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SILVER LININGS IN FEDERAL CIVIL JUSTICE REFORM

*Carl Tobias**

INTRODUCTION

Many observers, including most of the participants in the civil litigation symposium, have levelled considerable criticism at the Civil Justice Reform Act of 1990 ("CJRA" or "Act") and its implementation. This criticism—which encompasses numerous phenomena, as abstract as constitutional theory and as pragmatic as numerical limitations on interrogatories—emanates from several quarters and ranges across the political spectrum. For example, one respected commentator has strongly argued that the statute violates constitutional separation of powers and predicted that the legislation will change civil procedure as it has existed for the last half-century.¹ Some individuals involved in federal civil litigation, including members of the federal bench, have suggested that political factors substantially affected the measure's enactment.² Numerous critics believe that the statute was unnecessary or ill-conceived because, for example, it focuses too narrowly on

* Professor of Law, University of Montana. I wish to thank Beth Brennan and 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 mine.

¹ See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) [hereinafter Mullenix, *Counter-Reformation*]; see also Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993).

² See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993); Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99 (1991); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991). At a recent Advisory Committee hearing, an attorney who represents defendants in products liability cases disclaimed any effort to speak for all such defendants. Judge Ralph Winter, a Committee member, reportedly responded that the lawyer did not need to because Senator Biden had already done so in the CJRA.

reducing expense and delay in civil litigation.³ Others assert that Congress may have failed either to think completely through the legislation's effectuation or to provide sufficient guidance for its implementation.⁴

Most of these concerns have more specific manifestations. One is that Congress afforded minimal information on such critical matters as whether the ninety-four federal district courts could adopt local procedures that conflict with the Federal Rules of Civil Procedure ("Federal Rules").⁵ Moreover, certain of the institutions that Congress created to effectuate the Act, such as Advisory Groups named in each district, or to monitor its implementation, such as Circuit Review Committees, replicate existing entities, namely local rules committees and Circuit Judicial Councils, or have unclear responsibilities.⁶ Furthermore, Congress may have structured these institutions in ways that impair their effectiveness. For instance, Advisory Groups consisting principally of attorneys who practice before the judges in specific districts might understandably be reluctant to challenge the views of those judges, while Circuit Review Committees similarly may be reticent to criticize civil justice plans that their colleagues in other districts have prepared.⁷

Some observers have criticized the federal districts' effectuation of the CJRA. In a number of districts, advisory groups apparently have a less balanced composition than Congress contemplated. Certain groups are comprised substantially of defense counsel or interests, such as employees of large corporations, who dominated civil justice planning,⁸ or consist of too

³ See, e.g., Cohn, *supra* note 2, at 100-04; Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993); see also Mullenix, *Counter-Reformation*, *supra* note 1, at 392.

⁴ See, e.g., Cohn, *supra* note 2, at 100-04; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1402-22 (1992).

⁵ See, e.g., Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. (forthcoming 1994); see also Mullenix, *Counter-Reformation*, *supra* note 1; see *infra* notes 11, 41 & 65-68 and accompanying text.

⁶ See Robel, *supra* note 3, at 891; Tobias, *supra* note 4, at 1403-13; see also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

⁷ See Tobias, *supra* note 4, at 1403-13; see also Robel, *supra* note 3, at 900.

⁸ See, e.g., UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, REPORT AND PROPOSED PLAN OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP i (Dec. 1991) [hereinafter S.D. IND. REPORT]; UNITED STATES DISTRICT

few non-lawyers, who contributed minimally.⁹ In other districts, the federal judges have apparently exercised more influence in civil justice planning than might have been appropriate or they were unresponsive to the reports and recommendations that their Advisory Groups developed.¹⁰ Quite a few districts have adopted local procedures that conflict with the Federal Rules, and one court even declared that its provisions took precedence over the Federal Rules.¹¹

Numerous districts have prescribed procedures that may not reduce, and could even increase, expense and delay, thereby inverting the expressly stated purpose of the CJRA. For example, all elements of the organized bar so vociferously opposed a pre-discovery disclosure mechanism adopted by a number of districts that Congress nearly refused to permit its national application.¹²

Finally, many of the reform developments in civil litigation, especially those in the two paragraphs immediately above, have increased procedural disuniformity and complexity in the ninety-four federal districts, thus additionally fragmenting civil procedure.¹³ Indeed, the quantity and pace of recent reform activity have prompted calls for moratoria on the revision of Federal Rules pending an evaluation of current CJRA experimentation,¹⁴ and even for a moratorium on all reform

COURT FOR THE DISTRICT OF WYOMING, ADVISORY GROUP REPORT AND RECOMMENDED PLAN, at frontispiece (Dec. 1991) [hereinafter D. WYO. REPORT].

⁹ See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, at frontispiece (Aug. 1991) [hereinafter D. MONT. REPORT] (few non-lawyers); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) (non-lawyer quit participating).

¹⁰ These assertions are premised on conversations with many individuals involved in civil justice reform. Numerous judges did not adopt a number of their Groups' recommendations, and some offered no explanations.

¹¹ See UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (Dec. 20, 1991) (plan takes precedence) [hereinafter E.D. TEX. PLAN]; see also Tobias, *supra* note 4, at 1417 (providing other examples of conflicting procedures).

¹² See FED. R. CIV. P. 26(a)(1), reprinted in 146 F.R.D. 402, 431-36 (1993); see also H.R. 2814, 103d Cong., 1st Sess. (1993).

¹³ See generally Mullenix, *Counter-Reformation*, *supra* note 1; Tobias, *supra* note 4.

