A BLUEPRINT FOR JUDICIAL MANAGEMENT

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For well over ten years the federal judiciary has been concerned with problems of case management and the crowded docket.1 Unfortunately, increased dockets have affected the work load of both the district and appellate courts. According to the statistical information compiled by the Administrative Office of the United States, increased federal district court filings have been nearly paralleled in the federal appellate dockets.2 Along with this concern has stemmed the debate of whether the cause is the increased litigiousness of our society.3 My purpose, however, is not to set forth a statistical analysis of the case load increase in federal courts. Suffice it to say that the increase has occurred in immense proportions and all federal courts are in a continuous struggle with it. The purpose of this article is to make a plea to Congress and article III judges to avoid using the case load problem as a justification for closing the door to the federal courthouse for litigants espousing federal claims. Internal procedures are illustrated that can be used to alleviate the docket crunch; they can be adopted by the courts themselves and should be preferred over stripping the courts of substantive jurisdiction.

THE EXTENT OF THE DOCKET PROBLEM AND SOME PROPOSED SOLUTIONS

One discouraging factor of the docket increase is the influence it has had on many judicial decisions. These decisions are curtailing access to the federal courthouse through changes in substantive law. Decisions affecting issue preclusion such as Blonder-

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2. The five-year increase from 1978 to 1983 in federal district court filings was 77%. During the same period the appellate court increase was 58%. The 1983 increases were, respectively, 14% and 9%. See Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics 2, 7 (Dec. 31, 1983) (on file at Creighton Law Review office); id. at 1, 4 (Dec. 31, 1978).

Tongue Laboratories, Inc. v. University of Illinois Foundation,4 Allen v. McCurry,5 and Migra v. Warren City School District Board of Education6 have been logical extensions of existing rules. In other areas, however, recent decisions have directly affected access to the federal forum. Doctrinal law on standing,7 abstention,8 habeas corpus,9 and substantive holdings in civil rights cases10 have slowly curtailed access to the federal courts. Most of these cases sound in terms of comity: deference to the state courts under principles of federalism. However, it is equally obvious that much judicial thinking has been influenced by the state of the crowded docket in the federal courts.11

The justices of the Supreme Court are in controversy among themselves over how to handle their own necessary case load.12 In

8. See, e.g., Judice v. Vail, 430 U.S. 327 (1977); Hicks v. Miranda, 422 U.S. 332 (1975). Judice involved abstention in a section 1983 suit. The suit was brought to enjoin, as unconstitutional, state statutory provisions authorizing contempt. In a vigorous dissent, Justice Brennan, joined by Justice Marshall, stated: It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum because of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit without regard to the pendency of the state suit. Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.

11. See Edwards, supra note 3, at 908 n.195 (citing numerous Supreme Court decisions influenced by excessive burdens on the federal docket).
12. See Brennan, Some Thoughts on the Supreme Court's Workload, 66 IDICA-
seeking out a satisfactory answer to the docket problem of the Supreme Court, the continuing proposals concerning the creation of a new National Court of Appeals seemingly divide the justices as well as many other scholars and judges. The creation of new judgeships and new judges has received mixed reviews as being a long-term solution to the docket problem.\textsuperscript{13}

\textbf{Jurisdiction Curtailment}

A more radical proposal that Congress has been studying is ways and means of cutting back federal jurisdiction. Perhaps the greatest emphasis has been in cutting back diversity of citizenship jurisdiction.\textsuperscript{14} However, bills pending in Congress today also seek to curtail federal jurisdiction in habeas corpus,\textsuperscript{15} civil rights,\textsuperscript{16} so-

\textsuperscript{13} See, e.g., Meador, \textit{An Appellate Court Dilemma and a Solution through Subject Matter Organization}, 16 U. Mich. J.L. Rep. 471 (1983). Professor Meador notes that "[i]f . . . the number of judges is proportionately increased with the growth in appellate litigation, the number of three-judge decisional units will also increase, thereby threatening predictability and uniformity in the law of the jurisdiction." \textit{Id.}


\textsuperscript{15} A bill is presently pending that would preclude any federal habeas corpus case when there has been a "full and fair hearing in the state court." S. 2216, 97th Cong., 2d Sess. § 5 (1982), reprinted in \textit{The Habeas Corpus Reform Act of 1982; Hearings on S. 2216 Before the Comm. on the Judiciary, 97th Cong., 2d Sess.} (1982). \textit{Cf.} Stone v. Powell, 428 U.S. 465, 494 (1976) ("where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial"). The passage of such a bill would nearly eliminate all federal jurisdiction of habeas corpus cases. \textit{See generally} Yackle, \textit{The Reagan Administration's Habeas Corpus Proposals}, 68 Iowa L. Rev. 609 (1983). In the minds of many federal judges the bill would become self-defeating. Lower federal courts are already engaged in labyrinthine procedural examinations in habeas corpus cases without reaching the merits: exploring state court records and questions on mixed exhaustion (Rose v. Lundy, 455 U.S. 509 (1982)) and standing to raise issue ("cause") (Engle v. Isaac, 456 U.S. 107 (1982)) already occupy considerable time of federal district courts and courts of appeals.

