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Civil Justice Reform in the Western District of Missouri

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Congress passed the Civil Justice Reform Act (CJRA) of 1990 out of growing concern about litigation abuse in federal civil lawsuits, increasing cost and delay in those cases, and declining federal court access.[1] The legislation commands every federal district court to promulgate a civil justice expense and delay reduction plan by December 1993. The statute also creates a demonstration program and designates the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri as courts that are to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution."[2]

In October 1991, the Western District of Missouri established an Early Assessment Program (EAP) as a demonstration project. Under that three-year experiment, which began in January 1992, the court automatically assigns approximately one-third of its civil caseload to some form of alternative dispute resolution (ADR). Moreover, the Western District recently completed an evaluation of the first year of experience with the EAP.

Because the CJRA's implementation is a significant attempt to decrease expense and delay in civil litigation and because experimentation, especially with ADR, in the Western District of Missouri comprises an important constituent of the national endeavor, civil justice reform in the Western District warrants examination. This Essay undertakes that effort. The Essay initially describes the origins and development of civil justice reform. It then analyzes implementation in the Western District of Missouri, emphasizing the court's experience with ADR. The piece concludes with suggestions for future experimentation.[3]

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*Professor of Law, University of Montana. The Author thanks Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are the Author's.

1. *See* Judicial Improvements Act of 1990, 28 U.S.C. §§ 471-482 (Supp. II 1990).

2. Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(b)(2), *reprinted in* 28 U.S.C. § 471 note (Supp. II 1990).

3. This Essay emphasizes the 1990 statute and its implementation although the paper briefly treats executive branch civil justice reform. Civil justice reform, particularly in 1993, is quite dynamic. The May publication date of this essay meant that little which happened after February is included here.

I. ORIGINS AND DEVELOPMENT OF CIVIL JUSTICE REFORM

A. Civil Justice Reform Under the 1990 Statute

The background of civil justice reform warrants relatively limited exploration here as the reform's history has been treated elsewhere.[4] Congress enacted the Civil Justice Reform Act of 1990 because it wished to combat growing abuse in civil suits, particularly during discovery; escalating expense of resolving those actions; and shrinking access to the federal court forum.[5] For at least fifteen years, numerous federal judges had argued that the federal courts were experiencing a litigation explosion and mounting abuse of the discovery and litigation processes.[6]

The Act requires all ninety-four federal district courts to promulgate a civil justice expense and delay reduction plan by December 1993.[7] The purposes of the plans "are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolutions of civil disputes."[8] Every district court is to develop a plan after examining a report and recommendations that an advisory group has assembled for the district.[9]

Those groups, which the courts appointed within ninety days of the statute's enactment, were to be "balanced," including attorneys and people who are representative of litigants who are involved in the districts' civil cases.[10] The CJRA mandates that the groups fully analyze the courts' civil and criminal dockets and designate the principal sources of cost and delay in the courts as well as trends in the filing of suits and demands placed on the districts' resources.[11] In drafting recommendations, the groups must consider

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4. *See, e.g.*, Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105; Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992).

5. *See* 28 U.S.C. §§ 471-482 (Supp. II 1990); *see also* SENATE COMM. ON JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 101-416, 101st Cong., 2d Sess. 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804-05 (relevant legislative history); *see generally* Peck, *supra* note 4.

6. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975); Dissent From Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980); *see generally* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).

7. *See* Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1), *reprinted in* 28 U.S.C. § 471 note (Supp. II 1990).

8. *See* 28 U.S.C. § 471 note (Supp. II 1990).

9. *See id.* § 472.

10. *See id.* § 478(b).

11. *See id.* § 472(c)(1).

the needs and circumstances of the courts, the districts' litigants, and parties' counsel and insure that all three contribute significantly to decreasing expense and delay, thus facilitating federal court access in civil cases.[12] Once the groups submit their reports and suggestions to the districts, the courts are to scrutinize them and confer with the groups.[13] The districts then must take into account, and may adopt, the eleven principles, guidelines and techniques listed in the Act and any other procedures that they believe will reduce cost or delay.[14]

1. Early Implementation

a. EIDCs

Thirty-five advisory groups tendered reports and recommendations to their courts before December 31, 1991, and thirty-four districts promulgated plans by this date to qualify for designation as Early Implementation District Courts (EIDCs).[15] The Advisory Group for the Western District of Missouri completed its report and suggestions on December 23, 1991,[16] and the court adopted its civil justice expense and delay reduction plan on April 30, 1992.[17] The Judicial Conference of the United States Committee on Court Administration and Case Management completed its statutory duty to evaluate the plans that the thirty-four districts issued and officially designated them as EIDCs in July 1992.[18] The remaining advisory groups and courts are proceeding with their planning, but the Western District of Missouri was one

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12. *See id.* § 472(c)(2)-(3).

13. *See id.* § 472(a).

14. *See id.* § 473(a)-(b).

15. *See* Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing EIDCs); *see also* Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, §§ 103(c), 105(b), *reprinted in* 28 U.S.C. § 471 note (Supp. II 1990).

16. REPORT OF THE ADVISORY GROUP, CIVIL JUSTICE REFORM ACT OF 1990, W. DIST. OF MO. (Dec. 23, 1991) [hereinafter REPORT].

17. U.S. DIST. CT. FOR THE W. DIST. OF MO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Apr. 30, 1992) [hereinafter W. DIST. OF MO. PLAN]; *see also* Letter from Howard F. Sachs, then Chief Judge, United States District Court, Western District of Missouri, to Carl Tobias (Mar. 16, 1992) (explaining progress on plan's adoption) (on file with the Author).

18. *See, e.g.*, Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to James DeAnda, Chief Judge, United States District Court for the Southern District of Texas (July 30, 1992) (on file with the Author); Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Bruce S. Jenkins, Chief Judge, United States District Court for the District of Utah (July 30, 1992) (on file with the Author); *see also* 28 U.S.C. § 474(b) (Supp. II 1990) (statutory duty of Judicial Conference).

of only two districts which adopted civil justice plans in 1992.[19] Relatively few courts apparently will issue plans before the December 1993 deadline.

Thorough assessment of the civil justice expense and delay reduction plans that the EIDCs developed is not warranted in this Essay. Nonetheless, it is possible to afford a general overview and particular examples of those specific components of early civil justice planning that are relevant to the civil justice reform endeavors that have been, and will be, undertaken in the Western District of Missouri.