¹⁴ See, e.g., Letter from Edwin J. Wesely, Chair, Advisory Group for the Eastern District of New York, to Robert Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 3, 1992); Bryan J. Holzberg, *Judicial Conference Approves Amendments to Civil Rules*, 18 LITIG.

efforts.¹⁵

Notwithstanding the numerous criticisms that observers have lodged at the statute and its effectuation, a number of which have considerable validity, the federal reform initiative has afforded many advantages. Unfortunately, these benefits have received comparatively little recognition. Because the reform's salutary aspects could improve the civil justice system, they warrant analysis. This essay undertakes that effort by emphasizing the most important beneficial features of implementation to date.¹⁶ Part I of this Article examines the origins and development of the CJRA. Part II then analyzes the advantageous dimensions of the reform.¹⁷

I. ORIGINS AND DEVELOPMENT OF THE CIVIL JUSTICE REFORM ACT

The origins and development of the CJRA warrant comparatively brief examination here, as they have been comprehensively treated elsewhere.¹⁸ Congress passed the Act out of growing concern about the litigation explosion, litigation abuse—particularly during discovery—and decreasing federal court access.¹⁹ Since the mid-1970s, many federal judges had been arguing that there was a litigation explosion and mounting abuse of the litigation process.²⁰ Congress sought to im-

NEWS 10 (Dec. 1992) (ABA Litigation Section recommendation calling for moratorium).

¹⁵ See Burbank, *supra* note 2, at 841.

¹⁶ I deemphasize the statute because all ninety-four districts are now implementing the measure, and Congress seems unlikely to amend the legislation. See generally Jeffrey J. Peck, "Users United:" *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (Summer 1991); Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1993).

¹⁷ I do not treat Executive Branch civil justice reform because it has received little implementation. See generally Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993).

¹⁸ See, e.g., Peck, *supra* note 16, at 109-12; Robel, *supra* note 2, at 115; Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 508 (1992).

¹⁹ See Senate Committee on the Judiciary, *Judicial Improvements Act of 1990*, S. REP. NO. 416, 101st Cong., 2d Sess. 103 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6804-05. See generally Peck, *supra* note 16.

²⁰ See, e.g., *National Hockey League, Inc. v. Metropolitan Hockey Club*, 427 U.S. 639, 640 (1976); *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).

prove the federal civil justice system by encouraging reform "from the bottom up."²¹ Congress envisioned that increasing dialogue among federal judges and federal court practitioners and litigants would lead to the development of procedures that could reduce cost and delay and be acceptable to all participants in the reform process and in federal civil litigation.

The statute required every one of the ninety-four federal districts to have issued civil justice expense and delay reduction plans by December 1993.²² 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."²³ The courts were to issue the plans after Advisory Groups tendered reports and recommendations to the districts.²⁴

The statute requires these Groups, which the districts appointed ninety days after the CJRA's enactment, to be "balanced," including lawyers and others representative of litigants who participate in civil suits in the courts.²⁵ The Act commands every Advisory Group to analyze comprehensively the "state of the court's civil and criminal dockets," to "identify trends in case filings and in the demands being placed on the court's resources" and to designate the "principal causes of cost and delay in civil litigation" in the district.²⁶ The statute directs each Group, in developing recommendations, to consider the specific circumstances and needs of the district, its parties and their attorneys while insuring that all three contribute significantly to "reducing cost and delay and thereby facilitating access to the courts."²⁷

The judges, after receiving the Groups' reports and suggestions, considered them, conferred with the groups and then considered whether to prescribe the Act's eleven principles, guidelines and techniques and any other measures that they

²¹ See S. REP. NO. 416, *supra* note 19, at 14-16; Peck, *supra* note 16, at 110.

²² See Judicial Improvements Act of 1990, § 103(b)(1), 28 U.S.C. § 471 (Supp. II 1992).

²³ See 28 U.S.C. § 471 (Supp. II 1992).

²⁴ See *id.* § 472.

²⁵ See *id.* § 478(b).

²⁶ See *id.* § 472(c)(1).

²⁷ See *id.* § 472(c)(1)-(3).

believed would decrease delay or cost.²⁸ Thirty-four districts complied with these requirements by December 31, 1991, and the Judicial Conference officially designated them Early Implementation District Courts ("EIDC"),²⁹ while the remaining sixty districts adopted civil justice plans between that date and December 1993.³⁰

II. BENEFICIAL ASPECTS OF FEDERAL CIVIL JUSTICE REFORM

This Part examines the advantageous ramifications of the federal reform by tracing the steps that the CJRA prescribes for implementation. It examines the beneficial aspects of the courts' appointment of Advisory Groups and the Groups' efforts to discharge their statutory duties to assess the districts and to compile reports and recommendations. It also analyzes the districts' consideration of these reports and suggestions and consequent adoption of civil justice plans, various entities' oversight of those plans and the courts' implementation and evaluation of the procedures included in the plans. At each stage of the process, the Article affords specific examples derived from experimentation in the federal districts. It then evaluates certain ancillary advantages of the process.³¹

A. *Direct Beneficial Aspects of the Planning Process*

1. Composition of Advisory Groups and Communications

Most of the federal districts appointed Advisory Groups that were "balanced," especially in terms of representation of

²⁸ See *id.* §§ 472(a), 473(a)-(b). The principles, guidelines and techniques principally govern judicial case management, discovery and ADR.

