UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
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December 30, 1994

Philip Argetsinger, Program Specialist
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Washington DC 20544

Dear Mr. Argetsinger:

Enclosed please find the 1994 Civil Justice Reform Act Annual Report. The Advisory Group of the United States District Court for the Eastern District of Pennsylvania issued this second annual report. It examines developments since the last report, the present state of the court's docket, and the plans of the Advisory Group for the immediate future.

Please contact me if you have any questions or if I can be of assistance to you in this regard.

Very truly yours,

MICHAEL E. KUNZ
Clerk of Court

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

December 1994

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Honorable Robert F. Kelly
Honorable James R. Melinson
Michael E. Kunz, *Clerk of Court*

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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

December 1994

INTRODUCTION

The Civil Justice Reform Act 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, all in the interest of reducing "cost and delay in civil litigation."[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.

Since this is the second annual report of the Advisory Group it may be useful to review the chronology. Our original report, which included a Civil Justice Expense and Delay Reduction Plan for the consideration of the court, was submitted August 1, 1991. That plan, with minor variations, was adopted by the judges of the Eastern District of Pennsylvania, and became effective on December 31, 1991.

The Advisory Group considered it appropriate to allow for one year's operation under the Plan before attempting any assessment of how it was working and what impact, if any, it was having. Thereafter, the Advisory Group did examine the operation of the Plan and the state of the court's docket and in June 1993 issued its first Annual Report.

This second annual report, which is being issued a little over a year later, examines developments since the last report, the present state of the court's docket, and plans of the Advisory Group for the immediate future.

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[1] 28 U.S.C. §475.

[2] Id.

I. THE EASTERN DISTRICT AS A PILOT COURT

The Eastern District of Pennsylvania is one of ten pilot courts, each of which is subject to the terms of Section 105 of the Act.[3] As originally enacted, that section provided that the expense and delay reduction plans implemented by each pilot district should remain in effect for a period of three years.[4]

The three-year period has not yet expired, but it was to have done so before the next report of the Advisory Group. This timetable, however, was changed by statute as this report was being prepared. The effect of the legislation is to extend the three-year experimental period by a year. At the same time, it extends for one year the period during which the Rand Institute for Civil Justice is to complete its study of the pilot courts.[5] Finally, it extends for a like period the date on which the Judicial Conference of the United States is to report to the Congress on the operation of the Civil Justice Reform Act.

The revised schedule thus continues the pilot program until the end of December 1995 and the time for the Judicial Conference to file its report until December 1996. The extension is a reflection of the felt need to allow the experiment to continue for an additional period before attempting to assess and to evaluate its success or lack of success.

Absent strong countervailing considerations, this argues for allowing the plan to remain in place during the full experimental period, i.e. for four years. Of course, as developed more fully below, it has not precluded correcting obvious defects,[6] nor does it argue against in-depth study of how the plan is working.[7]

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[3] P.L. 101-650 (Dec. 1, 1990); 28 U.S.C. §471 note.

[4] §105 (b)(3).

[5] This Report is discussed more fully below.

[6] See discussion below concerning the ambiguity with respect to the operation of the self-executing disclosure provisions in cases assigned to the special management track.

[7] See the discussion below of the study of the operation of self-executing disclosure.

II. SOURCES OF INFORMATION

The Advisory Group had the benefit of three primary sources of information which kept us apprised of developments and provided the basis for our deliberations. First we must credit the Clerk of Court, Michael E. Kunz. He and his associates have provided us with a steady flow of statistics relevant to the disposition of civil litigation in the Eastern District of Pennsylvania: the volumes of filings and terminations, median times to disposition, motions pending in excess of 180 days, nonjury cases awaiting findings of fact and conclusions of law longer than 180 days, data on the operation of the court-annexed arbitration program, and data on the Eastern District's experimental court-annexed mediation program. This information has proved indispensable to the Advisory Group in its efforts to keep abreast of the situation in the district and in the preparation of this Annual Report.

Second, the Advisory Group held a public hearing on May 5, 1994. The hearing was widely publicized and, in addition, invitations were sent to professional as well as civic groups. Eight witnesses appeared and offered testimony. There was a representative of the civil division of the office of the United States Attorney, the chair of the local Civil Rules Advisory Committee, the president of the Philadelphia chapter of the Federal Bar Association, the chair of the Federal Courts Committee of the Philadelphia Bar Association, the president of the Eastern Pennsylvania Chapter of the National Employment Lawyers Association, a practitioner representing insurance interests, the chair of the Alternative Dispute Resolution subcommittee of the Philadelphia Bar Association's Federal Courts Committee and a private litigant.

