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Abstract
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Keywords
Case management, federal district courts, docket systems, local rules

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Case Management in the Eastern District of Virginia

By KIM DAYTON*

Introduction

RECENTLY, THE FEDERAL courts have come under attack from scholars, practitioners, and other critics who have argued that docket delays in the federal courts have become intolerable, and that litigation costs in the federal courts make them off-limits for many potential plaintiffs.1 Although not all observers agree that a litigation "crisis" truly exists in the federal courts,2 Congress, and to some extent the courts

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1. See generally JANE W. ADLER ET. AL., THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS (1982) (summarizing presentations and discussions about civil court delay that occurred at the Institute for Civil Justice Conference on the Pace of Litigation); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) (arguing that the pressure of the rapid and unremitting growth in caseload in the United States courts will harm the judicial system in America unless improvements in the system are made); Diane P. Wood, Court-Annexed Arbitration: The Wrong Cure, 1990 U. CHI. LEGAL F. 421, 421-22 nn. 1-2 (collecting authorities); Thomas W. Church, Jr., The "Old and the New" Conventional Wisdom of Court Delay, 7 JUST. Sys. J. 395 (1982) (summarizing older and more recent studies of delay in the court system and arguing that emphasis should now be placed on studies analyzing the results of such a delay); David N. Cole, Courts and the Threat of Litigation Overload, 27 N.H.B.J. 155 (1986) (reviewing the reasons for the present delay in the courts and suggesting several measures to reduce the delay).


The total number of cases filed in the federal courts has undoubtedly increased consistently over the last three decades. See Wood, supra note 1, at 422 n.3. The debate about the federal courts' problems does not concern absolute caseloads in the federal courts. Rather, it concerns the question of whether a litigation crisis exists, because a substantial share of the federal courts' civil caseload now consists of routine or noncomplex cases such as pro se pris-
themselves, recently have been receptive to the call for reform of court and case management procedures. Congress, through legislative action, and the courts, through proposed rule changes, are attempting to rectify this perceived crisis and satisfy the demands and needs of litigants in the federal judicial system.

The Judicial Improvements Act of 1990 ("1990 Act"), Congress's most recent effort at judicial reform, is a series of wide ranging measures intended to address alleged burdensome caseloads, docket delay, and unreasonable expense in the federal courts. The 1990 Act, among other things, implements some recommendations of the Federal Courts Study Committee, and recommendations resulting from the Brookings Institute's 1989 study of the alleged litigation crisis. Among the 1990 Act's most important provisions are those authorizing additional federal district and appellate judgeships, modifying the federal courts' subject mat-
ter jurisdiction and venue requirements,7 and prescribing the quarterly public reporting of certain judicial case management statistics.8

Title I of the Judicial Improvements Act of 1990 is the Civil Justice Reform Act of 1990 ("CJRA").9 The CJRA requires each federal court to appoint an "advisory group" made up of practitioners, litigants, and other representatives of the court's constituencies.10 This advisory group must intensely evaluate the court's docket and case management procedures11 and, if problems exist, recommend to the court a plan for reducing expense and docket delay in the district.12 The district court may adopt, modify, or reject the proposed plan, promulgate and adopt its own plan, or adopt a model plan to be developed by the Judicial Conference of the United States.13

In addition to advisory groups around the nation assessing docket conditions in the federal district courts and, in many instances, developing expense and delay reduction plans for individual courts,14 the Judi-

7. Title III of the 1990 Act, the Federal Courts Study Implementation Act of 1990, contains these provisions, which are codified in scattered sections of 28 U.S.C. Paradoxically, given the concern about federal court overload, this legislation significantly expanded federal court pendent claim, pendent party, and ancillary jurisdiction, now "supplemental" jurisdiction. See 28 U.S.C § 1367 (1990). This expansion of subject matter jurisdiction increases the number and breadth of cases filed in the federal courts, though in theory it may reduce litigation over whether a federal court should exercise pendent or ancillary jurisdiction in a particular case. For a discussion of the jurisdictional and venue provisions of the 1990 Judicial Improvements Act, see generally Oakley, supra note 3.
8. 28 U.S.C. § 476 (Supp. 1990) provides:
(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—
   (1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;
   (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and
   (3) the number and names of cases that have not been terminated within three years of filing.
(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with [28 U.S.C. § 481] shall apply to the semiannual report prepared under subsection (a).

The federal judiciary was opposed to this reporting requirement. Diana E. Murphy, The Concerns of Federal Judges, JUDICATURE, Aug.-Sept. 1990, at 112.
10. Id. § 478; see also MEMORANDUM RE IMPLEMENTATION OF CIVIL JUSTICE REFORM ACT OF 1990 (Administrative Office of the United States Courts, Dec. 20, 1990) (discussing the formation of CJRA advisory groups) (unpublished, on file with author).
12. Id.
13. Id. §§ 472(a), 477.
14. As of November 1, 1991, only two advisory groups of federal district courts—the
cial Conference has recommended sweeping changes in the Federal Rules of Civil Procedure. These changes are designed to address many of the problems that Congress focused on before it enacted the CJRA. In some cases, the proposed amendments seem to duplicate the efforts of the CJRA, or respond to problem areas the Federal Courts Study Committee and the Brookings Institution identified but were not addressed in the omnibus court reform legislation.

Both the CJRA and the proposed amendments to the Federal Rules of Civil Procedure assume that a need exists for a substantial overhaul of the federal courts' case management procedures. This Article takes issue with that assumption through a practical assessment of how one federal district court, the Eastern District of Virginia, has dealt effectively, efficiently, and ultimately, fairly, with its increasing civil and criminal caseloads. The court has not accomplished this through novel case management procedures, extrajudicial dispute resolution techniques, local rules of practice that are inconsistent with the Federal Rules of Civil Procedure, or other extraordinary measures contemplated by the CJRA and the Judicial Conference's proposed amendments to the Federal Rules of Civil Procedure. Rather, the court has relied primarily on two basic case management principles: firm docket control by the judges, as

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16. For example, a proposed amendment to Fed. R. Civ. P. 16(c)(9) would permit courts to compel attendance at court-annexed alternative dispute resolution ("ADR") proceedings, id. at 4, a rule Congress considered enacting the CRJA but left open by the ambiguous wording of the CJRA on this subject, see Kim Dayton, The Myth of Alternative Dispute Resolution in the Federal Courts, 76 Iowa L. Rev. 889, 948-50 (1991) (arguing that CJRA does not permit mandatory ADR). Proposed discovery rules changes would also duplicate parts of the CJRA. In a related matter, a proposed amendment to Rule 83 of the Federal Rules of Civil Procedure presently authorizes the federal district courts to promulgate local rules consistent with the national rules. The proposed amendment would allow district courts to enact "experimental" local rules inconsistent with national rules. Such inconsistent, experimental rules would expire at the end of five years. Proposed Amendments, supra note 15, at 9-10. The amendment is conceived in part to enable district courts to implement ADR programs. Id. (Committee Notes to Proposed Amendments to Rule 83). This proposed rule change at least indirectly responds to the Federal Courts Study Committee's recommendation, rejected by Congress, to expand by statute the district courts' rulemaking authority to adopt mandatory ADR programs. See FCSC Report, supra note 4, at 82-85.
federal Rule 16 expressly permits, and an insistence that attorneys prac­ticing in the district comply with local and federal rules of procedure. Incorporating these two basic principles into the Eastern District of Vir­ginia’s case management procedures and practices has resulted not only in case management statistics that are unsurpassed in the federal judici­ary, but also, as expressed by the court’s broadly representative advisory group, in “the high quality of justice administered to litigants . . . in the Eastern District of Virginia.”

Part I of this Article describes the administrative structure of the Eastern District of Virginia and its case management practices. Part II demonstrates that, despite the Eastern District of Virginia’s status as one of the busiest federal district courts, it has consistently been one of the most efficient and effective federal courts in the nation. As a result, in Part III, this Article concludes that the experience of the Eastern Dis­trict of Virginia raises many questions about the premises underlying the Civil Justice Reform Act, the proposed amendments to the Federal Rules, and the means by which Congress and the Judicial Conference have sought to address delay and expense in the federal courts. This Article suggests that the path to federal court reform may not necessarily be that suggested by the CJRA and other recent reform movements; instead the solution may be simply to acknowledge and activate the role of the judge as manager of civil litigation.

I. Case Management Procedures in the Eastern District of Virginia

The Eastern District of Virginia’s commitment to minimizing ex­ pense and delay in federal civil litigation is longstanding, tracing back to the efforts of Judges Walter E. Hoffman, Oren R. Lewis, and John D. Butzner, Jr. to clear the court’s backlog in the early 1960s. Since that time, the court has developed local rules, standing orders, and internal operating procedures that envision strict judicial control over the con­duct of civil litigation in the district court, from the time the complaint of


a case is initially filed through settlement or trial. Each judge on the court is personally committed to maintaining early and ongoing involvement in cases filed in the district. Magistrate judges and parajudicial personnel demonstrate a similar dedication to fulfilling their respective roles in the case management process. Local attorneys have become accustomed to the pace of litigation in this court and respect the court’s rules and processes.