Numerous EIDCs, relying on the reports and recommendations of, and conferring with, their advisory groups, apparently conducted the type of self-analyses and prescribed the kinds of procedures that Congress envisioned. The courts seemed attentive to the CJRA's goals of reducing cost and delay in civil litigation, carefully assessed their civil and criminal dockets, and took into account and adopted, as indicated, the principles, guidelines and techniques included in the CJRA.[20]

A number of mechanisms with which the EIDCs have been experimenting are identical or similar to procedures in the civil justice plan for the Western District of Missouri. Nearly every EIDC has been employing measures that are intended to foster the settlement of civil cases. A significant way in which the courts promote settlement is through using various forms of alternative dispute resolution (ADR). For example, the Southern District of West Virginia has been designating numerous civil cases appropriate for mandatory mediation.[21]

Sanctions are an additional procedure that quite a few EIDCs around the country have made an important component of their civil justice planning efforts. A number of these courts provide for the imposition of sanctions on parties or attorneys who fail to satisfy certain requirements included in their

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19. *See* W. DIST. OF MO. PLAN, *supra* note 17; U.S. DIST. CT. FOR THE W. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 30, 1992); *see also infra* notes 42-43 and accompanying text.

20. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF MASS., EXPENSE AND DELAY REDUCTION PLAN (Nov. 18, 1991) [hereinafter DIST. OF MASS. PLAN]; U.S. DIST. CT. FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 1991) [hereinafter DIST. OF MONT. PLAN].

21. *See* U.S. DIST. CT. FOR THE S. DIST. OF W. VA. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 81-84 (Dec. 1991) [hereinafter S. DIST. OF W. VA. PLAN]; *cf.* U.S. DIST. CT. FOR THE N. DIST. OF CAL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9-17 (Dec. 1991) (providing numerous ADR options and exploring possible expansion of the present ADR program).

civil justice plans.[22] The Massachusetts District even considers negligent violations of its strictures to be punishable with sanctions.[23]

Numerous EIDCs have adopted a discovery provision which resembles a procedure which has been, and will be, significant to civil justice reform in the Western District of Missouri.[24] These courts have required that parties undertake reasonable efforts to resolve discovery controversies with their opponents before filing formal discovery motions with judges.[25]

Some EIDCs have instituted different measures to expedite the resolution of summary judgment motions. For instance, the Montana District has required litigants to take certain actions, namely specifically identifying particular facts, that are intended to assist the court in ascertaining whether genuine issues of fact exist.[26] A number of EIDCs, including the Southern District of West Virginia, impose page limitations on supporting memoranda and briefs.[27] Other EIDCs employ techniques intended to expedite court rulings on summary judgment motions. For example, when judges in the Northern District of West Virginia do not decide these motions within thirty days, the discovery period is tolled for the time that the ruling exceeds thirty days.[28]

Several EIDCs have relied on the setting of early trial dates to reduce delay in civil cases.[29] A few EIDCs have prescribed early designation of expert witnesses.[30] Some EIDCs have specifically provided for social

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22. *See, e.g.*, U.S. DIST. CT. FOR THE S. DIST. OF IND., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (Dec. 31, 1991) [hereinafter S. DIST. OF IND. PLAN]; U.S. DIST. CT. FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5 (Dec. 17, 1991) [hereinafter E. DIST. OF N.Y. PLAN].

23. *See* DIST. OF MASS. PLAN, *supra* note 20, at 67.

24. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 4.

25. *See, e.g.*, U.S. DIST. CT. FOR THE S. DIST. OF ILL., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 14 (Dec. 27, 1991) [hereinafter S. DIST. OF ILL. PLAN]; U.S. DIST. CT. FOR THE DIST. OF WYO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13 (Dec. 1991).

26. *See* DIST. OF MONT. PLAN, *supra* note 20, at 20; *cf.* S. DIST. OF W. VA. PLAN, *supra* note 21, at 79-80 (similar requirements).

27. *See* S. DIST. OF W. VA. PLAN, *supra* note 21, at 79; *accord* S. DIST. OF ILL. PLAN, *supra* note 25, at 18.

28. *See* U.S. DIST. CT. FOR THE N. DIST. OF W. VA., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 80-81 (Dec. 1991); *cf.* E. DIST. OF N.Y. PLAN, *supra* note 22, at 9 (when motion has been pending for more than six months, clerk shall contact chambers to ascertain status and report findings to parties).

29. *See, e.g.*, U.S. DIST. AND BANKR. CT. FOR THE DIST. OF IDAHO, REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE 3 (Dec. 19, 1991); U.S. DIST. CT. FOR THE DIST. OF ORE., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4 (Dec. 30, 1991) [hereinafter DIST. OF ORE. PLAN].

30. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF DEL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (Dec. 23, 1991); *cf.* DIST. OF MASS. PLAN, *supra* note 20, at 37 (pre-discovery disclosure must include report of experts to be called at trial).

security appeals, often placing them on special tracks, which limit the cases' procedural opportunities.[31] Numerous EIDCs have adopted various measures to treat prisoners' hearings. For example, the New Jersey District's civil justice plan considers any prisoner with more than $200 in his or her prison account ineligible to proceed *in forma pauperis*.[32]

A number of EIDCs have invoked additional measures that appear less advisable as a matter of authority or policy. An especially troubling authority question is whether and, if so, the extent to which districts can adopt local rules that conflict with the Federal Rules of Civil Procedure. The most explicit enunciation of this idea is in the civil justice plan for the Eastern District of Texas which states that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."[33] Numerous other courts have been less clear. Quite a few districts did promulgate prescriptions that contravene the Federal Rules, the major example of which is provision for mandatory pre-discovery disclosure that is premised on a 1991 proposal to revise certain Federal Rules which has now been superseded.[34]

The implementation of civil justice reform has also proceeded less smoothly than it could have. There seems to have been less interdistrict and intradistrict interchange and cooperation than Congress envisioned. Because the thirty-four EIDCs were working simultaneously, the courts apparently had fewer opportunities for exchange and dialogue. Within a number of districts, all constituents of the bar were not actively involved in the civil justice planning effort, and there was relatively little interaction between some advisory groups and the local rules committees.[35]

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31. *See, e.g.*, DIST. OF MONT. PLAN, *supra* note 20, at 34; DIST. OF ORE. PLAN, *supra* note 29, at 11.

32. *See* U.S. DIST. CT. FOR THE DIST. OF N.J., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 23 (Dec. 19, 1991).

33. U.S. DIST. CT. FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (Dec. 20, 1991); *see generally* Tobias, *supra* note 15, at 51, 52 n.15.

34. *See, e.g.*, S. DIST. OF ILL. PLAN, *supra* note 25, at 11-14; U.S. DIST. CT. FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13-15 (Dec. 31, 1991); *see also* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 16, 26, *reprinted in* 137 F.R.D. 53, 83-84, 87-88 (1991). The Civil Rules Committee reversed direction on this issue twice in two months. *See* Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 12. In September 1992, the Judicial Conference sent to the Supreme Court a proposal covering mandatory pre-discovery disclosure. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS OF FEDERAL RULES OF CIVIL PROCEDURE 16, 26 (Sept. 1992).