Finally, the members of the Advisory Group themselves provided significant input based both on their personal experience and on what they had learned from colleagues at the bar. A diverse group of litigators with contacts in virtually all segments of the bar who appear in federal court, the members are sensitive to whatever problems may develop. They also participate in bench-bar programs relevant to our concerns.

Particularly significant is the fact that the judiciary is well represented on the Advisory Group. Chief Judge Edward N. Cahn has been an active participant in our work and the magistrate judges as well as the district judges are also represented.

2. Delayed Dispositions

A major concern of lawyers and litigants is the cases that drag on for many years. The Civil Justice Reform Act of 1990 requires the Director of the Administrative Office to make public twice a year the number and names of all civil cases that have not been terminated within three years of filing, identifying in each instance the judge to whom the case has been assigned.[11] What the statute added was the identification of the judge; the Administrative Office has for many years collected, and published by court, the number and percentage of civil cases not terminated within the three year period.

Measured by this standard, the Eastern District of Pennsylvania has steadily improved and has at this juncture achieved an enviable record. Focusing first on the nonasbestos cases, as of June 30, 1992 there were 109 that had not been terminated within three years. A year later the number was down to 81, and by the end of the last calendar year, December 31, 1993 the figure stood at 67.

As pointed out in last year's Annual Report, this was in marked contrast to the picture two decades earlier, when there were more than seven times as many such cases still pending after three years even though the number of filings was less than half and the number of judgeships a respectable 19.[12]

These data have excluded the asbestos cases, many of which were originally filed in the Eastern District and literally tens of thousands of which were transferred from other districts by the Judicial Panel on Multidistrict Litigation. Cases so transferred are considered terminated in the district of origin at the time of transfer, and are not reflected in the Administrative Office statistics for the Eastern District.[13] However, asbestos cases originally filed in the Eastern District, are not transferred by the Panel and hence no such "termination" is recorded.

As reported by the Administrative Office of the United States Courts, on September 30, 1993 there were 2,562 civil cases, or 29.6% of the caseload, not yet terminated three years after they were filed. A large number of these were, of course, asbestos cases. By September 30, 1994 that number had dropped to 77, or 1.5% of the caseload.

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[11] § 476(a)(3).

[12] 1993 Annual Report,p.4 n.6.

[13] See 1993 Federal Court Management Statistics at 167.

B. Court-Annexed Arbitration

The Eastern District of Pennsylvania was among the first federal courts to make use of court-annexed arbitration. Its experience goes back more than a quarter of a century. The bar has remained unequivocal in its support and all the available evidence points to litigant satisfaction[16] and to reduced litigation expense as a result of the low incidence of trial. When, in developing its plan under the Civil Justice Reform Act, the Advisory Group was obligated to provide for referral of "appropriate cases to alternative dispute resolution programs,"[17] the court's court-annexed arbitration program was included as part of the plan.[18]

Authorization for court-annexed arbitration had expired by virtue of a sunset provision and there was a concerted effort in the Congress to refuse to renew that authorization and thus to bring the program to a close. The basic objection was philosophical: the courts should try cases rather than to encourage litigants to seek alternatives. It seemed strange indeed that the Congress would in one statute encourage the courts to utilize alternative dispute resolution and at the same time seek to restrain or eliminate such use.

The organized bar and the court itself vigorously opposed the effort to abort the program and, ultimately was successful. The compromise, enacted in the last days of the session, renews the authorization for this district's court-annexed arbitration program until the results of the Rand study

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[16] For detailed data on both attorney and litigant perceptions and preferences see Meierhoefer, Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990) 63-83.

For an analysis of the reasons for preferring arbitration, see Hensler, Reforming the Civil Litigation Process: How Court Arbitration May Help 8-9 (1984) quoted in Levin & Golash, Alternative Dispute Resolution in Federal District Courts, 37 U. Fla. L. Rev. 29, 35 and n. 44 (1985). The conclusion may be summed up simply: given a fair hearing before an impartial decisionmaker, litigants and attorneys preferred informal proceedings over more formal mechanisms that involved both greater cost and delay.

[17] 28 U.S.C.§ 473 (a)(6), mandatory on pilot courts.