As a result of the historic efforts of nearly three decades ago, and the ongoing efforts of the court’s judicial and parajudicial personnel and the bar, the Eastern District of Virginia has avoided the litigation “crisis” that appears to confront many federal district courts. Despite its recent increasing criminal and civil caseloads, the median time for processing civil cases in the Eastern District of Virginia has decreased from the early 1980s. Criminal case disposition rates have remained relatively constant, contrary to the situation in some federal courts. After describing the “playing field,” that is, the characteristics of the Eastern District of Virginia as a federal court, this Part outlines the practices and procedures that have enabled the court to maintain its status as one of the most effective federal district courts in the nation.

A. Background: Characteristics of the Court

For many reasons, the Eastern District of Virginia is an excellent subject to study and discuss case management and the alleged litigation crisis. The court is neither exceptionally small, nor exceptionally large in the number of authorized district judges or its geographic size. It has permanent district judgeships, and one temporary district judgeship authorized under section 203(b)(2)(C) of the Federal Judgeship Act of

19. In statistical year ("SY") 1980, for example, the median time from filing to disposition of a civil case was five months in the Eastern District of Virginia. 1984 FEDERAL COURT MANAGEMENT STATISTICS 46 (Administrative Office of the United States Courts 1984) [hereinafter 1984 STATISTICS]. In SY 1990, the figure dropped to four months. 1990 FEDERAL COURT MANAGEMENT STATISTICS 70 (Administrative Office of the United States Courts 1990) [hereinafter 1990 STATISTICS]. The national median time from filing to disposition of a civil case was nine months in SY 1990. Id. at 167. In calculating the median, the Administrative Office ("AO") excludes land condemnations, prisoner petitions, recovery of overpayments, enforcement of judgments, and deportations. Id. The SY encompasses July 1 to June 30. Thus, SY 1990 runs from July 1, 1989 to June 30, 1990.

20. See infra part II.B.2.

Although the Federal Judicial Center historically has treated it as a metropolitan court, it has characteristics of both large metropolitan and small rural courts because of its divisional structure. Its caseload traditionally has been heavier than average for its size, but its civil and criminal case filings mix is comparable in most respects to the national filings mix. It has substantial civil caseloads of certain kinds of cases, such as products liability personal injury cases and pro se prisoner filings, which have caused some courts serious case management problems.

22. Pub. L. No. 101-650, Tit. II, § 203(a)-(c), 104 Stat. 5089; see 28 U.S.C.A §§ 133, 133c & Historical Note (West Supp. 1991). The provisions of the 1990 Judicial Improvements Act appear to be an attempt to strike a balance between equalizing per judgeship caseloads and addressing delays in the federal district courts on the one hand, and the Federal Courts Study Committee's admonition that the solution to the litigation "crisis" is not creating more federal judgeships on the other. The Act therefore created 13 "temporary judgeships" in some federal district courts. The legislation provides that, in districts authorizing such temporary judgeships, the first judicial vacancy occurring five years or more after December 1, 1990, shall not be filled. Id. § 133 historical and statutory note (citing Pub. L. No. 101-650, 104 Stat. 5089, § 203(c)).

A temporary judgeship was allocated to the Eastern District of Virginia under the 1990 Act because of the District's substantially higher than average caseload, including per judgeship weighted caseload and per judgeship criminal caseload.

In addition, like most courts, the Eastern District of Virginia has several senior judges who assume caseloads. As of September 30, 1991, the court had five senior judges who maintained full or near-full caseloads in the district, presided at trials in other district courts, and served on appellate panels. CJRA REPORT, supra note 17, at 48. For a discussion of the role and importance of senior judges in the federal judicial scheme, see Wilfred Feinberg, Senior Judges: A National Resource, 56 BROOKLYN L. REV. 409 (1990). Finally, the Eastern District of Virginia also has seven full-time judges, and one part-time magistrate judge, and four bankruptcy judges. Part I.B. of this Article discusses the role of the magistrate in case management in the Eastern district.

23. See STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 2 (Federal Judicial Center 1977) (identifying Eastern District of Virginia as 1 of 24 metropolitan district courts). Metropolitan and nonmetropolitan courts may have different court administration and case management problems. Id. See generally PHILIP L. DUBOIS, ADMINISTRATIVE STRUCTURES IN LARGE DISTRICT COURTS (Federal Judicial Center 1981).

24. For example, during SY 1990, 513 civil cases were filed for each of the Eastern District of Virginia's nine federal district judges, the eighth highest number of new civil cases filed per judgeship in the nation in that year. In addition, 72 criminal cases were filed in the district, 25th among the nation's 94 federal district courts. The district's weighted case filings of 647 cases (reflecting the complexity of the court's caseload) was the second highest in the nation. For further discussion of the Eastern District of Virginia's caseload and a comparison to national average caseloads, see infra part II.B.1.

25. See infra part II.A.1.

26. The number of personal injury products liability cases filed in federal court between SY 1974 and SY 1985 increased over 700%. Michael D. Green, The Paradox of Statutes of Limitations in Toxic Substances Litigation, 76 CAL. L. REV. 965, 967 n.7 (1988); see also Marc Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3, 21-25 (1986). A Justice Department study on case trends precisely tabulated the increase in federal products liability filings at 758% for that period. George L. Priest, The Current Insurance Crisis and Modern...
Like most other federal courts, it has seen dramatic increases in the number of criminal defendants prosecuted resulting from the so-called “war on drugs.” In short, except for its extraordinary case management statistics, the court is in many important respects an “average” federal district court.

Like other federal district courts, the Eastern District of Virginia has experienced significant judicial vacancies during the past two decades. A judicial vacancy exists for statistical reporting purposes from the date a district judge takes senior status, resigns, or otherwise leaves the bench, until a new district judge is sworn in as a member of the federal judiciary. The Administrative Office of the United States Courts (“AO”), which is responsible for gathering and reporting case management statistics for the federal district and appellate courts, calculates judicial vacancies in a district court for the statistical year (“SY”). The AO expresses these vacancies in terms of “vacant judgeship months” for a district and for the federal district courts as a group. For example, in SY 1990, there were 4.1 vacant judgeship months in the Eastern District

*Tort Law, 96 Yale L.J. 1521, 1532 (1987).* Certain products liability cases, such as asbestos cases, Agent Orange litigation, and similar “mass tort” cases, have posed problems for the federal courts. See, e.g., Linda S. Mullenix, *Beyond Consolidation: Postaggregate Procedure in Asbestos Mass Tort Litigation,* 32 WM. & MARY L. REV. 475 (1991).

The number of federal actions brought by prisoners has also burdened the federal judicial system, at least in the number of filings. Because the majority of these cases are filed pro se, the pleadings are often difficult to understand, and few settle because meaningful negotiations between prisoners acting pro se and government attorneys are practically impossible. Moreover, no restraint occurs on unwarranted litigation because the plaintiff, who is usually proceeding in forma pauperis, is undaunted by either the expense of litigation or the threat of monetary sanctions. Mark K. Dietrich, *Transportation of State Prisoners to Their Federal Civil Rights Actions,* 53 FORDHAM L. REV. 1211, 1211 n.4 (1985); Michael J. Mueller, Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control,* 18 U. Mich. J.L. Ref. 93, 101 n.25 (1984).

27. 28 U.S.C. § 604 (1988 & Supp. 1990) authorizes the AO to compile statistics on the federal district courts’ caseloads. This Article’s discussion of caseloads, trends, and other statistically-based analyses is based primarily on information compiled and published by the AO. Most statistics discussed in this Article are included in the AO’s yearly “Federal Court Management Statistics” publications. Unless otherwise indicated in text or footnotes, statistical information for SY 1985-90 derives from 1990 STATISTICS, supra note 19, statistical information for SY 1979-84 derives from 1984 STATISTICS, supra note 19, and statistical information for SY 1976-78 derives from MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1981 (Administrative Office 1981). These three publications are on file with the author.

The AO provided additional criminal defendant caseload statistics to the author in the author’s capacity as Reporter to the Eastern District of Virginia’s CJRA Advisory Group. These statistics are on file with the author. At the time this Article was written, SY 1991 court management statistics were not available.

28. See supra note 19 (defining “statistical year”).
of Virginia, and 540.1 vacant judgeship months among the 94 federal district courts.29

During SY 1985-90, 75.6 vacant judgeship months existed in the Eastern District of Virginia. This is the equivalent of more than six full-time judges absent for one year, and represents 11.7% of the total vacant judgeship months allocated to the Eastern District of Virginia during that time period. Figure 1 expresses the vacancies in the Eastern District of Virginia and nationally during this period as a percentage of total judgeship months; this figure illustrates that, during SY 1976-90, the percentage of vacant judgeship months in the Eastern District of Virginia exceeded the national percentage. Thus, the problem of judicial vacancies is more severe in this district than expected nationally.

The federal statute creating the federal district courts permits, but does not require, district courts to create divisions.30 The Eastern District of Virginia has such a local rule, and comprises four separate divisions: Alexandria, Newport News, Norfolk, and Richmond.31 The Alexandria and Richmond divisions historically have operated independently of the other divisions in most case management procedures. The Newport News and Norfolk divisions, though separate by law and local rule, operate as one court, and this Article treats them as a single division.

