Report of the Civil Justice Reform Act Advisory Committee of the United States District Court for the Western District of Virginia

July 30, 1993

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Chapter I: Summary of Conclusions

The Committee's major conclusions explained in the body of the report may be summarized as follows.

- The District is characterized by professionalism and colleagiality which should be fostered and preserved.

- The District should strive to preserve flexibility and simplicity in its procedures.

- The current organization of the District in seven divisions is warranted and should continue.

- Increased judicial involvement, particularly the setting of an early and firm trial date, will result in the reduction of unneeded cost and delay in the District.

- Magistrate Judges should be charged with ongoing oversight of civil cases in their pretrial phase.

- Local rules need not be adopted, the Committee's recommendations can be implemented through the Court's plan and through a form of pretrial order.[1]

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[1] The Committee's proposed form of order is found at Appendix A.

- Some restrictions on discovery should be imposed, subject to alteration to fit the needs of a particular case.

- Tenative rulings on dispositive motions should be promptly made.

- The current procedures for handling social security and pro se prisoner cases should continue and adequate resources should be devoted to those procedures.

- Ongoing attention to the criminal docket, to alternative dispute resolution and to the physical and human resources of the Western District is needed.

Chapter II: Description of the Western District of Virginia

A. General Description of the region.

The Western District occupies the western portion of the Commonwealth, from the Piedmont to the border.[2] 52 counties and 20 cities are contained within the district. The district is geographically large, encompassing 24,716 square miles. The size of the District is illustrated by the driving distances between various locations. For example, it is 235 miles from Big Stone Gap to Roanoke and 220 miles from Roanoke to Winchester.

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[2] A map of the district is included as Appendix B.

The district's total population is 1,949,200. The population is dispersed among several large cities - Roanoke (96,397), Lynchburg (66,049), Danville (53,056), Charlottesville (40,341), Harrisonburg (30,707), Winchester (21,947), numerous small cities and towns and large rural areas.

In the 1980's, most of the Western District had a stable population. However, the southwestern portion of the District saw its population decline and the northern portion of the District experienced substantial population growth. Should this trend continue, the Charlottesville and Harrisonburg Divisions may well see a disproportionate increase in criminal and civil filings relative to other divisions of the Western District.

The economy of the Western District is varied. Services, particularly higher education and medical care, represent a major sector. Both public and private employers are represented in the service sector. Manufacturing is a major economic force in much of the District. Although a wide range of manufacturing is found here, two major types of manufacturing are particularly prevalent -- 1) wood and wood products, including lumber, furniture, paper goods and printing and 2)textiles and apparel. Coal mining is important in the southwestern portion of the District. Transportation, including railroad transport, is an important factor in the Roanoke area and in the southwestern portion of the

District. Agriculture remains an important economic force in much of the District.

5511 state prisoners are housed in 17 facilities in the Western District. Currently, there is no federal prison facility in the Western District. One is planned for Lee County, in the Big Stone Gap division, within the next few years.

The Western District includes 814,090 acres of federal land, the bulk of which is federal forest located in the Blue Ridge and Appalachian Mountains.

B. Description of the Court, its Personnel, Facilities and Equipment.

1. Judicial Officers.

The Western District has an unusual structure in that it has seven divisions and four authorized judgeships. The district's divisions are Harrisonburg, Charlottesville, Lynchburg, Danville, Roanoke, Abingdon and Big Stone Gap.

Currently, all of the Western Districts authorized judgeships are filled. In addition to its four active judges, the district is served by one senior judge and three magistrate judges. The District is fortunate in being served by an experienced bench,

well-known to each other and to the local bar. Judge Turk was appointed to the bench in 1972 and served as Chief Judge from 1973 to 1993. Judge Williams and Magistrate Judge Conrad were appointed in 1976, Judge Michael was appointed in 1980, and Magistrate Judge Crigler was appointed in 1981. Judge Kiser, who became Chief Judge of the District in May of 1993, was appointed in 1982. Most recently, in 1990, Judge Wilson and Magistrate Judge Kinser were appointed. The District has also been served by an experienced Clerk of Court, Joyce Witt, who has served in that position since 1972.

Currently, division assignments are as follows:

Judge Michael is resident in the Charlottesville division.

Judge Turk is resident in the Roanoke division.

Judge Kiser is resident in the Danville division.

Judge Wilson is resident in the Abingdon division.

Senior Judge Williams is resident in the Abingdon division.

Magistrate Judge Conrad is resident in the Roanoke division.

Magistrate Judge Kinser is resident in the Abingdon division.

Magistrate Judge Crigler is resident in the Charlottesville division.

Currently, civil docket assignments are as follows:

Civil cases docketed in Charlottesville and Harrisonburg are assigned to Judge Michael.

Civil cases docketed in Roanoke are assigned 1/3 to Judge Turk, 1/3 to Judge Wilson, and 1/3 to Judge Kiser.

Civil cases docketed in Abingdon and Big Stone Gap are assigned 1/3 to Judge Turk, 1/3 to Judge Wilson and 1/3 to Judge Williams.

Civil cases docketed in Lynchburg are assigned 1/2 to Judge Turk and 1/2 to Judge Kiser.

Civil cases docketed in Danville are assigned to Judge Kiser.

2. Support Personnel

Each judge is served by two law clerks and a secretary. Each magistrate judge is served by a law clerk and a secretary. In addition, the divisions are staffed by the following personnel:

Division	Clerk's Staff	Court Reporters
Harrisonburg	2	0
Charlottesville	3	1
Roanoke	21	2
Lynchburg	2	0
Danville	2	0
Abingdon	4	1
Big Stone Gap	2	0

Currently, the District is also served by two pro se law clerks who, under the supervision of Magistrate Judge Conrad, assist in handling pro se petitions. Although the growth of pro se petitions has been such that a third pro se law clerk position may soon be needed to maintain service at current levels, budgetary constraints are such that the District may be reduced to one pro se law clerk position.[3]

3. Equipment and Physical Facilities

Four of the divisions (Big Stone Gap, Danville, Harrisonburg and Lynchburg) have a single courtroom each. Abingdon, Charlottesville and Roanoke divisions each have three courtrooms --

[3] In Chapter IV. A, the handling of pro se petitions is addressed at greater length.

one large, one small and one Magistrate Judge's courtroom. Although the total number of courtrooms in the District is thus relatively large, courtroom scheduling difficulties do arise in some of the divisions -- Roanoke, Big Stone Gap and Harrisonburg -- which are served by more than one judicial officer.

The District is currently engaged in implementing an electronic docketing system. The system can be accessed through computer terminals in each judge's chambers. In the future, public access to the electronic docket will be available. The district currently has an electronic court reporting system which is operated by a qualified technician and is used to supplement its court reporting staff.

Chapter III: Statistical Analysis of the Western District Docket

A. New Filings.

1. Total Filings. Total filings in the district decreased from a recent high of 2,209[4] in 1988 to a low of 1,713 in 1990 but increased to 2,036 in 1992. There was a substantial

[4] The numbers used in this report may not be identical with other reports for the same years because of the timing of reports and the adjustments made in reports from year to year. The statistics are generally taken from the September, 1992 report of the Administrative Office of the United States Courts, which is found in Appendix C.

increase in the number of criminal cases filed in 1992. There was an increase of 8.4% in total filings from 1991 to 1992.

2. Civil Case Filings. New filings decreased significantly from a high in 1984 of 3,011 cases to a low of 1,603 cases in 1991. There was a modest increase to 1,635 new filings in 1992. In 1984, two-thirds of the civil filings consisted of prisoner cases, social security cases and student loan cases. Those same three component areas comprised 57% of the 1992 filings. New civil filings in those three component areas dropped by 1,097 from 1984 to 1992 while overall civil filings during the same period dropped by 1,376. The increase of 32 civil filings from 1991 to 1992 is more than explained by the new filings in those three component areas: prisoner filings from 1991 to 1992 increased by 107, student loan cases increased from 22 to 65 while social security cases dropped by 5. The net increase of 150 new filings in those component areas from 1991 to 1992 was substantially more than the total increase in new civil filings of 32. In terms of new filings in 1992, the Western District ranked 4th of the 9 districts in the Fourth Circuit.

