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CIVIL JUSTICE REFORM IN THE FOURTH CIRCUIT

CARL TOBIAS*

Congress passed the Civil Justice Reform Act of 1990 (CJRA) because it was increasingly concerned about litigation and discovery abuse in federal civil cases, growing cost and delay in such suits, and decreasing access to federal courts.¹ The statute requires that all ninety-four federal district courts develop civil justice expense and delay reduction plans by December 1993. Thirty-four districts issued plans by December 1991, and the Judicial Conference of the United States recently designated these districts as Early Implementation District Courts (EIDC).

Three of those EIDCs, the Eastern District of Virginia, the Northern District of West Virginia, and the Southern District of West Virginia, are located in the United States Court of Appeals for the Fourth Circuit, while the remaining six districts in the Circuit have been proceeding with the development of their civil justice plans. Because implementation of the Civil Justice Reform Act is an important attempt to reduce expense and delay in civil litigation, which could significantly affect the character of federal civil practice, effectuation of civil justice reform in the Fourth Circuit warrants close analysis. This essay undertakes that effort.

The piece first examines the background of civil justice reform, focusing on the statutory requirements and on the Act's national implementation. The paper then evaluates effectuation of civil justice reform in the Fourth Circuit, emphasizing developments in the three EIDCs and describing relevant work to date in the other districts. The essay concludes with suggestions for future implementation of civil justice reform in the Fourth Circuit.²

I. BACKGROUND OF CIVIL JUSTICE REFORM

A. *Civil Justice Reform Under the Civil Justice Reform Act of 1990*

The origins and development of civil justice reform require comparatively cursory treatment in this essay, as the reform's background has been

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, the individuals involved in civil justice reform who generously provided their views of it, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)).

2. This paper primarily treats the 1990 Act and its implementation, although the piece briefly examines executive branch efforts relating to civil justice reform. Civil justice planning, especially during 1993, is a very dynamic process. The April publication date of this paper, however, meant that few developments occurring after January 1993 could be treated here.

explored elsewhere.³ Congress passed the Civil Justice Reform Act during 1990 because of mounting concern over abuse in civil litigation, particularly in the discovery process; the growing costs of resolving civil lawsuits; and decreasing federal court access in those cases.⁴ For a decade and a half, many federal judges, led by Chief Justice Warren Burger, had contended that the federal judiciary was experiencing a litigation explosion and increasing discovery and litigation abuse.⁵

The statute mandates that every federal district court adopt a civil justice expense and delay reduction plan by December 1993.⁶ The plans' purposes "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."⁷ Each federal trial court must promulgate a plan after it has assessed a report and recommendations that an advisory group has prepared for the court.⁸

The groups, which the districts appointed within ninety days of the CJRA's passage, were to be "balanced," including lawyers and persons who are representative of parties who participate in the courts' civil litigation.⁹ The legislation commands the groups to evaluate thoroughly the districts' civil and criminal dockets and identify the primary causes of expense and delay in the districts, as well as trends in case filings and demands imposed on the courts' resources.¹⁰ The groups, when developing suggestions, are to take into account the needs and circumstances of the districts, the courts' parties, and litigants' counsel and guarantee that each contributes significantly to reducing expense and delay, thereby facilitating access to the civil justice system.¹¹ After the advisory groups tender their reports and suggestions to the courts, the districts must review them and consult with the groups.¹² The courts then are to consider, and may prescribe, the eleven principles, guidelines, and techniques enumerated in the statute

3. 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*, 54 LAW & CONTEMP. PROBS. 105 (Summer 1991); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992).

4. See 28 U.S.C. §§ 471-482 (Supp. II 1990); see also SENATE COMM. ON 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 (relevant legislative history). See generally Peck, *supra* note 3.

5. 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); Warren Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *THE FOUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23 (A. Leo Levin & Russell Wheeler eds., 1979).

6. See Civil Justice Reform Act of 1990 § 103(b)(1).

7. 28 U.S.C. § 471 (Supp. II 1990).

8. See 28 U.S.C. § 472 (Supp. II 1990).

9. See 28 U.S.C. § 478(b) (Supp. II 1990).

10. See 28 U.S.C. § 472(c)(1) (Supp. II 1990).

11. See 28 U.S.C. § 472(c)(2)-(3) (Supp. II 1990).

12. See 28 U.S.C. § 473(a) (Supp. II 1990).

and any other procedures that they find appropriate for decreasing expense or delay.¹³

1. Early Implementation

a. EIDCs

Thirty-five advisory groups submitted reports and recommendations to their districts before the end of 1991, and thirty-four districts issued plans by this date to qualify for the status of Early Implementation District Courts.¹⁴ The Committee on Court Administration and Case Management of the Judicial Conference of the United States discharged its statutory responsibility to review these plans and officially designated the thirty-four districts as EIDCs in July 1992.¹⁵ The other sixty advisory groups and districts are continuing to implement the reform; however, only two courts issued civil justice plans during 1992 and comparatively few districts apparently will promulgate plans prior to the December 1993 deadline.¹⁶

Comprehensive analysis of the civil justice expense and delay reduction plans that the EIDCs created is unnecessary in this essay. Nevertheless, it is worthwhile to provide a generalized account and specific examples of those particular elements of nascent civil justice planning under the 1990 Act which have applicability to the civil justice reform efforts that have been, and will be, undertaken in the Fourth Circuit.

Most of the EIDCs, in consulting with, and employing the reports of, their advisory groups, seem to have undertaken the kind of self-assessment, and promulgated the types of procedures, which Congress contemplated. Sensitive to the statutory purposes of decreasing expense and delay in civil cases, the districts carefully analyzed their civil and criminal dockets, and considered and prescribed the principles, guidelines, and techniques included in the CJRA.¹⁷

13. See 28 U.S.C. § 473(a)-(b) (Supp. II 1990).

14. See Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) [hereinafter Tobias, *Judicial Oversight*] (listing EIDCs); see also Civil Justice Reform Act of 1990 §§ 103(c), 105(b).

15. See, e.g., Letter from Robert M. Parker, Chairman, Judicial Conference of the United States Committee on Court Administration and Case Management, to Norman C. Roettger, Jr., Chief Judge, United States District Court for the Southern District of Florida (July 30, 1992) (on file with author); Letter from Robert M. Parker, Chairman, Judicial Conference of the United States Committee on Court Administration and Case Management, to James A. Redden, Chief Judge, United States District Court for the District of Oregon (July 30, 1992) (on file with author); see also 28 U.S.C. § 474(b) (Supp. II 1990).

16. See U.S. DIST. COURT FOR THE W. DIST. OF MO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1992) [hereinafter WESTERN DISTRICT OF MISSOURI PLAN]; U.S. DIST. COURT FOR THE W. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1992); see also *infra* notes 36-38 and accompanying text.

17. See, e.g., U.S. DIST. COURT FOR THE S. DIST. OF IND., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter SOUTHERN DISTRICT OF INDIANA PLAN]; U.S. DIST. COURT FOR THE DIST. OF MASS., EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter DISTRICT OF MASSACHUSETTS PLAN].

Numerous procedures with which the EIDCs are experimenting resemble those that are significant components of the plans that the three EIDCs in the Fourth Circuit adopted or that the remaining districts in the circuit appear to be considering seriously. Nearly all of the EIDCs have relied upon mechanisms that are meant to encourage settlement. An important way in which districts foster settlement is through employing certain forms of alternative dispute resolution (ADR). For example, the Western District of Missouri randomly assigns one-third of its civil suits automatically to an ADR program and subjects parties to sanctions if they fail to participate in good faith.¹⁸

Sanctions correspondingly are another procedure which numerous EIDCs across the country have included as an important feature of their civil justice plans. Quite a few EIDCs prescribed the possible imposition of sanctions on litigants or lawyers for not complying with various requirements in their civil justice plans.¹⁹ Indeed, the Massachusetts District has made negligent violations of its plan punishable with sanctions.²⁰

Many EIDCs have promulgated procedures governing discovery that are analogous to those which have been, or will be, important to civil justice reform in the Fourth Circuit. For instance, approximately twenty EIDCs have adopted some type of compulsory pre-discovery disclosure that is based on a 1991 proposal to amend the Federal Rules of Civil Procedure which has been quite controversial and has now been superseded.²¹ A significant number of EIDCs have also required litigants to certify that they have made reasonable efforts to resolve discovery disputes with their adversaries before seeking judicial assistance.²²

A few districts carefully treated specific authority issues that civil justice planning raises. Perhaps the foremost example was the Western District of Wisconsin. That court refused to adopt certain suggestions of its advisory

18. See WESTERN DISTRICT OF MISSOURI PLAN, *supra* note 16.

19. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5 (1991); SOUTHERN DISTRICT OF INDIANA PLAN, *supra* note 17, at 9.

