courts from instituting partial fee plans and caused other courts to discontinue their plans. Those decisions held dismissal of a complaint as frivolous to be inconsistent with Federal Rule of Civil Procedure 4(a), which requires summons to issue once a complaint is filed (a complaint is considered filed as soon as the plaintiff pays a filing fee), and Federal Rule of Civil Procedure 15(a), which requires that a plaintiff be given an opportunity to amend a complaint before the court dismisses an action sua sponte. These rulings convinced a number of district courts that the benefits of a section 1915(d) frivolity dismissal outweighed the benefits of requiring partial payment of fees.

To avoid this problem under the former version of section 1915, some districts ordered partial filing fees only in nonfrivolous cases that survived review under section 1915(d). Other courts believed that such an approach—requiring only plaintiffs in "meritorious" cases to pay partial fees—defeated the purpose of using the fees to reduce the number of frivolous filings. In most districts, however, even cases likely to be unsuccessful in the end were not dismissed pursuant to section 1915(d) unless they lacked *any* arguable basis in law or fact. Thus, imposing partial filing fees under the old statute may not have reduced significantly the number of frivolous filings in most courts, but did force prisoner plaintiffs, like other civil litigants, to weigh the costs of pursuing their cases, whether meritorious or not. Nevada's approach may have had a greater impact on the number of frivolous filings by ensuring that a prisoner was aware before filing a civil rights complaint that he or she might be ordered to pay a partial filing fee and the amount of that fee.

The recent amendments to section 1915 eliminate this issue altogether. Regardless of whether a portion of the filing fee may have been paid, a district court is required to dismiss at any time an action in which the plaintiff is proceeding in forma pauperis if the court finds the action to be frivolous.[7]

Districts with formal plans for assessing partial filing fees report most satisfaction

Although the Center's inquiry was not aimed primarily at discovering the effectiveness of partial filing fee practices, conversations with court personnel in districts with partial filing fee rules or orders in effect revealed a range of positive and negative opinions. Their experiences may be of interest to courts as they establish procedures to implement the filing fee requirements in the PLRA. The most frequent complaint from those dissatisfied with partial fees was that they are too complex and were "more trouble than they are worth." (This complaint was voiced even more frequently by staff in districts that had informal, ad hoc procedures for assessing fees.) In districts where court staff expressed dissatisfaction, they said that while they examined in forma pauperis petitions to determine whether partial filing fees were appropriate, it was rare that petitioners were actually ordered to pay the fees.

Those districts that reported high levels of satisfaction with their partial filing fee plans had one element in common: All of the courts had formally adopted detailed procedures for assessing and collecting partial fees that applied uniformly to all cases covered by the procedures. Among these districts are the Eastern District of Texas, District of Nevada, Eastern District of North Carolina, District of South Carolina, Middle District of Louisiana, and Western District of Missouri. Their local rules or standing orders established regularized procedures that applied to all in forma pauperis petitions submitted by prisoners in civil rights cases, and most of the districts also provided standardized civil rights complaint forms and in forma pauperis forms. The PLRA mandates such a procedure for all courts and, of course, permits much less opportunity for interdistrict variation than the previous statute did.

The Center will monitor the implementation of the new requirements in an effort to assess whether they discourage the filing of frivolous complaints without creating additional administrative burdens on court staff.

Notes

1. *See* H.R. Rep. No. 104-537, 104th Cong., 2d Sess. 76-78 (1996).

2. *See* Thomas E. Willging, Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report vii (Federal Judicial Center 1984).

3. Courts with partial-payment rules or orders that applied solely to inmates apparently adopted the rationale stated in *In re* Epps, 888 F.2d 964 (2d Cir. 1989): "We also share the implicit view of the other circuits that it is appropriate to fashion court rules for partial fees that apply only to prisoners. The discretion conferred on district judges by section 1915 is to be exercised so as not to deprive litigants of the 'last dollar they have,' nor the 'necessities of life.' But what constitutes the 'necessities of life' that must be purchased is obviously different for prisoners, most of whose necessities are paid for by the jurisdiction that incarcerates them." *Id.* at 967 (citations omitted). No reported case law addresses the issue of equal protection.

4. H.R. Rep. No. 104-537, *supra* note 1, at 76.

5. *Id.*

6. The District of Nevada also took an innovative approach in processing prisoner civil rights complaints through the use of telephonic early case evaluation hearings prior to service of a complaint on named defendants. *See District of Nevada Uses Early Hearings to Cope with State Prisoner Pro Se Civil Rights Caseload* at page 18.