One unique aspect of the divisional structure and case management procedures of the Eastern District of Virginia's divisions is that, in many ways, the court is a microcosm of the federal district court system. As explained more fully below, two divisions of the court employ a master docket system for managing cases, while the third uses an individual docket system. The master32 and individ-

29. See 1990 STATISTICS, supra note 19, at 70, 167. Shortly after Congress creates new district judgeships, the number and percentage of vacant judgeship months for the SY swells markedly due to the lapse between when the judgeships are “created,” i.e., the effective date of the legislation authorizing the judgeships, and when judgeships are filled through the nomination and confirmation process. Figure 1, infra, illustrates this phenomenon. The Federal Courts Study Committee suggested that judicial vacancies have created a case management problem for many federal district courts, and that the President and Congress should act promptly to fill vacancies (those attributable to newly created but unfilled judgeships, and those resulting from other causes). FCSC REPORT, supra note 4, at 36. The executive and legislative branches, unfortunately, continue to ignore that advice: of the 13 temporary judgeships created as of December 1, 1990, when the 1990 Act became effective, only four had been filled on March 20, 1992. Telephone Interview with Maurice Galloway, Administrative Office of the United States Courts (Mar. 20, 1992).
31. E.D. VA. LOCAL R. 3(B).
32. A master docket system means that matters needing judicial attention are handled by
Docket systems are the prevailing methods of case management used in the federal district courts. In the Eastern District of Virginia the division’s judges on a rotational basis; individual cases are not assigned to a particular judge.

33. An individual docket system is one in which cases are assigned to an individual trial judge. That judge will handle the case from filing to disposition.
choice of docket systems has not impacted the individual divisions' case management statistics compared to the district's statistics as a whole.

B. Case Management Procedures in the Eastern District of Virginia

Several specific case management practices are key to the court's historic effectiveness in handling its civil caseload. Part I.B.1. discusses the local rule-based procedures that appear to be essential ingredients to the court's effective case management strategy and that all divisions use. Part I.B.2. discusses some of the differences in court management procedures among the divisions. These differences reflect the preferences of the district judges assigned to these divisions concerning case, motion, and trial assignment. Despite the differences in docketing and scheduling practices, all divisions have comparable management statistics. Finally, subsection I.B.3. addresses special procedures that the district uses in connection with two categories of cases: asbestos-related personal injury litigation and pro se prisoner civil rights complaints and petitions for habeas corpus relief from state or federal convictions.

1. Local Rules Governing Case Management

The local rules for the Eastern District of Virginia are designed to minimize unnecessary delay and expense in the civil litigation process while achieving quality justice for the litigants. These rules envision strict control by the district judges over litigation filed in the court, as expressly authorized by Rule 16 of the Federal Rules of Civil Procedure.34 This control extends to motions, discovery, and the scheduling of trials. The rules also contemplate attorney awareness of and compliance with time deadlines imposed by the rules and by orders in individual cases, and make clear that the court regards requests for extensions and continuances unfavorably.35 Although all of these local rules contribute to the district's successful management of its civil and criminal caseloads, several of them are particularly important. Many of these rules, all of

34. FED. R. CIV. P. 16. The rule was amended in 1983 to clarify that district judges may and should take control of civil litigation pending before them. The 1983 amendments were intended to at least respond to criticisms that judges were inappropriately becoming "managers" of litigation, rather than remaining dispassionate and neutral arbiters of "justice." FED. R. CIV. P. 16 advisory committee note.

Recently proposed amendments to Rule 16 would further expand judges' obligations to control civil cases through Rule 16 scheduling order and by other means. See PROPOSED AMENDMENTS, supra note 15 (FED. R. CIV. P. 16). The Civil Justice Reform Act also recognizes district judges' obligation to control litigation early and remain involved in cases throughout the pretrial stage. See infra part IV.

35. E.D. VA. LOCAL R. 11(J).
which antedate the CJRA, incorporate the principles, guidelines, and techniques of litigation management that Congress has indicated are important methods for reducing expense and delay in the federal courts. Accordingly, the salient features of some of these rules are discussed below.

a. Local Rules Concerning Venue

The Eastern District of Virginia's Local Rule 3 creates and defines the four divisions of the district. Local Rule 4 articulates venue rules governing where an action in the Eastern District of Virginia must be filed within the district under federal venue statutes. The importance of such venue provisions should be evident. They can reduce expenses by confining the litigation to the most convenient geographical area of the district for the court and parties to conduct discovery and, in the event of trial, to try the case. They also eliminate judge-shopping, which can occur in districts having individual dockets and no divisions or venue limitations.

b. Local Rules Concerning Motions Practice

The principal local rule governing motions practice in the Eastern District of Virginia is Local Rule 11. This rule requires that motions be in writing unless the motion is made in court during a hearing or the court specifically waives this requirement. It precludes using "form" motions unless extraneous material is deleted and the filing attorney personally reviews the motion and certifies that the motion as filed is fully pertinent to the case. Generally, a written brief must accompany all motions. This requirement, however, does not apply to motions for more definite statement or default judgment, motions for time extensions to file a responsive pleading unless the time to file has expired, or some discovery motions.

One of the most important features of Local Rule 11 is its requirement that counsel seeking a hearing on a motion must certify to the court that he or she has met with opposing counsel and has attempted to nar-
row the areas of disagreement at issue in the motion. This rule long antedates the CJRA that mandates district courts consider adopting such a rule or practice for discovery motions. The motion is returnable to the hearing date and time. The rule provides that in divisions having a motions day, the court will schedule a hearing on the motion at the earliest possible hearing date.

Counsel must file motions for summary judgment sufficiently in advance of the scheduled trial date to allow the court to consider the motion and supporting briefs fully. The court will not consider these motions untimely under this standard. The court will not grant motions for continuance of a scheduled trial date upon the mere agreement of counsel, but only for good cause shown to the court.

The four divisions implement the general provisions of Local Rule 11 in different ways. The details of each division's motions procedures are discussed in Part I.B.2. of this Article.

c. Local Rules Concerning Discovery

Local Rule 11.1 governs discovery practice in the Eastern District of Virginia. This rule has been instrumental in controlling litigation expenses associated with discovery. Among its important provisions are those limiting the number of interrogatories parties may file in a civil case to thirty, including parts and subparts, and limiting the number of non-party depositions that a party may take to five.

The local rule contains several subsections designed to control the time expended in discovery and prevent conflicts about discovery from delaying litigation. For example, it requires that objections to requests for discovery must generally be filed within fifteen days after service of the discovery request.

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43. Id. R. 11(E).
45. E.D. VA. LOCAL R. 11(E). Currently, only the Alexandria division has a motions day. See infra part II.B.2.
46. E.D. VA. LOCAL R. 11(G).
47. Id. R. 11(H). Continuances are rarely granted.
48. Id. R. 11.1.
49. Id. R. 11.1(A). One proposed amendment to FED. R. CIV. P. 33 would limit the number of interrogatories that a party may serve to 15. See PROPOSED AMENDMENTS, supra note 15 (FED. R. CIV. P. 33).
50. E.D. VA. LOCAL R. 11.1(B). The proposed amendments to FED. R. CIV. P. 30 would limit the number of interrogatories that each party must answer to ten. See PROPOSED AMENDMENTS, supra note 15 (FED. R. CIV. P. 30).
or for protective order the litigants must provide discovery to the extent contemplated by court's order within eleven days. Also parties may not extend the time limits for discovery established in the local rules and the scheduling order of the case without the court's explicit permission.

The rule requires that parties file written motions concerning discovery with the court, but that only important motions such as motions to compel or motions for protective order be accompanied by a brief. No discovery motion may be filed, however, until counsel have met and attempted to resolve the controversies informally, and the court will not rule on discovery motions not accompanied with a statement by counsel that such meeting took place. Discovery motions are subject to the provisions of Local Rule 11 concerning the setting of a hearing date.

The local rule contains explicit sanction provisions applicable to frivolous discovery requests, and to a party's or an attorney's failure to comply with the discovery provisions of the local rule or court order. The courts in the Eastern District of Virginia strictly enforce these sanction provisions.

Local Rule 21, which deals with depositions, also has helped reduce litigation costs associated with discovery. This rule ensures that depositions of parties or party representatives are taken within the district. The party serving notice of deposition must pay the costs of re-

52. Id. R. 11.1(H).
53. Id. R. 11.1(K).
54. Id. R. 11.1(C).
55. Id. R. 11.1(E), (F).
56. Id. R. 11.1(F).
57. Id.
58. Id. R. 11.1(L).
59. Id. R. 11.1(M).
60. The Eastern District of Virginia was one of the leaders in strictly applying Rule 11 after its amendment in 1983. As a result, attorneys practicing in the district quickly learned that filing pleadings in violation of that rule would result in sanctions. In recent years, few Rule 11 problems have occurred in the district. Telephone Interview with Honorable Richard L. Williams, United States District Judge for the Eastern District of Virginia (Mar. 20, 1992).
62. Id. R. 21(A).
cording and transcribing the deposition, but transcription costs are taxable if the prevailing party uses the deposition transcript during trial.\(^{63}\) For depositions taken outside the district, the rule also requires that the party taking the deposition pay reasonable travel expenses for one opposing counsel to travel to and from the deposition, an amount not exceeding "an amount which would reasonably be required to be paid to associate counsel in the area."\(^{64}\) These provisions ultimately encourage parties to take depositions within the district, minimize attorneys' fees associated with the deposition process, and deter the taking of unnecessary depositions.

