1991 REPORT OF THE ADVISORY GROUP
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPENDIX A

TO THE
CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN
OF THE NORTHERN DISTRICT OF CALIFORNIA

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1991 REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION.

This report is submitted pursuant to the provisions of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 ("the Act") to the United States District Court for the Northern District of California ("the Northern District") by the Advisory Group appointed by Chief Judge Thelton E. Henderson in accordance with section 478 of the Act.[1]

With the exception of ten district courts identified as "Pilot Districts" by the Judicial Conference of the United States ("the Judicial Conference"), the Act requires that all United States district courts, including the Northern District, implement a civil justice expense and delay reduction plan no later than December 1993. The Act also provides that any court which develops and implements such a plan no later than December 31, 1991 shall be designated by the Judicial Conference as an "Early Implementation District Court." The Advisory Group believes that there are significant advantages to attaining early implementation status under the Act. Those advantages include the opportunity to implement now those measures as to which a consensus exists with

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1 Consistent with section 478(b) of the Act, the Advisory Group consists of attorneys and other persons who are representative of the major categories of litigants in the Northern District. A list of the members of the Advisory Group, a description of its committee structure and a summary of its research methods appears as Appendix A to this Report.

respect to their need, and to adopt on an experimental basis those measures as to which our research demonstrates are likely to reduce unnecessary expense and delay in litigating civil cases to a just conclusion. Accordingly, the Advisory Group proposes that the Northern District approve the recommendations contained in this Report no later than December 31, 1991 for implementation in 1992.

By this Report, we do not intend to convey the impression that our work is done. Instead, we will continue to identify the causes of unnecessary cost and delay in the Northern District, and to formulate recommendations for their reduction and eventual elimination. In addition, we will monitor implementation of our recommendations to determine if they prove effective in reducing unnecessary cost and delay. Finally, we propose to study the many issues which our research has identified as being in need of further investigation and analysis before implementation can or should be made on even an experimental basis. Those areas are set forth at pages 48 through 67 of this Report. We will provide the Northern District with a final report of our findings and recommendations in mid-1993.

Our present recommendations fall generally within one of two categories: (A) recommendations for court-wide implementation in 1992; and (B) recommendations for pilot implementation in 1992. The burden of implementing these recommendations is intended to be shared among the attorneys who practice in the Northern District, the litigating parties who utilize its services, and the judiciary

and staff of the Northern District.[2] Increased efficiency and productivity in federal courts is necessary not only to preserve the confidence and trust of clients and the public alike, but also to enable us to return to a system of federal district courts in which judges have time to listen patiently, to weigh and reflect carefully, to appreciate and value their unique life in the law, and to be free from back-breaking calendars and the relentless statistical necessity to clear old cases at any cost so that new cases can be heard. To this end, our recommendations ask that litigating attorneys streamline their discovery and motion practice and resolve their disputes earlier in the process, that litigating parties become more active in the proceedings, and that the Northern District exercise greater control over the litigation process. Reforms in mature institutions are difficult to achieve. Inertia favors the old and the familiar. No institution renews

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2 We also believe that Congress must recognize, and take appropriate remedial action to address, its own responsibility for the expense and delay now associated with litigating civil actions in our federal courts. The gradual imposition on the federal courts of ever increasing numbers of new federal rights and new federal crimes threatens the potential success of the Act, and may result only in compressing the civil docket so that additional criminal cases can be heard. In addition, the failure to fill judicial vacancies promptly has had a substantial impact on the ability of the Northern District to devote its scarce resources to the resolution of civil actions. One of our responsibilities under the Act is to determine the extent to which legislation creates judicial impacts, burdening the courts with tasks which they lack the personnel to perform. The American Bar Association has recently endorsed the concept of judicial impact statements for new legislation. Our preliminary research suggests that we too endorse this concept. We intend to further analyze this issue during the course of our investigation in 1992. Similarly, we will take a hard look at the criminal docket to assess its impact on the just, speedy and inexpensive determination of civil actions. In our final report, we anticipate that Congress will be asked to share in the burden of implementing measures designed to reduce expense and delay in civil litigation.

itself without a revived commitment to the excellence and vigor that fired its early success. To introduce economies in federal civil practice may require all of us not only to think anew, but to jettison some of our old and familiar ways.

At the same time, we understand that the Act permits and even invites us to invoke reforms which are inconsistent with the current Federal Rules of Civil Procedure. By virtue of the proliferation of local rules, there are already many iterations on federal rules among the district courts. In this Report, we also make recommendations that depart in one way or another from the current federal rules. We intend to monitor, among other things, how these special departures affect the ability of attorneys from other districts to practice before the Northern District without undue burden. The existence of complex local rules has been a mixed blessing, and should not be encouraged without further careful study. With this caveat, a summary of our recommendations follows.

II. SUMMARY OF RECOMMENDATIONS.

The measures which the Advisory Group recommends be approved by the Northern District for implementation in 1992 fall into four subject matter areas: (1) alternative dispute resolution; (2) civil pro per litigation; (3) motion practice; and (4) pretrial case management/discovery. The Advisory Group believes that implementation of each recommendation will contribute to reducing unnecessary cost and delay in civil litigation in the Northern District.

A. Alternative Dispute Resolution.

The Advisory Group's analysis of the Northern District's current alternative dispute resolution program demonstrates that there is substantial anecdotal approval of the alternatives available, but that there is insufficient data upon which to base definitive conclusions as to its contribution to cost and delay reduction. Furthermore, the Advisory Group has found that support services are thoroughly insufficient to achieve the desired results in the existing programs. The following recommendations address these and some additional problems. Each of these recommendations is designed to make a good program better.

To this end, the Advisory Group believes that procedures should be implemented in 1992 to: (1) ensure that notice of the Northern District's alternative dispute resolution program is provided to all litigants; (2) provide adequate staff to supervise and improve the administration of the program; (3) evaluate the use of the Northern District's early neutral evaluation program; (4) assess the need for a mediation program; and (5) encourage the use of judge-supervised mandatory settlement conferences.

B. Civil Pro Per Litigation.

The number of pro per and prisoner matters, particularly habeas and prison conditions cases, has increased dramatically and is likely to continue to do so in light of both state capital punishment cases and Pelican Bay matters. For example, prisoner cases in the Northern District increased 43.8% between 1986 and 1990. Quantitatively, these cases represent the largest number of

cases on the Northern District's current docket. In reporting year 1991, 23% of all cases filed were prisoner petitions.

Given the demands of the existing caseload, the staff has had little opportunity to analyze whether the process by which these cases are handled could be better administered. Accordingly, the Advisory Group recommends the retention of additional staff both to relieve the present burden and to assist in collecting the data necessary to determine how that process might be improved.

The Advisory Group also recommends that the procedures now set forth in the Federal Pro Bono Project Guidelines be incorporated into the Northern District General Order No. 25.

C. Motion Practice.

The Advisory Group, after considerable dialogue, has concluded that there is unnecessary cost and delay in motion practice. For reasons discussed in this Report, we believe that implementation of the following measures will contribute to reducing this cost and delay: (1) use of tentative rulings; (2) elimination of argument if final decisions have already been made; (3) consolidation and limitation of motion papers; (4) issuance of decisions within prescribed time limits; and (5) expeditious service of motion papers when appropriate.

D. Pretrial Case Management/Discovery.

A range of case management approaches, including more efficient discovery, are currently used by the judiciary within the Northern District. The Advisory Group believes that increased use of these procedures will reduce unnecessary cost and delay.

To this end, we suggest the adoption of a Case Management Pilot Program in which the pilot judges, of whom there should be at least five, follow certain procedures, including: (1) a case management checklist for use by counsel, (2) a mandatory case management conference, and (3) a case management order, which includes a firm time line. According to the case management needs, the order might include: (1) discovery limitations; (2) continuances, on approval only; (3) the use of alternative dispute resolution procedures; (4) regularly scheduled status conferences; (5) single issue trials to resolve disputed issues or to facilitate settlements; and (6) narratives for experts in non-jury trials, as well as other trial time-saving devices.

E. Short Cause Pilot Program.

The Advisory Group recommends that a pilot program be adopted whereby each pilot judge would set aside a specified period of time on his or her calendar (e.g. one week, once or twice per year) during which only short cause matters, defined as cases or issues expected to be tried in one or two days or less, would be tried. Discovery in these cases would either be denied entirely, or extremely limited.

This recommendation is based upon information collected to date which indicates that one of the most important factors leading to the just and efficient disposition of civil matters is a firm trial date. If counsel in these short cause matters were assured of a firm trial date, then these matters would be more efficiently resolved either by way of settlement or trial.

F. Recommendations for Further Study.

In this Report, we also make recommendations for further study by the Advisory Group. The issues we intend to explore in greater detail include: (1) the impact of prisoner/pro per litigation on the Northern District; and (2) the impact of new legislation on the Northern District.

We also intend to study the various means which might be utilized to achieve firm trial dates in civil litigation. Such measures include: (1) wider dissemination of information with respect to the availability and competence of magistrate judges to hear cases; (2) the use of "back-up judges" to hear cases in the event that the assigned judge is not available on the scheduled trial date; and (3) a requirement that a motion for continuance of a trial date be signed by the party on whose behalf the motion is made. While we are not yet in a position to recommend the implementation of any specific measure, the Advisory Group nevertheless urges the Northern District to establish as one of its highest priorities the setting of reasonable, but firm, trial dates in every civil action.

III. STATISTICAL INFORMATION ABOUT THE NORTHERN DISTRICT.

A. Introduction.

The jurisdiction of the Northern District encompasses an area from the Oregon border in the north to Monterey County in the south. Major cities within the Northern District include Oakland, San Francisco and San Jose. There are fourteen active judgeships currently authorized. Three of these positions remain vacant, although appointments have been made to fill them. The Northern District also has nine senior judges and nine magistrate judges. Presently, the active judges in the Northern District each carry average caseloads of over 400 civil cases and over 60 criminal cases. We anticipate that appointment of the new judges will be of substantial assistance in reducing unnecessary cost and delay in civil litigation by reducing average caseloads to a less back-breaking level.[3]

The following statistical information is based upon 1990 and 1991 statistical year ("SY") [June 30-June 30] activity as reported by the Administrative Office of the United States Courts ("the AO"), unless otherwise indicated. The AO, however, does not collect statistical information about the substantial number of petty offenses, traffic cases and like matters handled by the

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3 The welcome arrival of these judges can be expected, however, to strain the existing resources of the Northern District. For example, due to severe space limitations, one of the new judges will not have a courtroom and will be required to shift locations, possibly on a daily basis. The difficulties this situation will pose to attorneys, clients, jurors, witnesses and the public are obvious.

magistrate judges. This Report, accordingly, does not include such information.

B. Civil Caseloads.

In SY 1991, new civil case filings totalled 4,643, a decrease of 3.3% from the 4,801 new civil cases filed in SY 1990. There were 4,360 civil cases terminated in SY 1991, a decrease of 9% from the 4,837 civil cases terminated in SY 1990. Pending civil cases in SY 1991 stood at 4,883, increasing 6.2% over the 4,600 pending civil cases in SY 1990. Nationally, civil filings declined 5%, continuing a trend commenced in 1986.

Six categories of cases accounted for approximately 81% of the private (United States not a party) civil suits commenced in SY 1991:

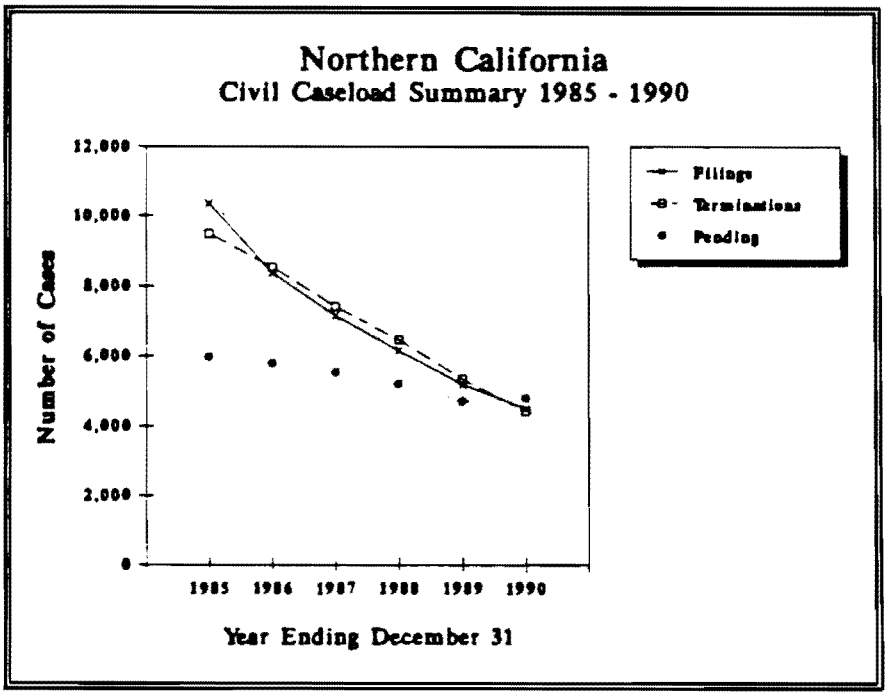
1.	Prisoner Petitions	963
2.	Contracts	747
3.	Labor	478
4.	Civil Rights	444
5.	Patent/Copyright	210
6.	Personal Injury	153

Of the 1,007 additional civil suits commenced in SY 1991 in which the United States was a party, seven categories comprised approximately 87% of the caseload:

1.	Contracts	345
2.	Torts	122
3.	Prisoner Petitions	106
4.	Tax	97

5.	Civil Rights	78
6.	Social Security	76
7.	Forfeiture/Penalty	56

A summary of 1985 through 1990 civil caseloads on a calendar year ("CY") basis is depicted below.

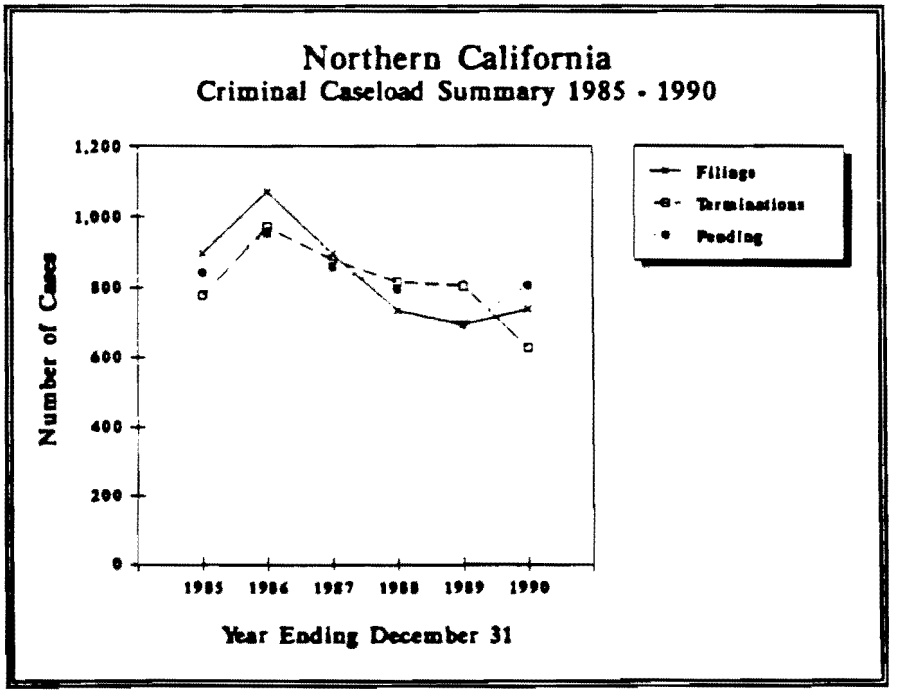


C. Criminal Caseloads.

In SY 1991, criminal case filings totalled 681, a decrease of 6.6% from the 729 criminal cases filed in SY 1990. There were 605 criminal cases terminated in SY 1991, an increase of 6% from the number of criminal cases terminated in 1990. 873 criminal cases were still pending in SY 1991, an increase of 12.1% from the 1990 figure.

The number of criminal defendants prosecuted in proceedings originating in the Northern District ("original proceedings") in SY 1991 was 909. 619 were felony proceedings, and 287 were misdemeanor proceedings, of which 100 were misdemeanor traffic violations. ("Original proceedings" excludes transfers, reopenings, etc.) Thus, both criminal cases, and the number of defendants prosecuted, declined in SY 1991 from SY 1990.

A summary of CY 1985 through 1990 criminal caseloads is reproduced below:



D. Summary of CY 1990 Civil and Criminal Caseloads.

CY 1990 civil and criminal caseloads are depicted in the following chart.

Civil and Criminal Caseload Summary

Authorized Judgeships . . . . . 12 *Senior Judges* 7
*Vacant Months** 19.2

Summary	Civil			Criminal			Total		
	1989	1990	% Change	1989	1990	% Change	1989	1990	% Change
Total Filings	5,179	4,501	-13.1	690	735	6.5	5,869	5,236	-10.8
Per Judgeship: weighted	383	442	15.4	48	50	4.2	431	492	14.2
unweighted	432	375		58	61		489	436	
Total Terminations	5,334	4,415	-17.2	802	626	-21.9	6,136	5,041	-17.8
Per Judgeship: unweighted	445	368		67	52		511	420	
Pending Caseload	4,706	4,792	1.8	690	805	16.7	5,396	5,597	3.7
Per Judgeship: unweighted	392	399		58	67		450	466	
Case Termination Index *(Months)*	10.6	13.0	23.0	10.3	15.4	49.5	10.6	13.3	26.3
Median Time, *Filing to Disposition (Months)*	6	8	33.3						

* for period July 1, 1989 through June 30, 1990.

E. Trial Statistics.

In SY 1990, 202 trials were completed. Of these, 96 were trials of civil actions (53 jury/43 non-jury), and 106 were trials of criminal actions (69 jury/37 non jury). The Northern District was ranked 90th out of 94 districts nationwide with respect to the number of trials completed. By the same standard, the Northern District ranked 11th within the Ninth Circuit.

In SY 1990, eight of the trials completed took 20 days or longer; the longest consumed 58 jury trial days (City of San

Jose v. Paine Webber). The trials of 48 actions took one day; 78 actions took between four and nine days to try.

In SY 1991, the number of trials of all types of cases (excluding trials by magistrate judges) dipped to 178. There were 99 trials of civil cases (57 jury/42 non-jury), and 79 trials of criminal cases (52 jury/27 non-jury).

A comparison of the number of trials completed in SY 1990 and SY 1991 is depicted in the following table:

	SY 1990			SY 1991		
Days	Civil	Criminal	Total	Civil	Criminal	Total
1	20	28	48	18	16	34
2	12	14	26	16	7	23
3	10	11	21	17	6	23
4-9	39	39	78	32	34	66
10-19	9	12	21	12	12	24
20+	6	2	8	4	4	8[4]
TOTAL	96	106	202	99	79	178

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4 In SY 1991, the cases which took 20 or more days to try were evenly divided between civil and criminal cases:

Civil

Kal W. Lines v. Bank of America (Antitrust), 26 days/jury;
Beregin, et al. v. Feinstein (Civil Rights), 25 days/jury;
E.I. DuPont v. Cetus (Patent), 24 days/jury;
Eureka Federal S&L v. Kidwell (Breach of Fiduciary Duty), 20 days/jury.

Criminal

U.S. v. Abono, et al. (Marijuana), 28 days/jury;
U.S. v. Broussard, et al. (Civil Rights), 25 days/jury;
U.S. v. Laurins (Wire Fraud), 21 days/jury;
U.S. v. White (Tax Evasion), 20 days/jury.

The "Judicial Workload Profile" published by the AO[5] reflects that the Northern District reported a decrease of four trials per judgeship--from 17 trials per judge in SY 1990 to 13 trials per judge in SY 1991. In light of this reduction, the Northern District was ranked 93rd nationally and 14th within the Circuit with respect to trials per judgeship completed.[6]

F. Vacant Judgeships.

In SY 1990, 458 cases were assigned to each of the 12 active judgeships. (It should be noted that the Northern District has 100 multi-district litigation cases). Due to vacant judgeships, the Northern District had 19.2 "vacant judgeship" months. We believe that this figure is an understatement, due to a drastically reduced caseload of one active judge.

The continued slow pace of filling vacant judgeships has created a distinct hardship on the Northern District. In SY 1990, the weighted filings per authorized judgeship in the Northern District stood at 500, placing the Northern District 1st in the Circuit and 17th (out of 94) nationally. In SY 1991, the weighted filings per judgeship, calculated using 14 judgeships, decreased to 417 per judge. Vacant judgeship months, however, increased to 27.2 months. The Northern District now ranks 3rd in the Circuit and 23rd nationally with respect to vacant judgeship months.

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5 Copies of the Judicial Workload Profile for SY 1990 and SY 1991 are attached as Appendix B to this Report.

6 Anecdotal evidence suggests that the relatively low number of trials completed per active judgeship may be due, in part, to the success of the Northern District's alternative dispute resolution programs. The Advisory Group intends to study this issue further to determine, with more certainty, its cause.