B. Terminations and Pending Cases.

In 1992, 2,045 cases were terminated, a drop of almost 200 terminations from 1991 when 2,220 cases were terminated. In civil case terminations, the number of cases terminated increased from

1,677 in 1991 (to June 30) to 1,970 cases in 1992, an increase of 17.5% in terminations. On September 30, 1992, there were 1,599 cases pending in the district, a slight decrease from a 1991 level of 1,608 and a substantial increase from the 1990 level of 1,937. The decrease in the number of pending civil cases was even more dramatic: From a June 30, 1991 level of pending civil cases of 1,705, the number on June 30, 1992 was 1,373, a drop of almost 20%.

C. Actions Per Judge.

The district was at full judicial strength in 1991 and 1992 and had the benefit of an active senior judge. At first look, the case load per judge appears relatively heavy. As to new filings, 470 cases (criminal and civil) per judge were filed in 1991, the 2nd highest number in the Fourth Circuit and in 1992 the number increased to 509 per judge, first in the Fourth Circuit. The number of pending cases per judge in 1992 was 400 and substantially lower than a high of 504 pending cases per judge in 1988. The number of pending cases per judge in the Western District is 3rd in the Fourth Circuit. As far as trials completed in 1992, the number dropped to 42 from a 1991 level of 63.

It should be observed, however, that the caseload per judge has been higher. During the years 1986 to 1989, the number of cases for each judge averaged over 500. It is hard to be certain about the meaning of these statistics. Clearly, they are affected

by the current high number of prisoner cases which are handled principally by a magistrate judge. These cases require relatively little district judge time. Similarly, from 1986 to 1989, a great number of student loan cases "padded" the statistics and they required very little district judge time.

The mix of cases has also changed. From a combination of 515 civil filings and 37 criminal felony filings per judge in 1988, the mix had changed in 1992 to 437 civil filings and 72 criminal felony filings per judge. The trend is clearly in the direction of more criminal cases.

Of concern must be the time taken to dispose of cases. From filing to disposition, in 1992, the median time was 7.0 months. While this was a significant decrease from the several years immediately preceding 1992 (in 1990 the median time was 8.2 months), it is up substantially from 5.1 months in 1987 and ranks the Western District 6th in the Fourth Circuit and 71st in the United States. The median time from the filing to the disposition of civil cases improved remarkably from 1991 to 1992. In 1992, the average time for the disposition of civil cases was 10 months; in 1991, it was 15 months. Still, this ranked the district only 8th best in the Fourth circuit and 56th in the United States.

The district does not appear to have an inappropriate number of civil cases over three years old. From a high of 104 such cases in 1990, the district now shows only 41 cases of that age.

On the basis of judicial interviews and statistics, it is apparent that some district judges are able to handle and dispose of substantially more cases than others. It is also significant that a high number of cases (particular prisoner cases) are handled by a magistrate judge. There does not appear to be an adequate justification for the current delays in the disposition of cases. Clearly, the number and priority of criminal cases make it increasingly difficult to handle civil cases more expeditiously. Still, effective case management should significantly reduce the length of time for disposing of civil cases.

D. Pro Se/Prisoner Cases.

The district appears to have achieved an exemplary procedure for handling pro se/prisoner cases. In spite of the significant number of prisoner cases filed in the district (711 in 1992) and the substantial increase in those cases (up from 439 in 1990), the district seems to handle those cases in an expeditious way. In the final quarter of 1992, only 23 prisoner cases had been pending for more than 12 months.

Chapter IV - Specialized Aspects of the Western District Docket.

Two categories of civil cases account for slightly over one-half of the civil cases filed in the Western District. They are social security cases and prisoner petitions.[5] Both categories of cases receive specialized handling in the District. The Committee believes that the procedures developed to handle these cases are working well and should be continued. The current procedures are summarized here. The Committee's later recommendations for change (see Chapter VI below) do not apply to these cases.

A. Prisoner Petitions.

Currently, all prisoner petitions, wherever filed, are referred to Magistrate Judge Conrad in the Roanoke Division for oversight. He is assisted in his work by two pro se law clerks. Prisoner petitions are also docketed in Roanoke and are handled by designated deputy clerks. (Appendix D contains a sample pro se filing order with attachments.)

In approximately 5% of these cases, a trial or hearing is warranted and the matter is heard in the division in which it originated. The vast majority of cases are disposed of in the Roanoke division through sua sponte dismissal or on dispositive

[5] 1748 civil cases were filed through the twelve month period ending 9/30/92. Of these, 232 were social security cases and 734 were prisoner petitions for a total of 966, or 55% of the civil docket. This combined percentage is the highest for any district court in the nation. The Western District of Virginia ranks 5th in the prisoner petitions per judge.

motion. Some of these dispositions, by consent of the parties, are made directly by the Magistrate Judge. In other cases, the Magistrate Judge prepares a report and recommendation for action by a District Court Judge. Finally, some pro se petitions are identified by the pro se law clerks as appropriate for direct disposition by a District Court Judge. (Appendix E contains the 1992 year-end statistical report on pro se/prisoner cases.)

The Committee is of the view that the centralized handling of prisoner cases in Roanoke, which began in 1988, has been successful. The increasing volume of prisoner petitions has been efficiently handled. The time required for disposition of these cases has been reduced. Those cases warranting judicial scrutiny are identified and heard. We strongly recommend that the current procedures be continued.

The current procedures necessitate at least two pro se law clerk positions. If the docket continues to grow, as we believe it will, a third position will be needed to effectively handle the caseload. The Committee recommends that every effort be made to secure funding for needed pro se law clerk positions. We view pro se law clerks as valuable staff members whose work relieves pressure on the time of Judges and Magistrate Judges.

The Committee discussed what procedures should be followed in the event that it proves impossible to fund the needed pro se law

clerk positions. In that event, our alternative recommendation is that pro se petitions continue to be handled initially in Roanoke by the designated deputy clerks and the remaining pro se law clerk, acting under Magistrate Judge Conrad's supervision. Initial screening, sua sponte dismissals, filing and non-dispositive motions should continue to be centrally handled. Cases would then be returned to the divisions in which they originated for the handling of dispositive motions. This system would preserve the value of initial centralization, in particular the pro se law clerk and deputy clerks will be able to continue early, consistent processing of these cases. It is a less desirable alternative than the current procedure, because it imposes increased costs and creates an increased risk of delay and inconsistency in the treatment of dispositive motions. Experience before 1988 suggests that, in the absence of experienced handling by pro se law clerks, a greater percentage of dispositive motions will be set for hearing before Magistrate Judges. The Committee therefore urges that this alternative be adopted only as a last resort.

The Committee wishes to comment on two other areas of concern. First, as we have noted, the prisoner petition docket has grown rapidly with the increase in the Virginia prison population, and continues to increase. The expected addition of a federal prison in the District will lead to further expansion. In the Committee's view, it is important that no judicial officer be limited to handling only prisoner cases. The growth of the pro se docket may,

therefore, ultimately necessitate the division of oversight responsibilities among the Magistrate Judges.

Second, we are concerned with the availability of counsel to represent pro se litigants with potentially meritorious claims. The limited availability of fee awards in these cases had made it difficult to secure counsel. We understand that a list of available attorneys has been started and we recommend that the bench and bar work to expand the pool. We also urge that, in setting fees, the bench recognize the significant contribution of those attorneys who make themselves available to handle the cases.

