UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

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July 26, 1993

Mr. L. Ralph Mecham
Director
Administrative Office of the
United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Dear Mr. Mecham:

Enclosed herewith is a copy of the Annual Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania.

Sincerely,

Michael E. Kunz
Clerk of Court

MEK/mcm
Enclosure

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ANNUAL REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

appointed under the

CIVIL JUSTICE REFORM ACT OF 1990

JUNE 1993

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Honorable Edward N. Cahn
Honorable Louis C. Bechtle
Honorable Robert F. Kelly
Honorable James R. Melinson
Michael E. Kunz, *Clerk of Court*

A. Leo Levin, *Reporter*

Jennifer R. Clarke, *Assistant to the Chairman*

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ANNUAL REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990

June 1993

INTRODUCTION

The Civil Justice Reform Act (CJRA) of 1990 requires each United States district court that has promulgated a civil justice delay and expense reduction plan to reassess the state of its docket annually. This review is intended to lead to further action where appropriate, in the interest of reducing "cost and delay in civil litigation" and in improving "the litigation management practices of the court."[1] The statute goes on to provide that in "performing such assessment, the court shall consult" with the advisory group appointed under the Act.[2]

This report is in partial fulfillment of the statutory mandate.

The Civil Justice Expense and Delay Reduction Plan (the "Plan") promulgated by the judges of the United States District Court for the Eastern District of Pennsylvania became effective on December 31, 1991. Allowing for one year of operation under the Plan, the Advisory Group met in January 1993 to consider how best to examine the operation of the Plan during that period, a process that would proceed while the Advisory Group also discharged its statutory obligation to examine the state of both the civil and criminal dockets of the court. The Group met again in May 1993 to analyze the information gained and to develop the major outlines of this report. Further consultation among the members of the Advisory Group continued until the report was completed.

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[1] 28 U.S.C. §475.

[2] Id.

I. Sources of Information

Four primary sources of information served as a basis for the Advisory Group's deliberations. They included data provided by the Clerk of Court, Michael E. Kunz;[3] data generated by a questionnaire sent to approximately 700 lawyers whose names appeared as counsel of record in cases filed after the Plan went into effect; and comment and reactions provided by the judges of the court. Finally, the members of the Advisory Group themselves provided significant input based both on their personal experiences and on what they had learned from colleagues at the bar.

In seeking information about the operation of the Plan and in assessing what was learned, the Advisory Group was guided by what it considered the appropriate function of a first annual follow-up report. The Group's conception of that function is described in the following section.

II. The Limited Function of an Initial Assessment

A. Tinkering, Fine-Tuning, and Emergency Relief

The Rand Corporation, acting under contract with the Administrative Office of the United States Courts and studying the operation of the Civil Justice Reform Act pursuant to statute, has selected the Eastern District of Pennsylvania for intensive study. Rand has developed a far more elaborate study, including an extensive questionnaire, than the Advisory Group could possibly undertake. In due course, Rand will prepare and publish a comprehensive report on the CJRA of 1990, which will include an evaluation of the Eastern District's Plan.

The Advisory Group was well aware of these arrangements. Indeed, we have coordinated our activities with those of Rand, ensuring that the sample selected to participate in our survey would not overlap with Rand's sample, thus avoiding the risk of diminished participation in the more intensive study. Moreover, we replicated the precise method of selecting the sample that Rand used, a procedure easily accomplished because Mr. Kunz and his office were involved in the implementation of each of the surveys. A copy of the protocol setting forth the sampling criteria is found as Attachment 1 (page 13).

We proceeded, nonetheless, to administer and analyze the responses to our own questionnaire for two related reasons. First, we could not delay until the conclusion of the Rand study; the statute requires an annual report. Second, in the view of the Advisory Group it was

[3] As always, Mr. Kunz and his staff were exemplary in generating and analyzing data, providing a small volume of tables, charts and graphs for the use of the Advisory Group.

investigation is warranted. By the same token, individual comments and trends can be useful.

