UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

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May 8, 1997

Frederick M. Russillo
Administrative Office of the U.S. Courts
Room 4-560
OCP-CAPS
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Dear Fred:

Enclosed is a draft of our Fifth Annual Assessment. Once again, I would appreciate your comments and advice.

Please note that I have made reference to RAND'S case management and ADR evaluations. I have now seen several drafts of these and I wonder if I could impose on you to confirm that I am quoting the "final" evaluations? Also, could you provide me with a copy of the ADR evaluation since I have managed to lose what I quoted from.

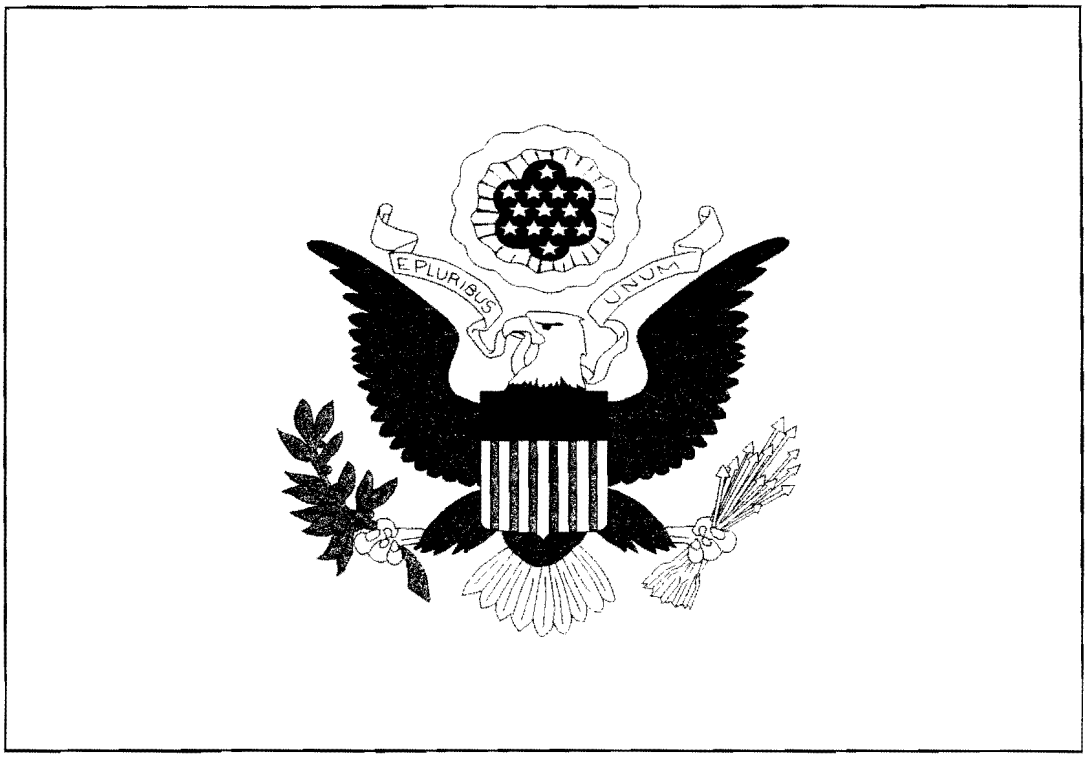
See you on May 21st at 10:00 A.M.!

Very truly yours,

Ron

RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY



FIFTH ANNUAL ASSESSMENT
OF THE
CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN
FOR THE IMPLEMENTATION OF THE
CIVIL JUSTICE REFORM ACT OF 1990

Adopted: ,1997

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FIFTH ANNUAL ASSESSMENT OF THE PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 IN THE DISTRICT OF NEW JERSEY

I. INTRODUCTION AND METHODOLOGY

This is the fifth-and presumably final-annual review of the Civil Justice Expense and Delay Reduction Plan ("the Plan") adopted by the United States District Court for the District of New Jersey on December 12, 1991. Prior annual assessments were adopted on December 22, 1992, April 29, 1994, April 28, 1995, and May 28, 1996.

The Court has, as before, relied on the advice of the Civil Justice Expense and Delay Reduction Advisory Committee for the United States District Court for the District of New Jersey ("the Advisory Committee") as well as the advice of the magistrate judges. The recommendations set forth herein have been carefully considered by the Board of Judges.

Following this "Introduction and Methodology" there is an "Assessment of the Dockets." The annual review then focuses on programs or proposals intended to reduce cost and delay, as well as evaluations of the Civil Justice Reform Act made by the RAND Institute for Civil Justice ("RAND").

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II. ASSESSMENT OF THE DOCKETS

A. CONDITION OF THE CIVIL AND CRIMINAL DOCKETS

1. Civil[1]

(a) During the twelve-month period ending September 30, 1996, civil case filings decreased -7.2% from 6,892 to 6,398. Of this total number, civil filings involving the United States numbered 1,176 (18% of the civil docket). The remainder were private in nature.