B. Social Security Cases.

This category of cases involves claimant challenges to agency action denying social security benefits. Social security cases are handled by Magistrate Judges to the extent possible. The Committee believes that social security cases are handled well in this District. The United States Attorney's Office is cooperative and the Magistrate Judges knowledgeable, well-prepared and well-organized. We recommend that the current procedure continue.

Under current procedure, Magistrate Judges are involved in social security cases through one of three mechanisms: a) party consent to referral of the case to a Magistrate Judge for disposition; b) by reference for report and recommendation on

dispositive motions; and, c) preparation of a preliminary draft opinion for a District Judge on a dispositive motion. In social security cases, the government, by standing order, is given 120 days to answer in social security cases. Experience has shown that this time is needed to prepare and file the agency record. The standing order obviates the need to respond to repeated requests for extension of time to answer. Thereafter, cases are set for argument before Magistrate Judges without the need for a party request. The United States Attorney ordinarily briefs and argues only cases in which his participation is invited by the Magistrate Judge. Participation is invited where the record suggests the agency's action might be reversed. In most cases, the Magistrate Judge hears argument in chambers from the claimant and his counsel and the case is then disposed of.

Chapter V - Description of the Committee and a Summary of its Research Findings.

A. Description of the Committee and its Work.

The Committee was appointed by Judge Turk during his tenure as Chief Judge and did most of its work on this report during that period. The Committee has thirteen voting members and four ex officio members. It is chaired by Phillip C. Stone of Wharton, Aldizer and Weaver. The majority of Committee members are practicing lawyers from different geographic areas and with a

variety of practices. The United States Attorney, Montgomery Tucker, is a voting member. The Committee also includes a member of the state judiciary, a representative of the news media and an alternative dispute resolution specialist. The Clerk of the Court, Joyce Witt, the Chief Probation Officer, Wray Ware, Magistrate Judge Conrad and Judge Turk are ex officio members of the Committee. Professor Joan Shaughnessy, a member of the Committee, serves as reporter. (Biographical sketches of the Committee members are attached as Appendix F.)

The Committee met for the first time on September 11, 1991 and has met in day-long sessions approximately once every two or three months since then. A Steering Committee, consisting of the Chairman, the Reporter, and the Clerk of the Court prepared information and agendas for the full Committee meetings. The Committee, at its meetings, heard a variety of presentations on aspects of its work from various Committee members and has discussed at length the current state of civil litigation in the District. The Committee, from the outset, worked as a Committee of the whole. No subcommittees were created.

The Committee reviewed an array of statistical information, existing court orders and reports, background information and the work of other CJRA Committees. The Committee Chairman and others attended national meetings on the CJRA organized by the Judicial Conference. The Committee also conducted several data-gathering

activities. The Committee conducted a written survey of Western District practitioners, conducted interviews with the District's judicial officers, reviewed eighty cases which had been unusually delayed and held two public hearings. The method and results of each activity will be summarized briefly in this Chapter. Later, in Chapter VI, Committee Recommendations, references are made to particular results.

B. The Attorney Survey.

In March, 1992, the Committee mailed a survey to all lawyers admitted to practice in the Western District. (A copy of the survey instrument is attached in Appendix G.) A total of 845 surveys were mailed. 440 responses were received. Many of the questions were answered by only a portion of the respondents. (The survey results are found in Appendices H and I.) In general, the survey results revealed that the bar is satisfied with handling of civil litigation in the District. To the question, "have you encountered unreasonable delays," 70 attorneys answered "yes" and 350 answered "no". Similarly, the question, "have you found [civil litigation in the Western District] to be unnecessarily costly," elicited 94 positive responses and 346 negative responses. A majority of respondents was satisfied with the District's current policy of conducting business without written local rules. 169 answers favored the adoption of written local rules, 271 opposed adoption.

The most common causes of unreasonable delay and unnecessary cost, according to respondents, are tactics of counsel. 437 respondents identified them as a moderate or substantial contribution. By contrast, only 55 respondents identified ineffective case management by judges as a substantial or moderate cause.

The comments of respondents echo the surveys statistical results. The most frequent comment was "if it ain't broke, don't fix it." Several comments noted the collegiality of bench and bar. As one respondent observed, "[T]he lawyers and judges have a good working relationship to effectively get cases through the system." Concern was expressed in the comments at the possibility of counterproductive change. "Imposition of additional formal, 'trendy' devices will only make federal practice more complex for attorneys and ultimately more costly for litigants."

There were, nevertheless, a number of comments in the survey suggesting the desirability of some judicial supervision of litigation, particularly of discovery, and of setting basic deadlines. Conduct of discovery appeared to be the most common source of complaints about lawyers' contributions to cost and delay. Two common comments suggested areas for possible attention by the bench. First, respondents frequently noted the critical importance of prompt rulings on dispositive motions. Second,

several comments noted the high cost associated with last-minute changes in scheduled trial dates.

Finally, a noteworthy result of the survey was the relative dearth of experience with alternative dispute resolution among the respondents. 329 reported slight or no experience with arbitration compared with 71 reporting substantial or moderate experience. Mediation was similarly little known. Those lawyers who did have experience with alternative dispute resolution reported predominately favorable opinions of the process.

C. Judicial Questionnaires and Interviews

The Committee, during the summer of 1992, sought information concerning the policies, practices and opinions of all judicial officers in the District. This was a two-step process, involving written questionnaires and interviews. In advance of the interviews, an outline of questions to be explored at the interview was supplied to each judicial officer. Interviews were conducted with Judges Turk, Michael, Kiser and Wilson and with Magistrate Judges Crigler and Kinser. Scheduling difficulties led to the Committee's receiving Judge Williams' views in writing. Magistrate Judge Conrad sat with the Committee throughout its deliberations, so no separate interview of him was conducted. Most interviews lasted about two hours. The reporter attended all interviews. She was accompanied by one or two other Committee members at each

interview. (Attached as Appendix J are copies of the judicial questionnaire and an outline of suggested interview questions.)

This section will summarize some of the themes and concerns which emerged from the interviews. Later, in the recommendations section, reference is made to some of the current judicial policies and practices which have been successfully used in the District.

The interviews revealed that the judges of the District recognize and value the collegiality which characterizes bench/bar relations here. Judges find most lawyers well-prepared and professional. Only a small percentage of cases raise problems of abuse by lawyers, in the judges' view. Accordingly, several judges commented that sanctions were used sparingly in this District. In general, the judges expressed a willingness to be involved in pretrial activity if called upon by counsel, but, by and large, the judges reported that they did not engage in on-going supervision as a matter of course. All of the judges noted the importance of keeping the court's docket moving while at the same time avoiding unnecessary rigidity. Thus, the interviews did not reveal a consensus for any particular rules limiting the extent of discovery or motion practice.

The judges differ in their approach to managing the length of time a case remains on the docket. Some of the judges leave the matter to counsel unless asked to intervene. Others establish

general time limits (trial dates and discovery cut-off dates) early in the litigation.

Several of the judges commented on alternative dispute resolution. None had wide experience with it. In general, the judges expressed the view that ADR could be extremely useful in some cases, when the parties were interested in its use, but that it should not be imposed upon unwilling litigants.

In the interviews, the Committee explored with the judges the current organization of the District. The judges recognized the logistical costs of operating multiple divisions, but were of the view that the costs were outweighed by the benefits of making access to the federal court possible for persons in remote areas of the District. The judges were generally satisfied with the current caseload allocation. They stressed the willingness of their judicial colleagues to assist one another in overcoming scheduling difficulties. A cause of future concern is the growing docket, particularly the criminal docket, in the northern part of the District. Several judges also noted the difficulty of scheduling trials in some divisions due to limited courtroom space.