35. This assessment is based on correspondence and conversations with many individuals involved in civil practice planning and civil justice reform efforts under the CJRA and the Executive Order.

b. Implementation Subsequent to Plan Adoption

After a district promulgates a civil justice expense and delay reduction plan, the court must annually evaluate the condition of its dockets to determine whether there are additional steps that it could initiate to decrease cost and delay and to improve litigation management.[36] A comparatively small number of courts have completed these annual assessments.[37] In fairness, numerous EIDCs that adopted plans in late 1991 made their requirements effective in 1992.[38] Accordingly, these courts could be waiting until they have experimented for a year and have gathered all of the relevant data before completing annual analyses. The later that EIDCs conclude the assessments, of course, the more difficulty districts that are finalizing their plans will have capitalizing on the evaluations.

c. EIDC Oversight

Oversight of the CJRA's effectuation in the EIDCs has not been especially rigorous.[39] The major explanation for this seems to be that Congress chose entities to monitor implementation that might be reluctant to scrutinize the EIDCs and assigned the instrumentalities very general responsibilities. It is not surprising that most of the circuit review committees, which include the chief circuit judge and every chief district judge in each circuit, would not closely assess the civil justice plans, much less make many recommendations for modifying them.[40] Analogous factors apply to the

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36. *See* 28 U.S.C. § 475 (Supp. II 1990).

37. *See, e.g.*, U.S. DIST. CT. OF N.J., ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 IN THE DIST. OF NEW JERSEY (Dec. 22, 1992) [hereinafter N.J. ANNUAL ASSESSMENT]; ANNUAL REPORT OF WESTERN DISTRICT OF WISCONSIN ADVISORY GROUP (Jan. 8, 1993). This estimate is based on correspondence and conversations with many persons who are familiar with implementation in the EIDCs.

38. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN AND RELATED AMENDMENTS TO THE RULES OF PROCEDURE (effective Apr. 1, 1992); *cf.* Letter from Patrick F. Kelly, Chief Judge, United States District Court for the District of Kansas, to Carl Tobias (Feb. 1, 1993) (describing preparation of assessment and projecting spring publication) (on file with the Author).

39. The Author relies substantially here on Tobias, *supra* note 15, and Tobias, *supra* note 4, at 511-12. *See generally* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

40. *See, e.g.*, Letter from Steven Flanders, Circuit Executive, United States Court of Appeals for the Second Circuit, to Carl Tobias (Apr. 14, 1992) (Circuit Executive reviewed plans, recommended approval to judicial council, and "this was accomplished by mail") (on file with the Author); REPORT OF FOURTH CIRCUIT REVIEW COMMITTEE (Mar. 31, 1991). *But see* NINTH CIRCUIT CJRA REVIEW COMMITTEE REPORT (Apr. 14, 1992). *See also* 28 U.S.C. § 474(a) (Supp. II 1990) (circuit review).

monitoring that the Judicial Conference Committee on Court Administration and Case Management conducted.[41]

2. Civil Justice Planning Outside the Context of EIDCs

Those districts that did not qualify for designation as EIDCs have continued to engage in civil justice planning. The Western District of Missouri and the Western District of Texas were the only courts which promulgated civil justice plans during 1992,[42] while there were only a small number of districts in which advisory groups published reports in 1992.[43] It is difficult to ascertain exactly the speed with which civil justice reform will proceed in 1993. The pace of planning probably will accelerate during the year although many districts may not promulgate plans much earlier than the December 1993 statutory deadline.[44]

This situation presents some significant difficulties. The later in 1993 that advisory groups tender reports and suggestions and districts adopt plans, the less likely it is that the remaining non-EIDCs will be able to profit from the prior endeavors. This problem could be ameliorated because the Judicial Conference recently circulated a model plan that includes numerous procedures which EIDCs prescribed.[45] Late promulgation of reports and plans will also hinder attempts to implement expeditiously those plan provisions that require revisions in current, or the issuance of new, local rules.[46]

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41. *See, e.g.*, Letters, *supra* note 18; Memorandum on Civil Justice Reform Act Implementation from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Chief Judges, United States Courts of Appeals, Chief Judges, United States District Courts, Chairs, Advisory Groups (Oct. 22, 1992) (on file with the Author); *see also* 28 U.S.C. § 474(b) (Supp. II 1990) (Judicial Conference review).

42. *See supra* notes 17, 19 and accompanying text; *see also* U.S. DIST. CT. FOR THE DIST. OF N.M., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Jan. 1993).

43. *See, e.g.*, U.S. DIST. CT. FOR THE E. DIST. OF LA., REPORT OF THE ADVISORY GROUP (Dec. 1992); REPORT OF THE ADVISORY GROUP OF THE U.S. DIST. CT. FOR THE MID. DIST. OF N.C. (Dec. 10, 1992); U.S. DIST. CT. FOR THE N. DIST. OF OKLA., REPORT OF THE ADVISORY GROUP (Dec. 1992); REPORT OF THE ADVISORY GROUP OF THE U.S. DIST. CT. FOR THE MID. DIST. OF PENN., APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 1, 1992); REPORT OF THE ADVISORY GROUP ON LITIGATION COST AND DELAY FOR THE U.S. DIST. CT. FOR THE E. DIST. OF TENN. (Dec. 18, 1992); U.S. DIST. CT. FOR THE N. DIST. OF TEX., CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE REPORT (May 7, 1992); *see also* U.S. DIST. CT. FOR THE S. DIST. OF IOWA, REPORT OF THE ADVISORY GROUP (1993).

44. *See* Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1), *reprinted in* 28 U.S.C. § 471 note (Supp. II 1990). This calculation is based on conversations with numerous persons involved in civil justice reform.

45. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 1992).

46. The Montana District required several months to revise its rules. The Author assumes

B. Executive Branch Civil Justice Reform

On October 23, 1992, President George Bush signed Executive Order 12,778, which was intended to facilitate the just and efficient resolution of civil cases in which the United States government participates.[47] In January 1992, the Justice Department promulgated a memorandum providing preliminary guidance for federal agencies and government lawyers on the Order's requirements that cover the conduct of civil suits in which the government is involved.[48]

The principal components of the Order are meant to change how government attorneys "conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases."[49] The Department of Justice announced that it would finalize this guidance after it received comments in July 1992 from agencies and government counsel regarding their experiences with the requirements.[50] In the concluding days of the Bush Administration, the Justice Department issued final guidelines which minimally altered the preliminary guidance.[51] All government attorneys, including lawyers in federal agencies, in the Justice Department and in the ninety-four local United States Attorneys Offices, were to implement Executive Order 12,778 and the accompanying guidance. An informal survey indicates that the reform's effectuation has been quite limited and checkered.[52] For example, lawyers in agencies, the Department, and United States Attorneys Offices have varied considerably in the rigor and seriousness with which they implemented executive branch reform. The reform's future is also unclear because the Clinton Administration has not decided whether it will retain the reform and, if so, how the reform will be implemented.[53]

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that courts will implement their plans through the local rules and not treat the plans as self-executing. *Cf.* 28 U.S.C. § 2071(e) (1988) (provision for emergency adoption of local rules).