The local rule also addresses how depositions are used during the pretrial process and the trial. First, it requires that counsel review all depositions, prepare summaries of parts of the depositions, such as experts' qualifications, and delete irrelevant material and objections made during the deposition, in the event that the deposition is read during the trial.\(^{65}\) Second, for nonjury trials counsel must prepare and submit to the court summaries of "the salient points" of the depositions used as evidence at the trial.\(^{66}\)

d. Local Rules Governing the Role of Magistrate Judges

Local Rule 29,\(^{67}\) which outlines the duties that magistrate judges may perform within the district, implements to their fullest extent the provisions of federal statutes\(^{68}\) and procedural rules\(^{69}\) governing the roles of United States magistrate judges. Magistrate judges' duties differ in the three divisions of the Eastern District of Virginia, but they play an important role in the case management procedures of the district. In all divisions, magistrate judges handle a broad range of criminal matters. Their primary civil duties include determining discovery motions, handling pro se prisoner-related matters, hearing and deciding matters designated by the district judge, and, with increasing frequency, exercising full jurisdiction over civil cases by stipulation of the parties. The details of

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63. Id. R. 21(B).
64. Id. R. 21(E)-(F).
65. Id. R. 21(F).
66. Id. R. 21(G). The Fourth Circuit has upheld the practice of requiring lawyers to summarize depositions at trial, see, e.g., Dabbaghian v. Pierce, No. 88-3611 (4th Cir. Aug. 30, 1989); Walker v. Action Indus., 802 F.2d 703 (4th Cir. 1986), although it has never specifically considered the validity of E.D. VA. LOCAL R. 21(G).
69. See, e.g., FED. R. CIV. P. 72-76; FED. R. CRIM. P. 1, 3, 4, 5, 5.1, 6, 9, 11, 15, 16, 17, 20, 32.1, 40, 41, 44, 49, 50, 54, 55, 57, 58. See generally CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES (Federal Judicial Center 1985).
how each division uses its magistrate judges are described more fully below.\textsuperscript{70}

2. Division Procedures

Each division implements the local rules structure in its own way, resulting in some differences in the management of cases among the four divisions.\textsuperscript{71} The most fundamental difference among the divisions is that the Richmond division uses an individual docket system, while the others use master docket systems. This subsection describes the nuances of each division's case management procedures for the civil caseload.

a. Alexandria Division\textsuperscript{72}

The Alexandria division, which presently has four active judges, uses a pure master docket system. Upon the filing of a complaint, a case is placed on the division's master docket. The clerk's office reviews this docket monthly, and examines newly filed cases to determine whether all parties have filed a pleading or response (including a notice of appearance). If one or more parties have not responded to the complaint, the case is abated.\textsuperscript{73}

Once all named parties have filed a response with the court, the Chief Judge of the district enters a Rule 16 scheduling order, which, inter alia, sets discovery cutoff and final pretrial conference dates, requires that motions filed in the case be heard before the final pretrial conference, and advises counsel of their obligations during discovery, the final pretrial conference, and the trial. This order sets the final pretrial conference for two to three months after filing and cuts off discovery the Friday before that conference. Any defendant who has filed a response but has not answered is ordered to file an answer within ten days. Under the sched-

\textsuperscript{70} See CJRA REPORT, \textit{supra} note 17, at 12-28.

\textsuperscript{71} Most of the practices described in this subsection have not been codified in any rule or standing order. The discussion contained herein concerning each division's specific case management procedures derives from the CJRA REPORT, \textit{supra} note 17. The relevant portions of that Report were based on interviews by the author, as Reporter to the Civil Justice Reform Act Advisory Group for the Eastern District of Virginia, of various court personnel, conducted during May, June, July, and September 1991. The description of division procedures contained in the Report was reviewed and verified as accurate by all district and senior judges of the Eastern District of Virginia prior to completion of the Report.

\textsuperscript{72} See CJRA REPORT, \textit{supra} note 17, at 12-14. Unless otherwise indicated in text or footnotes, this Article's description of the Alexandria division's procedures is taken directly from the Eastern District of Virginia's CJRA REPORT.

\textsuperscript{73} E.D. VA. LOCAL R. 6(A), which implements \textit{Fed. R. Civ. P. 4(j)}, provides that, 120 days after filing of the complaint, the action is dismissed without prejudice as to any defendant who has not been properly served and has not appeared.
uling order and the division's procedures, all motions must be heard to obtain a ruling and must be scheduled for a hearing no later than the Friday before the final pretrial conference. The standard order also notifies counsel that a trial will be set at the final pretrial conference and will take place three to eight weeks after that conference. 74

In the Alexandria division, Fridays are reserved for the hearing of motions that have been scheduled by the clerk's office. Magistrate judges hear all discovery motions filed in the Alexandria division. Motions are scheduled to be heard by a particular judge or magistrate judge. The clerk's office estimates that fifty civil and criminal motions are heard on a typical motions day in the division, and that ninety-five percent of all motions are decided at the hearing.

Attorneys for the litigants must meet in advance of the final pretrial conference for a stipulation of uncontested facts. The chief judge of the district, who is located in Alexandria, presides at all final pretrial conferences in the Alexandria division. Under the standard scheduling order discussed above, attorneys must bring to the final pretrial conference witness and exhibit lists, exhibits marked and ready for filing, and the written stipulation of uncontested facts. Any objections to exhibit evidence must be noted at the final pretrial conference; the court rules on these objections at trial.

Trials are assigned randomly among the division's four judges, considering the judges' schedules and potential ethical conflicts. In bench trials, counsel must file with the clerk written proposed findings of fact and conclusions of law.

b. Newport News/Norfolk Division 75

Newport News and Norfolk are distinct divisions under E.D. Va. Local Rule 3(B), but they operate as one court. Each division maintains a separate docket and staff. The clerk's office in Newport News is responsible for docketing and monitoring all civil actions filed in the Newport News division. The master calendar clerk located in Norfolk calendars initial pretrial conferences, hearings on motions, trials, and other matters for Newport News and Norfolk cases. Civil motions filed in Newport News cases are sometimes heard in Newport News and

74. An example of the Alexandria division's initial scheduling order is reproduced in Appendix 5 of the district's CJRA Report.
75. See CJRA Report, supra note 17, at 14-18. Unless otherwise indicated in text or footnotes, this Article's description of the Newport News/Norfolk division's procedures derives from the Eastern District of Virginia's CJRA Report.
sometimes in Norfolk. Cases originating in Newport News are tried in Newport News on days when one of the judges is sitting there.

The elaborate "tickler system" in Norfolk flags cases in which return of service on a defendant was not made within the 120 days required by Rule 4 or in which the defendant has failed to file a motion to dismiss or an answer. This system also flags cases in which a motion is ready for hearing or ruling.\(^{76}\)

The Newport News and Norfolk divisions use a master docket system. Within two weeks of the time a case is at issue, the clerk schedules the Norfolk master calendar initial pretrial conference. This conference takes place at the court but is generally conducted by either the master calendar clerk or a judicial law clerk, and one attorney for each party must attend. At this conference, the presiding clerk sets a time frame for discovery and a trial date is established. If counsel indicate that "technical" problems such as possible misjoinder, a party's incompetence, or a jurisdictional issue may exist, the clerk schedules a hearing for such issues. If they indicate that any motions are likely to be filed in the case, the clerk will work with the lawyers to develop a briefing schedule for these motions. Motions are scheduled for hearing only after filing, however, and according to Local Rule 11.

The precise timing of pretrial events differs from case to case. In setting the pretrial schedule, the master calendar clerk or judicial law clerk works backwards from a trial date, set four to six months after the initial pretrial conference depending on the case's complexity. The final pretrial conference is set for two-and-a-half to three weeks before trial. An attorney conference is scheduled two weeks before the final pretrial conference, the cutoff for de bene esse depositions is scheduled two weeks before the attorney conference, defendants' discovery cutoff two weeks before the depositions, and the plaintiffs' discovery cutoff one month preceding the defendant's discovery deadline. The local rules govern motions pending at the time of the initial pretrial; and filing deadlines are set for anticipated motions.

The scheduling order required by Rule 16(b) results from the initial pretrial conference. The initial conference and the scheduling order procedures permit the court to accommodate the needs of the parties, attorneys, and court without sacrificing the court's commitment to a prompt and fair resolution of the case.

\(^{76}\) In 1984, Chief Justice Burger requested the Norfolk division to prepare a description of its "tickler" system, which generally applies to Newport News cases. The tickler system is described in CJRA REPORT, supra note 17, at Appendix 4.
Motions are decided on the papers unless the attorney who desires a hearing has obtained a hearing date under the local rule. The calendaring clerk sets all motions for a date and time; judges are scheduled to hear motions according to their availability and the need to avoid potential ethical conflicts. Magistrate judges have historically heard all discovery motions. Recently, the judges in these two divisions have begun referring more motions to the magistrate judges for hearing as permitted under Local Rule 29, and civil litigants more frequently stipulate to the magistrate judges' jurisdiction over the entire case under these provisions. Usually, the presiding judicial officer rules on a motion from the bench.