20. See DISTRICT OF MASSACHUSETTS PLAN, *supra* note 17, at 67.

21. See, e.g., U.S. DIST. COURT FOR THE DIST. OF DEL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 2-3 (1991); U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1-5 (1991) [hereinafter EASTERN DISTRICT OF TEXAS PLAN]; 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 the compulsory pre-discovery disclosure 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 forwarded to the Supreme Court a proposal governing mandatory pre-discovery disclosure. See JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 16, 26 (1992).

22. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 15 (1991); U.S. DIST. COURT FOR THE DIST. OF WYO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13 (1991).

group, stating that the district lacked the requisite power to prescribe the recommendations.²³ The court also declined to employ procedures premised on proposals to revise the Federal Rules that were not scheduled to become effective until December 1993.²⁴

A number of EIDCs promulgated novel or creative specific procedures or employed approaches which could reduce expense or delay in civil lawsuits. For example, the Eastern District of Texas was one of a handful of districts that attempted to treat directly the question of litigation expense by placing caps on contingency fees.²⁵ An "opt-out" provision is another unusual measure that the District of Montana implemented to make the greatest permissible use of magistrates.²⁶ Under this procedure, the court assigns civil cases co-equally to Article III judges and magistrate judges and notifies litigants whose suits are assigned to magistrate judges that they must request reassignment to an Article III judge within a specific period or the right will be deemed waived.²⁷

Some EIDCs promulgated procedures that seem less advisable as a matter of authority or policy. A particularly problematic issue of power involves whether, and if so, the extent to which, courts can prescribe local rules that contravene the Federal Rules. The clearest articulation of this proposition appears in the plan for the Eastern District of Texas which provides that "[t]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."²⁸ Most other districts were less specific; however, a number of courts did adopt inconsistent procedures, the preeminent example of which is the prescription of mandatory prediscovery disclosure.²⁹

Civil justice reform has not been implemented as smoothly as it might have been. There apparently was less interdistrict and intradistrict exchange and cooperation than Congress had contemplated. Because the EIDCs were laboring at the same time, their opportunities for interchange were limited. Within certain specific districts, all elements of the bar did not actively participate in civil justice planning and comparatively limited interaction occurred between the advisory groups and the local rules committees.

23. See U.S. DIST. COURT FOR THE W. DIST. OF WIS., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, app. II, at 6 (1991) [hereinafter WESTERN DISTRICT OF WISCONSIN PLAN]; see also U.S. DIST. COURT FOR THE S. DIST. OF FLA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 95 (1991) [hereinafter SOUTHERN DISTRICT OF FLORIDA PLAN].

24. See WESTERN DISTRICT OF WISCONSIN PLAN, *supra* note 23, app. II, at 2; see also *supra* note 21 and accompanying text.

25. See EASTERN DISTRICT OF TEXAS PLAN, *supra* note 21, at 7-8.

26. See U.S. DIST. COURT FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3-4 (1991) [hereinafter DISTRICT OF MONTANA PLAN]; see also U.S. DIST. COURT FOR THE DIST. OF OR., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 6, 20 (1991). See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91, 93-94 n.9 (1992).

27. See DISTRICT OF MONTANA PLAN, *supra* note 26, at 3-4.

28. EASTERN DISTRICT OF TEXAS PLAN, *supra* note 21, at 9. See generally Tobias, *Judicial Oversight*, *supra* note 14, at 51-52 n.15.

29. See *supra* note 21 and accompanying text.

Once a court develops a civil justice plan, the district must annually assess the condition of its dockets to ascertain appropriate additional measures which the court might adopt to decrease expense and delay and to enhance litigation management practices.³⁰ Comparatively few districts have performed these annual evaluations.³¹ In fairness, a number of the EIDCs that promulgated plans in late 1991 made their procedures effective in 1992.³² These courts, accordingly, may be waiting until they have had a year's worth of experience and have accumulated all of the relevant data before finalizing their annual assessments. The longer the EIDCs delay in compiling these analyses, of course, the more difficult it will be for the districts that are completing their plans to profit from the evaluations.

Monitoring of the CJRA's implementation in the EIDCs has not been particularly rigorous.³³ The principal reason for this apparently was that Congress selected instrumentalities to oversee statutory effectuation which might be reluctant to monitor closely and Congress assigned them highly generalized duties. It was predictable, therefore, that most of the circuit review committees, comprised of the chief circuit judge and all of the chief district judges in every circuit, would not rigorously analyze the civil justice plans, much less make suggestions for changes in them.³⁴ Similar considerations apply to the oversight that the Judicial Conference Committee on Court Administration and Case Management performed.³⁵

b. Civil Justice Planning Outside the Context of EIDCs

The sixty courts that did not qualify for designation as EIDCs have continued to work on civil justice reform. The Western District of Missouri

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

31. See, e.g., U.S. DIST. COURT FOR THE DIST. 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 DISTRICT OF NEW JERSEY (1992); Annual Report from John S. Skilton, Chairman, Western District Advisory Group, to Barbara B. Crabb, Chief Judge, and John C. Shabaz, Judge, United States District Court for the Western District of Wisconsin (Jan. 8, 1993) (on file with author). This calculation that few districts have performed annual assessments is premised on correspondence and conversations with numerous individuals involved in, and familiar with, implementation in the EIDCs.

32. See, e.g., U.S. DIST. COURT FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN AND RELATED AMENDMENTS TO THE RULES OF PROCEDURE (1992); cf. U.S. DIST. COURT FOR THE N. DIST. OF CAL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3, 6 (1991) (prescribing three stages of phased implementation).

33. See Tobias, *supra* note 14; Tobias, *supra* note 3, at 511-12. See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1993) [hereinafter Tobias, *Balkanization*].

34. See, e.g., Seventh Circuit Review Committee, Report (Mar. 1992) (on file with author); Tenth Circuit Committee Review of the CJRA, Report (Mar. 1992) (on file with author). But see First Circuit Review Committee, Report (Mar. 1992) (on file with author); see also 28 U.S.C. § 474(a) (Supp. II 1990).

35. See, e.g., sources cited *supra* note 15; Memorandum from Robert M. Parker, Chairman, 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 Appointed Under the Civil Justice Reform Act (Oct. 22, 1992) (on file with author) [hereinafter Parker Memorandum]; see also 28 U.S.C. § 474(b) (Supp. II 1990).

and the Western District of Texas are the only two courts that adopted civil justice plans in 1992,³⁶ while the Middle District of North Carolina, the Eastern District of Tennessee and the Northern District of Texas apparently are the only courts in which advisory groups issued reports during 1992.³⁷ It is difficult to estimate precisely the speed at which civil justice planning will proceed in 1993; however, it currently appears that the pace of planning will quicken over the year, although most courts probably will not issue plans much earlier than the December 1993 statutory deadline.³⁸

This circumstance poses several important complications. The later in 1993 that advisory groups submit reports and recommendations, and courts promulgate plans, the less likely it is that other non-EIDCs will be able to capitalize on the earlier efforts. This difficulty may be ameliorated, however, because the Judicial Conference recently issued a model plan that includes many efficacious procedures implemented in the EIDCs.³⁹ Late issuance of reports and plans will also hamper efforts to implement promptly those plan provisions that require amendments in existing, or the adoption of new, local rules.⁴⁰

B. Executive Branch Civil Justice Reform

1. Executive Branch Experimentation

In October 1992, President George Bush promulgated Executive Order 12,778, which was meant to facilitate the fair and efficient resolution of civil litigation in which the United States government is involved.⁴¹ During January 1992, the Department of Justice issued a memorandum that afforded preliminary guidance to federal administrative agencies and government counsel on the Order's requirements that cover the conduct of civil

36. See *supra* note 16 and accompanying text.

37. See ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE MIDDLE DIST. OF N.C., REPORT AND RECOMMENDED PLAN (1992) [hereinafter MIDDLE DISTRICT OF NORTH CAROLINA REPORT]; ADVISORY GROUP ON LITIGATION COST AND DELAY FOR THE U.S. DIST. COURT FOR THE E. DIST. OF TENN., REPORT (1992); U.S. DIST. COURT FOR THE N. DIST. OF TEX., CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE REPORT (1992); see also ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE MIDDLE DIST. OF PA., REPORT (1993).

38. See Civil Justice Reform Act of 1990 § 103(b)(1). The estimate that civil justice planning will quicken is premised on conversations with many individuals involved in civil justice reform.

39. See JUDICIAL CONFERENCE OF THE U.S., MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1992).

40. The local rules amendment process consumed several months in the Montana District. I am assuming that districts will implement their plans through the local rules rather than consider the plans self-executing; cf. 28 U.S.C. § 2071(e) (1988) (provision for emergency adoption of local rules); see also *infra* notes 182-83 and accompanying text.