47. *See* Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991). The Author relies substantially here on Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. (forthcoming June 1993).

48. *See* Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778, *reprinted in* 57 Fed. Reg. 3640 (1992); *see generally* Tobias, *supra* note 4, at 512-15.

49. *See* Memorandum, *supra* note 48, at 3640-41.

50. *Id.* at 3640.

51. *See* Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778, *reprinted in* 58 Fed. Reg. 6015 (1993).

52. This assessment is based on correspondence and conversations with many individuals involved in civil justice reform efforts under the CJRA and the Executive Order. *See also* Memorandum, *supra* note 51, at 6015-16 (discussion of effectuation).

53. President Clinton has not changed President Bush's Executive Order; however, the Clinton Administration apparently has made no affirmative decision about executive branch reform. *Cf.* Carl Tobias, *Litigating With Justice: A Civil Agenda*, LEGAL TIMES, Dec. 28, 1992,

The Bush Administration also drafted a legislative proposal for civil justice reform, premised on the recommendations of the Council on Competitiveness Working Group on Civil Justice Reform, which appear in that group's August 1991 report titled *Agenda for Civil Justice Reform in America.*[54] Senator Charles Grassley and Representative Hamilton Fish introduced this legislation in February 1992.[55] The bill includes procedures that resemble those prescribed in the CJRA or effectuated under the statute or that are in Executive Order 12,778 while other features of the measure, such as its provision for fee shifting in diversity cases, are controversial.[56] These factors, the Bush Administration's defeat, and the Clinton Administration's likely opposition to the legislation mean that the proposal probably will not pass in 1993.[57]

In short, thirty-four EIDCs have been implementing procedures meant to reduce expense and delay for over a year while almost all of the other federal trial courts are continuing to formulate civil justice plans that they must issue by December 1993. Although the Judicial Conference did not officially designate the Western District of Missouri as an EIDC, the court has been experimenting for nearly as long as most of the EIDCs. The next section descriptively analyzes civil justice reform in the Western District.

II. IMPLEMENTATION OF CIVIL JUSTICE REFORM IN THE WESTERN DISTRICT OF MISSOURI

A. Introduction

Many features of civil justice reform's effectuation in the Western District of Missouri, both pursuant to the CJRA and involving the executive branch, are identical, or similar, to much implementation nationwide. For example, government attorneys have undertaken little implementation of

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at 22 (suggesting that the Clinton Administration vigorously implement executive branch reform); *see generally* Tobias, *supra* note 47.

54. *See* COUNCIL ON COMPETITIVENESS WORKING GROUP ON CIVIL JUSTICE REFORM, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991).

55. *See* S. 2180, 102d Cong., 2d Sess. (1992); H.R. 4155, 102d Cong., 2d Sess. (1992).

56. *See* S. 2180, 102d Cong., 2d Sess. § 102 (1992) (fee-shifting provision). *Compare* S. 2180, 102d Cong., 2d Sess. § 104 (1992) (requiring that plaintiffs afford potential defendants written notice of their claims before filing) *with* Exec. Order 12,778 § 1(a), 56 Fed. Reg. 55,195 (1991) (similar requirement).

57. Indeed, Congress did not schedule a hearing on the bill in 1992. Near the end of the last session of Congress, Senator DeConcini introduced legislation to create a national commission on civil justice reform. *See* S. 3333, 102d Cong., 2d Sess. (1992). He intended the bill to "address the inability of the current administration and Congress to develop a comprehensive legislative proposal for civil justice reform." 138 CONG. REC. S16994 (daily ed. Sept. 30, 1992) (statement of Sen. DeConcini).

executive branch reform in the district although some Assistant United States Attorneys have participated in the EAP.[58] Moreover, the Western District, like all ninety-four trial courts, appointed its advisory group within ninety days of the statute's enactment.[59]

This Essay emphasizes below the Western District of Missouri's efforts to implement civil justice reform through its civil justice plan. The Author descriptively assesses particular dimensions of effectuation which are most significant or controversial, commenting only on the aspects that are very important or interesting. Although the Advisory Group compiled an excellent report and recommendations, this Essay does not stress them. The court relied substantially on the report and suggestions in issuing its civil justice plan, but that plan includes the provisions which are being applied to civil litigation in the Western District and they have been in effect for more than a year.[60]

B. Descriptive Analysis of Early Implementation

1. Advisory Group Efforts

The Advisory Group for the Western District of Missouri apparently complied with all of the statutory requirements, such as the commands that it thoroughly assess the court's dockets and identify the major causes of expense and delay as well as trends in case filings and in demands imposed on the district's resources.[61] The Group determined that delay was not a substantial difficulty; however, it designated six areas in which the court might make improvements and offered a number of recommendations meant to address the problems discovered.[62]

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58. This assessment is premised on conversations with individuals who are familiar with civil justice reform in the Western District. Because there has been so little implementation, additional treatment is not warranted in this Essay. *See also supra* notes 47-53 and accompanying text.

59. Telephone conversation with Jerome T. Wolf, Esq., Spencer, Fane, Britt & Browne, Kansas City, Mo., Advisory Group Chair, United States District Court for the Western District of Missouri (Feb. 17, 1993).

60. The Author is not being critical of the Group's efforts, which were valuable and are continuing, especially in the area of assessment. The plan and its implementation are simply more important at this juncture of the reform.

61. *See* REPORT, *supra* note 16, at 9-19; *see also supra* notes 11-12 and accompanying text (statutory requirements).

