

EQUAL, ACCESSIBLE, AFFORDABLE
JUSTICE UNDER LAW:
THE CIVIL JUSTICE REFORM ACT OF 1990

Joseph R. Biden, Jr.[†]

INTRODUCTION

The first of the Federal Rules of Civil Procedure states that those Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."¹ As a guide to how all other rules should be interpreted, Rule 1 signifies that our courts, and the remedies they provide, must be as available to an individual as to a Fortune 500 company. If one ignores the mandate of "just, speedy, and inexpensive" litigation, or treats it as a cliché, our system of civil justice will not fulfill its foremost promise to the American people — that of equal justice under law.

Speaking at the Cornell Law School in April 1991, I sought to explore ways in which we can bring to life the majestic ideal of equal justice under law and its essential component, the speedy and inexpensive resolution of lawsuits. This article continues and elaborates on that discussion.

Too often, factors that have no theoretical standing in our law — factors such as education, race, or limited economic resources — prevent some Americans from obtaining equal justice from our legal system. Today, with the increasing volume of litigation in our courts, assuring equality before the law — that the *process* is fair to all who are brought into it — is a greater challenge than ever, a challenge we must meet.

In recent years, as the costs and delays associated with civil litigation have increased, the ideal of equal justice has too frequently gone unfulfilled. When the average American seeks redress for an injury, the litigation can be tied up for years. Motions and trial dates are postponed and rescheduled. In the interim, litigants have, at best, no motivation to conduct efficient discovery and, at worst, incentive to use discovery as an adversarial tool. Attorney preparation costs increase. Discovery expenses mount. Excessive discovery eventually prices the litigation out of reach for those with only modest resources.

[†] United States Senator; Chairman, Senate Judiciary Committee.

¹ FED. R. CIV. P. 1.

The available evidence confirms what lawyers who litigate in federal court have long known to be the case: our civil justice system is neither speedy nor inexpensive. In a survey conducted by Louis Harris and Associates of more than one thousand participants in the civil justice system,² a majority of judges and lawyers agreed that delay and excessive cost significantly restrict access to the courts for the ordinary citizen.³

I chaired a hearing on the Civil Justice Reform Act before the Senate Judiciary Committee on March 6, 1990, and the following example is typical of the testimony the Committee heard.⁴ A fifty-six-year-old man was injured by a defective product, and sought recovery for his medical bills and other damages. The man badly needed the money for his expenses. His lawyer told him that once the case was brought to trial, it would be in court for only two or three days. Four years later, the plaintiff still had not recovered any compensation. A trial date was set on three separate occasions and, in each case, was postponed. In the meantime, the plaintiff's litigation costs, which reflected these repeated preparations for trial, had skyrocketed. It is sad but true that the courthouse door is

² LOUIS HARRIS AND ASSOC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM (1989) reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 91-184 (1990). The survey, conducted for the Foundation for Change, was based on in-depth telephone interviews with 250 private litigators who represent plaintiffs, 250 private litigators who represent defendants, 100 public interest litigators who actively pursue cases in federal courts, 300 corporate general counsel of companies selected from the 5000 largest American corporations, and 147 federal district court judges. *Id.* at 92.

³ *Id.*, table 4.2, at 16. When asked the question: "Do you feel that the transaction costs of Federal litigation unreasonably impede the use of the Civil Justice System for the ordinary citizen, or not?" the following percentages answered, "yes, unreasonably impedes use:"

* private litigators (defense)	52%
* private litigators (plaintiff)	63%
* public interest litigators	85%
* corporate counsel	69%
* federal judges	56%

Id.

⁴ *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 37 (1990) [hereinafter *S. Hrg. 101-1097*] (statement of Bill Wagner, Immediate Past President, Association of Trial Lawyers of America).

rapidly being slammed shut for the middle class of this country. Once available to everyone, access to the courts has become an unaffordable luxury, even for middle-class Americans.

The problems of delay and excessive cost are by no means a recent phenomenon. Over a decade ago, Justice Lewis F. Powell, Jr. foresaw the magnitude of the problems we experience today. Dissenting from the Supreme Court's 1980 amendments to the Federal Rules of Civil Procedure pertaining to discovery, Justice Powell characterized the amendments as "tinkering" and "inadequate."⁵ Justice Powell explained:

[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system. . . . [T]he discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.⁶

As Chairman of the Senate Judiciary Committee, I believed that the legislative challenge presented by the problems of delay and excessive cost in civil litigation was clear: to formulate proposals that would effectively bridge the growing distance between the promise of Rule 1 — "the just, speedy, and inexpensive determination of every action" — and the reality of a system becoming increasingly inaccessible to the average citizen. The Civil Justice Reform Act of 1990⁷ answers this challenge by establishing a national framework for transforming the ideal of Rule 1 into the daily practice of every federal court.

⁵ Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 998, 1000 (1980) (Powell, J. dissenting).

⁶ *Id.* (footnote omitted); see also *Herbert v. Lando*, 441 U.S. 153, 177 (1979) ("[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'") (alteration in original) (quoting FED. R. CIV. P. 1).

⁷ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-106, 104 Stat. 5089-5098 (codified at 28 U.S.C.A. §§ 471-482 (West Supp. 1991)).

Signed into law on December 1, 1990, the Act implements, for the first time, a national strategy to attack the problems of cost and delay in civil litigation. The Act provides a mechanism, supported by the force of law, for maintaining a continuing national review of court procedures, involving the entire community of judges, lawyers, and court users. This mechanism has already begun to fulfill the promise of speedy and inexpensive civil litigation.