²⁹ See, e.g., Letter to Hon. Ralph G. Thompson, Chief Judge, United States District Court for the District of Oklahoma, from Robert M. Parker, Chair, Committee on Court Administration and Case Management of the Judicial Conference of the United States (July 30, 1992); Letter to Hon. Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana, from Robert M. Parker, Chair, Committee on Court Administration and Case Management of the Judicial Conference of the United States (July 30, 1992); see also Tobias, *supra* note 6, at 56 (listing EIDCs).

³⁰ See Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (Supp. II 1992).

³¹ I attempt to analyze both the processes employed and the results produced. My analysis of the processes is premised principally on conversations with numerous participants in civil justice reform.

various segments of the organized bar.³² For instance, numerous courts included in Advisory Groups similar numbers of attorneys who were members of the "plaintiffs' bar" and of the "defense bar."³³ Most districts also attempted to appoint non-lawyers who were representative of litigants, and some tried to encourage considerable participation by the non-lawyers. A few districts balanced the number of resource-poor parties with individuals who represent interests that possess greater resources.³⁴

Numerous districts instituted special efforts to foster communications between the groups and local rules committees, which the 1988 Judicial Improvements Act required that courts establish to routinize and open the local revision process while limiting the adoption of inconsistent local procedures.³⁵ For example, numerous judges and Groups attempted to keep the committees fully apprised of their reform endeavors by supplying them draft reports and recommendations, holding joint meetings of the entities and seeking the committees' assistance in proposing new local procedures. Some districts appointed several members of their local rules committees to the Groups,³⁶ while the Southern District of Indiana simply designated the committee as its advisory group.³⁷

³² See *supra* note 25 and accompanying text.

³³ See, e.g., D. MONT. REPORT, *supra* note 9, at frontispiece; REPORT OF THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON viii (Jan. 1993).

³⁴ See, e.g., REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, App. A (Sept. 1, 1993) [hereinafter E.D. KY. REPORT]; REPORT OF THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, App. A (Feb. 1, 1993).

³⁵ See 28 U.S.C. §§ 2071, 2077 (Supp. II 1992). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 854 (1991); Tobias, *supra* note 4, at 1399-1401.

³⁶ See, e.g., D. MONT. REPORT, *supra* note 9, at frontispiece; REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 AND RECOMMENDED PLAN ii (Dec. 10, 1992) [hereinafter M.D.N.C. REPORT].

³⁷ See S.D. IND. REPORT, *supra* note 8, at i.

2. Advisory Group Efforts

Practically all of the Advisory Groups undertook thorough analyses of conditions in their districts. The groups scrutinized the courts' civil and criminal dockets, delineated trends in filings and in demands imposed on the districts' resources, identified the primary sources of expense and delay in civil litigation and considered how these might be minimized with improved assessment of the legislation's effects on the courts.³⁸

Numerous Advisory Groups surveyed their bars, interviewed their judicial officers and court personnel and consulted other federal districts and state courts, especially within their own jurisdictions when designating causes of cost and delay and means of remedying or ameliorating them.³⁹ In formulating suggestions, nearly every Group apparently considered the particular needs and circumstances of the court, its litigants and their counsel while guaranteeing that each contributed significantly to decreasing expense and delay and to facilitating court access.⁴⁰

Most of the Groups compiled thorough reports and recommendations, which included all of the statutorily required information enumerated above and much additional instructive material relating to their districts' functioning. For example, some groups were very sensitive to issues of judicial authority, and the Middle District of North Carolina Advisory Group included a careful analysis of those questions in its report.⁴¹

³⁸ See, e.g., D. MONT. REPORT, *supra* note 9, at 17; REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 8-30 (Aug. 1, 1991), reprinted in 138 F.R.D. 167, 190-212 (1991).

³⁹ For helpful examples of surveys, see REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII 26 (May 12, 1993) [hereinafter D. HAW. REPORT]; M.D.N.C. REPORT, *supra* note 36, at 141; CIVIL JUSTICE REFORM ACT ADVISORY GROUP REPORT FOR THE DISTRICT OF SOUTH DAKOTA, App. C (Dec. 31, 1992) [hereinafter D.S.D. REPORT]; see also 28 U.S.C. § 472(c)(1)(C) (Supp. II 1992).

⁴⁰ See, e.g., REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA 17-19 (July 9, 1993) [hereinafter W.D.N.C. REPORT]; D.S.D. REPORT, *supra* note 39, at 44-46; see also 28 U.S.C. § 472(c)(3) (Supp. II 1992).

⁴¹ See M.D.N.C. REPORT, *supra* note 36, at 110-11; see also *infra* notes 65-68 and accompanying text. See generally Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 107-10 (1993).

The Groups developed suggested solutions that were tailored to the particular difficulties that they found. Some groups determined that changes were unnecessary, and recommended minimal, if any, reforms. These groups found that their districts were experiencing little cost or delay that was amenable to amelioration or were already applying procedures that decreased expense or delay, including the congressionally prescribed principles, guidelines and techniques.⁴² But other Groups proposed more comprehensive change upon ascertaining that their districts had encountered considerable cost or delay, which apparently could be reduced by procedures not currently in use.⁴³ Indeed, numerous groups recommended that districts adopt a host of mechanisms that could decrease expense or delay. Some of the procedures were innovative or relatively untested, others were premised on identical or similar measures that had previously proved effective in limiting cost or delay in other federal districts or in state courts, and most were based on the congressionally delineated principles, guidelines and techniques.⁴⁴

Illustrative of rather novel procedures was the Central District of California Advisory Group's suggestion that its court experiment assigning numerous judges only criminal cases for one year to expedite civil dispute resolution.⁴⁵ Another Group recommended that its district create peer review committees of federal bar members to which judicial officers could submit discovery disputes for advice.⁴⁶ A questionnaire that the East-

⁴² See, e.g., REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE DISTRICT OF KANSAS 50-67 (Oct. 25, 1991); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE EASTERN DISTRICT OF VIRGINIA 53-65 (Sept. 19, 1991); see also D.S.D. REPORT, *supra* note 39, at 17.