[18] The Advisory Group also recommended continuation of the court-annexed mediation plan and it, too, has been continued. That program has been the subject of many complimentary references, but it is still in the experimental stage. Much to the court's credit, data are being carefully collected and the program is to be further evaluated.

On the national level, controversy has skirted around the basic concept as well as the details. Moreover, the provision added to Federal Rule of Civil Procedure 26(a) by the amendment effective December 1993, is by its own terms operative only to the extent that it has not been modified or nullified by stipulation, order or local rule. Approximately one-half of the districts have opted out of the Rule 26(a) provision. A substantial number of these, including the Eastern District of Pennsylvania, provide for some form of self-executing disclosure, but prefer their own version to the one set forth in Rule 26(a).

Following promulgation of the local Plan, two issues have been the focus of concern in this district. First, there was some ambiguity about the applicability of self-executing disclosure to complex litigation, cases that had been assigned to the Special Management Track. The Advisory Group, in last year's Annual Report, recommended to the court that it resolve this ambiguity and make clear that the provisions of Section 4:01 of the Plan do not apply to cases assigned to the Special Management Track. The reasoning was simple: special procedures concerning the development of effective plans for discovery are already in place in those cases, and these are expected to incorporate disclosure provisions tailored, in the first instance, by the parties themselves to the needs of the particular case. We are pleased that this ambiguity has been resolved as recommended and that this issue is no longer before us.

The second focus of controversy is the provision of the Plan that delays other discovery until after disclosure. Specifically, the Plan provides that "a party may not seek discovery from any source before making the [mandated] disclosures...and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party."[20]

Those who oppose this provision argue that it delays the progress of the case needlessly. The prevailing practice of serving interrogatories with the complaint, at least in certain types of litigation, is precluded. On the other side are those who argue that the economies contemplated by the rule will not be achieved absent such a postponement.

The Advisory Group early determined that it would be highly desirable to attempt to learn, in a systematic way, precisely how the provisions of the Plan governing disclosure are working, whether there are any discernable benefits -- or detriments. We also wished to gain the benefit of

[20] Section 4:01 (b) of the Civil Justice Expense and Delay Reduction Plan (the "Plan") of the Eastern District of Pennsylvania.

It will be for the Advisory Group to assess the significance of the information developed through these efforts and to determine what recommendations to make to the court.

V. RESOURCES IN TIMES OF AUSTERITY

A. Judicial Resources

In its first report, the Advisory Group focused on judicial vacancies as a major cause of delay in the Eastern District of Pennsylvania. In our 1993 Annual Report we were pleased to report that the court had been brought to full strength in 1992. The figures are dramatic: in statistical year 1991[22] the court operated under the burden of 71.1 vacant judgeship months; two years later, the comparable figure was only 5.6 months. There can be little doubt that the dramatic improvement in the processing of civil litigation must be credited in significant measure to added judicial resources.

It would be wrong to leave the impression that the number of judgeships is so great that the full complement of active judges alone accounts for the happy situation in which the court presently finds itself. Credit should be given to the senior judges for their continuing contribution, which makes it possible for the court to keep abreast of its workload. Their contribution on a national basis has been recognized.[23] What is not always recognized is the fact that without the consistent contribution of the senior judges, the standards being applied for the creation of new judgeships would have to be significantly adjusted.

In order to appreciate why the active judges alone would be hard pressed to cope with the caseload, it is useful to examine some statistics that provide a sense of perspective. In statistical year 1993, the total number of filings per judgeship, (i.e. considering positions to be filled by active, not

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[22] The figures are for the twelve-month periods ending on September 30 of the year indicated. They are taken from 1993 Federal Court Management Statistics published by the Administrative Office of the United States Courts. This is the last compilation that has been published, although selected data for statistical year 1994 have been made available to us and have been cited elsewhere in this report.

[23] See, e.g., Wilfred Feinberg, Senior Judges: A National Resource, 56 Brooklyn L. Rev. 409 (1990); The Third Branch, vol. 26, no.5 (May 1994) p. 1.

constrained to address the then-impending suspension of civil jury trials. Today, our concern is that the clerks' offices in some courts are beginning to experience delays in the processing of court papers due to reduction of staff. We are pleased to report that, albeit with some effort, our clerk's office is making do with available resources.

We are also pleased to report that funding for the automation program, which was in serious jeopardy and which would have had a seriously adverse impact on this district, has been approved by the Congress virtually at the end of the most recent session. We are pleased to record our appreciation.

