Chapter 6
Adjudication

ADJUDICATION is the *raison d'être* of the federal courts. Adjudication encompasses a number of different functions, from managing the preliminary phases of cases and appeals to conducting proceedings, making decisions, and overseeing their implementation.

In the years ahead, federal courts will be challenged to manage their increased caseloads efficiently and effectively, while satisfying the interests of justice. Tensions among several sets of competing values will confront the courts at every turn as they design and implement new case management methods. They will be obliged to balance the objective of consistent results against individualized justice, national uniformity against local variation, law declaration against dispute resolution, the overall generalist's approach against more specific subject matter expertise, and excellence against delay.

As the federal courts approach the 21st century, it is clear that growing court caseloads, limited resources, emerging technology, and a changing population will require changes, as yet unclear, in the way justice is delivered. Given this uncertainty, as well as the lack of relevant data to show the impact of many possible changes, the federal courts must embrace careful experimentation and innovation as they and Congress shape the future of the justice system.

With few exceptions, innovations in appellate and district court case management and decision making should be tested on a pilot basis before they are adopted nationally. Wherever feasible, pilot projects should be coordinated and evaluated by the Judicial Conference. By pursuing this approach of careful innovation and evaluation, different courts may experiment with a variety of programs to cope with caseload problems and create better ways to deliver justice. The judiciary, moreover, will be able to measure what works and what does not, before it endorses national initiatives.

Wherever practical, the courts should conduct pilot programs that do not require new statutory authority. Where authority is required—*e.g.* to institute more ambitious pilot programs—it should be obtained as soon as possible. The range of experimentation in the judiciary should be broad, and the appropriate committees of the Judicial Conference of the United States, along with the judicial councils of the respective circuits, the Administrative Office, and the Federal Judicial Center, should assist in crafting the pilot programs so that a variety of techniques and procedures are tested and analyzed throughout the nation.

The topics discussed below are not an exhaustive list of the possible areas for innovation. The issues—rules of practice and procedure, criminal sentencing, the jury system, pro se litigation, cost of litigation, and the need for case management—emerged from the planning process. Future editions of the long range plan should target additional areas and issues.

Rules of Practice and Procedure

❒ RECOMMENDATION 28: **Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.**

Implementation Strategies:

28a *Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.*

28b *The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.*

28c *In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches.*

Under the Rules Enabling Act of 1934,[1] the Supreme Court prescribes nationally applicable rules of practice, procedure, and evidence for the federal courts based on recommendations from the Judicial Conference of the United States. The Conference is specifically charged by the Act with drafting and recommending rules that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[2]

Rule making under the Act proceeds in an exacting and meticulous manner, assuring broad-based consideration of the rules and taking into account the needs of the justice system and the public as a whole. Proposed amendments to the rules receive fresh and thorough review at several levels—by the respective rules advisory committees, through public comments and hearings, by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference itself, and finally by the Supreme Court. The amendments are then submitted to the Congress, which has the opportunity to amend, reject, or defer any of the rules.

The rules procedure is perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules.[3] "Neutral" describes rules that cause cases to be resolved impartially, *i.e.*, on findings of fact that are as close to the truth as it is reasonably possible to make them and that follow the law, as interpreted and applied with fidelity to the Constitution, statutes, and precedents.

It is troubling, therefore, that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act. The openness of the rule making process ensures that all interested persons have an opportunity to identify and comment on drafting ambiguities and potential problems. It is essential that the bench, the bar, and the Congress do their best, working together—as intended under the Rules Enabling Act—to keep procedural rules substantively neutral and fair.

[1] 28 U.S.C. §§ 2071-2077 (1988 & Supp. V 1993).

[2] 28 U.S.C. § 331 (1988).

[3] *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655 (1995) (describing the federal rules process in greater detail).

The federal rules are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure through local court rules that are "not inconsistent" with the national rules. Members of the bar have complained about the proliferation of local rules imposing procedural requirements. Moreover, the Civil Justice Reform Act of 1990 has encouraged each district court to engage in its own procedural experimentation and impose additional case management requirements. Accordingly, it is difficult for lawyers, particularly those with a national practice, to know all the current procedural requirements district by district.