7. H.R. Rep. No. 104-537, *supra* note 1, at 77.

Partial Payment of Filing Fees in In Forma Pauperis Cases in Federal Courts

Circuit	District	Local rule or standing order governing imposition of partial fees	Informal policy to impose partial fees
First	D.N.H.	**Local Rule 4.2(c):** Court may order partial fee as long as it does not exceed greater of 15% of value of applicant's liquid assets or net monthly income after deducting reasonable expenses.	
First	D.R.I.		Case-by-case determination based on funds petitioner has available.
Second	N.D.N.Y.	**Local Rule 5.4:** In prisoner civil rights cases and habeas corpus actions, partial fee is required equal to 10% of average monthly deposits to prisoner's account for 3 months before filing.	
Third	M.D. Pa.		Partial fees may be imposed in civil rights and habeas corpus cases in accordance with *Jones v. Zimmerman*, 752 F.2d 76 (3d Cir. 1985).
Fourth	E.D.N.C	**Order Adopted Jan. 19, 1980, and amended by Order Adopted April 30, 1980, and July 21, 1981:** In section 1983 cases, partial fees are based on income prisoner received within 6 months preceding filing and "such other factors as applicant may draw to court's attention." Fees may not exceed 15% of income received. **Order Adopted May 27, 1980:** Partial fee also applies to federal prisoners challenging conditions of confinement.	
Fourth	M.D.N.C.		On ad hoc basis, magistrate judge may assess fee based on average balance in prisoner's trust fund over past 6 months.
Fourth	W.D.N.C.		Magistrate judge may assess partial fee on ad hoc basis. In section 1983 cases partial fee of 15% of average balance in prisoner's account in preceding 6 months may be assessed. In social security cases, partial fee may only be assessed if each family member has more than $600 in his/her account.
Fourth	D.S.C.	**Order dated April 18, 1995:** Any state or federal prisoner filing a section 1983 action must submit financial certificate that shows applicable fee with IFP application. Fee based on greater of inmate's current account balance or average monthly net deposits for past 3 months.	
Fourth	E.D. Va.	**Local Rule 27:** In section 1983 cases or habeas corpus actions, partial fee not in excess of 20% of aggregate deposits in prisoner's account during 6-month period may be assessed. In nonprisoner cases, court may require petitioner to file affidavit re financial ability to pay in order to determine fee.	

Partial Payment of Filing Fees in In Forma Pauperis Cases in Federal Courts, *continued*

Circuit	District	Local rule or standing order governing imposition of partial fees	Informal policy to impose partial fees
Fourth	W.D. Va.		In section 1983 cases, court may impose partial fee in accordance with *Evans v. Croom*, 650 F.2d 521 (4th Cir. 1981); in other cases, court may assess fee of 15% of petitioner's average monthly income for 6 months before date of filing.
Fourth	N.D. W.Va.		Case-by-case determination based on funds petitioner has available.
Fourth	S.D. W.Va.		On ad hoc basis in sections 1983, 2254, and 2255 cases, magistrate judge may assess partial fee of 15% of average balance in prisoner's account 6 months before filing IFP petition.
Fifth	E.D. La.	**General Order No. 87-2:** In section 1983 cases, partial costs determined on sliding scale based on present economic status; at $365 prisoner must pay full fee. These guidelines do not preclude consideration of other variables inherent in section 1915(d) determination.	
Fifth	M.D. La.	**General Order No. 93-3:** Partial costs are determined on sliding scale based on prisoner's present economic status; at $450 prisoner must pay full fee. These guidelines do not preclude consideration of other variables inherent in section 1915(d) determination.	
Fifth	W.D. La.		Partial fees may be assessed in section 1983 cases. Court's guidelines and fee scale do not preclude consideration of other variables inherent in section 1915(d) determination.
Fifth	S.D. Miss.		Case-by-case determination based on funds petitioner has available.
Fifth	E.D. Tex.	**General Order 94-7:** Guidelines for fees in any prisoner action: for civil actions, if inmate's account balance is between $50 and $180, inmate pays a graduated portion of fee; in habeas corpus actions, if inmate's account balance over last 6 months is between $50 and $100, inmate pays $5.	
Fifth	S.D. Tex.	**General Order No. 88-20*:** Partial costs determined on sliding scale based on prisoner's present economic status; at $450 prisoners must pay full fee. Guidelines do not preclude consideration of other variables inherent in section 1915(d) determination.	
Fifth	W.D. Tex.		Experimenting on ad hoc basis.
Sixth	E.D. Ky.		Case-by-case determination based on funds petitioner has available.

* Although the general order is still in effect, the court has decided not to assess partial filing fees on prisoner pro se IFP petitioners in light of *Grissom v. Scott*, 934 F.2d 656 (5th Cir. 1991). However, the order may still be consulted for guidance in assessing partial fees for nonprisoner pro se petitioners, though it is rarely done.

Partial Payment of Filing Fees in In Forma Pauperis Cases in Federal Courts, *continued*

