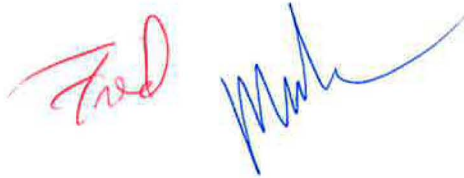


UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

THELTON E. HENDERSON
CHIEF JUDGE



April 11, 1995

Abel Mattos, Chief
Court Administration Policy Staff
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Mattos:

Enclosed please find a copy of our 1994 Annual Report under the
Civil Justice Reform Act.

As the report notes, the terms of many Advisory Group members
recently expired. The Court has appointed new members in their
place and the newly constituted Advisory Group will begin meeting
this month.

Sincerely,



Thelton E. Henderson
Chief Judge

cc: Donna Stienstra, Federal Judicial Center
(w/ enclosure)

**CIVIL JUSTICE REFORM ACT
NORTHERN DISTRICT OF CALIFORNIA
ADVISORY GROUP**

1994 REPORT TO THE COURT

March 13, 1995

CIVIL JUSTICE REFORM ACT
NORTHERN DISTRICT OF CALIFORNIA
ADVISORY GROUP

1994 REPORT TO THE COURT

March 13, 1995

I. INTRODUCTION

On February 22, 1991, Chief Judge Thelton Henderson appointed a diverse group of practitioners and other individuals to serve on the Northern District's Advisory Group pursuant to the Civil Justice Reform Act of 1990. By statute, most of us came to the end of our four-year terms last month.¹

The Court will therefore need to replace the bulk of the Advisory Group's members with a new group of lawyers and others to advise it on the continuing development of cost and delay reduction techniques. If the Court wishes input on the identification of possible replacements, we would be pleased to provide such assistance. Members have been asked to canvass their colleagues for names of willing and able potential new members.²

¹ Appendix 1 to this report is a complete list of those who have served on the Advisory Group. Patricia Lucas, Karl Mayer, Pamela Phillips, Steven Rosenbaum, David Shannon, William Spencer and Mary Beth Uitti, have each joined the Advisory Group at various dates since it was first formed. In addition, our Reporter, Professor Richard Marcus, and the United States Attorney, Michael Yamaguchi, who serves *ex-officio*, are not subject to the statute's four-year limit. Thus, they need not immediately leave the Group.

² Appendix 2 hereto lists names and pertinent information about potential members provided by some Advisory Group members. Others have indicated that they will be contacting the Court directly.

II. CURRENT STATUS

A. *The Court's Docket*

The following brief statistical study prepared by Advisory Group member Jerrold M. Ladar, is submitted for the Court's use in its statutorily mandated annual docket assessment. Among the trends which might be of interest to the Court are:

- * a significant *increase* in what we presume are labor intensive (from the Court's point of view) patent, trademark and anti-trust cases, and
- * a *decrease* in criminal filings.

In addition to these two trends in filings, we also wish to highlight two other important aspects of these statistics:

First, these statistics continue to be of only very limited use to us, and, we presume, to other districts and their advisory groups in the attempt to assess the impact of changes designed to reduce the cost and delay of civil litigation. With the assistance of the Court's ADR staff and the Clerk of the Court, the Advisory Group has looked very hard for ways to extract data from the computer-generated statistics available in the Clerk's office that would disclose information such as the elapsed time between filing and settlement and/or other significant events in civil cases. Since obtaining this information is proving to be an intractable problem, and since we believe that the purposes of the CJRA legislation would be served throughout the country if key changes were made in the way in which data is stored and could be retrieved, we strongly urge the Court to recommend to the Federal Judicial Center, and, if necessary, to Congress, that appropriate changes in data storage and retrieval systems be made. Without such changes, the Court will have to conduct expensive and time consuming privately contracted studies of relatively small groups of cases to determine if such programs as Early Neutral Evaluation, Multi-option ADR or Arbitration have any impact on cost and delay reduction.

Second, the Court will note that our District remains in the "top ten" of all judicial districts in *pro per* filings by prisoners ("prisoner petitions"). At the beginning of our activities as an Advisory Group, we named a task force to measure and address the cost and delay problem these filings create. That task force has energetically studied prisoner petition filings and has made a number of recommendations to the Court about how they might be more expeditiously and efficiently managed.

This is, however, one area in which we feel our Group's activities have been less than successful, inasmuch as there appears to have been little, if any, change in the way prisoner petition matters are handled. We recognize that much of the reason for this lies in the severe budget cutbacks in the Clerk's office. However, we remain convinced that innovative approaches to this problem *can* make a difference, and we will be recommending to our successors that study

and dialogue on this point continue.