D. Analysis of Problem Cases

The Clerk of Court identified for the Committee eighty recent cases in which the amount of litigation activity and/or the length

of time the case had been pending suggested that the case might exemplify unreasonable delay and unnecessary cost. Twenty cases were selected from the Roanoke Division and ten cases each from the other six divisions. With the assistance of deputy clerks, members of the Committee sought to identify causes of cost and delay in each of the sample cases. Where appropriate, Committee members examined the docket and case file and communicated with attorneys and parties.

Members of the Committee found that one common pattern in the problem cases studied was that none of the attorneys involved chose to take the initiative to move the case forward. In such cases, eventual judicial intervention led to relatively quick resolution. The Committee members found it difficult to determine whether the delays brought on by lawyer inaction were in the best interest of the parties. In some cases, cost and delay seemed to be caused by one side of the litigation. In such cases, attorneys engaged in excessive discovery or sought lengthy continuances which might have been prevented by more stringent oversight. Another cause of cost and delay sometimes noted in the case study was delay in issuing rulings either on dispositive motions or following bench trials. Occasionally, the major cause of delay appeared to be the time required to prepare a transcript for appeal to the Fourth Circuit. Lastly, upon examination, several of the cases appeared to be substantively complex and demanding, and the time and activity shown on the docket not unreasonable.

Lawyers from outside the District expressed more concern about the handling of the cases under review than did local lawyers. Some outside lawyers found the District's informality disconcerting. They expected more active judicial involvement in moving cases and expressed the view that such oversight would have reduced the cost of litigation for their clients.

E. Public Hearings

In the Fall of 1992, the Committee conducted two public hearings. The first was held in Roanoke on September 14, 1992 and the second in St. Paul, Virginia on October 20, 1992. Both hearings were publicized in the media. In addition, the Committee wrote to approximately 260 organizations identified as having an interest in the federal courts, inviting participation at the Roanoke public hearing. The invited organizations included bar associations, legal services organizations, civil rights groups, labor unions, medical societies, Chambers of Commerce, school boards, community services boards, environmental groups, veterans organizations and prisoner advocacy groups. (Attached as Appendix K are letters, press releases and mailing lists pertaining to the Roanoke public hearing.)

Both public hearings were lightly attended and neither resulted in any severe criticism of the Court. Among the speakers at the Roanoke public hearing were Bill Rakes, President of the

Virginia State Bar, a representative of the Roanoke NAACP and a handful of members of the Bar. In general, the speakers praised the quality of the bench and were satisfied with the workings of the Court. Some concerns and suggestions were voiced. For example, the Committee's attention was drawn to the Virginia state courts' recent development of ADR programs. It was suggested that the federal courts could draw upon the experience being developed at the state court level. Concern was also expressed at the hearing about the availability of counsel to undertake civil rights cases. It was suggested that the fee award structure was not adequate to secure representation.

The public hearing at St. Paul also elicited general satisfaction with the handling of civil cases in the District. (A report on the St. Paul hearing is annexed as Appendix L.) The particular concern most forcefully expressed at the St. Paul hearing was the desire that the Big Stone Gap division remain open and operational.

Chapter VI - Committee Recommendations

A. The Committee's Approach to Civil Justice Reform

In evaluating procedures to be recommended for the handling of civil cases, the Committee necessarily developed in its thinking a model of an efficient judge in terms of docket management. It is

the Committee's view that efficiency in the management of cases enhances the likelihood of fairness and justice by making the justice system more predictable, less costly and the resolution of cases more expeditious.

The Committee recognizes and wishes to emphasize here that a good judge must be much more than an efficient judge. We have, given our statutory charge, focused on efficiency as it impacts cost and delay in litigation. We recognize and reaffirm the other greater attributes of a good judge -- attributes valued by all the judicial officers of the District and by this Committee. Those attributes -- of fairness, thoughtfulness, intelligence, wisdom, and impartiality and courtesy -- are of utmost importance. They are all necessary to the first goal of procedure -- a just outcome. Our profile of an efficient judge is not meant to denigrate or overlook these more fundamental virtues. Rather it reflects our response to Congress's more limited charge to us.

The efficient judge is one who:

1. Establishes procedures to accommodate and promote reasonably prompt handling of civil cases by an appropriate expenditure of the time, energy and resources of the community's court system, the litigants, witnesses and others related to the judicial system.

2. Is committed to efficiency as a value and goal. A judge should not only be philosophically and personally committed to the efficient allocation of resources and the expeditious handling of cases, but should take advantage of educational opportunities to learn skills and techniques to develop efficiency.

3. Employs procedures which are calculated to produce efficiency. The procedures employed should be clearly communicated and consistently applied within the district, except as variations in cases may dictate.

4. Takes an active role in case management. Many cases can be adequately dealt with by the application of clearly stated procedures, such as those in the pretrial and standing orders. Others will require some unique and individual handling. Exceptions need to be granted to assure that standard rules do not create unnecessary cost and delay.

5. Either directly or through the magistrate judge or staff adequately monitors the progress of the pre-trial activities to assure that the case is resolved or tried on schedule. The trial date should not be set with such rigidity that it could not be moved in the interest of fairness and avoiding unnecessary costs. For example, when dispositive motions have not been ruled on and rulings would avoid trial preparation, it may be very desirable to continue the case if the court is not able to rule on the motion.

This avoids the unnecessary cost of trial preparation when the case may not be tried.

The Committee believes that the most significant step the trial judge can take to assure the prompt and inexpensive disposition of cases, is to set a trial date early in the process. Since other dates necessarily relate to the trial date, discovery dates and the dates for ruling on motions should evolve from the date of trial.

The Committee does not believe that the efficiency of a court is measured best -- or even measured at all -- by attempting to set records for promptness of trial dates and the rigidity of schedules. While the court may have "bragging rights" to a fast docket, parties will probably incur unnecessary and unjustified expense when required to accelerate discovery and prepare urgently for a trial when efforts ought to be first expended toward alternative dispute resolution methods or settlement. Such a system places a premium on a firm's having sufficient personnel so the case can be given extraordinary attention. It reflects a lack of understanding of efficiency and a lack of consideration for the inability of some litigants and attorneys to accommodate those time requirements without substantial hardship. While it is clearly not desirable for courts to be operated on such a fast track and with such rigidity that oppression results, neither is it necessary for a court to indulge attorneys, witnesses and litigants who

procrastinate, fail to expend reasonable efforts on the case and do not show proper respect for the court's time and schedule or for the interests of others. The efficient judge will attempt to develop case management techniques which apply the pressure of a fixed trial date and the expectation of a predictable time for resolution of the case on one hand and give an opportunity for the orderly preparation of the trial and efforts to settle on the other.

The Committee's recommendations are guided by its desire to see the many valuable attributes of Western District practice preserved and, at the same time, to respond to Congress' mandate that cost and delay in civil litigation be minimized. The Committee believes that the collegiality of the Western District is an important asset, to be preserved and nurtured. We value the willingness of our judges and magistrate judges to consult with counsel and respond to their needs. Similarly, we value the willingness of most members of the bar to avoid abuse of the litigation process. We believe that the current flexibility and collegiality which characterize the District should be preserved. Detailed, rigid rules could well do more harm than good.

At the same time, the Committee believes that it is necessary to place some general limits on lawyer's autonomy in litigation. A system which relies too heavily on the initiative of the lawyers to move a case through the process invites undue delay. One attorney, by inaction, can force his opponent to continually seek

court intervention. Moreover, while counsel may prefer to proceed through a case without time constraints, the interests of at least some parties may well be ill-served by delay. As one survey respondent noted, "attorneys are not self-policing, and indeed may have a responsibility to delay where it serves their clients' interests." In light of these concerns, the Committee is suggesting a framework, drawn from a variety of practices now in use in the District, to provide general oversight of the conduct of civil litigation. Within this framework, there is discretion to respond to the needs of parties and lawyers and to provide more detailed supervision where necessary.