I. THE CIVIL JUSTICE REFORM ACT OF 1990

A. DEVELOPING A NATIONAL STRATEGY FOR FULFILLING THE PROMISE OF A JUST, SPEEDY, AND INEXPENSIVE DETERMINATION

The foundation for a national strategy to fulfill the promise of Rule 1 was provided by a Brookings Institution task force in a report entitled *Justice for All: Reducing Costs and Delay in Civil Litigation*.⁸ At my suggestion, the Brookings Institution had convened the task force to make recommendations for improving our civil justice system. In January 1990, I introduced legislation containing many of the proposals in the task-force report.⁹ In December 1990, the President signed the Civil Justice Reform Act into law. The enactment of comprehensive court reform legislation in less than twelve months was unprecedented and, many had thought, impossible.

Congress passed the Civil Justice Reform Act, in large measure, because of the consensus approach that produced the legislation. When I convened the Brookings task force at its first meeting in September 1988, I was struck immediately by the composition of its membership.¹⁰ It was not simply that the thirty-six members represented, as one federal judge has remarked, the "heavy-weight thinking in every spectrum of our judicial system,"¹¹ — although I wholeheartedly endorse that assessment. Instead, what commanded my attention was the

⁸ BROOKINGS INST. TASK FORCE, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989), [hereinafter BROOKINGS INST. TASK FORCE] reprinted in *S. Hrg. 101-1097*, *supra* note 4, at 421-73.

⁹ S. 2027, 101st Cong., 2d Sess. (1990).

¹⁰ BROOKINGS INST. TASK FORCE, *supra* note 8, at 45-49.

¹¹ *S. Hrg. 101-1097*, *supra* note 3, at 227 (testimony of Hon. Richard A. Enslin, United States District Judge for the Western District of Michigan).

diversity of views represented. Working together on the task force were individuals who had long argued over the best approach to court reform. The membership of the Brookings task force included leading litigators from the plaintiff and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, general counsel of major corporations, representatives of the insurance industry, law professors, and former judges.

The task force itself stated that: "On many legal and policy matters, the participants in our task force disagree. However, on the condition of our civil justice system and on the means of improving it, the members of our task force find common ground."¹² To hold that common ground, the task force adopted a strict consensus approach: each of the thirty-six members held the authority to veto any proposal.

The recommendations for reform which emerged from this unlikely consensus ultimately became the Civil Justice Reform Act. The key structural feature of these recommendations is the requirement that each of the ninety-four federal district courts in the country establish a local advisory group to study the court and to recommend a plan for reducing cost and delay.¹³ In communities throughout the nation, these ninety-four advisory groups are reproducing the valuable consensus building accomplished by the Brookings task force.

The purpose of each plan developed by an advisory group is 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."¹⁴ To accomplish this goal, the Act proposes a number of specific principles for case management and cost and delay reduction which Congress has adopted, and which each district court must consider in developing its plan.¹⁵ Each of the principles set

¹² BROOKINGS INST. TASK FORCE, *supra* note 8, at 3.

¹³ See 28 U.S.C.A. § 478 (West Supp. 1991).

¹⁴ *Id.* § 471.

¹⁵ See *id.* § 473(a). The six principles and guidelines for litigation management and cost and delay reduction identified in section 473 are as follows: (1) differential treatment of cases according to their complexity, (2) early and ongoing case management and control by judicial officers, (3) discovery-case management conferences held by judicial officers in complex or other appropriate cases, (4) encouragement of cost-effective discovery through cooperative discovery devices and the voluntary exchange of information, (5) prohibition of the consideration of discovery motions unless the moving party

forth in the Act rests on a common premise: intelligent case management puts limited judicial resources to their best use and reduces delay and excessive cost in civil litigation.

In a district court adopting each of the case management principles recommended by Congress,¹⁶ the court will conduct civil litigation in the following manner: A judicial officer will evaluate every civil action at the time of filing or shortly thereafter.¹⁷ In appropriate cases, a judicial officer may recommend, or a litigant may request that some form of alternative dispute resolution — summary jury trial, mediation, mini-trial, or early neutral evaluation — be used to bypass traditional court procedures.¹⁸

The judicial officer will pay special attention, early in the process, to complex litigation and will issue a scheduling order designed to impose organization on the process and to eliminate redundant work by lawyers.¹⁹ In all cases, judges will schedule a firm trial date at the earliest possible time so that, with a few narrow exceptions, the trial will commence within eighteen months of the filing of the complaint.²⁰ Judges will actively manage cases by limiting and organizing discovery,²¹ and by

certifies that it attempted a resolution in good faith, and (6) authorization to refer appropriate cases to alternative dispute resolution. *Id.* § 473(a)(1)-(6).

¹⁶ In ten district courts, this will, in fact, be the case. These "pilot districts," designated by the Judicial Conference of the United States, are required by the statute to implement each of the major case management principles adopted by Congress. Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097 (1990). The remaining districts retain the discretion to include the recommended principles in their plans, and it is anticipated that the six case management principles outlined in 28 U.S.C.A. § 473 (West Supp. 1991) will be included, in varying degrees, in the plan of every district in the nation. The role of the pilot districts is explained in more detail in subsection C, below.

¹⁷ See 28 U.S.C.A. § 473(a)(1)-(2) (West Supp. 1991).

¹⁸ *Id.* § 473(a)(6).

¹⁹ *Id.* § 473(a)(3)(C).

²⁰ *Id.* § 473(a)(2)(B). This section allows for exceptions to this rule for complex cases that are incompatible with such a deadline and for courts burdened by an extremely heavy criminal docket. For a case to be exempted, a judicial officer must certify that one of these exceptions applies and that the 18-month goal cannot be met.