In this regard, we would like also to draw the Court's attention to a bill presently pending in the House of Representatives, H.R. 554, the short title of which is the "Stop Turning Out Prisoners Act."³ Among other things, the bill purports to limit federal court jurisdiction in prison cases so that "prospective relief in a civil action with respect to prison conditions shall extend no further than necessary to remove the conditions that are causing the deprivation of the federal rights of *individual* plaintiffs." [Emphasis added] A subcommittee of the advisory group, chaired by Amitai Schwartz, and including Karl Mayer and Mary Beth Uitti, is studying what we consider to be the distinct possibility that this bill may severely impact this district's prisoner petition case load.

We turn to our assessment of the Court's docket. The following statistics are excerpted from data supplied by the Administrative Office of the U.S. Courts (AO) and the Clerk's Office for the Northern District of California. Unless otherwise noted, all figures are based on the twelve month period ending June 30, 1994.

1. GENERAL TRENDS

a. The Past Year

Fourteen judgeships are authorized for the Northern District of California. Two positions are currently vacant, and one is curtailed due to appellate proceedings. The 1994 final complement was 11 active judges, 5 participating senior judges and seven full time magistrate judges.

Civil cases: Civil case filings *decreased* (for the third straight year) with 5,535 commenced, a drop of 6.5%. The latest judicial workload profile for the district discloses the following median times for civil cases:

filing to disposition	7 months
filing to trial	24 months ⁴

³ A copy of the bill may be found at Appendix 3.

⁴ These median times clearly illustrate the difficulty the Advisory Group has had using the AO's computer-generated statistics to measure accurately whether any of the steps the Court has implemented under the CJRA have actually reduced delay. While the filing-to-disposition and/or the filing-to-trial median may tell the Northern District where it stands in relation to other districts, or whether it is doing better or worse than last year, the numbers say nothing intelligible about *why* the interval is what it is, or what effect any particular technique has had on the interval. As we have noted above, the ability to measure with precision such intervals as the time from filing to settlement

The district's seven-month filing-to-disposition median remained the same as it was last year. Our two-year filing-to-trial median, however, cannot meaningfully be contrasted with last year's AO figures, which measured the median time between *issue* and trial, not *filing* and trial.⁵ Six percent (331) of the district's civil cases have been pending for over three years, a *decrease* of one percent resulting in a dramatic improvement of our national ranking from 63rd to 13th in this category.

Criminal cases: Criminal case filings, which increased by 23% in 1993, also *decreased* this past year by 8% to a total of 606. Criminal felony cases showed a median time of 9.2 months from filing to disposition. There is no empirical evidence that the present criminal caseload poses a problem for the civil docket. [Nationally, a number of districts continue to report emergency conditions; criminal cases literally prevent the timely trial of civil matters. See: U.S. v. Mosquera, 816 F.Supp. 168 (E.D.N.Y. 1993), opinion by Judge Weinstein.]

Trials: Judges in the district completed a total of 194 trials, 10 less than in 1993. Magistrate Judges completed a total of 18 civil trials pursuant to 28 U.S.C. Section 636© [consent], seven of which were bench trials, and 11 of which were tried to juries. In addition, magistrate judges tried 60 court and 1 jury criminal misdemeanor trials.

b. The Future

The Court's vulnerability to future docket congestion lies, in part, in uncharted areas where predictions are perilous:

State Prisoner Petitions: The increase in state court mandatory jail sentences and the implementation of California's "Three Strikes" law makes it likely that state prisoner petitions will continue to increase.

Death Penalty Habeas: As of December 1, 1994, California had 399 persons under sentence of death. One hundred twenty-one federal *habeas* death penalty cases were pending in California's four districts. The Northern District has 33 of the total. As affirmances of the judgments of death occur in the state court, this district's number of death penalty *habeas* cases will rise.

Increased Federal Prosecutions: Executive branch decisions affecting the prosecution of criminal offenses by the U.S. Attorney's Criminal Division, the Organized Crime Strike Force and the Drug Task Force (a combined total of approximately 54 Assistant U. S. Attorneys) could

or the ability to understand, without manually studying case files, whether settlement has been immediately preceded by, e.g., mediation or early neutral evaluation, seems crucial to the task of evaluating the benefit of the work we have been doing.

⁵ See, footnote 4, above.

rapidly change the docket picture. For the first time in several years, the district has a Presidentially appointed U.S. Attorney, Michael Yamaguchi, who has served as U.S. Attorney since July 4, 1993. It is, of course, too early to know what effect the federal "Crime Bill" (Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322) will have on the number and type of prosecutions brought by the government.