(b) As of September 30, 1996, 5,777 civil cases were pending. Of this total, 1019 were cases in which the United States was a party, prisoner cases numbered 810, and the remainder were private in nature.

(c) During the twelve-month period ending September 30, 1996, 6,693 civil cases were terminated. Of this total, 1,087 civil cases involved the United States, prisoner cases numbered 970, and the remainder were private in nature. Civil case terminations rose 2.9% over 1995.

(d) For 1994, 1995 and 1996, the disposition rate of non-prisoner civil cases, from the date of filing of the complaint, was as follows:

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[1] Civil caseload statistics for the District are graphed in the Appendix at _____.

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	1994	1995	1996
Total Number of Cases Disposed of	5,121 (100%)	5,380 (100%)	5,706 (100%)
Number of Cases Disposed of Before Any Court Action	661 (12.9%)	805 (12.9%)	860 (15.1%)
Number of Cases Disposed of Before Pretrial	2,410 (45.3%)	2,540 (47.1%)	2,683 (47.1%)
Number of Cases Disposed of During or After Pretrial	1,905 (38.1%)	1,885 (37.2%)	2,012 (35.3%)
Number of Cases Tried to Disposition	145 (3.6%)	150 (2.8%)	151 (2.7%)

During the operation of the Plan there has been an overall decrease in the percentage of civil cases disposed of at trial.

(e) Consistent with (d) above, the median time intervals for disposition of non-prisoner civil cases from the filing of the complaint for 1994, 1995 and 1996 were as follows:

	1994		1995		1996	
	Filings	**Months**	**Filings**	**Months**	**Filings**	**Months**
All Civil Cases	(5,121)	7	(5,380)	7	(5,706)	7
Cases Disposed of Before Any Court Action	(661)	3	(805)	3	(860)	3
Cases Disposed of Before Pretrial	(2,410)	5	(2,540)	4	(2,683)	5
Cases Disposed of During or After Pretrial	(1,905)	13	(1,885)	13	(2,012)	13
Cases Disposed of by Trial to Completion	(145)	25	(150)	23	(151)	21

In 1996 97.4% of all non-prisoner civil cases terminated were disposed of

within 13 months of filing, well within the eighteen-month period suggested by the Civil Justice Reform Act (28 U.S.C. § 473(a)(2)(B)) within which a case should be tried.

(f) The median disposition time of 7 months for all civil cases terminated in 1996 ranked the District behind only thirteen others nationwide out of 94 (the nationwide average was 7 months). The District ranked 62nd nationally in the median disposition time of 21 months for cases tried to completion. However, only 2.7% (151 cases) of all terminated non-prisoner civil cases fell into this category.

(g) The arbitration program (governed by General Rule 47) was responsible for the disposition of 1,282 (or 19.1%) of the 6,693 civil cases disposed of in 1996. The success of the arbitration program is reflected by the following:

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	1994	1995	1996
Number of Cases Placed in Arbitration	1,646	1,583	1,671
Total Cases Pending in Arbitration	1,472	1,260	1,318
Cases Closed Prior to Appointment of Arbitrator	1,088	983	865
Cases Arbitrated or Settled After Arbitrator Appointed	290	271	302
Requests for Trial De Novo	173	146	196
De Novo Requests Closed Before Trial	115	106	115
Cases Left for Trial or Tried to Completion	58	48	43

The number of cases placed in arbitration in 1996 remains consistent with prior years and has increased by 69% since adoption of the Plan.

(h) As of September 30, 1996, 298 three-year or older civil cases were pending. This represents 5.2% of the pending civil caseload.[2] Examples of three-year or older civil cases, by nature of statistical category, are as follows:

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[2] The District's figure of 5.2% remains below the nationwide level of 6.4%.

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Pending Civil Cases That Were Three-Years Old on 6/30/91

	Prsnr Civ Rgt	Oth Civ Rgt	P.I.	Cntrct
Newark (127)	13	18	10	24
Trenton (51)	14	8	11	8
Camden (59)	16	11	5	11
Total (237)	43 (18.1%)	37 (15.6%)	26 (11.0%)	43 (18.1%)

Pending Civil Cases That Were Three-Years Old on 9/30/96

	Prsnr Civ Rgt	Oth Civ Rgt	P.I.	Cntrct
Newark (208)	21	35	34	49
Trenton (54)	3	0	17	7
Camden (36)	2	3	5	10
Total (298)	26 (8.7%)	38 (12.8%)	56 (18.8%)	66 (22.2%)

2. Criminal[3]

(a) During the twelve-month period ending September 30, 1996, 936 criminal cases were filed in the District and 841 were terminated. As of September 30, 1996, 750 were pending. Of the cases filed, 650 were felonies and 277 were misdemeanors.

(b) In 1996, criminal cases were instituted against 1,202 defendants. Of this number, 916 defendants were charged with felonies and 286 with misdemeanor offenses.