Some local procedural variations are appropriate to account for differing local conditions and to allow experimentation with new and innovative procedures. Nevertheless, the long-term emphasis of the courts—at the conclusion of the period of experimentation and evaluation prescribed by the Civil Justice Reform Act—should be on promoting nationally uniform rules of practice and procedure. To this end, an effort should be made to reduce the number of local rules and standing orders. Local rules should be limited in scope and "not inconsistent" with national rules. The Judicial Conference and the judicial councils of the circuits should discourage further "balkanization" of federal practice by exercising their statutory authority to review local court rules.[4]

The bar and the state judiciaries should be active partners in the rule making process. Effective participation is essential, both through membership of state judges and practicing attorneys on the rules committees and the willingness of these individuals and groups to suggest and comment thoughtfully on proposed amendments to the rules.

The Standing Committee on Rules of Practice and Procedure recently completed a comprehensive study of the rule making process. As a result, several steps have been taken to enhance outside participation by increasing bar membership on the rules committees, expanding rules publications and educational efforts, adding more attorneys, state judges, and organizations to the mailing lists, increasing rules committee contacts with the bar, inviting state bar associations to appoint coordinators to the rules committees, and undertaking more empirical studies to measure the impact of the operation and effect of the federal rules on the bar and litigants. The Standing Committee should continue and expand these outreach efforts to the bar and the state courts.

Sentencing in Criminal Cases

Sentencing of criminal defendants upon conviction is perhaps the single most important area in which the federal courts experience the tension between the competing goals of uniform practice and attention to individual circumstances. The question of how to punish or deter criminal activity is a substantive legislative policy issue left to the Congress. In 1984, that body created the United States Sentencing Commission and charged it with formulating sentencing guidelines as a means of avoiding sentencing disparities among similarly situated criminals convicted of the same crime. However, some of the Commission's attempts to carry out its mandate—and the interest that Congress has shown in creating harsher criminal penalties that limit judges' sentencing discretion—have led many judges to question whether the current sen-

[4] These efforts should be supported, as necessary, through allocation of adequate funding and other resources.

tencing scheme adequately takes into account individual circumstances.

❒ RECOMMENDATION 29: **The Judicial Conference should continue and strengthen efforts to express judicial concerns about sentencing policy.**

Sentencing policy has been and will inevitably continue to be a focus of federal crime legislation and policy making. Despite major changes in the criminal justice system at both federal and state levels, there is continuing public demand for harsher sentencing policies.

The continuing challenge for the federal courts is to ensure that legislation and sentencing guidelines reflect sound public policy while taking into consideration the impact on court resources. The Judicial Conference, by statute, reports to the Sentencing Commission on the operation of the guidelines, suggests potential changes in the guidelines, and assesses the performance of the Commission.[5] In the emotionally charged area of criminal justice, both the unique perspective and expertise of judges and the relevant data collected by the courts should be brought to bear in developing positions that will serve the public interest in criminal sentencing and judicial administration.

❒ RECOMMENDATION 30: **The legal standards for criminal sentencing should encourage both uniformity of practice and attention to individual circumstances.**

Implementation Strategies:

30a *Congress should be encouraged not to prescribe mandatory minimum sentences.*

30b *The United States Sentencing Commission should be encouraged to develop sentencing guidelines that—*

(1) afford sentencing judges the ability to impose more alternatives to imprisonment;

(2) encourage departures from guideline levels where factual differences should appropriately be taken into account; and

(3) enable sentencing judges to consider within the guideline scheme a greater number of offender characteristics.

The sentencing regime of mandatory minimum penalties and sentencing guidelines has hampered the ability of federal judges to tailor appropriate sentences to the individual offender. The Judicial Conference has opposed mandatory minimum sentences where this approach has skewed the philosophy behind the sentencing guidelines—which are also the product of congressional enactment. In enacting these provisions, Congress intended that the offenders for certain crimes should receive at least the minimum prison term specified. This has sometimes produced unintended consequences.

Rather than narrowly targeting violent criminals or major drug traffickers for long prison terms, the guidelines also impose lengthy sentences on relatively low-level offenders due to anomalies, for example, over the weight of the drugs involved in

[5] *See* 28 U.S.C. § 994(o) (1988)

the crime. Although the goal was to reduce disparity in sentencing, more culpable offenders can receive shorter sentences than low level offenders who participated in the same conspiracy. The process shifts discretion from judges to the prosecutors who, through plea bargaining, reward cooperation. Research also indicates that mandatory minimum sentences arguably have a disparate impact depending on race, and this, too, has become a subject of debate. Finally, mandatory minimums have contributed to an ever growing federal prison population and the need for more prisons—at an average annual cost of $20,747 per prisoner.[6]

These are effects that judges see firsthand as they impose sentence and are not as readily apparent to Congress. Clearly it is the prerogative of the legislative branch to design a sentencing scheme and structure, but the judiciary has a unique perspective to comment on the effects of these approaches as they are implemented.