G. Cases Pending.

In SY 1990, 746 (15.1%) of the 4,945 civil cases pending had been pending for three years or more. This reflects an increase of 5.4% from the 1989 figure of 486 cases. The number dropped to 440 in SY 1991. Thus, the percentage that older cases bears to total cases decreased to 9.0%.

In SY 1991, the median civil disposition time (time from filing to disposition) remained at eight months where it has been since SY 1988. The national figure is nine months. Time from at issue to trial decreased slightly in SY 1991, from 16 months in SY 1990 to 15 months in SY 1991.

H. Trends Which May Adversely Impact the Northern District's Docket.

Unlike many other districts, the criminal docket in the Northern District does not appear to pose, at present, a significant problem with respect to the efficient litigation of civil actions. Indeed, in SY 1991, the major decrease in trials completed occurred in trials of criminal, not civil, cases. The five longest trials were trials of three civil and two criminal cases.

Prisoner petitions, however, have assumed a statistically significant position in the Northern District, rising dramatically in 1990 to 890 cases, the largest number filed in any one category. The 1991 workload profile shows a further rise in SY 1991 with 1,069 filings. Statistically, prisoner petitions comprised almost 20% of civil filings in SY 1990, and 23% of the 4,643 civil filings in SY 1991. We anticipate that

this trend will continue, given the renewed efforts to implement the death penalty in California and the fact that a new maximum security state prison facility is located in the Northern District. Thus, the Advisory Group has formed a committee to review and analyze both prisoner condition and death penalty habeas corpus cases. A summary of this committee's present findings may be found at pages 49 through 61 of this Report.

Specific in-court hours devoted to handling prisoner petitions are not available from any source. Informal comments by the judiciary of the Northern District reflect a consistent view that the main workload factor is in-chambers time, not in-court time. The Northern District does not generally refer prisoner petitions to magistrate judges. The AO reports that no "prisoner petitions" in the Northern District fell into that category in SY 1990 or SY 1991. The same is true for the Southern District. The Central District reports that 853 of 1,059 such cases were handled by magistrate judges; the Eastern District reports that 613 of 975 cases were so handled.

Available statistics do not lend themselves to a critical analysis of cost and delay factors. The system previously used to collect data was not designed to identify causes of either cost or delay. The new "CIVIL" electronic docket driven system is technologically capable of gathering the type of data which will assist in the analysis, but it must be programmed to do so apart from the standard statistical compilations now required for submission to the AO. Customized reports to address local needs can be generated from a properly designed program.

The Advisory Group hopes to obtain funding under the Act to engage a consultant to assist in further analysis of the state of the docket, and to design a program to collect appropriate data. Such assistance will help us to identify, among other things, those litigation activities which account for the greatest expenditure of litigation resources, when (and why) the most significant delays occur in the pretrial process, why judicial interventions occur when they do, and to what relative effect.

The Advisory Group also intends to study the criminal docket and issues associated with the litigation of criminal cases to assess their potential impact on the civil process. Among the areas of interest are the increase in the size of the U.S. Attorney's Office, emphasis on civil forfeiture matters, increases in civil penalty cases, Congressional "federalization" of heretofore "local" offenses handled in state courts, Department of Justice enforcement policies, such as the recent "Operation Triggerlock"[7] and Sentencing Guidelines (both in-court and chambers time, and the "satellite" litigation effect) and the additional matters discussed in the section of this Report entitled "Legislation Impact."

Civil litigation brought by the United States will receive attention in light of increased Department of Justice activity in "Qui Tam" cases and several circuit decisions upholding government employees' right to sue under the statute.

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7 "Operation Triggerlock" is a national campaign by the federal government to rid the streets of illegal firearms. Firearm violations have traditionally been the province of state and local prosecutors.

This area of complex three-party litigation could have an impact on the docket in future years.

In speeches and presentations, the Department of Justice has announced that it will step up litigation against health providers who submit improper claims, noting amendments to the false claims statutes that assist enforcement areas. New emphasis on court orders for discovery to implement review of insurance company processing of Medi-Care claims could also impact the docket substantially.

IV. RECOMMENDATIONS FOR ALTERNATIVE DISPUTE RESOLUTION.

A. Introduction.

The Act provides that the Judicial Conference must conduct a "demonstration program," pursuant to which the Northern District is required to demonstrate, among other things, the efficacy and potential of its alternative dispute resolution ("ADR") program.[8] To accomplish this directive, the Advisory Group appointed a committee of its members to study the Northern District's current ADR program, to assess its impact on reducing unnecessary cost and delay in civil litigation, and to make

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8 The Northern District programs have been the subject of considerable scholarly, bar and judicial attention, as well as self-examination. The District's early neutral evaluation program has been the subject of three substantial published studies. See Brazil, Kahn, Newman & Gold, Early Neutral Evaluation, A Follow-Up Report, 70 Judicature 236 (1987); Levine, Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution, 72 Judicature 235 (1989); and Brazil, A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values ("A Close Look"), 1990 University of Chicago Legal Forum, pp. 331-363.

recommendations concerning its administration, evaluation and possible expansion. This section of the Report summarizes the present findings and recommendations of the ADR committee. The Advisory Group, as a whole, has approved these findings and recommendations.

The Northern District currently provides a considerable number of ADR procedures whose primary purpose is to reduce expense and delay in civil litigation. In addition to the programs discussed below, the Northern District offers its litigants the use of: (1) special masters for case management/discovery and for settlement; (2) nonbinding summary jury and bench trials; (3) settlement conferences conducted by judges and magistrate judges; and (4) private ADR options.

The Northern District's arbitration and early neutral evaluation ("ENE") programs currently touch upwards of one thousand civil cases each year. These programs have demonstrated that they enjoy very substantial support in the bench and bar. More than 80% of attorneys polled in a Federal Judicial Center ("the FJC") study endorsed the arbitration program. Almost 90% of attorneys polled in a study of the ENE program during an earlier, experimental stage urged extension of the program to more cases. Attorneys were also asked to compare a required ENE session to a typical initial status conference in the Northern District. Of the attorneys polled by the study, 95% responded that ENE contributed more to communication across party lines than did a typical initial status conference; 88% responded that ENE contributed more to prospects for settlement; 83% responded that ENE contributed more to issue

clarification; and 73% responded that ENE contributed more to setting the groundwork for cost-effective discovery. Thus, there is substantial reason to believe that these programs offer valued services to attorneys and litigants that are not being delivered in the traditional adjudicatory process. See, e.g., Brazil, A Close Look, supra, pp. 303-397.

In light of their use and potential to reduce unnecessary expense and delay in civil litigation both in the Northern District and nationally, this Report contains recommendations for early implementation which focus upon assessing and improving our ADR programs.

B. Recommendations.

1. Recommendation: Notice of ADR Availability.

We recommend that three relatively modest changes to the Local Rules regarding notice of the availability of ADR procedures be implemented in 1992. As previously discussed, a broad array of alternatives to traditional litigation in federal court already exists in the Northern District. Some are provided by or through the Northern District itself (e.g., ENE); some are provided privately. A brochure describing these services is available, but is not distributed on any regular basis. As a first step, we recommend that procedures be put in place to ensure that all counsel and all litigating parties are aware of the various alternatives to federal litigation available to them.

To this end, we recommend that the Local Rules be supplemented to require that: (1) a written description of the ADR techniques available in the Northern District be delivered to all

persons filing a complaint; (2) a copy of that written description be served upon all opposing parties with service of the summons and complaint; and (3) a written acknowledgement, signed by each litigating party, be filed with the court establishing that the litigant has read and understood the ADR alternatives available.

2. Recommendation: Retention of ADR Staff.

Prior to adoption of the Act, supervision of the Northern District's ADR programs was, in large part, dependent solely upon the volunteer work of one of the Northern District's magistrate judges, Wayne D. Brazil. Because we could not, in good conscience, expect Magistrate Judge Brazil to continue his herculean efforts, particularly in light of the Act's additional mandate to demonstrate our ADR program, the Advisory Group requested funding provided under the Act to retain a full-time staff professional, together with associated support staff and equipment, to supervise the ADR program. Stephanie E. Smith, an attorney who is experienced in civil litigation and knowledgeable about ADR processes, has recently been retained. The specific duties of the ADR staff, led by Ms. Smith, will include:

a. Program structure.

Working with the Advisory Group, the Northern District and other interested parties, the ADR staff will be responsible for improving program structure, including the design and implementation of an administrative system for all of our ADR programs. The staff will also coordinate the activities of the ADR evaluation consultant (see infra, pp. 24 through 26), and other ADR consultants that might be retained.

b. Case selection.

The ADR staff will help to evaluate and refine the selection criteria by which cases are assigned to particular ADR programs. This project will include developing additional criteria for identifying those cases (or subsets thereof) in which an ADR process promises to be most productive, analyzing which ADR processes are most appropriate for use in particular categories of cases, and working with the bench and bar to identify additional categories of cases which are appropriate for some form of ADR (e.g., civil rights cases, mass tort cases, prisoner applications).

c. Recruitment, training and outreach.

The ADR staff will also be responsible for the development of screening mechanisms and recruitment of a substantial number of additional attorneys to supplement the pool of neutrals in the ENE, arbitration and, if funded, mediation programs. (For a discussion of the recommended mediation program, see infra, p. 26.) This process should include, among other things, an interview with each applicant to determine temperament, commitment, subject matter expertise, etc. to ensure that each neutral has the requisite qualifications. Also, the Northern District needs a system of replenishing its pool of neutrals that will maintain an appropriate balance among the various segments of the bar and ensure adequate coverage of subject area specialties (e.g., intellectual property). Intensive and repeated training programs for the neutrals must be designed and conducted. Intensive and repeated educational programs for members of the

bench, bar and client groups must be designed and conducted to explain the ADR programs, and to teach users to utilize these programs in the most productive manner. Finally, the ADR staff will provide a visible, accessible resource to respond to questions from neutrals about their assignments, and from all other members of the Northern District's many interested constituencies (e.g., client groups, bar associations, etc.)

d. Evaluation.

The ADR staff is intended to assist in the effort to design and implement mechanisms to systematically collect data about the Northern District's ADR programs. This project will include collecting and analyzing feedback from the neutrals, as well as feedback and suggestions from users (attorneys and clients) for program improvement. Systems to share information among neutrals must also be designed and implemented.

e. Coordination.

Finally, the ADR staff will work with our ADR consultant(s) in seeking support from, and coordinating the delivery of service among, the many bar associations and state courts within our jurisdiction. (This could lead to cost-sharing among all of these groups.) The Northern District needs to communicate regularly with staff and judicial officers in other courts to ensure that it is timely informed of new ideas and developments in other places. In this regard, the ADR staff will also be available to respond to the many requests for assistance and information about the Northern District's ADR programs. The final charge of the ADR staff is to work with neutrals and the Advisory Group to draft

changes in the Northern District's Local Rules and General Orders, especially as they relate to ADR (e.g., General Order No. 26).

3. Recommendation: ENE Evaluation Study.

As a result of a study conducted in 1988 by the National Institute for Dispute Resolution of the Northern District's ENE program, ENE was made a presumptively permanent part of the pretrial system in certain kinds of cases. Accordingly, every even-numbered case meeting certain established criteria has been included in the ENE program since late fall 1988. Almost 800 even-numbered cases have been so designated.

Some statistical data on handling ENE cases is available and there is a system in place for obtaining some limited information about the program from the attorney-evaluators. The experience of many of the attorneys and parties who have been involved in ENE and the evaluation of the judges who have worked in the program provide substantial evidence of its value; however, this evidence and the available statistical data have not been carefully and systematically reviewed to determine the extent to which ENE has reduced unnecessary cost and delay in resolving disputes. Accordingly, the ADR committee decided early on that a further in-depth study of ENE was the highest priority. In this regard, we believe that the Northern District presents a unique opportunity to test the ENE concept. The Northern District conceived the ENE program, has undertaken substantial implementation of ENE, and probably has greater experience in its application than any other district.

Pursuant to funding recently provided under the Act, the Advisory Group has retained the University of San Francisco School of Law to consult with us to evaluate our ENE program, particularly focusing on how well it has worked to reduce unnecessary cost and delay, and to achieve participant satisfaction. This study will be designed to answer five questions:

1. Does the ENE program reduce litigation cost and, if so, how much?

2. Does the ENE program reduce case processing time and, if so, how much?

3. Does ENE improve justice delivered?

4. How can the ENE process be improved; and

5. How can the ENE process best be monitored?

Our proposal for the ENE study which identifies the particular tasks to be performed, together with our consultant's proposal and project schedule and our September 25, 1991 letter of understanding with our consultant, are attached as Appendix C to this Report.

We plan to complete our initial study of the Northern District's ENE program during 1992. That study will be based upon our consultant's reports and evaluation as well as the prior work of the ADR committee and others. We expect that this will permit us to reach more definitive conclusions about the value of ENE in reducing unnecessary cost and delay in resolving disputes and achieving greater satisfaction for litigants. Assuming our conclusions are consistent with the prior experience of informed participants, neutral evaluators and judges, our plan would be as follows:

1. Make recommendations to extend and improve the use of ENE in the Northern District and nationally; and

2. Address the expected needs for:

a. Obtaining and training new evaluators;

b. Continuing education and replacement of present evaluators;

c. Consideration and avoidance of evaluator "burnout";

d. Further local rules changes and modifications; and

e. Continued systematic monitoring and study.

4. Recommendation: Assess Pilot Mediation Program.

We have preliminarily concluded that it would be helpful in meeting the statutory goals to establish a court annexed pilot program offering an ADR mediation program. Such a pilot program would require at a minimum:

a. Guidelines for case selection;

b. Standards for use; and

c. Sources and selection of mediators.

We plan to complete our study and recommendations during 1992.

5. Recommendation: FJC Settlement Conference Credit.

We have concluded that substantial unnecessary cost and delay can be eliminated by the use of judge supervised settlement conferences. In order to achieve maximum benefits and encourage the necessary investment of judicial resources in this ADR procedure, we believe it essential that credit be given under FJC statistics for judicial work in conducting settlement conferences. The ADR committee plans to work with the Judicial Liaison Committee towards this goal.

V. RECOMMENDATIONS FOR CIVIL PRO PER LITIGATION.

A. Introduction.

The Advisory Group has conducted a substantial investigation to examine the impact of prisoner and pro per litigation on the causes of unnecessary cost and delay in civil litigation in the Northern District. The effort undertaken to date has revealed more questions than answers. Consequently, most of our analysis in this area is provided in that portion of this Report concerning recommendations for further study (pages 49 through 61 of this Report). However, we feel confident, at this point, in recommending that two measures be implemented in 1992 to improve the procedures pursuant to which prisoner and pro per litigation is handled in the Northern District. These recommendations are as follows.

B. Recommendations.

1. Recommendation: Retention of Attorney/Clerk.

The current habeas clerk is dramatically overloaded with a caseload of habeas, civil pro per, prisoner and other section 1983 cases. Current statistics do not distinguish among these types of cases. A breakdown of these cases by type as well as by disposition would be highly useful in evaluating where problems exist and how to solve them. The Advisory Group recommends the retention of another attorney/clerk, whose duties would be to assist the current habeas clerk in processing the materials as well as to devise a system to collect appropriate statistics.

2. Recommendation: Modify General Order No. 25.

General Order No. 25 provides a scheme by which attorneys can be appointed for indigent plaintiffs in civil actions. As a matter of practice, attorneys are drawn from the Civil Legal Assistance Panel pursuant to the Federal Pro Bono Project.[9] Both programs rely upon voluntary attorneys because generally no funds are available to compensate attorneys.

The Advisory Group believes that there is a lack of uniformity in the Northern Dis ict regarding the question of whether to appoint volunteer attorneys to represent pro per parties. One step which would address this issue would be to incorporate the procedures of the Federal Pro Bono Project Guidelines into General Order No. 25, and to delete the old text of General Order No. 25.

In addition, current practice allows for reimbursement of expenses incurred by the volunteer attorneys subject to the restrictions of General Order No. 25 or the guidelines of the Federal Pro Bono Project. To avoid inconsistency in treating requests for reimbursement, it is suggested that court procedures be uniformly applied to requests for reimbursement. Adoption of standard court forms for reimbursement of expenses similar to those currently in use in the Eastern District of California is recommended.

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9 A copy of the Federal Pro Bono Project Guidelines is attached as Appendix D to this Report.

VI. RECOMMENDATIONS FOR MOTION PRACTICE.

A. Introduction.

Interviews of Northern District judges and magistrate judges, as well as practicing attorneys, resulted in a number of comments that motion practice and the procedures followed in briefing, arguing and the judicial handling of motions create unnecessary cost and delay. Also, in some instances, motions were not used as effectively as they could have been to narrow issues and to speed cases to a just conclusion. Accordingly, the Advisory Group recommends implementation of the following rules on a court-wide basis as part of a one- or two-year pilot program commencing January 1, 1992.[10] None of these rules is entirely novel; all are used by some courts already. All of these rules received support from a substantial number of those we interviewed.

B. Recommendations.

1. Recommendation: Tentative Rulings.

The Advisory Group recommends the use of tentative rulings, to be implemented as follows. Two days prior to the date scheduled for hearing, each judge would issue a tentative ruling, by telephone or in writing. The ruling would include a short statement of the basis for the ruling. Oral argument would be

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10 Some of the recommendations of the Advisory Group as to motion practice are contained in the Case Management Pilot Program, discussed at pages 31 through 47 of this Report. Thus, for example, the recommended Case Management Checklist includes provisions as to early scheduling of certain motions, the structuring of some cases to permit the early filing of summary judgment motions that might eliminate nonmeritorious issues, and the possible use of mini-trials to dispose of issues that are not subject to complete resolution by conventional summary judgment motions.

optional for the losing party. In the event the court requires oral argument to decide the motion, the tentative ruling should so state and, if possible, identify the subjects upon which oral argument is required.[11]

Based upon the experience of judges and litigants in some of our state courts, the Advisory Group believes that the use of tentative rulings can contribute significantly to reducing unnecessary cost and delay in civil litigation. The San Francisco Superior Court reports that arguments on matters for which tentative rulings have been issued have been reduced by as much as 50 percent. More importantly, judges in the state courts report that tentative rulings, including those which specify the issues upon which argument is required, produce more informative and focused arguments on the issues in question.

2. Recommendation: Notification of Final Decision.

In circumstances where the court believes that no argument is required or would be useful, the Advisory Group recommends that the Court so notify the parties not less than two days prior to the date scheduled for the hearing.

3. Recommendation: Limit Permissible Motion Papers.

Motion papers should be limited to memoranda of points and authorities and supporting declarations. Relevant portions of discovery appended to declarations should be highlighted.

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11 For the present time, the Advisory Group's recommendation with respect to the use of tentative rulings is not intended to extend to all discovery motions. Instead, we recommend that tentative rulings be used in this context only when the circumstances of the case justify their use.

The notice of motion and motion have become duplicative of other motion papers in light of the requirement to state the date, time and place of hearing in the caption of all papers filed in support of a motion. The specific grounds upon which the motion is based should be provided in the memorandum of points and authorities.

The proposed order is duplicative of minute orders issued by the Northern District. Also, the proposed order is so often modified or supplemented that its initial filing has become unnecessary.

3. Recommendation: Limit Permissible Pleadings.

Motion papers should be limited to opening, opposition and closing memoranda, together with supporting declarations. No supplemental pleadings or letters should be permitted. A subsequently decided case should be identified by letter to the court with citation only. No editorial comment should be permitted.

4. Recommendation: Orders Shortening Time.

Motions for orders shortening time should be made by declaration only.

5. Recommendation: Uniform Page Limit.

All memoranda should be limited to a maximum of 25 pages. The rule in the Northern District should be uniform.

6. Recommendation: Rulings on Motions.

Rulings on motions should be issued within 45 days of the scheduled hearing date. The parties should be informed if the 45-day period cannot be met, and why it cannot be met.

7. Recommendation: Expedited Service.

For motions to be heard on less than 28 days' notice, fax or delivery of all motion papers by hand should be required.

VII. RECOMMENDATIONS FOR CASE MANAGEMENT AND DISCOVERY PILOT PROGRAM.

A. Introduction.

The Advisory Group recommends implementation in 1992 of a Case Management Pilot Program designed to reduce unnecessary cost and delay in the pre-trial and trial stages of civil litigation, with an emphasis on streamlining the discovery process to expedite completion of trial preparation. The program utilizes a group of voluntarily participating judges and magistrate judges who implement an expedited case management system, including discovery limitations, in all civil cases assigned to them. The program: (1) utilizes accelerated service deadlines; (2) requires counsel to utilize a comprehensive Case Management Checklist[12] to prepare case management proposals; (3) sets an early Case Management Conference for the consideration of these proposals, the selection of pretrial dates and deadlines, and design of a discovery program; and (4) features the issuance of a Case Management Order[13] which implements the rulings made at the Case Management Conference and sets a firm trial date.

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12 A copy of the Case Management Checklist is Appendix E to this Report.

