1994 ANNUAL ASSESSMENT REPORT OF THE ADVISORY GROUP

NOVEMBER 30, 1994

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO

I. INTRODUCTION

Section 475 of the Civil Justice Reform Act of 1990 requires each United States District Court, in consultation with its Advisory Group, to assess annually the condition of the Court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the Court to reduce cost and delay in civil litigation and improve the litigation management practices of the Court. The *First Report of the Advisory Group* in this District was released Sept. 30, 1993, and this Court adopted its Civil Justice Expense and Delay Reduction Plan on November 30, 1993. This is the first annual assessment of the operation of that Plan.

In summary, the Advisory Group can report that the Court has actively implemented each of the 18 separate points in the Plan. Beyond that, there are both statistics and reports from the trial bar which evidence success being achieved in reducing cost and delay in civil litigation using that Plan. The Advisory Group therefore recommends no modification of the Plan at this time.

II. PURPOSE OF THE ASSESSMENT

The annual assessment should occur a year after the Plan's provisions become operational.[1] Although the statute does not specifically define the purposes of an annual assessment, the Judicial Conference suggests three purposes for the annual review. Those are: "(1) to inform the court itself of the impact of its CJRA plan so it can make adjustments and revisions as necessary; (2) to provide information to other courts and advisory groups who would benefit from analyses made by the courts; and (3) for use by the Judicial Conference in reporting to Congress." The Judicial Conference also recommends examining the "impact of the plan on other elements of importance to the court, attorneys, and litigants, such as the court budget, litigation costs, and attorney, litigant, and judge satisfaction with the programs and procedures adopted."[2]

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1 Robert M. Parker, Judicial Conference of the United States, February 5, 1993 letter regarding "Annual Assessments and Plan Revisions Under the Civil Justice Reform Act of 1990."

2 Id.

III. STATE OF THE DOCKET

A. The Criminal Docket

The number of criminal defendants in the Southern District of Ohio has decreased since Plan implementation. Over a ten-month period in 1992 and 1993, the average number of pending criminal defendants was 446 (*First Report* at 19); for the seven months from April to October, 1994 the average is 360 defendants.[3] Administrative Office of the United States Courts statistics for years ending June 30 reflect, similarly, a drop from 526 defendants in 1993 to 372 in 1994. We attribute most of this change to altered priorities used in selecting cases for prosecution, under guidelines revised during 1993 within the Office of the United States Attorney.

table 1

Southern District of Ohio
Total Number of Pending
Criminal Defendants

CITY	October 1993	April 1994	May 1994	June 1994	July 1994	August 1994	September 1994	October 1994
Cincinnati	85	95	86	87	79	70	70	64
Columbus	204	201	207	204	201	212	212	216
Dayton	80	65	67	72	78	76	82	78
DISTRICT	369	361	360	363	358	358	364	358

[3] The reader may wish to note that at 10/30/94 18% of these defendants are fugitives, imposing little immediate burden on the Court.

The number of pending criminal cases has also dropped. Over a ten-month period in 1992-93 the average of pending criminal cases was 311 cases. [*First Report*, page 20] Through the middle of 1994 the average is 263 pending criminal cases.

table 2

Southern District of Ohio
Total Number of Pending
Criminal Cases

	October 1993	April 1994	May 1994	June 1994	July 1994	August 1994	September 1994	October 1994
Cincinnati	65	80	71	74	71	62	61	55
Columbus	133	125	137	135	133	141	139	137
Dayton	64	52	54	57	64	61	68	64
DISTRICT	262	257	262	266	268	264	268	256

Criminal felony case filings for 1994 appear comparable to 1993, and more in line with the historical averages in this District. [*First Report*, page 16.] There are, of course, still very complex criminal cases being filed, such as the criminal prosecution of a subsidiary of the General Electric Company for alleged price fixing in the industrial diamond market heard in Columbus this fall.

table 3

Total Criminal Filings
(Calendar years 1992, 1993, and through September, 1994)

	1992	1993	9/30/94 Annualized
Cincinnati	151	122	115
Columbus	245	193	199
Dayton	111	93	120
DISTRICT	507	408	434

Distribution of criminal misdemeanor and petty offense filings adds disproportionately to the workload of the Court in Dayton, due to the presence of the Wright Patterson AFB and several other facilities. Thus, over a five year period reported by the Administrative Office the

Columbus docket averaged only six such cases per year, Cincinnati averaged 39, while Dayton averaged 243 misdemeanor and petty offense cases each year.