(c) The criminal statistics set forth above may be summarized as follows:

CRIMINAL CASES

	1994	1995	1996
Criminal Cases Filed	798	831	936
Criminal Cases Terminated	717	726	841
Felony Cases Filed	586	613	650
Misdemeanor Cases Filed	212	218	277
Number of Defendants	1,068	1,099	1,202
Number of Defendants (Felony)	845	880	916
Number of Defendants (Misdemeanor)	223	219	286
Criminal Cases Pending Year End	710	708	750

[3] Criminal caseload statistics for the District are graphed in the Appendix at _____.

3. Ranking of the District

For the twelve-month period ending September 30, 1996, the District ranked 11th nationwide in total case filings (6,398 civil and 936 criminal) with a total of 7,334. The District ranked 9th nationwide in civil and 7th nationwide in criminal case filings.[4]

B. TRENDS IN CASE FILINGS AND DEMANDS BEING PLACED ON THE RESOURCES OF THE DISTRICT

1. Civil

(a) Civil case filings decreased -7.2% in 1996. Nationally, civil filings rose 8.4%.

(b) 1996 saw the first decline in civil filings (6,892) in the District since 1993. This decline is attributable to the decrease in the number of products liability filings (-497) and prisoner civil rights cases (-233). These decreases were both anticipated. The enactment of the Prison Litigation Reform Act in April of 1996 curtained prisoner filings during the remainder of the 1996 statistical year (which ended September 30). In statistical year 1995 approximately 500 breast implant cases were removed from the Superior Court of New Jersey. These removals were not repeated in 1996.

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[4] Civil and criminal caseloads for the District are summarized in the Appendix at ___.

2. Criminal

The District's progress with its civil calendar continues to be hampered by criminal filings and trials, especially those drug- and bank-related. Criminal filings increased 5% nationwide in 1996. In the District criminal filings increased 12.0%. Felony filings in the District in 1996 increased by 6.0%, surpassing the nationwide increase.

There are currently 1,066 defendants in pending criminal cases (911 felony, 148 misdemeanor and 7 others). Since 1990, the number of defendants charged has risen from 912 to 1,212 -- a workload increase of 24.7%.

Drug, fraud and larceny cases dominate the criminal calendar and represent 72.9% of the felony cases filed in 1996. Some 74.7% of all felony and misdemeanor defendants were prosecuted for these three types of offenses.

III. THE STATE OF THE PLAN IN 1997

Like its predecessors, this section of the Fifth Annual Assessment focuses on developments over the past year which involved specific portions of the Plan. These are discussed below. However, the Fifth Annual Assessment is unique in two regards. First, it is presumably the last which will be issued under the Civil Justice Reform Act. Second, it has been issued after evaluations of alternative dispute resolution and case management aspects of civil justice expense and delay reduction plans implemented in various district courts under the Civil Justice Reform Act. These evaluations, together with the research leading to them, were products of RAND.

The District of New Jersey was not studied by RAND. Our Plan was not evaluated by RAND. Nevertheless, RAND's evaluations deserve comment, both to compare those evaluations with civil justice reform here and to express reservations about RAND's conclusions.

Before turning to specific aspects of the Plan, the Advisory Committee and the Court deem it appropriate to comment on one concern. Congressional funding for personnel made available through the Civil Justice Reform Act may not be continued and,

moreover, funding for the Court's arbitration program may end.[5] This latter funding supports deputy clerks who administer the arbitration program and also provides compensation for the certified arbitrators who conduct hearings and issue awards.

The Advisory Committee and the Court appreciate the fiscal constraints under which both the Congress and the United States Courts function. However, innovative programs require adequate staff. If appropriate funding is not provided the quality of civil justice as well as efforts to decrease expense and delay will invariably be effected at some point.

A. CASE MANAGEMENT

1. The RAND Case Management Evaluation

Late last year the RAND Institute for Civil Justice released An Evaluation of Judicial Case Management under the Civil Justice Reform Act ("Case Management Evaluation"). The Civil Justice Reform Act had required each of the 94 district courts to develop

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[5] The arbitration program was established pursuant to 28 U.S.C. §651 et. seq., and is not within the Civil Justice Reform Act. Nevertheless, arbitration should be seen as a form of alternative dispute resolution. In this District, as noted above on pages 4 and 5, the arbitration program disposes of a significant percentage of the civil caseload. The continued success of the arbitration program is of great concern to the Advisory Committee and the Court and, should the program cease functioning or become less effective, delay and expense in all civil cases may increase.

case management plans to reduce cost and delay. It also created a pilot program to test case management principles and required that an independent evaluation be conducted. RAND was chosen to conduct that evaluation.