13 A sample Case Management Order is Appendix F to this Report.

The Case Management Pilot Program includes a recommended Discovery Pilot Program which features: (1) a presumptive mandatory information exchange, similar to that envisioned by proposed amended Fed.R.Civ.P. Rule 26(a)(1); (2) the use of discovery plans tailored to the specific needs of each case; (3) the consideration of limits upon the amount of time devoted to discovery, and/or the number of depositions and interrogatories; and (4) an early court-supervised discovery conference (Rule 16 Conference) included as a component of the Pilot Program's Case Management Conference.

We recommend that use of the Case Management Checklist, the early Case Management Conference, the comprehensive Case Management Order, and the setting of a firm trial date be mandatory for cases participating in the pilot program. Additionally, we recommend that the Case Management Checklist and system be published as an appendix to the Local Rules for voluntary use by counsel and judges in other civil cases. The Case Management Checklist should also be included in the packet of materials distributed by the Clerk's office with every new civil case filing. Counsel would be encouraged to stipulate to these case management procedures and to utilize them in cases not included in the pilot program.

The proposed Case Management Pilot Program is designed to: (1) test the proposition that the early setting of a firm trial date promotes settlement and reduces unnecessary cost and delay in cases which are settled or tried, and (2) introduce and familiarize judges and counsel with a system of case management and discovery techniques designed to enable civil cases to be

litigated on an expedited basis so that the firm trial date can be kept.

The proposed Case Management Pilot Program is not anticipated to require any additional out-of-pocket expense to the judiciary. The costs of monitoring the Program's effectiveness have been requested as part of the Advisory Group's FY 1991-92 request for funding under the Act. Participating judges would expend additional time at the outset of pilot cases to ensure an effective Case Management Order. However, we believe that use of such orders will result in an overall savings of court time in pilot cases, particularly a reduction in time now spent in resolving discovery disputes.

B. Recommendations.

1. Recommendation: The Proposed Pilot Program.

All civil actions assigned to the judges who have agreed to participate in the Pilot Program will be automatically included in the Pilot Program. Participation is mandatory. Not all cases assigned to the Pilot Program will exhibit the same degree of complexity; however, the hallmark of the Case Management Checklist is flexibility in designing case management procedures which are best suited to the particular circumstances of the case. The point is that early attention to case management issues, control over discovery, and the setting of a firm trial date will promote efficiency and economy, and reduce unnecessary cost and delay, in relatively simple as well as large and complex cases.

Complaints in Pilot Program cases would be required to be served within 30 days of filing, except on good cause shown via

application to the assigned judge. The initial status conference ("Case Management Conference") would be scheduled automatically at filing for approximately 60 days after the filing date, and the Order Setting Case Management Conference would be required to be served by the plaintiff with the complaint. The Case Management Conference includes, but is not limited to, a Rule 16 conference.

Counsel for the parties would be required to meet and confer, and to submit joint or separate Case Management Proposals to the court at least seven days prior to the Case Management Conference. The resulting Case Management Proposal, to be filed by the parties jointly, if possible, would consist of specific schedules, limits, dates, deadlines and procedures for the conduct of all pretrial discovery, motions, settlement discussions and trial preparation selected from the Case Management Checklist.

The Case Management Proposals would be discussed at the Case Management Conference, to which the court would allot enough time (e.g., one hour minimum) for counsel to fully discuss and the court to become reasonably familiar with the parties, issues, level of complexity, and special circumstances or problems involved. Counsel of record responsible for supervising the case, and each party or an authorized representative of each party, together with an authorized representative of each insurer to whom a defense has been tendered, would be required to attend. The Case Management Conference is the comprehensive planning and "budgeting" conference for the case. At this Conference, specific limits on the duration of discovery, the number of depositions, the average or absolute length of depositions, and/or the number of interrogatories are

discussed and set, subject to later modification upon good cause shown.

Discovery is further streamlined by adoption of the "early mutual exchange" of documents. Depending upon the complexity of the case, and the anticipated cooperation and compliance of counsel with early mutual exchange requirements, the court may consider ordering early mutual exchange to occur shortly after the Case Management Conference, scheduling an additional Rule 16 conference within 60 days to assess the effectiveness of the early mutual exchange and design any additional necessary discovery procedures at that time.

The resulting Case Management Order would provide specific discovery motion and pretrial deadlines and limitations, and would set future status conferences at regular intervals. The schedules and deadlines set at the Case Management Conference would include a firm trial date. The progress of the case toward this trial date would be assessed, and Case Management modifications would be implemented in order to meet the trial date goal, at subsequent status conferences or upon special application to the court. At least one supervised mandatory settlement conference would be scheduled, as early as practicable in the case, to be conducted by an assigned magistrate judge. The parties would be encouraged to request earlier or additional settlement conferences at any juncture where these might prove productive. The magistrate judge could be empowered to modify the Case Management Order and any existing schedule (e.g., to order a short moratorium on

discovery or to expedite the completion of a particular category of discovery) in order to facilitate settlement discussions.

The Case Management Conference would be utilized by the court to explore and encourage the resolution of pretrial issues by stipulation, such as stipulation to class certification where and to the extent class treatment is clearly appropriate; and the voluntary amendment by plaintiffs of pleadings to provide requisite particularity, or to dismiss claims or parties unlikely to survive Rule 12 motions.

The magistrate judge assigned to the case would attend the Case Management Conference, at which referral issues would be determined. The court would have the option of referring some or all discovery matters, additional status conferences, nondispositive motions in general, or particular issues, such as class certification, to the magistrate judge. Moreover, the parties would be advised that the magistrate judge was available to adjudicate other matters, and to preside over the trial itself.

The trial date will be set, and a specific period of time set aside for the trial, upon consideration of the submissions of counsel regarding the amount of pretrial preparation time required, and the requisite duration of trial.

Trial length can only be estimated at the outset, but the estimate must be an informed one, based on early analysis by counsel of their claims, defenses and counterclaims. Precise trial time limitations (e.g., number of days or hours allotted to each party) will be set at the final pretrial conference. The parties are required to consider specific aids and procedures to expedite

the trial.

2. Recommendation: Case Management Time Line.

Day 1: Civil case becomes Pilot Program case upon assignment to participating judge. Case Management Scheduling Order and Case Management Checklist issued to plaintiff for service on all parties, and discovery stayed pending issuance of Case Management Order.

Day 30: Deadline for service of Complaint on defendants.

Day 31-52: Counsel for parties meet and confer to discuss Case Management Checklist and prepare joint or separate Case Management Proposals.

Day 53: Case Management Proposals due from counsel seven (7) days prior to Case Management Conference.

Day 60: Case Management Conference. Case Management Checklist discussed at Case Management Conference, Case Management Order issues, and structured discovery and pretrial proceedings commence.

3. Recommendation: Discovery Limitations.

a. Mandatory Information Exchange.

The theory behind mandatory disclosure is that some information is so basic that it is wasteful of litigation resources to cause parties to use discovery to get it, and that there is no role for advocacy and the adversarial process in connection with the disclosure of that information. Mandatory disclosure proposals may or may not include a limit on follow-up discovery. The Advisory Group recommends a pilot program in which the pilot judges will implement the exchange requirements of

proposed Rules 26(a)(1), (d) and (g)[14] for information exchanges,

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14 Proposed amended Rule 26(a)(1) presently provides as follows:

"Rule 26. General Provisions Governing Discovery; Duty of Disclosure

"a. Required Disclosures; Methods to Discover Additional Matter.

"(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:

"(A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

"(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

"(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

"(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

"Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding

(continued...)

but with the following two differences:

(1) Whether or not to exempt the case from mandatory exchange as well as the timing of the exchange would be decided by the court at the Case Management Conference. The court should be involved in resolving these important discovery decisions as part of an overall plan.

(2) At the Case Management Conference, the court will set a date for a second conference to be held following completion of the exchange, and following the filing of supplemental discovery conference statements reflecting the results of the exchange. At the second conference, the court will resolve what, if any, further discovery is required, and issue a discovery order to that effect.

i. Background: The Discovery Committee's Investigation.

During the past six months, the Discovery Committee of the Advisory Group has been considering the extent to which pretrial discovery is a cause of needless expense and delay in civil litigation in the Northern District, and the steps that could be taken to reduce if not eliminate these discovery-related problems. Relatively little time was spent discussing whether discovery was a problem since the Act and its legislative history show discovery to be a chief cause of delay and expense in civil

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14(...continued)
party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures."

litigation. In interviews with our judges and magistrate judges, the problem most often referred to is discovery misuse and abuse. If anecdotal information were a guide, then the Discussion Forum held at Golden Gate Law School provided an endless and varied list of discovery abuses. Correctly, we think, the focus of attention was on solutions.

To that end, we divided among us the task of identifying solutions already proposed by others and those actually implemented so that their impact could be assessed. Thus, we reviewed and studied the local discovery rules of federal and state courts throughout the country to see what discovery innovations had recently been adopted, including the individual rules of our local district court judges. Also, we conducted a search of discovery-related literature to see if others had come up with any creative ideas. Meanwhile, we looked carefully at recently proposed amendments to the Federal Rules of Civil Procedure dealing with discovery, and particularly Rule 26(a) dealing with information exchanges. Proposed Rule 26(a) is the outgrowth of our own Judge William W. Schwarzer's thinking, and Magistrate Judge Brazil's recent experimental orders in several securities cases.

This proposed reciprocal exchange requirement was advanced by Judge Schwarzer in "Slaying the Monster of Cost and Delay: Would Disclosure Be More Effective Than Discovery?", 74 Judicature 178 (1991). In that article, Judge Schwarzer had also proposed that after disclosure no discovery would be permitted against an adverse party without a court order "on a showing of particularized need"; moreover, the burden would be on

the party seeking discovery. Id. at 181. This proposed limitation on post-exchange discovery did not make its way into the proposed amended rules [but see proposed Rule 26(b)(2)(iii)].

Magistrate Judge Brazil has advocated similar information exchanges, and in several securities actions he has entered orders to this effect. E.g., Klein v. King, 132 F.R.D. 525 (N.D. Cal. 1990). The Klein order provides for disclosure in three stages: (1) reciprocal exchange of "core information" with limited depositions and interrogatories; (2) an optional stage of two months with focused discovery and then settlement discussions; and (3) final discovery for trial. We interviewed attorneys representing parties in some of these cases which have had mixed reactions to the staged discovery format. Basically, they favor the document exchange concept but report that the cases did not settle at stage 2; the issues in the case did not crystallize until stage 3, so that discovery at stages 1 and 2 did not prove useful. Magistrate Judge Brazil believes there has been insufficient experience with Klein-type orders from which to draw any conclusions.

Early reciprocal information exchange in civil suits has been adopted in at least two state courts, we learned through discussion with Alex Aikman of the National Center for State Courts. Arizona adopted Rule 26.1 of the State's Code of Civil Procedure which is quite similar to proposed amended Federal Rule 26(a)(1). The Rule (proposed by a special State Bar Committee appointed to study litigation abuse, costs and delay) was approved by the Arizona Supreme Court in March 1991. Nevada has adopted

Rule 16 in its Code of Civil Procedure which requires an early "case conference" at which the attorneys must exchange all documents "reasonably available to a party which are then contemplated to be used in support of the allegations or denials . . . ." The Rule also requires an exchange of non-expert witnesses, along with a description of their testimony.

We have talked to Supreme Court Justice Jerry Whitehead, who chaired the committee which drafted a report regarding Rule 16.1 and other reforms adopted by the Nevada court. Justice Whitehead enthusiastically reports that experience under Rule 16.1 has produced earlier trial dates and settlements with greatly reduced expenses to all concerned. One problem has been the practice of some attorneys to stipulate away the reciprocal exchange requirement of Rule 16.1.

Attorneys at the Discussion Forum enthusiastically endorsed the concept of Rule 26.1. One concern raised had to do with the proposal in Judge Schwarzer's article regarding post-exchange discovery (by order only, with the burden on the party seeking discovery). Specifically, the concern was that less ethical attorneys might not produce damaging documents in the information exchange, making it difficult or impossible to gain access later. Many responded that these same concerns exist under existing discovery rules. The proposed rule, like proposed amended Federal Rule 26, does not mandate this burden on post-exchange discovery.

Our Committee also prepared a detailed outline of discovery-related issues and potential reforms which served as a

catalyst for a frank discussion among attorneys and clients at the Discussion Forum. We have also benefitted greatly from the wide-ranging discussion held at the Advisory Group's September 7, 1991 retreat.

From what we could see from our own investigation, the nub of the discovery problem is two-fold: first, and foremost, attorneys bring to bear on pretrial discovery the same sort of adversarial skills and strategies they employ in the trial of the lawsuit. Winning or losing discovery battles are equated with winning or losing the trial war. Unless the very adversarial structure of civil litigation is changed, we cannot expect attorneys to make a meaningful change in their conduct. The penalization of attorneys through sanctions has not and will not make a material impact upon these discovery problems. The solution, instead, must be a structural one, and it is to curtail discovery and discovery disputes so that the opportunities and incentives for discovery abuse are eliminated or at the very least minimized.

The second problem arises from discovery that is ill-conceived or, worse yet, has not an intelligent purpose to begin with. Attorneys who have served as early neutral evaluators have confirmed what judges and magistrate judges have been saying for a long time: Attorneys often do not prepare their case until trial and, accordingly, pretrial discovery may be aimless and ultimately useless in resolving the dispute through settlement or trial.

ii. Limitations on Discovery.

The theory of limits on the time for and/or the amount of discovery is that by limiting discovery, counsel will be required to be more selective and efficient in the discovery process.

Many states and federal districts have tried to reduce the cost and delay of discovery by promulgating local rules limiting the amount, nature and timing of discovery. Limits on the number of interrogatories, requests for admissions and document requests which may be propounded are common, and some courts have even enacted limits on the number of depositions in a case. The timing of discovery may also be controlled by use of local rules; many states and districts establish mandatory discovery cut-off dates tied to the date of the defendant's answer or the initial case conference. Finally, some courts have tried to manage discovery by mandating that it be undertaken in stages, with initial discovery limited to issues which will facilitate early assessment of the strengths of the claims and encourage settlement.

We favor early implementation of the Pilot Program to study the effect of limits on the amount and timing of discovery. Judicial suggestion of limits on discovery, and judicial adoption of realistic limits proposed by the parties, forces parties and their attorneys to reduce their use of discovery and to complete discovery within a reasonable period of time. Limits also encourage litigants to determine how to effectively and efficiently utilize the allowed discovery to gather the information

most essential to their claims. We believe that any disadvantages of presumptive rules will be minimized by affirming the Pilot Program judges' discretion to forego or defer limits if justified in a particular case, and to issue orders in which limitations on discovery are tailored to the size and complexity of the case.

4. Recommendation: Client Participation.

The participation of clients in the formulation of a Case Management Plan, including a Discovery Plan, is necessary to assure that parties are aware of the costs and time entailed in civil litigation, particularly with respect to discovery. By participating in case management decisions, the parties will be able to monitor counsel's activities and assist in making cost-effective decisions before discovery commences.

One way to bring parties into this process is to require their attendance at the Case Management Conference, where the Discovery Plan is formulated. In some cases, personal attendance of the parties may prove a hardship, or be inappropriate given the nature of the case. Participating judges will review the Case Management Proposals and inform counsel prior to the Case Management Conference whether client attendance will be required. In any event, the client should be required to sign the Case Management Proposal being submitted by counsel upon its behalf.

5. Recommendation: Pilot Program Monitoring and Evaluation.

The progress of Pilot Program cases will be monitored to determine whether these pilot cases proceed more expeditiously than comparable non-pilot civil cases. In order to perform

effective monitoring, data from case management orders will be input into a tracking program, and the docket sheets of program cases will be periodically reviewed to determine the incidents of discovery disputes, and elapsed time from filing to disposition. In order to simplify the monitoring process, the program will rely on confidential questionnaires to be completed by the participants (judges, counsel and clients) for qualitative information on its effectiveness. The program will utilize a qualified consultant with civil litigation expertise to design the computer monitoring program and necessary inputing forms, to train monitoring personnel (e.g., a law school graduate or experienced paralegal), and to design the qualitative questionnaire.

Confidential qualitative questionnaires will measure judge and attorney participants' reaction to, satisfaction with and suggestions for improvement of the case management system. The gathering and analysis of quantitative data will determine whether the system increases the number of trials or other dispositions (particularly settlements) per judge and reduces time from commencement to disposition, and reduces the incidence of discovery disputes and the level of judicial resources which must be devoted to their resolution.

VIII. RECOMMENDATIONS FOR FURTHER STUDY.

A. What Means Should Be Used To Accomplish Firm Trial Dates?

The Advisory Group believes, and evidence demonstrates, that a system which is able to set realistic and firm trial dates

will reduce unnecessary cost and delay in litigating civil cases. Firm trial dates prompt earlier settlement, and save clients the shockingly useless cost of multiple trial preparations. The Advisory Group was, however, divided on the best means to achieve this goal. Accordingly, we intend to study this issue further in 1992 and 1993.

The means to be considered by the Advisory Group include a requirement that all motions to continue a trial date be signed by the party on whose behalf that motion is made. We will also consider the viability of a system pursuant to which a "back-up" judge is available to try a case on the scheduled trial date, if the regularly assigned judge is not able to hear the matter. The back-up judge might be a senior judge, a visiting judge or another Article III judge. The Advisory Group will also study how the AO might give statistical "credit" to the judge who tries the case under such a program. We are cognizant that any "back-up judge" concept raises many issues. For example, should parties be allowed to reinstate a jury demand if they waived the demand with the understanding that the assigned judge would try the case? Also, is a firm trial date worth relinquishing the judge who is familiar with the case, particularly in light of the new or increased emphasis on pretrial case management? The Advisory Group will investigate how frequently such reassignments would occur, and whether the designation of only some types of cases for inclusion in the program would alleviate some of the concerns. Finally, the Advisory Group intends to study comparable systems in other jurisdictions.

B. Should the Losing Party Be Required To Pay for the Cost of Discovery Motions?

The Advisory Group will study whether the losing party should be required to pay for costs of discovery motions, with some consideration being given to the assets of the party.

C. What Is the Impact of Prisoner/Pro Per Litigation on the Northern District?

1. Introduction.

The Prisoner/Pro Per committee of the Advisory Group was organized to examine the influence of prisoner and pro per civil litigation on the causes of unnecessary cost and delay in the Northern District. The members of the committee include the U.S. Attorney for the Northern District, the Chief Trial Attorney for the San Francisco City Attorney's office, two prisoner rights advocates, and three attorney members with no professional role in the prisoner/pro per field.

The committee has gathered information from a variety of sources, specifically including judges from the Northern District, judicial officers from other federal court districts, and the California Attorney General's office (including several meetings with those attorneys primarily responsible for representing California in all state prisoner litigation). In addition, the committee has tracked pending federal crime legislation regarding its proposed habeas corpus revisions, has conducted literature searches on pertinent issues and has examined the statistics available on the impact of prisoner/pro per litigation on the Northern District's docket. The committee has also met with

advocates of simplified procedures for non-prisoner pro per litigants to consider ways of streamlining the handling of those cases.

The effort undertaken to date has revealed more questions than answers. Consequently, this portion of the Report focuses primarily on studies to be done to more fully understand the role that prisoner/pro per cases play in the Northern District's effort to control unnecessary cost and delay. The immediate action steps recommended by the committee, and approved by the Advisory Group as a whole, consist of: (1) adding one person to the Northern District staff to process prisoner litigation; and (2) changes in General Order No. 25 relating to appointment of counsel in civil prisoner/pro per cases. Each of these steps is discussed earlier in this Report at pages 27 and 28.

2. Nonprisoner Pro Per Litigation.

Little is known statistically about nonprisoner pro per cases because the AO does not identify litigation brought by this group in its statistical summaries. The Northern District's Clerk's Office began to collect some data on pro per cases beginning in May 1990. The data consists of the name of the case and the case category (civil rights, contract, etc.). It combines prisoner and nonprisoner pro per cases, so only a rough measure of the volume and nature of nonprisoner pro per cases is possible. No statistical data prior to May 1990 is known to exist on Northern District nonprisoner cases, and trends are more difficult to assess.

The anecdotal information on this topic consists of the responses received from the judiciary of the Northern District, together with information and impressions of court personnel, members of the committee and attorneys associated with pro per programs.

To date, the interviews appear to shed little light on nonprisoner pro per trends. The responses indicate in some cases that judges combine prisoner and nonprisoner pro per cases in their responses. The few judges that addressed the pro per question made the following suggestions: (1) that Congress should consider some sort of "frivolous litigant" statute, presumably to deter abuse of the court system by pro per litigants; and (2) that referral of pro per cases to magistrate judges for screening may not be sensible since their time is better spent on other matters. One judge observed that pro per cases did not contribute significantly to cost and delay problems.

Turning to issues and suggested changes, we intend to study the following proposals:

(1) Examine the simplified litigation rules in use in the Federal Tax Court, and consider adapting them to small case pro per litigation;

(2) Consider using a judicial officer as a case manager in small pro per cases to streamline and simplify the issues (e.g., bankruptcy trustees may act as representative of an entire creditor class);

(3) Develop and market to pro per litigants explanatory literature and simplified procedures that will encourage them to

use ADR; and

(4) Design a system to improve the statistical data on nonprisoner pro per cases so we are better able to assess the size of this class of cases and judge whether procedural reforms are worthwhile.

