NATIONAL CENTER FOR STATE COURTS

CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS

FINAL REPORT

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Project Consultants
David C. Steelman
Richard Van Duizend

Vice President
Daniel J. Hall

COURT CONSULTING SERVICES DIVISION
1331 Seventeenth Street, Suite 402
Denver, Colorado 80202
(303) 293-3063

This document has been prepared under an agreement dated December 31, 2003, between the National Center for State Courts and the First Judicial District of the Commonwealth of Pennsylvania on behalf of the Philadelphia Court of Common Pleas, Trial Division, Civil Section. The points of view and opinions offered in this report are those of the project consultants, and they do not necessarily represent the official policies or position of the First Judicial District or the Philadelphia Court of Common Pleas.

CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS

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EXECUTIVE SUMMARY

In the First Judicial District of Pennsylvania, the trial court of general jurisdiction is the Philadelphia Court of Common Pleas. The Court of Common Pleas is a busy general jurisdiction trial court in a litigious urban area. In 2003 alone, over 35,000 cases were initiated in the Civil Section. The Court has three divisions – the Family Court Division (20 judges), the Orphans' Court Division (3 judges), and the Trial Division (67 judges), which has a Criminal Section and a Civil Section.

During the past 12 years, the Civil Section has undertaken an impressive effort to eliminate its case backlog and improve the flow of cases. This effort has met with considerable success in reducing the size of its pending civil inventory and the age of cases at disposition. In 1992, the Philadelphia Court of Common Pleas had a pending inventory of over 28,000 major civil cases with jury demands, and many of those cases were taking seven years or more after filing to be disposed. To reduce the size and age of the pending civil jury inventory, while achieving prompt disposition of newly filed cases, the Trial Division introduced a "Day Backward" program in 1992 to deal with the prior pending inventory and a "Day Forward" program for major civil jury cases filed on and after January 4, 1993.

The result of the collaborative effort by the Court and the civil trial bar under these two programs was a dramatic civil caseflow management success. By the end of calendar year 2003, the Court had reduced the total inventory of pending civil jury cases to fewer than 6,200, of which only a small percent had been pending longer than 24 months. The Court also initiated several other programs that support and supplement its Major Civil Jury Program. These programs include, but are not limited to, the following:

- Compulsory Arbitration Program
- Discovery Court Program
- Motions Court Program
- Complex Litigation Center
- Commerce Court Program

In addition, the Court has sought to facilitate coordination between the Office of the Prothonotary and the Court's Office of Civil Administration, and improve jury services and management.

The significance of this caseflow management improvement cannot be overstated. The Court's performance with civil jury cases is now better than that of *any* large urban trial court in the United States at the time that the Day Backward/Day Forward programs began in 1992-93.[1] The success of these programs has thus helped to make the Civil Section of the Trial Division in the Philadelphia Court of Common Pleas one of the finest and most successful urban trial courts in the country.

In order to better understand how it can build upon this success to further improve its operations and the administration of justice, the Court engaged the National Center for State Courts (NCSC) to conduct a study of its civil programs. In early 2004, two members of the NCSC project team made two visits to Philadelphia to interview judges, court officials and court staff members, and members of the civil trial bar who appear before the different civil programs of the Court. They found that the Court clearly has powerful reasons to be proud of how it has been able to reduce its civil backlog and has managed to stay current with its inventory of pending cases. For civil cases, this Court has all the elements of what is necessary for ongoing success in caseflow management – including strong and responsible judicial and administrative leadership over time, time standards and other relevant goals, use of information for regular measurement of actual performance against those standards and goals, and strong commitment of judges and

[1] For a comparison of Philadelphia with other large urban trial jurisdictions in 1993, see John Goerdt, et al., "Litigation Dimensions: Torts and Contracts in Large Urban Courts," *State Court Journal* (Vol. 19, No. 1, 1995), Appendix 8. Of the 45 largest urban trial courts in the country, the Circuit Court in Fairfax, Virginia, had the shortest times to disposition for civil jury cases – a median time of 13.5 months, with 75% disposed in 20.5 months or less, and with just 17% requiring more than two years to reach disposition. In Philadelphia, civil jury cases had a median time to disposition of 5.2 years, with 88.5% taking more than two years; 71.1% taking more than four years; and 25% taking 7.8 years or longer. Only one of the 45 largest urban trial courts in the country had longer times to disposition for civil jury cases than Philadelphia.

court staff to continuing effectiveness in caseflow management.[2]

In this context, the NCSC consultants also identified a number of ways in which the Court could further strengthen the operation and performance of its various programs and services. These findings and recommendations from the assessment of civil programs in the Court are summarized below.

Prothonotary and Office of Civil Administration

The Prothonotary's Office and the Office of Civil Administration work together closely and smoothly, despite having separate budgets and different appointing authorities. The Board of Judges of the Court of Common Pleas of Philadelphia County appoints the Prothonotary, while the President Judge of the Court of Common Pleas serves as the Approving Authority for the Prothonotary. The Prothonotary's Office is responsible for issuing all judgments for the Court of Common Pleas and the Philadelphia Municipal Court, as well as for filing all complaints, notices of appeal, foreclosures, and liens; maintaining the court files; issuing notices; and indexing records. The Administrative Judge of the Trial Division appoints the staff members of the Office of Civil Administration, who hold case management conferences; track the inventory to make sure cases are moving according to schedule; flag overdue events; assure that the necessary pleadings and memoranda are in the file so that judges can review them; share docketing responsibility with the Prothonotary; and serve as a buffer and conduit to the judges by responding to calls from lawyers and litigants.

The most significant concern regarding the Prothonotary and Office of Court Administration is the time and difficulty involved in dealing with self-represented litigants for the staff of the Prothonotary's Office and the Office of Civil Administration (as well as other court units such as the Arbitration Center).

[2] On the requirements for court success in caseflow management, see David Steelman, with John Goerdt and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2000); Barry Mahoney, et al., *Changing Times in Trial Courts: Caseflow Management in Urban Trial Courts* (Williamsburg, VA: National Center for State Courts, 1988); Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and For the Future* (Chicago: American Bar Association, 1987); and Maureen Solomon, *Caseflow Management in the Trial Court* (Chicago: American Bar Association, 1973). Under the criteria offered in any of these works, the current approach to civil caseflow management in the Philadelphia Court of Common Pleas would be rated as exemplary.

- *To address this concern the NCSC project team urges (see Recommendation 2-3 and 3-4 in the full report) that the Court take specific steps to assist self-represented litigants appearing both in Court and in the Arbitration Center, not only to improve customer service, but also to make more efficient use of the time of judges and staff members in the Prothonotary's Office and Office of Court Administration.*

Arbitration Center

Philadelphia's compulsory arbitration program was established for civil cases in which less than $50,000 is at stake, or when the parties stipulate to arbitration. The Arbitration Center's caseload also includes appeals of small claims cases heard in the Philadelphia Municipal Court. A few non-jury (i.e., equity) cases are referred to the Arbitration Center as well.

In total, more than 19,500 cases are referred to the Arbitration Center each year including about 2,000 remands. Approximately 7,500 of these cases (38%) are actually heard by a panel of arbitrators. The rest are settled, non-prossed, or have a default judgment entered. About 30% of those set for a hearing are settled on the day of the hearing. Arbitration panels generally consist of two lawyers who engage in personal injury work (one representing plaintiffs, the other defendants) and a non-personal injury lawyer. About half of the cases that result in an arbitration hearing are appealed. (This represents less than 20% of the total number of cases referred to the Arbitration Center.) Judges in the Civil Section's Complex Litigation Center hear arbitration appeals, which are generally disposed within six months.

Overall, there appears to be across-the-board satisfaction with the design and operation of the Arbitration Center program. The concerns noted are more in the nature of fine-tuning than fundamental change. The NCSC project team joins the chorus of those praising the Arbitration Center for disposing of a large number of disputes fairly and expeditiously. Given the effectiveness of the program and the need to keep costs low because of the relatively small amount at issue in these cases, some possible options (such as a mandatory settlement conference or mandatory mediation) to increase the settlement rate further are not warranted. Yet offering mediation and early neutral evaluation as an option to parties after the case is joined may siphon off some cases

earlier at a relatively low cost. In addition, adjustments to the staffing and resources available to the Arbitration Center may enable it to serve its customers even more effectively. Accordingly, the most significant suggestions by the NCSC project team to strengthen the Court's Compulsory Arbitration Program are the following (see section III in the full report for more details and further suggestions):

- *The Court should consider increasing the alternative dispute resolution (ADR) options available to litigants in cases referred to the Arbitration Center. The options could include mediation and early neutral evaluation prior to the hearing and a judicial settlement conference or binding arbitration by a highly experienced judge pro tem if an arbitration award is appealed. (See Recommendation 3-1 below.)*

- *The Court should provide additional clerical support to the Arbitration Center. Court Administration should conduct a workload analysis to determine how many additional support staff people are needed and what skills are required. (See Recommendation 3-2.)*

- *The Court should further enhance security for the Arbitration Center at its new location. At a minimum, a police officer or security guard should be present in the waiting room during the check-in and docket call and panic buttons should be installed at the front desk, in each hearing room, and the Manager and Assistant Manager's offices. Staff should be trained on how to identify and respond in an emergency situation. (See Recommendation 3-3.)*

Day Forward/Major Jury Program

The Day Forward/Major Jury Program deals with all major civil jury cases except mass tort cases. The phrase "Day Forward" refers to the caseflow management system that the Court has developed to coordinate and schedule major civil jury cases for trial. In its development and implementation of this system, the Civil Section has achieved remarkable success since 1993. As stated above, the Court's Day Forward Program has achieved remarkable success in reducing backlog and substantially shortening the time to disposition.

Under the Day Forward/Major Jury Program, cases are assigned on a year-by-year basis to judicial team leaders: one judge team leader has responsibility for all 2004 cases, another for 2003 cases, and third for 2002 cases, etc. Under the oversight of the team

leader, each case goes through the following steps unless it is dropped, dismissed, or settled before the next step:

- Case management conference with a case manager
- Discovery
- Settlement conference with a judge pro tempore (JPT)
- Judicial settlement conference
- Trial

Law-trained civil case managers conduct the case management conferences with counsel soon after case initiation and prepare case management orders to assign cases to one of three differentiated case management "tracks" for progress to trial or other disposition:

- *Expedited Track* (e.g., a motor vehicle tort with fewer than four parties): not more than 12 months from filing to trial
- *Standard Track* (e.g., a motor vehicle tort with four or more parties): not more than 18 months from filing to trial
- *Complex Track* (e.g., medical malpractice, other professional liability, products liability, or defamation): not more than 24 months from filing to trial

After the completion of discovery in a case, it is scheduled for a settlement conference with a judge pro tempore (JPT) recruited from among the most senior and respected members of the trial bar. These highly experienced and knowledgeable attorneys work *pro bono* directly under the supervision of the judge team leader. If a case has not been settled by a JPT, then it is set for a pretrial conference before the judge team leader. Cases not settled in a pretrial conference are set for trial. Most major civil jury trials last five days or less. It should be noted that while medical malpractice cases constitute only about 15% of the filings in this program, they represent over 75% of all trials.

Lawyers say that the best things about the court process are the predictability of the process, the firmness of trial dates, especially for complex cases that receive a date certain, and the quick disposition of cases. They say that the worst things are a lack of flexibility in the system, even if the attorneys agree to a delay for sound reasons, and the tendency of at least some judges to be "heavy-handed" and not show trust for the bar. Some lawyers perceive that the Court is "obsessed with numbers," although that was not

a common view among those interviewed by the NCSC project team. Overall, the members of the civil trial bar seem to consider their concerns to be no more than "tweaks" in what is a good system.

Given the success of the Court in its management of civil jury cases, there is no need for the NCSC project team to suggest radical changes. There are areas, however, in which improvements might be made. The most important of these is to find ways to achieve earlier settlements or other nontrial dispositions, for civil jury cases generally, and for medical malpractice cases in particular. (See section IV in the full report for more details and further recommendations.)

- *Working with the civil trial bar, the Court should explore ways to achieve more settlements and other nontrial dispositions in the early stages of cases. Attention should be given to all of the following areas: (a) making case management conferences more meaningful, (b) creating opportunities for more dispositions in JPT settlement conferences by making them more meaningful, (c) limitation of unnecessary continuances, (d) adding resources for achieving nontrial dispositions, and (e) providing education about issues relating to case processing. (See Recommendation 4-1.)*

- *Because of its importance as a means for the Court to exercise control over the movement of cases to disposition, the Court should take affirmative steps to assure that the case management conference is a meaningful court event that is taken seriously by counsel in each case. The Court should closely monitor its treatment of continuance requests. (See Recommendations 4-2, 4-5, and 5-1 for more details.)*

- *Similarly, the Court should take such specific steps as those suggested in Recommendation 4-3 to make JPT settlement conferences more meaningful opportunities for the early and appropriate nontrial disposition of cases.*

- *Whether or not the Court develops a mediation program for civil jury cases in general, as is suggested in Recommendation 4-4, it should work in collaboration with the medical malpractice bar to explore and promote the use of mediation in medical malpractice cases. (See Recommendation 4-9.)*

Discovery Court

The Discovery Court Program was established to help the Court manage the high volume of civil discovery motions more effectively, particularly those in the expedited and standard tracks. Rather than having one judge hear all discovery-related motions, the organization of the Program is closely tied to the structure of the Major Jury and

Commerce Court programs. Judges assigned to the Motions Court hear discovery motions in arbitration and non-jury cases as part of the Discovery Court Program, and discovery motions filed after the official cut-off date for such motions in major jury cases (45 days before the end of the discovery period) as part of their Motions Court duties.

The overriding concern of both judges and lawyers about Discovery Court is the number of inconsequential motions filed and heard, and the impact of having to "wade through the garbage" on those few motions that raise a complex legal issue such as privilege. Both judges and lawyers commented that a judge in Discovery Court might have neither the time nor the energy to give a complex motion full consideration. To address such problems as this, the NCSC project team has offered several suggestions (see section V in the full report), of which the following are the most significant:

- *Development of a discovery plan should be part of every case management conference. When completed, the discovery plan should be signed by each attorney and incorporated within a case management order signed by a judge. Since the attorneys will be on record as having agreed to a specific discovery plan incorporated in a court order, the Court should consider whether costs and sanctions can be applied for failure to comply with that order or at least following failure to comply with a single motion to compel based on that order. (See Recommendations 5-1 and 5-8.)*

Several states and the federal courts are experimenting with requiring counsel to disclose basic information about their case and limiting the scope of subsequent discovery. There is only limited empirical evidence available regarding the effect of mandatory disclosure. Both judges and lawyers in Philadelphia told us that a set of standard interrogatories for the First Judicial Circuit exists, and that although they have fallen into disuse and need to be updated, revising the set of standard interrogatories could be useful in reducing the duration and effort required by the discovery process. Given the time and energy required to amend Pennsylvania's discovery rule and the attendant uncertainty of success, instituting mandatory disclosure appears better suited as a long-term goal rather than immediate action step.

- *The Court should request that the Philadelphia civil trial bar review and update the current standard interrogatories for civil cases. Once the revised standard interrogatories have been adopted, the Court should require their use in all*

arbitration cases, and in expedited and standard major jury cases. (See Recommendations 5-3 and 5-4.)

- *If the development of standard interrogatories (as suggested in Recommendations 5-3 and 5-4) does not improve the exchange of required information in civil cases, the Court should ask the Pennsylvania Bar Civil Rules Committee to consider proposing a rule amending the current discovery process by requiring mandatory disclosure and limiting subsequent discovery at least in all but complex civil litigation. (See Recommendation 5-5.)*

Finally, though not a formal recommendation, the Discovery Court Program would greatly benefit from the implementation of electronic filing. Not only will it simplify the filing of motions and notices of opposition, but also, it will enable a judge to see the history of the case on screen, including the record of previous discovery motions, rather than having to rely on counsel for information on what has transpired previously.

Motions Court Program

About 50,000 civil motions are filed each year in the Court of Common Pleas. For cases in the Major Jury Program, the judges assigned to be team leaders hear almost all motions. In addition to hearing discovery motions in their cases under the Discovery Court Program, the team leader judges in the Major Jury Program hear virtually all non-discovery motions in such cases.