(2) Insights Gained from the Questionnaire

As explained more fully below, we found nothing in the responses of the litigators or in any of the other information available to us that impelled us to suggest immediate changes in the Plan after so brief an experience. Save for the clarification of an ambiguity in the applicability of self-executing discovery, we thought it undesirable to recommend fine-tuning at this juncture. Moreover, a substantial number of the respondents pointed to lack of familiarity with the Plan on the part of attorneys as a source of difficulty, but clearly this should improve with experience. In addition, a minority of respondents, but a minority that should not be ignored, thought that failure to apply the Plan or misapplication of the Plan by judicial officers was a problem. Again, assuming the criticism valid, that might be expected to improve as judicial officers gain experience under the Plan.

Finally, even though we do not recommend formal amendment of the Plan at this juncture, the responses did provide insights and did point to areas in which there appears to be a potential for improvement. We agreed to revisit these issues as we gain more experience with the Plan.

C. An Overall Assessment

Is the Plan working reasonably well? Of the 198 respondents who answered this question, 72 percent responded in the affirmative.[4] No less interesting are the comments of some who responded in the negative, of which the following is typical: "No—but the court is efficient and well-managed anyway."

Those results were mirrored in the responses to a subsequent question: "How does civil litigation in E.D. of Pa. compare to civil litigation before the Plan went into effect?" Almost 60 percent of those responding to this question thought it remained the same. Of those who perceived a difference, more than three to one found conditions "improved" rather than "slower and/or more costly."[5]

The responses of the judges lent support to that conclusion. Suggestions for improvement included, for example, amending the Plan to make explicit that the court can "compel the

[4] Yes: 142; no: 56.

[5] The same: 118; improved: 66; slower and/or more costly: 19.

complexity.[7] Moreover, no decrease in civil filings can account for them.[8]

We do not, however, claim credit solely for the Plan. After all, the filling of four vacancies on the court in 1992 dramatically increased the judicial resources available to process the caseload. With the number of senior judges constant at 11, the number of active judges increased 21 percent during the year. It does appear, however, that at the least this measure of improvement indicates that the Plan is working and apparently working well.

IV. A Look at the Major Innovations

A. Assignment to Management Tracks

The Plan, as promulgated by the court, provided for six management tracks: habeas corpus, social security, arbitration, asbestos, special, and standard. Assignment to the first four involves little, if any, discretion and, as predicted, raised no problems in implementation. The definition of Special Management Track, intended for "complex" cases, was far less precise, and substantial differences in case processing turned on the characterization. For that reason the

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[7] The number of felony criminal filings went up from 23 per judgeship in statistical year 1991 to 32 per judgeship in statistical year 1992. The number of judgeships remained constant. The number of defendants expressed as an average per felony case dipped one-tenth of 1 percent, but was higher than the comparable figure for the four years preceding 1991 (Administrative Office, Management Statistics, 1992).

In its Management Statistics for 1992, the Administrative Office provided two sets of data. The first was based on a twelve-month period ending on June 30 for each year, and the above analysis is based on those data. Indeed, terminating the statistical year on June 30 had been standard practice for some years previous.

In order to allow for an orderly transition to a statistical year that was coincident with the government's fiscal year, which ends on September 30, in 1992 the Administrative Office also presented a table, going back to 1987 to allow for comparative analysis, in which each of the statistical years ended on September 30 rather than on June 30. Use of those data would create some changes in the above presentation and analysis, but not of a dimension to warrant discussing those data as well.

[8] Civil filings per judgeship were down slightly (by three cases per judgeship) but were more than compensated for by the increase in felony filings. Overall terminations were up by a robust 17 percent, and the number of pending cases was down (Administrative Office, Management Statistics, 1992).

The median time from filing to disposition, seven months, remained the same and was the best in the Circuit and seventh nationally (id.). Indeed, at some point speed in disposition becomes excessive.

A table showing the record of the U.S.D.C. for the E.D. Pa. for statistical year 1992, compared with the 10 largest district courts by civil filings, is included at Attachment 3 (page 17).