62. *See* REPORT, *supra* note 16, at 7-8, 28-40.

a. Areas of Difficulty

The Group found evidence that dispositive motions are not resolved promptly enough, which can lead parties and lawyers to undertake expensive preparation for litigation that could have been avoided.[63] The Group identified three sources of this complication: counsel file dispositive motions on the eve of trial, the lack of uniform formatting that clearly designates evidence showing that no genuine issue of material fact exists, and the failure of the court to rule promptly.[64]

The Advisory Group concluded that litigants do not regularly exchange essential information at an early phase of civil cases.[65] This difficulty impairs the ability of parties to evaluate fairly and competently their cases, which correspondingly delays meaningful negotiations over settlement until late in the litigation.[66]

The Group determined that incarcerated individuals pursue many cases in the district and that a number of these suits are brought by pro se plaintiffs and involve problems of security and cost.[67] The Group also found that social security appeals present particular difficulty, requiring specialized medical knowledge, which relatively few law clerks possess.[68]

The Group concluded that the "sixty-day rule," requiring the quarterly submission to the Eighth Circuit of a "report showing the number of motions which were more than sixty days past due," did not always clearly reflect which motions were being rapidly processed.[69] Moreover, the Group ascertained that delay was not a major problem in the Western District, but the Group observed that litigation's expense could remain excessive because the litigation process is costly, regardless of how effectively courts manage it.[70]

b. Recommendations

The Advisory Group suggested that the Western District adopt a number of proposals to treat the complications that it had discovered. Perhaps most important was the Group's recommendation that the court include in its civil justice plan the Early Assessment Program which the District had promulgated

63. *Id.* at 7; *see also infra* notes 73-76 and accompanying text.
64. REPORT, *supra* note 16, at 7, 37-38.
65. *Id.* at 7; *see also infra* notes 81-83 and accompanying text.
66. REPORT, *supra* note 16, at 7.
67. *Id.*; *see also infra* notes 77-78 and accompanying text.
68. REPORT, *supra* note 16, at 7; *see also infra* notes 79-80 and accompanying text.
69. REPORT, *supra* note 16, at 7.
70. *Id.* at 7-8.

on October 31, 1991,[71] because the court ultimately made that program the centerpiece of the civil justice reform effort.[72]

The Group offered several suggestions for addressing the difficulties posed by dispositive motions.[73] It proposed that the court hold hearings on motions for summary judgment within sixty days of the filing of responses[74] and that the court state when it would rule if the judge did not rule from the bench.[75] The Group also recommended that the District create a uniform format for motions and that the court be permitted to specify when motions could be filed.[76]

The Group's suggested response to the problems of cases that prisoners file was the purchase of video equipment which would link the Missouri State Penitentiary with the federal courthouse in Jefferson City.[77] When appropriate, this would allow litigants and witnesses in these suits to testify or appear from the prison, thereby saving the expense of having them come to the federal courthouse.[78]

In response to the difficulties that social security appeals present, the Advisory Group offered two solutions. First, it recommended that the court hire a permanent law clerk who possesses medical expertise to handle the appeals.[79] If the District deemed that suggestion infeasible, the Group proposed that the court prescribe procedures for sending appeals directly from the administrative tribunal to the Eighth Circuit.[80]

The Advisory Group made several additional recommendations which seem less important. It suggested that the Western District provide for early trial settings.[81] Those settings foster prompter disposition by encouraging litigants to begin discovery early and to focus quickly on the significant issues

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71. *Id.* at 8, 28-32; *see also* U.S. DIST. CT. FOR THE W. DIST. OF MO., EARLY ASSESSMENT PROGRAM, COURT-APPROVED GENERAL ORDER (Oct. 31, 1991) [hereinafter EAP ORDER]; *infra* notes 85-101 and accompanying text.

72. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 2 ("major component of this Court's plan is an Early Assessment Program"); *see also infra* note 105 and accompanying text.

73. *See supra* notes 63-64 and accompanying text.

74. *See* REPORT, *supra* note 16, at 8, 34.

75. *Id.*

76. *Id.* at 8, 33-36.

77. *Id.* at 8, 40.

78. *Id.* at 40.

79. *Id.* at 8, 39-40.

80. *Id.* at 8, 40. The Group concluded that district court treatment of appeals is duplicative because the court is reviewing the administrative record and because litigants have a right of appeal to the circuit court. Moreover, direct appeal to the appellate court would resolve disputes more promptly for litigants in "particular need of a quick and low-cost resolution." *Id.* at 40. However, the district court lacks authority to order direct appeals when jurisdiction in the trial court is statutorily prescribed. *See* 42 U.S.C. § 405(g)-(h) (Supp. II 1990).

81. REPORT, *supra* note 16, at 8, 38-39.

in cases, thus preventing the postponement of meaningful settlement negotiations.[82] A related proposal called for the district to require that parties identify their experts and complete expert depositions early in the case.[83] The Group also suggested that the court preclude litigants from filing discovery motions until they had attempted to resolve discovery controversies in telephone conferences with the judge.[84]

2. Early Assessment Program

The Western District formally adopted an Early Assessment Program by general order on October 31, 1991.[85] The EAP became effective on January 1, 1992, and is functioning on an experimental basis until December 31, 1994, at which time the program will be evaluated to ascertain its success.[86] The purposes of the EAP are to encourage parties to (1) confront the issues and facts in their suits before participating in costly and time-consuming procedures; (2) participate in early discussion of relevant issues; (3) consider opponents' perspectives; (4) take into account the projected expense of future proceedings in an attempt to settle litigation before attorneys fees and costs complicate settlement; and (5) consider techniques apart from formal litigation to resolve cases.[87]

The court is randomly assigning to the EAP one third of all civil suits filed in the Western Division of the Western District except excluded categories of cases.[88] The second group of civil actions has been participating in the EAP, if the Project Administrator chooses the lawsuit for the program and the litigants concur,[89] while the third set of civil cases comprises a control group, which is exempt from automatic employment of ADR.[90]

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82. *Id.* at 38-39.

83. *Id.* at 39.

84. *Id.* at 8, 39.

85. *See* EAP ORDER, *supra* note 71. That Order with minor modifications appears as Exhibit A to the Western District of Missouri civil justice plan. *See* W. DIST. OF MO. PLAN, *supra* note 17, Exhibit A; *see also infra* note 104 (minor modifications). The analysis of the EAP in this subsection cites to the Exhibit and relies on the description of the program in the Advisory Group Report.

86. EAP ORDER, *supra* note 71, at 1.

87. *See* W. DIST. OF MO. PLAN, *supra* note 17, Exhibit A, at 1; *see also* REPORT, *supra* note 16, at 29.

88. *See* W. DIST. OF MO. PLAN, *supra* note 17, Exhibit A, at 1. The court excludes multidistrict cases, social security appeals, bankruptcy appeals, habeas corpus actions, prisoner pro se cases, class actions and student loan cases. *Id.* Kansas City, Missouri, is the major metropolitan area in the Western Division.

89. *Id.* at 2. The Project Administrator, whom the court selected, is primarily responsible for running, coordinating and evaluating the EAP. *Id.* at 4.