Among cases other than those in the Major Jury Program, judges hear motions in keeping with the allocation of cases by program or division. Thus, motions and petitions for preliminary injunctions in commercial cases are generally to be heard in Commerce Court; those in mass torts and class actions are to be heard in the Complex Litigation Program; wrongful death and minors' compromise petitions are heard in Orphans' Court; landlord-tenant appeals are heard by a Municipal Court judge specially designated to preside as a Common Pleas judge; and motions to enforce settlement or for reconsideration are to be heard by the judge assigned the case in which they arose. Other motions filed in civil cases that are heard in Motions Court include (a) non-jury motions; (b) arbitration program motions; (c) post-arbitration and arbitration appeal motions; (d) certain discovery motions not heard in Discovery Court; (e) preliminary injunctions in cases other than those in the Commerce Program; (f) Municipal Court appeals from

denial of motions to open default judgments; (g) appeals from Municipal Court money judgments; and (h) requests for emergency relief.

During the course of their interviews for this assessment, the NCSC project team members heard a number of comments about the structure and operations of the Civil Motions Program. Motions Court is a "catch-all" that receives a real "hodge-podge" of cases that do not "fit" elsewhere. There is a very positive dimension in this for a judge, because there is always something new, it is "hands on," and a judge can make a real difference in people's lives. Yet the "catch-all" nature of its workload also seems to present problems. To address these problems, NCSC offers several suggestions in section VI of the full report, and the most significant of these are the following:

- *The Motions Court should have additional administrative staff members for processing motions, petitions for equitable or emergency relief, and appeals. The Court should undertake a paper-flow analysis of the processes used by the Motions Court Office to ensure that it is operating as efficiently as possible. (See Recommendation 6-2 and 6-3.)*

Complex Litigation Center

The Complex Litigation Center (CLC) was established in 1992 in light of the growing volume of mass tort cases. Since then, 29 different mass tort programs have been referred to the CLC, of which 14 are now active. The attention given to these cases and the process that has been developed for considering them – providing both certainty and firm trial dates – are major reasons why Philadelphia has become a center for mass tort filings from all over the country. Appeals of arbitration cases and class action suits are also assigned to the CLC.

The CLC has justifiably garnered national attention for its ability to fairly and quickly dispose of large numbers of mass tort cases. Members of the mass tort bar commented that they strongly prefer filing in the Philadelphia Court of Common Pleas because of the procedures that have been established and the prompt and firm trial dates. The experienced members of the mass torts bar recognize that every case need not be tried, and the Court encourages litigator civility and discourages use of "scorched earth" tactics.

There was concern among both lawyers and judges, however, that the CLC is becoming such an attractive site for mass tort and class action litigation, that it may become overwhelmed unless it receives additional judicial and staff resources. There was also concern about the lack of technological sophistication at the Court in terms of the inability to file pleadings and documents electronically, the need to privately establish a litigation website, and the relatively small size of the high-tech courtroom, which limits its use in cases where there are several teams of lawyers. Finally, a few lawyers expressed concerns about some aspects of motion practice in the CLC.

The creation and operation of the Complex Litigation Center is clearly one of the Court's major achievements and a substantial service to the citizens of Philadelphia, the bar, and the nation, given the scope of mass tort litigation and class actions. The CLC is operating well, but consistent with the concerns discussed above, care will need to be exercised to assure that its popularity does not compromise its success. Accordingly, the NCSC project team has offered several suggestions in section VII of the full report, of which the following are most significant.

- *The Court should undertake a workload study to ensure that the staffing for the Complex Litigation Center is sufficient to meet the growing demand for its services. (See Recommendation 7-1.)*

- *The Court should continuously monitor the caseload of the Complex Litigation Center to ensure that it is able to perform its primary function effectively. If the time to trial begins to lengthen or the firmness of trial dates begins to slip, then NCSC suggests in Recommendation 7-2 that the Court consider moving arbitration appeals to a new Civil Appeals Program, as suggested in Recommendation 6-1.*

- *The Court should implement electronic filing and record storage capabilities for the Complex Litigation Center as soon as possible. (See Recommendation 7-5.) Electronic filing should ultimately be considered for application in other Civil Section programs, including the Commerce Court, the Day Forward/Major Jury Program, Discovery Court, and Motions Court.*

Commerce Program

The Philadelphia Court of Common Pleas initiated the Commerce Program in January 2000, as an extension of the Day Forward Program. The objectives of the program are (a) to provide an efficient process for paper-intensive litigation; (b) to assure

judicial expertise handling and deciding complex commercial litigation; and (c) to develop a body of case law on commercial issues thereby creating greater predictability in business transactions. Thus, the Commerce Program is designed to provide special management of cases that by their nature consume substantial court time and resources. In so doing, it both enhances the efficiency of the Court as a whole as well as strengthens the capacity of Philadelphia as an economic hub. The Commerce Program appears to be operating very effectively.

During the past year, the scope of the Program has been modified. Judges assigned to the Commerce Program now handle non-jury cases that, like major commercial cases, are largely document driven rather than fact driven. Class actions that had been assigned initially to the Commerce Program have now been transferred to the Complex Litigation Center, which handles other sets of cases involving numerous parties but a limited set of issues.

The members of the bar with whom that the NCSC project team members spoke stated that the Commerce Program has largely achieved its objectives and that the change in the scope of the Program has worked out well. They attributed the success to the quality of the judges assigned by the Administrative Judge, the quality of the law clerks attracted by the higher salary paid by the Commerce Court, and the individual calendaring system which allows the assigned judge to become familiar with the case and counsel to become familiar with the judge's perspective and style.

On the other hand, the lawyers expressed several concerns about the Program. The first is that because the Commerce Program was established by judicial order rather than by statute or Supreme Court Rule, it could be too easily abandoned in the future by a new Administrative Judge or because of reductions in the Court's budget. They felt that the relatively low number of cases handled by the Program made it particularly vulnerable. The second is due to the fact that assignment of a judge to the Commerce Program is entirely within the discretion of the Administrative Judge. The attorneys were concerned that some assignments in the future would not result in judges of the same quality as those who have served in the Program since its inception. The third concern is that the Commerce Program is not developing commercial law jurisprudence as quickly as some members of the Bar had hoped. Finally, they expressed a concern that the

settlement conferences as now scheduled and conducted in cases are largely a pro forma procedure, noting that only 10-20% of their cases are close to settlement at the time of such conferences. Given the substantial success of the Commerce Court Program to date, the NCSC project team offers only limited recommendations in section VIII of the full report. The most significant of these are Recommendations 8-1 and 8-2:

- *Consistent with the order establishing the Commerce Court, all motions or petitions for injunctive relief by parties to cases that have been filed in Commerce Court or that appear to meet the criteria for assignment to the Commerce Court Program should be heard in Commerce Court. The leaders of the Trial Division and the Civil Section should address and resolve any lack of clarity about the suitability for assignment of such cases to the Commerce Court Program.*

- *In keeping with the discretion allowed under the Pennsylvania Rules of Judicial Administration, the Administrative Judge may wish to amend the order establishing the Commerce Program by inserting a set of criteria for assigning judges to the Commerce Program, such as a minimum number of years of judicial experience and demonstrated expertise in hearing and settling complex commercial litigation.*

Jury Issues

Court figures for the first seven months of FY 2004 suggest that over 300,000 citizens will be summoned for jury duty in 2004. More than 90,000 actually report for jury service. The Trial Division closely monitors the number of cases likely to require a jury each day, and it employs a juror-initiated telephone system through which individual jurors can verify the need to appear the following day. For those potential jurors who are required to report, the Court has a juror utilization rate well in excess of 100% -- that is, all potential jurors who report are sent to a courtroom for voir dire once, and many are sent more than once.

Potential jurors report to the current jury assembly room in the Criminal Justice Center each morning during a normal jury week, and those jurors selected for a voir dire panel in a civil case must cross from the Criminal Justice Center to City Hall. To relieve the crowding in the Criminal Justice Center, enhance efficient operation of the court, and better serve the voters responding for jury service, the NCSC project team offers two suggestions in section IX of the full report, including Recommendation 9-1:

- *The Court should make it a priority to secure the funding needed to create a safe and comfortable Civil Jury Assembly Room in City Hall.*

I. Introduction

In the First Judicial District of Pennsylvania, the trial court of general jurisdiction is the Philadelphia Court of Common Pleas. The Court has three divisions – the Family Court Division (20 judges), the Orphans' Court Division (3 judges), and the Trial Division (67 judges), which has a Criminal Section and a Civil Section.

Reporting to the supervising judge for the Civil Section is a coordinating judge for its Complex Civil Litigation Program (including mass torts and equitable matters), which has about 8,500 cases now pending. The supervising judge for the Civil Section is also responsible for overseeing all of the Court's other civil case programs, which include the following:

- *Major Jury Cases* (civil cases at law with over $50,000 at issue, except for mass torts)(about 6,700 cases pending in 2003)
- *Commerce Program* (litigation among business parties)(about 600 cases pending in 2003)
- *Arbitration* (required in all cases at law where the amount in controversy is $50,000 or less)(about 11,900 cases pending in 2003)
- *Appeals Program* (appeals from Municipal Court and adjudications by the Pennsylvania Department of Transportation ["Penndot"])(about 1,300 cases pending in 2003)
- *Motions Program* (appeals from administrative agencies and tax collection cases [about 600 cases pending in 2003], as well as all non-discovery motions [about 14,000 annually])

The Court of Common Pleas is a busy general jurisdiction trial court in a litigious urban area. In 2003 alone, over 35,000 cases were initiated in the Civil Section. During the past ten years, the Civil Section has undertaken an impressive effort to eliminate its case backlog and improve the flow of cases. This effort has met with considerable success in reducing the size of its pending civil inventory and the age of cases at disposition. Seeking to identify how it might build on its success to further improve its operations, and what it might do differently to anticipate changing demands on Court services, the Court of Common Pleas engaged the National Center for State Courts (NCSC) to conduct a study of its civil programs.

In early 2004, two members of the NCSC project team made two visits to Philadelphia to interview judges, court officials and court staff members, and members of the civil trial bar who appear before the different civil programs of the Court. They

found that the Court clearly has powerful reasons to be proud of how it has been able to reduce its civil backlog and has managed to stay current with its inventory of pending cases. For civil cases, this Court has all the elements of what is necessary for ongoing success in caseflow management – including strong and responsible judicial and administrative leadership over time, time standards and other relevant goals, use of information for regular measurement of actual performance against those standards and goals, and strong commitment of judges and court staff to continuing effectiveness in caseflow management.[3]

Based on an analysis of information from interviews, focus groups, data analysis, and documents received from the Court, the NCSC project team has prepared this report of findings and recommendations in its assessment of civil programs in the Court. It begins with an assessment of case processing by staff members of the Prothonotary's Office and the Office of Civil Administration. Next, it addresses the manner in which cases are handled in the Arbitration Program. Then follows a consideration of each major program in the Civil Section. The report ends with an analysis of jury issues and of technology considerations that bear on Civil Section operations.

II. Prothonotary and Office of Civil Administration

The official in Pennsylvania who performs clerk-of-court responsibilities for civil cases filed in either the Municipal Court or the Court of Common Pleas is the Prothonotary. In Philadelphia, the staff members of the Prothonotary's Office work with the Court and with the staff members of the Office of Civil Administration.

A. The Prothonotary's Office. The Board of Judges of the Court of Common Pleas of Philadelphia County appoints the Prothonotary. The President Judge of the Court of Common Pleas serves as the Approving Authority for the Prothonotary. His Office is responsible for issuing all judgments for the Court of Common Pleas and the Philadelphia Municipal Court, as well as for filing all complaints, notices of appeal,

[3] On the requirements for court success in caseflow management, see David Steelman, with John Goerdt and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC 2000); Barry Mahoney, et al., *Changing Times in Trial Courts: Caseflow Management in Urban Trial Courts* (NCSC 1988); Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and For the Future* (ABA 1987); and Maureen Solomon, *Caseflow Management in the Trial Court* (ABA 1973). Under the criteria offered in any of these works, the current approach to civil caseflow management in the Philadelphia Court of Common Pleas would be rated as exemplary.

foreclosures, and liens; maintaining the court files; issuing notices; and indexing records. The Office receives approximately 100,000 filings per year, of which about 30% require judicial involvement.

At the present time, nearly all filings are on paper rather than in electronic form.[4] When a civil complaint is presented, Prothonotary Office staff meet privately with the lawyer or unrepresented litigant at one of the cubicles available in the office to make certain the filing is in proper form and determine to which civil case program the case should be referred. In making this determination, staff members use the cover sheet information provided by counsel or the complainant and the decision-making matrices developed by the Court. For cases for which a trial or hearing date is set at the time of filing (e.g., arbitration cases), the Prothonotary's Office faxes a notice to the Clerk of the U.S. District Court for the Eastern District of Pennsylvania as well as the Courts of Common Pleas in surrounding counties in order to limit conflicts in attorneys' schedules.

B. The Office of Civil Administration. Staff members of the Office of Civil Administration (OCA) are appointed by the Administrative Judge of the Trial Division. The staff of the OCA includes the case managers who are assigned to each of the Day Forward/Major Jury Program Teams to review the files[5] and conduct case management conferences.[6] After the case management conference, the case managers track the inventory to make sure cases are moving according to schedule; flag overdue events; assure that the necessary pleadings and memoranda are in the file so that the Team Leader or trial judge can review them; share docketing responsibilities with the Prothonotary; and serve as a buffer and conduit to the Team Leader by responding to calls from lawyers and litigants.

C. Relationship Between the Two Offices. The Prothonotary's Office and the Office of Civil Administration work together closely and smoothly, despite having separate budgets and different appointing authorities. For example, members of the OCA

[4] Some liens and all mental health case pleadings may now be filed electronically and filings and notices in Municipal Court code enforcement cases will soon be able to be transmitted in digital form.
[5] Case managers review the file about 90 days after the initial filing to ensure that the case has been properly referred to the Major Jury Program, and check, *inter alia,* whether the respondents have been served, whether the litigation should be suspended because of a bankruptcy proceeding, or whether alternative service has been requested. If the case is ready to proceed, the case manager will meet with counsel to discuss issues related to the future progress of the case.
[6] See Section IV, *infra*.

staff are posted to the Prothonotary's Office to assure that the case review and assignment process is swift and accurate. As another indication of excellent coordination, the two offices have established a special joint Quality Assurance (QA) Unit. Key responsibilities of the QA Unit include training new employees on operational procedures; analyzing and reporting performance data; developing and documenting new operational procedures and addressing operational problems; and refining requests from the operational units for the Banner Computer System changes before they are submitted to the Banner Committee. By transferring Banner System transaction data to an access database, this Unit is also able to track employee productivity and the quality of performance.

D. Concerns. Three sets of concerns were raised in discussions with the NCSC project teams. These are listed in ascending order of significance.

The first is the difficulty in tracking case events when a preliminary objection is raised under Rule 206.1, especially when another party files a preliminary objection to the initial preliminary objection. These motions appear to toll the standard case tracking and time limits and create one of the few areas of uncertainty in what is otherwise a rigorous and well-documented case management system.

The second is the communication loop between the Team Leaders meeting and operational staff. While there are clear mechanisms for the Prothonotary's Office and the Office of Civil Administration to bring issues to the leadership meetings, the mechanisms for transmitting the decisions made are less effective, leaving staff wondering what has happened or caught short when a policy or practice has been changed.

The third is the time and difficulty involved in dealing with self-represented litigants for the staff of the Prothonotary's Office and the Office of Civil Administration (as well as other court units such as the Arbitration Center). A Public Information Center for the First Judicial Center was established in City Hall in September 2002 with the cooperation and the strong support of the Philadelphia Bar Association. The Public Information Center provides forms and material to the public about a wide variety of Court and other governmental services and is staffed by experienced, bi-lingual personnel. Understandably, most of the court-related inquiries are related to Municipal Court and Family Division matters where the majority of the litigants represent

themselves. However, there is apparently little material available beyond some generic forms and lists of free legal service providers to assist self-represented litigants in Civil Section cases, such as sets of instructions in plain English and other languages on how to access the legal process, what information is called for on the forms, and what are their responsibilities as well as those of judges and the Prothonotary and Court staff. At one point, a "do's and don'ts package" was prepared, but it was not approved for use by the leadership of the Court. In addition, staff members in the Prothonotary's Office and the Office of Court Administration seem unaware of the Pubic Information Center or unclear on how it could be of help, since it was never mentioned in discussions with the NCSC project team in discussions about the problems presented by unrepresented litigants. Consequently, Prothonotary and Court staff must walk the uncertain line between being helpful to the public and refraining from providing "legal advice," with little guidance or resources, despite the growing number of self-represented litigants.