Circuit	District	Local rule or standing order governing imposition of partial fees	Informal policy to impose partial fees
Sixth	W.D. Ky.		In prisoner cases, judge may impose partial fees, but it is rarely done; as loose guideline, amount of fee will be approximately 10% of prisoner's average monthly income in 6 months preceding filing.
Sixth	W.D. Mich.	**Local Rule 7:** Magistrate judge may order a petitioner to pay reduced fee, defined as the greater of: (1) 20% of person's liquid assets including any prison account; or (2) 5% of total deposits placed in prison account during 6 months preceding signing of financial affidavit. Magistrate judge may make any other appropriate order re payment of reduced fee.	
Sixth	S.D. Ohio	**Amended General Order No. 1:** In prisoner civil rights cases, petitioners must make partial payment equaling 15% of their average monthly balance for 6-month period preceding submission of application.	
Sixth	E.D. Tenn.	**Local Rule 4.2:** Depending on amount of funds available to petitioner, court may require petitioner to pay partial fee.	
Seventh	C.D. Ill.	**Local Rule 2.12:** In section 1983 action, petitioner is required to make partial prepayment of fee in amount not to exceed 50% of inmate's average monthly income for 6 months preceding submission of petition.	
Seventh	N.D. Ill.		In any civil case, judge may impose partial fee based on pro se law clerk's recommendation, using informal sliding scale. For prisoner petitions, partial fee may be assessed if prisoner's average trust fund balance for preceding 6 months exceeds $30.
Seventh	N.D. Ind.	**Local Rule 4.3:** Any petitioner may be required to make partial payment in amount determined by court; petitioners have 30 days to show cause why they can't make payment. Informally, judges may assess reasonable fee in prisoner cases based on 50% of average of inmate's last 6-month trust account balance.	
Seventh	S.D. Ind.		Case-by-case determination based on funds petitioner has available.
Seventh	E.D. Wis.		Case-by-case determination based on funds petitioner has available.
Eighth	W.D. Mo.	**Local Rule 9:** All IFP petitioners (except in sections 2254 and 2255 cases), may be required to make partial payment, which should not cause applicant to give up basic life necessities. For prisoner petitions, partial fee of 10% of applicant's monthly income for 6 months preceding filing may be imposed.	

Partial Payment of Filing Fees in In Forma Pauperis Cases in Federal Courts, *continued*

Circuit	District	Local rule or standing order governing imposition of partial fees	Informal policy to impose partial fees
Eighth	D. Neb.	**Local Rule 83.11:** Court may order prisoner applicant to pay partial fee that doesn't exceed 30% of average monthly income to trust account for 6 months preceding filing or 30% of account balance at time of filing, whichever is greater. If based on current balance, court may require higher partial fee if applicant has withdrawn funds to avoid payment.	
Ninth	D. Alaska	**Local Rule 4.2(b)(1):** Judge may condition continuance of suit filed in forma pauperis on payment of partial fee.	
Ninth	C.D. Cal.		Experimenting on ad hoc basis.
Ninth	N.D. Cal.		Case-by-case determination based on funds petitioner has available.
Ninth	D. Idaho		On case-by-case basis, magistrate judge may assess partial fee based on funds prisoner currently has in account.
Ninth	D. Mont.		In Missoula and Helena divisions, a judge may require applicant to pay partial fee if applicant is able to pay something, but this is rarely done. Billings division does not impose partial fees.
Ninth	D. Nev.	**Local Rule 215(h):** IFP petitions in habeas corpus actions under sections 2241, 2254, and 2255 motions may be denied if value of accessible money and securities in petitioner's accounts exceeds $75 or such amounts as court may determine; IFP petitions in section 1983 cases may be denied if value of accessible money and securities in plaintiff's accounts exceeds $200 or such amounts as court may determine. If less than above amounts are accessible to petitioner, court may require payment of lower fee based on court-approved fee schedule. **Plan for Implementation of Partial Filing Fee Schedule for Complaints Filed Pursuant to section 1983:** In civil rights cases plaintiffs must submit an IFP motion with their complaint. With the motion, inmates must submit a financial certificate from their penal institution indicating whether they must pay partial fee. Fee is based on greater of their current account balance or their average monthly net deposits for past 6 months. Petitioners may seek a waiver from fee if they believe special circumstances should exempt them.	
Tenth	W.D. Okl.	**Local Rule 4.4:** Court may order IFP applicant to make partial or periodic payments of fee. If applicant is incarcerated, partial payments will equal amount in inmate's draw account that exceeds $30, unless inmate shows good cause for financial hardship.	

Partial Payment of Filing Fees in In Forma Pauperis Cases in Federal Courts, *continued*

Circuit	District	Local rule or standing order governing imposition of partial fees	Informal policy to impose partial fees
Tenth	D. Utah		Case-by-case determination based on funds petitioner has available.
Eleventh	M.D. Ala.	**Order filed Sept. 23, 1987:** For all IFP petitions, court must ascertain whether partial payment should be required. In section 1983 cases, court should consider petitioner's present economic status; in section 2254 cases, court should consider requiring inmates to pay $5 fee if they have $25 or more in their accounts. Guidelines do not preclude consideration of other variables inherent in section 1915(d) determination.	
Eleventh	N.D. Ala.		On all prisoner IFP petitions, flexible guidelines allow magistrate judge to assess partial fee that is approximately equal to the greater of 30% of either (1) an inmate's average monthly balance for preceding 6 months or (2) amount currently in an inmate's prison account. Judge can take other factors into account. Prisoner can explain why assessment of fee is not appropriate.
Eleventh	S.D. Ala.		In sections 1983 and 2254 cases, magistrate judges may assess partial fee based on informal formula: either 30% of average monthly deposit for past 4 months in inmate's account or 30% of account's balance, whichever is greater.
Eleventh	M.D. Fla.	**Local Rule 4.07:** Court may order any IFP petitioner to pay a portion of clerk's and/or marshal's fees within prescribed time; if petitioner fails to do so, action may be dismissed without prejudice. Court uses internal guidelines to determine amount petitioner has to pay in sections 1983, 2254, and 2255 cases: 30% of the higher of (1) amount in petitioner's prison account plus any assets possessed just before filing or (2) total deposits placed in prisoner's account for 3 months preceding filing, divided by three.	
Eleventh	S.D. Fla.		Experimenting on ad hoc basis.
Eleventh	M.D. Ga.		Case-by-case determination based on funds petitioner has available.
Eleventh	N.D. Ga.		Informal written guidelines: If inmate's account balance is between $50 and $300, inmate pays graduated portion of fee. Guidelines not strictly followed.
Eleventh	S.D. Ga.		In sections 1983 and 2254 cases, judge may assess partial fee on case-by-case basis depending on funds prisoner has available.