B. Differential Case Management

The civil docket in the Western District is composed of cases which, for various reasons, call for specialized treatment and ordinary civil litigation to which most of the Committee recommendations are addressed. The Committee wishes to avoid imposing inappropriate rules on cases calling for special handling. Therefore, unless otherwise noted, the Committee recommendations in this Chapter do not apply to:

a. Cases requesting review of a decision denying Social Security benefits. (The Committee's views on the handling of Social Security cases are found in Chapter IV.B.)

b. Pro se prisoner's cases. (The Committee's views on the handling of prisoner cases are found in Chapter IV.A.)

c. Suits by the United States to recover on defaulted student loans and overpayment of veteran's benefits. Many of these collection cases brought by the government are resolved by default, and, therefore, do not warrant involvement of judicial officers.

d. Appeals from bankruptcy court decisions. The processing of bankruptcy cases is beyond the scope of the Committee's study.

e. Any other case in which the District Court acts in an appellate capacity.

As to the remainder of the civil docket, the Committee believes that it is unnecessary, in our District, to attempt rigid categorization of civil cases by degree of complexity. Rather, our recommendations give the court and counsel the flexibility to plan the progress of each case depending upon its expected demands. In the remainder of this Chapter, the report frequently uses the term Ordinary civil case. By this term we mean simply all civil cases other than those listed in paragraphs a to e above.

C. The Initial Pretrial Order

The Committee recommends that all Ordinary civil cases be the subject of an initial pretrial scheduling order. The order would consist primarily of two sections. First, it would establish certain basic deadlines for litigation activity. Second, it would refer the case to a Magistrate Judge for ongoing supervision.

The Committee believes that the single most useful tool for reduction of delay in litigation is the early setting of a trial date. An established trial date allows lawyers to plan and accomplish pretrial activity in a prompt and efficient fashion. The litigation deadline can often act as a catalyst for settlement. Our District has had some experience with this technique. The Committee is of the view that, after a period of adjustment, early scheduling orders have worked well for those judges who have used them.

The Committee is also of the view that civil cases will benefit from flexible ongoing oversight by a judicial officer. The Magistrate Judge reference will provide the parties and counsel with a vehicle for discussion of settlement and of narrowing issues, for early intervention in discovery disputes and for exploration of the possibility of voluntary alternative dispute resolution. Routine reference to Magistrate Judges has also been used with success in our District and we recommend its use in all Ordinary civil cases.

The Committee also recommends that some minimal limits be set on discovery in the pretrial order subject to case-by-case adjustment by the Judge or Magistrate Judge.

Before turning to the details of the recommendations, the Committee wishes to emphasize that it does not view its recommendations as a first step on the road to a regime of detailed, rigid rules and deadlines governing all aspects of civil litigation. To the contrary, the Committee hopes and expects that flexibility and cooperation will continue to be a hallmark of practice in the Western District. In particular, the Committee is of the view that the procedures in use in the Eastern District of Virginia, the so-called "rocket docket", are not suited to practice here. The Committee believes that excessive regulation increases the cost and burden of litigation and exacerbates the effect of differences in resources among litigants. The following recommendations, therefore, represent what the Committee views, as a balance between flexibility and oversight.

The initial order should contain the following provisions:

1. Deadlines

As soon as possible after the filing of an answer or pre-answer motion in an Ordinary civil case, the Judge to whom it is assigned or a member of the judge's staff shall consult

with counsel and set a discovery cut-off date and a trial date. Ordinarily, the trial date should be approximately eight months from the date of the order. In complex cases, the trial date should ordinarily be later. The usual discovery cut-off date should be approximately forty days before the trial date. Ordinarily, consultation with counsel will be in the form of telephone or written communication.

Commentary:

1. *Because of the central importance of the trial date, we view consultation with counsel before the date is set to be of critical importance. Counsel should be in a position to inform the Court of any unusual features affecting case scheduling. The Committee believes that trial dates which are too early can lead to unnecessary cost. They force simultaneous discovery, much of which might ultimately prove unnecessary, instead of discovery in an orderly sequence. Moreover, it is important not to create a structure which virtually forces firms to staff cases with several different lawyers in order to meet*

deadlines. Such staffing drives up costs and places small firms and sole practitioners at a serious disadvantage.

2. *The forty-day discovery cut-off date is meant to accommodate dispositive motions.*

3. *At several places in this report, the Committee urges the use of teleconferencing in lieu of personal appearances by counsel. The Committee wishes to draw attention to the high costs of personal appearances by counsel at conferences in a District of our size. It is not uncommon for attorneys to travel several hours in order to appear. This time is costly and should be required only when genuinely necessary.*

2. Dispositive Motions.

The order should require that all dispositive motions be filed in time to be briefed, argued and submitted for decision no later than thirty days before the trial date. (See Chapter VI.E.1 below for a discussion of decisions on motions.) The order should also provide that the moving party has the

responsibility to bring all dispositive motions on for hearing within a set period of time on pain of denial of the motion.

Commentary: This provision is intended to give the Court time to rule on dispositive motions in advance of trial. It is also intended to discourage the filing of motions on which no ruling is ever sought. Chapter VI.E.1 below contains a provision suggesting that judges issue a ruling on dispositive motions no later than twenty days before the trial date. This is intended to obviate the cost of unnecessary final trial preparation.

3. Presumptive Discovery Limits.

The order should provide that, subject to change by the judge or magistrate judge, each party shall propound no more than thirty interrogatories and shall name as experts no more than five persons total and no more than two persons on any issue.

The order should provide that no discovery shall be filed with the Court unless required by the Court on good cause shown. When motions are made the parties can, and should, file any discovery materials having a bearing on the motion.

The order should require that any objections to discovery be made within ten days of the request. The order should provide that exceptions will be made to this deadline when an unanticipated basis for objection is discovered after the ten-day objection period has run.

Commentary:

1. *The Committee believes that where possible, practices throughout the District should be uniform. This helps avoid uncertainty among those who do not frequently practice in federal court. Currently, the majority of judges in the District routinely order the parties to refrain from filing discovery with the Court. This practice reduces cost to the parties and to the clerk's office. Therefore, we recommend against filing of discovery. In the special case of prisoner petitions, where oversight of discovery is needed, filing would continue because this order is inapplicable.*

2. *Expert discovery is so costly that some control is viewed as necessary.*

3. *The Committee is concerned that last minute objections to discovery constitute a cause of unnecessary delay. Frequently, parties are aware when discovery requests are received that an objection will be lodged. In such cases, objections should be lodged promptly. The Committee does not intend to create a trap for the unwary. Therefore, provision is made for exceptions to the ten-day time limit.*

4. Reference to Magistrate Judge

The order should contain a reference of the case to a Magistrate Judge for purposes of overseeing discovery and pretrial preparation. The order should require the Magistrate Judge to enter into discussions with counsel concerning possible settlement of the case and the interest of the parties in pursuing voluntary alternative dispute resolution. The order should authorize the Magistrate Judge to require parties to attend or be available by telephone for settlement conferences. The order should also authorize the Magistrate Judge to impose limits on discovery

different than, or in addition to, those imposed in the initial order. Finally, the order should authorize the Magistrate Judge, in consultation with the District Judge, to alter as needed all deadlines established by the initial order.

> *Commentary: In lieu of extensive regulation of discovery at the outset, the Magistrate Judge is vested with discretion to impose such limits and controls as may be required. Where discovery proceeds without difficulties, further limits should not be necessary.*

D. Supervision by the Magistrate Judge

1. Required Initial Conference

Following entry of the initial order, the Magistrate Judge should set an early conference with counsel in each case.