E. Recommendations for Improvement. The leadership and staff of the Prothonotary's Office and Office of Civil Administration have developed effective and efficient operations that serve the Court, the bar, and litigants well. Their cooperative relationship is exemplary and the Quality Assurance Unit is unique and can serve as a model approach for other jurisdictions. To address the few concerns noted above, the NCSC project team recommends that:

> ***Recommendation 2-1*.** **The Court should refer the issue of how best to account for cases that have "Preliminary Objection" practice to the Quality Assurance Unit.**

The QA Unit appears to provide the ideal forum for examining the confluence of legal, operational, and technological issues involved in tracking this subset of cases and making certain that they are monitored and moved as effectively as other cases.

> ***Recommendation 2-2*.** **The Deputy Court Administrator, or his designee, should be given the responsibility of recording the decisions made during Team Leader meetings on operational issues raised by staff or on new policies or practices that may affect operations (e.g., when motions are to be provided to judges – see Section VI). The written record of these decisions**

should be forwarded to the Prothonotary and all program Managers who should, in turn, inform the appropriate members of their staffs.

By their nature, the Team Leaders' meetings are informal. Following discussion, decisions tend to be made quickly. These meetings are an important and highly effective part of the management of the Civil Section, and the ease and openness of the process is evidence of the understanding and internalization of the Court's goals by its leadership. The NCSC project team does not wish nor intend to change the atmosphere of these meetings in any way. But in order to ensure that the decisions made are carried out as intended, some formal means of recording the decision or policy is necessary.

Another area that requires some attention has to do with the manner in which the Court deals with self-represented litigants in civil matters. For this purpose, NCSC recommends the following.

***Recommendation 2-3*. To improve customer service and to make more efficient use of the time of judges and staff members of both the Prothonotary's Office and OCA, the Court should enhance the capacity of the Public Information Center to assist self-represented litigants in civil cases by:**

a. Developing, in closed coordination with the bar, information and materials concerning the types of cases heard by the Civil Section in which self-represented litigants commonly appear, including, at a minimum:

- **Pamphlets explaining the processes to be followed and the responsibilities of plaintiffs and respondents**
- **Generic forms and instructions on the nature of the information that should be filled in**
- **Lists of providers of free or low-cost legal services and lawyers willing to provide counseling or unbundled representation**
- **Lists of mediators and other dispute resolution services**

All explanatory materials and instructions should be written in non-technical language and should be available in English and other languages spoken by significant portions of the community. When legal terms are used, clear definitions should be provided. The information center should have access to language line interpretation services.

b. Posting all the relevant materials available at the Public Information Center on the Court's website.

It is clear in courts throughout the country that the number of litigants who choose not to retain an attorney or who are unable to afford an attorney is increasing. The increase in self-represented litigants is but one aspect of the current "do-it-yourself" culture and is unlikely to abate in the foreseeable future.[7]

> The unfortunate reality is now undisputed and well documented. While our entire intellectual, jurisprudential, and even physical model of courts is built around the assumption that every litigant has a lawyer literally standing beside him or her, the reality is that in many courts, many or almost all of the cases do not fit that model. . . .The impact is similarly undisputed. Court calendars are clogged, clerks are overwhelmed and resentful, and litigants feel deprived of access to justice. Most significantly, when the assumptions on which the system is built are out of kilter with reality, nothing works properly for anyone.[8]

The current number of cases before the Civil Section involving self-represented litigants is probably not yet great enough to warrant some of the more far-reaching approaches that Zorza and others have recommended.[9] However, providing basic and comprehensible information regarding how to initiate and respond to legal proceedings, the role and responsibilities of plaintiffs and respondents, and where to find law-trained help, has become an essential element in meeting the judicial branches' obligation to ensure that all persons have access to justice. Responding to this need, courts throughout the country have established some form of information centers for self-represented litigants from the ground-breaking Self-Service Center in Maricopa County (Phoenix) Arizona, to the elaborate websites created by California and Florida courts (e.g., www.lasuperiorcourt.org and www.flcourts.org), to the information centers in many New Jersey courts. In so doing, they have worked closely with their bars to assure that this public service is viewed properly as an effort to better address the needs of those members of the public unable or unwilling to retain an attorney, rather than as an attempt to take away business from struggling lawyers.

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[7] Jonah Goldschmidt, Barry Mahoney, Harvey Solomon, & Joan Green, *Meeting the Challenge of Pro Se Litigation,* 10-11 (AJS 1996).
[8] Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers* (NCSC 2000), pp. 11-12.
[9] *Id.*

III. Arbitration Center

Philadelphia's compulsory arbitration program was established for civil cases in which less than $50,000 is demanded and there are no requests for equitable relief or real estate claims.[10] In addition, the Arbitration Center receives cases remanded from the Major Civil Jury Trial Program:

- When the value of the case initially included in that program is determined to be less than $50,000 at the case management conference or subsequently,
- Following appeal of an award, or
- When the parties stipulate to arbitration.

The Arbitration Center's caseload also includes appeals of small claims cases heard in the Philadelphia Municipal Court. About three-quarters of these approximately 900 cases involve self-represented litigants. A few non-jury (i.e., equity) cases are referred to the Arbitration Center as well.

In total, more than 19,500 cases are referred to the Arbitration Center each year including about 2,000 remands. Approximately 7,500 of these cases (38%) are actually heard by a panel of arbitrators. The rest are settled, non-prossed, or have a default judgment entered. Approximately 30% of those set for a hearing are settled on the day of the hearing. About half of the cases resulting in an arbitration award are appealed.

A. Process. When filing a case, an attorney must indicate whether the amount demanded is above or below $50,000. If it is less than $50,000 and there are no requests for equitable relief, the Prothonotary's Office refers the case to the Arbitration Center and assigns a hearing date approximately eight (8) months from the filing date. As with larger civil cases, plaintiffs are responsible for serving notice on opposing parties in cases assigned to the Arbitration Center. The same discovery process is followed as in major civil cases, but at an accelerated pace.

If there is a dispute over discovery or some other motion, they are heard in the Discovery Court and Motions Court, respectively. Leave must be granted to file a motion within 45 days of the date set for the arbitration hearing. The Director of the Arbitration Center has the authority to grant a request to reschedule an arbitration hearing if the

[10] First Judicial Circuit of Pennsylvania, Court of Common Pleas of Philadelphia County, *Trial Division-Civil Administration At a Glance,* Section 5 (2003-2004 Edition).

request is submitted more than 48 hours before the hearing. Such requests are granted only rarely, and only if they are based on some action or circumstance that could not have been dealt with earlier. If rescheduled, the case is usually reset for a hearing within 30 days of the original hearing date and will not be again rescheduled.

Arbitration panels generally consist of two lawyers who engage in personal injury (PI) work (one representing plaintiffs, the other defendants) and a lawyer who does not practice PI law. Arbitrators receive $200/day to sit and hear three cases per day on average. Approximately 3,500 Philadelphia County lawyers have signed up to serve as arbitrators, most hearing cases three to four times each year. The lawyers who agree to serve as arbitrators are seasoned. Eighty percent have practiced for at least 15 years; most are between 40 and 60 years of age. Lawyers generally receive notice of when they are to sit as arbitrators well in advance and may reschedule, if necessary. Only rarely does an assigned arbitrator fail to appear. Thus far, the Arbitration Center has never had to reschedule a hearing because there was not a panel to hear the case. On the other hand, the Arbitration Center does not have the staffing to be able to call attorneys in advance if, because of settlements and dismissals, they will not be needed on the day they are scheduled to serve.

Each morning, lawyers assigned to serve as arbitrators check in with the Assistant Manager of the Arbitration Center between 9:00 and 9:20 AM. They are then briefed as a group by the Arbitration Center Manager regarding the applicable rules, their authority, and their roles. Each panel is then assigned to one of the 14 hearing rooms available.[11] Cases have been previously set for one of three daily calendar calls – at 9:30 and 11:30 am, and 2:30 pm. The attorneys or parties check in with the Assistant Manager beginning about 15 minutes prior to the call to which their case has been assigned. If a case is settled before it is called, the attorneys or parties submit a settlement sheet to the Assistant Director in person, or if it has settled before the day of the hearing, by fax. At the designated time, the Assistant Director calls each case, instructing counsel, litigants, and witnesses to which room they should report. On the morning the NCSC team conducted its observations, the process moved quickly and efficiently, the atmosphere in the crowded room was relaxed,

[11] The Arbitration Center will be moving to a new facility a few blocks further from City Hall later this year.

and the staff conducted the process in a professional and friendly manner. No security was evident. If an incident develops, a staff member dials "911" or relies on Philadelphia Police officers who happen to be in the waiting room before they testify.

If the plaintiff fails to appear, the case is referred to a civil non-jury judge for dismissal with prejudice. If the defendant fails to appear, the case is referred to a civil non-jury judge for a default judgment. If neither party appears, the case is non-prossed. Hearings generally take from one to three hours. The Court does not record the proceedings, but an attorney may bring his or her own court reporter.

B. Arbitration Appeals. As we note above, about half of the cases that result in an arbitration hearing are appealed. This represents less than 20% of the total number of cases referred to the Arbitration Center. A substantial proportion of the appeals are filed by certain insurers who seek to use the arbitration award as a ceiling for further settlement negotiations. Only about 30% of the arbitration appeals filed are tried to verdict (i.e., 15% of arbitration awards and 6% of the cases referred initially to the Arbitration Center.) This proportion may increase, however, as a result of a new Court Rule (Rule 1311) which provides parties in cases in which the arbitration award is $15,000 with the option of trying the case to a jury without calling examining physicians or other experts to testify – the parties stipulate to the qualifications of the experts and submit only the experts' written reports for consideration by the jury. Half of the Rule 1311 cases proceed to trial. Generally, arbitration appeals are disposed within six months.

Arbitration appeals are handled by the Complex Litigation Center (CLC). Case management conferences for these cases are conducted by the Manager of the CLC. If she determines that the parties did not engage in the arbitration proceedings in good faith, she can refer the matter to one of the CLC judges for a hearing to show cause why the case should not be remanded to the Arbitration Center. In egregious cases, the judge may impose a fine of up to $650 on the appellant's attorney for filing a frivolous appeal.

C. Concerns. Overall, there appears to be across-the-board satisfaction with the design and operation of the Arbitration Center program. The concerns noted are more in the nature of fine-tuning than fundamental change.

Lawyers believe the process works best when the arbitrators fully understand real-world personal injury practice and remain in a neutral role, and when both sides treat the arbitration hearing seriously. Plaintiffs' counsel noted that arbitration cases could be costly in terms of the ratio of costs to the amount received, especially when insurance carriers appeal. Both plaintiffs and defense attorneys were interested in exploring ways of creating more flexibility. Some suggested an opt-out option to binding arbitration either before a highly experienced practitioner or a judge, suggesting that this might cut the effective appeal rate by more than half. Others suggested an opt-in procedure for cases over $50,000 in value with no limit on the size of the award. (Authorizing judges pro tem to conduct binding arbitration during the settlement conference was seen as another way of accomplishing the same thing.) The lawyers interviewed by the NCSC project team were not yet certain of the actual impact of Rule 1311, although they applauded the concept. Some suggested that in order to promote settlements rather than trials, the $15,000 cap should be raised above the minimum insurance level so that both sides are exposed to some risk.

There was greater unanimity regarding the time limit for filing discovery motions in arbitration cases, suggesting that the 45-day prior to hearing limit had initially been applied only to motions that could be dispositive of the case. They suggested that a deadline for non-dispositive motions closer to the hearing date could actually reduce the number of discovery motions and motions for extraordinary relief.

Staff concerns are more varied. They cited late service of complaints on defendants as the most common cause for delay, suggesting that a reminder postcard to plaintiffs before the end of the period for service might lessen the problem at relatively low cost. This concern is related to problems faced by self-represented litigants who have little guidance or assistance in coping with the legal process. Indeed, Arbitration Center staff members frequently prevail upon lawyers in the waiting room to talk with an unrepresented party who is frustrated or bewildered. Staff members are also concerned by the lack of security.[12] There is great appreciation for the tremendous contribution of

[12] It should be noted that since the visit of the NCSC team, the Arbitration Center has moved to a new location with improved security features such as partitions that limit access by the public to staff areas. However, it is the understanding of the NCSC project team that security in the waiting room, where large numbers of litigants and their witnesses gather, remains informal.

time and expertise provided by the members of the bar who serve as arbitrators. Staff felt badly that they are not able to notify lawyers when they are not needed as arbitrators on their scheduled date, and were concerned that the level of compensation is inadequate, suggesting that perhaps some attorneys might value CLE credit for service as an arbitrator more than $200.

D. Recommendations for Improvement. The NCSC project team joins the chorus of those praising the Arbitration Center for disposing of a large number of disputes fairly and expeditiously. When viewed in the context of the total number of cases filed, rather than just those arbitrated, the appeal rate does not appear to be excessive, and the Court has been able to try or facilitate settlement of those appeals quickly and effectively. Given the satisfaction with and effectiveness of the program, and the need to keep costs low because of the relatively small amount at issue in these cases, inserting a mandatory procedure (e.g., a settlement conference) or process (e.g., mediation) in order to further increase the proportion of settlements is not warranted. Neither is permitting cases to opt-out to judicial binding arbitration prior to the non-binding arbitration. Such an opt-out provision is likely to become a greater drain on judicial resources than is the current process, though having binding arbitration by a judge or a very experienced judge pro tempore as a standard option for arbitration appeals may be helpful. However, offering mediation and early neutral evaluation as an option to parties after the case is joined may siphon off some cases earlier at a relatively low cost. In addition, adjustments to the staffing and resources available to the Arbitration Center may enable it to serve its customers even more effectively. Therefore, the NCSC project team offers the following recommendations.

> ***Recommendation 3-1*.** **The Court should consider increasing the alternative dispute resolution (ADR) options available to litigants in cases referred to the Arbitration Center. The options could include mediation and early neutral evaluation prior to the hearing and a judicial settlement conference or binding arbitration by a highly experienced judge pro tem if an arbitration award is appealed. The period for selecting mediation or early neutral evaluation should end sufficiently before the scheduled date of the arbitration hearing so as not to delay the arbitration proceeding if the ADR process selected does not resolve the dispute. Since the ADR neutrals in the Arbitration Center would be members of the practicing bar, the Court**

should involve bar members extensively in the development of the Center's ADR programs.

Mediation – i.e., a consensual process in which a neutral person helps the disputing parties to reach their own resolution[13] – and early neutral evaluation (ENE) – i.e., having the parties or counsel briefly present a brief summary of their case to a neutral person experienced in litigating the type of matter in dispute who gives advice on the strengths and weaknesses of their positions and suggests a what a likely damage award might be[14] – can both be effective tools for resolving disputes early and quickly. Early neutral evaluation would be easy for the Court to implement using the cadre of experienced lawyers who have agreed to arbitrate cases. ENE sessions could be conducted in one of the rooms now used for arbitration sessions. As many as six could be conducted each day before a single lawyer. Mediation services could be provided directly by the Court using trained staff or paid volunteers or through referral to some of the many mediation service providers in Philadelphia. However, whether provided directly or via referrals, the Court would be responsible for monitoring the quality of the mediators or community programs.[15]

In addition to involving members of the practicing bar in the development of ADR programs, the Court should include assessment of the use and utility of available ADR options as part of its program implementation. In an evaluation of ADR programs in the New Hampshire Superior Court, for example, NCSC found that the use of mediation was by far the most popular ADR option, with ENE found to be much less attractive.[16]

In setting a cut-off date for accessing these services, a balance must be struck between the need to keep the option open as long as possible so as to encourage settlement, and the risk that some attorneys will use the alternative simply to extend the process. A cut-off of 60 days before the hearing will probably enable the case to ripen

[13] Susan Keilitz (ed.), *National Symposium on Court-Connected Dispute Resolution Research* 5 (NCSC 1994).
[14] *Id.,* at 12.
[15] *National Standards for Court-Connected Mediation Programs*, Standard 2.1 (Center for Dispute Settlement/Institute for Judicial Administration (1995).
[16] See David Steelman, Susan Keilitz, Paul Gomez and Adam Fleischman, *Superior Court Rule 170 Program and Other Alternative Dispute Resolution Prospects for New Hampshire Trial Courts* (NCSC 1997.

sufficiently and still allow the mediation or ENE session to take place without having to reset the arbitration hearing date. However, some experimentation may be required to determine what is the optimum deadline.

Judicial settlement conferences are sometimes arranged informally now for arbitration appeals. Suggesting this or binding arbitration before one of the very experienced attorneys who work with the Complex Litigation Center as part of the initial case management conference, and scheduling the conference or hearing if the suggestion is agreed to should be relatively simple and provide a quick and relatively low-cost way of disposing of the case.