VI. CONCLUSION

On the whole, the Civil Justice Expense and Delay Reduction Plan is working well in this district. The Advisory Group finds no need to recommend amendment at this time. It is appropriate, however, to record once again the very high regard in which the members of the Advisory Group and, more generally, the members of the bar, have for the judges of the Eastern District of Pennsylvania.

ATTACHMENT

1. Questionnaire on the Self-Executing Disclosure Rule

Questionnaire on the Self-Executing Disclosure Rule

I. As a reminder, the rule for self-executing disclosure is as follows.

> The term "self-executing disclosure" as used in this questionnaire refers to the obligation imposed by Section 4.01 of the Plan promulgated by the United States District Court for the Eastern District of Pennsylvania under the Civil Justice Reform Act of 1990.
>
> That section imposes the obligation on each party to turn over to all other parties, without any formal request having been made, the following: (1) the name and last known address of each person likely to have information relevant to the claims and defenses in the lawsuit; (2) a description of all relevant documents, data compilations and tangible things; and (3) insurance policies that may satisfy any resultant judgment, including making the documents available for inspection and copying.
>
> The provisions of this section do not apply to any cases assigned to the Special Management Track (special procedures govern those cases). For that reason, this questionnaire does not cover what is generally known as "complex litigation."
>
> The terminology has been anything but uniform. What we have termed "self-executing disclosure" is sometimes referred to simply as "disclosure" or "voluntary exchange of information among litigants and their attorneys." It is to be distinguished from "discovery," the process of using interrogatories, depositions, requests for admission, and other formal mechanisms for gaining information from one's adversary.

In thinking about your last case that was concluded at the district court level and to which the promulgated rule governing self-executing disclosure applied:

For Office Use Only
(9)
(10)
(11)

1. Were you on the side of a defendant?

   1. ___ Yes 2. ___ No

2. In which of the following categories was this case (check one)?

   1. ___ Contract-Insurance
   2. ___ Other contract
   3. ___ Personal injury
   4. ___ Tort-Personal property
   5. ___ Prisoner petitions
   6. ___ Other civil rights
   7. ___ Labor
   8. ___ Social Security
   9. ___ Other

3. When was the case terminated?

   1. ___ Before self-executing disclosure
   2. ___ After self-executing disclosure but before full discovery
   3. ___ After full discovery but prior to trial
   4. ___ During the trial
   5. ___ After the trial concluded

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4. How was the case terminated? (12)

   1. ___ By settlement or other voluntary dismissal
   2. ___ By verdict or judicial action

5. How would you characterize **your** level of compliance with the self-executing disclosure rule? (13)

   1. ___ Fully
   2. ___ Partially
   3. ___ Minimally
   4. ___ Not at all

6. Whether or not you complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance **by you** did/would have

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree	
• decrease(d) the time spent on the case.	1. ___	2. ___	3. ___	4. ___	5. ___	(14)
• decrease(d) the cost of litigation to your client.	1. ___	2. ___	3. ___	4. ___	5. ___	(15)
• improve(d) your ability to represent your client.	1. ___	2. ___	3. ___	4. ___	5. ___	(16)

7. How would you characterize **your opponent's** level of compliance with the self-executing disclosure rule? (17)

   1. ___ Fully
   2. ___ Partially
   3. ___ Minimally
   4. ___ Not at all

8. Whether or not your opponent complied with the rule on self-executing disclosure, indicate to what extent you agree or disagree with the following statements: Substantial compliance **by your opponent** did/would have

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree	
• decrease(d) the time spent on the case.	1. ___	2. ___	3. ___	4. ___	5. ___	(18)
• decrease(d) the cost of litigation to your client.	1. ___	2. ___	3. ___	4. ___	5. ___	(19)
• improve(d) your ability to represent your client.	1. ___	2. ___	3. ___	4. ___	5. ___	(20)

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9. Whether or not full self-executing disclosure occurred in this case, if the rule had been followed by both sides, compared to no self-executing disclosure by either side, the outcome of this case would likely have been: (21)

   1. ___ Greatly different
   2. ___ Somewhat different
   3. ___ The same

II. Now think about the self-executing disclosure rule more generally:

1. In how many of your cases that were instituted since the beginning of 1992 did this rule apply? (22)

   ___ 0–5 ___ 6–10 ___ 11–19 ___ More than 20

2. Of these cases, in what percentage was the self-executing disclosure rule followed to any extent by any party? (23)

   1. ___ Less than 10%
   2. ___ 10% up to 30%
   3. ___ 30% up to 70%
   4. ___ 70% up to 90%
   5. ___ More than 90%

3. At the time it became relevant in these cases, what was your knowledge about the self-executing disclosure rule? (24)

   1. ___ Was unaware of the rule
   2. ___ Had general knowledge of the existence of the rule
   3. ___ Had working knowledge of the rule
   4. ___ Knowledge of the rule varied from case to case

4. Which of the following reasons for not following the self-executing disclosure rule would generally apply to you (please check yes or no).