3. Impact of Prisoner Litigation.

The AO statistical reports on the federal courts contain specific information on prisoner litigation. Therefore, historical data and evidence of trends is available to a limited extent. Based upon these statistics, our preliminary analysis reveals the following trends:

(1) Since 1982, the number of prisoner cases filed in the Northern District has steadily increased from 248 cases in 1982 to 844 cases in 1990.

(2) Nationally, prisoner cases increased by 26.3% between 1986 and 1990.

(3) In the Northern District, prisoner cases increased by 43.8% between 1986 and 1990.

(4) As a percentage of annual filings in the Northern District, prisoner cases represented about 13% of the SY 1988-90 filings.

(5) During SY 1988-90, 12% of the pending prisoner cases in the Northern District were terminated and 5.5% of those were three or more years old.

(6) During SY 1988-90, 3.9% of the total number of civil cases terminated in the Northern District were three or more years old.

(7) According to the weighted caseload table measuring the impact of different types of cases on judges' workload, prisoner cases represented about 6% of the workload in the Northern District during SY 1988-90.

4. Current Issues Relating to Prisoner Caseloads in the Northern District.

A number of potential impacts on the civil caseload of the Northern District need to be considered as part of the Advisory Group's study of the prisoner caseload. The most visible of the current issues are as follows:

a. Death Penalty Cases. Currently there are 310 prisoners awaiting execution of death penalties in the California prison system. All 310 prisoners permanently reside in San Quentin. Petitions for federal review of their sentences go to the district court in the county in which they were sentenced. Of those prisoners, it is understood that only one, Robert Alton Harris, has substantially exhausted his remedies in the federal court system.

It is presumed that at some point a drastic increase in activity in the Northern District can be expected to occur as result of these prisoners. A shortage of defense counsel and the exhaustion of state remedies are among the reasons cited for the belief that the impact has not yet been felt. If Mr. Harris is executed, this may also accelerate the legal process for other prisoners as the reality of carrying out death sentences in California impacts the thinking of the public, prosecutors and defense attorneys.

Judges in the Northern District have been dealing with review of state death penalties for some time. One project that needs to be undertaken is a study of just how much time is spent on these cases so that their potential impact on the docket can be better assessed.

Another study should be done to assess the trend of the number of prisoners on death row. In recent years, the number of affirmances of death sentences by the California Supreme Court has increased, but we do not know how many new death row inmates to expect in future years. Examination of conviction rates and possible demographic changes would shed light on these trends.

b. Impact of New Prisons. Currently, there is one federal prison in the Northern District (Pleasanton) and three California prisons (San Quentin, Soledad and Pelican Bay). Additionally, there are numerous county jail facilities. A telephone survey of state and federal agencies indicates that at this time there are no immediate plans to build new facilities in the Northern District.

Pelican Bay is a new state prison near Crescent City and has recently spawned a flurry of prisoner petitions in the Northern District, the majority of which relate to prison conditions. Whether this is a normal occurrence when a new prison is opened is not known. An assessment of this phenomenon would assist in gauging the impact of new prisons opened in the Northern District in the future. In that regard, the state prison population is currently at about 100,000; by one estimate, it is expected to grow to 200,000 by the year 2000. To the contrary,

however, some of the relevant literature predicts a gradual decline in the growth of the prison population.

c. Federal Habeas Corpus Changes. Recent cases decided by the U.S. Supreme Court are significant for the future of prisoner litigation in the Northern District. While at first blush the new case law would seem to potentially reduce the volume of state prisoner litigation in the federal courts, the changes may actually increase the time spent on these cases by district court judges. Further consideration of these impacts will be needed.

The thrust of the recent Supreme Court cases has been to limit federal court habeas corpus review of state criminal cases. Of most immediate potential impact is the decision in McCleskey v. Zant, 111 S. Ct. 1454, 113 L. Ed. 2d 706 (1991) which, in essence, limits state prisoners to a single federal habeas corpus review of their state conviction. In Coleman v. Thompson, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the Supreme Court ruled that failure on the part of the prisoner to comply with state procedural rules bars federal habeas review absent of showing of good cause for the procedural default or a showing of extraordinary circumstances. In Ylst v. Nunemaker, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), the Supreme Court ruled that the federal court reviewing a habeas petition by a state prisoner could rely upon a routine denial of review by the highest state court to conclude that the state court relied upon state procedural default law in denying the review. Thus, based upon Coleman, the court could then deny review of the habeas petition.

These and certain earlier Supreme Court rulings, such as Teaque v. Lane, 109 S. Ct. 1060 (1990), seem to limit federal court access for state prisoners. However, interviews with attorneys in the California Attorney General's office indicate that the burden on the district courts may actually increase, at least for a time. This may occur because the effect of McCleskey is to give the state prisoner only one chance for federal review, thus the single habeas petition will have to be exhaustive and detailed. This will encourage counsel for prisoners to include in the one federal habeas petition every possible ground for relief. Arguably, the petitions will include many issues that might not normally have been raised. The federal courts will have to contend with these issues to some extent.

Moreover, representatives of the Attorney General's office believe that the process of reviewing state habeas petitions may become more time consuming because of Ylst and Coleman. This may occur because the judges will now have to consider whether a default has occurred as well as whether there is good cause for the default and whether other extraordinary circumstances exist that would justify relief.

Attorneys with the Attorney General's office also discussed another potential source of additional federal habeas petitions from prisoners. In recent years, there has apparently been a sizable increase in the number of state prisoners serving sentences of life without the possibility of parole. The Attorney General's office would normally expect significant habeas petition activity from this segment of the prison population, but has not

seen such activity. There are no certain explanations for this, but the attorneys we talked to expect this group of prisoners to generate much more habeas litigation as time spent serving these sentences goes by.

The Bush Administration's crime legislative package now before Congress contains habeas changes. The most significant section of the proposed bill would bar federal review of any issue that had already been "fully and fairly adjudicated" in state proceedings. (S.1241, proposed changes to 28 U.S.C. § 2254.) The proposed bill has passed both Houses of Congress in different forms, and is set for hearing before a Conference Committee. It appears likely that efforts to drastically curtail habeas corpus review in the federal courts may fail.

d. Current Northern District Prisoner Petition Handling Procedures. Currently, all prisoner petitions are reviewed by a staff attorney employed by the Northern District. The caseload is such that of the approximately 1,000 petitions accepted for consideration last year, only about 700 could be reviewed with the existing staff.

Petitions found to be procedurally adequate are assigned to a judge through use of the wheel. The staff attorney then reviews the merits of the case, prepares a memo to the assigned judge and forwards the file to the judge. At that point, the staff attorney has no further involvement with the case.

When reviewing the merits of prisoner petitions, some judges use an informal discovery technique involving the propounding of questions to counsel for the defense. Counsel is

expected to investigate the issues set forth and report back to the court. Often the answers are used as a basis for summary disposition of the prisoner petition. The Advisory Group believes that a study of this procedure is warranted. Our concerns include the issues of whether this provides fair review of the prisoner's claim, whether the burden on the defense counsel is excessive, and whether other procedures can be established that are more effective.

At this time, the only contrasting system for handling these petitions that has been examined is the one used in the Eastern District of California. In that District, the cases are referred to magistrate judges and their staffs rather than to a staff attorney. The magistrate judges review the cases, and supervise their processing. A district judge becomes involved only if a trial is needed or if there is a dispositive motion to be heard.

The Advisory Group recommends that a study be undertaken as part of the work to be done in the next year to look into the feasibility of increased use of magistrate judges in prisoner litigation. The practices of the Eastern District should be examined as should those of other districts around the nation that use magistrate judges for these types of cases.

The relative merits of the two procedural systems and others around the country need to be studied. At this time, the only notable difference between the Northern District and Eastern District approaches is the feeling on the part of the AG's office that more discovery and more adversarial hearings are conducted in

the Eastern District, possibly because the magistrate judges handling the cases are concerned about their decisions being challenged on review by the district judges.

Information regarding supposedly experimental approaches to handling prisoner petitions in other parts of the country has been requested but has not yet been received.

5. Summary of Prisoner Caseload Projects.

In summary, the Advisory Group intends to conduct the following prisoner caseload projects:

(1) Examine more closely the available statistics on prisoner litigation and attempt to determine why the indicated trends are occurring. Prepare a report on what further data should be captured to complete our understanding of the trends in this type of litigation.

(2) Acquire data on the impact of death penalty cases on the Northern District, and consider conducting a supplemental study of the experiences of the judges in the Northern District. Knowledge about the impact of past death penalty appeals will enable us to measure the likely impact of the expected large number of these appeals in the future.

(3) Assess future trends in the prisoner population. It is assumed that state and federal agencies will be of considerable help in this project, enabling us to grasp the likely changes in prisoner spawned litigation in the future.

(4) The nature of, and reasons for, the spate of prisoner litigation from Pelican Bay affords an opportunity to examine the impact of a new prison on a federal court docket. A

study to this end should be considered.

(5) The types of data currently collected should be examined to ensure we can measure future changes, if any, caused by the limitations placed on access to federal habeas remedies by the Supreme Court.

(6) It is apparent that the current system of handling prisoner petitions in the Northern District has resulted in a backlog of cases. Consideration should be given to recommending additional staff to cope with this issue.

(7) The question of how and when to provide defense counsel to prisoners litigating in the Northern District needs to be examined.

(8) The apparent lack of uniformity in the handling of prisoner cases among the judges in the Northern District and also between the Northern District and other districts will be explored.

(9) The feasibility of using magistrate judges to handle some aspects of prisoner litigation needs to be explored. The Advisory Group should discuss the wisdom of this approach with the court and determine if the use of magistrate judges in the Eastern District has been of sufficient benefit to propose experimentation with that system in the Northern District.

(10) The utility of relying upon defense counsel and defendants to investigate prisoner factual complaints should be reviewed. The Advisory Group should study whether a more effective, less burdensome, way to obtain this information is available.

We expect that further issues will arise as our work progresses. Supplemental reports will be prepared, as needed, to update concerned parties on our work.

D. What Is the Impact of New Legislation on the Northern District?

1. Introduction.

The Act requires each Advisory Group to (1) "examine the impact of new legislation on the court" (§ 472(c)(1)(d)) and (2) "analyze special problems relating to United States litigation." To this end, the Advisory Group has devised a plan of action (section two below) and has identified a number of issues relating to United States litigation (section three below), and to state and local government litigation (section four below).

2. Plan of Action.

To prepare the following plan of action, members of the Advisory Group met, analyzed the issues and then commissioned an analysis of available literature on the subject. Based on this activity, we recommend that the following tasks be completed in three phases:

(1) The first phase will consist of developing statistical and subjective information on which to base a more thorough analysis;

(2) The second phase will consist of a more narrow analysis of the impact of new legislation on the courts in the Northern District; and

(3) The third phase will involve the formulation of conclusions and recommendations.

Phase I: Subjective and empirical surveys should be conducted within the Northern District to determine whether new legislation has any impact on the court. We have obtained informal comments from the judiciary of the Northern District, the U.S. Attorney, the Chief Trial Lawyer in San Francisco City Attorney's Office and the Chair of the statistics and technology committee (who has incorporated his discussions with the Federal Public Defender). From these comments, we believe that the impact of major statutes such as CERCLA, RICO and the Sentencing Reform Act should be examined. In addition, we believe that our analysis should include an assessment of policy determinations by the U.S. Attorney and/or the United States Department of Justice ("the DOJ") to use, decline to use, or emphasize or de-emphasize use of existing or "new" criminal or civil statutes.[15]

Following a review of the information already gathered, the Advisory Group may determine that further surveys of judges, court attaches, magistrate judges, litigators or others are necessary. Additional empirical information may also be requested, including information regarding filings, motions, trials and other available data relating to the impact of new legislation on the Northern District and problems relating to United States legislation.

In addition to the surveys conducted during Phase I, the

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15 For example, the Attorney General's recent policy memorandum (May 29, 1991 memorandum to "All U.S. Attorneys") re "Operation Triggerlock" provides the potential for a greatly increased number of federal prosecutions of weapons offenses, previously left to local authorities. Such prosecutions could impact the docket significantly, depending upon implementation policy in this district.

Advisory Group will attempt to determine the types of mechanisms available for dealing with the impact of new legislation and problems relating to United States litigation. Obviously, the alternative of no new legislation is not one that need be studied. However, there are other conceivable methods of dealing with the impact of new legislation and the problems of U.S. litigation, including: (1) anticipating the effects of new legislation through a judicial impact statement or some other pre-enactment review; or (2) recommending the diversion of certain kinds of laws or acts to administrative bodies or other non-litigation forums such as is being discussed in connection with the Civil Rights Act currently before Congress. The report of the Federal Courts Study Committee, dated April 2, 1990, made a number of other recommendations. We believe that these recommendations should be considered in the context of the circumstances we face in the Northern District, and a further analysis of the costs and benefits of these recommendations should be discussed.

Finally, it is hoped that the Advisory Group can identify during Phase I the range of possible solutions to the impact problems by conducting a survey to identify these solutions. This work has already begun in connection with our literature search.

It is anticipated that the activities to be undertaken in Phase I will be completed on or about June 30, 1992.

Phase II: After the impacts of legislation are identified, the problems relating to U.S. litigation are more clearly crystallized, and the alternatives for dealing with these issues

are identified, it will be useful to then select a representative sample of new legislation which has had a significant impact on the Northern District during the last decade. Case studies could be conducted to determine what anticipated and unanticipated effects and problems occurred. Thereafter, various solutions to these effects and problems could be analyzed. It is anticipated that Phase II would be completed by the end of 1992.

Phase III: In Phase III, the Advisory Group will analyze the results of Phases I and II and determine what kinds of deliberations are necessary to reach conclusions and make recommendations. At a minimum, conclusions and recommendations will be designed to satisfy the statutory obligations set forth in the Act.

3. Preliminary List of Issues--Special Problems Relating to United States Litigation.

a. Criminal Cases.

(1) Charging Practices: Analysis should include special areas of enforcement, historical analysis of caseload, what "drives" the caseload, potential changes in number of cases filed from past years, DOJ mandated changes, personnel increase in prosecutors, cross-designation of local prosecutors;

(2) Plea Negotiation Practices: Analysis should include impact of the Sentencing Reform Act, minimum mandatory sentences, plea procedures used or declined by the U.S. Attorney and/or court;

(3) Discovery Practices: Analysis should include time spent in litigating discovery disputes, "Jencks Act" (18 U.S.C.

§ 3500) problems, in limine motions, and Fed.R.Evid. 404(b) matters;

(4) Motion Practice: Analysis should include review of local rules to streamline and make more efficient the use of court time, Sentencing Guideline hearings, Rule 12 hearings and Rule 41 hearings;

(5) Length of Trials: Analysis should include average time for trials, impact of multiple defendant cases, and "satellite litigation" re uncharged misconduct.

b. Civil Cases.

(1) Selection of Cases: Generally the United States is a defendant. However, it is a plaintiff in forfeiture and false claim cases (for which special units within the U.S. Attorney's Office now exist), and can become a plaintiff in private "Qui Tam" cases (31 U.S.C. § 3730, et seq.). Newly created attorney positions dedicated to FIREA work (12 U.S.C. § 1833a) may impact the docket.

(2) Removal: Analysis should include civil rights cases.

(3) Exercise of Settlement Authority: Analysis should include impact of dollar amount entrusted to U.S. Attorney without further DOJ approval, degree of coordination/cooperation between agency clients and U.S. Attorney, and autonomy issues;

(4) Alternative, Non-adjudicatory Procedures: The U.S. Attorney's office uses ENE and the arbitration system. Although the original practice was for three arbitrators per case, the panels have dropped to one arbitrator in many cases. Three

arbitrators may add to the perception of fairness for both parties. That perception might improve the parties' willingness to accept the award, and not to seek de novo review.

(5) Summary Judgment: Our analysis should include practices relating to the timing of, and success rate in, summary judgment motions in the Northern District.

4. Preliminary List of Issues--Special Problems Relating to State and Local Government Litigation.

(1) Habeas Corpus Litigation: The Advisory Group believes that capital punishment habeas corpus matters will increase in the next several years, which will likely have a serious effect on the workload in the Northern District. The habeas corpus committee is responsible for investigating this subject area.

(2) Procedures by District/State Attorneys and Other Prisoner Litigation: The habeas corpus committee is also investigating this area.

(3) Others: The Advisory Group is concerned with the escalation of bankruptcy cases in light of the current economy and the savings & loan collapses. This aspect of the federal court burden should be investigated.

IX. CONCLUSION.

As we said at the outset, this Report is but a beginning, and much remains to be done. The Advisory Group wishes to thank the Judicial Liaison Committee of the Northern District,

together with the Clerk's Office, for providing us substantial time and assistance. We look forward to working together in 1992 and 1993 towards achieving the goal of the Civil Justice Reform Act--the reduction of unnecessary cost and delay in civil litigation.

The Advisory Group

APPENDIX A

CIVIL JUSTICE REFORM ACT
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CIVIL JUSTICE REFORM ACT
ADVISORY GROUP
NORTHERN DISTRICT OF CALIFORNIA
COMMITTEE STRUCTURE

The Advisory Group was formed in March 1991. At present, the following committees of the Advisory Group have been established:

1. STEERING COMMITTEE.

This committee is composed of the Co-Chairs of the Advisory Group, Pauline Fox and Professor Morton P. Cohen, together with the chairs or co-chairs of each of the nine committees of the Advisory Group identified below.

The charge of this committee is to formulate policy and direction for the Advisory Group, and to ensure that the work of its committees is neither duplicative nor omits the investigation of any relevant area. This committee generally meets once every two weeks.

2. EARLY IMPLEMENTATION/LEGISLATION.

The charge of this committee was first to explore whether the Northern District should strive to achieve early implementation status under the Act, and then to examine the extent to which cost and delays in civil litigation could be reduced by a better assessment of the impact of new legislation on the federal courts. This committee has also undertaken to study the impact on the docket of special problems relating to United States, California state and local litigation.

The analysis provided by the committee is based upon information gathered from a variety of sources, including discussions between and among members of the committee and others, interviews of the judiciary of the Northern District, and a review of the applicable literature on the issue of, among other things, judicial impact statements.

The Chair of the Early Implementation/Legislation committee is Michael Kahn. Members of the committee include Susan Illston, John Levin, William McGivern and Kimberly Reiley.

3. CURRENT STATUS AND STATISTICS/TECHNOLOGY.

The charge of this committee is to determine the current status of the civil and criminal dockets in the Northern District, together with attempting to identify trends in case filings and in the demands being placed on the court's resources. This committee has also undertaken to evaluate how a better use of technology by attorneys and the judiciary could help to reduce unnecessary cost and delay in civil litigation.

Finally, this committee will assess what changes to the Northern District's new "CIVIL" electronic docket driven system should be made to enable the Advisory Group to monitor the efficacy of our recommendations and to better identify the causes of unnecessary cost and delay in the Northern District.

This committee has reviewed the statistics on the Northern District currently available, assessed the current level of technology in use in the court, and has identified the need for additional consulting assistance to conduct a more thorough examination of the docket. Funding under the Act has been requested to fulfill this need.

The Chair of the Current Status and Statistics/Technology committee is Jerrold Ladar. Members of the committee include William Chapman, Melvin Goldman, James Kleinberg, Theodore Kolb, William McGivern, Amitai Schwartz, John True and Bruce Vanyo.

4. PRE-TRIAL MANAGEMENT/ACCESS;
5. DISCOVERY PRACTICE;
6. MOTION PRACTICE; and
7. TRIAL PRACTICE.

The charge of each of these committees is to investigate whether there is unnecessary cost and delay associated with current practice in their respective subject area, and to propose solutions to those problems, if appropriate. Potential duplications and/or omissions in the work of these committees is handled by the steering committee, described above. Thus, for example, the work of all of these committees contributed to the Case Management Pilot Program discussed in the body of this Report.

The recommendations presented by these committees and incorporated into this Report are based upon information gathered from a variety of sources. These sources include lengthy discussions among members of the committees, interviews with many members of the judiciary of the Northern District, review of literature currently available on the relevant issues, review of local rules and practices of other federal courts, attendance at workshops relating to these issues, critical analyses of current suggested changes to the federal rules, and dialogue between members of the Advisory Group as a whole.

The recommendations of these committees embodied in this Report are also, in large part, based upon comments received at a Discussion Forum sponsored by the Advisory Group on July 31, 1991 at Golden Gate University in San Francisco. Individuals invited to attend included interested members of the public, together with a wide cross section of attorneys including those affiliated with private law firms (both large and small), local, state and United States governmental bodies, public interest groups, minority bar associations, the

"plaintiffs' bar," the "defense bar," academia and other concerned groups. Each attendee was provided with an opportunity to comment upon issues raised by the committees, in addition to presenting their own views on whether there was unnecessary cost and delay in civil litigation in the Northern District and, if so, whether any means could or should be adopted to reduce such cost and delay.