As noted, the trial date for the case is set at the initial pretrial conference. Usually, the trial judge is not assigned until the Thursday preceding the trial date. In some complex cases, the trial judge is assigned earlier to allow the judge to become more familiar with the record. The vast majority of all civil cases, in this division as elsewhere, settle before trial.

c. Richmond Division

The Richmond division has two active judges and one senior judge. The division uses an individual docket system in which cases are assigned to a judge, and the judge then handles all conferences held, motions filed, and other matters arising in the case. Each judge has formulated his or her own pretrial procedures, but these procedures are similar.

The clerk's office monitors all cases to ensure that the plaintiff has filed proof of service on all defendants and that answers or other responsive pleadings have been filed. If the plaintiff fails to file proof of service, the case is abated as provided by the local rule. If a party does not timely file a responsive pleading, the clerk's office notifies the party that the party is in default. The court enters a default judgment if there is still no answer.

Judge Merhige has the following procedures. The courtroom deputy schedules a pretrial conference within ten days of when the clerk's office knows counsel for the defendant by an entry of appearance, a motion to dismiss, or an answer. Judge Merhige presides at this conference, establishes a discovery schedule, and sets the final pretrial conference and the trial. Usually the trial date is set for three to four months after the

77. See CJRA REPORT, supra note 17, at 18-19. Unless otherwise indicated in text or footnotes, this Article's description of the Richmond division's procedures derives from the Eastern District of Virginia's CJRA REPORT.

78. See E.D. VA. LOCAL R. 12(B).
initial pretrial conference. A Rule 16 scheduling order results from the initial conference.

Judge Spencer's procedures are similar. When attorneys for all parties are known, a scheduling order is sent to counsel setting an initial pretrial conference within thirty days. He sets his cases personally and his secretary schedules motions. His courtroom deputy schedules most criminal matters.

Judge Williams sets his own cases. Attorneys must schedule motions and arraignments through his secretary and his courtroom deputy sets a pretrial conference date for three to four months after the answer has been filed.

Motions in the Richmond district are handled according to the procedures described in Local Rule 11. If an attorney wants a hearing on a motion, he or she must contact the judge's secretary and arrange for a hearing date.

Few discovery disputes occur in the Richmond division. When discovery-related motions are filed, however, judges handle these as they would any other motion. Magistrate judges do not become as involved in discovery in this division as they do elsewhere in the district.

3. Procedures Governing Special Classes of Cases

Special procedures apply to two categories of cases in the Eastern District of Virginia's civil caseload: asbestos-related personal injury cases and pro se prisoner petitions. These procedures have been

79. The Eastern District of Virginia is also the site of the "Dalkon Shield" litigation. The Dalkon Shield is an intrauterine birth control device that was discovered to have caused serious personal injury to women who used the device. See generally RONALD J. BACIGAL, THE LIMITS OF LITIGATION; THE DALKON SHIELD CONTROVERSEY (1990) (providing an overview of the Dalkon Shield litigation while focusing on the judicial role played by several judges; emphasizing the impact of bankruptcy proceedings on litigation); SUSAN PERRY & JIM DAWSON, NIGHTMARE: WOMEN AND THE DALKON SHIELD (1985) (providing a more personal view of the Dalkon Shield litigation by describing the ordeal which several women experienced in pursuing their claims); MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985) (providing an historical overview of the Dalkon Shield litigation; criticizing corporate criminality and the double standard which allows large companies to escape liability for their criminal acts). A.H. Robins, maker of the Dalkon Shield, has filed for Chapter 11 bankruptcy protection. See generally Sharon Youdelman, Note, Strategic Bankruptcies: Class Actions, Classification and the Dalkon Shield Cases, 7 CARDOZO L. REV. 817 (1986) (proposing a broad solution to the problems inherent in treating mass-tort claims in Chapter 11). As a result, a large number of Dalkon Shield personal injury cases are stayed. These stayed cases cannot be processed according to the court's usual civil procedures and have artificially inflated the district's list of cases that are more than three years old. See infra part II. New claims against A.H. Robins are now filed in the bankruptcy court pursuant to the Bankruptcy Code.
designed to account for the unique characteristics and needs of these two classes of civil litigation.

a. Asbestos Litigation

Most of the asbestos-related cases filed in the Eastern District of Virginia are associated with the shipbuilding industry in Newport News and Norfolk. Post-1990 asbestos-related cases filed in the Newport News or Norfolk division are subject to special procedures designed by Judge Clarke. When a party files a complaint, the filing attorney must provide the named defendants with the plaintiff’s medical records, pursuant to an oral standing order entered December 30, 1990. The complaint also must provide the plaintiff’s work history and factual material that is critical to determining individual defendants’ relative potential liability. Upon filing, the court enters a standard pretrial order that limits the time for discovery and sets dates for a final pretrial conference, attorney settlement conference, and trial.

The asbestos procedures contemplate that all cases filed within a designated two-week period will be scheduled for trial on the second or fourth Tuesday of the month approximately six months after the filing date. For example, all asbestos cases filed during the first two weeks of June 1991 are included in the “trial group” set for trial on January 14, 1992. If a case in that group does not settle before the trial date, it will be tried on that date. The special asbestos procedures used in the Eastern District of Virginia implicitly recognize that the legal and factual issues in these cases are generally very simple. The procedures are designed to focus the attorneys’ attention on the facts relevant to a settlement—such as the extent of the plaintiff’s personal injury, the plaintiff’s exposure, if any, to asbestos.

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80. See CJRA REPORT, supra note 17, at 20-22. Unless otherwise indicated in text or footnotes, this Article’s description of the division’s asbestos-related procedures derives from the Eastern District of Virginia’s CJRA REPORT.

81. Several companies routinely named as defendants in these cases are protected under Chapter 11 of the Bankruptcy Code, and all pre-1990 cases in which those defendants are named parties have been stayed with respect to the bankrupt defendants. These older cases are all resolved with respect to non-bankrupt defendants.

82. The effect of this requirement creates a special kind of “voluntary discovery” for these cases. Proposed amendments to Rule 26 of the Federal Rules of Civil Procedure would impose mandatory discovery in all civil cases. See PROPOSED AMENDMENTS, supra note 15 (FED. R. CIV. P. 26).

83. As is the case nationally, most asbestos cases in the Eastern District of Virginia settle before trial. For example, of about 1100 such cases filed in February 1990 and set for trial in October 1990, all but two settled. The trials of the two cases that did not settle took approximately four days.
individual defendants' products, and possible statute of limitations problems. The procedures ensure that plaintiffs who can establish a nexus between their injuries and the defendants' products receive fair compensation in a timely manner. They prevent the unnecessary allocation of resources to the mere process of obtaining compensation.84

b. Pro Se Prisoner Litigation85

The state's maximum security prison and a large federal correctional institution are located within the Eastern District of Virginia. As a result, the per judgeship filings for pro se prisoner civil rights complaints and habeas corpus petitions86 well exceed the national average.87 Pro se prisoner complaints and petitions are processed initially in Richmond, and then transferred to other divisions for ultimate disposition.88 Three staff attorneys, hired for one-year appointments, assist the court in processing these cases. The court's Local Rule 28 governs complaints and habeas petitions.89

The staff attorney assigned to the Richmond division is responsible for the initial prefiling stage of all cases and for the cases ultimately assigned to the Richmond division. Pro se prisoner complaints, both civil rights and habeas corpus, are sent upon receipt in the clerk's office to the Richmond staff attorney. The complaint is not formally filed at this time. The staff attorney reviews the papers to determine whether any technical defects exist—for example, to ensure that the proper number of copies have been filed, or that the proper defendants are named. If the papers are defective, they are returned to the inmate along with a letter indicating the reasons for the return. A form letter exists for this pur-

84. A copy of the standard pretrial order used in asbestos cases filed in Newport News or Norfolk is reproduced in Appendix 8 to the Eastern District's CJRA REPORT supra note 17.

On July 29, 1991, a Multi-District Litigation panel transferred all pending asbestos products liability litigation to the Eastern District of Pennsylvania under the control of Judge Charles R. Weiner. See In Re Asbestos Products Liability Litigations (No. VI), 771 F. Supp. 415 (E.D. Pa. 1991). All Eastern District of Virginia cases that do not settle promptly will be transferred back to the Eastern District. See CJRA REPORT, supra note 17, at 22.

85. See CJRA REPORT, supra note 17, at 22-28.


87. In SY 1990, for example, 113 prisoner petitions per judgeship were filed in the Eastern District of Virginia, compared to 74 per judgeship nationally. 1990 STATISTICS, supra note 19, at 70, 167.

88. Civil rights and habeas cases in which the inmate is represented by an attorney at the time of filing are handled according to the court's and division's normal procedures governing civil actions. CJRA REPORT, supra note 17, at 22 n.6.

pose, although sometimes the staff attorney must draft a more tailored letter.

Once the papers are in order, the staff clerk assigns the case to an individual judge within the appropriate division. This assignment process is specific. Once an inmate has filed a pro se petition or complaint in the Eastern District of Virginia, subsequent complaints will be assigned to the judge who handled the first complaint. Petitions filed by federal prisoners challenging the constitutionality of their sentences are assigned to the sentencing judge. Habeas petitions involving state prisoners are assigned to a judge in the division in the county where the state conviction occurred. Otherwise, cases are assigned randomly to judges in the district, with the objective of keeping the pro se prisoner caseload relatively equal among all judges in the district. All senior judges, except one, maintain a half-load of prisoner cases.