In this context, alternatives to imprisonment, community service or home confinement are underused, especially for nonviolent first offenders. The average time served for all types of crimes has increased while the proportion of offenders sentenced to probation without confinement has fallen. Probation, when employed correctly, is a resource that should not be neglected in times of expanding prison populations.

The guidelines were intended to eliminate the evil of disparate sentencing caused by inconsistency—where offenders who were similarly situated received markedly different sentences. However, they have only replaced it with a new disparity born of uniformity—where offenders who are different in relevant ways are often treated the same.[7] Indeed, the Sentencing Reform Act recognized that flexibility in sentencing is needed. The Act authorizes judges to depart from the guidelines when factors are present of a type or to a degree that the Sentencing Commission did not anticipate.[8] Most importantly, Congress granted the sentencing judge the authority to determine whether or not the Commission had adequately taken into account relevant factors in determining a guideline sentence. To ensure that this authority did not confer unlimited discretion, Congress made sentencing decisions subject to appellate review.

Despite these safeguards, the impression remains among judges that departures from guidelines are suspect and should be made only in extreme cases. The Sentencing Commission has contributed to this impression through language in the guidelines manual that is interpreted to discourage departures, and by repeatedly amending the guidelines to eliminate from future consideration those factors on which departures from guideline levels have been based. The Commission should encourage, not discourage, departures in appropriate cases in the interests of justice. More broadly, it should adopt guidelines that permit judges to take into account a greater number of offender characteristics and impose more alternatives to incarceration.

❒ RECOMMENDATION 31: **A well supported and managed system of highly competent probation and pretrial**

[6] See BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 9 (Federal Judicial Center 1994).

[7] *See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

[8] *See* 18 U.S.C. § 3553 (1994).

services officers should be maintained in the interest of public safety and as a necessary source of accurate, adequate information for judges who make sentencing and pretrial release decisions.

The current system of probation and pretrial services offices serves multiple purposes. Because sentencing requires both uniformity of practice and attention to individual circumstances, probation officers are called upon to provide the court with reliable information concerning the offender, the victim, and the offense committed, as well as an impartial application of the sentencing guidelines. Likewise, a pretrial services officer is a source of information upon which the court can base release and detention decisions while criminal cases are pending adjudication. Once these decisions are made, the courts further require the ability to enforce the conditions they impose as part of a criminal sentence or conditional release order. Probation and pretrial services officers must then protect the public through the critical task of supervising accused persons and offenders within the federal criminal justice system.

The Federal Courts Study Committee noted concerns over the difficult role probation officers were being asked to play between prosecutors and defense counsel at sentencing.[9] In light of the key importance of the probation system as a source of impartial information and assistance to the court, continued efforts should be made to ensure that probation officers play a neutral role in the sentencing process.

The Jury System

❒ RECOMMENDATION 32: **In the interests of promoting justice and fairness, all aspects of the administration and operation of the jury system—grand juries, criminal, petit, and civil—should continue to be studied and improved.**

To ensure that the federal jury system remains vital well into the 21st century and beyond, courts and legislatures must be sensitive to the changing characteristics, needs, and expectations of the American people. Enshrined as a fundamental right under the United States Constitution, the jury trial is an essential element in the Anglo-American tradition of justice.

Juries have received much attention in recent years.[10] Even so, every aspect of the operation of civil and criminal juries will require continued close analysis and repeated monitoring to ensure that jury practice—the formation of jury wheels, selection of jury panels and individual juries, and the treatment and utilization of jurors during the period of their service, comport with the highest standards of fairness to the jurors and the parties who appear before them.

Much of the planning and administrative work that needs to be done will require close coordination of planners in the judiciary with experts in the fields of sociology, demography, and statistics. Special

[9] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138-39 (1990).

[10] In addition to efforts at the federal level, there have been state courts projects aimed at improving jury administration and operation. See, *e.g.*, JURORS: THE POWER OF 12—REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (Sept. 1994) (containing recommendations on improving public awareness, juror summoning, jury selection, jury trial procedures, jury deliberations, and other juror-related policies).

needs of jurors (*e.g.*, accommodation of hearing-impaired individuals) may need enhanced attention and respect. And all proposals for change must be thoroughly justified in terms of serving the needs of the public generally, so that there is neither the fact nor the appearance of responding to demands from special interests.