Finally, each recommendation contained in this Report was discussed, debated and ultimately approved by at least a majority of the members of the Advisory Group. Such discussion occurred during the monthly meetings of the Advisory Group, culminating in a day-long retreat held by the Advisory Group last September.

The Chair of the Pre-Trial Management/Access committee is Elizabeth Cabraser. Members of the committee include Janis Harwell, James Kleinberg, Kimberly Reiley, Amitai Schwartz, John True and Bruce Vanyo.

The Chair of the Discovery Practice committee is Melvin Goldman. Members of the committee include Donna Brorby, Michael G. W. Lee, Armando Menocal, Malcolm Misuraca, William Spencer and Jeffrey White.

The Chair of the Motion Practice committee is John Hauser. Members of the committee include Jerome Braun, Elizabeth Cabraser, Henry Hewitt, William McNeill and Armando Menocal.

The Chair of the Trial Practice committee is Theodore Kolb. Members of the committee include William Chapman, Jerrold Ladar and Jeffrey White.

8. ALTERNATIVE DISPUTE RESOLUTION.

The charge of this committee is to assess the impact of the Northern District's current programs, and to consider the need to refine them. To this end, the committee reviewed general literature on alternative dispute resolution, together with publications specifically addressed to the programs in the Northern District. In addition, the committee met on numerous occasions to exchange information and ideas, attended all of the meetings of the Advisory Group as a whole, and participated in the July 31, 1991 Discussion Forum. The members of the committee have also participated in various state and national bar and professional group sponsored ADR conferences and workshops. The early neutral evaluation project team of the committee has also conferred frequently with the Judicial Liaison Committee, including Chief Judge Thelton E. Henderson, former Chief Judge Robert F. Peckham and Magistrate Judge Wayne D. Brazil.

The Co-Chairs of the Alternative Dispute Resolution committee are William Edlund and Susan Illston. Members of the committee include Jerome Braun, Donna Brorby, Janis Harwell, John Levin, Bill Maloney, Robert Mnookin and William Spencer.

9. LIAISON COMMITTEE.

The charge of this committee is to communicate with other Advisory Groups and district courts, together with the AO and the FJC, to exchange ideas and information and to ensure that the work of our Advisory Group was not unnecessarily duplicative of the work of other Advisory Groups.

The Chair of the Liaison committee is Malcolm Misuraca. Members of the committee include John Hauser, Michael G. W. Lee and Bill Maloney.

10. PRISONER/PRO PER LITIGATION COMMITTEE.

This committee was formed to examine the influence of prisoner and pro per civil litigation on the causes of cost and delay in the Northern District. The committee has tracked the pending federal crime legislation regarding its proposed habeas corpus revisions, has conducted literature searches on pertinent issues and has examined the statistics available on the impact of prisoner/pro per litigation on the docket in the Northern District. The committee has also met with advocates of simplified procedures for non-prisoner pro per litigants to consider ways of improving the handing of those cases.

The Chair of the Prisoner/Pro Per Litigation committee is Bill Maloney. Members of the committee include Mort Cohen, Jerrold Ladar, William McGivern, Malcolm Misuraca, Kimberly Reiley and Amitai Schwartz.

Data from the Statistics Committee Report re Available Information (the "Blue Book"), consisting of tables of case processing and court workload statistics, will be useful in developing summaries, descriptive compilations, and other statistical presentations to establish baseline information (relating to case type frequencies, central tendencies, settlement percentages, etc.). The analysis of the existing database will also provide data necessary for questionnaire and interview development for the next stage of the project.

The second step would be to observe ENE processes in action in a small number of representative cases and to conduct in-depth interviews with the designers and implementers of the Program to get the benefit of their anecdotal impressions of its effectiveness.

The third step would be to design questionnaires to elicit additional information from participants in the ENE process (lawyers, parties, and evaluators) about the costs and time involved in the process. The interview questions will tap the following information: i) the costs to the parties of ENE; ii) the resources required from the court and bar; iii) using comparable cases, whether ENE cases were settled or disposed of more quickly and inexpensively than a comparable "control group" of cases; iv) whether ENE played a significant role in achieving settlements of cases; v) satisfaction of participants with the ENE process; and vi) what types of cases or characteristics of litigants or attorneys would appear to be most suited to ENE.

This phase would also include gathering data relevant to the questions the Advisory Group is most concerned with, including those questions posed in the memorandum entitled "Goals for ADR Evaluation Program." The most credible information about litigation costs and processing times for cases would be data coming directly from parties or their attorneys.

The questionnaires contemplated to gather information would probably involve telephone interviews of ENE participants selected from among representative types of cases in the Program. These representative cases will include samples from different categories of disputes or other differentiating characteristics (e.g., amount of prayer, number of parties, attitude toward settlement, and other such variables).

The fourth step would involve in-depth interviews of selected participants in the ENE Program in order to follow up on questions not fully answered during the prior phases of the project and to gather suggestions about potential improvements to the Program. This step would involve gathering direct information about case costs and processing times for comparable types of cases going through the ENE process and comparing average figures with averages from similar cases that did not go through the ENE Program.

This latter step would involve gathering information from individual case files and then following up with attorneys or others having knowledge about specific cases. We anticipate being able to look at approximately 200 cases (approximately 100 ENE and 100 non-ENE). We would also anticipate being available to consult with the ADR Sub-Committee and those most closely involved in Program implementation about conclusions and rationales, following the submission of the project's draft and final reports.

Resolution;
6. Ms. Janice Roehl, Ph.D., Senior Vice President, Institute for Social Analysis, evaluator of the ABA's multi-door courthouse project;
7. Ms. Nancy Rogers, Professor of Law, Ohio State University, and Chair, ABA Standing Committee on Dispute Resolution;
8. Mr. Frank E.A. Sander, Professor of Law, Harvard University, and former Chair, ABA Standing Committee on Dispute Resolution;
9. Ms. Margaret Shaw, Former Director of the Institute for Judicial Administration;
10. Ms. Linda Singer, Executive Director, Center for Dispute Settlement.

Due to the importance of conducting statistical analysis of existing and other data as part of the project, we anticipate the need for obtaining consultation assistance of statistical experts and possibly others on a consulting basis. The project would also utilize law students, research associates (college graduates without law degrees), and lawyers to conduct appropriate tasks cost effectively.

Proposal for Evaluating the Early Neutral Evaluation Program

We understand that the Advisory Group and ADR Sub-Committee wish to conduct the project to evaluate ADR techniques in two phases. The first would focus on the ENE Program, how well it is working to reduce cost and delay and improve participant satisfaction, and ways that the Program might be improved. The first phase would be directed primarily at answering the five questions posed above. The second phase would focus on evaluating the range of other ADR techniques that may be usefully employed in the Northern District. We would be happy to assist with both phases of the project. This proposal, however, is only directed at work on the first phase.

Methodology

The starting point for an evaluation of the effectiveness of ENE would be to clarify which goals the project would use to measure performance against. We assume the three most important goals for this project are those relating to i) litigation cost, ii) case processing time, iii) satisfaction of parties, attorneys, and others with the ENE process, iv) possible improvements in the ENE Program, and v) ways to collect better data in the future that will help in further assessment and improvements. While other questions are posed in materials furnished to us, we assume that they are subsidiary to these principal five and will be addressed only if the budget and time constraints permit.

Given that a good deal of data and analysis of the ENE Program already exists, our first step would be to examine all prior evaluation reports that draw from existing data and to develop working hypotheses about the effectiveness of the Program, based on the positive responses to earlier questionnaires reflected in the studies and articles on the ENE Program. More recently a number of questions have been posed by the ADR and Statistics and Technology sub-committees, which must be clarified and organized. For this initial work, we would expect to work with a statistical consultant to draw conclusions from data already available.

connected ADR projects in the nation. These grants also included assistance to: more than fifteen theory-building centers based at major universities around the nation; more than thirty-five practitioner groups providing mediation and other dispute resolution services in a wide variety of areas, including family, community, commercial, public policy and environmental, and organizational settings; and about ten organizations (such at the American Bar Association's Standing Committee on Dispute Resolution and the American Arbitration Association) that help to promote broader use of ADR techniques throughout the nation.

Mr. Barrett is now in private practice as a mediator and dispute resolution consultant. Principal projects include the Judicial Council project referred to above and a project to provide ongoing assistance to the County of San Mateo and the Peninsula Conflict Resolution Center, which have formed a partnership to expand ADR use throughout the County. The overall goals of this unique project are to improve service delivery and the implementation of justice, while containing unnecessary conflict costs.

3. Joshua D. Rosenberg

Professor of Law
University of San Francisco School of Law
Ignatian Heights
San Francisco, CA 94117-1080

Telephone: 415-666-6413
Fax: 415-666-6433

Social Security Number: 137-40-1028

Professor Rosenberg's experience with court procedures and ADR programs includes his service as a law clerk in the United States Court of Appeals and as a trial attorney with the United States Department of Justice. More recently, he has worked as a mediator in court-annexed programs, and has taught several dispute resolution courses at the University of San Francisco School of Law, including both Mediation and Negotiation. He has written numerous books and articles, the most recent being a major piece on mandatory mediation. Professor Rosenberg is the Director of the USF Mediation Clinic. He has also lectured extensively to state and federal lawmakers and local and state bar associations.

4. Others

We regularly consult with other leaders in the ADR field and would expect to be able to make use of their advice and counsel, sometimes at little or no cost. Among those with whom we have close working relationships and whose backgrounds would be relevant to this project are the following:

1. Ms. Madeleine Crohn, President, National Institute for Dispute Resolution;
2. Ms. Linda Finklestein, former Director of the Division of Research, Evaluation, and Special Projects of the District of Columbia Superior Court;
3. Mr. Craig McEwen, Professor of Sociology and Anthropology, Bowdoin College, evaluator of court-connected ADR programs throughout the nation;
4. Ms. Marguerite Millhauser, ADR Consultant to the District of Columbia Superior Court for the implementation of the multi-door project;
5. Mr. Larry Ray, Executive Director, ABA Standing Committee on Dispute

Additional information about the principal investigators is presented below:

1. H. Jay Folberg

Dean and Professor of Law
University of San Francisco School of Law
Ignatian Heights
San Francisco, CA 94117-1080

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Fax: 415-666-6433

Social Security Number: 349-32-8400

Jay Folberg's experience with court procedures and alternative dispute resolution programs includes more than fifteen years of mediating cases, writing about and teaching ADR and civil procedure at law schools in California, Oregon, and Washington and at the National Judicial College in Nevada, and sitting as a judge pro tem for more than ten years.

He has served as Chairman of the ADR section of the American Association of Law Schools, President of the Association of Family and Conciliation Courts, President of the Academy of Family Mediators, and is on the Board of the Northern California Council for Mediation. He has been an ADR consultant and advisor to courts in Arizona, Florida, Indiana, Connecticut, Canada, and New Zealand, as well as to ADR and judicial administration research projects funded by federal, state, and private grants.

Dean Folberg has served on the Mediation Commission of the Circuit Court in Portland, Oregon and was appointed by the Governor of Oregon to the Dispute Resolution Advisory Council, which conducted a statewide survey of ADR and then drafted comprehensive legislation, now codified, to promote the use of ADR in courts throughout Oregon.

2. Robert C. Barrett

Principal
Robert Barrett & Associates
111 Anza Boulevard, Suite 300
Burlingame, CA 94010

Telephone: 415-375-8565
Fax: 415-375-8119

Taxpayer Identification Number: 94-3013595

Robert Barrett's experience with court procedures and ADR includes more than seven years as the principal executive responsible for the funding and development of ADR programs at the Hewlett Foundation, eight years handling litigation in the federal and state courts in California and New York, and two years as a law clerk in the United States District Court for the Southern District of New York.

Under Mr. Barrett's direction the Foundation invested more than $20 million in the ADR field during the past eight years, including support to a number of the most innovative court-

This proposal is submitted as a joint project by consultants who have been at the forefront of the ADR field over the past decade and who have extensive familiarity with ADR procedures in a variety of settings, including the Northern District of California. It combines the resources, expertise, and independence of a law school that has an outstanding ADR program with the wide network of contacts and broad viewpoint of a former foundation executive who helped create and support many of the nation's leading ADR programs. In addition, it draws upon experience the consultants have gained working on a similar project for the Judicial Council of California. That project involves developing recommendations on how the state courts might make more extensive use of ADR techniques.

The highlights of this proposal are:

a) that the three principal investigators have extensive, nationwide experience with ADR programs and are knowledgeable about the use of ENE in the Northern District and similar evaluation approaches in other jurisdictions;

b) that we have had considerable success working with judges, court administrators, and the Bar both in the Judicial Council project and in earlier efforts;

c) that we regularly confer with the key people at the forefront of developing ADR programs, evaluating their effectiveness, and planning their implementation, both in California and around the nation; and

d) that we have access to a diverse talent pool of law professors and students, researchers, program evaluators, statisticians, retired judges, and other ADR experts who could assist the project at relatively low cost.

Background on Consultants and Their Experience with ADR

The three principal investigators are: H. Jay Folberg, Robert Barrett, and Joshua Rosenberg. Together they recently undertook a major project for the Judicial Council of California/Administrative Office of the Courts to develop criteria and procedures to guide referral of cases from state trial courts to ADR providers. The project involves gathering information from judges and ADR providers through statewide questionnaires and in-person interviews to be conducted in six representative counties. The project began in June 1991 and is scheduled to conclude early next year. John Toker is the AOC staff attorney with whom we are working most closely. He may be contacted as a reference, if the Committee so desires, at the following telephone number in San Francisco: 396-9129

Introduction

There is general agreement that many cases filed in the courts remain in the justice system too long before disposition by trial, settlement, or closure. This results in excessive legal fees and other costs to litigants. To address this problem, a wide range of "alternative dispute resolution" (ADR) procedures have been developed, which help facilitate faster and cheaper dispositions of cases and enhance creativity and flexibility in structuring solutions to disputes.

One such procedure, Early Neutral Evaluation (ENE), was developed and implemented in the United States District Court for the Northern District of California in 1985. The goals of the ENE Program are to reduce delay and litigation costs and to enhance party satisfaction with case outcomes. ENE's approach emphasizes overcoming barriers to prompt, forthright communication between the litigants and lawyers on all sides about their cases and providing an early, realistic analysis of cases before large amounts of time and money are spent.

The Northern District's Advisory Group established pursuant to the Civil Justice Reform Act desires to conduct an evaluation of the District's ADR programs, beginning with its nationally known ENE Program. The ENE Program evaluation would focus on the following questions:

1. Does the ENE Program reduce litigation costs to parties and, if so, by how much?

2. Does the ENE Program reduce case processing time and, if so, by how much?

3. Does the ENE Program improve the administration of justice (as reflected in satisfaction levels) for parties, attorneys, or others involved in the Program?

4. How could the ENE process be improved?

5. How could the ENE Program best be monitored and documented so that useful data might be routinely collected on its effectiveness and improvements made in the Program in the future?

A number of other questions have been raised, relating to conclusions that might be drawn from analyses of case file statistics or from interviews with participants in the ENE Program. Following the ENE Program evaluation, the Committee plans to undertake a broader examination of other ADR techniques used by the Northern District.

This proposal is directed only at paragraph 1 of the Advisory Group's August 25, 1991 request to evaluate the Northern District's ENE Program and aims to gather, within whatever budgetary and time constraints might exist, the most credible data possible to provide answers to the five questions listed above. We would also be interested in assisting with other ADR work contemplated by the Advisory Group (e.g., training, expert consultation concerning a possible mediation program, etc.), but such activities are beyond the scope of this proposal.

Table of Contents

Proposal

to the Civil Justice Reform Act Advisory Group and

ADR Sub-Committee of the

United States District Court for the Northern District of California

regarding

Early Neutral Evaluation and Alternative Dispute Resolution

Submitted by

University of San Francisco School of Law
H. Jay Folberg, Dean

and

Robert Barrett & Associates
Robert C. Barrett, Principal

September 17, 1991

We do hope that we will have the opportunity to work with you and the ADR Sub-Committee on this project. Please let me know if we can provide any additional information or clarification.

Sincerely,

Robert C. Barrett
Principal

Encl.

Robert Barrett & Associates

Mediation • Facilitation • Dispute Resolution

September 17, 1991

William I. Edlund
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Via Fax: 477-4911

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William M. Spencer
ADR Sub-Committee
United States District Court for the Northern District of California
700 Larkspur Landing Circle, Suite 199
Larkspur, CA 94939
Via Fax: 258-1762

Dear Members of the Advisory Group:

The University of San Francisco School of Law and my firm are pleased to submit the enclosed revised proposal to evaluate the Northern District's Early Neutral Evaluation Program.

The USF School of Law, under the leadership of Dean Jay Folberg and Professor Josh Rosenberg, has developed a priority interest in examining the use of alternative approaches to resolve disputes that otherwise would remain in court. The Law School has launched a number of initiatives along these lines, including establishing mediation clinics and hosting discussion groups of ADR service providers. My interest in ADR techniques derives from my eight years' work at the Hewlett Foundation as one of the principal funders of dispute resolution organizations nationally.

The Law School and my firm are currently collaborating on a major project for the Judicial Council of California on ADR. The project involves interviewing judges and ADR providers in six representative counties throughout the state and developing recommendations concerning criteria and procedures for increasing ADR use by California courts.

We are keenly interested in working with other court systems and court committees to assess dispute resolution techniques and to understand better the increasingly significant role ADR is playing in improving the administration of justice.

Although Jay Folberg, Josh Rosenberg, and myself will be the principal investigators and consultants on the project, we will have the resources of the USF Law School and faculty and other research assistants to help complete the task and to follow through with the Advisory Group and ADR Sub-Committee in assessing the full range of ADR approaches available to the Northern District. The enclosed proposal and budget are cast with the flexibility to reduce or expand any part in order to conform with the expectations and needs of the Northern District and its Advisory Group and ADR Sub-Committee.

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ENE: STATISTICAL PROFILE

November 1988 through March 1991

766 Total cases designated for program at time of filing.

Monthly average: 26

Annual average: 300 (approx.)

179 Removed from program prior to ENE hearing.

75 Settled before evaluator selected.

60 Settled after evaluator selectad but before ENE hearing.

114 Closed by dismissal, default, motion, etc.

Of these, only seven (7) were closed after the ENE hearing.

239 Cases in which one or more ENE hearings were held.

Monthly average: Eight (8) (approx.)

Annual average: 99 (approx.)

110 Cases still in the pipeline en route toward an ENE hearing.

Percentage of cases designated for ENE in which at least one hearing is held:

36% Of all cases designated for ENE at time of filing. (not counting cases still in pipeline).

43% Of designated cases remaining after subtracting those cases that are removed from the program. (not counting cases still in the pipeline).

53% Of designated cases remaining after subtracting both the cases that are removed and the cases that are terminated prior to the hearing date by dismissal, default, or motion. (not counting cases still in the pipeline).

enestats.391

usefulness? Do they feel that cost and/or delay is actually reduced by the existing programs? Do they feel that the ADR offered is an appropriate adjunct of the court system? Do they feel that ADR offerings should be expanded? Contracted? Continue to be mandatory? Made voluntary? Do they agree/disagree with having the court offer pay-your-own-way ADR services (like JAMS, commercial mediation, etc.).

6. How much do clients and attorneys know about ADR before they enter the system? Taking each group separately, did they know about alternatives to filing suit before they filed suit? If not, would it be worthwhile preparing educational materials for clients and/or lawyers on this topic? If so, in what format (brochure, videotape, etc.)?

percentage of the control group cases resolved during an analogous time frame? What kinds of cases (legal theory and damage range) were involved in each group?

(c) What kinds of cases were included in the 114 cases "closed by dismissal, default, motion, etc."? 107 of these cases ended before the ENE hearing, and 7 ended after; was anything useful accomplished at the ENE?

(d) Of the 239 "cases in which one or more ENE hearings were held," how many ultimately settled, and what was the length of time between the ENE hearing(s) and the settlement? Did ENE actually stimulate a settlement? Speed up a settlement? Or did the settlement relate more to other factors, like the eventual trial date, than to efforts at ENE? How does the number of ENE cases which settled compare to the overall percentage of cases settled in the control group? Did the ENE cases which settled settle faster (fewer months from filing to settlement) than the non-ENE cases which settled?

2. How did the attorneys involved in the ENE process react to it? Did they view it as a positive step toward resolution of the case? Did they feel that the evaluator was knowledgeable, interested, etc.? Did they feel that enough/too little/too much time was spent? Did they feel that it was held too early in the process? Did they feel that the cases evaluated benefitted from ENE in ways other than settlement (e.g., narrowing issues; getting documents on the table)?

3. How did the clients involved in the ENE process react to it? If their case settled, did they feel that the resolution process was fair? Did they feel railroaded in any way, and if so do they attribute it to ENE (as opposed to their lawyers, etc.)? Did they feel that they saved any money or time via ENE? If their case did not settle, was there anything which they feel the ENE process should have done which would have made it more worthwhile?

4. How did the evaluators view the ENE process? Would they do it again? Did they feel that they were effective? Ineffective? Did they feel that they were adequately supported by the court system in performing their task? Would further training have been useful? How much time do they spend per ENE? Do they customarily hold repeat sessions? How can the ENE program be improved?