B. The Civil Docket

The trend in 1994 is toward a modest increase in total civil filings over 1993, when 2632 civil cases were filed. The estimated figure for calendar 1994 is 2704 new civil cases. Progress which the Court has made in keeping its docket moving contributes, no doubt, to an increased willingness among lawyers to bring cases here, as opposed to other Districts or state courts. At least a few reports from members of the bar suggest, moreover, that this District is sometimes preferred when "forum shopping" occurs because this Court has opted-out of mandatory disclosure under Rule 26(a)(1), FRCP.

table 4

Total Civil Filings
(Calendar years 1992, 1993, and through September, 1994)

	1992	1993	9/30/94 Annualized
Cincinnati	1010	906	888
Columbus	1207	1208	1276
Dayton	525	518	540
DISTRICT	2742	2632	2704

Overall, the number of pending civil cases is slightly lower than comparable pre-Plan numbers. [*First Report*, page 24, table 5.] Although in October 1993 immediately preceding Plan implementation there were slightly fewer pending civil cases than at present, that month was aberrationally low.

table 5

Total Number of Pending Civil Cases

	October 1993	April 1994	May 1994	June 1994	July 1994	August 1994	September 1994	October 1994
Cincinnati	923	947	931	894	921	904	880	874
Columbus	1055	1021	1033	1024	1026	1060	1098	1087
Dayton	425	474	496	498	476	469	461	467
DISTRICT	2403	2442	2460	2416	2423	2433	2439	2428

No significant change can be noted in the number of trials held in the Southern District of Ohio attributable to Plan implementation.

table 6

District and Magistrate Judge Trial Activity

	Trials	Days
October 1993	30	60
July 1994	28	51
September 1994	37	62
October 1994	47	83

Deciding bench trials after they are heard is a priority in this District, consistent with the Civil Justice Reform Act. At both reporting dates in 1994, there has been no backlog of bench trials completed and awaiting decision more than six months before any District Judge or Magistrate Judge.

table 7

Bench Trials Submitted More Than Six Months

	3/31/92	9/30/92	3/31/93	9/30/93	3/31/94	9/30/94
District Judges	11	1	0	0	0	0
Magistrate Judges	0	1	1	1	0	0
DISTRICT TOTAL	11	2	1	1	0	0

The number of civil cases pending more than three years has decreased sharply. [See, *First Report* at 27, table 9.] In September 1992, District Judges' dockets included 140 cases pending over three years. By March 1994, that number had been whittled down to only 57 such cases. In the same period, the Magistrate Judges cut their cases pending over three years by over fifty percent. Final figures for September 30, 1994 are unavailable, but preliminary totals show another meaningful reduction in three-year cases.

table 8

Civil Cases Pending More Than Three Years

District Judges

9/30/93	140
3/31/93	107
9/30/93	81
3/31/94	57
9/30/94	*

Magistrate Judges

9/30/92	15
3/31/93	14
9/30/93	14
3/31/94	7
9/30/94	*

IV. IMPLEMENTATION OF THE CJRA PLAN

A. Expediting Motion Practice

A key element of the CJRA Plan established an aggressive goal of deciding motions within 90 days after they are submitted, and as a corollary of issuing dispositive motion rulings in an expeditious manner which minimizes unnecessary trial preparations late in a case. The Plan provision, and a table outlining the significant progress made on motions since Plan adoption appear below.

PLAN POINT NO. I2

> Each judicial officer will set for himself or herself the goal of deciding Motions within 90 days after they are submitted; and the goal of issuing rulings on dispositive Motions not later than one week before the Final Pretrial Order is due to be filed by counsel, provided that the judge has had a reasonable opportunity to rule on the Motion prior to that time.

table 9

Motions Pending Over 2 Months Per Judge[4]

	(as of 7/8/94)	(as of 10/18/94)
District Judge		
Beckwith	148	90
Graham	41	40
Holschuh	123	88
Kinneary	56	54
Rice	189	107
Rubin	39	28
Smith	89	49
Spiegel	177	129
Weber	65	78
Magistrate Judge		
Abel	9	0
Kemp	2	5
King	1	0
Merz	13	8
Sherman	11	13
Steinberg	14	13
DISTRICT TOTAL	977	702

[4] Due to a misunderstanding, these first figures developed by the Clerk tracked pending motions from filing, rather than allowing time for a responsive memorandum and any reply memorandum to be filed. Because briefing normally takes about one month, these figures therefore reflect motions pending two months rather than the Court's goal of three months. The tracking system is being refined and future lists will reflect motions pending three months after briefing and submittal for decision by the Court.