41. See Executive Order No. 12,778, 3 C.F.R. 359 (1992). I rely substantially here on Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. (forthcoming June 1993).

cases in which the government participates.⁴² The principal aspects of the Order modify how government lawyers "conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases."⁴³ The Department stated that it intended to make these guidelines final once it received comments in July 1992 from agencies and government attorneys respecting their experience with experimentation.⁴⁴ In the waning days of the Bush Administration, the Justice Department issued final guidance that minimally modified the preliminary guidelines by primarily elaborating or clarifying the earlier guidance.⁴⁵

All attorneys who participate in civil suits on behalf of the government, including counsel in federal agencies, in the Justice Department and in the ninety-four local United States Attorneys Offices, were to comply with Executive Order 12,778 and with the departmental guidance. Nonetheless, several factors make additional examination of this aspect of executive branch reform unnecessary here. First, an informal national survey revealed that the reform's implementation has been limited and sporadic.⁴⁶ For instance, lawyers in federal agencies, the Justice Department, and the United States Attorneys Offices, have varied considerably in the seriousness and rigor with which they effectuated the reform. Second, the reform's future remains very much in flux, as the Clinton Administration has not indicated whether it intends to retain the reform and, if so, how it will be implemented.⁴⁷

2. Legislative Proposal

The Bush Administration also developed a legislative proposal for civil justice reform. The President based the bill on the suggestions of the Council on Competitiveness Working Group on Civil Justice Reform that are found in the entity's August 1991 report titled *Agenda for Civil Justice Reform in America*.⁴⁸ On February 4, 1992, Senator Charles Grassley and

42. See Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778, 57 Fed. Reg. 3640 (1992) [hereinafter Memorandum]. See generally Tobias, *supra* note 3, at 512-15.

43. See Memorandum, *supra* note 42, at 3640-41.

44. *Id.* at 3640.

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

46. The proposition that reform implementation has been sporadic is premised on the author's correspondence and conversations with numerous individuals involved in civil justice reform efforts under the CJRA and the Executive Order. See also *id.* at 6015-16.

47. President Clinton has not yet modified President Bush's Executive Order, but the Clinton Administration Justice Department apparently has made no affirmative decision about executive branch civil justice reform. Cf. Carl Tobias, *Litigating With Justice: A Civil Agenda*, LEGAL TIMES, Dec. 28, 1992, at 22 [hereinafter Tobias, *Civil Agenda*] (suggesting that Clinton Administration vigorously implement executive branch reform). See generally Tobias, *supra* note 41.

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

Representative Hamilton Fish introduced the Administration's civil justice reform measure.⁴⁹

The legislation consists principally of procedures that resemble those prescribed in the CJRA or implemented pursuant to that Act or which are included in Executive Order 12,778, while other aspects of the bill, such as its prescription of fee shifting in diversity cases, are quite controversial.⁵⁰ These factors and the Bush Administration's defeat probably mean that the legislation will not pass in the near future.⁵¹

In short, thirty-four EIDCs have been experimenting with civil justice reform for more than a year, and the remaining districts are continuing to develop civil justice plans that they must promulgate by December 1993. Executive branch civil justice reform has been partially implemented, although its future remains unclear. Civil justice reform in the Fourth Circuit is examined next.

II. IMPLEMENTATION OF CIVIL JUSTICE REFORM IN THE FOURTH CIRCUIT

A. *Civil Justice Reform Under the Civil Justice Reform Act of 1990*

Numerous aspects of civil justice reform's implementation under the CJRA in the Fourth Circuit resemble national implementation. For instance, all nine districts appointed advisory groups within ninety days of the statute's passage, while three courts issued plans before the December 31, 1991 deadline to qualify for designation as EIDCs.⁵² The efforts of these courts are the focus of analysis below. For each of the districts, there will be a descriptive analysis that emphasizes specific aspects of implementation that are important or controversial, although the article only comments on those features that are most significant or interesting.

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

50. See S. 2180, 102d Cong., 2d Sess. § 102 (1992) (discussing 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), 3 C.F.R. 359, 360 (1992) (discussing similar requirement).

51. Congress failed to schedule a hearing on the proposal during 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. S16,994 (daily ed. Oct. 5, 1992) (statement of Sen. DeConcini).

52. See, e.g., ADVISORY GROUP TO THE U.S. DIST. COURT FOR THE N. DIST. OF W. VA., REPORT 4 (1991) [hereinafter NORTHERN DISTRICT OF WEST VIRGINIA REPORT] (discussing advisory group appointment); ADVISORY GROUP TO THE U.S. DIST. COURT FOR THE S. DIST. OF W. VA., REPORT 1 (1991) (same); U.S. DIST. COURT FOR THE S. DIST. OF W. VA., PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter SOUTHERN DISTRICT OF WEST VIRGINIA PLAN]; see also U.S. DIST. COURT FOR THE E. DIST. OF VA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter EASTERN DISTRICT OF VIRGINIA PLAN] (example of early plan issuance); NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra*, at 77-89 (enumerating details of plan proposed by group and adopted early by court); SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra*, at 73-95 (same).

1. Descriptive Analysis of Early Implementation

a. EIDCs

i. Eastern District of Virginia

The civil justice plan that the Eastern District of Virginia adopted makes no changes in existing procedures.⁵³ The plan's introduction states that the advisory group's report demonstrated that the court's existing procedures "have been most effective in controlling not only litigation expenses but also in reducing delays in our civil docket."⁵⁴ It adds that the group unanimously concluded that the district had no problem with undue expense or delay while unanimously recommending that the court retain current case management requirements encompassed in its local procedures.⁵⁵

The district pledged to continue enforcing "its local rules to maintain a current docket on all civil cases."⁵⁶ The court then considered the six principles and guidelines prescribed in the CJRA but rejected the incorporation of any of them into its plan. The district found the mechanisms undesirable and unnecessary because they were already embodied in the court's local procedures or counterproductive in the sense that they would increase cost or delay. The court's rejection of ADR techniques is typical. The district found no convincing evidence that their use would reduce expense or improve disposition rates or the quality of justice dispensed; asserted that ADR rarely affects time devoted to discovery, the major source of cost and delay; and claimed that the availability of early, firm trial dates before Article III judges vitiated the need for ADR.⁵⁷

The district next considered the five statutorily-enumerated techniques but rejected each of them as undesirable, unnecessary, or counterproductive.⁵⁸ For instance, the court refused to adopt early neutral evaluation for reasons similar to its rejection of ADR.⁵⁹ It also found that requiring attorneys to submit a discovery-case management plan might conflict with the district's present pretrial procedures.⁶⁰ The court as well rejected five proposed minor changes in local procedures of the advisory group for reasons analogous to those above. For example, the district refused to promulgate a local prescription that would enable litigants to propose to the court different discovery schedules than the standard one, because the district believed that discovery must remain with the court and not be left to attorneys.⁶¹

53. See EASTERN DISTRICT OF VIRGINIA PLAN, *supra* note 52.

54. *Id.* at 1.

55. *Id.* at 2.

56. *Id.*

57. *Id.* at 6-7; see also 28 U.S.C. § 473(a)(6) (Supp. II 1990).

58. See EASTERN DISTRICT OF VIRGINIA PLAN, *supra* note 52, at 9-11.

59. *Id.* at 11; see also *supra* note 57 and accompanying text.

60. See EASTERN DISTRICT OF VIRGINIA PLAN, *supra* note 52, at 10.

61. See *id.* at 12; see also *id.* at 11-14 (discussing other four proposals).

In short, the Eastern District of Virginia implemented no new procedures in its civil justice plan and apparently was the only EIDC which so provided.⁶² The stringent control that the court maintains over civil cases and its reputation for having a "rocket docket" may justify the district's decision to institute no changes, although it is difficult to believe that no beneficial modifications could be instituted.⁶³

ii. Northern District of West Virginia

The civil justice plan for the Northern District of West Virginia consists of three major components. The plan prescribes differential case management of civil cases on three tracks with judicial involvement and discovery tailored to complexity, makes special provision for motion practice, and encourages the increased employment of ADR through regularized scheduling of settlement week conferences.

The court relies on three tracks for managing civil suits. The district will continue applying current case management procedures to type I civil cases, most of which are relatively uncomplicated, routine kinds of cases, such as litigation that seeks to recover veterans' benefits that allegedly have been overpaid.⁶⁴ The plan divides the remaining civil caseload into two tracks, standard cases and complex cases.