> ***Recommendation 3-2.*** **The Court should provide additional clerical support to the Arbitration Center. Court Administration should conduct a workload analysis to determine how many additional support staff people are needed and what skills are required.**

Currently the staffing levels of the Arbitration Center appear too low to fully serve both internal and external customers. For example, both the Manager and the Assistant Manager of the Arbitration Center perform clerical and support tasks including docketing cases and bookkeeping, and as noted earlier, there is insufficient staff capacity to call lawyers scheduled to serve as arbitrators when the number of cases that day are not sufficient.

> ***Recommendation 3-3.*** **The Court should further enhance security for the Arbitration Center. At a minimum, a police officer or security guard should be present in the waiting room during the check-in and docket call and panic buttons should be installed at the front desk, in each hearing room, and the Manager and Assistant Manager's offices. Staff should be trained on how to identify and respond in an emergency situation.**

Since the visit of the NCSC project team, the Arbitration Center has moved to a new location with improved security features such as partitions that limit access by the public to staff areas. However, given the large number of people who gather in the waiting room for each calendar call; the substantial number of unrepresented litigants; the fact that there are not separate rooms for plaintiffs, defendants, and their families and witnesses; and the emotions and anxieties generated in many disputes, additional security

measures to protect the public and staff are warranted. Thus far, there have apparently been no serious incidents through a combination of luck, the skill of the staff in diffusing potentially dangerous situations, and the coincidental presence of Philadelphia police officers waiting to testify. If nothing more, the incident at the Criminal Justice Center on April 13, 2004, suggests that this good fortune cannot be counted on to continue. To protect the public who use the Arbitration Center, the Center's staff, and the members of the bar who serve as arbitrators, better security at the Arbitration Center is essential.

> ***Recommendation 3-4*. Information for self-represented litigants regarding the procedures used by the Arbitration Center and for filing and pursuing/responding to an appeal, the roles and responsibilities of the parties, the forms required and written instructions for completing them, and a glossary of the most common legal terms used should be available in the self-represented litigant information center, at the Arbitration Center, and on the Court's website.**

A significant proportion of the litigants in cases referred to the Arbitration Center are not represented by attorneys. This is particularly true in appeals of small claims cases heard initially in the Municipal Court. While it would be best if these litigants were encouraged and able to retain counsel, the experience in other major urban jurisdictions around the country is that the current number of self-represented litigants appearing before the Trial Division of the Philadelphia Court of Common Pleas is likely to increase.[17] The impact of this increase will be felt most strongly by the Arbitration Center. To facilitate the fair and smooth handling of these cases, it is incumbent on the Court to provide basic information in non-technical language to these litigants. (See Recommendation 2-3.)

> ***Recommendation 3-5*. The Court should consider experimenting with sending a postcard to plaintiffs reminding them of their duty to provide defendants with proper notice and consequences for not complying with this duty.**

The NCSC project team was advised that the greatest single factor causing delay or dismissal and refiling of cases was the failure of plaintiffs to provide timely service to

[17] Goldschmidt, et al., *Meeting the Challenge of Pro Se Litigation,* 10-11 (AJS 1996).

defendants. Data should be compiled for one month on the number of cases in which late, improper, or no service occurs and the types of these cases. If the number of these cases is indeed substantial, the Court or Prothonotary should prepare and for one month send out a postcard 10 days after the case has been filed to all plaintiffs (or to those in the types of cases where dilatory service occurs most frequently). The postcard, in non-technical language, should remind the party of their obligation and that failure to provide service will result in dismissal of their case. These cases should be tracked to determine whether the postcard has had an effect on the incidence of dilatory service. If the reminder reduces the number of cases delayed or dismissed because of notice problems, then the postcard should become a standard part of the Arbitration Center process.

> ***Recommendation 3-6*.** **The Arbitration Center should give an evaluation form to counsel and parties following completion of a hearing. The form should request information regarding satisfaction with the pre-hearing process and the hearing itself; the objectivity, competence, and courtesy of the arbitrators; and suggestions for improving the process. The form should not request identifiable information, but should ask whether the person completing the form was a plaintiff, respondent, counsel for the plaintiff, or counsel for the respondent, and whether an award was issued. The Arbitration Center Manager and the leadership of the Civil Section should periodically review the evaluation forms.**

Given the volume of cases, litigants and decision-makers that pass through the Arbitration Center, and the lack of a record, it is important for the Court to provide some method for obtaining feedback regarding the process and the arbitrators. The information can be used not only to further improve the Program, but also to improve training and orientation of arbitrators, and, if necessary, remove arbitrators from the program when they fail to adhere to the role and level of performance required.

> ***Recommendation 3-7*.** **The Court should survey the lawyers serving as arbitrators whether Continuing Legal Education (CLE) credits would be an attractive alternative to the current $200/day payment and explore with the body that approves CLE credits whether it would recognize service as an arbitrator as meeting a portion of a lawyer's annual CLE requirement. If there is sufficient interest among the lawyers serving as arbitrators and recognition from the CLE approval body, then the Court should offer**

lawyers the choice of receiving monetary payment or CLE credit for their service.

The NCSC project team heard conflicting reports on whether the lawyers serving as arbitrators would prefer CLE credit to monetary compensation. Thus, before moving forward with this alternative, the Court should ascertain whether it would in fact be attractive to the bar and permissible under the regulations governing CLE requirements.

Finally, the NCSC project team considered whether the limit on the amount in controversy should be raised. The current $50,000 ceiling has been in effect for 15 years, during which the cost of living index and other inflationary indicators have risen. However, according to the bar members interviewed, neither demands nor awards in arbitration eligible cases have changed significantly since the late 1980s. If this perception is correct, then no change in the upper limit appears warranted. However, the Court may wish to monitor whether the number of cases being referred to the Arbitration Center is dropping and whether major civil jury cases demanding between $50,000 and $100,000 is increasing, and consider raising the ceiling if and when the current threshold no longer captures the small, straightforward civil case.

IV. Day Forward/Major Jury Program

The Day Forward/Major Jury Program deals with all major civil jury cases except mass tort cases. The phrase "Day Forward" refers to the caseflow management system that the Court has developed to coordinate and schedule major civil jury cases for trial. In its development and implementation of this system, the Civil Section has achieved remarkable success since 1993.

A. Philadelphia's Caseflow Management Accomplishment with Civil Jury Cases. In 1992, the Philadelphia Court of Common Pleas had a pending inventory of 28,496 major civil cases with jury demands, and many of those cases were taking seven years or more after filing to be disposed. To reduce the size and age of the pending civil jury inventory, while achieving prompt disposition of newly filed cases, the Trial Division introduced a "Day Backward" program in mid-1992 to deal with the prior

pending inventory and a "Day Forward" program for major civil jury cases filed on and after January 4, 1993.[18]

The operation of these programs was premised on a finding from the analysis of court statistics that only about 5% of civil jury cases are actually disposed by jury verdict, while the remaining 95% are typically settled before trial or disposed by motion. The "Day Backward" program involved collaboration with the civil trial bar in the creation of judicial teams consisting of judges working with experienced civil trial lawyers serving as volunteer Settlement Masters or Judges Pro Tempore to address the pending inventory. Meanwhile, the "Day Forward" program also involved collaboration with the civil trial bar, along with aggressive judicial case management practices, including strict judge enforcement of pretrial and trial deadlines, seeking to achieve disposition of cases in 24 months or less after filing.[19]

The result of the collaborative effort by the Court and the civil trial bar under these two programs was a dramatic civil caseflow management success.[20] By the beginning of calendar year 2000, there were only 19 "Day Backward" cases still pending, and the number of pending "Day Forward" civil jury cases had been reduced to fewer than 7,000. Moreover, the pending inventory was "current," in that only 8% of the pending jury cases were more than 24 months old.[21] By the end of calendar year 2003, the Court had reduced the total inventory of pending civil jury cases even further, to fewer than 6,200, of which only 10.5% had been pending longer than 24 months (including only 12 remaining "Day Backward" cases).[22]

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[18] See "Case-Delay Reduction Strategy Unveiled," *The Legal Intelligencer* (March 24, 1992).

[19] Developed by the National Conference of State Trial Judges and adopted by the American Bar Association (ABA) House of Delegates in 1984, the ABA time standards recommend that 90% of all general-jurisdiction civil cases should be disposed within 12 months after filing, 98% within 18 months, and 100% within 24 months. See ABA, *Standards Relating to Trial Courts, 1992 Edition,* Section 2.52. Because civil jury cases take longer to be disposed than many other kinds of civil cases, few courts (if any) are able to achieve disposition times for all civil jury cases within 24 months. Yet the fastest courts come close to meeting that expectation. Considered generally appropriate for civil cases, the ABA 24-month standard has been adopted by Philadelphia and many other trial courts as a suitable measure of timeliness.

[20] See Marvin Comisky and Patrick Ryan, "Reducing the Backlog in Philadelphia: Achieving the Unreachable Goal – The Miraculous Effort of the Philadelphia Court and Bar," *Pennsylvania Bar Association Quarterly* (1997).

[21] See First Judicial District of Pennsylvania, "Civil Statistical Summary, Year to Date December Term 2000," for the number of records pending as of January 3, 2000.

[22] See First Judicial District of Pennsylvania: Trial Division – Civil, "Civil Statistical Summary, Year to Date December Term 2003," for the number of records pending as of January 5, 2004.

The significance of this caseflow management improvement cannot be overstated. The Court's performance with civil jury cases is now better than that of *any* large urban trial court in the United States at the time that the Day Backward/Day Forward programs began in 1992-93.[23] The success of these programs has thus helped to make the Civil Section of the Trial Division in the Philadelphia Court of Common Pleas one of the finest and most successful urban trial courts in the country.

B. Program Organization. To achieve the objectives of its approach to caseflow management, the Day Forward/Major Jury Program has judges assigned to teams. Assigning cases to judge teams is an alternative to having an "individual calendar" case assignment system (in which cases are randomly assigned at commencement to specific judges who then take responsibility for all court events until disposition) or a "master calendar" case assignment system (in which judges are assigned to preside over particular court events in cases, such as status hearings, pretrial motions, or settlement conferences).[24]

1. Team Leaders. Cases are assigned on a year-by-year basis to judicial team leaders, so that one judge team leader has responsibility for all 2003 cases; another for 2002 cases; and third for 2001 cases; and a fourth for cases still pending that were filed in 1999 and 2000. On March 1, 2004, a new judge team leader took responsibility for all cases in the program filed in 2004. The team leader controls pretrial discovery and assigns motions and trials, working in an ongoing way with the members of the civil trial bar. Team leaders get weekly status reports from the Court's case information system ("Banner") on the size of their pending inventory and how many pending cases are older than the ABA time standards.

[23] For a comparison of Philadelphia with other large urban trial jurisdictions in 1993, see John Goerdt, et al., "Litigation Dimensions: Torts and Contracts in Large Urban Courts," *State Court Journal* (Vol. 19, No. 1, 1995), Appendix 8. Of the 45 largest urban trial courts in the country, the Circuit Court in Fairfax, Virginia, had the shortest times to disposition for civil jury cases – a median time of 13.5 months, with 75% disposed in 20.5 months or less, and with just 17% requiring more than two years to reach disposition. In Philadelphia, civil jury cases had a median time to disposition of 5.2 years, with 88.5% taking more than two years; 71.1% taking more than four years; and 25% taking 7.8 years or longer. Only one of the 45 largest urban trial courts in the country had longer times to disposition for civil jury cases than Philadelphia.

[24] For a discussion of the strengths and weaknesses of different systems for assigning cases to judges, see Maureen Solomon, *Caseflow Management in the Trial Court* (ABA 1973), pp. 6-30; Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (ABA 1988), pp. 33-44; and David Steelman, et al., *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC 2000), pp. 153-160 (in reformatted 3rd printing, 2004, pp. 111-115).

The team leader judges are selected because of their skill and experience in shepherding most cases to timely dispositions. This recognition comes with a substantial burden as well, since during the pretrial period, each team leader must handle discovery and other motions for thousands of cases. On the other hand, because the cases flow through the initial stages of the process at more or less the same pace, the team leader is not required to shift judicial gears constantly from dealing with pretrial motions, to conducting settlement conferences, and presiding over trials.

2. Civil Case Managers and Court Administrative Officers. After a case has been assigned to the Major Jury Program, civil case managers in the Case Management Center in City Hall play an important early role in caseflow management. The three civil case managers, all of whom are lawyers, conduct the case management conferences 90 days after case initiation, that trigger the paper process for managing the pace of litigation. In addition, a court administrative officer is assigned to each judicial team leader. These four court administrative officers take responsibility for cases after case management conferences, and assist the team-leader judges in managing the pending inventory as cases proceed through discovery to the settlement conference.

3. Dispute Resolution Center and Judges Pro Tempore. After the completion of discovery in a case, it is scheduled for a settlement conference at the Dispute Resolution Center in City Hall. Presiding at settlement conferences are judges pro tempore (JPT) recruited from among the most senior and respected members of the trial bar. JPT's work on a *pro bono* basis directly under the supervision of the judge team leader.

4. Trial Judges. A team leader judge works alone until cases are ready for trial. Trial judges are assigned to teams as they are needed. Team size grows as more cases filed in any given year reach trial readiness. The team approach in the Day Forward/Major Jury Program keeps trial judges busy every day. As a result of the flexible manner in which trial judges are assigned to teams, each trial judge seldom is

without a case ready for trial.[25]

C. General Processing of Cases in the Program. Under the oversight of the team leader, each case goes through the following steps unless it is dropped, dismissed, or settled before the next step:

- Case management conference with a case manager
- Discovery
- Settlement conference with a judge pro tempore
- Judicial settlement conference
- Trial

In general, case processing for these cases can be considered in terms of (1) initial case processing; (2) JPT settlement conferences; and (3) pretrial conferences and trials.

1. Initial Case Processing. The rules of civil procedure allow a plaintiff 30 days after the filing of a complaint for service on the defendant, and then the defendant has 20 days for a responsive pleading. A case management conference is scheduled to be held 90 days after filing, and this typically allows attorneys sufficient time to communicate with their clients.

In a case management conference, the case manager analyzes the case to confirm that it is above the $50,000 ceiling for mandatory arbitration, and makes certain that it is ready to proceed (about 20% require adjustment because of service problems, bankruptcy, or liquidation).

About 30 cases per day are scheduled for case management conferences (about 10 per case manager). If an attorney does not appear for the conference, or if a defendant does not file an appearance, a rule to show cause is issued. If a complaint has been served but there is no answer, the Court cannot enter a default judgment *sua sponte* until

[25] Because it was not within the scope of this project for the NCSC project team to compare the weighted workload for team leader judges or trial judges in the Civil Section of the Trial Division with that for judges in other divisions of the Philadelphia Court of Common Pleas, NCSC is not in a position to determine whether the Civil Section is relatively "over-judged" by comparison to other divisions. It is clear, however, that judge team leaders in the Civil Section are chosen for their ability to carry a heavy workload well; and the NCSC project team concludes that the trial judges in the Civil Section also must deal with a substantial and constant burden of trials. Exposing cases to an early and firm trial date is a key to success in caseflow management. See Steelman, et al., *Caseflow Management: The Heart of Court Management in the new Millennium* (NCSC 2000), pp. 9-16 and 183-185 (in reformatted 3rd printing, pp. 6-11 and 132-133). Being able to expose cases to trial was a critical feature in the success of the Court's "Day Backward" Program, and it remains critical to the ongoing success of the Day Forward/Major Jury Program. Reducing the number of trial judges in the teams would thus threaten the Court's ability to provide timely dispositions for major civil jury cases.

two years have passed. The Court can urge the plaintiff's attorney to seek a default judgment, however, which can then be reopened if the defendant subsequently files an answer, after which the case is sent back to the case manager to complete a case management conference.

The case management conference also is an information-gathering event for the Court and an opportunity for the attorneys to meet face-to-face to consider the possibility of settlement. While the court had hoped that this stage would be a more significant vehicle for settlement, only about 15% of cases are actually resolved between the case management conference and the settlement conference.

The work product from a case management conference is a case management order. The case management order gives a discovery deadline, according to a matrix that governs differentiated case management (DCM) track assignments. Managers assign cases to one of the following tracks. The attorneys may stipulate to change the track assignment or challenge the assignment, though the latter is rare.