These statistics evidence the serious commitment judicial officers of this Court have made to the implementation of this key element of the CJRA Plan. As part of Plan implementation, the Systems Manager in the Clerk's office in Columbus will regularly generate lists of motions submitted over 90 days, enabling the Court to continue to monitor the motion docket and effectively implement Point 12 of its Plan.

The Civil Justice Reform Act of 1990 focused attention upon motions awaiting decision at 180 days or more. Consistent with this Court's serious focus on motion decisions, reflected in the statistics in table 9 above, the Southern District of Ohio also continues to see a dramatic decrease in the number of motions pending over six months. [See, *First Report* at 25, table 8.] For the District Judges, the number dropped from 285 in March 1992 when statistics first became available to only 27 in March, 1994. Similarly, the number of motions pending over six months for Magistrate Judges dropped from 42 to 10 in the same two-year period. Figures for the most recent tabulation at September 30, 1994 are not yet available.

table 10

Motions Pending Over Six Months

Motions Pending:	6-12 months	Over 12 months	TOTAL
District Judges			
3/31/92	122	163	285
9/30/92	123	176	299
3/31/92	39	31	70
9/30/93	51	21	72
3/31/94	17	10	27
9/30/94	*	*	*
Magistrate Judges			
3/31/92	32	10	42
9/30/92	38	6	44
3/31/93	25	14	39
9/30/93	12	3	15
3/31/94	9	1	10
9/30/94	*	*	*

Point number 13 of the Court's Plan implemented a Recommendation of the Advisory Group that the Court retain Local Rule 7.1(c)(2)(B), first adopted two years before the CJRA Plan at a time when the motion docket was generally moving more slowly. The Local Rule allows parties to consent to transfer motions for decision by a Magistrate Judge if the matter has not been decided within 180 days after submission. This procedure has been used only infrequently due to the great reduction in pending motions noted above. Many believe it preferable for the assigned judicial officer to decide all pending motions whenever possible

rather than to have a case handled on two dockets, since experience suggests this offers the greatest case management efficiency, and the familiarity with a case which a single judge can thereby achieve benefits the parties at other phases as the case progresses through the docket to trial, or other resolution.

B. Alternative Dispute Resolution Programs

In the primary section of the CJRA Plan addressing this subject, the District Judges resolved to retain a flexible approach to ADR. Historically, this Court had been creative and offered a variety of alternative dispute resolution programs to litigants.

PLAN POINT NO. 1

> The Court will continue its commitment to ADR, and to the flexible approach reflected in Local Rule 53.1.

Since Plan implementation, the Court has continued to regularly utilize a variety of ADR procedures, including summary jury trials, Settlement Week mediation conferences, and other forms of mediation. The ruling of the United States Court of Appeals last year, *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993), has apparently not seriously undermined the use of Summary Jury trials, even though it held that the District Courts lack authority to compel participation in such ADR proceedings.

Settlement Week remains a useful technique in the Cincinnati and Columbus locations of Court. During the last year, the Court has examined adding additional "mini" Settlement Weeks, or even having such mediation continuously available as needed to accommodate cases not easily scheduled at the regular Settlement Weeks. Last year the District Judges proposed, as Plan Point 2, to establish Settlement Week as a regular program in the Dayton location of Court. The Court in Dayton is completing planning for its first Settlement Week, to be held during the fourth week of January, 1995.

Plan Point 3[5], adopted the Advisory Group's recommendation that this Court not establish a formal "early neutral evaluation" program. The Court's bar seem to substantially support this position, since they retain the option of suggesting this tool for specific cases.

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[5] Plan Point No. 3: The Court will not adopt any new "early neutral evaluation" program. However, the Judge assigned to any case identified by the Court or suggested by a party at or shortly after filing as being "complex" will consider using ENE in specific cases in which it appears desirable.