The Case Management Evaluation gave the following "overview" of the pilot program:

> The pilot program required ten districts to incorporate certain case management principles into their plans. The evaluation included ten other districts to permit comparisons. The 20 districts were selected rather than being volunteers, and all those selected were required to participate in the study.
>
> The ten pilot districts, selected by the Committee on Court Administration and Case Management of the Judicial Conference of the United States, were: California (S), Delaware, Georgia (N), New York (S), Oklahoma (W), Pennsylvania (E), Tennessee (W), Texas (S), Utah, and Wisconsin (E).
>
> The Judicial Conference, in consultation with RAND, also selected the following ten comparison districts: Arizona, California (C), Florida (N), Illinois (N), Indiana (N), Kentucky (E), Kentucky (W), Maryland, New York (E), and Pennsylvania (M).
>
> The pilot districts were required to implement their plans by January 1992; the other 84 districts, including the comparison districts, could implement their plans any time before December 1993. [Case Management Evaluation at xi].

It described the case management principles as follows:

1. Differential Case Management

2. Early judicial management

3. Monitoring and control of complex cases

4. Encouragement of cost effective discovery through voluntary exchanges and cooperative discovery devices

5. Good-faith efforts to resolve discovery disputes before filing motions

6. Referral of appropriate cases to alternative dispute resolution programs.

Pilot districts must incorporate these principles, while other districts may do so. [Case Management Evaluation at xii (footnote omitted)].

The Case Management Evaluation also described the case management techniques:

> The Act directs each to consider incorporating the following techniques into its plan, but no district is required to incorporate them:
>
> 1. Joint discovery-case management plan
>
> 2. Party representation at pretrial conferences by an attorney with authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters
>
> 3. Required signature of attorney and party on all requests for discovery extensions or trial postponements
>
> 4. Early neutral evaluation

5. Party representatives with authority to bind to be present or available by telephone at settlement conferences.

6. Other features that the court considers appropriate. [Case Management Evaluation at xii].

The Fifth Annual Assessment will not describe in detail the contents of the Case Management Evaluation. Instead, it will refer to and comment on RAND's conclusions as these relate to case management under the Plan in the District of New Jersey.

RAND concluded that,

> the CJRA pilot program, as implemented, had little effect. But that pilot program finding does not imply that case management has no significant effect. Because case management varies across judges and districts, we were able to assess the effect of specific case management procedures and techniques on time, cost, satisfaction, and fairness. This assessment clearly shows that what judges do to manage case matters. [Case Management Evaluation at xxvii].

RAND also noted the following in terms of disposition of civil cases:

> Four case management procedures showed consistent statistically significant effects on time to disposition: 1) early judicial management; 2) setting the trial schedule early; 3) reducing discovery cutoff; and 4) having litigants at or available on the telephone for settlement conferences. For general civil cases with issue joined that do not close within the first 9 months, we estimate that these procedures have the combined effect of reducing median time to disposition by

about four to five months in our post-CJRA sample.

> Case Management procedures have a substantial effect on predicted time to disposition. Of the total variance explained in our time to disposition analyses, only about half was explained by the case characteristics and other control variables; case management variables accounted for the rest. [Evaluation at xxix].

RAND then suggested a "promising" case management package:

> These findings suggest a package of case management policies with the potential to reduce time to disposition without changing costs, attorney satisfaction, and views of fairness. The package includes discovery control, the only CJRA case management practice that seemed to be effective in reducing costs***
>
> Our analysis suggests that the following approach to early management of general civil litigation cases should be considered by courts and judges not currently using this approach, and reemphasized by courts and judges that are using it. The powers to use this approach already exist under the Federal Rules of Civil Procedure.
>
> - For cases that do not yet have issue joined, have a clerk monitor them to be sure deadlines for service and answer are met, and begin judicial action to dispose of the case if those deadlines are missed.
>
> - For cases that have issued joined, wait a short time after the joinder date, perhaps a month, to see if the case terminates and then begin judicial case management.

- Include setting of a firm trial date as part of the early management package, and adhere to that date as much as possible.

- Include setting of a reasonably short discovery cutoff time tailored to the case as part of the early management package.

  For nearly general civil cases, this policy should cause judicial case management to begin within 6 months or less after case filing. [Case Management Evaluation at xxx-xxxi].

The Advisory Committee and the Court are satisfied that the four case management procedures identified by RAND are in place in the District of New Jersey. "Early judicial management" is conducted, in most instances, by the magistrate judges. Initial scheduling conferences pursuant to Rule 16(a) of the Federal Rules of Civil Procedure are conducted as soon after issue is joined as is practical. The procedures of "setting the trial schedule early" and "reducing discovery cutoff" are likewise managed in large measure by magistrate judges. Initial conferences (and, as necessary, subsequent conferences prior to a final pretrial conference), are intended to identify actual disputes between the parties, focus litigation on those actual disputes, schedule early dispositive motions, limit discovery, and explore settlement. We deem it impractical, however, to set

a "firm" trial date at any initial scheduling conference given the heavy criminal caseload in the District.

The fourth case management procedure, "having litigants at or available on the telephone for settlement conferences," is also within the Plan, which authorized judicial officers conducing settlement conferences to require representatives of parties to be available in person or by telephone.