- *Expedited Track* (e.g., a motor vehicle tort with fewer than four parties): not more than 12 months from filing to trial
- *Standard Track* (e.g., a motor vehicle tort with four or more parties): not more than 18 months from filing to trial
- *Complex Track* (e.g., medical malpractice, other professional liability, products liability, or defamation): not more than 24 months from filing to trial

2. Settlement Conferences. After the discovery period specified in the case management order has passed, every major jury case is set for a settlement conference with a JPT.[26] Before the conference for a case, the parties must submit a settlement memorandum. That memorandum must indicate what discovery remains to be completed.

While the settlement conferences before respected and experienced JPTs might seem to provide a perfect opportunity to resolve cases, the current settlement rate is only about 15-20%, and in NCSC interviews for this project it was suggested that no better

[26] The settlement conference was eliminated for a time in malpractice cases, because it was thought not to be useful: the parties were just not ready to talk at that point in the process. But settlement conferences have now been reinstated because the information provided makes the pretrial conference before judges much more useful. See sections D and F.4, and especially Recommendation 4-10.

rate than 25-30% could be expected. This may in part be because attorneys appear at settlement conferences without being prepared. Yet some of the lawyers assert that insurance carriers, not attorneys, control settlement and often will not settle until a trial is imminent.

On the other hand, events like a settlement conference can help clients to understand the process and what the risks are. If a JPT is very knowledgeable and respected, his or her effort to put a value on a case can have a positive effect. If the JPT is not considered knowledgeable, however, having the JPT put a value on a case can impede settlement.

3. Pretrial Conferences and Trials. If a case has not been settled by a JPT, then it is set for a pretrial conference before the judge team leader. As noted above, it has been estimated that only about 15-20% of the cases disappear before the pretrial conference. While case managers and JPTs rarely settle cases, they do narrow the issues, AND force the lawyers to open their files. The JPT reports also provide good summary information as well as inside information for the team leader judge on the case participants.

One of the objectives of the pretrial conference before the team leader judge is to explore the possibility of settlement. At the pretrial conference, much is accomplished short of settlement by refining the issues so that settlement can be considered or the trial shortened.

In all complex cases that are not settled at the pretrial conference, a date certain is set for jury selection each Thursday. For all standard and expedited cases, trials are set by month (as "pool" cases) at the pretrial conference, with counsel saying on which days they will not be available. Jury selection is done on a Friday, and the trial starts on the following Monday. Trials are assigned to judge team members as they are needed, in the following order of priority: (a) date certain trials; (b) the team's own "pool" cases; (c) one-day appeals; and (d) other team's trials. Most major civil jury trials last five days or less.

D. Dealing with Medical Malpractice Cases. Medical malpractices cases constitute only about 15% of the filings in this program, but they represent over 75% of all trials. A factor affecting these cases is malpractice insurance. There are two levels of

medical malpractice insurance coverage: primary coverage from a carrier up to $400-500,000, and secondary coverage by the state's "M-Care" plan for medical expenses above $500,000.

There was a bulge of medical malpractices cases filed in early 2002 in order to avoid the impact of a "tort reform act" passed in Pennsylvania. These cases are now becoming ready for trial, creating significant pressure on the defense bar and the Court. Structural changes in venue have now lowered the number of medical malpractice cases filed in Philadelphia, however.

For a while, the Court discontinued settlement conferences in medical malpractice cases because JPTs found them unsuccessful as a tool to resolve cases. They have now been reinstated, however, because they make pretrial conferences more effective for judges. Yet JPTs now throw up their hands because they perceive that attorneys are "stonewalling" them. One explanation, according to experienced trial practitioners, is that resolving the dispute in a medical malpractice case is a process that takes time. For example, the defense lawyer may have three or four entities with competing interests to reconcile (i.e., the doctor, the hospital, and the insurance carriers for each). When a case is scheduled for a settlement conference before a JPT, these entities may not be ready to discuss settlement.

E. Overall Perceptions of the Civil Trial Bar About the Program. Some lawyers perceive that the Court is "obsessed with numbers," although that was not a common view among those interviewed by the NCSC project team. Lawyers say that the best things about the court process are the predictability of the process, the firmness of trial dates, especially for complex cases that receive a date certain, and the quick disposition of cases. They say that the worst things are a lack of flexibility in the system, even if the attorneys agree to a delay for sound reasons, and the tendency of at least some judges to be "heavy-handed" and not show trust for the bar. Overall, however, the members of the civil trial bar seem to consider their concerns to be no more than "tweaks" in what is a good system.

Other observations by members of the trial bar in NCSC interviews include the following:

- Because of the potential for a substantial verdict in Philadelphia, some insurance carriers insist that only cream of the defense bar represent them, even in comparatively minor cases.
- Judges feel that law firms should have more than one lawyer who can try a case and are reluctant to extend trial dates because of a lawyer's schedule, sometimes even double-booking trials involving the same defense attorney (plaintiff's counsel are rarely double-booked because of their smaller caseload).
- Attorneys say that "double booking" an attorney destroys the certainty that is the hallmark of the Philadelphia system and forces lawyers to prepare two cases at once.
- Defense lawyers would like at least 48 hours between a verdict and picking a new jury in order to recover and prepare.
- The top lawyers do not need to go to Discovery Court; instead, they handle the disputes among themselves without court intervention.
- Prohibiting deposition of experts reduces costs and speeds up the discovery process.

F. Recommendations. Given the success of the Court in its management of civil jury cases, there is no need for the NCSC project team to suggest radical changes. There are areas, however, in which improvements might be made. The most important of these is to find ways to achieve earlier settlements or other nontrial dispositions, for civil jury cases generally, and for medical malpractice cases in particular. Other recommendations have to do with scheduling improvements and greater consistency among judge team leaders.

1. Finding Ways to Achieve Earlier Nontrial Dispositions for Civil Cases in General. Despite the caseflow management efforts of the Court, the "local legal culture" appears inclined not to settle until the last possible moment. This perception is confirmed by the fact that only a small percentage of cases (estimated at about 15%) settle at either a case management conference or at a JPT settlement conference held after the scheduled completion of discovery.

> ***Recommendation 4-1.*** **Working with the civil trial bar, the Court should explore ways to achieve more settlements and other nontrial dispositions in the early stages of cases. Attention should be given to all of the following areas: (a) making case management conferences more meaningful, (b) creating opportunities for more dispositions in JPT settlement conferences by making them more meaningful, (c) limitation of unnecessary continuances, (d) adding resources for**

achieving nontrial dispositions, and (e) providing education about issues relating to case processing.

In view of the fact that almost all civil jury cases are actually disposed by means other than a jury verdict, the achievement of settlements and other nontrial dispositions as early as is reasonable serves the citizens of Philadelphia and litigants in at least two ways. First, it means that parties and other case participants like witnesses can move on sooner with the rest of their lives. Second, it means that the cost of civil proceedings (for both parties paying lawyers and the public that pays taxes for court salaries and operations) is reduced.

Having meaningful court events in cases is one of the basic principles of effective caseflow management. The relationship between meaningful court events and settlements can be summarized in the following way:[27]

- Lawyers settle cases, not judges.
- Lawyers settle cases when they are prepared.
- Lawyers prepare for court events if they are meaningful.

a. Case Management Conferences. In case management conferences, the Court's case managers seek information, which attorneys may not want to give. Managers often must drag information from attorneys, who may only be associates in a law firm barely familiar with the case. Case managers prepare case management orders, but many attorneys apparently do not consider them to be "court" orders and consider the time limits and directives advisory.

Recommendation 4-2. **Because of its importance as a means for the Court to exercise control over the movement of cases to disposition, the Court should take affirmative steps to assure that the case management conference is a meaningful court event that is taken seriously by counsel in each case. The Court should consider the following steps with regard to case management conferences.**

- **Include information about the purposes of case management conferences in education programs for the bar, especially those for new practitioners.**

[27] See Steelman, et al., *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC 2000), p. 8 (in reformatted 3rd printing, p. 6).

- **In court notices and by other means, emphasize the Court's expectation that counsel attending a case management conference must be knowledgeable about the case and must have at hand all of the information that the Court calls for in a case management memorandum.**
- **Include a specific discovery plan (specifying, for example, to whom interrogatories will be served, who will be deposed, what documents will be requested, and the dates by which each will occur) as part of every case management conference (see Recommendation 5-1).**
- **Create means for case management conferences to be held by closed circuit video, particularly in cases with remote counsel.**
- **Provide for more visible and active oversight by judge team leaders of the case management conferences, by such means as (a) appearance in the Case Management Center on at least a random basis, to observe case management conferences (see Recommendation 5-2), and (b) readiness to impose appropriate sanctions in at least the most egregious circumstances where attorneys have appeared without being prepared or have not disclosed basic information needed for case management orders.**
- **Provide opportunities for the case managers to upgrade their skills so they can play a more active and assertive role in identifying cases suitable for settlement and prompt disposition.**
- **Make it clear that case management orders are indeed official orders of the Court, perhaps by having at least the facsimile signature of the judge team leader (see Recommendation 5-2), with a demonstration of court readiness to impose sanctions for undue or unjustified noncompliance with such orders in at least egregious situations.**

b. Settlement Conferences before Judges Pro Tempore. While the case management conference held soon after the beginning of a case is only incidentally an opportunity for early settlement, exploring the prospect of a negotiated outcome is the very purpose of JPT settlement conferences held after the completion of the discovery period. Yet, only a small percentage of cases actually settle during or at least as a consequence of these settlement conferences. The failure of these events to result in more frequent settlements is only partly ameliorated by the fact that they provide an opportunity for JPTs to provide important information to judge team leaders holding subsequent pretrial conferences.

As a consequence, it is worthwhile to question whether the JPT settlement conferences as designed and as currently operated, yield sufficient value to justify their cost, not only for the Court, the parties, and their attorneys, but also for the experienced practitioners who serve on a volunteer basis as JPTs. The NCSC project team concludes (in agreement with judges and members of the civil trial bar) that the settlement conference process with JPTs represents an valuable way for the Court and counsel to collaborate in meaningful efforts to resolve cases, and that it should be enhanced and improved rather than eliminated.

Recommendation 4-3. **The Court should take the following steps to make JPT settlement conferences more meaningful opportunities for the early and appropriate nontrial disposition of cases:**

- **Educational programs for attorneys on settlement conferences as meaningful events, and how to prepare for them more effectively;**
- **Educational programs for JPTs on the effective conduct of settlement conferences, including appropriate steps to take with counsel who have appeared without prior preparation;**
- **Consideration with members of the trial bar of ways that JPT settlement conferences might be scheduled to be held at a more optimal time in relation to the anticipated trial date;**
- **Means for JPTs to receive information beforehand (including any expert reports) about cases coming before them;**
- **More visible and active oversight of JPT settlement conferences by judge team leaders, including such possibilities as (a) judge-led settlement conferences on a random basis from time to time; (b) immediate imposition of a rule to show cause or other sanctions, perhaps by a "duty judge"; or (c) conducting a pretrial conference in a manner that responds in an appropriate way to the manner in which attorneys treated the JPT in a settlement conference.**

Some attorneys observed in NCSC interviews that holding the JPT conference six months before trial is ineffective. They said that it should be set much closer to the anticipated trial date – e.g., from two to four weeks before trial, with a judicial pretrial conference held one or two weeks before trial. For practical reasons, it might not be possible for the Court to adopt such a suggestion. Yet it would still be desirable for the Court to consider with the trial bar whether there is a more optimal time to hold JPT settlement conferences, so that they might have greater success in achieving settlements.

JPTs are very annoyed when attorneys appear at the Dispute Resolution Center without being prepared, and yet JPTs are reluctant to recommend that rules to show cause be issued. Attorney education is important for lawyers to see JPT settlement conferences as an important event. To promote better preparation, there should be consequences for lack of preparation. Options might include immediate sanctions by a "duty judge."

c. Judges and Other Potential Resource Persons. The civil jury cases coming before the Court have five means of achieving resolution once issue is joined: (1) withdrawal of the suit; (2) dismissal; (3) a negotiated outcome between or among the parties on their own initiative, whether early or late in the case; (4) a settlement under court aegis, associated with either a JPT settlement conference or a pretrial conference before a judge team leader; (5) a jury verdict, or (6) a judicial determination following a bench trial. While the "local legal culture" seems to favor not settling until the last possible moment, members of the civil trial bar raised the prospect in NCSC interviews of having a wider array of means to achieve nontrial outcomes.

> ***Recommendation 4-4.*** **The Court should consider whether to expand the pool of resources available for the disposition of civil jury cases in general by nontrial means. More specifically, the Court in collaboration with the civil trial bar should consider:**
> - **Whether there should be a designated list of judges who are willing and able to help settle cases (even prior to filing), and to whom attorneys can go to without seeking the permission of a team leader.**
> - **Whether to establish a voluntary mediation program.**
> - **Consider the relationship, if any, of such a program to any mediation programs for medical malpractice cases (see Recommendation 4-10).**
> - **How the development of any such alternatives would relate to the operational effectiveness of settlement conferences led by JPTs in the Court's Dispute Resolution Center.**

It is desirable in general for a court to have at hand as many tools and resources as possible to promote achievement of just, prompt, and economical resolution of disputes. Having some judges available –such as a judge team leader who has not yet reached the most intense part of his or her work, or a well-respected sitting or retired judge – can serve that function. Yet the Court should be wary of what has been called the "Law of Unintended Consequences," under which the implementation of an otherwise promising idea might lead to such collateral consequences as the breakdown of a court's control of

case progress. For this reason, the Court should be circumspect about having too many judges available to help settle cases.

Mediation is a form of alternative dispute resolution (ADR) that has become increasingly popular because of its success in promoting the resolution of disputes in a way that both parties find satisfactory.[28] In one state (New Hampshire), ADR is mandatory for all general-jurisdiction civil cases, with parties allowed a choice as to the preferred ADR mechanism. In this setting, most parties have chosen mediation before a volunteer mediator who is a respected member of the civil trial bar, and they find this highly satisfactory.[29]

d. Continuances. The mechanism for requesting a continuance in Philadelphia is a "motion for extraordinary relief." There are about 23,000 motions for extraordinary relief per year, and they are largely requests for time extensions for pretrial deadlines. For example, continuances are often requested for cases on the expedited track because the parties claim that they have not finished discovery. About two-thirds of these requests are approved, but few trial date continuances are granted. There has been a relaxation of the grant of continuances because the court is still maintaining timeliness.

> ***Recommendation 4-5.*** **The Court should closely monitor its treatment of continuance requests. On a regular basis in their meetings with the Civil Section Supervising Judge, the judge team leaders should discuss the incidence of continuance requests, the portion of continuance requests granted for pretrial matters and trials, and any possible correlation between the Court's practices with continuance requests and the extent to which it is meeting time standards applicable to civil jury cases.**

As a general proposition, it is desirable for a court to have a policy limiting continuances that is consistently applied by judges, so that it is more likely than not that a continuance request will be denied unless it is made in a timely manner and for good

[28] See Nancy Welsh and Barbara McAdoo, "The ABCs of ADR: Making ADR Work in Your Court System," *Judges' Journal* (Vol. 37, No. 1, Winter 1998) 11. See also, Susan Keilitz (ed.), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings–Implications for Courts and Future Research Needs* (NCSC 1994).

[29] See David Steelman, et al., *Superior Court Rule 170 Program and Other Alternative Dispute Resolution Prospects for New Hampshire Trial Courts* (NCSC 1997).

cause shown.[30] If attorneys know that they can easily have a continuance request granted, they are less likely to be prepared for scheduled court events. And as we suggest above, attorneys who are unprepared are less likely to be able to settle cases before they are absolutely forced to do so.

e. Education. The desirability of education as one of the tools for improving prospects for earlier nontrial dispositions has been mentioned as part of several of the recommendations offered above in this subsection. Consequently, NCSC offers the following suggestion:

> ***Recommendation 4-6*. Education as a tool for enhancing prospects for early resolution of civil jury cases should not be approached in a haphazard fashion. Instead, the Court should develop an affirmative educational program as a distinct and separate part of its improvement efforts. Such a program should include attention to (a) requirements for counsel to participate effectively in case management conferences and JPT settlement conferences; (b) how to be more effective as a case manager; (c) how to be more effective as a JPT; and (d) effective settlement and mediation techniques for both judges and lawyer mediators in civil jury cases.**

National research on delay in the courts has led to the conclusion that courts that are successful over time include education and training as an important element of their approach.[31] As one well-known caseflow management expert has written,

> If courts are to manage their caseloads successfully, both the judges and the court staff need to know why and how to do it. Since the whole notion of caseflow management is of relatively recent vintage, this is not an area in which there is a great deal of knowledge and experience in most courts. Training is essential to familiarize judges, staff members, and members of the bar with the purposes and fundamental concepts of caseflow management and with the specific details and techniques essential to effective case management in the court on a day-to-day basis.[32]

[30] See Steelman, et al., *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC 2000), pp. 13-14 and 115-116 (in reformatted 3rd printing, pp. 9-10 and 80-81).
[31] See William Hewitt, Geoff Gallas, and Barry Mahoney, *Courts That Succeed: Six Profiles of Successful Courts* (NCSC 1990), viii.
[32] Barry Mahoney, et al., *Changing Times in Trial Courts* (NCSC 1988), p. 203.