Standard cases are suits that apparently do not involve complex issues or time-consuming discovery.⁶⁵ The district, with the assistance of the clerk of court who closely monitors discovery, primarily manages this litigation pursuant to a local rule that was patterned on a draft proposal to amend Federal Rule 26.⁶⁶ The plan states that all discovery, except for that involving expert witnesses, is to be concluded within 180 days of an answer's service.⁶⁷ A reporter's note explains that the procedures permit litigants to delay the decision on experts until late in the period for discovery because determinations of whether to employ experts and, if so, which type, can depend upon material secured in discovery.⁶⁸

The prescription for management of standard cases principally through the imposition of time restrictions on, and the close monitoring of, discovery

62. Some other districts' civil justice plans were equally terse. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF ARK., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter EASTERN DISTRICT OF ARKANSAS PLAN] (six-page plan); EASTERN DISTRICT OF TEXAS PLAN, *supra* note 21 (eleven-page plan).

63. See Paul M. Barrett, "Rocket Docket": Federal Courts in Virginia Dispense Speedy Justice, WALL ST. J., Dec. 3, 1987, at 33; see also Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 101 (Summer 1991); *infra* note 188 and accompanying text. See generally Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445 (1992).

64. See NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra* note 52, at 77.

65. See *id.* at 77-78; see also *infra* note 72 and accompanying text (defining complex civil case).

66. See NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra* note 52, at 78-80, 83-89; see also *supra* note 21 and accompanying text (discussing draft proposal).

67. See NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra* note 52, at 78.

68. *Id.* at 79.

appears workable. Moreover, the plan's recognition that plaintiffs frequently need considerable discovery to make decisions regarding experts is realistic and advisable.⁶⁹ The court modeled its discovery provisions on a draft proposal to revise federal requirements that was available at the time; however, the proposal proved to be controversial and has been superseded.⁷⁰ The remaining rule revision entities, Congress and the United States Supreme Court, could additionally alter the proposal.⁷¹ The preferable approach, therefore, would be to await the conclusion of the rule amendment process in December 1993 and then conform the local discovery procedures to the new federal requirements that are adopted.

Complex suits are cases that seem to raise complicated issues or ones for which the discovery required to develop them cannot be finished in the time prescribed for standard suits.⁷² The court closely manages complex cases, relying on Rule 16 conferences for scheduling and sequencing discovery or for employing additional case management techniques to decrease expense and delay.⁷³ The litigants must only comply with the initial disclosure requirements regarding discovery when attending the first scheduling conference, unless the court imposes additional requirements pursuant to its case management responsibilities.⁷⁴

The second principal component of the plan pertains to motion practice. The plan requires that the clerk of court promptly notify the court upon receiving motions to dismiss under Federal Rule 12(b)(6) or motions for summary judgment under Rule 56.⁷⁵ The court's failure to decide these motions within thirty days will toll the discovery period for the time that ruling on the motions exceeds thirty days.⁷⁶ This procedure will probably expedite the court's resolution of these motions and appears fair to litigants, who will either receive prompt dispositions or additional time for discovery. It may afford the court insufficient time to rule in numerous situations, such as in civil cases involving complicated issues or when the court has a backlog created by criminal prosecutions that are statutorily required to take precedence.⁷⁷

69. See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-1989).

70. See *supra* note 21 and accompanying text.

71. See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 437 (1993). See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

72. See NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra* note 52, at 80.

73. *Id.*

74. *Id.*

75. See *id.* at 80-81.

76. See *id.* at 81.

77. See 18 U.S.C. §§ 3161-3174 (1988 & Supp. III 1991) (Speedy Trial Act); cf. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992) (complex litigation). See generally RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (2d ed. 1992).

The third major constituent of the plan prescribes increased use of ADR. The district provides for the scheduling of "settlement week conferences" during regular intervals at least three times each year.⁷⁸ The court refers every civil case in which discovery is concluded to such conferences. Type I civil suits are exempted from this requirement. Other cases are exempt from the conferences when litigants, with the court's consent, agree to participate in another type of ADR, such as a mini-trial, summary jury trial, arbitration or mediation.⁷⁹ The court will also exempt suits in which it determines that referring the cases to settlement week conferences will serve no beneficial purpose.⁸⁰

The plan provides as well for parties to ask that the court refer their suits to early neutral evaluation (ENE) or an additional form of alternative dispute resolution.⁸¹ When the court grants these requests, discovery time periods are tolled until the ENE is concluded, the ADR has proved unsuccessful, or the court decides that a litigant is not participating in good faith.⁸² The plan makes additional provision for those lawsuits exempted from settlement week conferences because no benefit would be derived from referral and for those cases that are not settled during these conferences. The court is to set a date for pretrial orders to be submitted and a firm trial date.⁸³

iii. Southern District of West Virginia

The civil justice plan for the Southern District of West Virginia is organized in terms of the eleven principles, guidelines and techniques prescribed in the Civil Justice Reform Act.⁸⁴ The plan also includes sections pertaining to additional staff resources and to the court's annual assessment, which warrant minimal examination here.⁸⁵

The district achieves the first principle, differentiated case management, by requiring that a judicial officer review and place all civil suits into categories of cases that are set for trial six months from the date of filing, nine months from that time or have an open period for the trial date.⁸⁶ The officer must conduct a "time frame conference" to determine the suits'

78. See NORTHERN DISTRICT OF WEST VIRGINIA REPORT, *supra* note 52, at 81.

79. *Id.*

80. *Id.*

81. *Id.* Contract negotiations involving a labor contract are considered a form of ADR for purposes of this provision. *Id.* at 81-82.

82. *Id.* at 82.

83. *Id.* Difficulties with the various provisions for settlement and ADR are that their invocation may prove unsuccessful, while their use can unduly burden litigants who lack resources or power in part because the procedures often impose costs. See Tobias, *supra* note 69, at 495-98; see also *infra* note 158 and accompanying text.

84. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 75-92; see also 28 U.S.C. § 473 (Supp. II 1990).

85. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 93-94 (discussing requests for additional resources); *id.* at 95 (requiring annual assessment).

86. *Id.* at 75; see also 28 U.S.C. § 473(a)(1) (Supp. II 1990).

complexity; to set deadlines for discovery, pretrial and motions; to determine the litigants' amenability to acceding to magistrate judge jurisdiction; to assess early settlement prospects; and to consider ADR measures as promptly as possible.⁸⁷

The second principle prescribes the early and continuing control of the pretrial process through the participation of a judicial officer in numerous matters.⁸⁸ One measure central to the plan is a "Time Frame Order" which establishes dates for completing pretrial activities, such as motions to dismiss and for summary judgment, joinder of parties, amendments of papers, discovery, and final settlement conferences.⁸⁹ The plan imposes numerous procedural requirements on motions and responses. All dispositive motions must be concise, filed in a timely manner, and include supporting memoranda, depositions, documents, admissions, and affidavits.⁹⁰ The court will accord priority to motions to dismiss,⁹¹ while it has discretion to set motions for hearings or oral arguments and to approve in advance the submission of supporting briefs or memoranda in excess of twenty pages.⁹²

The plan tersely provides for the third, fourth, and fifth principles and guidelines in the CJRA.⁹³ It states that the case management practice prescribed permits the identification of complex suits and the creation of time frames to manage the litigation adequately, although the court requested that the local rules committee review the local rules and draft any necessary revisions by June 1, 1992.⁹⁴ The district made a similar request regarding routine discovery exchange, even though the court observed that it "encourages cost-effective discovery through voluntary exchange of information among" parties and counsel and through the employment of cooperative discovery mechanisms.⁹⁵ The plan also requires that motions to compel discovery include statements that attorneys have conferred and attempted to resolve their discovery disputes in good faith.⁹⁶

87. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 75-76.

88. See 28 U.S.C. § 473(a)(2) (Supp. II 1990).

89. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 76-77. Time periods in the Time Frame Orders will be modified only for good cause. *Id.* at 80. Once the issues are joined, the court must set a "binding discovery schedule under which all discovery will be completed." *Id.* at 77-78.

90. *Id.* at 78-79. The plan makes certain exceptions for nondispositive motions. For instance, all of these motions are to be referred to the magistrate judge, unless the Article III judge assigned the case orders otherwise. *Id.* at 78. Even "[d]ispositive motions may be referred to a Magistrate Judge upon the individual determination of the District Judge." *Id.* at 78-79.

91. *Id.* at 78.

92. *Id.* at 79-80.

93. See *id.* at 80-81; see also 28 U.S.C. § 473(a)(3)-(5) (Supp. II 1990).

94. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 80.

95. *Id.* at 80-81. The responses of the local rules committee to the discovery exchange requests remain unclear because the committee had not completed, as of January 1993, a fundamental revision of the local rules commenced in 1992. See *infra* note 113 and accompanying text.

96. *Id.* at 81; see also 28 U.S.C. § 473(a)(5) (Supp. II 1990).