2. Diffferential Case Management

One case management principle identified in the Civil Justice Reform Act which RAND did not evaluate was differential case management ("DCM"). The "essence" of DCM is that,

> different types of cases need different types and levels of judicial management. One way to implement DCM is to create a number of separate 'tracks,' each of which implies a certain approach to case scheduling and management, and to assign cases early to these tracks. [Case Management Evaluation at xvi].

RAND concluded that there was a lack of experimentation with DCM among the ten pilot districts and offered several possible reasons for this:

> (1) the difficulty in determining the correct track assignment for most civil litigation cases using data available at or soon after case filings; and
> (2) judges have possessive desire to tailor case management to the needs of the case and to their style of management rather than having the track assignment provide the management

> structure for a category of cases. [Case Management Evaluation at xvii-xviii].

RAND concluded:

> With respect to the difficulty in determining the correct track assignment for a case, our statistical analysis indicates that the objective data available at the time of filing (such as nature of suit category, origin, jurisdiction, and number of parties) are not particularly good predictors of either time to disposition or cost of litigation. They apparently do not capture the real complexity of the case very well. This does not mean that a track system is not viable; rather, it suggests that if a track model is to be implemented, decisions about track assignments should be supplemented with subjective information from the lawyers or judge. [Case Management Evaluation at xviii].

DCM existed in the District before adoption of the Plan. Each civil action has long been assigned to a particular district judge and magistrate judge on the filing of a complaint, thus insuring uniform management and supervision. Nevertheless, the Plan introduced two litigation "tracks" consistent with the Civil Justice Reform Act. "These recognized that, although many non-arbitration civil cases can be pre-tried within one year of joinder at issue, other cases (which are complex in nature and include intellectual property and environmental matters) require more time as well as greater judicial management." Third Annual Assessment at 12.

In the Third Annual Assessment, both the Advisory Committee

and the magistrate judges recommended that the tracks be abandoned: "It was their sense that the formal designation of non-arbitration civil cases into tracks have proved to be of marginal benefit." This recommendation was rejected by the Court, which deemed the tracks to be "useful classifications for cases of varying complexity and reflecting the District's continued commitment to civil justice reform." Third Annual Assessment at 13 (footnote omitted).

The magistrate judges and the Advisory Committee have again recommended that the tracks be abandoned. Assignment of a particular civil case to either track is based on the nature of the case at time of filing and does not reflect later developments or, for that matter, the complexity or the discovery-related difficulties which might become apparent to a judicial officer during the course of case management. Thus, and to that extent, designation into tracks is arbitrary. Moreover, the magistrate judges and the Advisory Committee are both satisfied that individual judicial officers, in the exercise of their discretion and without regard to the designation of a particular case into one or another track, recognize the complexity of that case and the need for greater (or less) supervision. The magistrate judges and the Advisory Committee also note that its recommendation is consistent with RAND's

comments about DCM. The Court adopts this recommendation and directs the Clerk to issue an appropriate notice for public comment.

3. Model Joint Discovery Plan

Rule 26(f) of the Federal Rules of Civil Procedure requires parties to confer before the initial scheduling conference and submit a discovery plan prior to the conference. The Fourth Annual Assessment reported that the Advisory Committee was drafting a proposed discovery plan to be jointly submitted by the parties. The Model Joint Discovery Plan, which was prepared by the Advisory Committee after consultation with the magistrate judges, appears in the Appendix at _____. It is their expectation, as well as that of the Court, that use of this model plan will facilitate compliance with Rule 26(f) and assist the parties in focusing on matters which must be discussed at the initial scheduling conference.

4. Videoconferencing

In the Second Annual Assessment, it was reported that the Advisory Committee had been given a demonstration of videoconferencing systems. Although the Court was convinced that, at some time, videoconferencing might contribute to the reduction of delay and expense, it concluded that videoconferencing technology did not appear at that time to be

sufficiently developed to be effective. Second Annual Assessment at 23-25 & n.25. That technology is now available.

In June of 1996 the Committee on Court Administration and Case Management of the Judicial Conference of the United States authorized funding for the District of New Jersey to purchase and install videoconferencing equipment and transmission lines in the Camden, Newark and Trenton court houses. This equipment, which is now operational, allows communication with compatible equipment installed in every corrections facility in the State of New Jersey. It is the expectation of the Court and the New Jersey Department of Law and Public Safety that videoconferencing will be utilized in civil cases with incarcerated parties, thereby reducing transportation-related costs for the State as well as security-related costs for both the State and the United States Marshal. It may also be useful for conferences with or by attorneys and, consistent with Rule 43(a) of the Federal Rules of Civil Procedure, for the presentation of testimony.[6] Both the

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[6] Mention should also be made of the use of videoconferencing to conduct the arraignment in United States v. Theodore John Kaczynski. Kaczynski is accused by the United States of being the "Unabomber" and is incarcerated in California awaiting trial there. With the consent of both the United States and the defendant, the arraignment was conducted by Judge Debevoise with the defendant participating via videoconferencing from California. This resulted in a substantial savings of transportation- and security-related costs to the public. It should be noted, however, that this unique arraignment was conducted by consent and is not

Advisory Committee and the Court (through its Committee on Automation and Technology) will continue to investigate and evaluate to new or improving technologies that may contribute to reduction of cost and delay.