Asset Forfeiture Litigation: We noted in the last assessment that the automatic repeal of the state's criminal forfeiture law, effective January 1, 1993, could increase docket activity in the district court. Conversely, forfeiture and penalty cases declined for the second straight year -- from 60 to 50 to 39. (Thirty-five other federal districts exceed this number of forfeiture/penalty cases). California's criminal forfeiture scheme was "reenacted" as urgency legislation on August 19, 1994 (1994 Cal. Stats, Chap. 314; Cal. H&S Code §§11469 et seq.), removing the incentive (which did not materialize) to make a local law enforcement seizure into a "federal case."

On the other hand, increased litigation resulting from *U.S. v. \$405,089.23 In U.S. Currency*, 33 F.3d 1210, 1218-20 (9th Cir. 1994), (petition for rehearing and rehearing *en banc* pending) and *U.S. v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 494-5 (9th Cir. 1994) (each holding that civil forfeiture after criminal conviction, based on same facts, is barred by double jeopardy clause), may impact the docket. One legal newspaper reports that approximately 40 motions to dismiss criminal or forfeiture cases have been filed in the District of Oregon, relying on the reverse principle that if forfeiture first occurred, the criminal action is barred. The issues in *\$405* have been raised by motion in some 20 cases in this district.

2. CIVIL CASES

In 1992, civil filings increased by 9.2% nationally (228,075) and increased by 29.8% in this district (to 6,030 from 4,643). In 1993, national civil filings again increased, but by only 0.7%, and *decreased* by 1.8% in the district, to 5,924. Civil case terminations in this district in 1993 increased by 9.5%, and the pending caseload decreased by 2.2%. (This contrasts with a national decrease in terminations of 5.85 and a pending case increase of 1.3%.) In 1994, national filings increased to 235,996. The district's civil filings dropped again by 6.5% to 5,535. The pending case load dropped by 3%, but terminations decreased by 6.3%.

	1991	1992	1993	1994
Commenced	4,643 (-3.3%)	6,030 (+29.8%)	5,924 (-1.8%)	5,535 (-6.5%)
Terminated	4,360 (-9.9%)	5,514 (+26.5%)	6,040 (+9.5%)	5,661 (-6.3%)
Pending	4,883 (+6.2%)	5,350 (+10.7%)	5,208 (-2.2%)	5,031 (-3.0%)

In 1994, the Northern District ranked tenth among 94 districts in cases commenced. In 1993 it was eighth.

Categories of civil cases commenced in the district reflecting significant numbers were:

		1992	1993	1994
1.	Civil Rights (excludes Prisoner)	607	751	851 (+14%)
2.	Contract	2,008	1,390	766 (-44%)
3.	Tort (includes Tort Claims Act, FELA & Maritime)	506	603	645
4.	Labor	627	692	552
5	Copyright, Patent, Trademark	226	267	323 (+20.9%)
6.	Social Security	114	99	116
7.	Tax	107	96	82
8.	Real Property	79	32	51
9.	Forfeiture & Penalty	62	50	39
10.	Anti-Trust	21	25	39 (+56%)

The 44% decrease in contract cases is almost solely due to a decrease in the filing of "defaulted student loan" cases by the United States. In 1993, the government commenced 625 of these cases; the figure dropped to 58 in 1994. The decrease is caused by a U.S. Department of Education pilot program using a non-judicial pre-judgment garnishment procedure to effect enforcement. Thus, no referral of the pilot program cases are made to the U.S. Attorney's Office for civil judicial action. Conversely, the 20% rise in copyright (104), patent (111) and trademark (104) cases, and the 56% rise in anti-trust cases portends a substantial increase in court time, as these cases are labor intensive and often rapidly drain available court resources.

3. CRIMINAL CASES

Following a three-year downward trend, national criminal case filings decreased in 1994 by 1.7%. In this district, the U.S. Attorney's filings decreased by 8%. (In 1993, overall criminal case filings in the district had increased by 22%.)