Once the case has been assigned to an individual judge, it is "provisionally" filed and handled according to procedures used by that judge's division. Three specific procedures are used in all divisions.

First, all divisions utilize the in forma pauperis procedure outlined in Local Rule 28(C), which requires pro se filers to pay a nominal filing fee. The staff attorney for each division queries the institution about the inmate's account balance during the six months preceding the filing of the complaint or petition. The judge then assesses a filing fee that may not exceed more than twenty percent of the aggregate amount in the account during that period. Most judges in the district assess a filing fee of fifteen percent. The inmate has an opportunity to object to the fee and request waiver of all or part of the fee, but judges only grant waivers in cases of extreme hardship, such as when a plaintiff is paying child support from his prison earnings. The case is not treated as filed until the inmate pays the filing fee assessed under the local rule. 90

Second, pro se civil rights complaints based on alleged constitutional violations occurring in state penal institutions are subject to section 1997e of the Federal Civil Rights Act. This provision authorizes states to implement administrative grievance procedures for prisoners' civil rights claims. 91 If a state's grievance procedures have been approved under section 1997e, district courts may require exhaustion of these state procedures.

90. Id. R. 28(C).
administrative remedies before they will consider a state prisoner's civil rights complaint. The civil rights grievance procedures of all major Virginia penal institutions have been approved under this section.92

Third, the United States Court of Appeals for the Fourth Circuit held in *Roseboro v. Garrison*93 that prisoners proceeding pro se must be given adequate opportunity to respond to a motion for summary judgment. The district has developed a "Roseboro notice" that must be sent to all prisoners whose complaint or petition is subject to a motion for summary judgment.

Each division also has its own pro se procedures. The staff attorney assigned to the Alexandria division completes the in forma pauperis procedure and then, assuming that the plaintiff pays the appropriate filing fee and the case is filed, reviews the papers and drafts an appropriate opinion and order. If the staff attorney believes that he or she needs additional factual information he or she will prepare an order directing the appropriate party to provide the necessary evidentiary material. Once a draft opinion and order have been prepared, they are sent for review and final disposition to the district judge to whom the case has been assigned.

Most cases in the Alexandria division are disposed of without a hearing. If a hearing is necessary, the chief judge sets the date of the hearing at a final pretrial conference. A magistrate judge conducts hearings in these cases in his or her courtroom. Counsel is appointed if the inmate has requested counsel and the nature of the case warrants such appointment. The magistrate judge makes findings of fact and recommendations to the district judge as permitted by Local Rule 29.

The pro se law clerk handles about fifty percent of the pro se prisoner cases received in the Newport News/Norfolk division, and fifty percent go directly to the judges' chambers. After the defendants respond to the complaint or petition, the pro se law clerk or the judge's law clerk notifies the inmate by a form letter how he or she should respond to the defendants' pleadings (e.g., with a brief, documents, or other evidentiary material). In addition, the law clerk may prepare interrogatories for either or both sides if the court has insufficient factual information to decide the case.

92. *CJRA Report*, supra note 17, at 25. Most pro se civil rights complaints filed in the Eastern District of Virginia are subject to the provisions of the federal grievance statute. These cases are stayed pending exhaustion of the state administrative remedy. Empirical evidence indicates that implementation of these grievance procedures has reduced the number of pro se prisoner civil rights complaints filed in the Eastern District of Virginia.

93. 328 F.2d 309 (4th Cir. 1975).
The vast majority of pro se prisoner civil rights cases in the Newport News/Norfolk division are decided at the summary judgment stage. If a case is not, and the inmate has not made a demand for a jury trial, the case is referred to the magistrate judge for an evidentiary hearing. In a number of cases, the magistrate judge appoints an attorney to represent the inmate if the case has reached this stage. Hearings are usually conducted at the institution where the inmate is incarcerated. The magistrate judges, with the assistance of their law clerks, handle all habeas petitions filed in these two divisions, in accordance with the provisions of Local Rules 28 and 29.

Pro se petitions and complaints assigned to the Richmond division go through the in forma pauperis procedure of Local Rule 28. Pro se prisoner cases, as are civil cases, are handled according to the judges' own procedures. The staff attorney in Richmond coordinates with each judge to ensure that the prisoner cases are processed efficiently. The magistrate judge located in Richmond is involved with these cases, reviewing and signing preliminary orders drafted by the staff attorney. Most cases are decided at the summary judgment stage. The magistrate judge conducts most pro se prisoner hearings pursuant to Local Rule 29.

II. Case Management Statistics for the Eastern District of Virginia

Each year the AO gathers large amounts of data from each district court. The AO collects data on matters such as the number of civil and criminal cases filed in the court, the nature of the court's case mix, various statistics concerning disposition rates for civil and criminal cases, and the number of trials occurring in the district during the statistical year. Although such statistics are not dispositive indicators of either efficiency or fairness, they are highly relevant to whether reforming the pretrial process in a court is necessary. Congress evaluates these statistics in determining a court's need for additional judicial or court resources and, more broadly, when it debates proposed legislation for judicial reform. The Civil Justice Reform Act implicitly recognizes the importance of this information when it commands each district court, through its Civil Justice Reform Act advisory group, to "promptly complete a thorough assessment of the state of the court's civil and criminal dockets"94 before formulating a proposed expense and delay reduction plan. Most Civil Justice Reform Act advisory groups, as well as the Federal Judicial

Center, appear to have interpreted this language to require a discussion of individual courts' case management statistics.\textsuperscript{95}

Part II of this Article discusses recent judicial workload and case management statistics for the Eastern District of Virginia, and compares those statistics to national statistics.\textsuperscript{96} It shows that, even though the criminal and civil caseloads in the Eastern District of Virginia are heavier than average, its case management statistics rank it as one of the most efficient federal courts in the nation.

A. Current Civil Docket

Analysis of court management statistics reported by the AO for the Eastern District of Virginia reveals that the district has historically had heavier caseloads than the national average. The court also has had a criminal caseload that is more burdensome than average.\textsuperscript{97} Despite these


\textsuperscript{96} Except as otherwise noted, all statistical information discussed in part II of this Article is based on the AO materials cited in \textit{supra} note 27.

\textsuperscript{97} The Civil Justice Reform Act is principally concerned with district court management of civil caseloads. The criminal docket in a district court, however, can theoretically impact how effectively the court handles its civil docket because of the federal Speedy Trial Act, 18 U.S.C. §§ 3161-62, 3164 (1988 \& Supp. 1990). The federal Speedy Trial Act requires that all criminal cases be tried within 70 days of filing the indictment, unless a delay is expressly authorized by the statute or court order. Because no similar statutes exist for most civil filings, criminal cases have a priority over civil cases. If the criminal caseload in a district is large and many defendants go to trial, this can impair the court's ability to attend to its civil docket. Recently, several district judges have stated publicly that increasing criminal caseloads have adversely affected their ability to deal with their civil cases, and the Federal Judicial Center has specifically recognized that criminal caseloads have impacted some district courts. See Hon. Diana E. Murphey, \textit{The Concerns of Federal Judges}, \textit{Judicature}, Aug.-Sept. 1990, at 112; Report and Recommendations of the Civil Justice Reform Act Advisory Group for the District of Kansas 9 n.6 (Oct. 25, 1991); Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990 18 (Feb. 1991) (prepared for the Eastern District of Virginia) (on file with author). But see, e.g., United States v. Nedjl, 773 F. Supp. 1288, 1306 (D. Neb. 1991) (questioning whether the increased criminal caseload in District of Nebraska from 1986-1990 has adversely impacted civil disposition rates).

relatively heavy caseloads, the court consistently has processed its civil and criminal caseloads more expeditiously than other, less burdened courts.

During the SY ending June 30, 1990, 5263 criminal felony and civil cases were filed in the Eastern District of Virginia. A total of 5194 cases were terminated. At the close of SY 1990, 3682 cases were pending before the court. Per judgeship, these figures reflect 513 civil and 72 felony criminal filings, 409 pending cases, 647 weighted filings\(^98\) (second highest in the nation), and 577 terminations. Each judge in the district completed an average of 59 trials in SY 1990.

About 23.2% of the court's civil cases were more than three years old at the close of SY 1990. As explained more fully below, however, approximately 90-95% of these cases were stayed due to the bankruptcy of one or more defendants in the cases. These stayed cases are not subject to the court's normal procedures.

In comparison, national per se judgeship figures for SY 1990 were 379 civil filings, 474 pending cases, 448 weighted civil filings, 423 terminations, and 36 trials (criminal and civil) completed. Nationally, about 10.4% of civil cases are more than three-years-old.