Pro Se Issues & Answers: An On-Line Forum

As part of its expanded use of distance-learning technologies, the Center conducted its first on-line conference dealing with case-flow management in the fall of 1995. Over a period of several weeks, participants who were geographically scattered engaged in group discussions, facilitated by a center staff person, by sending and receiving electronic messages through their office computers. They were able to access the conference at any time convenient for them. The conference served as a follow-up to a workshop on the same subject which was held in Atlanta, Georgia, on March 13–14, 1995. Over forty district judges, magistrate judges, clerks of court, chief deputies, and other staff from district courts in the Fifth and Eleventh Circuits, some of whom had not attended the earlier workshop, participated with workshop faculty in the on-line conference. One of the "sidebars" of the conference allowed participants to explore the problems pro se litigants pose for clerks' offices and judges and share their approaches to those problems. Excerpts from that sidebar forum follow.

Robert H. Shemwell
[Magistrate Judge & District Court Clerk, W.D. La.]
19-OCT-95 16:02

In the Western District of Louisiana pro se filings are a problem as I am sure they are everywhere. The question of "What advice can be given to a pro se litigant?" is an important one.

One device used in this district is a handbook entitled "Guide to Practice in the United States District Court for the Western District of Louisiana" which is revised each year in October. This manual gives the roster of all officials in the district with telephone and mail information. It also describes the facilities and services which are present in the court. The manual sets forth a number of general principles concerning how the court operates. It also has a number of sections on specific topics, such as "General Rules of Pleading," "Filing of New Suits," "Motions," "Discovery," "Subpoenas," "Default Judgments," "Taxation of Costs," "Removal of Cases from State Court," "Appeals," "Registration of Judgments," and "Schedule of Fees." These sections are written in layman's terms, but contain legal citations for reference. There are also many checklists to help a litigant review the appropriate procedures. Whenever possible, deputy clerks give out a copy of this manual and refer litigants to its provisions.

There are no written procedures or guidelines for questions that deputy clerks get beyond the areas covered by the "Guide to Practice." Deputies receive the familiar admonition, "Do not give legal advice!," but . . . there is no definitive definition of what amounts to legal advice.

Consideration of what is or is not legal advice is in great part a matter of common sense. A deputy clerk should never tell a litigant what to do or not to do. All decisions must be decisions of the litigant, not the deputy clerk. A deputy clerk is free to tell any litigant any information present on the docket sheet or present in the official file. The deputy may also point out the existence of any local rules or federal rules. . . . Tell the litigant where to find the rule or in some cases even what a procedural rule is, but do not offer an opinion as to whether the litigant's situation falls . . . within the ambit of a particular rule. Give the litigant the rules of the game, but let the litigant do all the playing.

I will be interested to see how this situation is handled in other courts.

Judith K. Guthrie
[Magistrate Judge, E.D. Texas]
19-OCT-95 18:43

In the ED of TX we have a form letter that goes out to prison inmates who write asking for 1983 forms. If an inmate starts writing lots of letters to the clerk of court seeking advice, the judge will usually enter an order telling the litigant to stop writing to the clerk for advice.

If a response needs to be made to an inmate, the pro se writ clerk is charged with that duty. If she has a question about what response to make, she will either ask the staff attorney or the judge on the case.

If a pro se litigant shows up at the intake counter with legal questions, I believe the deputy clerks are supposed to call the clerk of court, who is an attorney.

Pamela Mitchel
[CJRA Staff Attorney, W.D. La.]
20-OCT-95 12:49

Of course, I agree with everything Robert said about pro se litigants and the problems that they create. I seem to deal with this problem on a daily basis because I share a phone line with the pro se staff attorney. I get a lot of prisoners calling and asking for "advice." We have been told here at the WD of Louisiana not to give "legal advice" but I have never heard this term defined so I do struggle with what to tell them . . . because sometimes this can be a fine line. A common question I get all the time is, "when will the court decide my case?" I give them a general answer . . . stating that it's with the judge and depends on how complicated the issues are. Another common question I get is, "what should I do next?" To me this question offers problems because one could walk a fine line of giving out advice. I usually offer general "advice"—say if a summary judgment is filed by the opposite side, I might tell them they can file an opposition to the summary judgment. That's as far as I go. Sometimes the pro se litigant does not seem to know if it's okay to file what they want to file—like they will suffer grave consequences if they file this.