The most important aspect of ADR in the district is a mandatory mediation program. The plan provides that all civil cases are eligible for inclusion, states that suits ordinarily must be mature in the sense that discovery has nearly been completed, and offers a list of cases which are typically appropriate or inappropriate for mediation.⁹⁷ Lawyers may suggest cases for inclusion in the mediation program, although the court will make the ultimate determination.⁹⁸ Once the court so decides, the litigants will be notified and the case will be mediated unless the parties can make a good cause showing that mediation is inappropriate.⁹⁹

The plan provides for the selection of mediators who will be drawn from experienced litigators who will donate their services.¹⁰⁰ Mediation procedures mandate the attendance of individuals with settlement authority and require that litigants participate in good faith.¹⁰¹ Counsel for each party can file written factual presentations of not more than five pages and will have five to ten minutes to clarify facts needing additional development and fifteen minutes to argue orally.¹⁰² Thereafter, the mediators can meet with the litigants and their lawyers independently and together to encourage settlement.¹⁰³

Several difficulties may attend the application of this compulsory mediation program. First, mandatory mediation might not work in a number of cases, as the plan recognizes by prescribing the exclusion of some suits. Participation in compulsory mediation can be particularly burdensome for litigants who possess limited resources. Some lawyers could correspondingly attempt to employ the procedure for strategic advantage. The court may also experience difficulty securing mediators who will be uncompensated volunteers, while the participation of attorneys as mediators may preclude their involvement in mediation on behalf of their clients.

The plan briefly provides for the five statutorily-prescribed techniques.¹⁰⁴ Lead trial counsel must be fully prepared at the pretrial conference to discuss every aspect of the case and all matters in the pretrial order.¹⁰⁵ "No later than the 10-day period prior to the conference," the litigants and lead trial counsel must meet and negotiate over settlement.¹⁰⁶ The court may levy appropriate sanctions, including attorney's fees, when a party and its lead

97. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 81-84; see also 28 U.S.C. § 473(a)(6) (Supp. II 1990).

98. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 82-83.

99. *Id.* at 83.

100. *Id.* at 84-86. In a specific case, the court will choose three mediators, the plaintiff and the defendant will each strike one, and the remaining attorney will mediate the case. *Id.* at 85.

101. *Id.* at 86.

102. *Id.*

103. *Id.* at 87. The plan also provides for postmediation follow-up. *Id.*

104. See *id.* at 90-92; see also 28 U.S.C. § 473(b) (Supp. II 1990).

105. See SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 90.

106. *Id.* Plaintiff's lead counsel must initiate the meeting, and all other counsel are to cooperate in the negotiations. *Id.*

trial counsel do not appear at a final settlement conference, when lead trial counsel does not appear at any pretrial conference, or when lawyers fail to confer in settlement negotiations as provided in the plan.¹⁰⁷

In addition to the attendance and participation requirements, the plan states that the court may require that litigants consent in writing to repeated requests for discovery extensions or trial continuances of its counsel.¹⁰⁸ The plan also announces that the district has established an "informal neutral evaluation program" to permit the presentation of a case's factual or legal basis to a neutral court representative at a nonbinding conference held early in the litigation.¹⁰⁹ Moreover, the plan provides that a district judge who becomes aware that he or she has multiple cases scheduled to begin trial on the identical day will attempt to secure consent to trial before a magistrate judge in the remaining cases.¹¹⁰

iv. Implementation Subsequent to Plan Adoption

The Southern District of West Virginia was the only EIDC in the Fourth Circuit that specifically mentioned in its plan the court's responsibility to conduct an annual assessment.¹¹¹ The plan states that the advisory group was to meet regularly in 1992 and subsequent years to review plan implementation and to evaluate the court's docket to ascertain appropriate additional actions that the court might take to decrease expense and delay and enhance litigation management practices.¹¹² Because the district undertook a fundamental revision of its local rules, which it had not completed as of January 1993, the district will not conduct an annual assessment until those new rules have been in effect for a year.¹¹³

The Eastern District of Virginia plans to issue its annual assessment in mid-spring.¹¹⁴ That document will include an assessment of civil litigation in the court since the plan's adoption and some comparison of developments in the Eastern District with those in "peer districts" that have similar caseloads.¹¹⁵ The Northern District of West Virginia will probably publish

107. *Id.* at 91-92. The court may also assess parties jurors' fees, unless the litigants advise the court of settlements not later than 3:00 p.m. of the last day before trial. *Id.* at 92.

108. *Id.* at 91; *see also* 28 U.S.C. § 473(b)(3) (Supp. II 1990).

109. SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 91; *see also* 28 U.S.C. § 473(b)(4) (Supp. II 1990).

110. *See* SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra* note 52, at 92. The "assigned Judge must attempt to secure another District Judge who is willing to try the next scheduled case," if no agreement is reached. *Id.*

111. *Id.* at 95.

112. *Id.*

113. Telephone Interview with Ronald Lawson, Clerk, United States District Court for the Southern District of West Virginia (Jan. 20, 1993).

114. Telephone Interview with Kim Dayton, Professor of Law, University of Kansas, and Advisory Group Reporter, United States District Court for the Eastern District of Virginia (Jan. 14, 1993).

115. *Id.*

its annual assessment in late spring.¹¹⁶ The district is conducting "settlement week conferences" during late March and early April and wants to await their conclusion so that evaluation of the technique's efficacy can be included in the assessment.¹¹⁷

v. EIDC Oversight

The written documentation of the Fourth Circuit Review Committee's examination of civil justice planning in the three EIDCs is very terse. The report consists of a one-page "report form" that includes no substantive information on any of the three districts.¹¹⁸ The cover letter from the Fourth Circuit Executive submitting the reports provides some additional information.¹¹⁹ The letter states that the committee had completed the "Circuit Committee Review Requirements of the Civil Justice Reform Act of 1990" for the court plans of the three EIDCs.¹²⁰ It also observes that "[t]he Committee believes that each district has made a good faith attempt to develop a Plan that will reduce delay and costs of civil litigation in their districts and that each satisfy the requirements of the Act."¹²¹

The Judicial Conference Committee on Court Administration and Case Management reviewed the work of the three courts somewhat more expansively. The Conference officially approved all of them as EIDCs and praised every district for the excellence of its civil justice plan and the degree to which each analyzed the comprehensive and thoughtful suggestions of its distinguished advisory group.¹²² The Conference made no particular com-

116. Telephone Interview with Wally Edgell, Clerk, United States District Court for the Northern District of West Virginia (Jan. 25, 1993); Telephone Interview with John W. Fisher II, Professor of Law, West Virginia University, and Advisory Group Co-Reporter, United States District Court for the Northern District of West Virginia (Jan. 25, 1992).

117. See telephone interviews cited *supra* note 116.

118. See Circuit Committee Review of CJRA Reports and Plans, Report Form for the Eastern District of Virginia (Mar. 31, 1992) (on file with Committee on Court Administration and Case Management, Washington, D.C.); Circuit Committee Review of CJRA Reports and Plans, Report Form for the Northern District of West Virginia (Mar. 31, 1992) (on file with Committee on Court Administration and Case Management, Washington, D.C.); Circuit Committee Review of CJRA Reports and Plans, Report Form for the Southern District of West Virginia (Mar. 31, 1992) (on file with Committee on Court Administration and Case Management, Washington, D.C.).

119. See Letter from Samuel W. Phillips, Circuit Executive, United States Court of Appeals for the Fourth Circuit, to Judicial Conference of the United States Committee on Court Administration and Case Management (Mar. 31, 1991) (on file with author).

120. *Id.*

121. *Id.*; see also Letter from Samuel W. Phillips, Circuit Executive, United States Court of Appeals for the Fourth Circuit, to Carl Tobias, Professor of Law, University of Montana (July 23, 1992) (stating that "no written narrative was submitted with report forms") (on file with author).