90. *Id.* at 2. Litigants in these cases may ask the Administrator to include them in the EAP

The Project Administrator has been conducting an early assessment meeting within thirty days of completion of responsive pleadings for those cases that the district has automatically assigned to the program.[91] During this session, the Administrator advises the litigants and counsel of the ADR options that are available.[92] Moreover, the Administrator ascertains whether additional discovery is necessary and, if so, works with the litigants to create an informal plan for exchanging significant information and completing important discovery so as to facilitate meaningful settlement negotiations.[93]

The Administrator has also been assisting parties in identifying areas of agreement and exploring the prospect of settling the litigation with mediation.[94] If the parties agree at the time or later to mediate, the Administrator serves as mediator for the process.[95] Should the litigants reject this alternative, the parties must choose nonbinding arbitration, outside mediation, early neutral evaluation (ENE), a settlement conference with a magistrate judge, binding arbitration, or some additional ADR mechanism.[96] When the litigants have been unable to agree on an ADR procedure, the Administrator has selected a method.[97]

Notice of participation in the EAP is accorded to attorneys of record, and the lawyers who attend sessions must be counsel with primary responsibility for handling the trial.[98] Notice is given to parties, who have been required to attend assessment meetings, so that they can articulate their positions and hear their opponents' views and so that someone with authority to enter into stipulations and commit to settlement is present.[99]

Communications in EAP sessions have not been divulged or been employed for any purpose in pending or future court proceedings.[100] If litigants do not make good faith efforts to participate in the EAP in accord with the provisions and spirit of the General Order, the court is authorized to impose sanctions on them.[101]

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or voluntarily agree to participate in ADR on their own. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2-3.

97. *Id.* at 3.

98. *Id.* at 3, 5.

99. *Id.* at 4-5.

100. *Id.* at 5-6. The EAP makes certain exceptions, primarily to enhance the program's purposes. *Id.* at 6.

101. *Id.* at 15.

3. The Western District's Civil Justice Expense and Delay Reduction Plan

The en banc court for the Western District of Missouri promulgated its civil justice plan on April 30, 1992.[102] The judges premised the plan on their consideration of the Advisory Group's report and suggestions and relied substantially on the recommendations in selecting specific procedures.[103] The court proposed changes in several of the local rules to effectuate the plan's provisions and promulgated amendments on September 1, 1992, after providing notice and public comment.[104] The judges characterized the EAP as the "major component" of the civil justice plan, and they made minor modifications in the program that the court had adopted on October 31, 1991.[105]

The Western District included a number of procedures in its plan, which the judges based on suggestions of the Advisory Group.[106] An important example of this is the court's adoption of procedures, which are intended to expedite the disposition of motions, primarily for summary judgment.[107] The judges prescribed a standard format, which requires litigants to provide independently numbered paragraphs setting out every disputed and undisputed fact and relevant citations to the record; this format will assist the court in ascertaining whether there are genuine issues of material fact.[108] The Western District restricted all suggestions supporting or opposing motions to fifteen pages and reply suggestions to ten pages because it believed that reducing the papers' length would expedite the resolution of motions.[109] When the judges will not decide summary judgment motions within sixty days of the filing of final reply suggestions, the plan prescribes the scheduling of

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102. *See* W. DIST. OF MO. PLAN, *supra* note 17.

103. *Id.* at 2.

104. *See id.* at 3 (proposed changes); THE KANSAS CITY DAILY RECORD, Aug. 5, 1992, at 1 (provision for notice and public comment); W.D. MO. LOCAL R. 13G, 15G(4)(5), M(2) (amendments). The promulgation of amendments is important because it avoids the difficult question of whether the plan should be considered self-executing and provides notice and opportunity to comment.

105. The court's decision to add student loan cases to the list of those excepted is typical. *Compare* W. DIST. OF MO. PLAN, *supra* note 17, at 2, *with* EAP ORDER, *supra* note 71, at 1.

106. The procedures are discussed here in the order in which they were discussed above, rather than in the order they appear in the plan.

107. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 4-5; *see also supra* notes 73-76 and accompanying text (Group's suggestions).

108. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 4; *see also supra* note 76 and accompanying text (similar Group suggestion).

109. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 5. Litigants can seek "leave of court to the contrary." *Id.* The Advisory Group made no recommendation as to page limitations. *See* REPORT, *supra* note 16.

oral argument on the motions at the earliest feasible time.[110] If the court does not resolve motions during oral argument, it will inform counsel when to expect a decision.[111]

The Western District subscribed to the Advisory Group's recommendation regarding prisoners' hearings by stating that the court would request funding to install video equipment in the Jefferson City courthouse.[112] The judges similarly adopted one of the Group's proposals respecting social security appeals by observing that it would seek resources from the Administrative Office of the United States Courts to hire a law clerk possessing medical expertise to process the appeals.[113]

The court incorporated in its plan several less significant suggestions that the Advisory Group made. The Western District stated that the court's judges are committed to establishing early trial settings whenever possible, making provision for this goal in Local Rule 15.[114] The District also included the Group's proposals recommending that parties identify experts and conclude expert depositions early in lawsuits.[115] The court concomitantly subscribed to the Group's suggestions regarding resolution of discovery controversies through telephonic conferences because the judges believed that such conferences would resolve the disputes without necessitating additional action.[116]

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110. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 5; *see also supra* note 74 and accompanying text (similar Group suggestion).

111. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 5; *see also supra* note 75 and accompanying text (similar Group suggestion).

112. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 6; *see also supra* note 77-78 and accompanying text (similar Group suggestion).

113. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 5-6; *see also supra* note 79 and accompanying text (similar Group suggestion). The plan does not mention a second Group suggestion. *See supra* note 80 and accompanying text.

114. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 3; *see also supra* notes 81-82 and accompanying text (similar Group suggestion).

115. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 5; *see also supra* note 83 and accompanying text (similar Group suggestions).

116. *See* W. DIST. OF MO. PLAN, *supra* note 17, at 4; *see also supra* note 84 and accompanying text (similar Group suggestion). The plan's conclusion stated that the court would continue consulting with, and seeking input from, the Group on possible procedures for reducing expense or delay while continuing to study, analyze and implement procedures for decreasing cost and delay without sacrificing the quality of judicial determinations. W. DIST. OF MO. PLAN, *supra* note 17, at 6.