Deborah Hunt
[District Court Clerk, S.D. Ala.]
23-OCT-95 11:57

I think the best way to provide information to pro se litigants is through the use of an informational handout that tells them generally about complaints, service of process, IFP status, refers them to the federal rules and local rules, and gives information about the length of time cases are generally pending. . . .

I think our perspective is uniquely administrative and doesn't focus on substantive issues, which in my experience is what pro se's want information about. Certainly pro se litigants are held to a less rigid standard when procedural matters are concerned. Since it is impliedly procedural matters we are capable of helping with, we need not be overly concerned about hyper-technical obstacles to the progress of their cases anyway. Perhaps that is the bottom line—rather than expecting pro se litigants to recognize all the traditional modalities of bringing matters before the court, that information they provide, although in novel form, should be liberally construed for the purposes for which it was intended. This obviates the need for clerical personnel to provide that assistance to pro se litigants. If a pro se litigant is sufficiently in need of help and has arguably meritorious claims, appointment of counsel is an appropriate vehicle to provide that assistance. Payment might be available under the EAJA or the court can use its nonappropriated special attorney admission fund. . . .

Gerri Crockette
[District Court Clerk, S.D. Ind.]
9-NOV-95 18:43

I have been enjoying what others are saying and it has been informative. One question I have concerns motions. Given that some litigants file a large number of motions in a case, it is sometimes very difficult to sort them out. Case management is becoming more and more difficult. How do you handle this? It would be helpful if I could hear from both chambers and clerk's office.

In addition, I have another question that relates primarily to clerk's office procedure. How are clerks handling the problem of incomplete complaints? Many prisoners send in something that may be a complaint but do not send in a filing fee or an IFP form. Do you set up a new case or treat the document as a piece of correspondence? . . .

Christine A. Noland
[Magistrate Judge, M.D. La.]
14-NOV-95 19:29

Gerri, I just found your message. . . . Motions have always been a problem. Either I can't determine what the inmate is asking for sometimes, or I know what he is asking for, but that's not what he really wants. We had video conferencing for a while and it was great. All we had to do was first give the prison time to get the inmate and notify opposing counsel, get on the video camera and ask him what he meant. Now we have to set up a discovery conference and either have the inmate come to the courthouse or we will go to the prison. [*Editor's note:* The videoconferencing pilot program, using equipment purchased by the state of Louisiana, ran from mid-January to mid-April 1995.]

We also use the discovery conference between the parties as one way to solve the problem. That is, make the inmate write to the attorney first and try to solve any problem before a motion is filed. If a motion comes in, sometimes I order counsel to respond to it within 10 days. (Defendants do not always respond to discovery motions, as we rule on them without setting a hearing date.)

One thing I learned from Judith G. in Tyler is that I order initial disclosure in inmate cases and then limit the number of further discovery requests to 10 each. The attorneys for the Attorney General's Office like this better and I think it is going to cut down on my motions. I also think the inmate will get the information he needs without a lot of excess.

Steve Ehrlich
[Chief Deputy Clerk, D. Col.]
15-NOV-95 12:35

Gerri, . . . As for your two questions:

Case management has become a greater team effort. Docket clerks maintain the case management information system. They are crucial in this regard. In our court the judge's secretary does the settings. It varies from chambers to chambers as to who monitors service, follows up on settlement papers, makes calls to see if trials are going to settle, etc. It can be the courtroom deputy, docket clerk or secretary. Another crucial element is providing information to all key players. We do this by issuing monthly inventory/motions reports (a combination of two ICMS reports) and three subset reports on the movement of prisoner cases, HHS and administrative appeals, and bankruptcy appeals. For certain judges I review their status and comment where appropriate. The most crucial element is to have a judge that is interested in this and that sets clear expectations for staff.

Regarding prisoner cases that are incomplete. We have begun using orders to cure deficiencies. The pro se law clerks prepare these orders for a designated pro se judge. Once issued they monitor these cases. If they fail to cure, they are dismissed. Missing or incomplete pauper's motions are filed in as miscellaneous cases. Their motions are denied since they can cure at any time by doing it properly.

Gerri Crockette
15-NOV-95 16:27

Christine and Steve, thanks for your comments. One item you noted was the use of videoconferencing and how helpful that was. I have never used it, but I have heard good things about it, particularly in the area of prisoner litigation. Would teleconferencing be an alternative? It certainly is a pain to have to visit the prison or give the prisoners a holiday trip to the courthouse. I certainly like the idea of limiting the prisoners to only filing 10 discovery requests.

Steve — . . . You mentioned that you initially set up miscellaneous files for incomplete cases. After all the proper paperwork comes in, is that when you officially open up a civil case and close the miscellaneous case?

Sandra McCormack
[Operations Manager, S.D. Miss.]
15-NOV-95 17:17

With regard to incomplete complaints—if there is no original signature on the complaint, no completed IFP application or filing fee enclosed, our pro se attorney returns the complaint according to federal Rule 11.