\textsuperscript{16} Bills to curtail federal jurisdiction in state habeas corpus cases are based in part on comity and deference to the state court system. Such bills are also concerned with repetitious litigation and crowded dockets of the federal courts. The comity concern is already procedurally balanced by the fundamental requirement that a state prisoner exhaust his pretrial remedies in state court. Comity should not preempt the constitutional concern of the supremacy clause under article VI of the United States Constitution. Chief Justice Marshall recognized long ago if state courts were given final jurisdiction in federal cases, the result would be "a hydra in government, from which nothing but contradiction and confusion can proceed." \textit{Co-}

\textit{hens v. Virginia, 19 U.S. (6 Wheat.) 264, 415-16 (1821).}

There were 8,402 habeas corpus petitions filed in federal court in 1983. Federal Judicial Workload Statistics, \textit{supra} note 2, at A-13 (Dec. 31, 1983). Although there is
and many other areas. Many federal judges urge that diversity of citizenship should no longer provide a basis of jurisdiction under section 1331. Recent statements before Congress provide support for divesting federal courts of diversity jurisdiction. Nevertheless, I have long voiced several practical problems.

3. There is a bill presently pending before Congress that would require exhaustion of administrative remedies in civil rights cases. H.R. 4412, 98th Cong., 2d Sess. (1983). In Patsy v. Board of Regents, 457 U.S. 496 (1982), the Supreme Court held that it was the original intent of Congress not to require exhaustion of administrative remedies for civil rights cases. Such a bill would override the clear statement in Monroe v. Pape, 365 U.S. 167 (1961), that the federal proceeding is a supplementary proceeding. In many instances such a law would make the state administrative body an arbiter of its own self-wrongs.

17. It has been recommended that we remove all social security cases from the federal courts with the exception of statutory and constitutional questions. P. Lively, Workload of the Federal Appellate Courts 6 (Mar. 7, 1984) (remarks before the Subcomm. on Courts, Comm. on the Judiciary, U.S. Senate) (copy on file with author). This would leave social security claimants who are often wronged by lack of fairness in proceedings before administrative tribunals without a fair forum of review. If the social security administration would follow the law of the courts rather than becoming a law unto itself, many of the problems in social security appeals might disappear. See Lopez v. Heckler, 725 F.2d 1489, 1497 (8th Cir. 1984) (“Far from raising questions of judicial interference in executive actions, this case presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law.”); Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring) (“I have no wish to invite a confrontation with the Secretary [of Health and Human Services]. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit’s decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities.”); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983) (“For some unexplained reason, the Secretary [of Health and Human Services] insists upon ignoring this court’s statements with respect to the proper evaluation of pain.”). See generally Heaney, Why the High Rate of Reversals in Social Security Disability Cases?, 7 Harmline L. Rev. 1 (1984); Fallon, Social Security and Legal Precedent, 89 Case & Comment 3 (Mar.-Apr. 1984).


Bills pending in Congress that would eliminate or dilute diversity jurisdiction include H.R. 3689, 3690, 3691, 3692, and 3693, 98th Cong., 1st Sess. (1983).

19. See, e.g., Letter from Charles Clark (C.J., 5th Cir.) to Senator Hollings 2 (July 11, 1983) (Response to Request for Jurisdictional Information, Senate Appropriation Subcomm. Hearings) (on file with the author) (“In the latest statistical period, 22% of all cases in the federal system are bottomed on [diversity jurisdiction]. . . . The Administrative Office of the United States Courts has developed a
objections to total abolition of diversity jurisdiction.20

First and foremost, if the federal courts do not provide an alternative forum for diversity cases, they will be transferred over to crowded state court systems. Although some state court systems have expressed their willingness to assume responsibility for all diversity cases, many state judges have expressed to me strong reservations over their ability to provide expeditious processing of this new case load. Second, most trial lawyers with whom I have visited still fear a feeling of antagonism and bias against nonresident citizens and nonresident lawyers litigating cases in local communities, particularly rural communities.21 Third, there are serious logistical problems for lawyers who must go to remote rural communities without adequate transportation facilities and central airports nearby. The ability of a trial lawyer to bring these cases into a metropolitan area where a federal court sits enters into the overall public consideration of the availability of a convenient forum for litigation. In my judgment, the public as a whole will suffer the greatest prejudice through the abolition of diversity jurisdiction. Fourth, there is no question that federal district courts and appellate courts have provided a tremendous input into the common law of the states and thereby have furnished an additional cross-section of legal analysis under the common law of the state.22

Another fundamental reason for retaining diversity jurisdiction is the need for the federal courts to maintain an interrelationship with the civil bar of this country. If all diversity cases are shunted off to state court, the vast numbers of civil trial lawyers who try diversity tort and contract cases in the federal courts will quickly forget where the federal courthouse is. In doing so, the role of the federal court in the social and economic fabric of America will become secondary in the eyes and minds of a vast number of lawyers. This, I think, would provide unfortunate

20. I have little objection to raising the jurisdictional amount to $50,000 or $100,000. This would provide some reduction in the case load.