²¹ 28 U.S.C.A. § 473(a)(2)(C) (West Supp. 1991); see also *id.* § 473(a)(3)-(5).

setting deadlines and timeframes for the filing and disposition of motions.²²

Twice a year, the Administrative Office of the United States Courts will publish reports identifying those cases that have stalled in court because of the failure to decide a motion promptly²³ or to rule on a bench trial.²⁴ The reporting requirement applies to every district in the United States and has already taken effect.²⁵ The first of these reports reveals that approximately one-fifth of the district court judges have twenty or more motions that have been pending for more than six months.²⁶ In one case, a judge has 468 motions pending.²⁷ Judge Justin L. Quackenbush, the Chief Judge of the Eastern District of Washington, wrote to me last year to describe the early effects of the reporting requirement. In his letter, he writes:

In this district, we have commenced to circulate among the judges the statistics which will be furnished to this district's Advisory Group. We have also furnished each judge a schedule of his statistics compared to the national averages, the district averages, and those of other judges in the district. This procedure has caused each individual judge to sharpen his focus on case man-

²² *Id.* § 473(a)(2)(D).

²³ *Id.* § 476(a)(1).

²⁴ *Id.* § 476(a)(2).

²⁵ In an editorial, the Washington Post welcomed the publication of statistics on judges' backlogs:

Information on court delay has been compiled for years, but was always kept secret. In 1990, however, Congress passed legislation requiring that this information be supplied by each individual federal judge and made public. The law has had a salutary effect. One Washington lawyer reports, for example, that three cases that had been pending for quite some time in three different district courts were finally resolved the day before the data were due -- the implication being that judges across the country were cleaning up old business rather than confessing delay.

Judge Penn's Backlog, WASH. POST, Jan. 15, 1992, at A22.

²⁶ Memorandum from David L. Cook, Chief, Statistics Division, Administrative Office of the United States Courts, to the Committee on Court Administration and Case Management 1 (Dec. 6, 1991) (on file with author). One-hundred-and-twenty district judges and 28 magistrate judges had more than 20 motions pending over six months.

²⁷ *Id.* at 2.

agement and on the timeliness of his decision making. The case termination statistic in our district has shown a substantial increase.

We all recognize that peer pressure plays an important role in our everyday lives, and it likewise is important in the judicial setting.²⁸

The most effective judges in the federal system have successfully employed, in various forms, each individual case management principle adopted by Congress. The Civil Justice Reform Act's innovation is to establish a national framework to identify valuable court procedures, to implement them systematically, and to inform the more than 600 federal trial judges in America of their effectiveness in reducing delay and excessive cost.

B. ADVISORY GROUPS: THE ENGINE FOR REFORM

The effectiveness of the Civil Justice Reform Act depends on the work of the district court advisory groups. The role of the advisory groups is twofold. First, they create a meaningful forum for the discussion of cost and delay reduction. Advisory group members are engaging in a structured yet informal process that brings together judges, litigants, and lawyers,²⁹ who have rarely, if ever, exchanged views on the shortcomings in court procedures. From this exchange of diverse views is emerging the consensus fundamental to successful reform. Second, these advisory groups ensure that this exchange takes place locally among those who best know the legal culture of a given district. Consequently, each district tailors its reform proposals to the sources of cost and delay unique to that particular district.³⁰

²⁸ Letter from Justin L. Quackenbush, Chief United States District Judge of the Eastern District of Washington, to U.S. Senator Joseph R. Biden, Jr. (Apr. 23, 1991) (on file with author).

²⁹ The membership of each advisory group must reflect the broad diversity of the litigants in each district. 28 U.S.C.A. § 478(b) (West Supp. 1991) ("The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court . . .").

³⁰ The Brookings Task Force noted: "[T]he wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, the bar, and client

At this early stage in the implementation of the Civil Justice Reform Act, the quality and diversity of participation in advisory groups is the statute's most notable achievement. Advisory groups have amply satisfied the statutory requirement that the groups be "balanced" and "representative of major categories of litigants in [the] court."³¹ Law professors are serving as the reporters for many groups. The attorney members include plaintiff and defense attorneys, state judges, former federal judges, corporate counsel, public interest advocates, and law school deans. Non-lawyers, such as media and business executives, union leaders, non-profit foundation executives, and state legislators, are also participating as advisory group members. As a result of the Civil Justice Reform Act, more than 1700 community leaders nationwide are serving on advisory groups dedicated to reducing delay and excessive cost in civil litigation.³²

An early example of the type of change made possible by a national framework for civil justice reform is evident in a report of the advisory group for the District of Massachusetts. This group, led by Professor Arthur R. Miller of the Harvard Law School, studied the district court and acknowledges that:

Of the data made available thus far, one statistical fact is very illuminating: Of 90 judicial districts in the United States, the District of Massachusetts ranks 82nd in median time from filing to disposition of civil cases, and 88th in filing to disposition of criminal cases. When these statistics are contrasted with the figures for total filings, which show that Massachusetts ranks 58th of 90 districts in the number of civil filings and 88th of 90 in criminal cases filed, it becomes abundantly clear that the

communities about methods for streamlining litigation practice." BROOKINGS INST. TASK FORCE, *supra* note 8, at 12.

³¹ 28 U.S.C.A. § 478(b) (West Supp. 1991).

³² COURT ADMIN. DIV., ADMIN. OFFICE OF THE U.S. COURTS, PROFILE OF CIVIL JUSTICE REFORM ACT ADVISORY GROUPS (1991). The distinguished participants in the advisory groups include Professor Leo Levin, formerly director of the Federal Judicial Center and now on the faculty at the University of Pennsylvania Law School; Chesterfield Smith, a past president of the American Bar Association; and Alan Morrison, Director of the Public Citizen Litigation Group. The advisory groups range in size from 5 to 54 members with most having between 10 and 20 members. *Id.*

delay factor is not a function of the undue calendar congestion in this district. . . .