(2) Postponing Discovery Pending Disclosure

The Plan as promulgated by the court provides that, except by leave of court or agreement of the parties, "a party may not seek discovery before making the disclosures" required of it, nor may it seek discovery from another party "before the date such disclosures have been made by, or are due from, such other party."[10] A major purpose of disclosure as distinguished from formal discovery is to reduce expense. To the extent that disclosure reduces the need for formal and more expensive discovery, this end will be achieved.[11] With this in mind, there is an argument to be made in favor of delaying formal discovery until after disclosure in order to see what the latter has produced. Indeed, the proposed amendments to the national rules of civil procedure provide for greater delay than does the Plan of the Eastern District.[12]

In its initial recommendation, however, the Advisory Group refused to follow the provisions of the then-pending amendment to the national rules, noting that delaying discovery "might impede rather than expedite the forward movement of the litigation."[13]

The court, however, chose to provide for delay in discovery pending disclosure. In practice, difficulties appear to have developed. Delay in the progress of the litigation frequently results, and this delay does not appear to be compensated by the sought-for advantages. Accordingly, a substantial body of opinion among the members of the Advisory Group favors recommending an amendment to the Plan to eliminate this enforced waiting period. This

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[10] Section 4:01(b).

[11] Litigants, in significant numbers, do appear to be making disclosure. Thus, 189 respondents stated that they "had occasion to make disclosure to [an opponent] without awaiting formal requests," and 119 responded affirmatively when asked whether their opponents had done so. These responses, however, do not yet tell us whether the quality of the disclosures was such as to obviate the need for formal discovery with respect to the same subject matter.

[12] The amendment to Fed.R.Civ.P. 26(d) would, in the ordinary situation, preclude discovery until after "the parties have met and conferred as required by subdivision (f)." That meeting is to take place at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). The Advisory Committee notes to Rule 26(f) point out that "Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant."

In any event, the proposed amendment specifically provides that, with respect to disclosure, the national rule gives way to any local rule and the local rule will govern.

[13] Report at p. 80.

year unless and until the Congress provides additional funding.[20]

The suspension of civil jury trials in federal courts for lack of funds to pay juror fees seems almost inconceivable. It has, however, happened in the relatively recent past, resulting in litigation that declared such suspension unconstitutional.[21] Despite that fact, suspension is threatened once again. The details are not unimportant. Some time ago the Judicial Conference of the United States announced that funds for civil jury trials would be exhausted in mid-May and that civil jury trials must therefore be suspended at that time. Thereafter, it was announced that because there had been fewer jury trials than originally projected, sufficient funds were available to avoid suspension in May and jury trials could continue at least into June.[22] There is a measure of irony in the fact that unfilled judicial vacancies, a serious and unfortunate cause of delay to which the Advisory Group referred in its first Report,[23] was the reason for fewer jury trials and thus must be "credited" with preventing a mid-May suspension.

We choose to emphasize the lack of funds for civil jury trials, even though severe problems of underfunding exist in other areas affecting the courts,[24] for several reasons. First, the potential impact of suspending jury trials cannot be overestimated. The Civil Justice Reform Act is premised on the assumption that the problems of delay and expense are so severe that every incremental improvement is important. Upon a moment's reflection, however, it becomes perfectly clear that not every element of a plan can possibly be of equal significance.

Assigning cases to differentiated management tracks, making public reports of judges who have civil motions pending for more than 180 days, and exhorting counsel to attempt to resolve discovery disputes without bringing them to court may all be valuable and worthwhile, but can any one of them, or all in combination, be viewed as having the same impact as calling a halt to civil jury trials for a period of months?

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[20] See "Federal Courts Experience Short-term Fiscal Relief," The Third Branch, vol. 25, no. 5 (May 1993), pp. 1, 4.

[21] Armster v. U.S. District Court, 792 F.2d 1423 (9th Cir. 1986).

[22] See note 20 *supra*.

[23] See pp. xiv, 49–51.