⁴³ See, e.g., REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA 61-103 (Mar. 19, 1993) [hereinafter C.D. CAL. REPORT]; REPORT OF THE ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (Oct. 1991).

⁴⁴ See 28 U.S.C. § 473 (Supp. II 1992) (principles, guidelines and techniques). See generally Tobias, *supra* note 4, at 1418-22.

⁴⁵ See C.D. CAL. REPORT, *supra* note 43, at 65-68; cf. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, CIVIL JUSTICE REFORM ACT ADVISORY GROUP REPORT 51-52 (Apr. 1993) (suggesting splitting criminal and civil dockets among judges).

⁴⁶ See D. MONT. REPORT, *supra* note 9, at 17; see also Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 449 (1991). See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992).

ern District of California Advisory Group circulated to federal court practitioners indicated a valuable technique for decreasing the time that lawyers spent at the court house waiting to argue motions: the staggered scheduling of law and motion matters by specially setting or scheduling at the end of the motion calendar lengthy proceedings.⁴⁷ Several Groups urged that their districts adopt procedures for streamlining the disposition of summary judgment motions.⁴⁸

Some Groups premised suggestions on efficacious measures instituted in other districts or by state judges. The South Carolina Advisory Group drew on an expedited tracking mechanism employed in the Western District of Texas⁴⁹ when proposing that the South Carolina federal judges implement a similar mechanism.⁵⁰ The Group also recommended the adoption of a settlement week analogous to one successfully used in the South Carolina state court system.⁵¹ The Connecticut Advisory Group concomitantly suggested that the district create a joint federal-state alternative dispute resolution ("ADR") scheme for providing alternatives to traditional civil litigation.⁵² These and related proposals for modelling federal procedures on state analogues apparently represent efforts to capitalize on the profession's familiarity with particular procedures and to realize savings, for instance, by drawing on a readily available source of ADR providers.⁵³

⁴⁷ See REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA 81, 95, 97 (Nov. 21, 1991); see also UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5-6 (Dec. 31, 1991).

⁴⁸ See REPORT OF THE ADVISORY GROUP, CIVIL JUSTICE REFORM ACT OF 1990, WESTERN DISTRICT OF MISSOURI 33-36 (Dec. 23, 1991); D. MONT. REPORT, *supra* note 9, at 81-83. See generally Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335, 347 (1993).

⁴⁹ See UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 6-7 (Nov. 30, 1992).

⁵⁰ See FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE DISTRICT OF SOUTH CAROLINA 37-39 (July 29, 1993) [hereinafter D.S.C. REPORT].

⁵¹ *Id.* at 55-58; see also *infra* note 78 and accompanying text.

⁵² See REPORT AND PLAN OF CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE DISTRICT OF CONNECTICUT 14-17 (Dec. 1992) [hereinafter D. CONN. REPORT].

⁵³ The federal and state courts often look to one another in the area of civil justice reform. Indeed, Congress premised a number of the eleven CJRA principles, guidelines and techniques on analogous state procedures. See S. REP. NO. 416,

Practically all of the Groups called on their courts to prescribe various combinations of the eleven principles, guidelines and techniques, especially those that involve judicial case management, discovery and ADR. Many Groups suggested some type of case management with ongoing judicial participation through management and discovery plans, conferences and additional mechanisms.⁵⁴

Almost every Advisory Group recommended reforms in discovery, a number of which were based on new Federal Rules amendments or the measures in the CJRA.⁵⁵ For example, numerous Groups proposed that districts adopt automatic disclosure or presumptive restrictions on numbers of interrogatories or depositions.⁵⁶ Other Groups suggested that their courts require litigants to certify that they had attempted to resolve discovery disputes before filing motions.⁵⁷

Nearly all of the Advisory Groups recommended that the districts experiment with multiple forms of alternatives to dispute resolution. These ranged across a broad spectrum from traditional options, such as mediation, to recently invented possibilities, such as court-annexed arbitration, to very new alternatives, namely early neutral evaluation ("ENE"), summary jury trials and settlement weeks.⁵⁸

Finally, many Advisory Groups offered a number of suggestions for reducing delay and expense which were primarily

supra note 19, at 19, 21, 23-27; *see also* ROBERT E. LITAN (THE BROOKINGS INSTITUTION) & MARK H. GITENSTEIN (THE FOUNDATION FOR CHANGE), JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 15-17, 29 (1989).

⁵⁴ *See, e.g.*, UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF MISSISSIPPI, ADVISORY GROUP REPORT AND RECOMMENDED PLAN 1-19 (Aug. 20, 1993); W.D.N.C. REPORT, *supra* note 40, at 20-47; *see also* 28 U.S.C. § 473(a)(1)-(3) (Supp. II 1992).

⁵⁵ *See* FED. R. CIV. P. 26, 28-34, 36-37, *reprinted in* 146 F.R.D. 402, 431-73 (1993); *see also* 28 U.S.C. §§ 473(a)(3)-(5), (b)(1), (3) (Supp. II 1992).