These numbers suggest that there is much to be done in this district, that the formation and implementation of an effective Plan is imperative, and that the obligation to formulate a Plan should be viewed as an opportunity and not a burden.³³

The response of the District of Massachusetts to the advisory group's assessment of its civil and criminal dockets has been exemplary. The expense and delay reduction plan, adopted by the court on November 18, 1991, contains detailed local rules that implement the advisory group's recommendations. For example, Rule 1.02, "Early Assessment of Cases," requires judges to hold scheduling conferences, with substantial input by counsel, not later than ninety days after the appearance of a defendant in the case.³⁴ Article II of the Massachusetts plan establishes a number of procedures for streamlining discovery, including orders directing disclosure of specified documents, and certification of discovery motions.³⁵ Rule 3.01 directs judicial officers to "establish a framework for the disposition of motions, which, at the discretion of the judicial officer, may include specific deadlines or general time guidelines for filing motions."³⁶

C. PILOT AND DEMONSTRATION DISTRICTS: STANDARDS FOR CIVIL JUSTICE REFORM

The Civil Justice Reform Act creates two complementary programs, a pilot program and a demonstration program, that support the work of the advisory groups throughout the nation. Together, these programs engage fifteen of the ninety-four district courts in testing the effectiveness of the case management techniques at the core of the Act.

³³ CIVIL JUSTICE REFORM COMM., EXPENSE AND DELAY REDUCTION PLAN FOR THE U.S. DIST. COURT FOR THE DIST. OF MASS. 7-8 (Preliminary Draft) (July 31, 1991).

³⁴ CIVIL JUSTICE REFORM COMM. OF THE U. S. DIST COURT FOR THE DIST. OF MASS., EXPENSE AND DELAY REDUCTION PLAN 21 (1991).

³⁵ *Id.* at 34-50.

³⁶ *Id.* at 50.

The "pilot program"³⁷ established by the Act directs the Judicial Conference of the United States to select ten district courts in which the case management principles set forth in the statute are mandatory.³⁸ These pilot courts must include, in the expense and delay reduction plans they adopt, the litigation management guidelines for cost and delay reduction identified in 28 U.S.C.A. § 473(a).³⁹ The difference between these ten pilot districts and other districts is only one of degree. Districts not designated as pilot districts must consider the six case management principles in the Act, but may choose to include them in a plan for reducing expense and delay at their discretion.⁴⁰

The ten districts participating in the pilot program are working at an accelerated schedule. The advisory groups for these districts have recommended plans for reducing expense and delay, and the courts have begun to implement these plans through local rules. The pilot district plans will remain in effect for a minimum of three years.⁴¹

The "demonstration program"⁴² established by the Act is, in one respect, the most ambitious of the statute's programs. The demonstration program pushes beyond the principles of litigation management listed in 28 U.S.C.A. § 473 and implements, on an experimental basis, more aggressive case management techniques in five district courts.

Three of the demonstration districts, the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri, are experimenting "with various methods of reducing cost and delay in civil litigation, including

³⁷ Pub. L. No. 101-650, § 105, 104 Stat. 5097 (1990).

³⁸ *Id.* § 105(b)(1). The Judicial Conference selected the following districts as pilot districts: Southern District of California, District of Delaware, Northern District of Georgia, Western District of Tennessee, Southern District of New York, Eastern District of Pennsylvania, Western District of Oklahoma, Southern District of Texas, District of Utah, and Eastern District of Wisconsin. *Civil Justice Reform Pilot Courts*, THE THIRD BRANCH, April 1991, at 2.

³⁹ *Id.* § 105(b). See *supra* note 15, for a list of the six principles for cost and delay reduction identified in section 473.

⁴⁰ 28 U.S.C.A. § 473(a) (West Supp. 1991).

⁴¹ Pub. L. No. 101-650, § 105(a)(3), 104 Stat. 5097 (1990).

⁴² *Id.* § 104.

alternative dispute resolution."⁴³ The two remaining demonstration districts designated by the Act, the Western District of Michigan and the Northern District of Ohio, are testing "systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and timeframes for the completion of discovery and for trial."⁴⁴

The differentiated case management plan adopted by the Western District of Michigan combines implementation of a case-tracking system with the other case management principles contained in section 473(a). In its report, the advisory group describes its comprehensive and integrated approach:

The recommended plan will divide the civil docket of the district into six tracks defined principally in terms of the length of time it takes for the case to be resolved and the degree of judicial involvement in the case management process. The tracks span a continuum from the least complex cases, expected to resolve themselves in a relatively short time with little judicial involvement and sparing use of case management techniques, to the most complex cases: those expected to take years to resolve, requiring intensive judicial involvement in the management of discovery, the resolution of discovery disputes, and the selection and use of alternative dispute resolution processes, as well as in other aspects of case management. . . . The single most important element in effective case management, however, is the prudent exercise of sound judicial discretion in making an early determination in each case about how long the case should be permitted to pend, the scope and degree to which the court will be actively involved in the day-to-day management of the case, the method of alternative dispute resolution, if any, that will be employed, the limitations, if any, that will be placed on the discovery process, and the extent to which the resources of the court will assist in resolving the case.⁴⁵

⁴³ *Id.* § 104(b)(2).

⁴⁴ *Id.* § 104(b)(1).

⁴⁵ CIVIL JUSTICE ADVISORY GROUP TO THE U.S. DIST. COURT OF THE W. DIST. OF MICH., REPORT OF THE ADVISORY GROUP OF THE U.S. DISTRICT COURT APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 130-133 (1991).

In all six tracks, the advisory committee recommended that the district should conduct, at a minimum, an initial case management conference via telephone by a judicial officer.⁴⁶ This conference should take place within two weeks of the defendant's answer or first response to the complaint.⁴⁷ During this conference, the judicial officer will discuss the following issues with the parties: the assignment of the case to a specific track, the need for any pre-discovery disclosure, jurisdictional or other dispositive issues, the extent and timeframe of discovery, deadlines for filing motions, the referral of appropriate cases to alternative dispute resolution, and the establishment of early, firm trial dates.⁴⁸

D. NATIONAL IMPLEMENTATION

I have heard concern voiced that the plans developed by advisory groups and district courts may be put on the shelf, so to speak, and ignored, thereby undermining the Civil Justice Reform Act's goal of achieving the just, speedy, and inexpensive determination of civil actions.