The conference is intended to provide a setting for an exploration of the issues actually in dispute between the parties under the guidance of the Magistrate Judge. To this end, counsel should be prepared to discuss the factual and legal bases for their claims and defenses, the main factual inquiries to be pursued in discovery and plans for resolving legal issues before trial through dispositive motions.

The conference is also intended to provide counsel with an opportunity to plan for discovery and to alert the Magistrate Judge to any discovery problems which counsel can anticipate at the outset. If necessary, counsel and the court can establish a procedure for resolving any anticipated discovery problems. Counsel should, therefore, be prepared to discuss discovery plans during this conference.

The conference also provides an opportunity for the Magistrate Judge to explore voluntary resolution of the litigation. The possibility of early settlement could be explored, where appropriate, or plans for a later settlement conference could be made. Additionally, the conference provides an occasion for counsel and the Court to discuss whether the case might better be handled through ADR and, if so, what ADR process should be used. Counsel should, therefore, be prepared to discuss voluntary resolution of the dispute, and how and when such resolution might best be explored, during this conference.

In the discretion of the Magistrate Judge, attorneys may be required to appear in person for this conference. However, wherever possible, such conferences will be conducted by telephone.

> *Commentary: The Committee believes that an early, informal assessment of each case and a discussion of general plans for the course of*

the litigation will be of great assistance. First, it will require counsel, in preparing for the conference, to give early attention to the case's merits and weaknesses. Preparation will also entail early thought on plans for discovery. Second, it will give counsel a tentative insight into the perspectives of his or her opponent and of a neutral third party, the Magistrate Judge, on the case. Last, the conference will provide an opportunity to begin the process, which may take some time to complete, of exploring voluntary resolution. The Committee hopes that the conference will afford some of the benefits of the early neutral evaluation process, adopted by some districts, without requiring creation of a separate, court-annexed ADR program. The Committee recognizes that the benefits of this conference will accrue only if lawyers are willing to give serious thought to their cases before the conference. The Committee hopes that, with experience, counsel will realize the benefits of full preparation for, and participation in, the initial conference.

2. <u>Further conferences.</u>

In all cases not resolved by the discovery cut-off date, the Magistrate Judge should hold a settlement conference unless all parties indicate in writing that such a conference would not be helpful to resolution of the dispute. The Magistrate Judge would nevertheless be authorized to convene a settlement conference if he or she disagreed with the parties' conclusion. This settlement conference should be scheduled to occur promptly after the completion of discovery.

Some cases may benefit from additional conferences with the Magistrate Judge. For example, unanticipated scheduling problems may arise or discovery problems may reach a level where a conference is necessary to resolve the issues or impose additional limits. The Magistrate Judge, on the Magistrate Judge's own initiative or upon request of a party, should conduct additional conferences when they would be helpful. The Magistrate Judge may, to facilitate resolution of the case, call a conference in response to the request of a party without disclosing the identity of the requesting party.

The settlement conference and any additional conferences should be conducted, where possible, by telephone or, when the Magistrate Judge deems necessary, by personal appearance. The Magistrate Judge, at any conference, should have authority to require the attendance or availability of parties when their presence would assist in resolution of the case.

Commentary: Many cases may warrant active, ongoing oversight by the Magistrate Judge. Others may progress with no need for intervention, simply on the strength of the pre-existing trial date. The degree of ongoing involvement is thus left to case-by-case determination. For those cases not resolved during the pretrial process, a settlement conference seems warranted. Therefore, we recommend that such a conference be held unless all parties decline to participate.

The authority of the Magistrate Judge to call a conference upon the request of a party without disclosing the identity of the requesting party is not meant to authorize ex parte communications concerning the substance of a dispute. Nor does the Committee mean to suggest that it need be used routinely. Rather, the Committee believes that, in certain cases, each side's unwillingness to be perceived as initiating settlement discussions may be a barrier to dispute resolution. This device is suggested as a possible means to overcome the barrier.

3. Discovery Disputes

The initial referral includes the authority to hear and resolve discovery disputes. The Committee recommends the following guidelines.

1. Attorneys for the parties are expected to make a reasonable, good faith effort to resolve any discovery disputes among themselves before the intervention of the Magistrate Judge is sought.

2. Normally, discovery disputes should be resolved through telephone conferences between attorneys for the parties and the Magistrate Judge.

3. If the Magistrate Judge so orders, or any party so requests, a discovery dispute will be submitted to the Magistrate Judge on written motion for resolution. All written discovery motions and responses thereto must contain the relevant portions of the discovery materials at issue.

4. Appeal of any discovery ruling may be made to the District Judge to whom the case is assigned.

Commentary: We believe that, in general, counsel in the district do attempt to resolve

matters among themselves and this section states the Committee's expectation that such cooperation will continue to be the norm. We do not believe a formal certification to that effect is called for.

E. Recommendations Related to Pretrial Motions.

1. Rulings on Dispositive Motions.

The Committee recommends that the Court advise the parties of its proposed ruling on all timely dispositive motions no later than 20 days before the scheduled trial date or 30 days after completion of briefing and oral argument, whichever occurs first. The Court's advice will be followed at a later time by a written order and memorandum opinion.

The Committee recommends that, in cases where a dispositive motion has been pending more than 30 days, the time limits in the initial scheduling order extended upon application of any party.

Commentary: This recommendation is similar to those set out in the Judicial Conference's Model Plan. The provision for a ruling no later than twenty days before trial is critically important. Final trial preparation

is extremely costly. It requires parties, witnesses and attorneys to arrange their schedules and frequently their travel plans to be in attendance. Lawyers devote long hours to preparing examinations, arguments and instructions. Dispositive motions, if granted, should avoid the cost of final pretrial preparation. They cannot serve their intended function if a ruling comes on the eve of trial. Even a pending motion which is ultimately denied can interfere with trial preparation by creating uncertainty. It is thus critically important that rulings be made well in advance of trial. Without this mechanism, many of the benefits of setting an early and firm trial date will be lost.

The Committee is of the view that dispositive motions at every stage of the litigation should be ruled on promptly. Costs incurred in discovery on a case that is ultimately dismissed are wasted. If the parties seek to avoid costs by deferring discovery pending a ruling, delay is inevitable.

The Committee believes that tenative rulings can be made relatively quickly, if the written order and opinion can follow at a later time. Our recommendation for tenative rulings does not limit the time available for preparation of written orders and opinions. Moreover, it is structured to avoid confusion concerning the time at which the right to appeal begins to run.

2. The Role of Magistrate Judges with Respect to Dispositive Motions.

The Court should seek partial consent of the parties to referral of a case to a Magistrate Judge for disposition by motion. This partial consent would not extend to the trial, which would, if it occurs, be conducted by the District Judge.

Commentary: The Committee considered the advisability of reference of dispositive motions to Magistrate Judges for report and recommendation. Such a reference can be useful where the motion involves a voluminous record. However, in many cases reference ultimately leads to delay and duplication of effort since the party aggrieved has every

incentive to seek de novo review by the District Judge. In such cases, the District Judge in turn is required to write an opinion. In the alternative, we suggest a new technique, being used in some Districts, whereby parties enter partial consent to the Magistrate Judge's ruling on summary judgment. This process permits the Magistrate Judge to rule on the motion for summary judgment and eliminates the necessity of de novo consideration of the same motion by the District Judge. On filing their consent, the parties may reserve their right to appeal the Magistrate Judge's ruling to the District Court or they may agree that any appeal be filed with the Fourth Circuit. In any event, if the motion were denied, trial would be held before the District Judge.

3. Use of Teleconferencing Facilities.

Normally, whenever reasonably possible, arguments on motions should be heard through the use of teleconferencing facilities, unless the Court or counsel prefer that counsel appear. Motions which required the taking of testimony or which are supported by a

complex documentary record should ordinarily be heard with counsel personally present.