⁵⁶ *See, e.g.*, CIVIL JUSTICE REFORM ACT ADVISORY GROUP REPORT, NORTHERN DISTRICT OF IOWA 8-9 (Dec. 30, 1991) [hereinafter N.D. IOWA REPORT]; D. MONT. REPORT, *supra* note 9, at 73-75; *see also* 28 U.S.C. § 473(a)(4) (Supp. II 1992); *supra* note 12 and accompanying text; *infra* notes 80-82 and accompanying text.

⁵⁷ *See, e.g.*, W.D.N.C. REPORT, *supra* note 40, at 44; REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA 68-69 (Dec. 1, 1992) [hereinafter M.D. PA. REPORT]; *see also* 28 U.S.C. § 473(a)(5) (Supp. II 1992).

⁵⁸ *See, e.g.*, D. CONN. REPORT, *supra* note 52, at 14-16; D.S.C. REPORT, *supra* note 50, at 53-64; *see also* 28 U.S.C. §§ 473(a)(3)(A), (a)(6), (b)(4)-(5) (Supp. II 1992); *infra* notes 83-85 and accompanying text.

directed to Congress. Numerous Groups recommended that the courts urge prompt action by the President to nominate, and the Senate to confirm, appointees for existing judicial vacancies.⁵⁹ Similarly, many Groups suggested that Congress seriously consider the impact of passing new legislation—particularly measures that create new civil causes of action or that federalize additional criminal behavior—on prompt, inexpensive civil dispute resolution.⁶⁰

3. District Courts' Consideration of Advisory Groups' Reports and Recommendations and the Courts' Adoption of Civil Justice Plans

All of the federal districts seem to have considered carefully the reports and suggestions that their Advisory Groups submitted. Most of the districts conferred closely with the Groups, and a number of courts participated in meetings with Group members to discuss the documents that they had developed.⁶¹ Most districts were very responsive to the reports and recommendations, and some replied in writing to the suggestions, explaining why the judges adopted, modified or rejected the proposals.⁶²

The benefits of this consideration and the adoption of plans were similar to the advantages of the Groups' efforts.⁶³ This certainly was true for courts that subscribed verbatim to their Groups' recommendations, as numerous districts did. More specifically, most of the courts that received modest sug-

⁵⁹ See, e.g., D. HAW. REPORT, *supra* note 39, at 35; N.D. IOWA REPORT, *supra* note 56, at 9-10. See generally Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257. Numerous groups also recommended that the districts be authorized to hire additional court personnel. See, e.g., E.D. KY. REPORT, *supra* note 34, at 40-41; D.S.C. REPORT, *supra* note 50, at 72.

⁶⁰ See, e.g., C.D. CAL. REPORT, *supra* note 43, at 38-43; M.D. PA. REPORT, *supra* note 57, at 72; see also 28 U.S.C. § 472(c)(1)(D) (Supp. II 1992).

⁶¹ I premise these ideas on conversations with numerous judges, advisory group members and reporters who participated in the meetings. See generally Tobias, *supra* note 16, at 118.

⁶² See, e.g., UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 14-17, 19-21 (Dec. 27, 1991); UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, App. 2 (Dec. 31, 1991) [hereinafter W.D. WIS. PLAN].

⁶³ See *supra* notes 38-60 and accompanying text.

gestions for modification in turn prescribed minimal change in their plans.⁶⁴ Even the numerous courts that adopted the recommendations only in part, however, seemed cognizant of the problems in civil litigation.

Quite a few of the districts displayed sensitivity to both procedural and substantive issues implicating courts' authority. For instance, a number of districts did not consider those procedures that they included in plans to be self-executing. Instead, the courts made them effective only after proposing the promulgation of new, or the amendment of existing, local rules and after considering public comment.⁶⁵ Similarly, most districts evinced equal caution in treating substantive questions that involved authority. Numerous courts carefully attempted to avoid the adoption of local procedures that conflicted with the Federal Rules,⁶⁶ and some districts flatly refused to promulgate inconsistent local procedures that Advisory Groups had suggested.⁶⁷ Moreover, a few courts crafted procedures in ways that minimized potential conflicts with constitutional or statutory provisions.⁶⁸

When engaged in civil justice planning, the judges in a

⁶⁴ See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991); UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 16, 1991); see also *supra* note 42 and accompanying text.

Districts that received more comprehensive suggestions correspondingly adopted broader change. See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 18, 1991); see also *supra* note 43 and accompanying text.

⁶⁵ See, e.g., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 IN THE DISTRICT OF NEW JERSEY 17-25 (Dec. 19, 1991); UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 74 (Dec. 30, 1991).

⁶⁶ See *supra* notes 5 & 41 and accompanying text.

⁶⁷ See, e.g., W.D. WIS. PLAN, *supra* note 62, App. 2, at 2, 6; cf. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 18 (Dec. 17, 1991) (asking whether district needs specific power to impose compulsory, nonbinding court-annexed arbitration).