The Act expressly addresses this concern by requiring national implementation of the plans developed by the advisory groups and district courts. By December 1, 1993, three years from the date of enactment, every one of the ninety-four district courts in the nation must move beyond evaluation of its procedures to the actual *implementation* of a plan to reduce expense and delay in civil litigation.⁴⁹

At the end of 1991, thirty-four district courts had already adopted plans, choosing to do so far in advance of the December 1993 deadline.⁵⁰ More than one-third of all federal district

⁴⁶ *Id.* at 134.

⁴⁷ *Id.*

⁴⁸ *Id.* at 134-35.

⁴⁹ Pub. L. No. 101-650, § 103(b), 104 Stat. 5096 (1990).

⁵⁰ The 34 districts that have already implemented plans are as follows: the District of Alaska, the Eastern District of Arkansas, the Eastern District of California, the Northern District of California, the Southern District of California, the District of Delaware, the Southern District of Florida, the Northern District of Georgia, the District of Idaho, the Southern District of Illinois, the Northern District of Indiana, the Southern District of Indiana, the District of Kansas, the District of Massachusetts, the Western District of Michigan, the District of Montana, the District of New Jersey, the Eastern

courts now have in place locally-developed plans for reducing costs and delays in civil litigation, and the remaining districts will soon follow.

In the thirty-four district courts that have adopted plans, implementation of the Act is working better than anticipated. One of the Act's most controversial provisions was its mandate that district courts consider the six specific case management techniques adopted by Congress in section 473(a). Nevertheless, as district courts implement their reform plans, an overwhelming majority of them are including these six principles in their programs:

- * Recommendation that judges hold "discovery case management conferences" in order to organize and streamline complex litigation.⁵¹ All thirty-four district courts that have adopted civil justice expense and delay-reduction plans have implemented such a provision.⁵²
- * Recommendation that cooperative discovery among litigants be encouraged.⁵³ This recommendation has also been adopted by all thirty-four district courts implementing plans.⁵⁴
- * Recommendation that courts take advantage of the authority provided by the Act to expand use of alternative dispute resolution programs, thus bypassing traditional court procedures.⁵⁵ Thirty-two of the thirty-four

District of New York, the Southern District of New York, the Northern District of Ohio, the Western District of Oklahoma, the District of Oregon, the Eastern District of Pennsylvania, the Western District of Tennessee, the Eastern District of Texas, the Southern District of Texas, the District of Utah, the District of the Virgin Islands, the Eastern District of Virginia, the Northern District of West Virginia, the Southern District of West Virginia, the Eastern District of Wisconsin, the Western District of Wisconsin, and the District of Wyoming.

⁵¹ 28 U.S.C.A. § 473(a)(3) (West Supp. 1991).

⁵² See *supra* note 50 for a list of these thirty-four districts.

⁵³ 28 U.S.C.A. § 473(a)(4) (West Supp. 1991).

⁵⁴ See *supra* note 50 for these thirty-four courts.

⁵⁵ 28 U.S.C.A. § 473(a)(6) (West Supp. 1991).

district courts with plans have implemented new alternative dispute resolution programs.⁵⁶

- * Recommendation that judges provide early and on-going management and control of each case.⁵⁷ Twenty-eight of the thirty-four district courts have adopted such a provision.⁵⁸
- * Recommendation that courts systematically treat complex cases differently from simple cases so that the level of court involvement in a case is tailored to the case's specific needs.⁵⁹ Twenty-six of the thirty-four district courts have adopted such a provision.⁶⁰
- * Recommendation that judges refuse to hear discovery motions unless the parties certify that they have attempted to resolve the dispute.⁶¹ Twenty-three of the thirty-four district courts have adopted such a certification provision.⁶²

Every plan may be reviewed by both a committee composed of the chief judges of the district courts in a circuit and the chief judge of the circuit court, as well as the Judicial Conference of the United States.⁶³ Each of these reviewing authorities may direct the district court to take additional action to reduce cost and delay.⁶⁴

In the longer term, a provision in the Act guarantees national implementation by directing the Judicial Conference to bring greater uniformity to the plans emerging from the district courts.⁶⁵

⁵⁶ See Appendix A for a list of the districts implementing this provision.

⁵⁷ 28 U.S.C.A. § 473(a)(2) (West Supp. 1991).

⁵⁸ See Appendix A for a list of the districts adopting this recommendation.

⁵⁹ 28 U.S.C.A. § 473(a)(1) (West Supp. 1991).

⁶⁰ See Appendix A for a list of the districts adopting this recommendation.

⁶¹ 28 U.S.C.A. § 473(a)(5) (West Supp. 1991).

⁶² See Appendix A for a list of districts adopting this recommendation.

⁶³ 28 U.S.C.A. § 474 (West Supp. 1991).

⁶⁴ *Id.*

⁶⁵ Pub. L. No. 101-650, § 105(c)(2)(A), 104 Stat. 5098 (1990).

The Judicial Conference must recommend whether the case management principles set forth in the statute should be made mandatory nationally. If the Judicial Conference recommends against such national implementation, it will propose an alternative program which it deems more effective in reducing delay and excessive cost.⁶⁶ Regardless of the Judicial Conference's determination, proceedings will be initiated under the Rules Enabling Act⁶⁷ to make permanent a national plan for assuring the speedy and inexpensive resolution of civil disputes.

II. CIVIL JUSTICE REFORM AT WORK: AN ILLUSTRATION

The Civil Justice Reform Act has established an effective framework for reform, as illustrated by the example of "cost-effective discovery," one of the case management principles set forth in section 473(a).⁶⁸ The evolution of this principle reveals the working relationship among the consensus-building approach developed by the Brookings task force, the Act's mechanisms for reducing delay and excessive cost, and the national debate now taking place on the effectiveness of competing case management approaches.