5. At a more general level, how do users (both clients and attorneys) of any of the ADR programs in our court view their

CJRA -- N.D. CAL. COMMITTEE

ADR SUBCOMMITTEE

GOALS FOR ADR EVALUATION PROGRAM

The ADR Subcommittee wishes to evaluate the existing ADR programs in effect in the Northern District of California. At present we are considering both evaluation of the existing programs as they have functioned to date (primarily ENE), and the possibility of long-term study of the ENE programs as they will function after the addition of staff and training programs currently contemplated.

We are aware that some statistical data exists for the ENE program from November, 1988 through March, 1991. A copy of this is attached to this memo as Exhibit "A". We would like to evaluate both the available statistical data, currently in the files, and to obtain other statistical and qualitative data from the participants in the ENE sessions.

Our goal is to learn whether ENE helps resolve cases in a way that saves time and money and in a way that is satisfying to the participants at a substantive level. If we learn that ENE is helpful in these ways, then we would also like to determine how the process can be improved to work better.

Our preliminary questions include the following:

1. What does the statistical information on ENE (Exhibit "A") tell us about the way ENE is presently working? For example:

(a) Looking at the statistical information on Exhibit "A", why did the 75 cases "settled before evaluator selected" settle? Did impending ENE have anything to do with it? In the control group of cases not sent to ENE, what percentage of cases settled or otherwise resolved during this same time frame (e.g., either during the same period of weeks after filing, or prior to the first status conference)? What types of cases, by legal theory and damage range, were included in the 75 ENE cases which settled during this period? In the control group cases which settled?

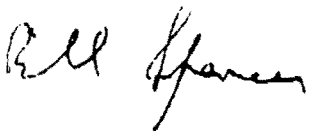
(b) Why did the 60 cases "settled after evaluator selected but before ENE hearing" settle? Did impending ENE and/or the identity of the assigned evaluator have anything to do with it? Again, what

2. Next, the Committee needs to know how well all the Court sponsored ADR processes are reducing cost and delay - which are cost effective, how they can be improved, should any ADR devices be added, is the Court best organized to further the use of ADR. Funding for this research must be obtained.

Included as sources of information for conducting these projects would be case files, questionaires, existing research, and interviews.

Two memos are attached which set forth the perspectives of the Committee on the research projects. Other information will be made available.

The Committee requires an early response to its request for research proposals.



APPENDIX C

WILLIAM M. SPENCER
Consulting Services for Corporations

Suite 199
700 Larkspur Landing Circle
Larkspur, CA 94939

Tel: (415) 461-7509
Fax: (415) 258-1762

August 25, 1991

MEMO TO: Consulting Firms

FROM: Northern District Committee

cc: Brazil, Fox, Cohen, Illston, Edlund, Ladar

General agreement exists that civil cases remain in our system of justice too long before disposition by trial, settlement or closure. This results in excessive legal fees and other costs to litigants.

The Northern District Advisory Group is one of the committees convened by the The Civil Justice Reform Act to address the problem at the federal level. To help it formulate its recommendations, the Committee requires that research be completed with this objective - to assess to what degree court sponsored ADR processes within the Northern District are reducing cost and delay, and how those processes can be improved.

The importance of these ADR processes is underscored by the fact that less than 5% of all cases filed eventually result in trial.

The research would be conducted in two stages.

1. The Committee is first anxious to determine how well Early Neutral Evaluation (ENE) is working and how it can be improved. ENE was created by the Northern District, and is being watched nationally to assess whether its use should be more widespread. Funding for this stage of the research is in hand or obtainable.

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

CALIFORNIA NORTHERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1991	1990	1989	1988	1987	1986		
OVERALL WORKLOAD STATISTICS	Filings*		5,060	5,293	6,270	6,952	8,504	10,284		
	Terminations		4,718	5,225	6,761	7,846	7,928	9,713		
	Pending		5,480	5,490	5,463	5,958	6,895	6,305		
	Percent Change In Total Filings Current Year	Over Last Year		-4.4					54	11
		Over Earlier Years			-19.3	-27.2	-40.5	-50.8	94	15
	Number of Judgeships		14	12	12	12	12	12		
	Vacant Judgeship Months		27.2	19.2	22.0	19.9	4.1	7.8		
ACTIONS PER JUDGESHIP	FILINGS	Total	361	441	523	579	709	857	53	8
		Civil	332	400	483	537	662	819	33	4
		Criminal Felony	29	41	40	42	47	38	86	13
	Pending Cases		391	458	455	497	575	525	44	8
	Weighted Filings**		417	500	509	488	576	530	23	3
	Terminations		337	435	563	654	661	809	58	8
	Trials Completed		13	17	18	18	22	23	93	14
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	8.2	6.2	7.0	4.9	4.4	3.7	89	14
		Civil**	8	8	8	8	7	7	19	2
	From Issue to Trial (Civil Only)		15	16	14	16	13	13	45	5
OTHER	Number (and %) of Civil Cases Over 3 Years Old		440 9.0	746 15.1	486 9.7	473 8.7	378 6.0	212 3.7	60	9
	Average Number of Felony Defendants Filed per Case		1.6	1.5	1.7	1.7	1.6	1.5		
	Jurors	Avg. Present for Jury Selection	50.41	54.98	55.63	41.64	38.04	35.89	88	13
		Percent Not Selected or Challenged	36.4	35.8	32.9	30.0	29.5	27.3	69	12

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

1991 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	4643	76	297	1069	153	44	498	795	414	213	522	25	537
Criminal*	398	29	20	12	11	20	14	73	7	98	7	56	51

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

APPENDIX B

U.S. DISTRICT COURT -- JUDICIAL WORKLOAD PROFILE

CALIFORNIA NORTHERN

			TWELVE MONTH PERIOD ENDED JUNE 30						NUMERICAL STANDING WITHIN U.S. CIRCUIT	
			1990	1989	1988	1987	1986	1985		
OVERALL WORKLOAD STATISTICS	Filings*		5,293	6,270	6,952	8,504	10,284	9,362		
	Terminations		5,225	6,761	7,846	7,928	9,713	10,242		
	Pending		5,490	5,463	5,958	6,895	6,305	5,735		
	Percent Change In Total Filings Current Year	Over Last Year		-15.6					82	13
		Over Earlier Years			-23.9	-37.8	-48.5	-43.5	91	15
	Number of Judgeships		12	12	12	12	12	12		
	Vacant Judgeship Months		19.2	22.0	19.9	4.1	7.8	3.3		
ACTIONS PER JUDGESHIP	FILINGS	Total	441	523	579	709	857	780	43	6
		Civil	400	483	537	662	819	732	33	4
		Criminal Felony	41	40	42	47	38	48	68	13
	Pending Cases		458	455	497	575	525	478	44	9
	Weighted Filings**		500	509	488	576	530	510	17	1
	Terminations		435	563	654	661	809	854	44	5
	Trials Completed		17	18	18	22	23	24	90	11
MEDIAN TIMES (MONTHS)	From Filing to Disposition	Criminal Felony	6.2	7.0	4.9	4.4	3.7	3.9	72	12
		Civil	8	8	8	7	7	8	15	3
	From Issue to Trial (Civil Only)		16	14	16	13	13	15	47	4
OTHER	Number (and %) of Civil Cases Over 3 Years Old		746 15.1	486 9.7	473 8.7	378 6.0	212 3.7	225 4.4	80	11
	Triable Defendants** in Pending Criminal Cases Number (and %)		545 (59.4)	390 (46.7)	641 (70.1)	659 (78.0)	681 (74.3)	555 (63.9)		
	Jurors**	Avg. Present for Jury Selection	54.98	55.63	41.64	38.04	35.89	35.10	90	14
		Percent Not Selected or Challenged	35.8	32.9	30.0	29.5	27.3	28.2	71	11

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

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

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	4801	123	499	890	197	31	528	792	453	223	494	8	563
Criminal*	463	39	25	14	19	25	22	67	16	137	4	53	42

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

Timeline

The projected timeline will need to be worked out with the Advisory Group and the ADR Sub-Committee. Tentatively, we would propose a schedule as follows. All times are figured from the start date of the project.

1. Detailed Project Design — Weeks 1-4

The team will: i) confer with the Advisory Group and ADR Sub-Committee or one or two designated representatives from them, ii) conduct a preliminary review of the data and reports on the ENE Program and literature pertaining to it, iii) consult with evaluators and statisticians from among the informal advisory group mentioned above, and iv) consult with others in order to develop detailed project plans. This phase will set project priorities and budget time and funds so as to address the most important issues the Advisory Group and the Sub-Committee want studied.

2. Analysis of Currently Available Data — Weeks 2-8

The evaluation team will conduct a quantitative analysis of currently available data on the ENE Program, focussing on the issues already raised by the Advisory Group and ADR Sub-Committee. This will help establish a baseline of information and identify information that needs to be gathered through the questionnaire or interview processes.

3. First Round of Interviews — Weeks 2-6

The team will observe ENE processes and conduct in-depth, in-person interviews with a small number of people who were closely involved in designing and implementing the ENE Program, in order to develop working hypotheses from their anecdotal impressions.

4. Questionnaire Design and Data-Gathering — Weeks 7-12

During this phase the project team will review case files from about 1,000 ENE and non-ENE cases. We would develop a list of comparable cases in approximately 10 subject matter areas (e.g., business and insurance contracts, motor vehicle and other torts, civil rights and employment, intellectual property, securities, and other cases) and gather relevant information about 200 such cases that could be validly compared (about 100 ENE cases and 100 non-ENE cases). We would then prepare interview sheets to guide telephone interviews of a representative sampling of ENE participants (parties, lawyers, and evaluators) and non-ENE parties and attorneys. During this phase, the team will assess and test different means for gathering information in order to find the most cost effective.

5. In-Depth Interviews and Qualitative Analysis — Weeks 13-18

Over-the-telephone interviews will be scheduled with lawyers from the approximately 200 ENE and non-ENE cases to gather direct information about litigation costs and processing time. In-depth interviews will also be conducted with a few ENE participants, attorneys, evaluators, and others, as needed, to gather additional information, to verify preliminary findings about satisfaction levels, to test hypotheses from the prior quantitative analyses, and to gather ideas for improving the ENE Program.

6. Preparation of Draft Report — Weeks 19-22

Principal investigators will confer together and prepare a draft report, including tentative findings, conclusions, and recommendations. This will draw from the entire project and will be done in consultation with the Advisory Group and ADR Sub-Committee so as to ensure that the draft report will be as useful as possible in format and content.

7. Comments on Draft Report — Weeks 23-24

Comments on the draft report will be solicited from those interviewed and others who have indicated an interest in the project, including the Advisory Group and ADR Sub-Committee.

8. Preparation of Final Report — Weeks 25-28

The principal investigators will prepare a final report for submission to the ADR Sub-Committee and Civil Justice Reform Act Advisory Group. The report will reflect the comments made on the draft report and will include the principal investigators' findings, conclusions, and recommendations.

9. ADR Sub-Committee Consultation — Weeks 7 on

The principal investigators will be available to consult with the Advisory Group and ADR Sub-Committee to assist in digesting findings and conclusions of the project and in broadening the scope of analysis to include other ADR techniques. This time will be useful for developing ideas on how improvement suggestions might be implemented.

Proposal Budget

After reviewing data currently available and deciding upon detailed project plans, we will obtain necessary statistical and evaluative consultation to analyze as thoroughly as possible the body of existing data and analysis on the ENE Program and to help in designing new data-gathering mechanisms. We would also anticipate using law students and other research associates to help on interview teams, in data tabulation and analysis, and in the report-writing and preparation phases of the project to save costs.

Compensation Rates

Our normal compensation rates are substantially reduced because of the importance of the project and our interest in undertaking it. Every effort would be made to utilize a team of people with varied levels of experience and compensation rates, so as to complete the project most cost effectively. Rates for time spent on project tasks would be billed as follows:

1. Principal Investigators' time	$80 per hour
2. Senior Research Associates' time	$50 per hour
3. Research Associates' time	$30 per hour
4. Law Students' time	$10 per hour

Estimated Itemized Budget

The estimated itemized budget summarized below covers a full range of activities contemplated in this proposal. Because many features about the project have not been definitively settled at this time, we would expect to work with one or two representatives of the Advisory Group and ADR Sub-Committee to develop a workplan and budget that meets its needs and that is realistic within the time and budget constraints on the project. We would be pleased to make adjustments, if appropriate, because of budget limitations or to reflect Advisory Group or Sub-Committee priorities. Such adjustments may expand or contract any of the project's phases as presented below.

1. Detailed Project Design. $ 3,200
   In this phase we would meet with the Advisory Group and ADR Sub-Committee, conduct a preliminary review of data available, consult with evaluators on the Northern District's staff, and consult with others to develop detailed project plans. We estimate about 40 person hours for this phase.

2. Analysis of Currently Available Data $ 4,800
   In this phase we would conduct a quantitative analysis of data already available, focussing on questions the Sub-Committee has raised. This would involve up to 60 hours of principal and statistical consultants' time.

3. First Round of Interviews $ 5,600

Here the team would observe ENE processes and different evaluators at work, conduct in-person and in-depth interviews with a small number of people who know the ENE process well, in order to develop a set of working hypotheses to test later. We estimate this phase taking up to 70 hours.

4. Questionnaire Design and Data-Gathering $ 8,900

This phase would involve examinations of case files to pick out representative ENE and non-ENE (and also perhaps arbitrated and non-arbitrated) cases to study in depth. We would also design questionnaires or interview scripts to gather other information. To review files from 200 cases might take an estimated 400 hours, most of which would be time spent by research assistants and law students. We anticipate this phase consuming a total of 480 hours.

5. In-Depth Interviews and Qualitative analysis $ 18,400

This would be the most important part of the project, during which we would interview selected attorneys and participants, seeking to determine the time to disposition and costs of ENE as compared with non-ENE cases. We estimate studying about 200 cases, with 4 hours being needed for each case to contact attorneys by telephone and get the information needed; overall we estimate this phase would require about 800 hours of research assistants' and law students' time and up to 80 hours of principals' time.

6. Preparation of a Draft Report $ 4,000

Principals will confer and prepare a draft report of findings and conclusions from the data gathered. We estimate this to take about 50 hours.

7. Comments on the Draft Report $ 1,200

Comments on the draft report will be solicited from those who know the ENE program well and from others who could review our draft report and make helpful suggestions. We estimate this phase to require about 15 hours of principals' time.

8. Preparation of Final Report $ 2,000

This should be a short phase of gathering comments and making necessary revisions to the draft report. We estimate it requiring about 25 hours of principals' time. Whether this estimate is accurate depends in large part on the number and tenor or the comments made on the draft report.

9. Consultation with the Advisory Group and ADR Sub-Committee The principal investigators will be available to consult with the Advisory Group and ADR Sub-Committee in following up recommendations made and other leads developed during the project. We have added an amount of time here of about 40 hours of consultation, but this amount could be increased or decreased substantially.	$ 3,200
10. Fund for Compensation of Specialists or Statisticians This amount is included in case we need to call in others to help in the quantitative analysis requiring special computer or statistical techniques. We have allowed for the possibility of needing up to 100 hours of such assistance.	$ 8,000
11. Overhead and Other Miscellaneous Expenses This amount is for telephone and mileage costs, secretarial, and other administrative and out-of-pocket costs.	$ 5,000
12. Contingency This amount (about 8 percent) would cover unanticipated activities needing to be included in the project or other unforeseen contingencies.	$ 5,000
Total:	$69,300

List of Appendices
(Sent earlier and not duplicated here)

1. Resume of H. Jay Folberg
2. Biographical Information on Robert Barrett
3. Resume of Joshua Rosenberg

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WRITER'S OFFICE AND
DIRECT DIAL NUMBER

225 Bush Street
Telephone: (415) 983-1321
Telecopier: (415) 477-4911

September 25, 1991

Dean Jay Folberg
University of San Francisco
School of Law
Ignatian Heights
San Francisco, CA 94117-1080

Dear Dean Folberg:

This letter confirms the understanding between U.S.F. School of Law (the "School) and the Northern District of California Advisory Group under the Civil Justice Reform Act ("Group") regarding the written project which you propose to do for the Group on Early Neutral Evaluation. The project shall be governed by your proposal of September 17, 1991 (a copy of which I attach) and by this letter. We have recommended your engagement to the Court and the Judicial Liaison Committee and, subject to review of the selection process employed by the Group and the preparation and execution of a formal contract with the Administrative Office of the United States Courts, we have determined that we wish the School to undertake this project for us.

We expect the project be completed in three stages, with each phase to begin upon the direction of the Group: stage one will include the design of the project, analysis of the data presently available, the initial interviews, preliminary questionnaire design and data gathering, and beginning the interview process. Interviewing and in-depth analysis will be completed during the second stage, and the third stage will include the completing of the analysis and submission of the final written report. We expect the final report to be completed by July 1, 1992. You have proposed to complete this project as a fixed price contract in the amount of $69,300.

You have assured us that you can begin work on the project as soon as the contract is signed and approved. During the project you will consult regularly with the Advisory Group's project committee, made up of William Edlund, Jerrold Ladar,

Susan Illston and William Spencer. As appropriate, your contact with Northern District Court records should be funnelled through Judge Magistrate Brazil or his designee.

If this supplement to your Proposal Letter is acceptable, please sign the attached copy and return it to me.

Yours very truly,

William I. Edlund
Project Team Head
CJRA Advisory Group
Co-Chair, ADR Subcommittee

Accepted:

Dean Jay Folberg
University of San Francisco
School of Law 9/26/91

CONCURRED AND APPROVED:

Chief Judge Thelton E. Henderson

APPENDIX D

Federal Pro Bono Project

of the

United States District Court
Northern District of California
and
The Bar Association of San Francisco
Volunteer Legal Services Program

Guidelines

1. Selection of cases - The Federal Pro Bono Project has been established to secure pro bono representation for litigants meeting the following criteria:

   a. The litigant must be a plaintiff, in propria persona, in an action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, et seq. or an incarcerated plaintiff, in propria persona in a prisoner civil rights action.

   b. The litigant must previously have been granted leave to file in forma pauperis.

   c. In the case of Title VII litigants, the plaintiff must have used reasonable (but unsuccessful) efforts to retain private counsel willing to represent the client on a contingent fee basis, including, but not limited to attempting to locate counsel through a California State Bar-approved Lawyer Referral Service.

   d. The Court must determine the case is one which warrants pro bono representation.

2. Referral of cases to program - The Court may refer litigants to the program on its own motion or upon the granting of the motion of the litigant. A sample "Order Referring Plaintiff to Federal Pro Bono Project [etc.]" is attached to these Guidelines as Exhibit "A." (The goal of the program is to place every case referred by the Court with a volunteer attorney. However, it is unlikely the program will be able to accommodate many more cases than were previously selected for appointment of counsel because the pool of volunteer attorneys is limited.)

   The following procedure should be observed once a litigant has been selected by the Court for referral to the program:

   a. The Court should notify the Bar Association program personnel of the referral by completing and mailing the appropriate referral form. There are two separate referral forms - one for Title VII cases (attached as Exhibit "B") and one for Prisoner Civil Rights cases (attached as Exhibit "C").

   b. In Title VII cases, the Court should give the litigant a copy of the attached "Instructions to Litigant" information sheet (attached as Exhibit "D".) This sheet explains the program to the litigant. The litigant should be admonished by the Court to follow the instructions on the sheet carefully and that failure to do so may result in the litigant being removed from the program.

c. The Court should arrange for the appropriate material from the Court file to be copied and forwarded to the Bar Association program personnel with the referral form or as soon thereafter as the file is available.

d. The BASF/VLSP staff will attempt to locate counsel willing to be appointed by the Court to represent the client on a pro bono basis. Once a volunteer attorney is located, the staff will notify the referring judge of the identity of the volunteer attorney.

e. In Title VII cases, questions regarding the status of any referral can be directed to:

1. William Martinez, Bar Association of San Francisco (BASF) Volunteer Legal Services Program (VLSP) Referral Coordinator (764-1600) between the hours of 2:00 pm and 5:00 pm, Monday through Thursday and 9:00 am - 5:00 pm on Fridays. Mr. Martinez will generally have the most current information on efforts to place any case.

2. Jody Joseph
BASF-VLSP Assistant Director and Supervising Attorney
764-1600.

3. Tanya Neiman
BASF-VLSP Director
764-1600.

4. Drucilla Ramey
BASF Executive Director
764-1600.

f. In Prisoner Civil Rights cases, questions regarding the status of any referral should be directed to: Amitai Schwartz, Esq., 398-0922.

3. Stay of proceedings until four weeks after appointment of counsel. At the time a litigant is referred to the program the Court should stay all proceedings in the action for a period to and including four weeks from the date a volunteer attorney is appointed by the Court to represent the litigant. The purpose of the stay is to permit the volunteer attorney sufficient time to meet and interview the client, review the case file, and conduct preliminary investigation and legal research.

4. Appointment of counsel - Once a volunteer attorney has been located, the Court shall issue an order appointing that attorney to represent the litigant. A sample order is attached to these guidelines as Exhibit "E."