Commentary: The Committee, as stated above, believes the use of teleconferences can be extremely cost-effective.

4. Committee views on Other Matters relating to Motion Practice

The Committee considered a range of other possible recommendations concerning motion practice, for example, requirements for, or limitation on, written briefs, requirements of pre-motion conferences or certification of pre-argument consultation, and limitations on the filing of Rule 11 motions. The Committee did not believe any of these changes were necessary.

With respect to sanctions, the Committee believes that the treatment of Rule 11 in this District is to be commended. Attorneys who practice here generally use restraint in determining whether to seek sanctions. Judges impose sanctions when they are clearly called for but not otherwise. We hope that this collegial state of affairs will continue.

F. Managing the Trial Calendar.

1. Initial Scheduling of Trial Dates.

It is frequently necessary to schedule more than one trial for a single trial date. However, District Judges should seek to avoid "double-booking" whenever possible and consistent with providing early trial dates. If more than one case is scheduled for a single date, counsel should be so informed when the date is scheduled. The Court should also notify counsel of the identity and priority of each case scheduled for that date.

Commentary: The Western District's docket appears to have reached the point where "double-booking" has become common. The Committee recognizes the docket pressures which may necessitate this practice. The Committee does, however, view "double-booking" as a regrettable necessity, and not as a preferred practice and urges that it be avoided where possible.

Some judges in the District currently notify counsel of whether their cases stand first or second on the docket. This practice is extremely helpful to attorneys and we recommend that it be adopted throughout the District.

2. Resolving Conflicts in Trial Dates.

Whenever possible, a case should proceed to trial on the date originally set. If it becomes apparent that a District Judge has on his or her schedule more than one case to be tried, one of the cases should be transferred to another District Court Judge, if possible. Alternatively, the District Court should explore with the parties their willingness to consent to trial before a Magistrate Judge.

If it becomes apparent that the Court will be unable to comply with a scheduled trial date, counsel should be notified as soon as possible. In any event, trial dates should be released on the request of any party no later than three days before trial. In cases where more notice is needed to avoid extraordinary expense in rescheduling, the parties should so notify the Court. In that event, the case should be released no later than ten days before trial. A case should not be rescheduled for trial due to "double-booking" more than once.

Commentary: The Judges in the Western District demonstrate a genuine willingness to assist their colleagues in keeping trial date commitments. The Committee's recommendation is intended to reflect and approve current practice. We also recommend that the Court

continue to use consent to trial by a Magistrate Judge as a means to honor trial commitments.

As the Committee has already noted, final trial preparation is one of the most costly stages of the litigation process. Last minute cancellation of a scheduled trial is expensive and disruptive. At some point, cases must be released and rescheduled. On the other hand, if release comes too early, later pleas and settlements may leave a gap in the Court's calendar. We recommend, therefore, three days for most cases and ten days for cases involving extraordinary expense. Such expenses might be anticipated for example, in cases involving several experts, multiple parties, lengthy trial time or substantial involvement of out-of-state counsel, witnesses or parties.

3. Committee Views on Other Matters relating to Trials

The Committee discussed whether to make other recommendations concerning the conduct of trials and has chosen not to do so. We would note some observations. The daily schedule of a jury trial

should strike a balance between utilizing the day as fully as possible, in the interest of efficiency, and consideration of the need of participants. Jurors, in particular, often must travel long distances over sometimes difficult roads to attend each day. At a certain point, concern for the Court's efficiency must yield to jurors' legitimate needs.

G. The Criminal Docket.

This District, like many across the country, is experiencing significant growth in its criminal docket. This Committee, like its counterparts in other Districts, believes that this growth has had, and will continue to have, an impact on civil litigation. Fortunately, we have not experienced the kind of overwhelming criminal docket which in some Districts has brought civil litigation to a virtual halt. Nevertheless, the Committee does have some observations and suggestions to ameliorate the pressure of the criminal docket.

1. Arraignments.

Magistrate Judges should conduct all arraignments.

> ***Commentary:*** *Currently, practice within the District varies. The Committee suggests that the practice on arraignments throughout the*

District should be uniform. We suggest that Magistrate Judges conduct arraignments. In our view, this suggestion will help alleviate pressure on the District Judges' calendars.

2. The "Federalization" of Criminal Law.

a. Federal Criminal Statutes

Congress should exercise restraint in enacting wide-ranging criminal statutes covering conduct already governed by state criminal laws. Congress should reexamine the scope of current federal criminal law.

b. Charging Practices.

The United States Attorney should carefully exercise the discretion of the office in determining whether to bring federal charges when a matter might also be prosecuted under state law. Cases which can be prosecuted in state court effectively should be brought there.

Commentary: The breadth of federal criminal law is such that a large percentage of all criminal conduct could conceivably be prosecuted in federal court. Nevertheless,

our history and tradition has been that states have the major responsibility for ordinary law enforcement. The Committee recommends that Congress examine the scope of coverage of the federal criminal law with a view to determining whether it covers conduct best left to state control. The federal system will never be able to handle more than a fraction of the criminal prosecutions in this country -- nor was it meant to do so. It is important that Congress recognize this constraint.

The United States Attorney also has an important role to play in balancing the federal and state role in law enforcement. It is incumbent upon the United States Attorney to make an informed judgment as to whether there is a particular federal interest or concern warranting federal prosecution in cases involving crime under both state and federal law. The Committee urges continued attention by the United States Attorney to charging practices.

3. Suggestions to Congress Concerning Sentencing.

The sentencing guidelines and mandatory minimum sentences have resulted in a major change in federal criminal practice. We suggest to Congress, as some of our counterparts have done, that it re-examine its imposition of mandatory minimum sentences. In our view, there is reason to believe that they frequently constitute an unwarranted disincentive to guilty pleas.

We also suggest that Congress re-examine the question of whether the coverage of misdemeanors under the guidelines is warranted. Some misdemeanors are not covered now and if all were removed, sentencing would be prompter. We suggest that misdemeanors may not warrant the time and attention required to prepare a pre-sentence investigation report.

4. Allocation of the Criminal Docket.

The recent growth in the criminal docket has been located disproportionately in the northern part of the District. Demographic information projecting population growth and the United States Attorney's decision to assign staff to that area suggest that this trend will continue. Accordingly, the Committee recommends consideration of the current allocation of the criminal docket. We suggest that, where necessary to spread the caseload evenly, cases be assigned to Judges from other divisions. We also are of the view that sentencing should follow the filing of a pre-

sentence investigation report by no more than three months. If necessary, the assignment of new criminal cases should be adjusted to permit sentencing judges to meet this time limit.

H. Local Rules.

The Western District of Virginia has never adopted local rules. Some observers tease that this simply means the rules are not written. However, it is certainly not the experience of the members of the Committee (and the responses of the survey of several hundred attorneys were in accord) that particular preferences of judges have constituted procedural traps for practitioners from other areas. While it might be reassuring to have detailed rules in writing, litigants and attorneys certainly are not penalized in the Western District when they comply with the Federal Rules of Civil Procedure. The Committee is unaware of any rigid local traditions. If there are local traditions, they are usually pointed out in a patient and courteous manner and the necessary adjustment is permitted.

Clearly, in this report, the Committee is proposing some standardized procedures and techniques for case management which might often be found in the format of local written rules. The Committee discussed whether it ought to develop local rules and concluded that it would not move in that direction. There were several reasons for this decision:

1. Because of a long tradition of not having local rules, it is more comfortable for the practitioners in the Western District to continue the same tradition. If there is not demonstrable need to change, the bias is in favor of continuing the current arrangement.