[24] There has been a $55 million shortfall in funds for panel attorneys, and there is also no funding for 35 additional bankruptcy judges. The latter item has not been included in a pending supplemental appropriations bill. See "Federal Courts Experience Short-term Fiscal Relief," note 20 *supra*.

dispositive motions have been decided promptly, 60 respondents answered in the negative. Still others said that it depends on the judge or that it varies. The negative comments constitute almost 45 percent of all respondents who answered the question and did not respond that they were without information.

We make no formal recommendation, nor can we be confident that in every case the negative assessment was justified. But we do not believe that these data should be ignored. Perhaps simply informing the court of these comments may suffice. This is a matter that, in our view, is appropriately left to the court.

CONCLUSION

On the whole, the Civil Justice Expense and Delay Reduction Plan is working well and we find no immediate need to suggest substitution amendments. More significantly, the bar, and the members of the Advisory Group among them, have immense respect for the judges of the Eastern District and appreciation for the exemplary way they process the civil caseload.

ATTACHMENTS

1. *Sampling Criteria for Selection of Cases for the Questionnaire*

2. *Questionnaire Sent to Counsel*

3. *Median Time Intervals from Filing to Disposition and Issue to Trial for the 10 Largest U.S. Courts*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SAMPLING CRITERIA FOR SELECTION OF CASES FOR THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP'S QUESTIONNAIRE

The sampling criteria and procedures which were utilized for the RAND evaluation of the pilot program of the Civil Justice Reform Act were also utilized for the selection of cases for the Eastern District of Pennsylvania's Civil Justice Reform Act Advisory Group Questionnaire. However, we did not send questionnaires on any of the cases which were selected by RAND. These procedures were approved in advance by RAND.

Cases were included from each of the different case management approaches used by this district excluding asbestos cases. Starting with all civil cases filed after December 31, 1991 a total of 840 cases were reviewed in order to select approximately 300 cases that met the sampling criteria. Of the 302 cases which were selected for the sample, 20% were minimal management approach cases which included: prisoner, social security, recovery, foreclosure, forfeiture and penalty, and bankruptcy cases. The remainder of the 302 cases were selected based on the Case Management Track Designation Form. Arbitration management track cases accounted for 20% of the cases, standard management track cases accounted for 40% of the cases and special management track cases accounted for 20% of the cases. A total of 693 questionnaires were sent to attorneys involved in the 302 cases. Any attorney who was involved in more than one case was sent only one questionnaire.

ATTACHMENT 1

ADVISORY GROUP TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Under the Civil Justice Reform Act of 1990

A. AN OVERVIEW

1. Is the Plan working reasonably well?

Yes ☐ No ☐

2. If problems have developed, check each one of the following that is responsible:

☐ Opposing counsel do not cooperate.

☐ Provisions are not familiar to the attorneys and hence are not used.

☐ Failure to apply the Plan, or misapplication of the Plan, on the part of judicial officers.

☐ Other.

3. How does civil litigation in E.D. Pa. compare to civil litigation before the Plan went into effect?

☐ The same ☐ Improved ☐ Slower and/or more costly

B. SPECIFIC PROVISIONS

I. INVOLVEMENT OF JUDICIAL OFFICERS IN THE PRETRIAL PROCESS

1.01 Are trial dates set early in the course of the litigation? Yes ☐ No ☐ N.I.* ☐

1.02 (a) Are trial dates set so that trial takes place within 12 months of filing in ordinary cases and within 18 months of filing in complex cases? Yes ☐ No ☐ N.I.* ☐

(b) If changes in the trial date have been necessary, has the court followed the procedure detailed in the plan? Yes ☐ No ☐ N.I.* ☐

* N.I. = No information

(c) Have dispositive motions been decided promptly? Yes ☐ No ☐ N.I.* ☐

II. CASES ON THE SPECIAL MANAGEMENT TRACK

2.01 Has the court generally followed the provisions of the plan (e.g. staged pretrial conferences, staged discovery, settlement procedures)? Yes ☐ No ☐ N.I.* ☐