21. See M. BUTLER & J. FRANK, supra note 14, at 21-30 (advocating the retention of diversity jurisdiction).

22. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (recognizing a viable cause of action under the second collision doctrine). The reasoning of Larsen has been cited with approval in 29 states.
ramifications. The federal courts need the support of the civil trial bar.

ALTERNATIVE DISPUTE RESOLUTIONS

Because of the increase of litigation in the courts, there are an increasing number of advocates who support the idea that we should work towards other forms of dispute resolution.\textsuperscript{23} The most popular suggestion as an alternative form of dispute resolution is arbitration.\textsuperscript{24} The United States Arbitration Act provides support for those who desire to resolve their differences by private agreement through arbitration.\textsuperscript{25} The Supreme Court has recently given impetus for use of the federal Arbitration Act by holding that a state cannot, even as a matter of public policy, preclude arbitration of the parties if there has been private agreement on matters affecting interstate commerce.\textsuperscript{26}

It appears to be a popular suggestion that arbitration provides a ready answer to resolve disputes. However, if one would make a close study of the arbitration process, it should as readily appear that arbitration is actually a second-class form of summary justice devoid of due process and the rule of law. It is extremely difficult for me to understand that a summary process should find favor over judicial procedures guided by the rules of law.

Arbitration has found favor in labor management disputes because it is designed to maintain industrial peace between the parties.\textsuperscript{27} But there the primary goal is the maintenance of industrial peace, not dispute resolution. The arbitration process includes a form of summary fact-finding. In effect, it sets up the arbitrator as a law unto him or herself and is not based upon stare decisis or any other principle or standard of law. Arbitration fails to provide equitable relief, such as the issuance of injunctions, nor does it af-

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\item See, e.g., Edwards, \textit{supra} note 3, at 929-36.
\item Id.
\item 9 U.S.C. § 2 (1982). This section provides:
\begin{quote}
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
\end{quote}
Id.
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ford other remedial powers inherent in the judicial process, such as the use of contempt to enforce its decrees. The rights of third parties, often involved in private disputes, are not considered in arbitration. Moreover, the selection of the arbitrators in given disputes is often based upon prior favorable results from the same arbitrator. Arbitrators cannot help but be aware of this fact, and often times such weighted factors can ill serve the fairness aspect of arbitration.

The idea that arbitration is inexpensive and expeditious is fallacious. In a recent oral argument to our court, for example, a brokerage firm that maintained an employment contract with its brokers sought to avoid the arbitration clause of the contract. The reason given was that the brokerage firm was concerned over the length of delay in the arbitration proceeding and the inability to equitably assist its position through injunctive decree.

Today there exists a fundamental concern that, unless the case crunch is solved by cutting from the roots of jurisdiction or through diversion to other forms of dispute resolution, the system itself will break down. If a party requires two years to adjudicate its civil appeal or if it takes six years to come to trial, there is no question that litigants are not afforded justice. However, as real as these concerns may be, such concerns should not serve to erode the citizens' basic rights of access to the federal courts. It is unfortunate that courts have utilized the docket problem as a means to cut down and divert substantive rights. This is particularly true in the civil rights field where the federal courts were intended to become a guarantor of individual liberty, standing between the people and the states to avoid acknowledged abuse by state officials. To echo the statement that state judges are as capable of determining federal constitutional decisions as judges serving with lifetime appointments ignores our constitutional history.28

28. See THE FEDERALIST NO. 78 (A. Hamilton). Hamilton therein stated: The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

... [A] temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice
Most state judges will agree with the fact that their lack of judicial independence works as a practical detriment in deciding the rights of minorities in controversial issues. I recall a conversation many years ago with a state judge trying a well-publicized, controversial criminal case wherein a police officer had been slain. An obvious illegal search (later conceded to be illegal in our court by the state) was before the judge for a ruling on a motion to suppress. On the day of the ruling the state judge saw me at lunchtime and said that he was going to rule that afternoon and indicated that “you know how I am going to rule.” He stated that, although the search was obviously illegal, he was not going to take “the heat of the community.” “After all,” he said, “you fellows don’t have to stand for election and I do.”