B. MEDIATION

One of RAND's tasks was to evaluate alternative dispute resolution ("ADR") programs in six districts.[7] Mediation or early evaluation programs were established in each of these districts. In An Evaluation of Alternative Dispute Resolution Under the Civil Justice Reform Act ("ADR Evaluation"), RAND set forth its assessment:

> Our evaluation provided no strong statistical evidence that the mediation or neutral evaluation programs, as implemented in the six districts studied, significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management. The low completion rate for our litigant surveys does not allow us to confidently make statistical inferences from the litigant data. Our only statistically significant finding is that the ADR programs appear to increase the likelihood of a monetary settlement.

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authorized by any statute or Federal Rule of Criminal Procedure.

[7] These are the Southern District of California, the Eastern District of New York, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania and the Southern District of Texas.

We conclude that the mediation and neutral evaluation programs as implemented in these six districts are not a panacea for perceived problems of cost and delay, but neither do they appear to be detrimental. We have no justification for a strong policy recommendation because we found no major program effects, either positive or negative. This lack of a demonstrated major effect on litigation cost and delay is generally consistent with the outcomes of prior empirical research on court-related ADR.

It is possible that these programs had smaller effects that could not be identified as statistically significant in the sample of cases we studied. Further evaluation, based on a sample that would permit detection of more subtle effects, appears justified.

Given that most mediation and neutral evaluation programs have been in place in federal court for only a few years, refinements should be expected as time progresses. The problems noted by the participants in the ADR sessions suggest the need to consider ensuring that each side has some basic information about the other side's case before the session is held, adjusting the timing of the session to maximize its utility for the case, and enforcing the requirement that the sessions involve not only the lawyers but also those who hold the keys to the litigation's resolution.

Since the time when the cases in our study were referred to ADR, a number of the study districts have changed the timing and method of the referral, the number and type of cases deemed appropriate for inclusion, or the length and timing of the ADR session itself. Perhaps more important, mediators and evaluators have had time to acquire additional experience in conducting the sessions, and judicial officers have become more familiar with the types of cases that would be helped by a discretionary

> referral or by a [sic] firm suggestion to [illegible] to volunteer. The evolution and fine-tuning these ADR programs is an ongoing process.

The Advisory Committee is troubled by the problematic nature of the ADR Evaluation. Nor is the Advisory Committee alone in this regard. In March of 1997, the CPR Institute for Dispute Resolution issued a Statement of Concerns Regarding the Rand ADR Study. The Statement included the following:

> The Rand ADR findings must be understood in the specific context of the six programs studied. The four mediation programs and two neutral evaluation programs examined were neither exemplary nor representative of the 51 mediation and 14 neutral evaluation programs now operating in the federal district courts. The six ADR programs were selected for study only because they were statutory pilot programs and had sufficient ADR caseloads to permit analysis. Moreover, the programs studied were new and examined early, before or as program refinements were underway. In several of the courts studied, substantial revisions to the ADR programs were made after the RAND date were collected.
>
> Since ADR programs vary in almost every aspect of design, implementation, purpose and quality, single and multi-court studies may tell us very little about how another court program-differently designed and operated-works. More than a decade of court ADR research from RAND and other distinguished researchers confirms this observation.
>
> The ADR programs studied also varied vastly in quality. Several had significant design flaws, later corrected, at the time they were studied. Indeed, one of the four mediation programs violated most of what is known about building successful court ADR programs. The

> court required no training for its lawyer-mediators, excluded settlement-empowered clients and insurers from the mediations, and held short and often perfunctory mediation sessions.
>
> Nor was the study environment optimal. Almost all the study courts changed their programs midstream to correct earlier missteps or implemented so many case-management innovations simultaneously that researchers could not effectively control for ADR effects. Comparable comparison cases were also difficult to find in programs where the tough-to-settle cases were routinely referred to mediation.
>
> * * *
>
> Although the RAND study does not provide definitive answers on court ADR's effects on cost and delay, the researchers' massive efforts reveal a huge amount of information about successful and failed court ADR programs. Most significantly, the RAND researchers underscore the critical importance of careful program definition, structure and implementation, as well as sufficient resources and staffing to deliver quality ADR services in the courts. Policy makers should also assess other values informing ADR use in the public justice system, such as its capacity to increase public satisfaction with and confidence in the courts.

The Statement also included these recommendations:

> The Civil Justice Reform Act has resulted in important information from RAND, the Federal Judicial Center and other researchers which should inform decision-making and program building for years to come. In the short-term, however, as the U.S. Judicial Conference and Congress begin to formulate ADR policy, we believe three recommendations bear repeating.