⁶⁸ For example, the Oregon District adopted co-equal case assignment involving Article III and magistrate judges but eschewed opt-out provisions which other districts employ and, therefore, may violate 28 U.S.C. § 636 (1988). See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5, 20 (Dec. 30, 1991) [hereinafter D. OR. PLAN]; see also *infra* note 70 and accompanying text. See generally Tobias, *supra* note 16, at 126.

number of districts apparently made greater efforts than previously to consider the "courts *qua* courts."⁶⁹ One important manifestation of this was the effort in some districts to treat the Article III judges and the magistrate judges as similar judicial officers for purposes of reducing expense and delay in civil cases. For example, several districts provided for co-equal assignment of civil lawsuits to Article III and magistrate judges.⁷⁰ Other districts correspondingly assigned cases to particular judicial officers based on the suits' subject matter or on the officers' specialized expertise.⁷¹

A small number of districts attempted to maximize procedural uniformity. The preeminent example of this phenomenon is the intrastate uniformity that the Northern and Southern Districts of Mississippi attained by promulgating a joint plan with identical procedures.⁷² Other districts tried to promote a related type of intrastate uniformity by modelling their local requirements on analogous mechanisms applicable in the state court systems where the districts are situated.⁷³

Many districts prescribed numerous procedures that could reduce cost or delay.⁷⁴ Certain of the measures were novel or comparatively untested, a number were based on the same or similar mechanisms that had decreased expense or delay in

⁶⁹ I am indebted to Donna Stienstra of the Federal Judicial Center, and John Oakley, the Advisory Group Reporter for the Eastern District of California, for this proposition.

⁷⁰ See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (Dec. 1991) [hereinafter D. MONT. PLAN]; UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5 (Sept. 23, 1993) [hereinafter W.D.N.C. PLAN].

⁷¹ See, e.g., D. OR. PLAN, *supra* note 68, at 23; UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4-5 (Nov. 1, 1993) [hereinafter W.D. VA. PLAN]; see also *supra* note 43 and accompanying text.

⁷² See NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 1993); see also Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) (discussing intrastate uniformity).

⁷³ See, e.g., W.D.N.C. PLAN, *supra* note 70, at 13-19 (premising mediation program on state effort); Telephone Interview with Wally Edgell, Clerk, United States District Court for the Northern District of West Virginia (Jan. 25, 1993) (premising settlement weeks on state court analogue); see also *supra* notes 51-52 and accompanying text.

⁷⁴ Some of these were obviously identical or similar to those that groups recommended. See also *supra* notes 45-60 and accompanying text.

other districts or in the state courts, and a majority were premised on the CJRA's principles, guidelines and techniques. Illustrative of relatively untested procedures that were meant to limit litigation expenses directly was the imposition of ceilings on contingency fees in the Eastern District of Texas.⁷⁵ The Montana District's provision for co-equal assignment of cases to Article III and magistrate judges, which permits parties to opt-out, is another measure which had received practically no prior experimentation.⁷⁶ An example of federal modeling was the decision of the Western District of North Carolina to incorporate in its plan a procedure analogous to the Montana co-equal assignment system.⁷⁷ An illustration of state borrowing was the Northern District of West Virginia's prescription of settlement weeks similar to those already employed in the state court system.⁷⁸

Virtually every district adopted some of the enumerated principles, guidelines and techniques, and an overwhelming majority prescribed procedures for case management, discovery and ADR. Numerous districts instituted case management schemes, most of which contemplated close judicial management through judicial conferences and other techniques. For instance, the Maine District's plan contemplates exacting judicial supervision of all cases, which are assigned to tracks by case-type and degree of complexity.⁷⁹

Many districts are employing a plethora of discovery reforms, nearly all of which are premised on the new revisions of the Federal Rules or on the eleven congressionally prescribed procedures. For instance, most of the EIDCs and some of the remaining courts adopted different forms of automatic disclosure.⁸⁰ Numerous districts correspondingly imposed presump-

⁷⁵ See E.D. TEX. PLAN, *supra* note 11, at 7-8. See generally Tobias, *supra* note 16, at 125.

⁷⁶ See *supra* note 70 and accompanying text.

⁷⁷ *Id.* The examples in this paragraph are obviously not exhaustive.

⁷⁸ See *supra* note 73.

⁷⁹ See COST AND DELAY REDUCTION PLAN FOR THE DISTRICT OF MAINE 2-3, App. A (Aug. 1, 1993) [hereinafter D. ME. PLAN]. Numerous other districts are implementing similar permutations and combinations which typically involve close management and tracks. See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1-5 (Jan. 1, 1993); W.D. VA. PLAN, *supra* note 71, at 1-2.

⁸⁰ See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE,

tive numerical limitations on interrogatories or depositions,⁸¹ although quite a few courts had prescribed these restrictions before Congress enacted the CJRA.⁸²

A substantial number of districts are experimenting with a broad array of alternatives to dispute resolution, including arbitration, mediation, ENE, settlement weeks and settlement conferences and summary jury trials and minitrials.⁸³ The Western District of Missouri comprehensively and carefully initiated an early assessment program in which one-third of the civil cases are automatically assigned to some form of ADR and many of the rest are encouraged to participate.⁸⁴ Several districts implemented or are considering settlement offer requirements that resemble a proposal for amending Federal Rule 68, which the Advisory Committee has been evaluating.⁸⁵

4. Oversight of Civil Justice Reform

The process for monitoring civil justice planning prescribed in the CJRA had several beneficial aspects.⁸⁶ Some Circuit

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2-3 (Dec. 23, 1991); REPORT AND PLAN OF THE ADVISORY GROUP OF THE DISTRICT COURT OF THE VIRGIN ISLANDS 36-37 (Dec. 23, 1991); *see also supra* note 56 and accompanying text.

⁸¹ *See, e.g.*, D. MONT. PLAN, *supra* note 70, at 16; W.D. VA. PLAN, *supra* note 71, at 2; *see also supra* note 56 and accompanying text.

⁸² *See, e.g.*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 17, 1991) [hereinafter E.D.N.Y. PLAN]; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2 (Dec. 31, 1991); *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020-26 (1989).