I think there is convincing evidence that we still have much room for internal improvement within both the trial and the appellate courts before we need to close the courthouse door to litigants in diversity, civil rights, habeas corpus, or social security cases. The courts still have ample room to absorb the case crunch and deal with expeditious justice. The federal courts have long been students of judicial administration and many improvements throughout the circuits have occurred. Much of this improvement has been based upon “the reconciliation of tradition with reality.”

Often times, the old adage is proven that innovative remedies have been created because of the necessities of the situation. In effect, many courts have begun to recognize that we do not, in our process of adjudication, need to keep on “reinventing the wheel.”

PROCESSING THE CASE LOAD IN THE EIGHTH CIRCUIT

Although the district and circuit judges of the Eighth Circuit enjoy many conservative traditions with stable social and economic surroundings, we still have many of the same docket problems as other courts. Nonetheless, through development of many administrative techniques the Eighth Circuit has not only...
kept pace, but we are today more current in our docket than any other time in our recent history.\textsuperscript{31} I do not attempt to represent that Eighth Circuit procedures and administrative approaches should be a paradigm for others to follow. I write simply to suggest that there are internal techniques and procedures by which the case crunch can be handled on a current basis without divesting the courts of jurisdiction. The primary purpose of this article is to explore some of the ideas and techniques that we have used, and are proposing to use, in achieving what I feel represents one of the nation’s most expeditious trial and appellate processes.

\textbf{Federal Practice Committees}

First and foremost, our judges have long recognized that lawyers within the federal bar should serve in a mutual partnership with the judges in the administration of justice in the federal courts. As a member of the bar for over thirty years, I have practiced in a period when the only time a judge could be addressed in regard to a particular rule or procedure was in open court. Lawyers had few opportunities to provide input or suggest improved procedures by which the court might better function in serving the administration of justice. If the trial court effected a “paperchase” via pretrial rules, in which the bar was put through many technical obstacles to get to trial, lawyers lacked a forum to suggest that the rules be amended to cut down inefficiency and waste. Unfortunately, this was done in many districts.

In recent years the Eighth Circuit has established a federal practice committee within each of our districts. The committee is a cross section of the bar who work with the federal judges of the district. The committees are organized with a representation of lawyers young and old, black and white, male and female, lawyers of large firms, small firms, plaintiffs’ lawyers, defendants’ lawyers,

\textsuperscript{1970 to 1770 cases in 1983. This is an increase of 197%, one of the highest percentage increases in the circuit courts of appeals. Although our docket is fewer in numbers than a majority of the other circuits, this fact is not relevant to the ability of a court of appeals to maintain its case load on a current basis. Circuits with larger numerical dockets have more judges and utilize more visiting judges. The case load in the Second Circuit ranks higher than most circuits, yet the Second Circuit has, through innovative administrative processing, maintained a current status in their docket. See Administrative Office of the U.S. Courts, Federal Court Management Statistics 3 (1983) (on file at Creighton Law Review office). In fact, the Second Circuit’s median time from record to disposition ranks first. \textit{Id.} The Eighth Circuit is second. \textit{Id.} at 9. In addition, according to the 1983 fiscal report, although 2,731 cases were filed in the Second Circuit, only 963 were pending at the end of the year. \textit{Id.} at 3.

\textsuperscript{31 As I write this article, the clerk of the Eighth Circuit has announced that our court is within 18 cases of being current for our May, 1984, term of court.}
prosecutors and defenders. The committees, numbering twelve to sixteen, have four primary functions. First, they meet together and work with the federal district court to effect innovative policies and rules to improve the practice in the federal district courts. Second, the committees serve as a liaison for any complaints between the bar and the federal courts of their district. Third, the committees are delegated the responsibility of holding at least once a year CLE programs within the district on federal practice and procedure. These programs are to be coordinated with the local and state bar associations as well as with the law schools. The law schools, incidentally, are also represented on the federal practice committees. The fourth responsibility for the federal practice committee is to compile a list of active federal court practitioners that can be sent registration material for the annual judicial conference.

The Eighth Circuit Judicial Conference has been changed from an invitational conference to an open conference; any lawyer who is actively practicing within the federal courts of the circuit may attend the judicial conference. We no longer deserve the condemnation that lawyer membership in the Judicial Conference constitutes "an old boys club" made up of social friends of the judges. We feel open registration is more in keeping with the spirit of the congressional enactment, which requires both the bench and bar to engage in an educational forum to study the administration of justice in the federal courts.

THE FEDERAL ADVISORY COMMITTEE

The Eighth Circuit has also created a Federal Advisory Com-

32. The federal practice committees thus serve as a means to stimulate education of the federal bar and provide a basis for the overall competency of the entire trial bar within the federal court.
33. The congressional enactment provides:

The chief judge of each circuit shall summon annually the circuit, district, and bankruptcy judges of the circuit, in active service, to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits.

Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit.

mittee pursuant to 28 U.S.C. § 2077(b), which serves as the alter ego of all the federal practice committees in the circuit. The Federal Advisory Committee represents each of the districts within the circuit and works with the court of appeals by providing input on appellate rules and internal policies. The Federal Advisory Committee also has input in the logistical planning of the Eighth Circuit judicial conference.

The success of these committees and the various programs carried on by the committees has been tremendous. Each district has revised their rules with lawyer input. We have received many comments from lawyers who feel that there is now a more open avenue of communication between the federal courts and the bar. Programs are presently underway, with joint impetus from the bench and bar, to study the reform of abusive discovery practices. I am confident that these joint programs involving both the bench and bar are effectively improving the administration of justice throughout the circuit.

EIGHTH CIRCUIT DISTRICT COURTS

Setting up a blueprint for judicial management in the trial courts is a much more difficult task than in the appellate court. There are many more people involved in the trial courts and necessary to the litigation process; the increased numbers can account for delay and inefficiency. In the appeals process the court is working directly with documentary filings such as briefs and records. This lends itself to easier control. Also, we need deal only with the lawyers involved in the appeal. The trial court, on the other hand, is constantly concerned with the various parties, witnesses, court reporters, and jurors, and the time lag in trying multiple party cases, class actions, and extended, complex litigation.

Our Judicial Council has appointed a district court management committee that has requested each district judge to report to the chief judge of the circuit every ninety days. This same policy is followed in our sister circuits, but they generally process their reports through the administrative office. The administrative office report system is sometimes sixty to ninety days late and does not

34. This section provides:
Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court of appeals. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

Id. § 2077(b).
provide the opportunity for immediate supervision and control that is involved when the report is made directly to the chief judge of the circuit. We have followed the policy of thereafter discussing with individual judges any reported backlog of motions held under advisement over sixty days, cases held under advisement over ninety days, and any pending three-year-old cases. The initial reaction of many district judges to this supervision was one of sensitivity and concern. There is now a better understanding that the purpose of such discussion is the attempt by the chief judge and the judicial council to provide assistance to judges who find themselves, for varied reasons, behind on their dockets. For example, one district judge was behind primarily because he had been assigned a deceased judge's docket. There were some seventeen motions on his reported docket that had been under advisement from six months to a year. In an immediate visitation with the district judge it was determined that (1) some of the cases could be deferred to other judges; (2) a visiting judge could be sent in for three weeks; and (3) an emergency law clerk could be assigned to him for a period of ninety days to six months in order to clear up the backlog. His next report stated he was current.

**Rule 16 (b): The New Scheduling Conference**

The newest innovative procedure today is the scheduling conference effected through rule 16(b) of the Federal Rules of Civil Procedure. This scheduling conference will, if effectively carried out, bring forth immeasurable success in docket control. First, it will provide the district judge the opportunity to control the excesses of discovery and cut down adversarial jostling that often occurs without judicial intervention. Second, it will provide the

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35. This rule provides:

Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file and hear motions; and
(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

**Fed. R. Civ. P. 16(b).**
district judge the opportunity to immediately schedule the case for processing and bring it to termination within a shorter period of time.

The primary problem with rule 16(b) is that it allows the district court, by rule, to authorize a magistrate to hold the conference. Many trial judges feel that they are too busy with the trial of cases and thus feel they do not have time for case management. With this attitude, I predict many trial judges will find the rule accomplishing very little and perhaps feel it is a greater burden than existing procedures. Some judges, however, have personally conducted scheduling conferences in every case, and have long opined that it can change the entire backlog picture. Early, and effective, judicial management can cut down on the length, and even necessity, of trials.

Lawyers who appear before the court at an early scheduling conference can immediately alert the court to jurisdictional problems and possible motions for summary judgment, and eliminate much time normally spent jostling on pleading and discovery. The judge in the scheduling conference can effectively require the parties to exchange as much information as possible without adversary exchange and dispute. The judge can immediately set a trial time according to the court's schedule; the parties are then alerted to the necessity for keeping within the scheduled time frame.

There is some concern that perhaps this kind of management will not be time and cost effective. I think such views fail to appreciate what judges have already experienced and achieved through this process. It is time to fully understand that the adjudication process starts when the complaint is filed, and the trial judges should have direct and early control and management of the case. Equally important to the actuality of the process is the perception of the public that excesses of discovery and abuses of process will no longer be in vogue.