III. SELF-EXECUTING DISCLOSURE

3.01 Have you had occasion to make disclosure to your opponent without awaiting formal requests? Yes ☐ No ☐ N.I.* ☐

3.02 Has your opponent done so? Yes ☐ No ☐ N.I.* ☐

3.03 Have you had occasion to enter into cooperative discovery arrangements as envisioned by the plan? Yes ☐ No ☐ N.I.* ☐

3.04 Does the provision postponing formal discovery to allow for disclosure cause delay? Yes ☐ No ☐ N.I.* ☐

3.05 To the best of your knowledge does the rule governing self-executing disclosure appear to be working well? Yes ☐ No ☐ N.I.* ☐

IV. ALTERNATIVE DISPUTE RESOLUTION

4.01 Does court-annexed arbitration need fine-tuning at this time? Yes ☐ No ☐ N.I.* ☐

V. JOINT DISCOVERY - CASE MANAGEMENT PLANS (SPECIAL MANAGEMENT TRACK CASES)

5.01 (a) Is the provision concerning development of joint discovery-case management plans being implemented? Yes ☐ No ☐ N.I.* ☐

(b) In special management track cases is discovery by both parties proceeding simultaneously? Yes ☐ No ☐ N.I.* ☐

VI. REPRESENTATION BY ATTORNEY WITH POWER TO BIND

6.01 (a) Is the provision in the plan authorizing the court to require the presence at pretrial conferences of an attorney with power to bind being utilized? Yes ☐ No ☐ N.I.* ☐

(b) If so, is it working satisfactorily? Yes ☐ No ☐ N.I.* ☐

VII. REPRESENTATIVES WITH AUTHORITY TO SETTLE

7.01 (a) Is the provision authorizing the court to require that representatives of the parties with authority to settle be present or be available by telephone being utilized? Yes ☐ No ☐ N.I.* ☐

(b) If so, are both alternatives (telephone availability and presence) being utilized? Yes ☐ No ☐ N.I.* ☐

(c) Is this provision of the plan working satisfactorily? Yes ☐ No ☐ N.I.* ☐

C. MY RESPONSES ARE BASED ON...

My responses are based on (please check all applicable boxes):

☐ Personal experience litigating

☐ one case ☐ several cases ☐ many cases

which was/were on the

☐ special management track ☐ standard management track ☐ other

☐ Discussion with other lawyers concerning

☐ specific cases ☐ general conditions in the court.

COMMENTS: We welcome any additional comments you may care to make concerning any aspect of the operation of the Plan. (Feel free to use the other side of this sheet or to attach additional sheets.)

If you would prefer to respond by telephone, please let us know and one of us will call you. By the same token, if you would like to share your experiences at a meeting of the Advisory Group, please let us know.

UNITED STATES DISTRICT COURTS
MEDIAN TIME INTERVALS IN MONTHS
FOR THE TEN LARGEST COURTS (BY FILINGS)
AS OF JUNE 30, 1992

CIVIL CASES

DISTRICT COURT	FILING TO DISPOSITION	ISSUE TO TRIAL
ILLINOIS-NORTHERN	5	11
PENNSYLVANIA-EASTERN	7	11
FLORIDA-SOUTHERN	8	13
CALIFORNIA-CENTRAL	6	14
MICHIGAN-EASTERN	7	15
NEW YORK-SOUTHERN	8	19
CALIFORNIA-NORTHERN	8	21
NEW YORK-EASTERN	10	24
NEW JERSEY	7	24
TEXAS-SOUTHERN	11	24

CRIMINAL CASES

DISTRICT COURT	FILING TO DISPOSITION
TEXAS-SOUTHERN	4.1
CALIFORNIA-CENTRAL	4.5
FLORIDA-SOUTHERN	6.3
MICHIGAN-EASTERN	7.2
PENNSYLVANIA-EASTERN	7.4
ILLINOIS-SOUTHERN	7.4
NEW YORK-EASTERN	7.7
NEW YORK-SOUTHERN	7.8
NEW JERSEY	8.7
CALIFORNIA-NORTHERN	9.4

ATTACHMENT 3