C. *Annual Report for the Early Assessment Program*

On January 26, 1993, the individuals responsible for the Early Assessment Program submitted an annual report on the EAP to the judicial officers of the Western District.[117] The report included preliminary EAP termination statistics, a summary of the responses of 102 lawyers to the EAP attorney questionnaire, and a list of the presentations that the individuals had given to publicize the program.[118]

The authors of the report cautioned that the termination statistics were preliminary.[119] Nonetheless, those writers expressed optimism about the EAP's effectiveness, observing that thirty-seven percent of the cases automatically assigned to the program had terminated in comparison with twenty-seven percent of the suits which were not included in the EAP.[120]

Because a relatively small number of cases has participated in the EAP, there are insufficient data on the type and timing of terminations to permit very definitive conclusions.[121] For example, nearly identical numbers of the lawsuits assigned to the EAP and those cases opting into the program terminated as suits not assigned to the EAP and cases not opting in, but the percentage of the former set was substantially higher than the latter group.[122]

The data also show that the EAP Administrator conducted 131 initial and 61 follow-up early assessment meetings.[123] There were only four magistrate judge settlement conferences and three early neutral evaluations apparently because litigants were reluctant to choose alternatives in which they must pay to participate.[124] The data indicate as well that seventeen percent of that

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117. KENT SNAPP & DAVIS LOUPE, 1992 EARLY ASSESSMENT PROGRAM REPORT (Jan. 26, 1993) [hereinafter EAP REPORT]; *see also supra* note 36 and accompanying text (annual assessment requirement).

118. *See* EAP REPORT, *supra* note 117. The EAP personnel gave thirteen presentations, primarily to bar groups, private firms and law schools. Those presentations, which constitute the type of outreach effort that can be important to securing cooperation in new programs, such as ADR, warrant no additional treatment here.

119. *See* Cover Memorandum, EAP REPORT, *supra* note 117; *see also* Preliminary Early Assessment Program Termination Statistics, EAP REPORT, *supra* note 117 [hereinafter Termination Statistics].

120. *See* Cover Memorandum, EAP REPORT, *supra* note 117; *see also* Termination Statistics, *supra* note 119, at 1. The ten percent differential might not seem compelling. It actually indicates, however, that nearly forty percent more cases had terminated. Telephone conversation with Davis Loupe, EAP staff (Feb. 17, 1993).

121. *See* Termination Statistics, *supra* note 119, at 2.

122. Seventy-four of 240 (31%) cases in the first group and 71 of 362 (19.6%) cases in the second group were voluntarily dismissed. *Id.*

123. *See* Early Assessment Meetings, Termination Statistics, *supra* note 119, at 2.

124. *See id.* (four settlement conferences and three ENEs); telephone conversation, *supra* note 120 (apparent reason for low numbers).

one-third of the civil cases which could opt in chose to do so and that the percentage nearly doubled between June 30, 1992, and December 31, 1992, figures which seem to demonstrate that parties are "voting with their feet" for the program.[125]

The individuals responsible for the EAP circulated a survey on the program to lawyers and reported on the results gleaned from 102 responses.[126] The individuals were encouraged that ninety percent of the attorneys "would volunteer an appropriate case for the" EAP and that eighty-nine percent believe that the program ought to be continued.[127] Thirty-seven percent of the respondents found that the EAP was very helpful in moving a case toward resolution, and thirty percent found it somewhat helpful, while twenty-five percent thought that the program had no effect on the suit.[128] Of those eighty-seven percent of the lawyers whose clients attended the early assessment meetings, fifty-one percent believed that the client's presence helped resolve the case, but forty-two percent thought it had no effect.[129]

The survey asked attorneys thirteen questions about the EAP's value, most of which queries were premised on the purposes articulated for the program.[130] For example, twenty-seven percent of the lawyers found the EAP to be very helpful in encouraging the litigants to consider techniques other than litigation for resolving their cases, and twenty-eight percent believed the program somewhat helpful although forty-one percent thought that it had no effect.[131] Perhaps most interesting, a majority of the respondents found the EAP to be very or somewhat helpful in all of the additional areas surveyed except for encouraging earlier discovery and improving relations between the litigants.[132]

The instrument also asked attorneys whether they agreed or disagreed with fifteen statements, principally regarding the EAP Administrator's handling of the early assessment meeting, their opponent's participation in the

125. *See* Opt-Ins/Opt-Outs, Termination Statistics, *supra* note 119, at 2; Percentage of "B" Cases Opting In, Termination Statistics, *supra* note 119, at 3; telephone conversation, *supra* note 120 ("voting with feet").

126. *See* Early Assessment Program, Attorney Survey Results, EAP REPORT, *supra* note 117 [hereinafter Survey].

127. *See* Cover Memorandum, EAP REPORT, *supra* note 117.

128. *See* Survey, *supra* note 126, at 1.

129. *Id.* at 2.

130. *Id.* at 3; *see also supra* note 87 and accompanying text (EAP purposes).

131. Survey, *supra* note 126, at 3.

132. *Id.* The last question, which asked whether the EAP was helpful in "reducing the costs to resolve this case," is important because it is one of the few queries that elicits information on expense rather than delay reduction. Thirty-five percent found the program very helpful, 21% considered the EAP somewhat helpful, 20% believed the program was somewhat detrimental, and 19% thought it had no effect. *Id.*

session, and the meeting's effectiveness.[133] The respondents favorably evaluated the program Administrator and the session's effectiveness.[134]

Finally, the survey posited several questions about the overall impressions of the lawyers and their clients of the EAP. Seventy-five percent of the attorneys considered participation's benefits to outweigh the costs, fifty-seven percent found that the procedures used were very fair to their clients, forty-six percent believed that their clients liked being involved in the EAP, while twenty-three percent thought their clients were very satisfied and thirty-three percent thought their clients were somewhat satisfied with the program.[135]

Mr. Davis Loupe, an individual with important responsibilities for the EAP and its assessment, offered two additional perceptive observations. Mr. Loupe thought that the District should seriously consider the adoption of a mechanism that would allow the Project Administrator to screen and facilitate the resolution of cases that essentially raise questions of law.[136] He also believed that the EAP needed better procedures for insuring the attendance at early assessment meetings of individuals with settlement authority.[137]

In sum, the Western District of Missouri has been experimenting since January 1992 with an Early Assessment Program, focused primarily on encouraging parties to participate in ADR. The court has been experimenting with several additional procedures since April 30, 1992, when it adopted a civil justice expense and delay reduction plan. The final section of this Essay affords suggestions for the future.

III. SUGGESTIONS FOR THE FUTURE

A. Introduction

The comparatively modest nature of the civil justice reform endeavor undertaken in the Western District and the relatively brief period during which the court has been implementing its civil justice plan complicate efforts to offer well-informed recommendations for the future. The Early Assessment Program has been operating for little more than a year while most of the remaining procedures in the civil justice plan have been in effect for a shorter period and are less ambitious. Moreover, it is difficult to evaluate the efficacy, especially in reducing expense and delay, of either the EAP or the

133. *Id.* at 4.