122. See Letter from Robert M. Parker, Chairman, Judicial Conference of the United States Committee on Court Administration and Case Management, to James C. Cacheris, Chief Judge, United States District Court for the Eastern District of Virginia (July 30, 1992) (on file with author); Letter from Robert M. Parker, Chairman, Judicial Conference of the United States Committee on Court Administration and Case Management, to Robert Earl

ments on the plan that the Eastern District of Virginia developed.¹²³ The Conference did request that the court consider creating mechanisms for monitoring the success of its plan in reducing litigant costs by controlling the extent of discovery and by employing additional procedures while asking that the district annually report to the Conference.¹²⁴

The Conference stated that the Northern District of West Virginia, like most EIDCs, had generally attempted to decrease expense and delay through numerous measures, such as controlling the extent of discovery and motions, promoting settlement, and considering ADR.¹²⁵ The Conference expressed its belief that judicial officers, not lawyers, should control discovery and that courts ought to consider limitations on the quantity of discovery requests, interrogatories, and depositions in conjunction with restrictions on the time to complete discovery.¹²⁶ The Conference also offered several specific recommendations. It stated that the plan provided for judicial officers to be informed of dispositive motions but did not include procedures to guarantee prompt disposition or to eliminate unwarranted motions.¹²⁷ The Conference observed that the plan required settlement weeks at least three times every year; however, long periods could remain from the time of filing until a judicial officer initiated settlement negotiations.¹²⁸ Moreover, the Conference asked the court to clarify whether it considered the advisory group's suggestions that it include a provision which requires lawyers to certify that they have made good faith efforts to resolve discovery controversies before seeking judicial assistance.¹²⁹

The Conference made the same general observations about the Southern District of West Virginia as it had provided for the Northern District of West Virginia.¹³⁰ The Conference, however, offered no particular comments about the Southern District.¹³¹

Maxwell, Chief Judge, United States District Court for the Northern District of West Virginia (July 30, 1992) (on file with author); Letter from Robert M. Parker, Chairman, Judicial Conference of the United States Committee on Court Administration and Case Management, to Charles H. Haden, II, Chief Judge, United States District Court for the Southern District of West Virginia (July 30, 1992) (on file with author).

123. See Eastern District of Virginia Letter, *supra* note 122. The Eastern District of Virginia was one of nine EIDCs that received the same letter.

124. See *id.*

125. See Northern District of West Virginia Letter, *supra* note 122.

126. *Id.*

127. *Id.*; see also notes 75-77 and accompanying text.

128. Northern District of West Virginia Letter, *supra* note 122; see also *supra* notes 78-83 and accompanying text.

129. Northern District of West Virginia Letter, *supra* note 122; see also 28 U.S.C. § 473(a)(5) (Supp. II 1990).

130. See Southern District of West Virginia Letter, *supra* note 122; see also *supra* notes 125-26 and accompanying text. The Southern District of West Virginia was one of ten EIDCs that received the same letter.

131. See Southern District of West Virginia Letter, *supra* note 122.

b. Civil Justice Planning Outside the Context of EIDCs

The advisory groups in the districts that are not EIDCs have been discharging their statutory responsibilities to develop reports and suggestions since early 1991 when the courts appointed the groups. The Advisory Group for the Middle District of North Carolina, however, is the only group that submitted its report and recommendations to the court before April 1993.¹³²

The Advisory Group for the Eastern District of North Carolina is planning to have rough drafts of its report and suggestions prepared by the beginning of February and probably will present the final version to the judges in May.¹³³ The Advisory Group for the Western District of North Carolina is scheduled to tender its report and recommendations to the court by the end of May, while the judges intend to develop the civil justice plan during the summer so that they can issue it well before December 1993.¹³⁴

The Advisory Group for the District of Maryland apparently will submit its report and suggestions to the judges during April.¹³⁵ The Advisory Group for the District of South Carolina is planning to provide the court its report and recommendations in April.¹³⁶ The Advisory Group for the Western District of Virginia will probably tender its report and suggestions to the judges during May or June.¹³⁷

The Advisory Group for the Middle District of North Carolina completed its report and recommendations in December 1992.¹³⁸ The group compiled a comprehensive, creative report and set of suggestions that include many perceptive, helpful ideas. The group relied substantially on its members' experience, its committees' deliberations, and on a wealth of data, some of which the group derived from a survey of all lawyers who are admitted to practice in the district.¹³⁹ The group also developed a proposed cost and delay reduction plan.¹⁴⁰ Because that proposal epitomizes the careful nature of the group's work, incorporates by reference numerous recommendations of the group, and could well be adopted by the court, the proposed plan is the focus of analysis below.

132. MIDDLE DISTRICT OF NORTH CAROLINA REPORT, *supra* note 37.

133. Telephone Interview with Carol Morgan, Esq., CJRA Staff Attorney, United States District Court for the Eastern District of North Carolina (Jan. 15, 1993).

134. Telephone Interview with Sam Hamrick, Office of the Clerk, United States District Court for the Western District of North Carolina (Jan. 15, 1993).

135. Telephone Interview with Joseph Haas, Clerk, United States District Court for the District of Maryland (Jan. 22, 1993).

136. Telephone Interview with Virginia Vroegap, Esq., Sinkler & Boyd, Columbia, S.C., Advisory Group Chair, United States District Court for the District of South Carolina (Jan. 19, 1993).

137. Telephone Interview with Philip Stone, Esq., Wharton, Aldhizer & Weaver, Harrisonburg, Va., Advisory Group Chair, United States District Court for the Western District of Virginia (Jan. 19, 1993).

138. See MIDDLE DISTRICT OF NORTH CAROLINA REPORT, *supra* note 37.

139. See *id.* at iii; see also *id.* at app. F (attorney survey).

140. See *id.* at 109-14.

Illustrative of the careful character of the group's efforts is the discussion in its plan of the "legal" and "practical considerations" that attend civil justice reform's implementation.¹⁴¹ The group systematically reviewed the relevant sources of its authority, appropriately concluded that this power is comparatively limited, and fashioned a pragmatic solution to the problems which the group's authority implicates.¹⁴² The group ultimately decided to forward the report and proposed plan to the district's local rules committee for drafting and for suggestions for local rules' changes.¹⁴³ The group premised this determination on the legal factors and its view that the local rules committee might be considering other proposals which would interact with those of the group; that the committee's life is unlimited, unlike the group's which is statutorily restricted to four years;¹⁴⁴ and that the two entities have common members which affords institutional memory.¹⁴⁵

The group's proposed plan and its recommendations include numerous particulars, which warrant only brief examination here. For instance, the proposed plan suggests local rules amendments that would permit nonsteno-graphic depositions upon notice or stipulation, require the "disclosure of information on experts to be called at trial," prescribe a presumptive limit of thirty-five pages for briefs, and accord the court discretion to mandate the attendance of parties or insurers at settlement or other conferences relating to dispute resolution.¹⁴⁶

The central features of the proposed plan and the group's recommendations implicate restrictions on discovery and expansion of ADR, and these aspects deserve more comprehensive treatment. The plan does suggest, however, that the court revise a local rule by including precatory phrasing which admonishes lawyers and litigants to employ discovery procedures in good faith by not overusing or abusing them.¹⁴⁷

The most important dimensions of the report relating to discovery propose the implementation of automatic disclosure and the imposition of greater controls on discovery. The group suggested that automatic disclosure be achieved by revising a local rule to require that parties, as part of pretrial orders, identify certain potential witnesses, provide general descriptions of documents used to draft pleadings, and divulge the existence and contents of specific insurance agreements.¹⁴⁸

This proposal will probably expedite civil cases by moving to an earlier phase of litigation the voluntary disclosure of information that could be secured with discovery requests. The proposal correspondingly minimizes

141. *See id.* at 109-11.

142. *Id.*

143. *Id.* at 111.

144. *See id.*; *see also* 28 U.S.C. § 478 (Supp. II 1990) (group's statutory life).

145. *See* MIDDLE DISTRICT OF NORTH CAROLINA REPORT, *supra* note 37, at 111.

146. *See id.* at 111-12, 114.

147. *See id.* at 111; *see also id.* at 59.

148. *See id.* at 60-62.

the difficulties raised by those mandatory pre-discovery disclosure provisions that the EIDCs have premised on the Federal Rules proposal.¹⁴⁹

The proposed plan recommends that discovery be controlled through restrictions on the type, frequency, and amount of discovery implemented in the context of differentiated case management. The standard case management plan would allow discovery for four months from the initial pretrial order's entry while permitting each party five depositions and twenty-five interrogatories.¹⁵⁰ The time period and the numerical limitations may be modified only if the litigants so stipulate and the court approves, or by the court's order for good cause shown.¹⁵¹ A second track would enable parties to have their cases resolved within nine months, if the litigants consent to trial before a magistrate judge.¹⁵²

The case management plan for complex cases provides seven months for discovery and allows every party ten depositions and fifty interrogatories,¹⁵³ while the time frame and the numerical restrictions can be changed for the same reasons as standard cases.¹⁵⁴ If the litigants consent to trial before a magistrate judge, they will have a trial date fifteen months after the initial pretrial order is entered.¹⁵⁵ The temporal and numerical limitations on discovery might afford insufficient flexibility in suits that are complicated or require substantial discovery, but the provision for modification may suffice.