> First, policy makers should evaluate the success or failure of ADR development in the federal courts under the Civil Justice Reform Act on the basis of a full and fair understanding of the available empirical data and other research. The future of ADR programs in the federal courts should not rest on misinterpretations of the RAND ADR findings. ADR policy should be made deliberately and with full consideration of ADR's rich contributions and potential for courts and litigants.
>
> Second, while we await final work on ADR's impact on cost and delay, we know that well-designed and well-implemented court ADR programs offer litigants better quality solutions to litigation and may increase public confidence in and satisfaction with our courts. Mixed cost and delay data should not overshadow these important justice values. Indeed, further and different kinds of research in these areas is required.
>
> Third, high-quality ADR programs need sustained support, professional staffing, and other resources to achieve long-term success and public legitimacy. While the courts have many needs, full and sustained support for ADR programs is essential to integrate ADR processes effectively into a comprehensive justice system. We urge the U.S. Judicial Conference and Congress to provide the resources needed to assure quality ADR programs in the federal district courts.

The Advisory Committee adopts the above comments and recommendations, as does the Court. The Court and the Advisory Committee have done so, in large measure, on the basis of their experience with the mediation program in the District of New Jersey. Our program, incidentally, addresses the "problems"

noted by RAND: There has been discussion within the Co "best" type of civil cases to refer to mediation (see Annual Assessment at 1445); cases are referred to mediation after initial conferences at which magistrate judges have the opportunity to discuss the parties' needs for discovery; mediators have been trained in the mediation process and in the timing of mediation sessions; and party representatives are presumed to attend each session.

The mediation program has been in effect for over five years. Three hundred and one (301) civil cases have been referred to mediation during that time. Thirty-eight (38) of these remain active. The settlement rate is 59%. Although we lack empirical evidence, the anecdotal evidence available to the Advisory Committee and the Court is that attorneys and litigants are satisfied with the mediation process and that mediation conserves resources of both the Court and parties.

The Advisory Committee is of the opinion that judicial and party resources may be further conserved by the early reference of civil cases to mediation. There are two factors present in which foster early reference: (1) the Court has "opted-in" to the 1993 amendments to the Federal Rules of Civil Procedure which, among other things, require that automatic disclosure of certain core information be made by parties (see Rule 26(a)(1) of the

Federal Rules of Civil Procedure); and (2) initial scheduling conferences are conducted expeditiously by the magistrate judges who, among other things, routinely discuss settlement and ADR with counsel. Mediation in the District of New Jersey is flexible. Limited, focused discovery may be conducted as part of the mediation process. Early reference of civil cases to mediation after the exchange of core information and an initial scheduling conference may obviate voluminous discovery, motion practice and trial. As noted in a recent article,

> [e]arly use of ADR can affect the mindset of litigation participants. This does not mean that proceduralism and adversariness will necessarily be avoided in the pretrial process. Indeed, it is a mistake to think of ADR as not being adversarial; attorneys in ADR act as champions of their clients' interests just as they do at trial. But one can be both adversarial and open to cooperative approaches, joint problem solving, and creative solutions. This dimension of ADR could effect the manner in which attorneys evaluate their cases, investigate and prepare the issues, shape their presentations and arguments, and propose settlements within the ongoing litigation process.

Sherman, "The Impact on Litigation Strategy of Integrating Alternative Dispute Solution into the Pretrial Process," 168 F.R.D. 75, 78 (1996). The Court agrees with this recommendation of the Advisory Committee and encourages all judicial officers to consider making early references to mediation.

The Advisory Committee also expressed the need for education efforts to continue. There still appears to be uncertainty among the Bar and parties about mediation and some tendency to confuse mediation with arbitration. Accordingly, as in prior years, the Advisory Committee recommended to the Court that seminars be offered on practice in the District and that these include a strong mediation component. Seminars have been conducted within the past several months in Camden, Newark and Trenton under the co-sponsorship of the Federal Practice and Procedure Section of the State Bar Association, the Association of the Federal Bar and the Court. It is the expectation of both the Advisory Committee and the Court that these seminars will continue to be offered annually.

C. CRIMINAL CASELOAD

The Fourth Annual Assessment made note of "the substantial impact of the criminal caseload on civil justice reform in the District." It also reported on possible means to lessen the impact of the criminal caseload. Fourth Annual Assessment at 16-18.

The District of New Jersey continues to have a substantial criminal caseload. See above at 6-7 and 8. This caseload invariably effects civil case disposition. For example, criminal

trials take priority over civil trials. Despite these constraints, the median disposition time for all civil cases terminated in 1996 was only 7 months, ranking this district behind only 13 others nationwide. See above at 4. The Advisory Committee and the Court are satisfied that, at least under present circumstances, appropriate judicial resources are being devoted to the civil calendar despite the criminal caseload. That this is so is due in large measure to the role of the magistrate judges in the management of civil cases.

D. PRISONER PRO SE LITIGATION

In the Fourth Annual Assessment, the Advisory Committee recommended that a partial filing fee be required of prisoner pro se litigants. However, prior to adoption of the Fourth Annual Assessment, the Prison Litigation Reform Act of 1996 ("PLRA") was enacted into law. For this reason, among others, the Court deemed further consideration of the Advisory Committee's recommendation to be appropriate. Fourth Annual Assessment at 20-27.