2. Scheduling Cases. Currently cases are scheduled by court terms so that all processing dates (discovery deadlines, case management conferences, trial pool periods) fall on the first of a month. This has the consequence, however, of concentrating dates at the beginning of each month. To deal with this problem, NCSC offers the following suggestion.

> ***Recommendation 4-7.*** **The Court should discontinue its current practice of having matters scheduled according to court terms. To spread the workload for Motions Court, Discovery Court, and Major Jury trial pools more evenly throughout each month, the cases should instead be scheduled on the basis of their actual dates of filing, or at least by weeks.**

If in keeping with this recommendation case scheduling were based on the actual date of filing, or at least by weeks, then the workload for the Motions and Discovery Courts in particular and trial pools would be more evenly spread through the month.

3. Promoting Greater Consistency Among Judge Team Leaders. The differences in style among team leader judges has an impact on the bar's perception of the process, and the bar must adjust to such differences.[33] Although there is broad agreement on the need to manage cases and that it is the court's job to create significant events to force settlement, there is disagreement among judge team leaders about how aggressively to work with lawyers to settle cases.

> ***Recommendation 4-8.*** **Judge team leaders should engage in ongoing discussion among themselves about differences in their styles and the best ways to achieve just case outcomes in a timely and cost-efficient manner. To the extent that differences among team leaders may lead to substantial inconsistencies in case processing, team leaders should seek to reduce differences in their individual approaches to the management of their cases.**

It is unavoidable that judge team leaders, who should be persons with strong leadership capacity and ample confidence in their own abilities and experience, will have

[33] For example, one team leader judge goes through the pretrial memorandum with counsel and a court reporter present at a pretrial conference, while another team leader does this closer to trial. Some judges require the listing of witnesses at the pretrial conference, while others wait until later. Some team leaders are more flexible about to which program to send a case; when to require a hearing on non-compliance with a case management or discovery order; what is compliance; and what information is required.

reasonable differences of opinion about how to deal with specific matters. To the extent that such differences do not create inconsistencies that affect the parties or cause undue burdens on the practicing bar, there is no need to impose a "lock step" approach to the management of cases. Judge team leaders should be aware, however, of the ways in which their colleagues may differ in the handling of matters, and there should be an effort among team leaders to achieve a suitable level of consistency.

4. Improving Chances for Earlier Nontrial Dispositions in Medical Malpractice Cases. Among the members of the trial bar who appear in medical malpractice cases, there has been discussion of the possibility of using mediation as an alternative means to resolve cases. Some have proposed mediation for medical malpractice cases about six months after filing, with both plaintiff's counsel and defense lawyers available to serve as mediators.

Another approach would be to seek mediation even ***before*** the filing of a case in Court. Drexel University Hospital in Philadelphia is proposing to implement a model developed by Rush Memorial Hospital in Chicago that provides for early mediation at the defense's initiation. The plaintiff would select the mediators from lists of plaintiff and defense lawyers (one each for the mediation) and the defense would pay the costs. The mediation should take place before discovery if possible. This would provide an opportunity for the patient to express hurt and outrage and the doctor to express regret. It would also "humanize" the process of resolving these disputes. The Court's interest would be in getting otherwise trial-bound cases resolved early.

> ***Recommendation 4-9.*** **Whether or not the Court develops a mediation program for civil jury cases in general (see Recommendation 4-4), it should work in collaboration with the medical malpractice bar to explore and promote the use of mediation in medical malpractice cases. In addition to considering voluntary court-annexed mediation for such cases after they have been filed, the Court might encourage efforts to introduce the "Rush" model of pre-filing mediation for appropriate cases.**

Medical malpractice cases often take longer to reach disposition than many other kinds of civil jury cases. In addition, they consume a disproportionate share of the Court's judicial resources, since they represent over three-fourths of all trials in the Civil

Section. Both as a means to promote prompt and affordable justice and as a way to conserve finite judge resources, mediation for medical malpractice cases seems to be a valuable ADR mechanism for the Court to explore in collaboration with the bar.

V. Discovery Court

The Discovery Court Program was established to effectively manage the high volume of discovery motions filed in civil cases, particularly those in the expedited and standard tracks. Rather than having one judge hear all discovery-related motions, the organization of the Program is closely tied to the structure of the Major Jury and Commerce Court programs. Specific time slots are set aside each week for each Team Leader in the Major Jury Program to hear discovery motions in a single courtroom. Separate time slots are assigned to the judges in the Commerce Court Program to hear discovery motions arising from the cases on their individual calendars. Discovery motions for arbitration appeals are heard at a separate time by the judge coordinating the Complex Litigation Center. Judges assigned to the Motions Court hear discovery motions in arbitration and non-jury cases as part of the Discovery Court Program, and discovery motions filed after the official cut-off date for such motions in major jury cases (45 days before the end of the discovery period) as part of their Motions Court duties.

A. Process. An attorney initiates a discovery motion by filing a "Discovery Hearing Request Form" with the Discovery Court Unit. After a brief review to assure that the form is properly completed and the filing fee has been paid, the Discovery Court Unit faxes the form with a scheduled hearing date back to the filing attorney. Normally, the hearing is set two weeks after filing. The filing attorney is responsible for providing notice to all the other parties in the case of the hearing along with a copy of the motion no less than 10 days prior to the scheduled hearing. This provides the initiating party a four-day period to prepare the motion or for necessary discovery to be arranged so that no motion is needed. The motion is not filed with the Court until the day before the hearing.

If the attorneys have reached agreement on the discovery issue prior to the hearing date, the initiating party may either forego filing the motion with the Court, or the initiating party may file the motion together with the agreed upon order and a cover letter certifying that the motion is unopposed. Such orders are provided to the judge in the

robing room for signature and the filing attorney may pick up the order from the Discovery Court Unit within five days of the hearing date.

If the attorneys reach agreement on the date of the hearing, either attorney may present the agreed-upon order for the judge's review and signature when the case is called. Frequently, however, responding attorneys fail to notify the moving party that the motion will not be contested which results in the initiating attorney sitting through the Discovery Court session until the case is called, and the judge having to handle the motion from the bench.

Judges have different practices for hearing contested motions. Some hear them in open court. Others call the attorneys into the robing room behind the courtroom and decide them in that less formal setting. In both instances, the judge, after reviewing the written motion usually cuts to the practical heart of the dispute through questions, rather than permitting formal argument by counsel. In the view of the judges with whom we spoke, neither practice has been effective in reducing the number or increasing the quality of the motions.

B. Concerns. The overriding concern of both judges and lawyers about Discovery Court is the number of inconsequential motions filed and heard, and the impact of having to "wade through the garbage" on those few motions that raise a complex legal issue such as privilege. Both judges and lawyers commented that a judge in Discovery Court might have neither the time nor the energy to give a complex motion full consideration.

Judges view discovery motion practice as a game by attorneys either to delay providing information until the last minute to place the opponent at a tactical disadvantage, or to attempt, collusively, to wrest control of the pace of the litigation from the Court. Lawyers appreciate the predictability and speed of decision provided by the Discovery Court Program. While they dislike the time spent waiting for their respective cases to be called,[34] lawyers see a large part of the motion practice as a response to the Court's strict discovery deadlines. "You can't wait around to be nice," said one lawyer, because the deadline is looming. While some lawyers acknowledged that they could ignore the Court's deadline and exchange information later, they were concerned about

[34] The recent practice of splitting the morning call was hailed by attorneys for reducing waiting times.

instances in which a judge, *sua sponte,* has precluded presentation of witnesses who were not named by the discovery deadline. They also noted that some delays in completing discovery are the result of delays in receiving the transcript of a deposition from a court reporter.

C. Recommendations. In the early 1990s, NCSC conducted a study of discovery practices and judges and attorneys views about them in four urban courts (Boston, Kansas City, New Haven, and Seattle).[35] Both the opinion and the case file review data suggest that requiring an early discovery conference, developing a discovery plan agreed to by counsel and signed off by the court, and direct court involvement in enforcing that plan when the attorneys were not able to settle conflicts themselves, were the most effective means for limiting discovery disputes.[36] A 1989 survey of attorneys practicing in federal court and a 1992 survey of state court litigators by the Defense Research Institute also found development of a discovery plan to be a key.[37]

Currently in Philadelphia, an overall discovery deadline is set, according to case track, as part of the Case Management Order in major jury cases not included in the Complex Litigation or Commerce Court Programs. We were told that there is generally little if any discussion of discovery during the case management conferences. These conferences appear to us to be an opportunity for getting counsel to commit themselves to a specific discovery schedule and attempting to reduce the last minute gamesmanship that characterizes many cases on the Expedited and Standard case tracks. Accordingly, we recommend that:

> ***Recommendation 5-1.*** **As part of the improvement of case management conferences (see Recommendation 4-2), the development of a discovery plan should be made a part of every case management conference.**
>
> **Given the Court's current staffing levels, crafting a discovery plan for each case on an individualized basis would cause the time it takes to conduct a case management conference to increase substantially. Unless the Court is able to hire additional case managers, the Court should work with the civil**

[35] Susan. Keilitz, Roger Hanson, and Richard Semiatin, "Attorneys Views of Civil Discovery" 32 *Judges Journal* (Spring 1993) 6.
[36] *Id.*, at 38.
[37] Lou Harris & Associates, *Procedural Reform of the Civil Justice System* (Foundation for Change, Inc. 1989); Defense Research Institute, *Civil Litigation in State Courts: Perspectives on the Process and Preferences for Reform* (1992).

trial bar to create generic discovery plans based on the type of case being addressed. In all automobile or premises liability cases, for example, the discovery plan might indicate how soon the defendant should be deposed, how soon the plaintiff should be deposed, and when any interrogatories should be completed and filed. Such discovery plans should probably be based on the differentiated case management track to which each case is assigned.

When completed, the discovery plan should be signed by each attorney and incorporated within a case management order signed by the judge. Attorneys may agree to modifications and enhancements to the plan including both the addition or deletion of persons and documents subject to discovery or changes in the deadlines specified, but may not stipulate to an extension of the overall period for discovery.

In order for case management conferences to achieve their full potential as an opportunity for settlement and a means for establishing an expeditious but reasonable schedule for future proceedings when settlement is not yet possible, they must be seen as something more than a pro forma step in the process. While the development of a binding discovery plan may assist in having lawyers take case management conferences more seriously (e.g., by attending themselves or sending an associate who is informed about and prepared for the case), there is no better way of getting a lawyer's attention than by having a judge preside over the conference. Therefore, we recommend that:

***Recommendation 5-2*. Team leaders should occasionally sit in on or preside over case management conferences on a random, unannounced basis. (See Recommendation 4-2 for a parallel recommendation.)**

Several states and the federal courts are experimenting with requiring counsel to disclose basic information about their case and limiting the scope of subsequent discovery. Arizona, Illinois, and Texas provide for broad disclosure in all cases,[38] cases under $50,000,[39] and at the option of the parties respectively.[40] The federal courts, Colorado, and Utah require limited disclosure in all cases.[41] Alaska is in between.[42] The wisdom and impact of mandatory disclosure remains controversial. Proponents argue

[38] Ariz. R.Civ.P. 26.1
[39] Ill. S.Ct.R. 201(b).
[40] Tex. R.Civ.P. 194.2.
[41] Fed.R.Civ.P. 26 (a)(1); Colo.R.Civ.P. 26(a)(1); Utah R.Civ.P. 26(a)(1).
[42] Alaska R.Civ.P. 26(a).

that automatic disclosure simplifies the process and eliminates the time, cost, and skirmishes over formal discovery requests.[43] Opponents assert that disclosure adds a layer to the discovery process, only postpones conflicts over discovery,[44] and may force lawyers into volunteering information inimical to their clients' interests.[45]

There is only limited empirical evidence available regarding the effect of mandatory disclosure. A Federal Judicial Center (FJC) study published in 1998 found that:

> In general, initial disclosure appears to be having its intended effects . . . Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them. [Consistent with the views of the attorneys] we found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure.[46]

However, the FJC found that disclosure was less effective in high stakes, complex litigation than in more routine cases.[47]

Professor Paul Carrington, a former Reporter to the Federal Civil Rules Advisory Committee has suggested a middle ground between traditional discovery and mandatory disclosure. He recommends requiring the use of a set of standard interrogatories.[48] Both judges and lawyers in Philadelphia told us that a set of standard interrogatories for the First Judicial Circuit exists, and that although they have fallen into disuse and need to be updated, revising the set of standard interrogatories could be useful in reducing the duration and effort required by the discovery process. Accordingly, we recommend that:

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[43] *See e.g.,* R. K. Winter, "In Defense of Discovery Reform," 58 *Brooklyn L. Rev.* 263 (1992).
[44] *See e.g.,* G.B. Bell, "Automatic Disclosure in Discovery – The Rush to Reform," 27 *Ga. L. Rev.* 1 (1992).
[45] *See e.g.,* P.D. Carrington, "Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends," 156 *F.R.D.* 295 (1994).
[46] T. Willging, *et al*., "An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments, 39 *B.C.L.Rev*. 613, 679 (1998).
[47] *Id.,* at 564.
[48] P.D. Carrington, "Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts, 9 *Kan.J.L.&Pub. Pol'y*, 456, 461 (2000).

***Recommendation 5-3*.** **The Court should request the Philadelphia Bar to review and update the current standard interrogatories for civil cases.**

***Recommendation 5-4*.** **Once the revised standard interrogatories have been adopted, the Court should require their use in all arbitration cases, and in expedited and standard major jury cases.**

***Recommendation 5-5*.** **If the development of standard interrogatories as suggested in Recommendations 5-3 and 5-4 does not improve the exchange of required information in civil cases, the Court should ask the Pennsylvania Bar Civil Rules Committee to consider proposing a rule amending the current discovery process by requiring mandatory disclosure and limiting subsequent discovery at least in all but complex civil litigation.**

If implemented, the above changes are likely to reduce the volume of discovery-related litigation. However, given the litigious legal culture evident in Philadelphia, there will still be a substantial number of discovery motions on which the Court must rule. The Philadelphia Court of Common Pleas has been a leader in effectively using court personnel and private attorneys serving as judges pro tem to screen, manage, and attempt to settle cases. The Arbitration, Major Civil Jury, Complex Litigation Center, and Commerce Court Programs are notable examples. We suggest applying this management approach to the Discovery Court Program. Specifically:

***Recommendation 5-6*.** **The Court should require a Notice of Opposition to be filed on the day before a Discovery Motion is set for hearing and served on all parties if an attorney wishes to contest the motion. If no Notice is filed, the Motion should be presumed to be uncontested and handled accordingly.**

***Recommendation 5-7*.** **The Court should assign legally trained case managers to the Discovery Program with the responsibility and authority to review all motions filed and assign them to one of three tracks – Uncontested/Stipulated, Contested-Routine, and Contested-Complex.**

- **Motions in the Uncontested/Stipulated track should be provided to the judge for review and signature in chambers or the robing room as they are now, and held at the Discovery Court Unit for the moving party to pick up and serve.**

- **Motions in the Contested-Routine track should be referred to a judge pro tem (or a court-employed hearing officer or senior judge) for hearing and decision, subject to review by the team leader.**

- **Motions assigned to the Contested-Complex track should be referred to the team leader for hearing and decision. Problem cases should be referred to this track as well – i.e., those in which there have been multiple sets of motions or an utter unwillingness to comply with discovery orders.**

***Recommendation 5-8*. Since the attorneys will be on record as having agreed to a specific discovery plan incorporated in a court order if Recommendation 5-1 is adopted, the Court should consider whether costs and sanctions can be applied for failure to comply with that order or at least following failure to comply with a single motion to compel based on that order.**

Both as a matter of courtesy and for efficient time management, neither the Court nor the moving party should be left in the dark until the motion is called as to whether or not it will be contested. While a simple Notice of Opposition form means one more piece of paper to be filed, it should reap the dividend of saving attorney and Court time and facilitating the management of the Discovery Program.