Improvements in administration and operation of the jury system should take into account four overlapping elements of the system and the environment in which it operates. First are the essential differences between criminal juries (grand and petit) and civil juries. The constitutional protections and functional roles of criminal and civil juries differ enough to warrant separate consideration in an assessment of the status and possible futures of lay fact-finding in federal litigation. Second, studies should review the major subsystems of the jury system, including the mechanics of creating the master and qualified jury wheels,[11] summoning a jury panel for a case or a set of cases,[12] selecting the jury for a case,[13] and managing jury matters until the jury is discharged. Third, any innovations considered should comprehend that the role and significance of juries in federal court litigation in the future will change as the population of the nation becomes ever larger and more diverse while federal litigation becomes faster-paced and more complex. Finally, planning for changes in how and when juries are used must take into account the *appearance* of change as well as its substance, because the jury trial is a potent public symbol of the quality justice in America as well as a device for the disposition of court business.

[11] See 28 U.S.C. §§ 1863-1866 (1988 & Supp. V 1993).
[12] See 28 U.S.C. §§ 1866-1867 (1988).
[13] See FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

Pro Se Litigation

❒ RECOMMENDATION 33: **Steps must be taken to confront the growing demands pro se litigation places on the federal courts.**

Access to a court to present claims has been held to be a fundamental right. When deprivation of constitutional rights is attributed to actions by government agents, access to the courts to redress these violations is even more important. Congress enacted 42 U.S.C. § 1983 and related civil rights statutes to allow affected plaintiffs to bring their causes of action in federal court when they were deprived of rights under the Constitution or laws of the United States and there was no adequate remedy at state law. A significant number of these plaintiffs proceed pro se.

Pro se litigation places great stress on the resources of the federal courts; a large proportion of recent caseload increases is due to pro se filings.[14] While these cases create some burdens at the appellate level, the district courts must face numerous practical difficulties in dealing with unrepresented litigants.

[14] Statistics are limited with regard to pro se cases, although the Administrative Office continues to take steps to expand the range of data available. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 112 (1990) (recommending regular collection and reporting of pro se litigation data). In the district courts, prisoner petition filings increased in 71 of 94 districts between 1994 and 1995; approximately 62,600 prisoner petitions, or 26% of all civil case filings, were filed in the year ending June 30, 1995.

In the courts of appeals approximately 19,500 pro se cases were filed in the year ending June 30, 1995, constituting over 39% of all filings in those courts. Prisoner petitions represented approximately 65% of these pro se filings. Although the Supreme Court does not separately track pro se or prisoner filings, 4,621 in forma pauperis (IFP) petitions for certiorari were disposed of in 1993, accounting for 69% of all case dispositions that year.

Most pro se cases are filed under 28 U.S.C. § 1915, which allows plaintiffs to avoid payment of filing fees and causes the court to direct service by the United States Marshals Service. The court must screen these cases to determine whether a plaintiff should be allowed to proceed "in forma pauperis" (IFP). Often, pro se IFP cases involve plaintiffs with claims of employment discrimination, denial of social security benefits, habeas corpus, or egregious conduct by governmental authorities other than prison officials. The great majority, however, are civil rights cases brought by prisoners alleging that conditions of their confinement constitute a deprivation of their civil rights.[15]

Implementation Strategies:

33a *A broad-based study, with participation from within and outside the courts, should be conducted to evaluate the impact of pro se litigation and recommend changes.*

The courts, in conjunction with ongoing efforts by the Federal Judicial Center, should gather and study additional statistical data on pro se litigation to determine how much of the future caseload could be expected to result from pro se filings and to find better ways of addressing the disputes underlying these cases. Statutory changes may be necessary, and input from all those involved in the process should be sought. In Chapter 9, this plan proposes creation of a permanent National Commission on the Federal Courts to study and make recommendations on a variety of issues affecting the judicial system.[16] Such a commission, which might include judges (both federal and state), representatives of the other two branches of the federal government, members of the bar, and academic experts, would be an appropriate body to inquire into the growing problem of pro se litigation.

The importance of adjudicating meritorious cases suggests that significant jurisdictional changes and changes in case management techniques should be considered. A study of pro se litigation should also consider the issue of adequate funding for staff attorneys and law clerks—on whom courts currently rely to determine, in the first instance, which cases are meritorious as opposed to frivolous. The study should also include consideration of ways to improve the courts' handling of pro se cases, to provide better information to pro se litigants, and the means to provide counsel to those who would otherwise proceed pro se.[17]

33b *Alternative avenues for pro se prisoner litigation should be explored.*

Most prisoner pro se cases are brought by state prisoners. Federal prisoners have an extensive administrative procedure that often results in their obtaining some relief.