⁸³ *See, e.g.*, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 23-25 (May 14, 1993); W.D.N.C. PLAN, *supra* note 70, at 13-19.

⁸⁴ *See* United States District Court for the Western District of Missouri, Early Assessment Program, Court-Approved General Order (Oct. 31, 1991). *See generally* Tobias, *supra* note 48, at 348-54.

⁸⁵ *See, e.g.*, E.D. TEX. PLAN, *supra* note 11, at 10; UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, App. A (July 14, 1993); *see also* William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

⁸⁶ For descriptions of the monitoring process, *see* Tobias, *supra* note 6; Tobias, *supra* note 4, at 1403-13.

Review Committees rigorously analyzed and made constructive suggestions for change in the plans that districts developed. For instance, the Ninth Circuit Committee scrutinized all of the plans that the seven EIDCs had promulgated and recommended modifications in most of them.⁸⁷ A few districts altered their procedures in response to these suggestions, and a number of the remainder seriously reconsidered the mechanisms questioned.⁸⁸

The Judicial Conference Case Management Committee correspondingly recommended that some courts revise or reexamine certain features of their plans. For example, the Committee recommended that the Connecticut District implement several changes in the plan that it had adopted during the summer of 1993.⁸⁹ The court decided to treat that document as a proposal and instituted numerous modifications which were responsive to the Judicial Conference's concerns.⁹⁰

5. Implementation With Emphasis on Annual Assessments

Several reasons make it difficult to offer more than preliminary observations about whether civil justice reform has reduced expense or delay in civil litigation. A majority of the districts issued civil justice plans only in 1993, and many published them as recently as November. Moreover, some of the EIDCs made the procedures in their plans effective as late as mid-1992. Furthermore, relatively few EIDCs have completed comprehensive annual assessments which evaluate the effectiveness of their procedures in decreasing expense or delay. Nonetheless, some general, tentative ideas can be afforded.

⁸⁷ See REPORT OF NINTH CIRCUIT REVIEW COMMITTEE (Apr. 14, 1992).

⁸⁸ See, e.g., United States District Court for the District of Alaska, Miscellaneous General Order No. 638, Amendment No. 1 (Apr. 27, 1992); cf. Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239, 244 (1992) (discussing Montana District's reconsideration of procedures prescribed).

⁸⁹ See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (June 1993); see also Telephone Interview with Mark Shapiro, Administrative Office of the United States Courts, Court Administrative Division (Dec. 1, 1993).

⁹⁰ See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 1993); see also Telephone Interview, *supra* note 89.

Many districts seem to have implemented civil justice reform carefully, and a number of courts have instituted efforts to inform the legal profession about their reform endeavors. For example, the districts have sponsored continuing legal education programs and have circulated to practitioners copies of the new procedures, often emphasizing the availability of particular measures, such as expedited tracks, automatic disclosure and ADR options.⁹¹

Numerous mechanisms, including most of the broader reforms in case management, discovery and ADR that courts employed are apparently functioning smoothly. In fact, some procedures are apparently reducing cost or delay. For example, the division of the Montana District, which is using the opt-out mechanism, seems to be securing more consents to magistrate judge jurisdiction than the divisions that are not, thereby saving the time of Article III judges.⁹² Moreover, close judicial case management in that court and the Northern District of Ohio has reduced expense and delay somewhat.⁹³

Anecdotal evidence from several districts that have employed the controversial automatic disclosure technique indicates that the procedure is working rather well, particularly in non-complex cases once lawyers become accustomed to the mechanism.⁹⁴ It remains unclear, however, whether the measure generally effects savings in time or money or whether it operates efficaciously in complex litigation.⁹⁵

Certain ADR procedures that many districts have institut-

⁹¹ See, e.g., D. ME. PLAN, *supra* note 79, at 2-3 (calling for more educational programs); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN AND RELATED AMENDMENTS TO THE RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (Apr. 1992) (circulating pamphlet including new procedures to bar).

⁹² These are the preliminary results of the court's statistical analysis of the docket. Telephone Interview with Jeremiah Lynch, Law Clerk, Chief Judge Paul Hatfield (Dec. 1, 1993).

⁹³ *Id.*; UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET 1 (Jan. 29, 1993) [hereinafter N.D. OHIO ASSESSMENT]; see also *supra* note 79 and accompanying text.

⁹⁴ These ideas are premised on telephone interviews with numerous practitioners and other individuals familiar with automatic disclosure in the Districts of Arizona, Northern California, Massachusetts and Montana.

⁹⁵ See *supra* note 94; see also Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39-42 (1992); Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 268 (1992).

ed seem to be yielding benefits. The early assessment program in the Western District of Missouri has been able to increase the percentage of cases that are submitted to some form of ADR and that are settled, thus saving time and money of the judicial officers, attorneys and parties.⁹⁶ The plethora of possibilities that the Northern District of California affords has apparently prompted a greater number of, and earlier, settlements.⁹⁷

Some EIDCs have performed comprehensive, careful annual assessments.⁹⁸ The evaluation process generally helped reassure a number of districts that their procedural choices to prescribe or eschew specific measures were reasonable. Indeed, the Kansas District derived valuable information from comparing its results with those achieved by numerous "peer courts."⁹⁹ Compilation of the analyses similarly enabled a few districts to learn that particular procedures were unworkable or ineffective and thus, to recalibrate them.¹⁰⁰

Finally, several districts capitalized on the opportunity that the reform's implementation provided to review and revamp their local rules.¹⁰¹ Compliance with certain reporting requirements imposed by the CJRA or the districts generally

⁹⁶ See KENT SNAPP & DAVIS LOUPE, 1992 EARLY ASSESSMENT PROGRAM REPORT (Jan. 26, 1993); see also Tobias, *supra* note 48, at 352-54.