In SY 1990, 4614 civil cases were filed in the Eastern District of Virginia. Of these civil cases, the AO categorized 27 (0.6%) as social
security appeals; 82 (1.8%) as actions for recovery of overpayments or enforcement of judgments; 1020 (22.1%) as pro se prisoner actions; 151 (3.3%) as forfeiture and tax suits; 23 (0.5%) as real property-related actions; 223 (4.5%) as labor suits; 713 (15.5%) as contract actions; 1776 (38.5%) as tort suits; 66 (1.4%) as intellectual property actions; 284 (6.2%) as civil rights actions; 7 (0.2%) as civil antitrust actions; and 242 (5.2%) as some other type of civil matter.
These percentages compare to a national civil filings mix of 7439 (3.4%) social security appeals; 10,878 (5.0%) overpayments and judgments actions; 42,630 (19.6%) pro se prisoner complaints; 8797 (4.0%) forfeiture and tax suits; 9505 (4.4%) real property-related actions; 13,841 (6.4%) labor suits; 35,161 (16.1%) contract actions; 43,759 (20.1%) tort suits; 5700 (2.6%) intellectual property actions; 18,793 (8.6%) civil rights actions; 472 (0.2%) civil antitrust actions; and 20,904 (9.6%) some other type of civil matter.99

The median time from filing to disposition of a civil case in the Eastern District of Virginia was four months in SY 1990 compared to a national median time of nine months. The median time from issue to trial was five months compared to a national median of fourteen months.

In February 1991, the Federal Judicial Center ("FJC") prepared a caseload analysis for the Eastern District of Virginia that includes a discussion of the "life expectancy" and "indexed average lifespan" of civil cases in the district.100 The FJC has suggested that it considers these statistics to be a better predictor of a court's future efficiency than most other variables.101

The average life expectancy of a civil case in the Eastern District of Virginia is ten months. This figure, however, is based in part on a large number of products liability cases that have been stayed for several years due to the bankruptcy of one or more defendants. Excluding the stayed cases, the average life expectancy of a civil case in the district is six months or less.

The indexed average lifespan of a civil case in the district is five months. The FJC has said that figures below the national indexed average lifespan of twelve months "indicate that the court disposes of its cases faster than the average."102

99. Figure 2 illustrates the civil case profile for the Eastern District of Virginia, and the national profile, for SY 1990.


101. Id. at 15.

102. Id. The criminal caseload of the Eastern District of Virginia is substantially higher than the national average. During SY 1990, 633 criminal felony indictments or informations were filed in the Eastern District of Virginia. Approximately 15 cases were transferred to the district, bringing the total to 648 criminal filings. This total represents a figure of 72 felony cases per judgeship. Criminal cases made up 12.3% of total filings in the district for SY 1990. The national average felony filings per judgeship was 58 cases per judgeship, and criminal cases accounted for about 13.3% of total filings. See 1990 STATISTICS, supra note 19, at 70, 167.

A total of 3220 criminal defendants (felony and misdemeanor) were prosecuted in the Eastern District of Virginia in SY 1990; 860 were felony defendants, representing a per judge-
B. Trends in Civil Case Filings and Other Statistics

The following discusses the trends in case filings in the Eastern District based on an analysis of court management statistics compiled and published, or provided to the Reporter, by the AO. Civil caseload trends examined cover SY 1971-90.103

1. District Statistics

Total filings. Like all federal district courts, the Eastern District of Virginia has experienced significant increases in case filings during 1971-90. Total filings of 5263 (which includes criminal felony and civil filings) for SY 1990 represents an increase of twenty-one percent over SY 1989. It represents an increase in total filings of thirty-five percent since SY 1980 and of about sixty-nine percent since 1971. Figure 3 illustrates the trend of total case filings in the Eastern District of Virginia from SY 1971-90.

Total terminations. The total terminations figure of 5194 cases for SY 1990 represents a twenty-nine percent increase in terminations over SY 1989. It is an increase of thirty-nine percent over total terminations since SY 1980 and of eighty-two percent since SY 1971. These figures show that the court has kept pace with increased filings in the district through its increased termination rates. Figure 4 illustrates the trend in case terminations in the Eastern District for SY 1971-90.

Total pending cases. The total pending cases figure of 3682 for SY 1990 represents an increase of about three percent over the previous year. It is an increase of eighty-five percent over SY 1980 and sixty-nine percent over SY 1971. These increases correlate to increases in total filings in the district during SY 1971-90. Figure 5 illustrates the trend in total pending cases in the Eastern District for SY 1971-90.

Ratio of pending cases to case terminations. The Federal Judicial Center has suggested that one measure of a court’s effectiveness in handling its caseload over time is the ratio of pending cases to case termi-

ship defendant load of more than three times the national average. The felony defendant caseload was 96 felony defendants per judgeship, compared to a national average of 85 felony defendants per judgeship. See Criminal Defendants Filed (Excluding Transfers), Years Ending June 30, 1980-90 (prepared for Administrative Office) (unpublished, on file with author).

The median time from filing to disposition of a criminal case in the Eastern District of Virginia was 3.6 months in SY 1990. The national median time for filing to disposition of a criminal felony case was 5.3 months during that year. 1990 Statistics, supra note 19, at 70, 167.

103. In calculating the number of federal district judgeships allocated to the courts in SY 1991, the figures do not include judgeships created by the Judicial Improvements Act of 1990.
tions. If this ratio decreases over time, the court is improving its disposition rate. If the ratio is less than one, the court is disposing of cases faster than they are filed.

104. See John Shapard, HOW CASELOAD STATISTICS DECEIVE 3 (draft of May 2, 1991) (unpublished, on file with author).
At the close of SY 1990, the ratio of pending cases to case terminations in the Eastern District of Virginia was 3682 to 5194, or 1:0.71. This is a decrease from a ratio of 1:0.89 in SY 1989, and an increase from ratios of 1:0.53 in SY 1980 and 1:0.52 in SY 1976. Nationally, the pending cases to case terminations ratio for SY 1990 was 1:01.12. Figure 6 illustrates the trend of the pending cases/case terminations ratio for the Eastern District of Virginia and the nation from SY 1976-90.
Filing to disposition rates. The median time from filing to disposition of four months in SY 1990 represents a decrease of one month since 1989. It is a decrease of one month from 1980 and of four months from 1971. This is the shortest median time from filing to disposition of any district court in the nation. Figure 7 shows the trend in median time from filing to disposition for the Eastern District of Virginia, and the national trend.
Issue to trial rates. The median time from issue to trial of five months in SY 1990 is the same as for SY 1989. It represents a decrease of one month from SY 1980 and three months from SY 1971. This also is the shortest median time for federal district court. Figure 8 illustrates the trend in median time from issue to disposition for the Eastern District of Virginia and the nation.
2. Per Judgeship Statistics

Because the federal district courts differ radically from one another in size and complexity of their caseloads, case filing and related statistics may not permit an accurate comparison of districts with respect to variables affecting expense and delay. Per judgeship statistics, in contrast,
permit direct comparison of the judicial workload in one court to the national average or to another court. Per judgeship statistics also allow a better longitudinal study of individual judges' workload, because they account for increases in the number of judgeships allotted to that district court. This section compares trends in the Eastern District of Virginia's per judgeship case management statistics to national per judgeship trends.
Civil filings per judgeship. In SY 1990, there were 513 civil filings per judgeship in the Eastern District of Virginia. This is an increase of twenty-one percent over SY 1989, one percent over SY 1980, and forty-three percent over SY 1971. This number compares to a national per judgeship civil filings of 379 cases. Figure 9 illustrates the trend in civil filings per judgeship for the Eastern District of Virginia from SY 1971-90, and the national trend.
Terminations per judgeship. In SY 1990, 577 cases (criminal and civil) per judgeship were terminated. This is an increase of twenty-nine percent from SY 1989, twenty-three percent from SY 1980, and twenty-one percent from SY 1971. This figure is substantially higher than the national per judgeship figure of 423 case terminations in SY 1990. Figure 10 illustrates the trend for the Eastern District of Virginia and the national trend in terminations per judgeship.
Pending cases per judgeship. In SY 1990, 409 cases (criminal and civil) were pending per judgeship in the Eastern District of Virginia. This is an increase of 2.5% since SY 1989, of 64% since SY 1980, and of 28% since SY 1971. The national per judgeship pending caseload in SY 1990 was of 474 cases. Figure 11 illustrates the trend in pending cases per judgeship for the Eastern District of Virginia from SY 1971-90, and the nation.
Weighted filings per judgeship. The statistic weighted filings is extremely important. It allows comparisons of caseloads among districts and within districts over time because it restates the total filings figure to reflect the complexity of those cases. The weighted filings per judgeship figure of 647 for SY 1990 in the Eastern District of Virginia represents a thirty-seven percent increase over SY 1989, a seventy percent increase from SY 1980, and a forty-three percent increase from SY 1971. It was the second highest weighted filings figure in the nation in SY 1990. The national weighted filings per judgeship figure was 448 for that year. Figure 12 illustrates the trend in weighted filings from SY 1971-90 for the Eastern District and the nation. This chart shows that the cases filed in the Eastern District, as a group, historically have been more complex than the national average.

Trials completed per judgeship. The judges of the Eastern District of Virginia have adopted a policy to set an early and firm trial date for civil cases. As a result, a decision not to settle does not unreasonably prolong disposition of the case as it does in some courts; litigants can obtain early resolution of their dispute through a trial before a judge. This may contribute to more civil cases being tried in the Eastern District of Virginia than in most courts.