C. Civil Case Management

The CJRA Plan opted to retain this Court's commitment to individualized attention to the pretrial management of civil cases, in lieu of establishing some other type of "Differentiated Case Management" (DCM) system. That policy was outlined in Plan Point 4.

PLAN POINT NO. 4

> The Court will continue to give personalized attention by a judicial officer to the pretrial management of each trial-track civil case, and will not adopt a predetermined "Differentiated Case Management" system.

The bar of this Court has strongly supported the Court's action in Point 4.

Although the Court refrained from adopting a predetermined case track system, it sought to provide some mechanism to assure that there was an early means to identify individual cases anticipated to require an unusual amount of pretrial case management.

PLAN POINT NO. 5

> The Court will provide some mechanism by which a party can advise the Court at the earliest stage of a case which appears likely to require unusual types of pretrial attention, or other special handling as a "complex" case. The Court will promptly respond in such cases with as much additional attention as the Court's resources permit and the legitimate needs of the case require. In addition, the Court will consider employing in such cases the "Early Neutral Evaluation" technique or other methods of ADR in addition to those afforded all trial-track cases; and to additional monitoring of discovery, such as requiring an early meeting of counsel, joint preparation of a discovery plan, or other techniques likely to contribute to the cost effective management of the case.

To implement its Plan, the Court developed a simple form to allow counsel to self-identify such "complex" cases. Implementation of both points 4 and 5 has also occurred at pretrial conferences, during presentations at the Court's 1994 Bench/Bar Conference, and at various bar meetings and CLE conferences at which judicial officers have emphasized the Court's desire to receive input and work closely with trial counsel to manage individual cases in the most efficient, cost-effective manner.

D. Local Rules of the District

1. Interrogatories and Requests for Admissions

The Court remains committed to reasonable limitations on the number of Interrogatories and Requests for Admissions, presently 40 unless altered by the Court. Local Rules 33.1 and 36.1. [Plan Point 7] Notwithstanding the fact the limit on Interrogatories is higher than the limit of 25 in newly amended Rule 33(a), FRCP, the bench and bar have had no difficulty with this limit, which conforms to Ohio state court procedure.

2. Discovery Motions

For decades this Court has adhered to the principle that discovery disputes are best resolved by extrajudicial means between counsel. As stated in Plan Point 11, counsel have an affirmative obligation to exhaust all extrajudicial means before involving judicial officers in their discovery disputes, as this has benefits for both litigants and in the overall operation of the Court. Discovery motions must be accompanied by an affidavit from counsel detailing the extrajudicial means used in an effort to resolve the dispute. While such long-standing requirements of this Court now largely duplicate procedures included in recent 1993 amendments to the Federal Rules of Civil Procedure, it is the judgment of the Local Rules Committee of this Court and of this Advisory Group that the Court should, at least for the time being, retain its Local Rules. This duplication will reinforce the importance of such extrajudicial effort upon both the bar and litigants.

3. Class Certification Motions

The Advisory Group recommends that this Court continue to use Local Rule 23.3, a long-standing requirement that a motion for class certification be filed within 120 days unless extended by the Court. Continued use of this Local Rule was addressed in Point 6 of the CJRA Plan. We are aware of no criticism of this Local Rule among the bar, and we believe experience teaches that it helps clarify the responsibility of litigants, and thereby reduces cost and delay in the management of such cases.

E. Utilization of Magistrate Judges

Implementing Plan Point 14, the District Judges have made a concerted effort to inform the bar and litigants of the exceptional skills of the Magistrate Judges in this District. As one example, most of the Magistrate Judges were given significant roles in the Court's well-attended Bench/Bar Conference in May, 1994. During the past year, the number of "consent"

cases increased in both the Dayton and Cincinnati locations of Court, and District-wide such cases comprised between 5 and 6% of the Court's total docket.

As contemplated in Point 15 of the Plan, in May, 1994 the District Court published a 16-page pamphlet which summarizes the civil case "consent" process for trial to a Magistrate Judge, and which provides a photograph and substantial biographical information on each of the six full-time incumbent Magistrate Judges. The Magistrate Judge pamphlet has been widely circulated in this District. As new cases are filed most District and Magistrate Judges either distribute copies, or at least have copies readily available in their chambers and during pretrial conferences. The Advisory Group continues to believe that better educating the bar and litigants to the potential use of the "consent" system and to the top quality individuals who serve this District as Magistrate Judges will continue to increase the use of these officers and the respect which they are afforded.