One method to reduce the delay and costs created by discovery is through cooperative discovery techniques. Several district courts had already employed this case management principle on their own initiative, prior to the passage of the Civil Justice Reform Act.⁶⁹ Typically, cooperative discovery involves the automatic exchange of information between adversaries. Parties know, in advance of the filing of the lawsuit, what information they are to exchange, as specified by local rule. Production of the information occurs in the absence of discovery requests so cost and delay are reduced. The drafting of routine interrogatories and document demands becomes unnecessary.

The challenge of these automatic disclosures is to identify information or documentation common to most civil cases that litigants routinely produce after an appropriate request. The

⁶⁶ *Id.* § 105(c)(2)(C).

⁶⁷ 28 U.S.C.A. § 2072 (West Supp. 1991).

⁶⁸ 28 U.S.C. § 473(a)(4) (West Supp. 1991).

⁶⁹ *E.g.* Northern District of California (Judge Robert Peckham); Southern District of New York. For a discussion of the cooperative discovery devices used by these districts before passage of the Act, see *infra*.

names of individuals with knowledge of the case, information about damages, the existence and content of insurance policies, and the location, custodian and description of relevant documents all fit this description.⁷⁰ Early exchange of the targeted information should speed the litigation by facilitating a realistic assessment of the case without prejudicing the plaintiff or the defendant.

A second approach to cost-effective discovery is accomplished by "staging" discovery. One of the Brookings task force's twelve recommendations for procedural reform was to "[s]et time guidelines for the completion of discovery."⁷¹ As part of this recommendation, the task force suggested the "staging" of discovery.⁷² Citing Judge Robert F. Peckham's pioneering work, the task force indicated that discovery could take place in two stages. The Peckham approach limits the first stage of discovery to information necessary for the parties to realistically and intelligently assess the strengths and weaknesses of the case.⁷³ Only if the case continues will a second stage of "full-blown" discovery begin.⁷⁴

The task force also described a form of staged discovery used by the Southern District of New York in which the parties are limited to so-called "identification" interrogatories during the first stage of discovery.⁷⁵ Identification interrogatories are requests for information limited to damage estimates, document descriptions and locations, and the names of those with knowledge of an action's subject matter.⁷⁶ Additional interrogatories are permitted by leave of court under this procedure.⁷⁷

With the introduction of the Civil Justice Reform Act in January 1990, the goal of cost-effective discovery was translated into specific statutory language. By the time Congress passed the Act, the legislation had been further refined and contained two separate provisions: one recommending that, in complex

⁷⁰ Several specific approaches are discussed *infra*.

⁷¹ BROOKINGS INST. TASK FORCE, *supra* note 8, at 19.

⁷² *Id.* at 20.

⁷³ *Id.* (referring to Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985)).

⁷⁴ *Id.* (quoting Peckham, *supra* note 73, at 269).

⁷⁵ BROOKINGS INST. TASK FORCE, *supra* note 8, at 20.

⁷⁶ *Id.*

⁷⁷ *Id.*

cases, discovery be phased into two or more stages;⁷⁸ and a second provision encouraging "cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."⁷⁹

Today, the work of the advisory groups reflects the legislative intent of Congress and the work of the Brookings task force. Districts as diverse as the Districts of Montana and Eastern New York are including automatic disclosure as part of their plans for reducing civil justice expense and delay.⁸⁰ Since neither of these courts was a pilot district, the decision to implement cooperative discovery devices was voluntary.⁸¹

In its expense and delay reduction plan, the District of Montana adopted a local rule of "Pre-Discovery Disclosure," that requires automatic disclosure of the factual basis of every claim or defense advanced, the legal theory on which each claim is based, the identity of all individuals with discoverable information about the claims or defenses, a description of tangible evidence and relevant documents, a computation of damages claimed, and the substance of insurance agreements.⁸² Under the proposed rule, such disclosure would have to precede other discovery requests and, in any event, would take place no later than fifteen days prior to pretrial conference.⁸³

In its expense and delay reduction plan, the Eastern District of New York adopted a program called "Automatic Required Disclosure."⁸⁴ During an eighteen-month test period, the parties will be required to disclose each of the items identified in the Montana Plan, as well as information about expert witnesses.⁸⁵

⁷⁸ 28 U.S.C.A. § 473(a)(3)(C)(ii) (West Supp. 1991).

⁷⁹ *Id.* § 473(a)(4).

⁸⁰ BOARD OF JUDGES OF THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4-5 (1991) [hereinafter E.D.N.Y. PLAN]; U.S. DIST. COURT FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 27 (1991) [hereinafter MONTANA PLAN].

⁸¹ *See supra* note 38 for a list of the ten pilot districts.

⁸² MONTANA PLAN, *supra* note 80, at 27 (Rule 200-5(a)(1)).

⁸³ *Id.*

⁸⁴ ADVISORY GROUP TO THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., FINAL REPORT TO HONORABLE THOMAS C. PLATT, CHIEF JUDGE 57-62 (1991).

⁸⁵ E.D.N.Y. PLAN, *supra* note 80, at 4-6.

Fewer than half of the district court advisory groups have adopted expense and delay reduction plans and, inevitably, there will be a broad spectrum of responses to the Congressional recommendation in favor of cooperative discovery. From these plans, however, a strong trend toward adoption of this case management principle appears to be emerging. In fact, all thirty four of the district courts that have adopted cost and delay reduction plans have adopted measures to reduce cost and delay associated with discovery.⁸⁶

In addition to those districts voluntarily adopting cooperative discovery devices, each pilot district must implement cooperative discovery as part of its plan.⁸⁷ For example, the Eastern District of Pennsylvania has already adopted a provision entitled: "Discovery — Duty of Self-Executing Disclosure."⁸⁸ The detailed section specifies the timing and sequence of discovery, the information to be disclosed automatically, and the duty to supplement disclosures if necessary.⁸⁹ After three years' time, the Rand Corporation's Institute for Civil Justice will compare the success of this provision with the experience in comparable courts which may not have adopted similar cooperative discovery devices. If the early enthusiasm for this case management principle proves to be justified, the Judicial Conference will probably recommend to Congress the expansion of cooperative discovery devices like those in the Eastern District of Pennsylvania to those districts that have declined to implement the procedure.