The Bar has been urging the Court to appoint masters to hear complex discovery motions or those that raise significant legal issues. We believe that it is more appropriate for judge pro tem, masters, or hearing officers to deal with the multitude of day-to-day disputes under the guidance of a judge, and a better use of the Court's most precious resource – judicial time and energy – to hear the exceptional cases. This may facilitate the development of a discovery jurisprudence for Philadelphia as well which several attorneys indicated would be helpful for providing greater certainty – e.g., on when to permit video depositions of defendants.

Though not a formal recommendation in this paper, the Discovery Court Program would greatly benefit from the implementation of electronic filing. Not only will it simplify the filing of motions and notices of opposition, but also, it will enable a judge to see the history of the case on screen, including the record of previous discovery motions, rather than having to rely on counsel for information on what has transpired previously.

VI. Motions Court

During the course of their interviews for this assessment, the NCSC project team members heard a number of comments about the structure and operations of the Civil

Motions Program. Motions Court is a "catch-all" that receives a real "hodge-podge" of cases, including appeals and equitable matters in addition to motions not assigned for hearing elsewhere. In other words, anything that does not fit elsewhere is heard in Motions Court. There is a very positive dimension in this for a judge, because there is always something new, it is "hands on," and a judge can make a real difference in people's lives. Yet the "catch-all" nature of its workload also seems to present problems. Some of the comments about it in interviews included the following:

- Motions Court's collection of assigned matters has evolved over time. Judges are stretched to their limits, in part because there has been a geometric growth in litigiousness.
- It is difficult to handle both appeals and motions, because these kinds of proceedings involve two very different perspectives.
- Because there are two judges assigned to Motions Court, there can be inconsistency in their approaches.
- The steps immediately behind the door leading from the bench to chambers are a hazard for judges, lawyers, and staff.

Because of such observations as these, the NCSC project team has given particular attention to Motions Court. Is the Civil Motions Program "messy" but effective? Does its structure and character present undue confusion for litigants or result in such inefficient use of court resources that it should be dramatically restructured? Or are there less dramatic ways in which its structure and operation might be refined to provide better service to the citizens of Philadelphia? To provide a basis for considering whether and how the program might be improved, the NCSC project team sought to understand the current structure and operation of Motions Court in more detail.

A. Civil Motions and the Work of Motions Court. One of the key purposes of Motions Court is to do what the name of the program suggests – to hear and decide civil motions. Yet the judges of Motions Court do not hear all (or perhaps even a majority of) the civil motions filed in the Court of Common Pleas in any given year. Moreover, they do a considerable amount of work *other* than just hearing civil motions.

1. Assignment of Civil Motions in the Court. Approximately 50,000 civil motions are filed each year in the Court of Common Pleas. All such motions in civil

cases are to be filed with the Civil Motions Clerk, after which they are then assigned to specific judges in keeping with a "motion matrix."[49]

a. Motion Allocation. For cases in the Major Jury Program, the judges assigned to be team leaders hear almost all motions. In addition to hearing discovery motions in their cases under the Discovery Court Program, the team leader judges in the Major Jury Program hear virtually all non-discovery motions in such cases.

Among cases other than those in the Major Jury Program, judges hear motions in keeping with the allocation of cases by program or division. Thus, motions and petitions for preliminary injunctions in commercial cases are generally to be heard in Commerce Court; those in mass torts and class actions are to be heard in the Complex Litigation Program; wrongful death and minors' compromise petitions are heard in Orphans' Court; landlord-tenant appeals are heard by a Municipal Court Judge specially designated to preside as a Common Pleas Court judge; and motions to enforce settlement or for reconsideration are to be heard by the judge assigned the case in which they arose.

Other motions filed in civil cases are heard in Motions Court. More specifically, its judges are assigned to hear the following:

- Non-Jury Program motions
- Arbitration Program motions
- Post-arbitration and arbitration appeal motions
- A specified set of discovery motions[50] not heard in Discovery Court

b. Motion Allocation Problems. There are at least two areas in which the allocation of motions between Motions Court and other programs appears to present problems that might warrant closer attention and greater control. These problems appear to be a consequence of problems with policy and procedure – having a firm policy as to where such cases should be heard, and having screening mechanisms and staff resources to assure that cases are properly assigned for hearing and decision.

[49] See "Civil Trial Division Motion Assignment Matrix, 2003," in First Judicial District of Pennsylvania, Court of Common Pleas of Philadelphia, *Trial Division – Civil Administration at a Glance (2003-2004 Edition)* (September 2003), Section 7.

[50] The *only* discovery motions that are supposed to be accepted by the Motions Court are: (a) discovery motions in landlord-tenant appeals from Municipal Court; (b) motions for discovery in aid of execution; (c) motions for pre-complaint discovery; (d) Tax Court cases; and (e) statutory appeals.

One of these has to do with cases in the Major Jury Program, in which a team leader has ordered (a) that there may be no further motions for extraordinary relief to extend the period allowed for discovery, and (b) that lawyers may not file any further motions in Discovery Court within 45 days before the conclusion of the time for completion of discovery. To circumvent such orders, it appears that attorneys file motions in Motions Court seeking relief no longer available from a team leader.

Despite the apparent clarity of the motion matrix, the second problem area in the allocation of motions has to do with motions or petitions for injunctive relief by parties in cases that have been filed in Commerce Court or that appear to meet the criteria for assignment to the Commerce Court Program. This may be a result of there being a certain category of cases that involve commercial litigants, but about which the suitability for assignment to Commerce Court remains unclear.[51]

2. Scope of Motions Court Work. Under the motion matrix, there are additional matters assigned to the judges in Motions Court that clearly do not involve motions. These include the following

- Preliminary injunctions in cases other than those in the Commerce Program
- Municipal Court appeals from denial of motions to open default judgments
- Appeals from Municipal Court money judgments

In addition to hearing and deciding a variety of motions, the Motions Court judges thus also serve as judges granting equitable relief. The nature of such matters can vary considerably, and it can involve issues far more complex than many of the routine issues presented in many motions. In addition, the motions matrix indicates that Motions Court judges have appellate responsibilities involving Municipal Court matters. While many such default judgment denials and money judgment cases may be decided on appeal with relative expedition, they can also from time to time present challenging issues of fact or law.

[51] Where the Civil Section judges are largely assigned cases on a "master calendar" basis, having different judges assigned at different stages of a case is not generally problematic. But the Commerce Court Program has cases assigned to judges on an "individual calendar" basis, so that the same judge is responsible for all matters in a case from its initiation through its conclusion. The judges in Motions Court perceive that having them hear motions in these commerce cases not only adds to their workload, but that it may also undermine the benefits of an individual assignment approach to such cases.

Beyond what is shown in the motion matrix, the appellate responsibility of the Motions Court judges also includes statutory appeals.[52] The Statutory Appeals Program includes appeals from the decisions of state and local administrative agencies, including driver-license suspensions or revocations by the Pennsylvania Department of Transportation (Penn-DOT0) as well as such other matters as appeals from local tax, zoning, and civil service determinations. While the Motions Court judges hear motions in arbitration cases and while they hear appeals in other kinds of cases, they do not hear appeals from awards under the Compulsory Arbitration Program. Instead, the judges in the Complex Litigation Program hear arbitration appeals.[53]

The final area of work assigned to Motions Court judges has to do with requests for emergency relief. "Emergency" matters are those that require immediate judicial intervention to prevent imminent irreparable harm not remedial by money damages and which could not otherwise have been anticipated. To deal with such situations, the Court of Common Pleas President Judge designates an "emergency judge" on a rotating assignment to handle any such matters that arise outside normal court hours.[54] During regular court hours from the beginning of the workday on Monday through the end of the day on Friday, however, the Motions Court judges hear requests for emergency relief for situations other than family or criminal matters or that arise outside of civil cases that have already been filed and assigned to another judge. The kinds of emergency matters heard in Motions Court may include petitions for temporary restraining orders to prevent violence, mass picketing and threats of violence, and labor disputes. They could also, in appropriate circumstances, include petitions for emergency medical treatment not filed with the Orphans' Court Division.

B. Judges and Court Personnel. The Motions Court has two judges. Each Motions Court judge has a law clerk, and there are three other law clerks for the program. The other three law clerks assigned to the Motions Court review pleadings. The volume of cases and paper is overwhelming.

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[52] See *Trial Division – Civil Administration at a Glance (2003-2004 Edition),* Section 9.
[53] Ibid., Section 6. This approach allows the Civil Section to deal with a continuing stream of matters from that high-volume program by assigning such matters for the Complex Litigation judges to hear during their "downtime" from dealing with the more difficult issues presented by mass torts and other complex litigation.
[54] Ibid., Section 13.

There are currently 12 clerks, including two in courtrooms (Motions Court and Discovery Court) and one receptionist. There recently was a problem for the operation of the Motions Court that arose from a personnel shortage. Because a key person was out, in February 2004 cases were not assigned to the Motions Court for two weeks. The entry-level salary for motions clerks is $22,000. It is difficult to find people at this salary who are capable of performing the reviews and administrative functions required of them quickly and accurately and who are willing to work under the pressure created by the volume of motions filed. Motions clerks receive the initial court orientation and on-the-job-training; the program manager must correct a lot of mistakes.

C. Case Processing for Motions. Each motion may result in three separate pleadings – a motion, a reply, and a "sur-reply." Staff members in the Motions Office accept and docket each filing and assign it to a judge. Assignments are generally made according to the motion matrix, though the better motions clerks sometimes check to see whether a judge other than the team leader or motions judge should receive the motion. The Motions Office staff members do not screen motions for substance, other than to code the general type of each motion and to try to make sure that the filing does not moot some prior filing. The clerks and the program manager check to make sure that all required parts of the motion package have been filed – i.e. statement of law, proposed order, certificate of service.

The general practice is to hold motions for 20 days for a reply to be filed before scheduling a hearing and sending it to a judge. Yet some judges want to see motions as soon as they are filed. This difference in approach creates some confusion and difficulty for the staff, given the enormous volume of paper. A special request from a judge (e.g., to send all motions assigned to the judge by the following day so the judge can dispose of them prior to vacation) can suspend all other work in the office.

When a motion comes to the Motions Court, the judge assigns it to the law clerks. One law clerk researches the motion and makes a recommendation; the same procedure is used for equitable matters. Uncontested motions and petitions for alternative service go to the judge's law clerk. The judges consider Motions Court law clerk memoranda to be excellent.

D. Recommendations for Improvement. The NCSC project team recognizes that the complex nature of the civil work to be done by a trial court means that a large urban general-jurisdiction trial court like the Philadelphia Court of Common Pleas must always have adequate means to deal justly and efficiently with matters that do not quite fit into any easily structured approach to organizing the work of judges and court staff. Moreover, the Court must have means at hand to deal quickly and fairly with emergency matters. As a consequence, the Court will always need to have ways to perform such functions as those now carried out in Motions Court.

Yet, this does not mean that the Court should not from time to time consider whether and how there might be more rational ordering of the "catch-all" functions that have been assigned over time to the Motions Court Program. The NCSC project team concludes that the structure and operation of Motions Court are indeed "messy" and in need of some refinement to yield more effective and efficient use of court resources to serve Philadelphia in civil cases. Based on their observations and findings as discussed above, the NCSC project team offers the following recommendations to help improve the structure and operation of Motions Court.

> ***Recommendation 6-1.*** **The leaders of the Trial Division and the Civil Section should consider whether there should be a new and separate program under which the processing and hearing of all civil appeals, including appeals from arbitration, appeals from Municipal Court, and statutory appeals, are combined. However such cases may be assigned to judges for hearing, such a program should have its own staff and procedures.**
>
> ***Recommendation 6-2.*** **Whether or not the Court of Common Pleas creates a new and separate Civil Appeals Program, the Motions Court should have additional administrative staff members for processing motions, petitions for equitable or emergency relief, and appeals. The responsibilities of the support staff should include the provision of a "triage" function to differentiate not only motions that need only a signature or that can be decided "on the papers," but also to distinguish more substantive motions from those that can be addressed more summarily, and to work with the Motions Court judges on how to schedule and decide such matters in an effective and efficient manner for both the Court and counsel.**
>
> ***Recommendation 6-3.*** **The Court should undertake a paper-flow**

analysis of the processes used by the Motions Court Office to ensure that it is operating as efficiently as possible.

Recommendation 6-4. **Motions or petitions for injunctive relief by parties to cases that have been filed in Commerce Court or that appear to meet the criteria for assignment to the Commerce Court Program should be heard in Commerce Court. The leaders of the Trial Division and the Civil Section should address and resolve any lack of clarity about the suitability for assignment of such cases to the Commerce Court Program.**

Recommendation 6-5. **The Administrative Judge or Supervising Judge for Civil should establish a policy specifying whether a motion should be held by the Motions Court Office until the reply period has expired or a reply is filed; or whether each pleading should be sent to the judge upon receipt and docketing.**

VII. Complex Litigation Center

The Complex Litigation Center (CLC) was established in 1992 in light of the growing volume of mass tort cases. Since then, 29 different mass tort programs have been referred to the CLC, of which 14 are now active. The attention given to these cases and the process that has been developed for considering them – providing both certainty and firm trial dates – are major reasons why Philadelphia has become a center for mass tort filings from all over the country. Other reasons include, on the one hand, that Philadelphia juries are generous to plaintiffs, and on the other hand, the inability of plaintiffs in Pennsylvania to seek punitive damages. Appeals of arbitration cases and class action suits are also assigned to the CLC.[55] The latter is a recent change. Non-jury cases that until 2003 had been heard in the CLC are now assigned to the Commerce Court. The class action cases appear to be a good fit, since like mass tort litigation, they often involve a multitude of individual consumers as plaintiffs and large corporations as defendants. Currently there are 45 class actions pending. About 30 class actions are filed each year. At the end of 2003, the CLC had a pending caseload of nearly 9,800 and a clearance rate[56] of 106%.

[55] Arbitration appeals are discussed in Section III. Arbitration Center, *supra*.
[56] Clearance rate is the number of cases disposed divided by the number filed. Probably because of the shift between non-jury and class action cases, however, the pending caseload for the CLC actually rose in 2003.

A. Process. Specialized procedures and forms have been developed to handle mass tort cases. Mass tort plaintiffs complete two separate complaint forms – a global long-form complaint that is filed in a master docket, and a short-form complaint that focuses on the specific facts and circumstances of each plaintiff. Special arrangements have been made with the Prothonotary for the early stages of a mass tort cycle, since as many as 200-300 cases may be filed in a single day. Once a mass tort program has been established, a master answer document is established, so that defendants need only to enter an appearance in order to be considered to have responded to the complaint.

Cases are placed on a 30-36 month track, although once global discovery has been completed, sets of cases can be brought to trial 18-24 months after filing. The defendants in a mass tort case post the generally applicable discoverable materials on a website to facilitate access. This website is privately created, rather than being run by the Court.

The key to the success of the CLC program is the intense management of cases. This begins at the Case Management Conference with the highly regarding CLC Program Manager. A case management order is fashioned for each mass tort program (i.e., one for asbestos-related case, another for Phen-Fen cases, a third for Baycol, etc.). These global case management orders are developed by the Coordinating Judge for that mass tort program and counsel. The orders "designate when and how actions can be filed, motion and discovery procedures, names of liaison counsel, and trial schedules."[57] Standard fact sheets and uniform interrogatories are also hammered out either at the case management conference or at subsequent monthly face-to-face meetings for each mass tort program between the coordinating judge, the CLC Manager, and counsel to facilitate movement of the cases.

The CLC judges hear the motions filed in cases referred to the Center. A standard has been set to turnaround motions affecting only a single case within two weeks, and a motion affecting all cases in a particular mass tort within 30 days. There are few motions to compel or impose sanctions in CLC cases due to the standardized discovery procedures. There is a perception that most of the motions are filed by out-of-state counsel who do not fully understand CLC practice.

[57] *Trial Division – Civil Administration at a Glance (2003-2004 Edition),* Section 4.

Groups of ten cases are set for trial one year in advance. To the greatest extent possible, the groupings consolidate cases in which the plaintiffs are represented by the same law firm, the location of the alleged tort is the same, and the resulting disease is the same. The intense contact between the Court and counsel continues during the pretrial period. Judicial mediation or settlement conferences are available, and in the month preceding the scheduled trial date, there are weekly telephone conferences between the coordinating judge and counsel. The Court has also been able to establish innovative procedures for facilitating disposition of cases such as allowing the amount of damages to be determined at a hearing before questions of liability are considered. This "reverse bifurcation" has encouraged settlement in routine cases, e.g., those without unlitigated causation issues. The "inactive docket" for cases in which symptoms have not appeared also functions well to preserve a plaintiff's rights without clogging the calendar.