There are several types of prisoner pro se plaintiffs. Many are illiterate, most are unschooled in the law, and some are in need of mental health counseling. Others have legitimate claims of assaults or medical needs that should be addressed immediately. Some are "frequent filers," having upwards of 20 cases in court at one time. Occasionally, some of these latter plaintiffs are very sophisticated and adept at pleading practices, forcing the court to continue cases even on claims without any basis in fact

[15] At the time this plan goes to print, legislation is pending that, if enacted, would alter significantly the handling of prisoner litigation in the federal courts. *See* H.R. 2076, tit. VIII, 104th Cong., 1st Sess., 141 Cong. Rec. H13874, H13890-93 (Dec. 4, 1995) (conference report), H14112 (Dec. 6, 1995) (passage by the House of Representatives), S18182-83 (Dec. 7, 1995) (passage by the Senate).

[16] See Chapter 9, Implementation Strategy 91d *infra*.

[17] See Recommendation 85 *infra*.

or law. Although the obvious purpose of some filings is to harass prison or court authorities, other cases are brought merely to enable a plaintiff to confer with another inmate, or to travel outside the prison for a court hearing.

Changes in state law or procedures may well exacerbate the litigation pressure. Many states are implementing procedures to lengthen the time spent in prison before an inmate is eligible for parole or to eliminate parole entirely for certain kinds of crimes or numbers of convictions. Increasingly violent prison populations in overcrowded conditions are likely to increase: (1) the number of inmate-on-inmate assaults and resulting claims of deliberate indifference by prison authorities; (2) actions by guards alleged to violate the cruel and unusual punishment clause; and (3) claims for deprivations of due process following prison misconduct incidents. Currently these disputes are all resolved by filing a case in a federal court.

Maintaining the federal courts as a forum of limited jurisdiction requires that changes be made in the manner in which prisoner pro se claims are handled. States should be encouraged (financially, if feasible) to provide a means of reviewing claims of abuse of due process, deliberate indifference to medical needs, or other conduct in violation of constitutional prohibitions. It is anticipated that fewer pro se filings will occur where such changes are effectuated.[18]

Filing in forma pauperis petitions should be protected, but guarded from abuse. Consideration should also be given to furnishing legal services to aid in the screening and drafting of prisoners' complaints.

33c *The courts should develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation.*

Pro se claims are processed through the system in some manner. Many of these claims receive too much attention because staff attorneys, clerks, magistrate judges *and* district judges must review them, while others receive too little attention because sheer volume renders court personnel unable to afford them sufficient attention until significant time has passed (assuming that the claim is clearly drafted, which it often is not). Determining what claims are meritorious is too often a search for the proverbial needle in the haystack.

In the near term, the courts must continue to develop more effective and efficient case management systems for adjudicating pro se litigation. Creating a workable system involves several factors: the jurisprudential standards set by the court of appeals of the circuit for dismissal as frivolous under 28 U.S.C. § 1915(d), the number of prison inmates in the state or district, whether the state has a death penalty, the statute of limitations for § 1983 claims (currently the state personal injury statute of limitations), whether the state has a statute which tolls any statute of limitations for a person who is incarcerated, and the jurisprudential standards applicable to frequent filers.

[18] Federal district courts are now authorized to stay proceedings in state prisoner cases brought under 42 U.S.C. § 1983 for up to 180 days to require exhaustion of prison administrative grievance procedures that the U.S. Attorney General certifies, and the district court determines, are in "substantial compliance" with certain minimum standards prescribed in the statute or "are otherwise fair and effective." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20416, 108 Stat. 1796, 1833-34 (amending 42 U.S.C. § 1997e(a)(2)). This change was recommended by the Federal Courts Study Committee and the Judicial Conference, and it should promote earlier resolution of state prisoner claims. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48 (1990); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 60 (Sept. 1990).

33d *The district courts should make more effective use of pro se law clerks.*

For those district courts that qualify by virtue of the number of pro se filings, the use of a pro se law clerk may be one answer to developing sufficient expertise within the court to screen and recognize claims that deserve further attention by the court. Several courts have been quite innovative in this area. The most effective use of pro se law clerks should be studied and information about their effective use should be distributed widely.

Costs of Litigation

❒ RECOMMENDATION 34: **The federal court system should continue to study possible shifting of attorneys' fees and other litigation costs in particular categories of cases.**

In assessing how the federal courts may continue to provide access to all who seek justice, the judicial system will benefit from further consideration of the subject of attorneys' fees, the shifting of other costs of litigation, and the imposition of court costs. Whether fees should be shifted, or costs imposed, based on the outcome of a case, has been an intensely debated and controversial issue for many years. Appropriate data are needed to assess the potential impact of fee and cost shifting on users of the federal courts.[19] For example, while the plan rejects the "loser pays" or "English" rule for shifting attorneys' fees for all federal claims, it believes that evaluation of fee shifting to deter frivolous or abusive litigation conduct should continue. Consideration should also be given to modifying current Federal Rule of Civil Procedure 68, which allows for cost shifting in connection with offers of judgment.