5. Recruitment of volunteer attorneys - Volunteer attorneys will be selected from a panel recruited by BASF-VLSP for the purpose. All volunteers are required to be experienced in litigation or to have attended a special training program conducted by BASF-VLSP. (See paragraph No. 6 below). The attorney will represent the litigant on a pro bono basis, except this arrangement shall not preclude the attorney from accepting statutory attorneys fees awarded to the litigant as the prevailing party or as part of a negotiated settlement of the case. (See paragraph No. 10 below).

6. Training and supervision of volunteer attorneys

   a. Training. Unless already experienced in litigation, all volunteers are required to attend a training program sponsored by BASF-VLSP. (Approximately 30 attorneys attended the first such training on litigating Title VII actions. All received extensive written materials prepared by leading employment discrimination plaintiff's attorneys. A copy of the materials is available in the Court Clerk's Office. The training was videotaped, and is available for viewing with materials, to any attorney interested in participating in the program. Arrangements to participate can be made by contacting the BASF-VLSP staff at 764-1600.)

   At present referrals of Prisoner Civil Rights cases will be placed with experienced attorneys. A training in this area is planned for late 1988 or early 1989.

   b. Supervision. Any volunteer attorney without prior experience in the field will, upon accepting a referral, also be assigned an "advisor attorney" from among a panel who are experienced in the substantive area and who have litigated cases in federal court. The identity of the advisor shall not be revealed to the client, nor will the advisor have direct contact with the client.

7. Request for reconsideration of referral for lack of merit, and/or lack of cooperation of client - The program, in consultation with this Court, has developed the following procedure for the reconsideration of any referral, where the volunteer attorney and/or the advisor attorney feel it would be improper to proceed with the case due to lack of any merit, and/or serious lack of cooperation on the part of the client. If, after preliminary investigation, the volunteer attorney and/or advisor, where applicable, are of the opinion that appointment of counsel is not appropriate in the case, a screening panel of the Bar Association will review the case. If the panel disagrees, the case will be reassigned to another attorney. If the panel agrees, the Chair of the panel (Amitai Schwartz for §1983 cases; Charles Ragan for the Title VII cases) will request a meeting with the Chief Judge and, thereafter, an appropriate record will be made with the Judge/Magistrate who referred the case. If the Judge/Magistrate continues to be of the opinion that appointment of counsel is required, the Bar Association will make every effort to place the case with another volunteer attorney.

8. Status conference at expiration of stay - As near a time as is practical to the expiration of the stay of proceedings in any referred case, the Court shall conduct a status conference with all parties represented. One purpose of the status conference shall be to consider whether expedited discovery and/or other proceedings are appropriate to facilitate efficient resolution of the case.

9. Cost reimbursement - The Court shall follow the procedures set forth in General Order No. 25, paragraph 6 for reimbursement for out-of-pocket costs connected with any referred case. However, the limit for reimbursement in any one case shall be increased to $2500 for cases referred through this program, unless an additional amount is appropriate for good cause shown.

   Reimbursable costs shall include, but not be limited to, amounts reasonably and necessarily spent on:

   a. Deposition costs, except to the extent reimbursed under the California State Transcript Reimbursement Fund (described in General Order 25).

   b. Copying

   c. Service of process and delivery service for filing

   d. Filing fees, if any

   e. Expert consultant and witness fees, if any

   f. Reasonable travel expenses for attorney

   g. Reasonable investigation expenses

   h. Long-distance telephone

   It is the policy of the Court that reimbursement requests for this program be liberally considered.

10. Attorney fees - Although cases referred through the program will be handled by the attorney on a pro bono basis, if the plaintiff is the prevailing party, the Court shall award attorney fees and costs against the opposing party as provided by law. Also, these rules shall not be construed to require a litigant referred under the program to waive an award of attorneys fee as a condition of settlement.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,	)	NO.
vs.	)	ORDER REFERRING PLAINTIFF TO FEDERAL PRO BONO PROJECT AND STAYING PROCEEDINGS PENDING APPOINTMENT OF COUNSEL
Defendant.	)	

The plaintiff having requested and being in need of counsel to assist him/her in this matter and good and just cause appearing,

IT IS HEREBY ORDERED that plaintiff shall be referred to the Federal Pro Bono Project in the manner set forth below:

1) The clerk of this court shall forward to the Volunteer Legal Services Program of the Bar Association of San Francisco a copy of the court file with a notice of referral of the case pursuant to the guidelines of the Federal Pro Bono Project for referral to a volunteer attorney.

ATTACHMENT "A"
to Federal Pro Bono Project Guidelines

2) Upon being notified by the Federal Pro Bono Project that an attorney has been located to represent the plaintiff, that attorney shall be appointed as counsel for plaintiff in this matter until further order of the court.

3) All proceedings in this action are hereby stayed until four weeks from the date an attorney is appointed to represent plaintiff in this action.

IT IS SO ORDERED.

DATED:

_____

United States District Judge

FEDERAL PRO BONO PROJECT
TITLE VII REFERRAL FORM

TO: Tanya Neiman
Federal Pro Bono Project
Bar Association of San Francisco
Volunteer Legal Services Program
685 Market Street, Suite 700
San Francisco, CA 94105

FROM: Judge _____
Federal District Court Northern District of California

DATE:

RE: Referral of Indigent Plaintiff in
Employment Discrimination Case

Please be advised that the following client is being referred to the Bar Association of San Francisco Volunteer Legal Services Program for appointment of a volunteer attorney through the Federal Pro Bono Project. The client has been given a copy of the instruction sheet for litigants. A copy of the court file is enclosed, or will be forwarded as soon as it is available.

Name: _____

Address: _____

_____

Telephone #: _____

Message Telephone #: _____

Case Title : _____

_____

Case #: _____

Status of case: _____

_____

_____

_____

_____

_____

Attachment "B"
to Federal Pro Bono Project Guidelines

FEDERAL PRO BONO PROJECT
PRISONER CIVIL RIGHTS REFERRAL FORM

TO: Amitai Schwartz, Esq.
Federal Pro Bono Project
155 Montgomery Street, Suite 800
San Francisco, CA 94104

[Please send a copy of this form to:
Tanya Neiman
Federal Pro Bono Project
Bar Association of San Francisco
685 Market Street, Suite 700
San Francisco, CA 94105]

FROM: Judge _____
Federal District Court Northern District of California

DATE:

RE: Referral of Indigent Plaintiff in
Prisoner Civil Rights Case

Please be advised that the following client is being referred to the Bar Association of San Francisco Volunteer Legal Services Program for appointment of a volunteer attorney through the Federal Pro Bono Project. A copy of the court file is enclosed, or will be forwarded as soon as it is available.

Name: _____

Address: _____

_____

Telephone #: _____

Message Telephone #: _____

Case Title : _____

_____

Case #: _____

Status of case: _____

_____

_____

_____

_____

Attachment "C"
to Federal Pro Bono Project Guidelines

FEDERAL PRO BONO PROJECT

of the
United States District Court
Northern District of California
and
The Bar Association of San Francisco
Volunteer Legal Services Program

Instruction Sheet for Litigants
(Title VII Cases)

TO: _____

_____

_____

FROM: Judge _____
Federal District Court, Northern District of California

DATE:

RE: Referral to the Federal Pro Bono Project

You are being referred to the Federal Pro Bono Project of the Bar Association of San Francisco Volunteer Legal Services Program (BASF-VLSP). This organization will attempt to locate a volunteer attorney willing to be appointed to represent you in your employment discrimination case. In order to remain eligible for for this free legal assistance, it is important that you follow all of the instructions below:

1. You will be contacted by the VLSP staff once a volunteer attorney has been selected for your case. This process may take as long as one month to six weeks. Once you are referred to the volunteer attorney, you will be expected to cooperate completely with that attorney.

2. You must remain in contact with the VLSP, as instructed by their staff. You must notify the VLSP staff immediately if you change your address or telephone number. (Write to Tanya Neiman, Director, BASF-VLSP, 685 Maket Street, Suite 700, San Francisco, CA 94105).

3. The VLSP staff will refer you to a volunteer attorney. Do not miss any appointment with the attorney, except in an emergency. If you miss any appointment or fail to cooperate with your attorney, you may no longer be entitled to receive free legal services through the VLSP.

Attachment "D"
to the Federal Pro Bono Project Guidelines

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,	NO.
vs.	ORDER APPOINTING COUNSEL
Defendant.	

The plaintiff having requested and being in need of counsel to assist him/her in this matter, and a volunteer attorney willing to be appointed to represent plaintiff having been located by the Federal Pro Bono Project,

IT IS HEREBY ORDERED THAT:

_____

_____

_____

_____

_____

is appointed as counsel for plaintiff in this matter.

IT IS SO ORDERED.

DATED:

_____

United States District Judge

Attachment "E"
to Federal Pro Bono Project Guidelines

APPENDIX E

CASE MANAGEMENT CHECKLIST

I. ASSIGNMENT TO PILOT PROGRAM

A. Assignment to Pilot Program automatic upon assignment, at filing, to one of participating judges.

B. Issuance, upon filing, of Case Management Checklist and Case Management Conference Scheduling Order setting conference 60 days from filing, to be served by plaintiffs with complaint.

C. Service of complaint must be made within 30 days of filing.

D. Counsel meet and confer to discuss Checklist and prepare joint case management proposal, if possible.

E. Case management proposals due from counsel seven days prior to Case Management Conference.

II. CONTENTS OF CASE MANAGEMENT PROPOSALS

Case management proposals must include discussion of, and suggestions regarding, the following issues:

A. Local Rule 235-3 categories (a) through (i); Local Rule 235-7 items (d) through (g); (l) through (q); (s), (t).

B. Discovery:

1. Document depository.

2. Mandatory information exchange.

3. Document identification protocol.

4. Confidentiality order.

5. Deposition conduct protocol.

6. Assignment of discovery disputes to magistrate judge or other officer.

7. Informal resolution of discovery disputes.

   a. letter briefs
   b. telephonic conferences
   c. on-call availability

8. Discovery period: e.g., ___ days.

9. Discovery cut-off date.

10. Staged or prioritized discovery (key depositions prior to settlement conference date).

11. Limitations on number of interrogatories: e.g., ____ interrogatories.

12. Prohibition of, or limitation on, contention interrogatories.

13. Limit on number of depositions: e.g., ___ depositions.

14. Limit on absolute length of each deposition (e.g., 8 hours) or average length of depositions.

15. Losing party pays costs of discovery disputes.

C. Staged resolution or bifurcation of issues.

1. Stipulation to class certification of case, or of particular claims and issues.

2. Stipulation to amendments to complaint or dismissal (without prejudice and with tolling agreement) of certain claims.

3. Scheduling of summary judgment or partial summary adjudication motions.

4. Test cases or test plaintiffs.

5. Summary jury trial or mini-trial (binding or nonbinding).

D. Organizational issues.

1. Designation of lead, liaison, and/or committees of counsel for plaintiffs and defendants.

2. Early cut-offs for joinder of parties and assertion of counterclaims and third party claims.

3. Pretrial and/or trial coordination under Rule 42.

4. Proposals re specific penalties and sanctions for infractions of case management order; suspension of Rule 11 considerations until end of case.

E. Motions.

1. Format and page limitations for briefs.

a. Limit briefs to __ pages.

b. Limit motion papers to memoranda, declarations and deposition excerpts.

c. Limit to opening, opposition and closing memos; no supplemental memos or letters. No post-hearing letters except to submit, without editorial comment, new decisions which are important.

d. Highlight relevant portions of depositions attached to motions.

e. In appropriate cases, establish at status conference abbreviated schedules for noticing and briefing motions.

f. Require hand or overnight delivery or faxing of motion papers where there is a tight schedule or out-of-town counsel.

g. Require courts to rule on motions within a limited period of time: e.g., _____ days from submission of closing memos.

2. Informal letter briefs.

3. Referral of motions to magistrate judge.

4. Prioritization and scheduling of Rule 12 and Rule 23 motions.

5. Expedited schedules for briefing and hearing of motions.

   a. Moving papers filed ____ days before hearing.

   b. Responses filed ____ days before hearing.

   c. Closing memoranda filed ____ days before hearing.

6. Tentative rulings on motions to guide oral argument and eliminate unnecessary appearances.

F. Discovery cut-off, motions cut-off, and pretrial dates.

G. Requests for continuances of any dates or deadlines must have consent of, or notification to, client.

III. TIMING OF REFERRALS

A. Alternative dispute resolution and issue focusing techniques.

1. Timing of referral to ENE
2. Schedule for settlement conferences
3. Other alternative dispute resolution techniques

B. Referrals to magistrate judge

IV. ATTENDANCE AT CASE MANAGEMENT CONFERENCE

A. Supervising counsel.

B. Party or parties' representatives.

C. Insurer or insurer's representatives.

D. Exchange of all applicable insurance policies prior to Case Management Conference.

V. SCHEDULING OF ADDITIONAL STATUS CONFERENCES AT REGULAR INTERVALS

VI. TRIAL

A. Pre-Trial Conference I (60 days before trial): Decides scope of trial, trial length, delineation of issues, and

facts which can be stipulated; and directs additional Rule 56 motions, if necessary, to further limit or identify issues for trial.

B. Pre-Trial Conference II (7 days before trial). Final rulings made on motions in limine, outlines of contested issues of fact to be determined by trial, outline of all evidence offered by both sides; limitations on number of witnesses, number of trial hours or trial days allotted to each party, and protocol for expert witness testimony.

C. Use of mini-trials (bench or jury) in lieu of conventional trial if summary judgment outcome leaves only limited, specific fact issues for resolution.

D. Limitation and special procedures for handling expert witnesses. (Applies to bench trials and may be considered for jury trials.)

1. Direct examination of experts to be submitted and exchanged in narrative form 10 days before Pretrial Conference II.

2. Rulings on objections to expert narrative statements made at Pretrial Conference II.

3. Approved narrative statements constitute the direct examination of experts.

4. Proposed Rule 702 and 45 adopted with respect to experts.

APPENDIX F
SAMPLE CASE MANAGEMENT ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:, _____ LITIGATION _____ THIS DOCUMENT RELATES TO: ALL CASES	Civ. No. _____- [judge]-[magistrate judge]

CASE MANAGEMENT ORDER NO. 1

Having considered the written Case Management proposals and the comments and suggestions of the parties presented at the Case Management Conference held _____, 199_, the Court ORDERS:

1. **Pretrial Consolidation.** The cases listed on Attachment A are, until further order, consolidated for pretrial purposes. This Order does not constitute a determination that these actions should be consolidated for trial, nor does it have the effect of making any entity a party to an action in which it has not been joined and served in accordance with the Federal Rules of Civil Procedure.

a. **Master Docket and File.** The Clerk will maintain a master docket and case file under the style "In re _____ Litigation," Master File Number C.A. No. H-90-0214. All orders, pleadings, motions, and other documents will, when filed and docketed in the master case file, be deemed filed and docketed in each individual case to the extent applicable.

b. **Captions; Separate Filing.** Orders, pleadings, motions and other documents will bear a caption similar to that of this Order. If generally applicable to all consolidated actions, they shall include in their caption the notation that they relate to "ALL CASES" and be filed and docketed only in the master file. Documents intended to

apply only to particular cases will indicate in their caption the case number of the case(s) to which they apply, and extra copies shall be provided to the Clerk to facilitate filing and docketing both in the master file and the specified individual case files.

c. **Discovery Requests and Responses.** Pursuant to Fed.R.Civ.P. 5(d), discovery requests and responses will not be filed with the Court except to the extent offered in connection with a motion under Rule 11, 12, or 56 or a motion seeking a ruling by the Court on a discovery dispute.

2. **Referrals.** The following matters are referrals to Hon. _____, the assigned Magistrate Judge:

a. Discovery [specify].

b. Nondispositive motions.

c. Other. Upon the consent and stipulation of all parties: [specify].

3. **Organization of Plaintiffs' Counsel.**

a. **Plaintiffs.** To act on behalf of plaintiffs the court designates--

(1) as Lead Counsel:

(2) as an additional member of an Executive Committee to act together with Class Co-Lead Counsel with respect to issues common to the class and individual actions:

b. Defendants, to act on behalf of defendants the court designates --

c. **Time Records.** Counsel who anticipate seeking an award of attorneys' fees from the Court shall maintain contemporaneous records reflecting the services performed and expenses incurred, to be submitted to the Court upon request. Unless otherwise ordered, compensation to plaintiffs' counsel shall be calculated upon a reasonable percentage of recovery basis under the guidelines set forth in Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268 (9th Cir. 1989) and In re Activision Securities Litigation, 723 F. Supp. 1373 (N.D. Cal. 1989). [Note: This provision, together with all of the other provisions of this sample order, is included only to provide an example. Thus, this particular provision may have no application to other kinds of lawsuits, e.g. civil rights cases. See, City of Riverside v. Rivera, 477 U.S. 561 (1986).]

4. **Service of Documents.** All counsel of record in any of the cases listed on Attachment A shall be served with

a copy of each pleading, motion, or other document filed by a party, and with a copy of each order entered by the Court.

5. **Refinement of Issues.**

a. **Consolidated Complaint.** The plaintiffs shall file a single consolidated amended complaint which shall replace the underlying complaint in each of the three class actions listed on Attachment A by _____.

b. **Responsive Pleadings and Rule 12 Motions.** Each defendant shall have until _____ to serve and file an answer to the plaintiffs consolidated amended complaint, and, if they desire, to serve and file, together with all other defendants desiring to do so, a joint motion to dismiss (with all supporting papers and briefs) addressed to the plaintiffs' consolidated amended complaint. The plaintiffs shall have until _____ to serve and file a joint opposition brief (with all supporting papers). The moving defendants shall have until _____ to serve and file a joint reply brief (with all supporting papers) limited to discussions of points raised in plaintiffs' joint opposition brief, which were not fully covered in the defendants' joint opening brief and supporting papers.

c. **Class Action.** The plaintiffs will file by _____, their motion seeking class certification, identifying the class(es) for which certification is sought, detailing the facts on which satisfaction of the requirements of Fed.R.Civ.P. 23 is asserted, and describing what and how notice will be given to class members. Defendants will file by _____, any objections to class certification, specifying with particularity the factual and legal basis of their objection and identifying any facts on which an evidentiary dispute exists. The plaintiffs will file by _____, any reply to Defendants' objections. A hearing will thereafter be conducted by the Court under Rule 23(c), at which time the parties may present extracts of depositions, interrogatories, and documentary evidence relevant to any factual disputes. Only on a showing of good cause will a party be permitted to call a witness to testify in person at the hearing.

d. **Summary Judgment.** [The calendaring of any Summary Judgment motion shall be done at the First Status Conference held after the determination of class certification issues] Each defendant shall have until _____ [or _____ days], to serve and file, together with all other defendants desiring to do so, a joint motion for summary judgment (with all supporting papers and briefs) addressed to the plaintiffs' consolidated amended complaint and the complaint(s) in the individual action(s). The plaintiffs shall have until _____ [or _____ days], to serve and file a joint opposition brief (with all supporting papers). The moving defendants shall have until [or

_____ days] to serve and file a joint reply brief (with all supporting papers) limited to discussions of points raised in plaintiffs' joint opposition brief, which were not fully covered in defendants' joint opening brief and supporting papers.

6. **Motions Practice.** Unless otherwise ordered in exceptional circumstances, briefs and memoranda shall be limited to _____ pages. Motion papers shall be limited to memoranda, declarations or affidavits, and deposition excerpts. Exhibits limited to a total of _____ pages per party may be submitted in connection with a motion requiring review of evidentiary material. Unless otherwise ordered, motions shall be briefed and heard on a _____ day schedule. Moving papers: _____ days before hearing; opposition: _____ days before hearing; reply: _____ days before hearing. No other submission will be considered.

7. **Discovery.**

a. **Schedule.** Discovery shall be conducted according to the schedule set forth on Attachment B. All discovery on the issue of class certification shall be completed by _____.

b. **General Limitations.** All discovery requests and responses are subject to the requirements of Fed.R.Civ.P. 26(b)(1) and (g). Discovery shall not, without prior approval of the Court, be taken of, require or include _____. Any request for approval of such otherwise prohibited discovery shall indicate why the discovery is needed and the specific information or documents sought.

c. **Confidentiality Order.** See Attachment C.

d. **Documents.**

(1) **Preservation.** See Attachment C.

(2) **Numbering System.** Counsel shall develop and use a system for identifying by a unique number or symbol each document produced or referred to during the course of this litigation. All copies of the same document should ordinarily be assigned the same identification number.

(3) **Document Depositories.** See Attachment D.