The PLRA was enacted as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. 104-134, 110 Stat. 1321 (1996). In Santana v. United States, 98 F.3d 752 (3d Cir. 1996), the court discussed the PLRA as follows:

> Section 804 of the PLRA, which amends 28 U.S.C. § 1915, redefines the rights and obligations of litigants who are granted in forma pauperis status. Prior to the passage of the PLRA, imprisoned litigants who were granted leave to proceed in forma pauperis could seek and easily obtain waivers of filing fees. The PLRA, however, requires prisoners proceeding in forma pauperis who bring 'civil actions' or appeals of 'civil actions' to pay all filing fees. The PLRA also establishes an elaborate deferred payment schedule by which litigants may fulfill their filing fee obligations. If an imprisoned litigant's funds are insufficient to pay the full filing fee, the prisoner must pay an initial partial filing fee. Thereafter, the prisoner must make monthly payments to the court until the filing fee is paid in full. [98 F.3d at 753-54 (footnote omitted)].

From June 1, 1995 to April 30, 1996 (approximately 11 months prior to enactment of the PLRA), 546 prisoner civil rights suits were filed in the Court. From May 1, 1996 to March 31, 1997 (11 months after enactment), 229 were filed. This represents a 58% decrease in prisoner filings. Prisoner complaints are filed after execution of an order granting in forma pauperis status to the prisoner-plaintiff. Among other things, the order may require payment of an initial partial filing fee in addition to monthly payments. A number of prisoner-plaintiffs in the 229 cases filed after enactment of the PLRA have not met one or more of the terms of the order and appropriate action has or will be taken by individual judicial officers.

Both the Court and the Advisory Committee are satisfied that the PLRA has rendered superfluous the partial filing fee proposal made by the Advisory Committee in the Fourth Annual Assessment. The Advisory Committee and the Court will continue to monitor the operation and effect of the PLRA in the District.[8]

E. CERTIFICATION TO THE NEW JERSEY SUPREME COURT

"Certification" is a means by which a federal court may submit an unresolved state law question to the court of last resort of that state. New Jersey is one of only three states which does not have some form of certification (the others being California and Pennsylvania).

In the Fourth Annual Assessment, the Advisory Committee recommended that the New Jersey Supreme Court be encouraged to adopt a certification procedure. The Court adopted this recommendation. Fourth Annual Assessment at 28-29. Chief Judge Anne E. Thompson transmitted this recommendation to Chief Justice Wilentz as well as to his successor, Chief Justice Poritz. Thereafter, Chief Judge Thompson met with Chief Justice Poritz. One of the topics discussed was certification.

In December of 1996, the Court adopted a resolution which

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[8] The PLRA is being monitored on behalf of the Court by its Committee on Pro Se Law Clerks.

urged the New Jersey Supreme Court to establish procedure by adoption of the Uniform Certificat.. of Law Act (1995). This resolution, together with a m.. which discussed certification in some detail, was also transmitted to the New Jersey Supreme Court. In March of 1997 Chief Judge Thompson was advised by Chief Justice Poritz that, after review and discussion, the New Jersey Supreme Court had elected not to consider adoption of a certification procedure.

Both the Court and the Advisory Committee regret this decision. We trust that, in the future, the New Jersey Supreme Court will again address this issue and provide a means by which questions may be certified to it.

IV. CONCLUSION

The Civil Justice Reform Act represents a large-scale experiment in reducing cost and delay in civil litigation. The results of that experiment are now being presented to Congress.

We in the District of New Jersey are confident that our Civil Justice Expense and Delay Reduction Plan, adopted in 1991 and amended thereafter, focuses both the Court and the community on the need to reduce cost and delay and offers a viable means to do so. No doubt other districts have the same opinions of their plans.

In concluding this last annual review, a statement from RAND is worthy of quote:

> One issue that has been raised regarding the CJRA is how appropriate and effective national uniform standardized rules and procedures are. Some people see CJRA as a 'top down' reform started by Congress. Others see CJRA with its local advisory Groups and local rule revisions as an attempt to tailor management to the local legal needs and culture. Our research design did not address the debate over national versus local rules and procedures. Instead, we report here what happened as a result of CJRA and the application of management principles and techniques identified in the Act, and leave it to others to draw conclusions on the uniformity or rules and procedures issue. [Case Management Evaluation at xvi (footnote omitted)].

We urge Congress to give careful consideration to the results of

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its experiment in civil justice reform. We also urge in so doing. to recognize the diversity among the 94 j districts and the appropriateness of allowing those di ...cts to address local problems through local initiatives. ~~Uniformity~~ may serve a legitimate purpose. However, uniformity for its own sake should not be a goal.

Respectfully submitted,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

By: _____
ANNE E. THOMPSON, Chief Judge

[INDEX TO APPENDIX and APPENDIX follows]

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