38. Cf. Jaquette v. Black Hawk County, Iowa, 710 F.2d 455 (8th Cir. 1983). Jaquette involved a section 1983 action based on employment termination. The case spanned nearly three years and was ultimately settled for $1,500 and a stipulation that the plaintiff was the prevailing party. Plaintiff's attorneys thereafter sought $96,422 pursuant to 42 U.S.C. § 1988. This was based on 1,034 hours expended. Although the district court reduced this amount to $20,437, we nevertheless remanded to the district court for an evidentiary hearing to determine the cause of the excess-
There are other innovative techniques that district courts may invoke as well. In our circuit, for example, each of the chief district judges have resolved to meet with judges of their district and announce by June of 1984 a blueprint for judicial management within their district. Some innovative suggestions being studied by these districts are as follows:

1. The use of an order, similar to that used in the Southern District of New York, regarding the elimination of three-year-old cases. The adoption and use of such an order on all three-year-old cases might provide a useful measure in dealing with cases that have been dormant for some time in the docket.

2. Adoption of a rule within each district encouraging lawyers who seek preliminary injunctions to consolidate their evidence so as to present all of the evidence to the court on both the preliminary and permanent injunction. This will avoid bifurcation of trials and assist the circuit court so that the record is complete and there are not multiple appeals.

3. Adoption of a local rule that the lawyers be required to file briefs not exceeding ten pages in length unless otherwise allowed by the court.

4. The district judges should be required to rule on motions for new trial within ten days of the date of their submission.

5. Motions for summary judgment and any other interlocutory motion should be ruled upon by the district court.
within thirty days; rulings on all but exceptional motions should be by order without opinion.

(6) All cases under submission by the district court should be ruled upon within ninety days.

(7) The trial judges should be encouraged to minimize their legal opinions to ten pages or less; findings of fact should cover only the essential disputed facts.

(8) The use of non-binding, court-annexed arbitration, court-annexed conciliation, and advisory juries should be considered; settlements should be encouraged and a form settlement procedure should be adopted by the district.

The attempt to encourage some of these steps should not be viewed as an inroad on the quality of decisions by the district court. The same quality decision-making can be achieved, but it must be accomplished with the realization that the trial court must expeditiously decide the case. A former chief justice of a large state court system told me that trial judges in his state did not write opinions; trial judges were there for adjudicating cases, not writing substantive legal opinions. It is not so easy to approach the problem in the federal court system with such a facile solution, but this succinct observation has a good deal to be said for it.

District judges should, of course, articulate the reasons for their decisions. In doing so, however, trial judges must recognize that the precedential value of their decisions are limited; the appellate courts or the Supreme Court may modify or alter their decisions. In that sense, the bottom line of the trial court’s decision becomes more important than the historical precedent. Some trial judges may view this statement as demeaning. It is not intended to be. I have long asserted that the trial judge is the most important judicial officer in the land. The people look to him or her for the calm and staying hand of decision-making within the immediate community. The trial judge has the responsibility to administer the often times unmanageable, complex case to its ultimate conclusion. The trial court’s role is much more difficult than that of an appellate or supreme court. Yet in recognizing this fact, the judge must also recognize that he or she is not an appellate judge and should not be writing learned substantive opinions for precedential value. This means that, in a proper perspective, the trial judge’s decision should still be done with qualitative reasoning, but because of the timeframe and the administrative concerns under which the court works, the decision should not unnecessarily belabor the thought process behind it.40 The trial courts

40. The same can be said for the opinions of the administrative law judges.
should focus primarily on the timely announcement of the remedy; this should be their paramount concern in the adjudicative process.

THE EIGHTH CIRCUIT APPELLATE PROCESS

In 1966 the Eighth Circuit processed a little over 400 appeals. We are now processing nearly 1,800 appeals with the addition of only one judge. It was several years before our traditional setting of fifteen cases a month was abandoned. Today the court sits in three panels a month, we hear twenty-five cases per panel and process in addition a little over twenty percent of the docket under a no argument calendar. Once again, innovative change was made necessary by the docket crunch. In my judgment, however, the court still has ample room in which to process more appeals and do a better job. Over the past several years we have adopted various procedures that have been essential to improved operation.

THE APPEALS EXPEDITER

In evaluating the appellate process within the circuit several years ago, we discovered a great delay in getting the case ready for oral argument. The delay was caused, in part, by the failure of many lawyers to order transcripts and records, and to file timely briefs. We also found court reporters reluctant to prepare timely transcripts for the court. One of the first things this circuit did to correct these deficiencies was to set up an Appeals Expediter.

The Appeals Expediter works with the various attorneys and court reporters in seeing that transcripts and records are brought to the court in a timely fashion, that briefs are filed in a timely manner, and that oral argument is put in a proper logistical schedule for the court. The expediter in the Eighth Circuit is more or less a "wet nurse" to the appellate process. I have heard judges in other circuits say that there is no sense in having lawyers expedite their preparation of appeal documents because their court has such a backlog of cases that they are not too concerned as to when the lawyers complete the filing of records and briefing of their cases. I think this attitude reflects the fact that the court itself is really not concerned with an expeditious handling of the cases on either end. There is a psychological incentive in our court that, if we are going to put the lawyers and court reporters under a time

schedule, then the court has an equal responsibility to see that appeals are expeditiously scheduled, that opinions are written on time, and that cases are concluded within a reasonable time.