When we receive a motion for TRO, signed with IFP that doesn't relate to an underlying complaint, we assign the motion a miscellaneous number and enter an order directing them to file a complaint. We would like to know if this is how other courts handle these matters or if they have other suggestions.

Pamela Mitchell
16-NOV-95 11:33

Sandra, In response to your questions regarding incomplete complaints, if our court receives complaints that have no original signature on complaint, no completed IFP application or filing fee enclosed, we give the complaint a miscellaneous number and send a letter with it (with the appropriate forms if necessary, for example if it is a prisoner who wants to file a civil rights action) asking the pro se litigant to conform within a certain number of days or the suit will be abandoned. Then, if they don't comply, we send the complaint back to them. On motions that are filed without a complaint having first been filed, it depends on what the motion says. If the motion really contains the language of a complaint (just not titled that way) and a motion too, we assign a civil action number. If it is just a motion with no complaint having been filed first, we assign it a miscellaneous number and send the appropriate forms (if necessary).

Steve Ehrlich
16-NOV-95 12:41

Gerri, Pursuant to rule 5 we take everything. If they have not paid the fee or they have not presented a pauper motion that can be granted, we would set up a miscellaneous case. If they get it right, we would then set up a civil case.

Judith K. Guthrie
28-NOV-95 10:45

For Gerri Crockette: You asked about how to manage the many motions filed by pro se litigants: The trick is, in my opinion, to get the case set for a quick hearing. A lot of questions can be answered at that hearing and the need for motions disappears. In our court's Plan, pro se inmate cases are assigned to our Track 2, which means that disclosure is the only form of discovery allowed. Disclosure is required only if I order the defendants to file an answer. Once an answer is filed, the defendants have 30 days to disclose (that usually means producing documents and witness names that "bear significantly" on a claim or defense). By the time disclosure is made, the case has a trial date in the near future. This system cuts down tremendously on the number of motions that get filed.

Those motions that do get filed need to be ruled on promptly. Unless it is a motion for summary judgment or the like, I often rule on the motion without waiting for a response. It is a killer on the judge or staff to let these motions pile up. Hope this helps.

Gerri Crockette
28-NOV-95 15:38

Judith: Your response was very helpful. One item you noted that is of interest is that you only allow disclosure for the pro se inmate cases. This keeps them on track with the least amount of paperwork and effort for all involved. Thanks.

The Center will conduct two on-line case-flow management conferences in 1996. One will run from May through September 1996 as an extension of the February case-flow management workshop held for the First, Second, and Third Circuits. The other will be scheduled from December 1996 to April 1997, following up on the August workshop for the Fourth, Sixth, and District of Columbia Circuits. Both of the conferences will include pro se sidebars.

Pro Se Debtors & Creditors in Bankruptcy Cases: An Excerpt from the Case Management Manual for U.S. Bankruptcy Judges

In 1995, the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, with assistance from staff of the Federal Judicial Center and the Administrative Office of the U.S. Courts, published the Case Management Manual for United States Bankruptcy Judges. The manual helps judges manage the cases and proceedings on their dockets. Its suggestions reflect the varied experiences of both bankruptcy and district court judges, but not any official position or recommendation of the Judicial Conference, the Administrative Office, or the Center. The following excerpt is from Chapter X, which deals with a variety of special matters, including pro se litigation. (Copies of the manual were distributed to the courts in 1995. Courts needing additional copies should contact the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts, 202-273-1900. Please note that distribution of the manual is restricted to the courts.)

Section B. Pro Se Debtors and Creditors

1. Introduction

In some courts, a great number of debtors file bankruptcy petitions without the assistance of counsel, whereas in other courts pro se filings are much less prevalent. Factors contributing to these differences include, among other things, the economic conditions of the district, the availability of pro bono and low- or no-cost legal services, and the prevalence of paralegal services or so-called "bankruptcy mills" that prepare petitions for debtors. Similarly, the number of litigants appearing without counsel in proceedings that take place subsequent to the filing of the petition varies among districts, depending in part on the stance taken regarding limitations on the scope of attorney representation and requests for withdrawal of representation (see discussion in subsection 3 below).

This section of the Manual attempts to provide guidance to courts that are faced with pro se debtors either occasionally or on a regular basis. In addition, many of its suggestions are applicable to creditors who may appear before the court without counsel. . . .

Judges disagree as to the level and type of assistance they or other members of the court staff can provide to pro se parties without creating a perception of, or actually, favoring unrepresented parties, engaging in the inappropriate "practice of law" in the cases before the court, and compromising the court's impartiality. These materials are not intended to provide support for any position on these issues, but rather to provide suggestions for consideration by judges in light of their individual views.

. . . .