When the Civil Justice Reform Act was signed into law on December 1, 1990, Congress intended for the district advisory groups and the ten pilot districts to continue the reform effort begun by the Brookings task force. In the year since enactment, however, an additional and essential contributor has become engaged in the reform effort more quickly and more significantly than could have been anticipated — the judiciary and, in particular, the Judicial Conference of the United States.⁹⁰

⁸⁶ See Appendix A.

⁸⁷ Pub. L. No. 101-650, § 105(b), 104 Stat. 5097 (1990).

⁸⁸ U.S. DIST. COURT FOR THE E. DIST OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13-15 (1991).

⁸⁹ *Id.*

⁹⁰ During Congressional consideration of the Civil Justice Reform Act, some judges were vocal in their criticism of the legislation. Now that the statute has been enacted, judges are examining it on its merits — rather than

Led by Chairman Judge Sam C. Pointer, Jr., the Judicial Conference's Advisory Committee on Civil Rules has embraced certain case management principles set forth in the Act in its proposed amendments to the Federal Rules of Civil Procedure.⁹¹ A good example of the Advisory Committee's work is in the area of cooperative discovery. Building on the innovative ideas and persistent efforts of Judge William Schwarzer, director of the Federal Judicial Center, the advisory committee has proposed amendments to the rules, similar to the local rules that many district courts have adopted under the Civil Justice Reform Act.⁹² The Committee has even proposed a change to

debating it solely with respect to which branch of government is best positioned to bring about the needed reforms — and many judges have praised the legislation. Judge Scott O. Wright generously described the Act as "one of the best things that has happened to the federal District Courts." Letter from Judge Scott O. Wright, W. Dist. of Mo., to U.S. Senator Joseph R. Biden, Jr. (Apr. 24, 1991) (on file with author).

⁹¹ *E.g.*, Several amendments embraced the prohibition against considering discovery motions without certified attempted resolution, § 473(a)(5). See proposed FED. R. CIV. P. 26(c), 137 F.R.D. 63, 94-95 ("Upon motion . . . accompanied by a certificate that the movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action . . .") (new material underlined). See also proposed FED. R. CIV. P. 37(a)(2). *Id.* at 128-129.

The amendments also authorize referrals to alternative dispute resolution programs, § 473(a)(6). See proposed FED. R. CIV. P. 16(c)(9) advisory committee's note, 137 F.R.D. 63, 87 (the rule was "revised to enhance the court's powers in utilizing a variety of procedures to facilitate settlement").

Several amendments also include discovery case management conferences, § 473(a)(3). See proposed FED. R. CIV. P. 16(c)(6), 137 F.R.D. 63, 85 (use of pretrial conferences for "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 27 through 37:") (new material underlined). See also proposed FED. R. CIV. P. 16(b)(4) (use of pretrial conference for "modification of the times for disclosures . . . and of the extent of discovery to be permitted:") (new material underlined). *Id.* at 83.

For the complete text of the proposed amendments to the Federal Rules of Civil Procedure, see 137 F.R.D. 63, 63-155 (1991). For a summary of relevant proposed rule changes, see *id.* at 64-73.

⁹² *E.g.* For the amendments dealing with automatic disclosure, see proposed FED. R. CIV. P. 26(a)(1)-(4), 137 F.R.D. 63, 87-91 (additions require the automatic disclosure, without discovery requests, of certain basic information needed to make an informed decision about settlement including: identification of all persons with pertinent knowledge about the case and sources of potential documentary evidence, and disclosure of all expert opinions, persons, and exhibits that may be offered at trial). See also proposed FED. R. CIV. P. 37(c) (amended to provide sanctions for failure to disclose without substantial

Federal Rule of Civil Procedure 1 to further emphasize the affirmative duty of the court and attorneys to ensure civil litigation is resolved without undue cost or delay: "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." (new material underlined).⁹³

The work of the Advisory Committee on Civil Rules is a welcome and valuable complement to the reform framework established by the Act. The Advisory Committee recognizes the urgency of the civil litigation problem and is amplifying the message of reform. The interest of the Advisory Committee in improved case management, combined with the efforts of advisory group members and district judges working at the local level, will help recapture the promise of Rule 1 to secure the speedy and inexpensive determination of all civil actions.

CONCLUSION

The Civil Justice Reform Act set in motion a number of badly needed changes in court procedures. It has provided a forum for each district court to identify the causes of delay and excessive costs in its jurisdiction and to implement the best tools for reform. Already, those seeking justice from our courts are feeling the benefits. The advisory group for the Eastern District of Pennsylvania has concluded that the Act is "the most significant piece of legislation that the Congress has enacted in the last three decades directed to procedures of the federal courts for reducing cost and delay in civil litigation."⁹⁴

justification such as: excluding as substantive evidence material not disclosed, permitting the opposing party to reveal nondisclosure to the jury, and cross-referencing to (b)(2) declaring certain facts to be established or preventing contradictory evidence). *Id.* at 131.

For amendments relating to staged discovery, see proposed FED. R. CIV. P. 26(d), 137 F.R.D. 63, 95 ("Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making [the required automatic disclosures]") (new material underlined). *See also* proposed FED. R. CIV. P. 34 and 36 (amendments require initial automatic disclosures to be complete before allowing documentary requests and requests for admissions, respectively). *Id.* at 125-128.

For other amendments limiting discovery see proposed FED. R. CIV. P. 31 and 33, 137 F.R.D. 63, 118-125 (amended to limit parties each to 10 depositions and 15 interrogatories, respectively).