The expediter program has worked successfully in the Second Circuit as well as the Eighth Circuit.\(^{42}\) Our expediter has worked out a series of forms that attorneys must complete so that there is not a delay in ordering the transcript or filing the record in the court. This program has now been in effect a little over ten years. It has been highly successful and accounts for the fact that the Eighth Circuit continually ranks first or second among all the circuits in the timely disposition of its docket.\(^{43}\)

### The Settlement Program

Following the lead of the Second Circuit, we have recently set up a Civil Appeals Mediation Plan. One of the problems in conducting this program is that the circuit is spread over a large geographic range; our circuit includes seven states from the Canadian border down to the border of Louisiana. We have hired a settlement director, and now an assistant, to meet with as many attorneys as possible in cases that have a money judgment involved. We attempt to negotiate at the early stages of the appeal, before filing of the transcript and briefs. We have been successful in achieving approximately sixty-four settlements over the last year. There is merit at least in attempting to bring the lawyers together and having them meet at an early stage of the appellate process in order to try to effect a settlement.

We have generally excluded from the settlement director's jurisdiction certain subject matter cases that do not lend themselves to settlement discussion. These include cases in which policy or precedential reasons preclude the settlement director's supervision. Examples are social security cases, dismissals for lack of jurisdiction, interlocutory appeals certified under section 1292(b), injunctions under section 1292(a) (1), federal or state agency cases, and federal income tax cases. In addition to the above, also excluded are all cases involving Title VII and section 1983 cases, labor arbitrations, and suits brought under ERISA unless there is a specific money judgment involved and both parties indicate a settlement conference would assist in the termination of the appeal.


\(^{43}\) See Federal Court Management Statistics, supra note 30, at 9.
SCREENING

Our circuit set up a screening procedure several years ago that has functioned very efficiently. We have utilized two staff attorneys to screen our civil and criminal cases. The cases are generally screened on the basis of no argument, twenty minute argument, or thirty minute or longer argument. Screening is generally based on a common-sense evaluation with the understanding that frivolous issues, simple issues, or singular issue cases generally will be screened for no argument. Most cases are set down for twenty minutes a side, but with proper screening, complex cases with multiple parties and cross appeals are given an enlarged time. Thus, this type of screening gives us better management of our oral argument calendar.

All the cases that are potentially screened for no argument go to a screening panel of three judges with the understanding that any one judge holds a veto and may request any case so screened to be set down for oral argument. We approach each case with the idea that if it is worthy of appeal it is worthy of oral argument. At the same time the attorneys are given an option of oral argument; if there is a request for oral argument in a proposed no argument case, the panel generally will allow argument in those cases. This procedure eliminates concern from the bar that meritorious cases are being screened off for no argument. A judge who has a no argument case may either write the opinion himself or, if he feels that it is a simple issue or frivolous case, he may refer the matter to a staff law clerk with whom he works; this allows for an expeditious processing of the case.

The screening process generally takes place after both the appellant and appellee's briefs have been filed. However, in this circuit we have instituted an additional screening process under our local rule 12(a).44 In accord with rule 12(a) we allow an attorney to file a motion to dismiss the case for lack of jurisdiction within the time frame set forth under the rule. Our former rule allowed an attorney to move to dismiss for frivolous cases as well, but we found that this duplicated our efforts. In many instances a panel

44. Rule 12(a) provides:

The court, at any time on its own motion and without notice, may summarily dispose of any appeal, but 15 days' notice will be afforded in an in forma pauperis appeal in which a certificate of probable cause has been issued but the briefs have not been filed. The court may dismiss the appeal if it is not within the jurisdiction of the court or it is frivolous and entirely without merit. The court may affirm or reverse when the questions presented do not require further consideration.

8TH CIR. R. 12(a).
might consider the motion to dismiss a case and then the case would be reassigned to a panel for full argument; this second panel of judges would then have to restudy the case. We have found that it saves a good deal of time by not allowing an attorney to move for dismissal on the grounds that the appeal is frivolous. This does not mean, however, that the court cannot dismiss on its own consideration.

POST-CONVICTIOn AND SECTION 1983 PRISONER APPEALS

We have adopted a procedure in which the senior staff counsel immediately reviews all post-conviction and section 1983 prisoner appeals that are excluded from the settlement director's process. Upon the filing of a notice of appeal the staff attorney immediately reviews the district court file, including any state court record or exhibits and particularly the district court's judgment. Often times, particularly in pro se appeals, it can be readily determined that the appeal on its face is frivolous. Rather than setting down a briefing schedule, the senior staff counsel, after consulting a screening panel of three judges, will issue an order to show cause why the case should not be dismissed for the reasons the district court has previously recited.