F. "Voluntary" Discovery/Amended Rule 26

Simultaneously with the adoption on December 1, 1993 of amended Rules 26(a)(1), 26(f), and 26(d), FRCP, the Southern District of Ohio adopted Local Rules opting out of such pretrial procedures. In doing so, this Court acted consistently with Plan Points 8, 9 and 10.

PLAN POINT NO. 8

If Rule 26(a)(1), FRCP, is amended this Court will, at least for the present time enact a Local Rule which provides that "Except as may be agreed by the parties or as Ordered by a Judge of this Court in a specific case, parties are not obligated to provide the initial disclosures prescribed by Rule 26(A)(1), FRCP, as effective December 1, 1993."

PLAN POINT NO. 9

If Rule 26(f), FRCP, is amended, this Court will adopt a Local Rule which provides that "Parties are encouraged, but not obligated except as Ordered by a Judge of this Court, to meet and confer and prepare a joint discovery plan as prescribed by Rule 26(f), FRCP, as effective December 1, 1993."

PLAN POINT NO. 10

If Rule 26(d), FRCP, is amended, this Court will adopt a Local Rule which provides that "Unless otherwise Ordered or agreed by the parties, discovery may begin at any time notwithstanding Rule 26(d), FRCP."

At the Court's Bench/Bar Conference in May, 1994, attorneys were polled by secret ballot about their view on the amendment to Rule 26(a)(1). They voted overwhelmingly (86%) in support of this Court's action to opt-out. Published reports indicate, of course, that the disclosure rule in Civil Rule 26(a) has been suspended, at least in part, in 39 Districts. *Litigation,* Vol. 20, No. 4 (summer, 1994) at 12. Disclosure under other portions of the new amendments to the FRCP has sometimes proven troublesome for the bar in this District. Despite the straightforward "checklist" nature of Rule 26(a)(2)(B), situations have arisen in which expert witness reports must be ordered redone because significant items have not been covered in such reports.

G. Trial Assignments

The Court firmly believes that assigning a reasonably early, meaningful trial date greatly reduces cost and delay in federal litigation. District and Magistrate Judges continue to make every effort to assign such trial dates in the early stages of litigation. Two points in the CJRA Plan focused on this subject.

PLAN POINT NO. 16

The Court will adopt a practice of uniformly assigning a meaningful trial date early in the progress of each civil case.

PLAN POINT NO. 17

As a goal, the Court will attempt to assure that the trial of most non-"complex" civil cases occurs within 18 months after filing.

As part of the Court's effort to implement these points, the Clerk's office developed a computerized monitoring system listing cases which have not gone to trial within 18 months. Such statistics are intended for distribution to all District and Magistrate Judges. Current figures are shown below.

table 11

Cases in which trials have not occurred within 18 months of filing

District Judge	(as of 7/8/94)	(as of 10/19/94)
Beckwith	22	20
Graham	18	15
Holschuh	52	63
Kinneary	37	31
Rice	69	64
Rubin	14	15
Smith	20	19
Spiegel	57	42
Weber	41	36
Magistrate Judge		
Abel	5	3
Kemp	1	1
King	4	2
Merz	5	6
Sherman	13	14
Steinberg	10	8
DISTRICT TOTAL	370	339

Since 85% or more of pending civil cases reach trial or are otherwise resolved within 18 months, the Advisory Group believes the Court is performing well in terms of minimizing delay. Given the complexity of cases frequently filed in the District Court and the often substantially increased demands on lawyers and trial judges in such complex federal civil cases, it is unrealistic to expect any significant increase in this area will necessarily provide a higher yield of justice for litigants.

H. Miscellaneous Provisions

The Court implemented Point 18 of the Plan by holding a biennial meeting focused on relevant substantive and procedural issues, including the Court's CJRA Plan. On May 5-6, 1994 the Court sponsored a Federal Bench/Bar Conference in Columbus attended by 250 participants. At a nominal cost of $120, participants received 6 hours of Ohio CLE credit, a reception for informal conversation among the bench and bar, continental breakfast, and a box lunch. Registrants expressed great satisfaction with the format.

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