The other integral feature of the proposed plan and the group's recommendations is increased reliance on ADR. Both suggest that litigants should be afforded notice of opportunities to stipulate to a trial before a magistrate judge, to court-annexed arbitration, to binding arbitration, to court-annexed mediation, and thus early neutral evaluation, and to the appointment of a master to resolve certain or all issues in a case.¹⁵⁶ Both also recommend that parties be required to state in the final pretrial conference whether the litigants have stipulated to the above forms of ADR, because the group believed that these options could appear more appealing once a suit has been through the pretrial process and is awaiting trial.¹⁵⁷ Although the successful use of much ADR will conserve the resources of the court and

149. See *supra* note 21 and accompanying text.

150. See MIDDLE DISTRICT OF NORTH CAROLINA REPORT, *supra* note 37, at 62-63.

151. See *id.* at 63. Trial must be scheduled as early as the civil and criminal "dockets of the assigned district judge permit." *Id.*

152. *Id.* The discovery period and restrictions on depositions and interrogatories are identical to those in the standard plan. A trial date must be established at or soon after the time of the pretrial order and can be continued only for extraordinary good cause. *Id.*

153. See *id.* at 64.

154. See *id.*; see also *supra* note 151 and accompanying text.

155. See MIDDLE DISTRICT OF NORTH CAROLINA REPORT, *supra* note 37, at 64. Trial must otherwise be scheduled as early as "the criminal and civil dockets of the assigned district judge permit." *Id.*

156. See *id.* at 112 (plan); *id.* at 65-66 (recommendations).

157. See *id.* at 113 (plan); *id.* at 68-71 (recommendations).

of some litigants and lawyers, its employment can disadvantage other parties and attorneys, particularly those who lack resources.¹⁵⁸

B. Executive Branch Civil Justice Reform

All lawyers who participate in civil suits on behalf of the government, including counsel in federal agencies, in the Department of Justice, and in the local United States Attorneys' Offices, were and are to comply with Executive Order 12,778 and with the Justice Department's guidance.¹⁵⁹ Several factors complicate efforts to discern precisely how the government has implemented executive branch reform in the Fourth Circuit.

First, the government has had little time to experiment with the Order and the guidance. Second, there are hundreds of government lawyers with varying responsibilities for litigating civil cases. For example, the United States Attorneys Offices in a number of Fourth Circuit districts have minimal responsibility for conducting much of the government's civil litigation, such as Army Corps of Engineers condemnation proceedings and suits involving social security. Third, it is very difficult to trace how the contents of the Order and the guidelines were disseminated to these attorneys, how the lawyers comprehended and implemented them, and what counsel reported to the Department on their experiences with experimentation. Fourth, the nine districts that comprise the Fourth Circuit apparently have implemented executive branch reform differently, if at all.

Nevertheless, certain information can be extracted from the Federal Register Notice, which attended the issuance of the final guidelines and afforded explanations for them, from discussions with Justice Department personnel who played major roles in the guidelines' finalization, from interviews with government attorneys who were to effectuate executive branch reform, and from conversations with individuals familiar with civil justice reform in the Fourth Circuit. These sources indicate that government lawyers have undertaken very little implementation of executive branch reform in the Fourth Circuit. Moreover, the recent change in presidential administrations means that the future of this reform in the Fourth Circuit could well remain uncertain during the short term.¹⁶⁰

In sum, the three EIDCs and the remaining six districts in the Fourth Circuit have been actively involved in civil justice reform for more than two years. Because the efforts of each district have been diverse, because a majority of the courts have yet to finalize their civil justice plans, and because reform instituted under the 1990 Act is not scheduled to expire until 1997, it is important to offer suggestions for the future.

158. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986). See generally Tobias, *supra* note 69, at 495-98.

159. See *supra* notes 41-47 and accompanying text.

160. See *supra* note 47 and accompanying text.

III. SUGGESTIONS FOR THE FUTURE

A. *Civil Justice Reform Under the Civil Justice Reform Act of 1990*

1. General Suggestions

Although the most efficacious ways to implement civil justice reform and the most effective particular procedures might necessarily be district-specific, the preferable approaches to civil justice planning and the best procedures may apply in many, if not all, districts. Indeed, the insight that certain procedures will work well in most districts partially animated congressional prescription of the eleven principles, guidelines and techniques.¹⁶¹

All of the districts in the Fourth Circuit should attempt to secure the maximum material which will inform their civil justice reform efforts. The three EIDCs, when compiling their annual assessments and fine-tuning implementation, and the judges in the remaining districts, when developing their civil justice plans, should consult and incorporate information gleaned from civil justice reform efforts across the nation and in the Fourth Circuit. Valuable national sources of material on how to effectuate civil justice reform and on particular procedures are the recently-issued model plan, which includes a plethora of efficacious procedures collected from all of the EIDCs;¹⁶² the civil justice plans of the thirty-one other EIDCs, which provide these and other helpful procedures as well as effective ways of implementing the reform;¹⁶³ and the annual assessments performed to date, which suggest pitfalls to be avoided and improvements that can be instituted.¹⁶⁴

Important sources of information available within the Fourth Circuit are the civil justice plans of the three EIDCs and the advisory group reports that have been prepared.¹⁶⁵ For instance, the report of the advisory group for the Middle District of North Carolina carefully treats the difficult issues of authority that the reform raises and specifically attempts to minimize prescription of local procedures which conflict with the Federal Rules.¹⁶⁶ The efforts of this court and its advisory group to keep the district's local rules committee fully informed of, and involved in, the group's work exemplifies effective planning.¹⁶⁷ Further, the decision of the Southern District of West Virginia to undertake a comprehensive review and revision

161. See 28 U.S.C. § 473(a)(1)-(6), (b)(1)-(5) (Supp. II 1990).

162. See *supra* note 39 and accompanying text.

163. See *supra* notes 14-29 and accompanying text.

164. See *supra* notes 30-32 and accompanying text.

165. See *supra* notes 52-110, 138-58 and accompanying text. The annual assessments could also be helpful sources; however, none had been issued as of January 1993. See *supra* notes 111-17 and accompanying text.

166. See *supra* notes 141-45, 148-49 and accompanying text.

167. See *supra* notes 142-43 and accompanying text.

of its local rules in the context of implementing civil justice reform is an efficient, creative method of proceeding.¹⁶⁸

2. Specific Suggestions

a. EIDCs

The EIDCs, in preparing their first and subsequent annual assessments, must consult with their advisory groups and discharge the statutory duties of evaluating the condition of the courts' criminal and civil dockets to ascertain appropriate additional actions that they may initiate to decrease expense and delay and to enhance litigation management practices.¹⁶⁹ The districts are to collect, analyze, and synthesize relevant information regarding their dockets from the preceding year and the impact of plan provisions on cost and delay in civil cases. Insofar as the districts are able to detect procedures that have proved inefficacious, the courts should seriously consider deleting them, as a few EIDCs have already done.¹⁷⁰ To the extent that the districts identify causes of expense or delay which might be addressed more effectively, the courts should consult numerous sources of information for felicitous procedures. Helpful material is available nationally and in the Fourth Circuit in the form of the new model plan, the civil justice plans that the EIDCs developed, and the annual assessments which some districts have compiled.¹⁷¹

Once the EIDCs in the Fourth Circuit have undertaken the review suggested above, the districts should amend their civil justice plans and applicable local rules, as indicated. The courts must omit those procedures that have clearly been ineffective. They may also want to continue experimenting with techniques the efficacy of which remains uncertain, and should implement any new measures that will, or promise to, reduce cost or delay in the districts.

b. Civil Justice Planning Outside the Context of EIDCs

After the courts in those districts that have not issued civil justice plans receive the reports and recommendations of their advisory groups, the judges should consider many factors in compiling final plans. The judges must

168. See *supra* note 113 and accompanying text.

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

170. The Eastern District of Texas eliminated the requirement that leave of court be secured to file motions in suits subject to the plan. See 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) (on file with author); see also EASTERN DISTRICT OF TEXAS PLAN, *supra* note 21, at 7. The court apparently modified the procedure, which theoretically seemed to be a good idea, because it proved unworkable in practice.

171. See *supra* notes 164-65 and accompanying text; see also *supra* note 166 and accompanying text (discussing Middle District of North Carolina report that is helpful in analyzing authority issues).

discharge their statutory obligations to confer with the advisory groups. They must also take into account, and may adopt, any of the eleven principles, guidelines, and techniques that Congress prescribed.¹⁷²

The judges should collect and analyze the greatest quantity of relevant information.¹⁷³ This suggestion implicates important issues of timing. The later in 1993 that courts wait to promulgate plans the more material, in the form of other districts' plans and EIDCs' annual assessments, the judges will have to guide them. Delaying too substantially, however, could complicate compliance with the December 1993 deadline for issuing plans. This will be especially true for districts in which plan implementation necessitates the promulgation of new, or the revision of existing, local rules.¹⁷⁴

The judges should also be attentive to the most troubling problems that the thirty-four EIDCs have encountered. A number of these difficulties have been mentioned in this paper, but several are sufficiently significant to warrant additional treatment. An important cluster of problems, examined at various junctures above,¹⁷⁵ involves judicial authority. Some EIDCs have exercised broad power under the CJRA and have even prescribed local procedures that contravene the Federal Rules or provisions in the United States Code.¹⁷⁶ Nonetheless, Congress, in passing the civil justice reform statute, apparently contemplated that courts would have considerably narrower authority to act.¹⁷⁷ Moreover, several writers have persuasively argued that Congress intended to grant courts limited power,¹⁷⁸ while one commentator has contended that the legislation effectively repeals the Rules Enabling Act.¹⁷⁹ Furthermore, most EIDCs have neither claimed that the CJRA affords them expansive power nor attempted to exercise such power.