This still allows informa pauperis petitioners in habeas corpus cases or plaintiffs in section 1983 cases to have their day in court by filing a brief as to what issues they feel are meritorious. If the appeal appears to be meritorious, a panel of judges may so determine and even appoint an attorney and allow the case to proceed for full briefing. On the other hand, if a panel of judges determines that the case is frivolous on its face, the appeal can be readily dismissed by summary order. The same procedure is followed by staff counsel on all cases that have jurisdictional problems. This provides the court a means to screen cases out on a summary basis before briefing. At the same time it gives full compliance to Supreme Court cases that require informa pauperis plaintiffs to have the same opportunity to address the court as other litigants when the court invokes summary procedures.45

THE EXPEDITED CALENDAR

The appellate process that I have briefly summarized above has served the court well. However, with the increased case load we need to do more. The Eighth Circuit has continued to experi-

ence an increased number of filings in the past several years. In fact, the Eighth Circuit has the second largest percentage increase in the number of filings since 1979. The increased filings have required our constant supervision and administration. We have recently adopted a new procedure for case management. We call this the expedited calendar.

The expedited calendar is based on a management concept that all appeals will be immediately investigated and placed under administrative supervision at the time that the notice of appeal is filed. Staff counsel are directed to study all incoming appeals by analysis of the district court record and the informational sheet furnished by counsel and the trial judge. The informational sheet covers the general nature and subject matter of the appeal involved. If the case indicates the appeal questions are singular in nature or, alternatively, are not considered to be complex, then staff counsel recommends that the case be expedited. The attorneys are consulted and are informed that the case will be placed on an expedited calendar.

Counsel are provided a short period of time in which they may object to the placement of the case on the expedited calendar, but if no objection is filed, the attorneys are requested to stipulate the record or work with the court reporter in getting a transcript to the court of appeals within an abbreviated time period. The parties are then requested to file typewritten briefs not to exceed twenty pages in length; the appellant is required to file his brief within twenty-one days and the appellee within fourteen days thereafter. The reply brief is to be filed within seven days. Once the appellee has filed its brief the case will immediately be placed on an expedited calendar and set for a ten minute per side argument. Instead of hearing five cases on a given day, the court will hear seven to eight cases on the expedited calendar. It is understood that the court will write a short opinion in these cases. Even though opinions are to be abbreviated, every opinion will recite a reasoned analysis as to why the case was so decided. This governing princi-

46. For the four year period between 1979 and 1983, the Fifth Circuit had the largest percentage increase with 70%. (This percentage increase is taken from the 1979 filings in the old Fifth Circuit and the 1983 filings in the new Fifth and Eleventh Circuits.) The Eighth Circuit was second with 59%. Next was the Ninth Circuit with 52%. See Federal Judicial Workload Statistics, supra note 2, at 2 (Dec. 31, 1983); id. at 2 (Dec. 31, 1979).

47. The time period under the circuit's plan to expedite criminal appeals requires furnishing transcripts in 21 days from the time of the notice of appeal. A similar time period will be followed on the expedited calendar in the event the full transcript of the case is required.
ple is an important factor in processing cases from the expedited calendar.

After eighteen years on the court of appeals, it is my general estimate that between fifty and seventy percent of the case load on the federal appellate courts are cases that can be handled without long opinions. Other chief circuit judges have indicated to me their agreement with this appraisal. Our circuit is confident that, through the processing of the expedited calendar, lawyers can bring the cases to us shortly after the judgment in the district court. The issues will still be fresh in their mind and they will have their appeal heard within sixty to ninety days from the time of the judgment below. Decisions will be rendered expeditiously in these cases. We are confident that in a short time this will reduce the time lag in deciding appeals in the Eighth Circuit. We continue to strive to see that all decisions will be rendered in a median time of four to five months after the notice of appeal is filed. Our new procedures will shorten this time. The expedited calendar also provides the court more flexibility in which to apply itself on the complex cases that increasingly appear on the docket.

CONCLUSION

With innovative procedures now being explored by both our trial courts and the court of appeals, internal management of our case load will improve. I firmly believe that few legislative curtailments on diversity, habeas corpus, civil rights, and social security cases are necessary. These cases should continue to be processed by article III judges. It is fundamental that federal courts should remain open and provide equal access to all citizens for adjudication of federal rights. I believe that curtailment of subject matter jurisdiction in the federal court or diversion of cases for dispute resolution to other forms of secondary justice are poor solutions for coping with the case load problem. Today there exists a challenge to the federal courts of our nation to find innovative means for improving quality and expediting justice, without yielding to lesser solutions. Finding these solutions, internally, is part of our responsibility in carrying out our constitutional duties. It has been, and should continue to be, done.