134. *Id.* The respondents evaluated their opponents somewhat less favorably. *See id.*

135. *Id.* at 5.

136. Telephone conversation, *supra* note 120. Many of these cases would be appropriate for summary judgment motions.

137. *Id.*; *cf. infra* notes 142-43 and accompanying text (reluctance to employ sanctions to insure attendance).

plan procedures. Notwithstanding these complications, it is possible to provide some ideas relating to future experimentation.

B. General Suggestions

The Advisory Group and the court apparently complied with all of the CJRA's requirements.[138] Although the statute fails to state clearly whether the civil justice plans are self-executing, the Western District properly considered its plan to be self-executing and wisely proposed amendments in relevant local rules to implement the plan.[139]

The EAP seems to be a responsive general approach for discharging the District's statutorily assigned duty to "experiment with various methods of reducing cost and delay in civil litigation, including" ADR.[140] The program is apparently working smoothly and achieving reasonably well its expressly articulated purposes.[141] The court has rarely, if ever, invoked the sanctioning provision for parties' failure to participate in the EAP in good faith; the judges apparently have not needed to do so because of the high level of cooperation by litigants and because judges may be reluctant to sanction parties, lest that activity discourage litigants' participation.[142] The judges should remember that both involvement in the program and the threat of sanctions can disadvantage resource-poor litigants who may be unable to afford the costs of participation, much less of sanctions.[143]

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138. *See, e.g., supra* notes 59, 61, 102 and accompanying text.

139. *See supra* note 104 and accompanying text. Some districts apparently have considered their plans self-executing, which can create problems involving notice and enforcement. *See* Tobias, *supra* note 39, at 1419 n.128; *see generally supra* note 46 and accompanying text.

140. *See supra* note 2 and accompanying text; *see also supra* notes 85-101, 105, 117-34 and accompanying text (EAP as general approach).

141. *See supra* notes 130-32 and accompanying text; *see also supra* note 87 and accompanying text (EAP's purposes).

142. Telephone conversation, *supra* note 120 (rare sanctioning and explanations therefor). *But cf.* Survey, *supra* note 126, at 4 (sixteen percent strongly agreed or agreed that some parties did not participate in good faith).

143. *See, e.g.*, Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); *see generally* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89).

C. Specific Suggestions

The procedures prescribed in the plan, which the District promulgated on April 30, 1992, should be efficacious. The provisions made for expediting rulings on summary judgment motions, such as standard formatting of briefs and requiring the court to specify when it intends to rule, ought to facilitate the resolution of motions.[144] The page limitations imposed on supporting papers may be too restrictive in certain cases although parties may seek the court's permission to exceed the limitations when necessary.[145] The provision made for prisoners' hearings could effect savings, but the district must be careful to insure that restrictions on testifying in person do not jeopardize prisoners' rights.[146] The court's decision to request funding for the employment of a law clerk with medical expertise to process social security appeals seems advisable although a judicial officer must render final decisions in those cases.[147]

The prescription for early trial settings and the requirements governing early designation of expert witnesses and their depositions should reduce delay and perhaps decrease some costs.[148] Moreover, the provision for judicial officers to resolve discovery disputes through telephone conferences should save time and money that would otherwise have to be spent on formal discovery.[149]

The court's annual report is a helpful source for assessing the effectiveness of the EAP.[150] It would be valuable to know whether the program as a whole and its specific procedures, particularly various forms of ADR and the sanctioning provision, actually reduced delay or expense although this is exceedingly difficult to analyze. The District's limited evaluation of the procedures, such as early trial settings and telephonic conferences, included in the plan complicates efforts to ascertain how the measures have worked in practice, but the court intends to analyze them after it has had a year's worth of experience.[151]

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144. *See supra* notes 107-08, 111 and accompanying text.

145. *See supra* note 109 and accompanying text.

146. *See supra* note 112 and accompanying text. The Author merely means to suggest that live testimony might be more persuasive. *See id.*

147. *See supra* note 113 and accompanying text; *see also* 42 U.S.C. § 405(g)-(h) (Supp. II 1990) (judicial officer must decide social security appeals to the district court). The court similarly lacks authority to order direct appeals to the circuit court. *See id.* § 405(g); *see also supra* note 80.

148. *See supra* notes 114-115 and accompanying text.

149. *See supra* note 116 and accompanying text.

150. *See supra* notes 117-37 and accompanying text.

151. Telephone conversation, *supra* note 120.

D. Longer-Term Suggestions

The district judges, the Advisory Group, and the EAP personnel should seriously consider whether any modifications in the procedures in the EAP or the civil justice plan are warranted and whether any new procedures should be prescribed. When experimenting with the measures that are already in effect, the District should collect and evaluate relevant data on efficacy and make those adjustments which will improve the procedures. For instance, the New Jersey District, in conducting its first annual assessment, found the development of joint discovery plans too time-consuming and expensive to warrant their preparation in noncomplex cases and fine tuned its civil justice plan by excusing those suits from compliance.[152]

The court, the Group, and the EAP employees might consult several sources for measures that could prove efficacious if applied in the Western District. One is the efforts of the EIDCs. The model plan, which the Judicial Conference issued in mid-1992, collects the procedures that many of these courts adopted.[153] An especially valuable source may be the work of the other demonstration districts, particularly those courts that have been experimenting with ADR. For example, the effort to expand the ambitious ADR program in the Northern District of California will be informative.[154] The Western District should also examine the civil justice plans that the remaining courts promulgate by the December 1993 deadline. Once the District has gathered, analyzed, and synthesized all of this material, it should be able to ascertain whether any additional modifications in its plan are warranted and to implement those changes as indicated.[155]

IV. CONCLUSION

Nascent implementation of the Civil Justice Reform Act of 1990 seems to have proceeded smoothly in the Western District of Missouri. The Early Assessment Program, which is the keystone of the court's efforts, apparently is saving some money and time while lawyers and litigants in the district seem increasingly comfortable with ADR. The specific procedures in the court's civil justice plan, although less ambitious than the EAP, also appear to be decreasing expense and delay. The assessment of implementation undertaken to date has been instructive; however, evaluation should be expanded. The Western District should continue experimenting vigorously with the EAP and

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152. *See* NEW JERSEY ANNUAL ASSESSMENT, *supra* note 37, at 20.

153. *See supra* note 45 and accompanying text.

154. *See supra* note 21.

155. *See supra* note 36 and accompanying text (statutory provision for annual assessments and modifications).

specific procedures in its plan, ought to explore broadly experimentation in other federal districts, should rigorously analyze its own efforts, and ought to make necessary adjustments while prescribing new efficacious procedures. If the court implements these suggestions, it should be able to realize reductions in expense and delay in civil litigation.