An average of fifty-nine trials per judgeship were completed in the Eastern District of Virginia in SY 1990. Of these fifty-nine trials, fifty-seven percent were civil trials. This represents a decrease of three percent (two trials per judgeship) since SY 1989, an increase of twenty percent (ten trials per judgeship) since SY 1980, and a decrease of twenty-five percent (twenty trials per judgeship) since SY 1971. Nationally, thirty-six trials were completed per judgeship. Figure 13 illustrates the trend in number of trials completed per judgeship for the Eastern District and the nation.

Percentage of civil cases over three years old. In SY 1990, 23.2% of the Eastern District's civil cases were over three-years-old. This is an increase from 18% in SY 1989, 5.1% in SY 1980, and 6.9% in SY 1971. Nationally, 10.4% of the cases were over three-years-old in 1990. Figure 14 illustrates the trend respecting the percentage of civil cases more than three-years-old for the Eastern District of Virginia, and the nation. The chart shows that, until SY 1983, the percentage of civil cases more than three-year-old in the Eastern District was substantially smaller than the national average. Beginning in SY 1983, however, a series of bankruptcy orders stayed a large number of asbestos and IUD liability cases pending in the Newport News, Norfolk, and Richmond divisions. These stays have precluded the court from handling such cases according to its nor-
mal procedures. Approximately ninety to ninety-five percent of the court’s civil cases that are over three-years-old are cases that have been stayed as a result of these bankruptcy orders. These older cases have been resolved with respect to non-bankrupt defendants.105

105. Trends in criminal case filings and the number of felony defendants prosecuted are similar to national trends. Overall, the Eastern District of Virginia’s criminal caseload has
been heavier than average. The number of felony defendants prosecuted per judgeship has consistently exceeded the national average. For a detailed discussion of recent trends in the Eastern District’s criminal caseload, see CJRA REPORT, supra note 17, at 43-47.
III. A Solution to Litigation Expense and Delay in Federal Courts

The United States District Court for the Eastern District of Virginia has had a more burdensome civil caseload, in terms of number and complexity of the cases, than the national average. Likewise, relative to the
national average, it has had a more burdensome criminal caseload in terms of number of cases filed and defendants prosecuted and at least as burdensome in complexity of the cases.

Despite the court's exceptionally burdensome caseload, case management statistics for the Eastern District of Virginia show that the court has significantly shorter disposition rates for civil cases than the national average. These shorter disposition rates include a shorter median time from filing to disposition, a shorter median time from issue to trial, and a shorter indexed average lifespan, than the national average. Judges in the Eastern District of Virginia try significantly more cases than the national per judgeship average. Civil cases filed in the Eastern District of Virginia are usually set for trial no longer than six months after the filing date, and most cases are tried approximately four to five months after filing.

The case management statistics discussion suggests that, regardless of whether the federal courts are overburdened, existing judicial resources can effectively manage existing caseloads. The Eastern District of Virginia, with one of the nation's heaviest civil and criminal caseloads, does not have undue expense or delay with respect to its civil or criminal caseload. Given this, it is difficult to understand why so many federal court dockets are hopelessly backlogged. It is also curious why Congress and the Judicial Conference, in crafting remedies for the "crisis" in the federal courts did not look first to courts like the Eastern District of Virginia.

The differences between the Eastern District of Virginia and many, if not most, federal district courts, can be simply explained. First and foremost, the judges in this district are committed to handling the district's civil and criminal caseloads fairly and efficiently and have developed procedures, embodied in their local rules and practices, that reflect these objectives. These include standing orders and internal procedures that specifically aim towards reducing expense and delay to the extent warranted by the district's needs and ends of justice. Regardless of the type of docket system used, all procedures and practices depend on the judges' early and continuous monitoring and intervening in civil cases, no matter how simple or complex. The judges, not the lawyers, control the docket; and attorneys practicing in this district respect the court and its processes, understand the court's rules, and follow them.106

106. Interestingly, the clerk's offices in each of the four divisions independently reported that the only attorneys who appear to have difficulty complying with the court's rules and procedures are out-of-district counsel who are unaccustomed to practicing in a court such as the Eastern District of Virginia. CJRA REPORT, supra note 17, at 51.
Because of the district-wide commitment to speedy and just administration of cases and the contributions of senior judges and magistrate judges, the case mix, judicial vacancies, and legislative and executive actions have little impact on the court’s case management statistics. For example, the court has addressed asbestos litigation by developing special procedures suited to the needs of those cases. As a result, even a mass filing of 1100 such cases in a month, as occurred in February 1990, has no discernable impact on the court’s overall management statistics. Likewise, the district has experienced significant judicial vacancies during the past two decades. The nature of the court’s case management procedures allow other judges to absorb workload overflow that might result from such vacancies.

Perhaps the best evidence that the court has coped far better than most stems from its criminal caseload. The court has a heavier criminal caseload than the national average. The total number of defendants prosecuted per judgeship is three times the national average, and the number of felony defendants prosecuted per judgeship well exceeds the national average. In other words, the Eastern District of Virginia, like other courts, must react to the effects of congressional and executive actions, which vastly increases the federal court workload. The filing to disposition rate for criminal cases of the court, however, is one of the lowest in the federal judicial system, and the court meets the demands of the federal Speedy Trial Act in processing these cases. But, the backlogs in other courts’ dockets have not appeared in the Eastern District of Virginia. Increases in the criminal caseload resulting from the “drug war,” and possible increases in the numbers of defendants going to trial as a result of the Federal Sentencing Guidelines, have not impacted the court’s civil case management statistics.

Conclusion

The experience of the Eastern District of Virginia suggests that the solution to the “crisis” in federal court civil litigation is not tracking proposals, alternative dispute resolution, or other esoteric case management devices. Firm judicial control of the docket, as envisioned in Rule 16 of the Federal Rules of Civil Procedure, is the key to reduced expense and delay in federal civil litigation. Those experienced with litigation know, but may not admit, that attorneys and their clients sometimes benefit from, economically or otherwise, delay, and may not have an incentive to

107. See CJRA REPORT, supra note 17, at 52.
108. Id.
move cases expeditiously through the pretrial stage. They also know that most cases will settle once a trial is imminent. The pretrial procedures of the Eastern District of Virginia recognize these two premises and use them to an advantage.

The CJRA and the proposed amendments to the Federal Rules of Civil Procedure, though well intentioned, will overhaul unnecessarily the infrastructure of the civil litigation process. Many delay and expense reduction strategies outlined in the CJRA and the proposed amendments will probably impact civil litigation as intended.\footnote{Sections 473(a) and (b) of the CJRA REPORT provide that each district court, in consultation with the Advisory Group, "shall consider and may include" six specific principles and guidelines of litigation management and cost and delay reduction in formulating a proposed Expense and Delay Reduction Plan to recommend to the district court. The six statutory principles are (1) systematic, differential treatment of civil cases depending on their relative complexity, \textit{id.} § 473(a)(1); (2) early and ongoing control of the litigation process by a judicial officer, \textit{id.} § 473(a)(2); (3) use of discovery-case management conferences in complex cases, \textit{id.} § 473(a)(3); (4) encouraging discovery through voluntary and cooperative means, \textit{id.} § 473(a)(4); (5) requiring counsel to meet and attempt to resolve discovery disputes informally prior to the filing of discovery-related motions, \textit{id.} § 473(a)(5); and (6) authorizing the reference of appropriate cases to alternative dispute resolution, \textit{id.} § 473(a)(6). The six statutory techniques for implementing these principles are requirements that (1) counsel submit a discovery-case management plan prior to the initial pretrial conference, \textit{id.} § 473(b)(1); (2) each party be represented at each pretrial conference by an attorney having binding authority in connection with matters to be discussed at the conference, \textit{id.} § 473(b)(2); (3) all requests for extension of discovery deadlines and postponement of trial dates be signed by the party as well as the attorney making the request, \textit{id.} § 473(b)(3); (4) a program for early neutral evaluation be implemented, \textit{id.} § 473(b)(4); and (5) a party representative with binding settlement authority be available at any settlement conference, \textit{id.} § 473(b)(5).} Many of these strategies have been part of the pretrial procedures of the Eastern District of Virginia for years. But strategies such as alternative dispute resolution techniques, and other empirically unproven case management "techniques," not only are unnecessary, but threaten important values implied in the right to timely resolution of a federal court claim before a judge. Further, such strategies have internal and external costs that probably will never be included in cost-benefit analyses of the alternative procedures.

The district judges' firm commitment to fair and efficient case management and the bar's cooperation in this endeavor are the principal reasons that the Eastern District of Virginia has consistently maintained its status as the most efficient and effectively-managed federal district court in the nation. The master docket system used in Alexandria, Newport News, and Norfolk, and the individual docket system used in Richmond, entail significant judicial control over the litigation process to ensure timely disposition of cases. The clerks' offices in each division have
worked to ensure that cases do not languish due to noncompliance with time deadlines imposed by statutes, court rules, or orders. The court will not tolerate dilatory tactics; attorneys who practice in the district understand this and comply with rule- and court-imposed deadlines. Judges and magistrate judges generally rule promptly on nondispositive and dispositive motions. Prompt judicial decisions are necessary to dispose of civil cases fairly and efficiently. Because justice delayed is to a great extent justice denied, this efficiency has contributed to a high quality of justice for litigants in the federal district court for the Eastern District of Virginia.