B. Perceptions and Concerns. The Complex Litigation Center has justifiably garnered national attention for its ability to fairly and quickly dispose of large numbers of mass tort cases. Members of the mass tort bar commented that they strongly prefer filing in the Philadelphia Court of Common Pleas because of the procedures that have been established and the prompt and firm trial dates. The experienced members of the mass torts bar recognize that every case need not be tried, and the Court encourages litigator civility and discourages use of "scorched earth" tactics.

One lawyer compared the Court's expeditious dispositions to a suburban county where a case filed in 1994 still had not gone to trial. Others noted the backlog of more than 26,500 tort cases in the New York City's mass tort program. Still others complained about the practice in Baltimore of setting 1,000 asbestos cases at one time rather than 10 in Philadelphia. Perhaps most notably, there was consensus that the Philadelphia Court of Common Pleas was able to dispose of mass tort cases far more expeditiously than the US District Court for the Eastern District of Pennsylvania or any federal "Multidistrict Litigation" (MDL) court.

There was concern among both lawyers and judges, however, that the CLC is becoming such an attractive site for mass tort and class action litigation, that it may become overwhelmed unless it receives additional judicial and staff resources. The Center is under particular strain at the present time because three mass tort programs are

maturing at the same time. One suggested remedy is for the CLC to handle the pretrial portions of mass tort cases, but send the case back to the situs of the alleged tort when it is ready for trial. This would not only spread the burden of trying cases but also lessen the number of choice-of-law questions the Court must consider. Another is to be stricter when determining whether Philadelphia is truly the most convenient and appropriate forum.

There was also concern about the lack of technological sophistication at the Court in terms of the inability to file pleadings and documents electronically, the need to privately establish a litigation website, and the relatively small size of the high-tech courtroom, which limits its use in cases where there are several teams of lawyers.

Finally, there are two concerns about motion practice in the CLC. The first is what lawyers perceive to be the frequent practice of denying case-specific non-dispositive motions without explanation.[58] Because they do not understand the basis for the judge's decision, some lawyers will file a second motion simply to define the parameters. The second is the time required to admit non-Pennsylvania lawyers "pro hac vice." One suggestion is to permit an out-of-state lawyer involved in several cases in a mass tort program or a class action to list all those in a single motion rather than having to file a separate motion for each individual case.

C. Recommendations for Improvement. The creation and operation of the Complex Litigation Center is clearly one of the Court's major achievements and a substantial service to the citizens of Philadelphia, the bar, and the nation, given the scope of mass tort litigation and class actions. The CLC is operating well, but consistent with the concerns discussed above, care will need to be exercised to assure that its popularity does not compromise its success. Therefore, the NCSC team recommends that:

> ***Recommendation 7-1*. The Court should undertake a workload study to ensure that the staffing for the Complex Litigation Center is sufficient to meet the growing demand for its services.**
>
> ***Recommendation 7-2*. The Court should continuously monitor the caseload of the Complex Litigation Center to ensure that it is able to perform its**

[58] Opinions are generally issued for dispositive motions and motions that cover the mass tort program or class.

primary function effectively. If the time to trial begins to lengthen or the firmness of trial dates begins to slip, the Court should consider moving Arbitration Appeals to a new Civil Appeals Program (see Recommendation 6-1).

In addition to these administrative recommendations, there are procedural steps the Court can take to further streamline CLC operations.

Recommendation 7-3. **Given the relationship among the multitude of individual cases in mass tort and class action litigation and that a single lawyer may serve as counsel in many cases in a single mass tort program or class action suit, judges should be encouraged to provide a brief explanation whenever ruling on a motion in order to provide the greatest legal guidance possible and avoid follow-up motion practice.**

Recommendation 7-4. **Attorneys seeking admission *pro hac vice* in more than one case should be permitted to consolidate their request into a single motion, even if an admission fee is charged on a per case basis.**

There are technological measures as well that federal courts handling multi-district litigation and state courts focused on major commercial litigation have found useful in facilitating court, party, and public access to the voluminous records generated in mass tort and class action litigation. Accordingly, the NCSC team urges that:

Recommendation 7-5. **The Court should implement electronic filing and record storage capabilities for the Complex Litigation Center as soon as possible.**

Recommendation 7-6. **The Court should ensure that at least one of the courtrooms large enough for several teams of attorneys to try a case has the cabling and other infrastructure necessary to support videoconferencing and the presentation of evidence electronically, even if the communication and presentation equipment is not permanently installed in that courtroom.**

VIII. Commerce Program

The Philadelphia Court of Common Pleas initiated the Commerce Program in January 2000, as an extension of the Day Forward Program. The objectives of the program are to:

- Provide an efficient process for paper-intensive litigation
- Assure judicial expertise handling and deciding complex commercial litigation
- Develop a body of case law on commercial issues thereby creating greater predictability in business transactions

Thus, the Commerce Program is designed to provide special management of cases that by their nature consume substantial court time and resources - not to provide special results. In so doing, it both enhances the efficiency of the Court as a whole as well as strengthens the capacity of Philadelphia as an economic hub.

A. Process. As in the Major Jury Program, the Commerce Program provides for a case management conference (albeit with a specially selected law clerk) and a settlement conference with a judge pro tempore (JPT) (again a specially selected volunteer from among the most experienced members of the bar). Parties are asked to indicate their preferences from a list of five potential JPTs; the judge pro tem for their case is then assigned based on that list by court staff. The primary differences between the Commerce Program and other Civil Programs are that:

- Cases are assigned to an individual judge immediately upon assignment to the Program and remain with that judge through disposition
- The judge assigned to try the case will often meet with the parties to try to narrow the issues, move the case along, and facilitate settlement
- The JPTs are explicitly available to serve as mediators as part of and subsequent to the settlement conference

During the past year, the scope of the Program has been modified. Judges assigned to the Commerce Program now handle non-jury cases that, like major commercial cases, are largely document driven rather than fact driven. Class actions that had been assigned initially to the Commerce Program have now been transferred to the Complex Litigation Center, which handles other sets of cases involving numerous parties but a limited set of issues.

The Commerce Program appears to be operating very effectively. In 2003, it achieved a clearance rate (dispositions divided by filings) of 161%. Relatively few Commerce Program cases are disposed through a trial.

B. Views and Concerns. The members of the bar with whom we spoke stated that the Commerce Program has largely achieved its objectives and that the change in the

scope of the Program has worked out well. They attributed the success to the quality of the judges assigned by the Administrative Judge, the quality of the law clerks attracted by the higher salary paid by the Commerce Court, and the individual calendaring system which allows the assigned judge to become familiar with the case and counsel to become familiar with the judge's perspective and style. They also cited not having to go to Discovery Court, and in many instances, Motions Court, as a distinct advantage. They indicated that there was great interest in Philadelphia's Program in other jurisdictions in which they practice, and that the new Commerce Court established in the 9th Judicial Circuit of Florida (Orlando) is modeled after the Commerce Program.

On the other hand, the lawyers expressed several concerns about the Program. The first is that because the Commerce Program was established by judicial order rather than by statute or Supreme Court Rule, it could be too easily abandoned in the future by a new Administrative Judge or because of reductions in the Court's budget. They felt that the relatively low number of cases handled by the Program made it particularly vulnerable.

The second is due to the fact that assignment of a judge to the Commerce Program is entirely within the discretion of the Administrative Judge. The attorneys were concerned that some assignments in the future would not result in judges of the same quality as those who have served in the Program since its inception. The lack of influence over who would preside over Commerce Program cases appeared to the NCSC project team to be as great or a greater concern than the permanence issue.

The third concern is that the Commerce Program is not developing commercial law jurisprudence as quickly as some members of the Bar had hoped. As of May 2004, the Commerce Program had 431 opinions set forth on its website. Yet the vision of bar members is that the Philadelphia Commerce Court would develop a set of opinions of quality and stature equal to that of the Delaware Chancery Court.

Fourth, they expressed a desire that opinions on motions would be issued more quickly. This may reflect their lack of appreciation for the "balancing" or "tradeoffs" that the judges in the Commerce Program must make. If the program judges are to write as many opinions as possible to explain their thinking and help to build a body of law,

then the Court would take more time to decide motions without explanation. The judges in the program perceive that they are acting on motions in a seasonable manner.

Finally, the members of the bar expressed a concern that the settlement conferences as now scheduled and conducted are largely a pro forma procedure, noting that only 10-20% of their cases are close to settlement at the time of the conference. The solutions they proposed ranged from delaying the conference until a few weeks before trial to having the judge conduct the conference rather than a JPT; to establishing a mandatory mediation process similar to that used in North Carolina as a substitute for or in addition to the settlement conference. The judges of the Commerce Program observe, however, that the lawyers themselves may in part be delinquent. The Court enters management orders, and most cases in fact settle before trial.

C. Recommendations. As discussed above, the current procedure is that motions in Commerce Court cases are filed with the Motions Court, and some are docketed in the Motions Court for decision rather than sent to the assigned Commerce Court judge. We believe that having Commerce Program motions heard in Motions Court not only contributes unnecessarily to the congestion of the Motions Courts, but that it also undercuts the purpose and effectiveness of the individual calendar system in the Commerce Program. Therefore, we recommend that:

> ***Recommendation 8-1.*** **Consistent with the order establishing the Commerce Court, all motions or petitions for injunctive relief by parties to cases that have been filed in Commerce Court or that appear to meet the criteria for assignment to the Commerce Court Program should be heard in Commerce Court. The leaders of the Trial Division and the Civil Section should address and resolve any lack of clarity about the suitability for assignment of such cases to the Commerce Court Program.**

> ***Recommendation 8-2.*** **In keeping with the discretion allowed under the Pennsylvania Rules of Judicial Administration, the Administrative Judge may wish to amend the order establishing the Commerce Program by inserting a set of criteria for assigning judges to the Commerce Program, such as a minimum number of years of judicial experience and demonstrated expertise in hearing and settling complex commercial litigation.**

On the one hand, promulgating such criteria would demonstrate the Court's recognition of the Bar's concerns. On the other hand, it may establish a precedent limiting the scope of the Administrative Judge's authority.

Finally, the NCSC project team offers two further recommendations to assist the Commerce Program judges in assuring that cases are disposed in as just and timely a manner as possible.

> ***Recommendation 8-3***. **The Court Administrator's office should collect data over a six month period regarding the timing of settlement conferences in Commerce Court cases in order to help determine when they should be scheduled in order to most effectively promote settlement. The results of the analysis of this data should be discussed with the Commerce Program judges, the Commerce Court judges pro tempore, and the Bar, and, if appropriate, a guideline established.**
>
> ***Recommendation 8-4.*** **To address differing perceptions between the Court and the commercial trial bar about the operation of the Commerce Program, the judges should engage in regular exchanges with the commercial bar. Such exchanges should include attention to such issues as the development of a body of law for commercial cases; the timeliness of rulings on motions; and the effectiveness of settlement conferences.**

We are aware that there has been discussion regarding establishment of a commonwealth-wide or one or more regional Commerce Courts in Pennsylvania. The scope of the project did not permit us to collect the detailed case filing and disposition data to determine whether there would be a sufficient number cases in other areas of the commonwealth to sustain such a Court or Program.

IX. Jury Issues

As a general jurisdiction trial court serving a major urban area, the Philadelphia Court of Common Pleas operates a substantial jury management program. While the purpose of this study by NCSC does not include jury management in general, there are some issues that bear on the quality of court operations in the Trial Division's Civil Section, and which merit at least brief attention in this report.

A. General Observations. In FY 2003, more than 273,000 Philadelphia County citizens were summoned for jury duty. The figures for the first seven months of FY 2004 suggest that at least that many will be summoned by June 30, 2004. More than 90,000 actually report for jury service. The Trial Division is quite cognizant and respectful of the time of the citizens. It closely monitors the number of cases likely to require a jury each day and employs a juror-initiated telephone system through which individual jurors can verify the need to appear the following day. For those potential jurors who are required to report, the Court has a juror utilization rate well in excess of 100% -- i.e., all potential jurors who report are sent to a courtroom for voir dire once, and many are sent more than once.

Between 300 and 400 potential jurors report to the current jury assembly room in the Criminal Justice Center each morning during a normal jury week.[59] The jury assembly room has a seating capacity of 310. The number of potential jurors reporting exceeds this number at least four days per week. On Monday-Thursday of each week, criminal cases receive priority for jurors; on Friday, civil cases receive preference, and most, though not all, civil juries are selected on Fridays. Potential jurors selected for a voir dire panel in a civil case must cross from the Criminal Justice Center to City Hall. In order to avoid the congestion in the lobby of the Criminal Justice Center, they are often escorted out through the loading dock.

Although already heavy, the demand for jury trials in Philadelphia is likely to continue to increase due to several factors. On the criminal side, the increasing number of mandatory minimum sentences set by statute is increasing defendant requests for a jury trial, and the District Attorney now has the right to a jury. On the civil side, Rule 13-11 is expected to significantly increase the number of short jury trials for appeals of arbitration awards. [60]

B. Recommendations. The American Bar Association's *Standards Relating to Juror Use and Management* specify that:

[59] The number of potential jurors who must report on days before holidays (e.g., Christmas Eve) are usually substantially lower; on some Mondays, the number of potential jurors who must report is significantly higher, occasionally approaching 500.

[60] The rule permits the parties to conduct a trial before a jury based solely on written expert reports rather than expert testimony if they stipulate to a cap on damages of no more than $15,000.

> Courts should provide an adequate and suitable environment for jurors . . . Jurors should be accommodated in pleasant waiting facilities furnished with suitable amenities.[61]

The accompanying commentary states that:

> The importance of adequate physical facilities for efficient performance by jurors and accessibility and security for all persons cannot be overemphasized . . .Because much of jurors' time is spent waiting for panel assignment, comfortable and accessible accommodations are paramount. Their surroundings will contribute to shaping the image of the judicial system in the juror's minds. A multi-purpose space, suitable for reading, writing . . . and other suitable activities should be provided. Areas designated for telephones and desks . . . should also be provided . . .[While] designing a space for the initial number of people could be impractical . . .[,] jury managers must ascertain their own needs, both peak and average . . .[62]

As we note above, the number of persons reporting for jury service exceeds the capacity of the current jury assembly room on at least 80% of the mornings each week. As a result, potential jurors are forced to stand or sit on the floor, and must sometimes be shunted to other rooms. The amenities recommended by the ABA Standards are out of the question. Not only are these conditions not conducive to promoting public trust and confidence in the court system and compliance with court summonses, but they also reduce the efficiency of civil case operations (e.g., by having to wait for a venire to be led from the back of the Criminal Justice Center, across the busy streets to City Hall and up to the courtroom) and limit flexibility for scheduling civil trials. There is space on the first floor of City Hall that has been set aside for a civil jury assembly area. In order to relieve the crowding in the Criminal Justice Center, enhance efficient operation of the court, and better serve the voters responding for jury service, we recommend that:

> ***Recommendation 9-1*.** **The Court should make it a priority to secure the funding needed to create a safe and comfortable Civil Jury Assembly Room in City Hall.**

[61] American Bar Association, Judicial Administration Division, *Standards Relating to Juror Use and Management* (1993), Standard 14.
[62] *Id.*, at pp. 129-130.

In addition, in light of the difficulty and cost of parking in Center City and to make it easier and less expensive to fulfill jury service obligations:

> ***Recommendation 9-2*. The Court should consider arranging for SEPTA passes or discounts for at least those jurors having to report on more than one day.**

X. Conclusion

The Philadelphia Court of Common Pleas clearly has powerful reasons to be proud of how the Civil Section of its Trial Division has been able to reduce its civil backlog from the high levels that were present in the early 1990s. The Court should also take pride in how the Civil Section has managed since then to stay current with its inventory of pending cases.

As we note in the Introduction to this report, the Philadelphia Court of Common Pleas has all the elements of what is necessary for ongoing success in civil caseflow management – including strong and responsible judicial and administrative leadership over time, time standards and other relevant goals, use of information for regular measurement of actual performance against those standards and goals, and strong commitment of judges and court staff to continuing effectiveness in caseflow management. These elements of strength have contributed to the Court's fine performance in all of its civil programs as discussed in this report. The NCSC project team is pleased to offer the recommendations in the preceding sections of this report as a way for the Court to maintain itself as arguably the best-managed large urban civil trial court operation in the nation.