3. Management Techniques for Individual Cases and Proceedings

This subsection describes techniques that judges can implement in specific cases and proceedings to assist pro se litigants.

a. Early Review of Documents

Some judges direct the clerk's office to bring filings by pro se parties to their attention so that the document can be promptly reviewed and the pro se litigant be given an opportunity to cure defects if technical requirements have not been met. The judges also may check for threshold issues, such as subject matter jurisdiction and venue.

b. Status and Pretrial Conferences

Some judges choose to hold a status conference at the beginning of a case or proceeding to explain procedural requirements in straightforward terms, point out available reference materials . . . and generally provide a procedural overview of the case or proceeding. Some judges also have found that a brief discussion on the record regarding the operative law in the circuit facilitates settlement or dismissal of some proceedings (e.g., those concerning the student loans), although other judges believe that such a discussion is improper. . . .

c. Payment of the Filing Fees in Installments

A substantial number of pro se debtors may apply under 28 U.S.C. §1930(a) and Fed. R. Bankr. P. 1006(b) to pay the filing fee in installments. The court can help ensure debtors understand that failing to make the installment payments will result

in dismissal of the case by clearly stating this fact in orders granting the applications.

d. Referral to Mediation

The court may wish to refer the pro se litigant to mediation, if a program is available in the district. Some judges believe that such a referral not only enhances the possibility of settlement, but puts the pro se party on a more equal "playing field" with represented parties. This alternative is most useful when the mediator is a volunteer and thus does not require payment.

e. Sanctions Under Fed. R. Bankr. P. 9011

As discussed in Chapter VII of the Manual, an objective standard generally is used to determine whether Fed. R. Bankr. P. 9011 has been violated, that is, to determine whether an adequate investigation into the facts and law has been made and whether a document has been interposed for an improper purpose. Courts usually will consider a party's pro se status in applying this standard; the party's actions will be evaluated against what a reasonable person in the pro se party's position would have done. . . .

Some judges are reluctant to impose Fed. R. Bankr. P. 9011 sanctions on a pro se party unless that party had actual notice of the rule's requirements and its consequences. To ensure that such notice is given, the court may want to require either the opposing counsel or the clerk's office to notify pro se parties directly of the Rule 9011 requirements and consequences. . . .

Fed. R. Bankr. P. 9011 gives the court the discretion to tailor any sanctions that are imposed to the particular facts of the case. . . . Courts have imposed a wide range of sanctions on pro se litigants, from simple reprimands and monetary sanctions to injunctions against the filing of additional pleadings or actions without prior court approval. . . .

f. Motions for Summary Judgment

A number of circuit courts have held that pro se litigants are entitled to specific notification of the consequences of failing to respond properly to a motion for summary judgment. See, e.g., *Somerville v. Hall*, 2 F.3d 1563 (11th Cir. 1993); *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992); *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287, 289 (11th Cir. 1988); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639 (2d Cir. 1988); . . . Courts adopting such a rule generally have explained that a pro se litigant (particularly a prisoner) served with a summary judgment motion may be unaware that a response to the motion is necessary. This may be particularly problematic when a motion to dismiss is converted to a motion for summary judgment under the provisions of Fed. R. Bankr. P. 7012. Without specific notification, the pro se litigant might believe that the motion can be addressed at trial. Thus, the pro se litigant ought to be provided with information concerning the type of response that is required and the consequences of failing to provide such a response.

Other circuits have rejected a rule that would require any special treatment of pro se litigants in responding to motions for summary judgment. See, e.g., *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988) (no special treatment for nonprisoner pro se litigants); *Jacobsen v. Filler*, 790 F.2d 1362, 1364–65 (9th Cir. 1986) (same). . . .

g. Reaffirmation Agreements

Note on the 1994 Act: Section 103 of the Bankruptcy Reform Act of 1994 clarifies 11 U.S.C. §524(c) to require that a reaffirmation agreement must contain "a clear and conspicuous statement" which advises the debtor that such agreement is not required by either bankruptcy or nonbankruptcy law, and that the attorney for the debtor has fully advised the debtor of the legal effect and consequences of the reaffirmation agreement, including the consequences of a default under the agreement. This section also amends 11 U.S.C. §524(d) to require a reaffirmation hearing if the debtor was not represented by an attorney during the course of negotiating of the agreement.

The court's approval of a reaffirmation agreement is required when a debtor is not represented by an attorney during the course of negotiating the agreement. 11 U.S.C. §524(c)(6)(A). To minimize the effects of inappropriate pressure by creditors on the debtor, the court may wish to provide information regarding reaffirmation agreements to the debtor relatively soon after the petition is filed. To ensure that the pro se debtor receives this information, while at the same time insulating the judge from any improper ex parte communication, the court might require the bankruptcy clerk's office to mail notice to the debtor soon after the petition is filed or, alternatively, request the trustee to distribute written notice at the section 341 meeting.

h. Withdrawal of Representation and Limitations on the Scope of Representation

Whether a debtor is represented by counsel in contested matters and adversary proceedings often depends on the way the court views requests by attorneys for withdrawal of representation. Some judges generally do not permit withdrawal of the attorney who files the petition except for good cause and with reasonable notice. . . . Some judges have held that mere nonpayment of fees does not constitute sufficient cause for permitting withdrawal, unless the unpaid fees impose an unreasonable financial burden on counsel. . . .

Other judges regularly grant requests for withdrawal when the debtor cannot afford to pay the attorney's fees, reasoning that not doing so would raise the fees attorneys charge for filing petitions across the board and thus increase the number of pro se filings.