Original cases commenced, excluding petty offenses, transfers from other districts (Rule 20) or cases reopened from appeal, were divided as follows:

	1991	1992	1993	1994
Felony	392	381 (-2%)	423 (+11%)	379 (-10%)
Misdemeanor	277	161 (-4%)	239 (+48%)	227 (-.05%)
Total	669	542	662 (+22%)	606 (-8%)

The following chart *includes* petty offenses, transfers from other districts (Rule 20) and cases reopened from appeal:

	1991	1992	1993	1994
Commenced	702 (-.2%)	552 (-21.5%)	682 (+23%)	627 (-8.1%)
Terminated	661 (+14.0%)	578 (-12.6%)	574 (-.05%)	597 (+4%)
Pending	857 (+5.0%)	833 (-3.0%)	917 (+10%)	737 (-20%)

As of June 30, 1994, a total of 737 cases (felony and misdemeanor) were pending on the docket. A total of 609 cases were terminated during the reporting period. The ratios of commenced/terminated/pending have remained relatively constant over the past four years. Of the *pending* cases on the docket (737), the highest numbers by offense categories are: drugs (148), fraud (121), embezzlement (109), robbery (54) and weapons (38).

The 1994 judicial workload per judgeship reflects 30 criminal cases per judge and 1.6 defendants per case. (The workload statistic counts only cases commenced in the current reporting period.)

There is no significant change in the number of felony defendants per criminal case. (Average, 1.5) The total number of defendants involved were:

	1991	1992	1993	1994
Felony	619	567	690	641 (-7%)
Misdemeanor	289	241	255	233 (-8%)
Total	908	811	945	874 (-8%)

It does not appear that the Court's 1994 criminal case load posed any serious, systemic docket problems, although this could change based on legislative and other developments.

A random survey of *new* 1994 criminal case filings did not reveal any fundamental change from past years in types of cases charged. A random sampling of the embezzlement cases (the highest number of new cases filed) indicates most are disposed of as misdemeanors.

Weapons cases filed decreased, despite the Department of Justice's "Operation Triggerlock" announcement in 1991.

	1991	1992	1993	1994
Embezzlement	90	45	100	125 (+25)
Fraud	127	108	117	124
Drugs	97	97	115	74 (-35)
Robbery	57	51	63	61
Traffic	96	97	67	58
Weapons	14	37	43	38 (-11)
Larceny	47	58	40	37
Escape	12	17	16	16
Forgery	9	13	20	12
Immigration	29	9	12	9

4. *PRO PER* PRISONER PETITIONS

As noted, in 1994 our district ranked among the top ten in the country in the number of state prisoner civil rights and *habeas corpus* cases. For 1994, a total of 1,290 *pro-per* combined state and federal institution prisoner petitions" ("*habeas corpus*, civil rights, *mandamus* and others") were filed. Of these, 1,179 were state prisoner petitions.

This total comprises 23.3% of the civil filings in the district, up from almost 20% in the previous reporting period.

Prisoner petitions in 1994 involving only state penal institutions and alleging civil rights violations number 800; an additional 377 were "*habeas, mandamus, other*" for a total of 1,177 cases involving non-federal facilities. (State prisoner petitions are initially screened and handled by the court's *pro-se* staff. When they are later referred to judge's chambers, they become an "in court" matter.)

5. TRIALS

a. Totals (Criminal and Civil jury and Non-Jury)⁶

1990	1991	1992	1993	1994
202	178	200	240	194
	-24 trials	+22 trials	+40 trials	-46 trials

In 1994, 32 districts (out of 94) completed more trials than the N.D. of California. The highest was Texas, Southern (875), followed by the Southern District of Florida (649), the Eastern District of Pennsylvania (594) and the Southern District of New York (579).

According to the AO's judicial workload profile, this district's allocation was 17 trials per judge for the 12-month period, placing it 89th among districts nationwide.

BREAKDOWN		
1994	113 civil	54 jury and 59 non-jury
	81 criminal	50 jury and 31 non-jury
1993	135 civil	56 jury and 79 non-jury
	105 criminal	63 jury and 42 non-jury
1992	108 civil	52 jury and 56 non-jury
	92 criminal	59 jury and 33 non-jury
1991	99 civil	42 jury and 27 non-jury
	79 criminal	52 jury and 27 non-jury ⁷

⁶ The AO figures *exclude* cases tried by magistrate judges, but *include* TRO's, preliminary injunctions, hearings on contested motions, and other proceedings when evidence is introduced. Under this system, "trials" may be interpreted variously and reported differently from district to district or, for that matter, from judge to judge. We respectfully submit that the better practice would be to include cases tried by magistrate judges, so as to be able to measure the effect of the use of this significant court resource. *See, n. 7, infra, re 1991 "Court Trials."*

⁷ In 1991, the 27 non-jury criminal "trials" actually represented only 7 trials in the traditional usage of the word. The remaining 20 consisted of contested evidentiary matters (e.g., a motion to suppress). Succeeding years have followed this pattern.

b. Length of Trials -- 1994

(The length of trials statistics have remained relatively constant during the period 1990-1994.)