2. There is a perception by many practitioners in the Western District that local rules in other districts are used as an obstacle course. Rules pertaining to some of the most trivial matters for which consistency would not seem to be important become obstacles over which the litigant must pass before being heard. They often appear to be enforced in a rigid, doctrinaire manner so that additional costs are incurred. The Committee does not believe that the claimed benefit of clarity and predictability offsets the risk that costs will actually be increased by the detailed requirements established in local rules.

3. The Committee believes that there are some scheduling and pre-trial matters which ought to be clearly understood by all the parties. It also concludes that consistency among the judges is desirable. Obviously, for a new practitioner or a practitioner coming in from another district, it will be helpful to know the expectations of the court which exceed the Federal Rules or Civil Procedure. Therefore, the Committee recommends in the report that there be a standard order which will contain much identical information in almost all cases in addition to any special terms

applying to a particular case. The common elements would include setting of a trial date and the referral to a magistrate judge with instructions on pre-trial handling. Those matters which do not need to be made part of the order will be part of the district judges' or the magistrate judges' list of items to cover with the parties during pre-trial activities. By making these matters part of an order in each particular case, it appears that there would be more focused attention on the compliance with the Court's requirements in that particular case, give clear notice to counsel for the litigants since all counsel will receive a copy of the order in each case and thereby better assure that all requirements are designated in one order as opposed to being contained partially in local rules and partially in a pre-trial order.

4. In two years, when the procedures recommended in this report are evaluated, an evaluation can be made as to whether written rules would be an improvement over the use of the standard order.

I. Other Matters.

1. Divisions of the District.

The Committee discussed at length the advantages and disadvantages of the District's current organization in seven active divisions. The Committee believes this organization is

warranted and should continue.[6] At the public hearing in St. Paul, in attorney surveys and in judicial interviews, the importance of ensuring that litigants and jurors in remote sections of the District have access to the federal courts was repeatedly emphasized. The Committee is of the view that any efficiency gains from closing divisions would be more than offset by the cost to litigants and jurors of inaccessible federal courthouses.

2. Assignment of Cases.

As has been noted at various points in this report, there is an increasing disparity within the District between population growth and division staffing. The docket is growing most quickly in the northern portion of the District while judicial resources are predominately located in the center and south. Accordingly, the Committee recommends that the Chief Judge, with the assistance of the Clerk of Court and the Chief Probation Officer, actively monitor the docket to ensure its currency. The Chief Judge should assign and transfer cases where necessary to account for undue burdens and docket congestion.

3. Court Reporters.

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[6] The Committee notes that the Office of the United States Attorney for the Western District of Virginia is of the view that the seven divisions of the District are not warranted. The Office, and the Committee, recognize that the decision is ultimately one for Congress and the judges of the District to make.

We recognize that the assignment of court reporters in this District is difficult due to its size and that the demands on their time can contribute to delay. In general, we are of the view that sufficient court reporting services should be available to all judicial officers to permit them to utilize their time to the fullest while permitting prompt completion of transcripts. Often, contract court reporters will fill this need. Advances in technology may also help. The District's electronic court recorder operator (ECRO) also contributes valuable service to the District, particularly to the Magistrate Judges. The Court may, however, soon require more full-time reporters.

4. Comments Relating to Other Matters the Committee is Required by Statute to Consider.

a. Model Plan.

The Committee considered the Model Plan and drew upon many of the ideas it presented. The Committee also attempted to follow the order of the Model Plan. However, the Committee developed its own plan.

b. Contributions by the Court, the Litigants, and Litigants' Attorneys.

Among other things, the report recommends that litigants' attorneys contribute to cost and delay reduction by earlier case assessment in preparation for the initial conference and by adhering the deadline. The recommended contribution by the Court includes commitment to prompt ruling on motions and limitation on trial calendar management. Contribution by litigants includes their participation where required at settlement conferences and the limitations imposed on the number of experts who may be called on their behalf.

c. Other Statutory Matters.

The Committee's views and approach to other factors the statute directs it to consider are, we believe, addressed in the Report. Appendix M contains a cross-reference table referring readers to the section of the report which responds to each statutory provision.

J. Future Plans for Committee Work.

The Committee, as established by Congress, is intended to be a continuing body, albeit one whose membership must change. Accordingly, our recommendations here are to the Court and the Committee concerning future endeavors the Committee plans to undertake, on its own or with others.

1. Western District Bench-Bar Conference.

We recommend that the Committee sponsor a regular conference of practitioners and judicial officers in the Western District. We envision this Conference as a vehicle for an ongoing exchange of views among participants about the nature of practice in the District and about general areas of change or concern. We also envision that this Conference would serve an education function, familiarizing the bench and bar with new developments in the area of litigation. Initially, of course, it could be used as a means of introducing this report and the Court's plan. We also believe it can and should be used to discuss in depth alternative dispute resolution. Finally, and most importantly, we hope that this Conference will help the bench and bar to continue their collegial relationship. It will also serve as a vehicle to acquaint new lawyers, and those new to federal practice, with the members of our bench and bar.

2. Equipment and Facilities.

The Committee believes that the Court should have available to it all equipment and facilities it needs. We believe that courtroom space needs should continue to be studied by the Court, assisted as needed by this Committee. Particular attention should be given to Big Stone Gap, Roanoke, and Harrisonburg where additional courtroom space may well be needed. The Committee has

no reason to believe that courtroom space is needed elsewhere, but the demand for additional office space may be more widespread.

Similarly, we recommend future attention to advances in technology which might be of benefit to the Court. For example, telecommunication equipment may be, or become, available to facilitate telephone conferences and arguments. Advances in recording equipment and computer technology may be of assistance in court reporting.

3. Alternative Dispute Resolution.

Above, we have recommended that Magistrate Judges discuss ADR with litigants with a view to determining its desirability in the case. We have also recommended that the Bench-Bar Conference be used to introduce ADR to judges and practitioners in the District. We believe the Committee should continue to investigate how ADR might best be used in the District.

As a first step, we recommend that the Committee consider investigating the available ADR programs in the District with a view to determining which programs might be suited to federal litigants. (A list of all currently available programs is annexed as Appendix N.) The results could then be made available to Magistrate Judges. Second, we suggest that the Committee seek information concerning developing state court experience which

might be adopted for federal court use. Third, we suggest that the Committee gather information concerning available ADR training for interested persons in the District.

In the longer term, the Committee should seek to develop a profile of cases best suited to various ADR procedures. This profile might then be used to develop training and referral programs for court-annexed ADR in the Western District. To implement these suggestions we recommend that the Committee, in conjunction with the Bench/Bar Conference, consider creating an advisory group on alternative dispute resolution. This group could bring needed expertise to bear on the questions raised here and might ultimately be the focus of ADR programs in the District.

4. Study of Litigant Views and Expenditures.

Like our counterparts in other Districts, we found it difficult to obtain information directly from litigants concerning their experiences. We also had little direct data on legal fees incurred in litigation. We believe the Committee should attempt to gather additional information on these questions. It might, for example, be possible to identify litigants as their case is filed and then to follow-up when the case is closed.

5. Two-year Review.

We recommend that, two years after the District's CJRA plan is implemented, the Committee undertake a thorough review of the efficiency of the plan. In particular, we recommend study of the scheduling order and Magistrate Judge reference recommended in Chapter VI. C and D.

6. Response to Forthcoming Amendments to the Federal Rules of Civil Procedure.

On April 22, 1993, the Supreme Court transmitted to Congress amentments to the Federal Rules of Civil Procedure. The amendments, absent action by Congress, will take effect on December 1, 1993. Several of the amendments are written to permit courts to override the requirements of the Rules by order or by local rules. These "override" provisions were drafted, in part, to avoid interfering with implementation of the Civil Justice Reform Act. Accordingly, once Congressional review of the amendments is completed, the Committee should review them and recommend to the judges of the District what action, if any, should be taken in response.