Even if Congress meant to provide courts relatively broad authority, reliance on that power to adopt local procedures that conflict with national provisions or with procedural strictures in other districts would be unwise as a policy matter.¹⁸⁰ When courts prescribe local procedures that differ from federal requirements or from ones in the remaining ninety-three districts, such inconsistency complicates the efforts of parties and lawyers

172. See 28 U.S.C. § 473 (Supp. II 1990).

173. See *supra* notes 164-66 and accompanying text.

174. Revising local rules consumed several months in the Montana District. *Cf. supra* note 113 and accompanying text (noting that comprehensive rule revision consumed more than year); see also *infra* notes 183-84 and accompanying text.

175. See, e.g., *supra* notes 28-29, 141-45 and accompanying text.

176. See *supra* notes 28-29 and accompanying text.

177. The statutory language employed and the accompanying legislative history indicate that Congress granted the courts narrow authority to act under the CJRA. See 28 U.S.C. § 473 (Supp. II 1990); S. REP. NO. 416, *supra* note 4.

178. See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 947-51 (1991); Lauren K. Robel, *Fractured Procedure* (1992) (unpublished manuscript, on file with author); see also Tobias, *supra* note 14, at 52 n.17.

179. See Mullenix, *supra* note 3, at 379; see also 28 U.S.C. § 2072 (1988 & Supp. II 1990).

180. See Tobias, *Balkanization*, *supra* note 33.

who participate in litigation in multiple districts. For instance, those parties and attorneys experience difficulty finding, mastering, and complying with disparate procedures, problems which can increase expense and delay and particularly disadvantage resource-poor individuals and their counsel. These factors mean that districts in the Fourth Circuit should closely analyze this judicial power and minimize the possibility that the procedures they promulgate will conflict with the Federal Rules or requirements in the United States Code. The careful treatment that the Middle District of North Carolina Advisory Group accorded the issues of power in its report typifies this approach.¹⁸¹

Several more specific ideas are closely related to these authority questions. One issue is whether the civil justice plans must be implemented through the local rules or whether they should be considered self-executing and directly enforceable against lawyers and litigants. Some EIDCs apparently have treated their plans as self-executing.¹⁸² Nonetheless, the preferable approach for courts is to adopt new, or amend current, local rules.¹⁸³ This affords attorneys and parties notice and an opportunity to comment on proposed changes and notice of any modifications' applicability, thereby potentially improving the rules prescribed and facilitating compliance. This question in turn implicates the appropriate relationship between the most active participants in civil justice reform—district judges and advisory groups—and the local rules committees. Because the local rules committees must formulate any new, or revise existing, local rules that are needed, the groups and the courts should keep the committees fully apprised of, and involved in, civil justice reform efforts.

Another important factor that districts in the Fourth Circuit should consider is how to address directly the problem of cost reduction, even though most EIDCs did not, attempting instead to reduce delay and, thus, decrease expense. The Eastern District of Texas is one court that adopted procedures to attack cost directly, imposing ceilings on contingent fees in most cases, implementing requirements for settlement offers that differ somewhat from Federal Rule 68, and placing restrictions on the amount of discovery.¹⁸⁴ In an October 1992 memorandum, the Judicial Conference Committee on Court Administration and Case Management informed all ninety-four courts that excessive discovery is the single greatest factor which contributes to unacceptable expense, admonishing that civil justice planning could not be successful unless it closely controlled discovery's extent.¹⁸⁵

The establishment of baselines is an additional factor that the Fourth Circuit districts should take into account, although comparatively few EIDCs

181. See *supra* notes 141-45 and accompanying text.

182. See, e.g., EASTERN DISTRICT OF ARKANSAS PLAN, *supra* note 62; SOUTHERN DISTRICT OF FLORIDA PLAN, *supra* note 23.

183. The 1988 Judicial Improvements Act requires courts to adopt or amend local rules. See 28 U.S.C. § 2071 (1988).

184. See EASTERN DISTRICT OF TEXAS PLAN, *supra* note 21, at 1, 7-8, 10.

185. See Parker Memorandum, *supra* note 35.

apparently created them.¹⁸⁶ The use of baselines relating to cost and delay will facilitate the compilation of annual assessments and attempts to ascertain accurately the relative success of the various procedures instituted in civil justice plans. Without these baselines, districts will have to rely substantially on anecdotal evidence.

It is particularly important that the courts in the multi-district states of North Carolina, Virginia, and West Virginia maintain close communications in their civil justice reform efforts. For example, these courts should consider the possibility of adopting uniform local procedures, an approach that the Northern and Southern Districts of Indiana implemented immediately before issuing their civil justice plans.¹⁸⁷ The judges might assess the disadvantages of intrastate inconsistency, such as the expense of demanding that the many lawyers with statewide practices master different requirements in each district. The judges could then evaluate the benefits of having disparate procedures, including the need to treat aspects of local legal cultures that are peculiar to specific courts. Next, the districts ought to balance the detriments and advantages. Unless the courts find the benefits to be substantial, they should undertake efforts that would maximize, or at least increase, intrastate uniformity.

c. A Special Note on the Eastern District of Virginia

Both EIDCs and courts preparing civil justice plans should accord consideration to the situation in the Eastern District of Virginia. Two essential case management techniques, "firm docket control by the judges, as federal Rule 16 expressly permits, and an insistence that attorneys practicing in the district comply with local and federal rules of procedure,"¹⁸⁸ which the court instituted before the CJRA's passage, have apparently enabled it to achieve Congress' principal objectives in enacting the statute, namely reducing expense and delay. This means that other districts in the Fourth Circuit should closely evaluate these mechanisms to ascertain whether the districts might apply those measures effectively. Courts should then determine which techniques alone or in conjunction with mechanisms prescribed in the CJRA would best permit them to attain the statute's purposes. Indeed, courts may find that reliance on the two fundamental case management measures that have been used so successfully in Virginia could suffice, or at least obviate the need to adopt many of the statutorily-enumerated procedures.

B. Executive Branch Experimentation

The Clinton Administration should closely analyze Executive Order 12,778 and the accompanying Justice Department guidance, omit any pro-

186. Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1993).

187. Telephone Interview with Lauren Robel, Professor of Law, University of Indiana-Bloomington and Advisory Group Reporter, United States District Court for the Southern District of Indiana (Jan. 21, 1993).

188. See Dayton, *supra* note 63, at 448-49.

cedures that seem ineffective, add any measures that promise to be efficacious, and vigorously implement executive branch civil justice reform.¹⁸⁹ This would enable the government to set somewhat higher standards than private parties for the litigation in which it participates,¹⁹⁰ to provide for experimentation with certain procedures other than those prescribed in the CJRA, and to realize some expense and delay reduction.¹⁹¹ Furthermore, President Clinton and the Attorney General should clearly and forcefully state that United States Attorneys, Justice Department lawyers, and agency counsel are to effectuate executive branch reform rigorously. This means that the United States Attorneys in the Fourth Circuit's nine districts ought to implement fully and faithfully the reform, emphasizing those requirements that will most effectively reduce expense and delay in civil cases.¹⁹²

CONCLUSION

The three EIDCs and the remaining six districts which are located in the Fourth Circuit have been actively involved in early civil justice reform efforts. By the end of 1993, the EIDCs will have compiled annual assessment and all nine courts will have adopted civil justice expense and delay reduction plans. It should then be possible to have a better sense of the early success of the reform. If the courts in the Fourth Circuit implement the suggestions above, particularly by exchanging information with each other and additional districts across the nation, the courts should be able to decrease cost and delay in civil litigation.

189. See Tobias, *Civil Agenda*, *supra* note 47; see also *supra* notes 41-45 and accompanying text.

190. Higher governmental standards were one reason that the Bush Administration proffered for promulgating the Executive Order. See Executive Order 12,778, 3 C.F.R. 359 (1992). See generally Tobias, *supra* note 41.

191. It is important to emphasize that executive branch civil justice reform is a modest reform which will only effect modest reductions.

192. See *supra* note 43 and accompanying text.

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