DAYS	1	2	3	4-9	10-19	20+
Civil (135 cases)	21	16	17	39	14	6
Criminal (81 cases)	20	12	9	36	3	1

c. Length of Trials -- 1993

DAYS	1	2	3	4-9	10-19	20+
Civil (135 cases)	27	16	13	60	14	5
Criminal (105 cases)	31	12	11	43	3	--

B. The Advisory Group's Activities

As the Court is aware, the Advisory Group's work began in earnest in 1991 and continued at a brisk pace through the end of 1993. The Group met once in early 1994. At that meeting we assessed the progress we had made, discussed possible future projects, and concluded that our best course would be to continue to monitor the progress of innovations already in place as a result of our recommendations and the Court's action on them.

1. ADR ACTIVITIES

a. Training of Neutrals

The Court's ADR staff has conducted introductory training programs for its experienced and newly-accepted ADR neutrals over the past two years. Two-hundred eleven (211) lawyers participated in one of four one-day training programs from ENE evaluators. One-hundred forty-three (143) lawyers, many of whom are also trained as ENE evaluators, participated in one of five two-day mediation trainings. Additionally, 187 lawyers attended one of three half-day arbitration training programs.

b. ADR Multi-Option Pilot

Since the start of the ADR Multi-Option program in July 1993, the ADR Director and Deputy Director have conducted over 300 ADR phone conferences in which they have attempted to help counsel select an ADR option appropriate for their case.

Of the ADR options selected by participants in the ADR Multi-Option pilot, the most popular choice is ENE (35%), followed closely by a settlement conference with a magistrate judge (30%), and then mediation (24%). Relatively few have opted for arbitration (5%) or ADR with a private provider (6%).

c. Proposed New Local Rules on ADR

In conjunction with the Court's revision of its local rules, the ADR staff has drafted a proposed new set of Local ADR Rules. These rules include a few substantive changes, codify some existing policy and procedures not addressed by the prior rules, and reorganize into a single coherent set of rules the following prior local rule and general orders: Local Rule 500 (Arbitration), General Order 36 (ADR Multi-Option Pilot), General Order 26 (Early Neutral Evaluation) and General order 37 (Mediation).

d. Handbook for ENE Evaluators

The Court has prepared a comprehensive Handbook for ENE Evaluators from extensive notes of Magistrate Judge Wayne Brazil. The Handbook describes the history, purposes and

assessments of the ENE program, addresses in detail the specific components of the ENE process, and includes copies of materials distributed to ENE evaluators and counsel.

2. LOCAL RULE REVISION

A new group was formed, made up of some of our members, which has been assisting the District's Local Rules Committee, chaired by Judge Ware, in revising and updating the Court's Local Rules to incorporate the innovations produced under the Civil Justice Reform Act, changes in the Federal Rules of Civil Procedure, as well as other local developments. The Local Rules Committee's draft of the proposed revised Local Rules was circulated for the Court's review and thereafter for public comment. At the Advisory Group's most recent meeting on February 8, 1995, we discussed the draft and commented on its contents the members of the Court and the Rules committee present. Specific comments on individual Rules are noted on the Advisory Group's minutes of the meeting, but we wish to report to the Court that a motion was made, seconded and carried that the case management experiment begun with General Order No. 34 should be continued at least for two more years so that this District may more accurately gauge the results achieved by the Order.

III. CONCLUSION

To the extent that the Civil Justice Reform Act sought to inspire in local judicial districts a sense of experimentation, we feel that our district has acquitted itself extremely well. We have begun to assess the impact of experimental forms of alternative dispute resolution including this Court's arbitration and ENE programs, made improvements in them where necessary, and added to them a bold approach to case management which, although controversial, has very definitely introduced the beginnings of a new culture surrounding litigation in this district. We are immensely proud of our district for having taken the challenge contained in the Civil Justice Reform Act so seriously, we are pleased with the Advisory Group's participation in meeting this challenge, and we are hopeful that our successors will continue to assist the Court as we have.

Finally, the Court should be aware that the process involved in the work we have produced is almost as important to all of us as the final product. Our suggestions to the Court, both those that were accepted and those that fell by the wayside, were the end product of a remarkable meeting of diverse minds in which frank views were exchanged, positions taken and modified, and, in general, the interests of individual clients or particular practice areas were subordinated to the importance of making litigation in our district as efficient, as civil and as rational as possible. Thus, we are pleased to have been part of this effort not only because we feel we have made a substantial contribution to the Court, but because we have learned much about ourselves and each other in doing so.

Respectfully submitted,

John M. True, III
Chair
Civil Justice Reform Act Advisory Group

F:\LET\JOHNCJRA\FINALRPT