The Need for Case Management

The challenges of broadened jurisdiction, rising caseloads, increased access, and a rigid sentencing process have magnified federal court workload to such an extent that the system now operates under severe strain in many courts. While striving to manage the impact of major increases in the criminal docket, the courts still seek to accomplish fair and efficient outcomes in every civil action—a goal reinforced by the requirements of the Civil Justice Reform Act of 1990 (CJRA).[20]

Special attention to managing the process of litigation may once have been necessary only in certain specialized categories of cases, especially complex litigation and mass tort claims. Indeed, trial judge involvement in overseeing complex litigation is well accepted.[21] The confluence of pressures on the federal judicial system, however, has made reliance on effective case management vital to the effective disposition of all types of cases at all levels in the system. The early involvement and active role of federal district judges "in the management of litigation" was credited by the Federal Courts Study Committee with explaining "the federal district courts' ability to keep abreast of their increased workload."[22] And the availability of

[19] A related issue of interest to the courts is *how* attorneys fees are paid. *See*, *e.g.*, Sarah Evans Barker, *How the shift from hourly rates will affect the justice system*, 77 JUDICATURE 201 (1994).

[20] 28 U.S.C. §§ 471-482 (Supp. V 1993).

[21] *See, e.g.*, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY § 3.06, at 106-09 (1994); MANUAL FOR COMPLEX LITIGATION, THIRD §§ 20.1, 20.13 (Federal Judicial Center 1995).

[22] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 99 (1990). The FCSC predicted that "[g]reater use of active case management, and development—in cooperation with the bar—of local plans to control cost and delay in civil

magistrate judges to conduct pretrial and settlement proceedings, as well as trials, has made the magistrate judge system an indispensable tool to the modern district courts.

Although the central role of the federal district judge in effecting the appropriate pace of civil litigation has been clear to judges for many years,[23] case management has proven equally useful to appellate courts faced with increased case filings. Recommendations for dramatic structural change in the appellate courts have not been supported by objective data, but there clearly is a need to continue procedural experiments and innovations in the way the courts of appeals cope with their burgeoning caseloads, while maintaining the quality of justice.

Case Management in the Courts of Appeals

Unfortunately, the processes by which appeals are actually decided in each circuit are generally not well known, and they have not been sufficiently studied. In the text that follows, programs are discussed that would help address the current caseload and allow for the testing of procedural variations short of wholesale court restructuring. Ideally, all the techniques suggested would be selected by one or more circuits, so that the entire universe of possibilities could be canvassed.

❒ RECOMMENDATION 35: **The courts of appeals should exchange information on appellate case management.**

Federal appellate courts have developed a variety of different case management systems.[24] It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems.

This exchange might well be stimulated by more frequent intercircuit assignment, as now occurs frequently for senior judges. On a voluntary basis, it would also be beneficial for active appellate judges to observe first-hand how other courts handle their work.[25] The Administrative Office and the Federal Judicial Center should promote the growth of institutionalized means of enabling the appellate courts to make full use of this information.

❒ RECOMMENDATION 36: **The federal court system should collect and analyze information on various courts of appeals' case management practices.**

Providing access to meaningful review in the courts of appeals by a panel of three Article III judges does not imply that all cases merit the same procedures or level of judicial attention. To the contrary, many appeals can be handled effectively and fairly

cases, will be necessary to keep courts abreast of rising workloads and secure 'the just, speedy, and inexpensive determination of every action' promised by Federal Rule of Civil Procedure 1." *Id.*

[23] *See* STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977).

[24] *See* ROBERT A. KATZMANN & MICHAEL TONRY, EDS., MANAGING APPEALS IN FEDERAL COURTS (Federal Judicial Center 1988).

[25] Consistent with a Federal Courts Study Committee recommendation, Congress amended 28 U.S.C. § 291(a) to authorize intercircuit assignments of court of appeals judges "in the public interest." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 104, 106 Stat. 4506, 4507. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 155 (1990).

with a minimum of judicial attention.[26] Appeals that are exclusively fact-driven differ greatly from those that raise novel legal issues. Most appeals are disposed of without a decision on the merits[27] and many of those that require the attention of a three-judge panel do not require the full panoply of traditional appellate procedure such as oral argument and full briefing. Accordingly, evaluation of what appellate procedures are best suited to different types of cases or issues on appeal would be helpful in guiding efficient resource allocation.