   - Would hurt my case 1. ___ Yes 2. ___ No (25)
   - Did not believe my opponent would comply 1. ___ Yes 2. ___ No (26)
   - Did not believe the judge would enforce it 1. ___ Yes 2. ___ No (27)
   - Did not know the rule 1. ___ Yes 2. ___ No (28)

5. (a) In any case in which you participated, was there a motion for sanctions relating to self-executing disclosure? (29)

   1. ___ Yes 2. ___ No

   (b) Was any such motion granted? (30)

   1. ___ Yes 2. ___ No

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(c) In general, what is your perception of the judges' attitude to the self-executing disclosure rule? (31)

1. ___ Favorable
2. ___ Neutral
3. ___ Hostile
4. ___ Court seemed unaware of rule
5. ___ Varies

6. In applying the self-executing disclosure rule, have you faced any issue of attorney-client privilege or of work product protection? (32)

1. ___ Yes, but easy to resolve
2. ___ Yes, but difficult to resolve
3. ___ No

7. Assuming some kind of self-executing disclosure will remain, what are your feelings about the following?

	Strongly Disagree	Mildly Disagree	Neutral	Mildly Agree	Strongly Agree	
• Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure	1. ___	2. ___	3. ___	4. ___	5. ___	(33)
• Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure.	1. ___	2. ___	3. ___	4. ___	5. ___	(34)
• Define more specifically to what the obligation of disclosure applies.	1. ___	2. ___	3. ___	4. ___	5. ___	(35)
• Expand to what the obligation of disclosure applies.	1. ___	2. ___	3. ___	4. ___	5. ___	(36)

8. What is your opinion of the current self-executing disclosure rule? (37)

1. ___ Strongly in favor
2. ___ Mildly in favor
3. ___ Indifferent
4. ___ Mildly against
5. ___ Strongly against

9. Do you think a self-executing disclosure rule should remain in effect? (38)

1. ___ Yes 2. ___ No

10. Has the obligation to disclose under the self-executing disclosure rule caused any problem with your clients? (39)

1. ___ Yes 2. ___ No

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11. Please indicate any general comments you might have about the self-executing disclosure rule: (40)____

_____ (41)____

_____ (42)____

_____ (43)____

III. At this point we would like to obtain a little background information about you. Please be assured that this information is for survey purposes only, and all such data will be amalgamated across respondents to ensure confidentiality.

1. In what percentage of your cases that were instituted since the beginning of 1992 were you

_____ on the side of a plaintiff? (44,45,46)
_____ on the side of a defendant? (47,48,49)

2. Of the cases you handled in which suit was filed in the Eastern District of Pennsylvania since the beginning of 1992, what were the percentages (to add up to 100%) in the following categories:

_____ Contract-Insurance (50,51,52)
_____ Other contract (53,54,55)
_____ Personal injury (56,57,58)
_____ Tort-Personal property (59,60,61)
_____ Prisoner petitions (62,63,64)
_____ Other civil rights (65,66,67)
_____ Labor (68,69,70)
_____ Social Security (71,72,73)
_____ Other (74,75,76)
_____ **Total (must equal 100%)**

3,. In which category does your age fall? (77)

1. ___ Under 30 years
2. ___ 30–39 years
3. ___ 40–49 years
4. ___ 50–59 years
5. ___ 60 years or over

4. What is your gender? 1. ___ Female 2. ___ Male (78)

5. How many years have you been in practice? (79)

1. ___ Less than 5 years
2. ___ 5–9 years
3. ___ 10–14 years
4. ___ 15–19 years
5. ___ 20–29 years
6. ___ 30 years or over

6. What is the number of lawyers in the firm in which you practice (at all offices)? (80)

___ Fewer than 5 ___ 5–9 ___ 10–29 ___ 30–49 ___ 50–99 ___100 or more