⁹⁷ Telephone Interview with Richard L. Marcus, Advisory Group Reporter, Northern District of California (Feb. 23, 1994); see also UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9-17 (Dec. 1991); see also Marcus, *supra* note 9, at 819 n.242.

⁹⁸ See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 1992) [hereinafter N.J. ANNUAL ASSESSMENT]; N.D. OHIO ASSESSMENT, *supra* note 93.

⁹⁹ See ANNUAL ASSESSMENT UNDER THE CIVIL JUSTICE REFORM ACT OF THE STATE OF THE CIVIL AND CRIMINAL DOCKETS AND OF THE CJRA EXPENSE AND DELAY REDUCTION PLAN OF THE DISTRICT OF KANSAS (July 9, 1993).

¹⁰⁰ See N.J. ANNUAL ASSESSMENT, *supra* note 98, at 20 (deleting requirement for preparation of joint discovery plans in non-complex cases); United States District Court for the Eastern District of Texas, General Order No. 92-23 Amending Article Four, Civil Justice Expense and Delay Reduction Plan (Oct. 29, 1992) (omitting procedure that proved unworkable); Telephone Interview with Ronald Lawson, Clerk, United States District Court for the Southern District of West Virginia (Jan. 20, 1993) (district undertaking fundamental revision of local rules).

¹⁰¹ See, e.g., REPORT OF THE ADVISORY GROUP TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA 6 (1993); see Interview, *supra* note 100.

seems to have had beneficial effects. More specifically, the requirements have apparently encouraged numerous judges to initiate special efforts that expedited the resolution of civil cases on their dockets.¹⁰²

B. *Ancillary Beneficial Aspects of the Planning Process*

Many somewhat less direct benefits have attended the process of civil justice planning. When Congress passed the CJRA, it probably did not foresee or consciously intend that a number of these specific advantages would directly result from the planning endeavors, although the benefits could prove to be among the most salutary effects of the reform effort.

The CJRA instituted an unprecedented nation-wide self-analysis by the federal trial courts. The districts have amassed a wealth of invaluable information on their functioning, institutions, personnel, procedures and local legal cultures. The collection, evaluation and synthesis of this material within specific districts among courts and nationally should increase immeasurably the understanding of federal civil litigation in the late twentieth century.

This massive planning effort has helped to focus attention on the needs, problems, operations and priorities of the federal courts. The passage of the CJRA and its implementation have correspondingly promoted healthy dialogue between the federal judiciary and Congress. That discussion has encompassed numerous facets of the civil justice system, including the optimal number of federal judges, the purposes of the courts, the resources available for, and required to administer, the courts, and the importance of cooperation between Congress and the judiciary. Civil justice planning has also fostered valuable interchange between these two branches and other entities responsible for the courts' operation, such as the Federal Judicial Center and the Administrative Office of the United States Courts.

¹⁰² Interviews with numerous individuals familiar with civil justice reform indicate that numerous judges have employed additional personnel, moved older cases to the front of the queue or taken other measures to avoid the embarrassment of appearing to have backlogs. See generally R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687 (1993).

There has been instructive exchange among and within the ninety-four districts. For instance, each of the districts has opened and expanded communications with numerous other courts, especially contiguous districts or ones located in the same state, and with the state judiciary. The bench, bar, court personnel and litigants in every court have engaged in salutary dialogue regarding the district. These interactions have improved communications and enhanced appreciation of the federal trial courts.

Civil justice planning has beneficially affected procedural experimentation, particularly relating to civil rule revision. For example, the experience with the 1993 federal discovery amendments and their integration with civil justice reforms implicating discovery has informed comprehension of the national rule revision process, the interface between those procedures and local rule amendment and the need for federal and local consistency. Implementation of the CJRA has concomitantly required that numerous districts adopt new, or revise existing, local rules. In short, these efforts have provided helpful insights on experimentation with the national and local amendment processes which Congress instituted in the 1988 Judicial Improvements Act.¹⁰³

Finally, the testing of various mechanisms has improved understanding of how to experiment in ways that will promote the discovery and implementation of the most efficacious procedures.¹⁰⁴ Indeed, the ninety-four districts comprise highly effective laboratories of experimentation. The districts have afforded the requisite diversity, in terms of geography, caseload, local legal cultures and procedures, to offer a valuable foundation from which to extrapolate vis-a-vis numerous phenomena that are critical to federal civil procedure.

Many of the developments described above ultimately should foster the adoption of the best procedures for treating modern federal civil litigation. These will involve and affect the institutions responsible for facilitating civil dispute resolution

¹⁰³ See 28 U.S.C. §§ 2071-77 (Supp. II 1992). See generally Mullenix, *supra* note 35.

¹⁰⁴ For valuable discussions of experimentation, see A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) and Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988).

and change in civil procedure, such as Congress, the federal courts and the Civil Rules Committee, the specific measures, including Federal and local rules, and the individuals involved in civil suits, namely judges, attorneys and parties.

CONCLUSION

Civil justice reform under the CJRA has afforded a number of benefits, although some disadvantages have accompanied statutory implementation. Congress, the federal judiciary, and federal court practitioners and litigants now must capitalize on the beneficial aspects of civil justice reform by promoting the most effective features and by deemphasizing the least efficacious ones. Careful continuation of the reform initiative should eventually lead to the finest procedures for resolving civil litigation in the next century.