Many streamlining efforts are underway today in the courts of appeals. New strategies are being explored for appeal diversion, appeal management, expanded use of non-judicial staff, restricted publication of opinions, and maintaining consistency of circuit law. Information about how the courts handle their workloads will be collected as part of an appellate case management study initiated by the Judicial Conference's Committee on Court Administration and Case Management. This is a worthwhile effort, since it is important that all appellate courts receive the benefit of the varied experiences of other circuits and exchange information about the operation and results of their use of particular case management techniques and systems.

❒ RECOMMENDATION 37: **The courts of appeals should adopt internal procedures and organizational structures to promote the effective delivery of high-quality appellate justice and to maintain the consistency of circuit law.**

Implementation Strategies:

37a *There should be further development of appellate adjudicative programs, such as the Civil Appeals Management Plan ("CAMP").*

Experience has shown that some courts have been able to settle significant numbers of civil appeals through dispute resolution programs. Under such procedures as CAMP, attorneys in selected civil appeals are required to confer with a judge, a court staff attorney, or a volunteer private lawyer in an effort designed to dispose of appeals through settlement, improve the quality of briefs and arguments in those appeals that do not settle, resolve procedural problems that might arise, and conform to scheduling order deadlines.

37b *Innovative management of appeals should continue and be expanded as needed.*

In the view of some courts, not all appeals require oral argument. Some may not require full briefing and may be evaluated on short briefs limited to fifteen pages, without extensive records.[28] Courts may also wish to experiment with adjunct judicial officers, such as appellate commissioners, to act as evaluators and managers of appeals. Some courts may find it useful to have appeals screened first by nonjudicial court staff. Others may find it preferable to have one judge or a panel of judges determine the process due before the case is scheduled for a particular track. Still others may opt for no screening at all.

[26] More than 50% of all filed appeals are currently disposed of by means other than a decision on the merits of the case. Some of these nonmerits terminations require judicial attention (*e.g.*, dismissals for want of jurisdiction), but many do not.

[27] *See* JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (Federal Judicial Center 1993).

[28] *See* Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning 8 (Feb. 16, 1993).

37c *Appellate courts should consider the use of nonjudicial staff and adjunct judicial officers to handle certain routine matters that do not involve the appellate review function reserved to Article III judges.*

Courts differ greatly in how they use their central staff counsel, particularly with respect to the level of their involvement in the nonargument decision making process.[29] These differing practices can reflect strong differences of opinion among judges regarding the proper role of staff—differences that are heightened in the face of current proposals to expand the use of adjunct judicial officers to the appellate context. It is clearly not appropriate to delegate essential appellate decision making functions, such as affirming or reversing a district court judgment, to "appellate commissioners" in the courts of appeals. Those officials, however, might play a useful role in a variety of properly delegable functions, such as conducting settlement programs and making findings and recommendations to the court on matters (*e.g.*, counsel fee petitions and contempt petitions) that require fact finding by the appellate court.

37d *Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed.*

Not all appellate decisions warrant publication and citation for precedential purposes. Uncomplicated applications of clear precedent, for example, do not add to the law of the circuit and need not be published. Opinions published for precedent by the appellate court tend to require more judicial time and resources than opinions restricted and distributed primarily for the benefit of the parties directly involved in a dispute. Historically, these opinions had not been published in the official reporters and were sent only to the parties, although they were part of the public file and available for public inspection.

Widespread electronic distribution of appellate decisions has changed the traditional relationship between publication and citation. In the past, widespread distribution of decisions was accomplished only through their publication in the official reporters; this is no longer true. The courts cannot very well control the eventual availability of their written decisions in electronic databases and bulletin boards. As the Federal Courts Study Committee noted in 1990, efforts by courts to restrict distribution could lead to those having better access to the court's original written decision having unfair advantage. On the other hand, courts must be able to establish which of their decisions were intended to further the law on the points of the case. What is to be cited is becoming only a portion of what has been widely distributed.

The Federal Courts Study Committee recommended the creation of an ad hoc committee, under the auspices of the Judicial Conference, to review the policy on unpublished opinions.[30] In the interim, nonpublication and citation rules have been in the process of evolving. Some circuits have enforced strict non-citation rules for unpublished opinions, others have invited bar associations to monitor and ensure that opinions with precedential value are published, while a few are experimenting with suspension of the non-citation rule.

[29] *See* JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (Federal Judicial Center 1985).