Monitoring the disclosure statement required by 11 U.S.C. §329 and Fed. R. Bankr. P. 2017 can help discourage inappro-

priate withdrawals. Factors for the court to consider include the basic fee to be paid, the services covered, the matters that will require compensation beyond the basic fee, and the rate at which any additional services will be billed. In addition to the statement required by 11 U.S.C. §329 and Fed. R. Bankr. P. 2017, some courts require that all motions to withdraw describe what significant matters are currently before the court and what matters are likely to come before the court with respect to the withdrawing attorney's client and also provide in their local rules for sanctions against attorneys who violate local rules or court orders regarding withdrawal.

4. Development of Districtwide Programs to Assist Pro Se Parties

This subsection offers suggestions regarding the development of districtwide programs to address the needs of pro se parties. In addition, the ABA Center for Pro Bono has prepared an information packet, "Pro Bono Involvement of the Judiciary," that includes materials useful to judges who are interested in obtaining assistance for pro se parties.

a. Establishment of a Committee to Consider Issues Related to Pro Se Parties

The court might wish to establish a committee to consider ways to meet the needs of unrepresented parties. Membership could consist of bankruptcy judges, the bankruptcy clerk, and representatives from legal services organizations, the bar, and local schools of law.

b. Establishment of Pro Bono Programs

The court can work with local bar associations to establish pro bono programs to assist parties who otherwise would proceed without legal representation. The court also may wish to discuss with local law schools whether the schools' clinical programs could provide litigation assistance to pro se parties.

Pro bono programs might assist debtors in preparing and filing the bankruptcy petition and related papers and provide representation in contested matters and adversary proceedings.

Instead of, or in addition to, providing assistance on an individual basis, such programs might provide classroom-type instruction to prospective pro se parties focusing on issues such as the advisability of filing bankruptcy given the debtor's level of debt and personal circumstances, whether the debtor ought to proceed under chapter 7 or 13, and the procedural requirements and substantive law related to each chapter. . . .

A number of state and local bar associations have established bankruptcy pro bono programs. The focus and operating procedures of the programs vary from locale to locale. . . .

c. Development of Instructional Materials and Sample Forms

Courts also might provide materials, in languages commonly used in the district, explaining the bankruptcy process and the debtor's substantive rights. Some of the topics that might be covered in the instructional materials include (1) differences between seeking relief under chapter 7 and chapter 13, (2) the automatic stay and motions for relief from the stay, (3) the order of discharge, (4) dischargeability complaints, and (5) the effect of reaffirmation agreements.

The Central District of California, for example, has prepared an extensive group of forms to assist pro se litigants in filing the required documents with the court. The forms are available from the court and local legal book stores. . . . In addition to the forms, the chapter 13 trustees have developed an information sheet for pro se chapter 13 debtors, which is available in both English and Spanish and is mailed to all chapter 13 debtors on filing.

Other courts also have prepared instructions or forms to assist pro se debtors on a more limited basis. . . .

In some districts, the standing trustee has prepared materials to assist chapter 13 debtors. . . .

Finally, fact sheets containing general information about chapters 7, 11, 12, and 13 can be obtained from the Bankruptcy Judges Division of the Administrative Office.

d. Controlling Improper Filings by "Bankruptcy Mills"

Note on the 1994 Act: Section 308 of the Bankruptcy Reform Act of 1994 creates standards and civil penalties pertaining to a bankruptcy petition preparer by adding a new section 110 to the Code. A bankruptcy petition preparer is defined as a person other than an attorney or an employee of an attorney who for compensation prepares a petition or any document for filing. See Chapter XII of this Manual for more detail.

Section 312 of the 1994 Act establishes new criminal penalties for bankruptcy fraud and for the willful disregard of the requirements of the Bankruptcy Code or Rules by petition preparers. See Chapter XII of this Manual for more detail.

Some districts are experiencing problems with the proliferation of "bankruptcy mills," "petition mills," or "typing mills" that advise and assist low-income and legally unsophisticated individuals regarding the filing of bankruptcy cases. These services often charge debtors several hundred dollars of fees and mislead them into believing that filing a bankruptcy case will stay eviction for an extended period of time and that no detrimental consequences will occur. In some instances, individuals are not aware that the service is filing bankruptcy on their behalf. . . . The activities of bankruptcy mills may

result in negative consequences for the debtor, a waste of judicial resources, and a fraud against landlords and other creditors.

Primary responsibility for dealing with the bankruptcy mill problem lies with the United States trustee or bankruptcy administrator and the United States attorney. By statute, the United States trustee is required to notify the appropriate United States attorney of matters occurring in bankruptcy cases which may constitute a crime and assist the United States attorney in prosecuting bankruptcy crimes. 28 U.S.C. §586(a)(3)(F). Bankruptcy administrators also are required to notify and assist the United States attorney. Bankruptcy Administrator Regulations §§3.01(k) and 3.05. In addition, some courts have adopted special procedures to discourage the filing of bankruptcy cases by mills (e.g., procedures related to the processing of installment fee applications and the noticing of dismissals pursuant to section 707).

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