⁹³ 137 F.R.D. 63, 74.

⁹⁴ REPORT OF THE ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E.

Moreover, the consensus approach and the model of reform embodied in the law advance our understanding of how we can effectively solve problems. One of our most valuable accomplishments is proving that reform is possible in an arena dominated by lawyers and judges who hold deep and often contradictory opinions. Where controversy is inevitable, building consensus is indispensable to reform.

In August 1991, Vice President Quayle unveiled the Administration's "Civil Justice Reform" proposals.⁹⁵ Some of the initiatives — such as increased use of alternative dispute resolution, the streamlining of discovery and, in general, more active case management — are already being implemented across the United States under the Civil Justice Reform Act.⁹⁶ The remaining proposals offered by the Vice President — such as caps on punitive damages and shifting fees to the losing party in a lawsuit⁹⁷ — are not so much court reforms as they are substantive changes in tort law. Rather than improving the fairness of the civil justice process, they would affect the outcomes of that process. They will, undoubtedly, spark considerable controversy in Congress, among business people, and within the judiciary and the bar.

I welcome the additional attention by the Administration to reducing delay and excessive cost in civil litigation with the following caveat: the judicial procedures at the heart of court reform may seem arcane, but the problems of cost and delay affect the lives of real people. The victim of a defective product who has already waited five years to be compensated should wait no longer — neither for his recovery, nor for a reformed civil justice system. Given the pressing need to reduce delay and excessive cost, the government must devote itself to achieving real reform as quickly as possible. As the Civil Justice Reform

DIST. OF PA. 1 (1991) (footnote omitted).

⁹⁵ PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) [hereinafter PRESIDENT'S REPORT]. Vice President Quayle delivered the Administration's proposals in a controversial speech to the American Bar Association, *Administration Unveils Civil Justice Reforms*, THE THIRD BRANCH, Sept. 1991, at 8. Some of these proposals were included in Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

⁹⁶ PRESIDENT'S REPORT, *supra* note 95, at 15-27.

⁹⁷ *Id.*

Act demonstrates, meaningful reform requires consensus support.

The framework for reform established by the Civil Justice Reform Act is in place and has great potential. It is flexible and inclusive. The entire community of court users —judges, lawyers, and clients — now have an opportunity to participate in a structured plan for improving our civil justice system, and our entire nation, our economy, and our citizens have a vital stake in achieving Rule 1's promise of speedy and inexpensive civil litigation.

APPENDIX A Early Implementation District Courts

Encouragement of Cost Effective Discovery § 473(a)(4)	Discovery Case Management Conferences § 473(a)(3)	Referral to Alternative Dispute Resolution § 473(a)(6)	Early Involvement of a Judicial Officer § 473(a)(2)	Systematic, Differential Treatment of Civil Cases § 473(a)(1)	Require Certification of Attempted Resolution to Accompany Discovery Motions § 473(a)(5)
Alaska, Arkansas, California (E), California (N), California (S), Delaware, Florida (S), Georgia (N), Idaho, Illinois (S), Indiana (N), Indiana (S), Kansas, Massachusetts, Michigan (W), Montana, New Jersey, New York (E), New York (S), Ohio (N), Oklahoma (W), Oregon, Pennsylvania (E), Tennessee (W), Texas (E), Texas (S), Utah, Virgin Islands, Virginia (E), West Virginia (N), West Virginia (E), Wisconsin (E), Wisconsin (W), Wyoming Total = 34	Alaska, Arkansas, California (E), California (N), California (S), Delaware, Florida (S), Georgia (N), Idaho, Illinois (S), Indiana (N), Indiana (S), Kansas, Massachusetts, Michigan (W), Montana, New Jersey, New York (E), New York (S), Ohio (N), Oklahoma (W), Oregon, Pennsylvania (E), Tennessee (W), Texas (E), Texas (S), Utah, Virgin Islands, Virginia (E), West Virginia (N), West Virginia (E), Wisconsin (E), Wisconsin (W), Wyoming Total = 34	Alaska, Arkansas, California (E), California (N), Delaware, Florida (S), Georgia (N), Idaho, Illinois (S), Indiana (N), Indiana (S), Kansas, Massachusetts, Michigan (W), Montana, New Jersey, New York (E), New York (S), Ohio (N), Oklahoma (W), Oregon, Pennsylvania (E), Tennessee (W), Texas (E), Texas (S), Utah, Virgin Islands, West Virginia (N), West Virginia (E), Wisconsin (E), Wisconsin (W), Wyoming Total = 32	Alaska, Arkansas, California (S), Delaware, Florida (S), Georgia (N), Idaho, Indiana (N), Indiana (S), Kansas, Massachusetts, Montana, New Jersey, New York (E), New York (S), Ohio (N), Oklahoma (W), Oregon, Pennsylvania (E), Tennessee (W), Texas (E), Texas (S), Utah, West Virginia (N), West Virginia (E), Wisconsin (E), Wisconsin (W), Wyoming Total = 28	Alaska, California (E), California (S), Delaware, Florida (S), Georgia (N), Illinois (S), Kansas, Massachusetts, Michigan (W), Montana, New Jersey, New York (E), New York (S), Ohio (N), Oklahoma (W), Oregon, Pennsylvania (E), Tennessee (W), Texas (E), Texas (S), Utah, West Virginia (N), West Virginia (E), Wisconsin (E), Wyoming Total = 26	California (N), California (S), Delaware, Georgia (N), Idaho, Illinois (S), Indiana (N), Indiana (S), Massachusetts, Montana, New Jersey, New York (S), Ohio (N), Oklahoma (W), Pennsylvania (E), Tennessee (W), Texas (S), Utah, Virgin Islands, Virginia (E), W. Virginia (N), W. Virginia (S), Wisconsin (E), Wyoming Total = 23

Information Compiled by the Court Administration Division of the Administrative Office of the United States Courts.