[30] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130-31 (1990).

Clearly this is an area in flux that requires study and assessment. In light of these developments, the relevant committees of the Judicial Conference should work together to develop a uniform set of procedures and mechanisms for access to circuit court opinions, guidelines for publication or distribution, and clear standards for citation.

37e *Internal efforts to maintain the consistency of circuit law should be continued and enhanced.*

Courts should consider whether they might maintain the consistency and coherence of circuit law by methods short of gathering the full court for an en banc proceeding. These might include: (1) circulating a concise list each week of the significant issues in cases heard or submitted that week on which opinions will be written; and (2) monitoring by staff attorneys to ensure strict adherence to the policy that no panel may overrule or disregard the decision of a prior panel unless the court as a whole so agrees either informally (by prior circulation of the proposed opinion) or formally (by en banc rehearing).

Case Management in the District Courts

❒ RECOMMENDATION 38: **The district courts should enhance efforts to manage cases effectively.**

This plan acknowledges the need for broader, more effective use of case management to meet increasing caseload burdens at the trial level. Because it is anticipated that there will be continuing growth at the trial level due to expanding civil and criminal federal jurisdiction, continued experimentation in the district courts with innovative case management techniques should be encouraged.

❒ RECOMMENDATION 39: **District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.**

Bench and jury trials resolve only a very small proportion of the district court's civil docket. More than ninety percent of cases are resolved without trial by such means as summary judgment, default, voluntary or involuntary dismissal, and settlement. Most litigants' experience, therefore, is based upon a resolution in federal court without a trial. Judicial case management efforts would benefit from increased focus on this large proportion of the civil caseload that does not reach trial, taking into account the simplicity or complexity of various categories of civil cases, the costs of litigation, and the need to achieve timely and just dispositions for the litigants.

A conventional bench or jury trial is very expensive and not the best resolution for every dispute initiated in the district courts. Often, a fair settlement by the parties, with or without court involvement, is the preferable resolution for particular litigation. To this end, the federal trial courts should be encouraged to offer a wide array of means and methods for resolving civil disputes—while preserving the traditional trial process—through settlement efforts by district judges and magistrate judges, by the effective use of supporting court personnel, and by a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts.

Primary emphasis should be placed on fairness and justice. Simplicity, cost and timeliness must also be considered and obviously contribute to the perception of fairness and justice on the part of the litigants and the public. Even conventional jury and bench trials should continue to be evaluated against these benchmarks, and steps should be taken to enhance their performance on these standards as well.

A goal of our judicial system must be to resolve disputes expeditiously and inexpensively—with resolutions that are, and are perceived by litigants, attorneys, and other members of the public to be, both procedurally fair and substantively just. The effective operation of the federal civil justice system depends on average citizens being confident that there exists a public forum in which they can secure a fair and just resolution of their disputes without risking personal or professional bankruptcy.

Using time-honored procedures for case management, federal judges resolve approximately ninety-four percent of all civil cases without trial. These procedures include early control of discovery, prompt ruling on motions, and ample notice of firm dates for pretrial conference and trial. Lawyers, confronted with the certainty of firm pretrial and trial dates, settle those cases that can be settled. Those cases that should be resolved by summary judgment are resolved by timely consideration of motions. The five-to-six percent of those cases not resolved proceed to trial expeditiously before a judge who has controlled discovery and ruled on all pending motions.

Over the past decade the increasing civil caseload, the continuing federalization of crime, the implementation of the Sentencing Guidelines, and the Civil Justice Reform Act of 1990 have caused the judiciary to examine case management carefully with a view towards resolving civil disputes with methods other than the traditional trial process. Federal courts have experimented with broader use of magistrate judges and supporting court personnel, and have developed a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts.

Private forums should be encouraged, but the federal courts must not shed their obligation to provide public forums for disputes that need qualities that federal courts have traditionally provided, including at a minimum a neutral and competent decision-maker and the protection of weaker parties' access to information and power to negotiate a dispute. Court supervision of ADR programs may be the only means of ensuring satisfaction of those conditions in some cases, although referral to private dispute resolvers may well serve as part of a court-supervised program.

This proposal will have a budgetary impact in that additional funds may be necessary to compensate neutrals who participate in ADR programs, and additional staff may be needed in some courts to administer the programs. The Federal Judicial Center should continue to sponsor the requisite training and education for judges and assist the courts in developing programs for arbitrators, mediators and other ADR neutrals to implement this recommendation.

Accordingly, this plan proposes that courts wishing to experiment with ADR programs be encouraged to do so.