(4) **Avoidance of Multiple Requests.** Counsel shall, to the extent possible, coordinate and consolidate their requests for production and examination of documents to eliminate duplicative requests from the same party.

e. **Interrogatories.** Counsel shall, to the extent possible, combine their interrogatories to any party into a

single set of questions. No question shall be asked that has already been answered in response to interrogatories filed by another party unless there is reason to believe that a different answer will be given. Each party is limited to _____ interrogatories. No contention type interrogatories may be propounded without prior court order upon a showing of good cause.

f. **Depositions.** See Attachment E.

g. **Experts.** All parties shall exchange lists of expert witnesses expected to be called by them not later than _____. No party shall, in the absence of good cause shown, be permitted to call as an expert witness at trial any person not appearing on such party's expert witness list.

h. **Special Agreements.** All parties shall be under a continuing duty to make prompt disclosure to the court (and, unless excused by the court for good cause shown, to other parties) of the existence and terms of all agreements and understandings, formal or informal, absolute or conditional, setting or limiting their rights or liabilities in this litigation. This obligation includes not only settlements, but also such matters as "loan receipt" and "Mary Carter" arrangements, and insurance, indemnification, contribution, and damage-sharing agreements.

i. **Discovery Previously Taken.** Discovery conducted prior to consolidation in any of the actions listed on Attachment A shall be deemed to have been taken in all of the consolidated actions.

j. **Early Mutual Disclosure.** Within 30 days of the date of this Order, all parties shall disclose to each other:

(1) the identification of all persons reasonably likely to have information that bears significantly on any of the claims and defenses in this litigation, including damages;

(2) a general description of documents and other matters within a party's possession, custody or control that are reasonably likely to bear significantly on the claims and defenses;

(3) computation of damages claimed; and

(4) the existence and contents of liability insurance policies.

8. **Trial.** Subject to further order of the Court, the parties are directed to be ready for trial on all issues by _____. Counsel are cautioned that the Court may

require a listing in advance of trial of the factual contentions each party expects to prove at the trial, identifying the witnesses and documents to be presented in support of each such contention, and may preclude the presentation of any contention, witness, or document not so identified.

9. **Next Conference.** The next pretrial conference is scheduled for _____. Thereafter, conferences shall be scheduled at ____ month intervals.

10. **Later Filed Cases.** The terms of this Order, including pretrial consolidation, shall apply automatically to actions later instituted in, removed to, or transferred to this Court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407) that involve related claims. Objections to such consolidation or other terms of this Order shall promptly be filed, with a copy served on counsel for plaintiffs and defendants.

DATED: _____, 199_.

_____
United States District Judge

[PROPOSED]
Attachment A
TO CASE MANAGEMENT ORDER NO. 1

LIST OF CASES CONSOLIDATED

[PROPOSED]
Attachment B
TO CASE MANAGEMENT ORDER NO. 1

DISCOVERY SCHEDULING ORDER

IT IS ORDERED:

1. Discovery shall be conducted according to the following schedule:

a. Document discovery by all parties shall resume immediately. Deposition discovery shall commence on _____ 1991, and all discovery (document and deposition) shall thereafter proceed according to the following schedule:

Discovery Initiated By	Duration
Plaintiffs	_____ through _____
Defendants	_____ through _____
Plaintiffs	_____ through _____
Defendants	_____ through _____
Plaintiffs	_____ through _____
Defendants	_____ through _____

b. **Experts.** Document and deposition discovery of expert witnesses for all parties shall commence on _____, 1991, and continue through _____, 1991.

2. Except for good cause shown,

a. relief from the above schedule shall not be granted, and all non-expert discovery shall be completed by _____, and all discovery shall be completed by _____;

b. non-expert discovery shall be limited to matters occurring after _____, and before _____;

c. no more than 30 interrogatories (including subparts) may be propounded to any party (exclusive of interrogatories seeking the identity and location of witnesses and documents) and interrogatories shall be limited to the identification of persons with relevant information, insurance information and other informational requests that can most easily be obtained through interrogatories.

3. The parties are expected to be prepared for trial on all issues by _____, 199_.

DATED: _____, 199_.

_____
United States District Judge

[PROPOSED]
Attachment C
TO CASE MANAGEMENT ORDER NO. 1

CONFIDENTIALITY AND RECORDS PRESERVATION ORDER

IT IS ORDERED:

The _____ Securities Litigation may involve the production of voluminous documents. Some of the documents and other discovery materials of each of the parties are confidential or privileged within the meaning of Rule 26 of the Federal Rules of Civil Procedure.

1. Confidential Documents Defined.

a. Confidential documents (hereafter the "Confidential Documents" or "Confidential Information") means those documents that are (i) identified by a party as responsive to a request for production of documents propounded by any other party and (ii) that are designated in accordance with ¶ 3 below as Confidential Documents.

b. As to those documents that are produced for examination for the purpose of allowing counsel to determine which of those documents he desires copied, those documents shall be subject to this Protective Order, whether or not designated, until copies of the documents are requested and supplied, and thereafter only if the copies supplied are designated as provided in ¶ 3 or otherwise designated as Confidential.

2. Contents of Confidential Documents.

a. Confidential Documents contain trade secrets, proprietary information, and other information that is confidential to the producing party or other party who designates documents pursuant to ¶ 3 ("designating party").

b. _____ contends that disclosure of Confidential Documents or Information to the competitors of a producing party could impair the producing party's ability to compete. Further, _____ contends that disclosure of sensitive investor information could subject _____ or other defendants to liability from investors. Good cause, therefore, exists to enter this Protective Order, which shall govern the disclosure and use of documents designated as "Confidential."

3. Designation.

a. Confidential Documents shall be so designated with a legend: "CONFIDENTIAL - SUBJECT TO PROTECTION PURSUANT TO

COURT ORDER," along with an identification of the designating party, to signify that it contains information believed to be subject to protection. Designation shall be made no later than ten days after the documents identified by the requesting party have been copies and Bates labeled. After a document is designated as confidential, the original copy and all subsequent copies shall be so marked. For purposes of this Protective Order, the term "document" means all written, recorded, or graphic material. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize or contain materials entitled to protection may be accorded status as a Confidential Document. However, to the extent feasible, such materials shall be prepared in a manner that the Confidential Information is bound separately from that not entitled to protection.

b. The parties may designate confidential only those documents that they in good faith believe are entitled to protection. A party may object to the designation of a document as "Confidential" and apply to the court for a ruling that the document should not be so treated. Until the court enters an order changing the designation, the document and the information contained therein shall be protected in accordance with this Protective Order.

4. Non-Disclosure of Confidential Documents.

Except with the prior written consent of the producing party or other person originally designating a document as a Confidential Document, or as hereinafter provided under this Protective Order, no Confidential Document may be disclosed to any person or entity.

5. Permissible Disclosures and Maintenance of Confidential Documents.

Notwithstanding ¶ 4 above, Confidential Documents may be disclosed only to the following Qualified persons:

a. Plaintiffs in the Litigation;

b. Defendants in the Litigation;

c. Counsel for the parties in the Litigation and their regular employees (secretarial, paralegal, clerical, and those regularly involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions);

d. Employees of third-party contractors performing one or more of the functions described in paragraph 5(c);

e. Present or former employees or directors of any party to the Litigation or other persons with prior actual knowledge of the documents or the Confidential Information contained therein, and their counsel;

f. Court personnel involved in this litigation (including court reporters and persons operating video recording equipment at depositions);

g. Consultants or experts, and their employees and subcontractors, retained solely for the purpose of assisting counsel in the Litigation; and

h. Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper.

Qualified Persons shall be required to keep Confidential Documents or Information separate and inaccessible to all persons other than those identified in this paragraph 5.

6. Procedure for Permissible Disclosures.

a. Each individual to whom disclosure is made pursuant to §§ 5(a), (d), (e), (g) or (h) above shall, prior to disclosure, sign an acknowledgement form, a sample of which is attached hereto as Exhibit "A," containing:

(1) a recital that the signatory has read, understands, and agrees to be bound by this Protective Order;

(2) a recital that the signatory understands that unauthorized disclosures of the Confidential Documents constitute contempt of Court; and

(3) a statement that the signatory consents to the exercise of personal jurisdiction of the transferee forum, the United States District Court for the _____.

A copy of the acknowledgement shall be retained by the party obtaining execution. If any Qualified Person refuses to sign an acknowledgement form, a party may apply to the Court for permission to show that person Confidential Documents, notwithstanding the provisions of paragraph 6 of this Protective Order. A Qualified Person who is deposed may be shown Confidential Documents at his deposition, whether or not he has signed an acknowledgement form.

b. Before disclosing a Confidential Document to any person who is a competitor (or an employee of a competitor) of a party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance written notice to the counsel who designated

such information as Confidential, stating the names, addresses, and business activity of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed by any party objecting to the proposed disclosure, disclosure is not permissible until the Court has denied such a motion. The Court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted.

7. Declassification.

A party (or aggrieved entity permitted by the Court to intervene for such purpose) may apply to the Court for a ruling that a document (or category of documents) designated as confidential is not entitled to such status and protection or for an order permitting disclosure beyond the terms of this Protective Order. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. The proponent of confidentiality has the burden of proof in demonstrating that there is good cause for the documents to have such status.

8. Confidential Information in Depositions.

a. Qualified Persons who are deposed shall not retain or copy portions of the transcript of their depositions that contain Confidential Information unless they sign the acknowledgement prescribed in paragraph 6.

b. Parties may, within 20 days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential Information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "CONFIDENTIAL - SUBJECT TO PROTECTION PURSUANT TO COURT ORDER." Until expiration of the 20-day period, the entire deposition will be treated as subject to protection against disclosure under this Protective Order. If no party timely designates Confidential Information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall, unless prohibited by the Court, be filed under seal apart from the portions and exhibits not so marked.

9. Subpoena by Other Courts or Agencies.

If another court or an administrative agency subpoenas or orders production of Confidential Documents that a party has obtained under the terms of this Protective Order, such party shall promptly notify the party or other person who

designated the document as confidential of the pendency of such subpoena or order.

10. Filing.

Confidential Documents need not be filed with the Court except when required by the Court. If filed, they shall be filed under seal, unless prohibited by the Court, and shall remain sealed while in Court so long as they retain their status as Confidential Documents.

11. Client Consultation.

Nothing in this Protective Order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Confidential Documents; provided, however, that on rendering such advice and otherwise communicating with such client, counsel shall not make any specific disclosure of any item so designated except pursuant to the procedures of paragraphs 5 and 6, as applicable.

12. Use.

Persons obtaining access to Confidential Documents under this Protective Order shall use the documents and information only for preparation and trial of the Litigation (including appeals and retrials).

13. Scope of Protective Order.

This Protective Order shall govern all documents and other discovery materials produced in response to any method of discovery employed by any party in the Litigation.

14. Non-Termination.

The provisions of this Protective Order shall not terminate at the conclusion of the Litigation. At the conclusion of this Litigation, Confidential Documents and all copies thereof (other than exhibits of record) shall, at the request of the producing party, be re-tendered to the producing party, person, or entity, or destroyed.

15. Preservation of Documents.

During the pendency of this Litigation, and for 120 days after the final order closing all cases, each of the parties herein and their respective officers, employees, agents, and all persons in active concert or participation with them are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or otherwise changing [scope of document retention order] in the actual or constructive care, custody or control of such person, wherever such document is physically located; or

from irrevocably changing the manner and sequence of the files in which the documents were originally compiled or kept.

16. Modification Permitted.

Nothing in this Protective Order shall prevent any party or other person, for good cause shown, from seeking modification of this Protective Order or from objecting to discovery that it believes to be otherwise improper.

17. Non-Exclusive Order.

Nothing in this Protective Order shall prevent the parties from entering into other confidentiality agreements or obtaining other protective orders by stipulation or otherwise. Nothing in this Protective Order shall preclude any party from seeking additional protection with respect to the Confidential Documents and Information.

18. Responsibility of Attorneys.

The attorneys of record are responsible for providing a copy of this protective Order to all persons entitled by paragraph 5 to Confidential Documents, and for employing reasonable measures, including those set forth in paragraph 6, to control, consistent with this protective Order, duplication of, access to, and distribution of copies of Confidential Documents. No one shall duplicate any Confidential Document except for the creation of working copies, exhibits to depositions, and, as necessary, a copy to be filed in Court under seal.

19. No Waiver.

a. Review of the Confidential Documents and Information by counsel, experts or consultants for the litigants in the Litigation shall not waive the confidentiality of the documents or objections to production.

b. The inadvertent, unintentional, or in camera disclosure of Confidential Documents and Information shall not, under any circumstances, be deemed a waiver, in whole or in part, of any party's claims of confidentiality.

20. Nothing contained in this Protective Order and no action taken pursuant to it, shall prejudice the right of any party to contest the alleged relevancy, admissibility'

or discoverability of the Confidential Documents and Information sought.

DATED: _____, 199__

_____
United States District Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:	)	Civil No. _____
	)	
	)	
_____	)	
LITIGATION	)	
_____	)	

ACKNOWLEDGEMENT OF PROTECTIVE ORDER
AND AGREEMENT TO BE BOUND

_____ states as follows:

1. That he resides at _____ in the City and County of _____, and State of _____.

2. That he has read and understands the Protective Order dated _____, 199_ entered in the _____ Litigation.

3. That he is either (a) engaged as a consultant or expert or (b) has been interviewed by _____ on behalf of _____ in the preparation and conduct of one or more of the cases consolidated under the Transfer Order in In re _____ Litigation.

4. That he agrees to comply with and be bound by the provisions of the Protective Order.

5. That counsel who has retained or consulted with him has explained to him the terms thereof.

6. That he will not divulge to persons other than those specifically authorized by paragraph 5 of the Protective Order, and will not copy or use, except solely for the purposes of the Litigation, any Confidential Document or Information as defined by the Protective Order, except as provided therein.

_____
(name of individual to whom disclosure will be made)

[PROPOSED]
Attachment D
TO CASE MANAGEMENT ORDER NO. 1

ORDER FOR ESTABLISHMENT OF DOCUMENT DEPOSITORIES

IT IS ORDERED:

1. **Establishment of Depositories.** Document depositories shall be established in _____ [city], _____ [state] at such locations as the parties may agree upon. In the absence of agreement, the Court upon motion shall designate such locations. Documents produced by plaintiffs pursuant to formal or informal request shall be placed in a plaintiffs' depository maintained at the expense of plaintiffs; those produced by defendants pursuant to formal or informal request shall be placed in a defendants' depository maintained at the expense of defendants. Each depository will contain (or have available) a copying machine with an appropriate mechanism for separately counting the copies that are made by each party.

2. **Filing System.** The filing party shall place the documents in the depository in sequential order according to the document numbers, and the documents shall be organized in groups in accordance with the document identification prefixes. Documents without identification numbers shall be organized in an orderly and logical fashion. Existing English translations of all foreign-language documents shall be filed with the documents.

3. **Access; Copying; Log.** Counsel appearing for any party in this litigation and the staffs of their respective law firms working on these cases shall have reasonable access during business hours to each party's documents in any such depository and may copy or obtain copies at the inspecting parties' expense. A log will be kept of all persons who enter and leave the depository, and only duplicate copies of documents may be removed from the depository except by leave of Court. Access to, and copying of, confidential documents is subject to the limitations and requirements of the order protecting against unauthorized disclosure of such documents.

4. **Subsequent Filings.** After the initial deposit of documents in the depository, notice shall be given to all counsel of all subsequent deposits.

DATED: _____, 199__

_____
United States District Judge

[PROPOSED]
Attachment E
TO CASE MANAGEMENT ORDER NO. 1

DEPOSITION GUIDELINES

IT IS ORDERED that depositions be conducted in accordance with the following rules:

1. **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and deponents.

2. **Stipulations.** Unless contrary to an order of the Court, the parties (and, when appropriate, a non-party witness) may stipulate in any suitable writing to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for the extension of discovery cut-offs set by the Court are not, however, valid until approved by the Court.

3. **Scheduling.** Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places. That some counsel may be unavailable shall not, however, in view of the number of attorneys involved in this litigation, be grounds for postponing a deposition if another attorney from the same firm or who represents a party with similar interests is able to attend.

4. **Attendance.** Unless otherwise ordered under Fed.R.Civ.P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purpose of the deposition, the parties or the representative of a party, counsel for the deponent, and potential witnesses. While a deponent is being examined about any designated confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

5. **Conduct.**

a. **Examination.** Each side should ordinarily designate one attorney to conduct the principal examination of the deponent, and examination by other attorneys should be limited to matters not previously covered. Counsel for each side shall cooperate with each other in the apportionment of time, such that the time limits set in this Court's orders with respect to length of individual depositions will be complied with.

b. **Objections.** The only objections that should be raised at the deposition are those involved in a privilege

against disclosure or some matter that may be remedied if presented at the time, such as to the form of the question or the responsiveness of the answer, or objections to the scope of discovery based upon orders of this Court. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to (or otherwise coach) the deponent. Argumentative interruptions will not be permitted.

c. **Directions Not to Answer.** Directions to the deponent not to answer are improper except on the ground of privilege, violation of an order of this Court governing the permissible scope of discovery, or to enable a party or deponent to present a motion to the Court for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the party or the deponent. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

d. **Private Consultation.** Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

6. **Documents.**

a. **Production of Documents.** Witnesses subpoenaed to produce numerous documents should ordinarily be served at least 30 days before the scheduled deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the interrogation commences.

b. **Confidentiality Order.** A copy of the Confidentiality Order shall be provided to the deponent before the deposition commences if the deponent is to produce or may be asked about documents which may contain confidential information.

c. **Copies.** Extra copies of documents about which counsel expect to examine the deponent should ordinarily be provided to opposing counsel and the deponent. Deponents should be shown a document before being examined about it except when counsel seek to impeach or test the deponent's recollection.

7. **Depositions of Witnesses Who Have No Knowledge of the Facts.** An officer, director, or managing agent of a corporation or governmental official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party a reasonable time before the date noticed an affidavit so stating and identifying a person within the corporation or government entity believed to have such knowledge. Notwithstanding such affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.

8. **Expert Witnesses.** Leave is granted to depose expert witnesses in addition to or in lieu of discovery through interrogatories. Objection to such depositions may be made by motion.

9. **Tape Recorded Depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by tape recording in lieu of stenographic recording (and identifying the person before whom the deposition will be taken), a party shall be deemed to have moved for such an order under Fed.R.Civ.p. 30(b)(4). Unless an objection is filed and served within 15 days after such notice is received, the Court shall be deemed to have granted the motion pursuant to the following terms and conditions:

a. **Transcript; Filing.** Subject to the provisions of paragraph 12, the party noticing the deposition shall be responsible for preparing a transcript of the tape recording and for filing within applicable time limits this transcript together with the original tape.

b. **Rights of Other Parties.** Other parties may at their own expense arrange for a stenographic recording of the deposition, may obtain a copy of the tape and transcript upon payment of a pro-rata share of the noticing party's actual costs, and may prepare and file their own version of the transcript of the tape recording.

10. **Videotaped Depositions.** By indicating in its notice of a deposition that it wishes to record the deposition by videotape (and identifying the proposed videotape operator), a party shall be deemed to have moved for such an order under Fed.R.Civ.P. 30(b)(4). Unless an objection is filed and served within 15 days after such notice is received, the Court shall be deemed to have granted the motion pursuant to the following terms and conditions:

a. **Stenographic Recording.** The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall on

camera administer oath or affirmation to the deponents. The written transcript by the court reporter shall constitute the official record of the transcription for purposes of Fed.R.Civ.P. 30(e) (submission to witness) and 30(f) (filing exhibits).

b. **Cost.** The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape and the stenographic transcript. Requests for taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

c. **Video Operator.** The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed.R.Civ.P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

d. **Attendance.** Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped.

e. **Standards.** The depositions will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.

f. **Interruptions.** Videotape recording will be suspended during all "off the record" discussions.

g. **Examination; Exhibits; Re-reading.** The provisions of paragraphs 5 and 6 of this Order apply to videotaped depositions. Re-reading of questions or answers, when needed, will be done on camera by the stenographic court reporter.

h. **Index.** The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter

numbers, that identifies the positions of the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.

i. **Filing.** The operator shall preserve custody of the original videotape in its original condition until further order of the Court. No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the Court.

j. **Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the Court.

k. **Use at Trial; Purged Tapes.** A party desiring to offer a videotape deposition at trial shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at trial, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), may be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least 30 days before it is used, and the unedited original of the tape shall also be available at the trial.

11. **Telephonic Depositions.** By indicating in its notice of a deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed.R.Civ.P. 30(b)(7). Unless an objection is filed and served within 15 days after such notice is received, the Court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not by word, sign, or otherwise coach or suggest answers to the deponent.

12. **Waiver of Transcription and Filing.** The parties and deponents are authorized and encouraged to waive transcription and filing of depositions that prove to be of little or no usefulness in the litigation or to agree to defer transcription and filing until the need for using the deposition arises.

13. **Use.** Depositions may, under the conditions prescribed in Fed.R.Civ.P. 32(a)(1)-(4) or as otherwise

permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this Court as part of this litigation)--

a. who was present or represented at the deposition,

b. who, within 30 days after the filing of the deposition (or, if later, within 60 days after becoming a party in this Court in any action which is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.

14. **Rulings.**

a. **Immediate Presentation.** Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition may be presented by telephone to the Court. If the judge is not available during the period while the deposition is being conducted, the dispute may be addressed to a Magistrate Judge of this Court. The presentation of the issue and the Court's ruling will be recorded as part of the deposition.

b. **Extraterritorial Jurisdiction.** The undersigned will exercise by telephone the authority granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken.

DATED: _____, 199__

_____
United States District Judge