THE CIVIL JUSTICE REFORM ACT OF 1990

FINAL REPORT

Alternative Proposals for Reduction of Cost and Delay
Assessment of Principles, Guidelines & Techniques

Submitted by the Judicial Conference of the United States
Transmitted by Leonidas Ralph Mecham, Secretary

May 1997

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EXECUTIVE SUMMARY

Introduction

The Judicial Conference of the United States submits the following report in accordance with sections 104(c) and 105(c) of the Civil Justice Reform Act of 1990 ("CJRA" or "the Act"). This report is the Conference's third, and final, report to Congress under the Act. It assesses the experience of the federal courts in applying the civil litigation cost and delay reduction measures suggested in the Act, and offers a series of recommendations for continuing the judiciary's efforts to ensure prompt, inexpensive resolution of civil disputes.

Background

Congress enacted the CJRA to explore the causes of cost and delay in civil litigation. The Act required all 94 federal district courts to implement "civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (28 U.S.C. § 471). It identified a series of case management principles, guidelines, and techniques for the courts to consider in making their plans. It also established pilot programs in ten districts to test the effectiveness of the Act's principles and guidelines for cost and delay reduction, as well as demonstration programs in five other districts to test systems of differentiated case management and other methods of cost and delay reduction (including alternative dispute resolution (ADR)). The Judicial Conference was directed to study the results of these experiments with the aid of an independent consultant and, on the basis of its assessment, to propose either an extension of the pilot program to other courts or the implementation of alternative measures for reducing expense and delay in civil litigation.

Although some judges have viewed this legislative approach to civil justice reform with reservations, the judiciary has a longstanding commitment to sound case management. The "just, speedy, and inexpensive" resolution of civil disputes has been an abiding purpose of the federal courts for 60 years under Rule 1 of the Federal Rules of Civil Procedure. The intensive review of litigation procedures required by the Act has provided the courts with both a format and a source of funding to continue their efforts to improve and enhance judicial management of civil dockets. And, the judiciary adopted almost all of the principles, guidelines, and techniques in the Act through the 1993 amendments to the Civil Rules and the policy directions set forth in the December 1995 *Long Range Plan for the Federal Courts.* The additional experience gained through the pilot courts, demonstration programs, and other experimentation under the Act has been useful to the courts, providing information that can aid policy-making in the future.

Evaluation of the Pilot Program

Under the CJRA, the Judicial Conference is required to review the pilot court programs and assess whether other districts should be required to implement all the case management principles and guidelines tested in the pilot programs. In preparing this report, the Conference has reviewed: (a) an independent evaluation by the RAND Corporation of the CJRA principles, guidelines, and techniques applied in the pilot courts; (b) a Federal Judicial Center evaluation of the differentiated case management and ADR demonstration programs; and (c) the experiences of all 94 district courts in implementing their CJRA cost and delay reduction plans.

Although the judiciary has adopted most of the principles, guidelines and techniques in the Act, the Judicial Conference does not support expansion of the Act's case management principles and guidelines to other courts *as a total package*. This recommendation is based in large part on the RAND study of the pilot courts. The RAND study found that the pilot program *per se* did not appear to have significant impact on cost or delay reduction because the courts were already following most of the Act's principles, guidelines, and techniques and more importantly, the cost of litigation was driven by factors other than judicial case management procedures. However, that study did find six procedures suggested in the CJRA that are effective, when used in combination, in reducing delay without increasing costs: (1) early judicial case management; (2) early setting of the trial schedule; (3) shortening discovery cutoff; (4) periodic public reporting of the status of each judge's docket; (5) conducting scheduling and discovery conferences by telephone; and (6) implementing the advisory group process. This report therefore sets forth proposed alternatives based in large part on the CJRA experiment, and provides findings, commentary, and recommendations regarding specific CJRA principles, guidelines, and techniques for effective case management. As outlined below, these alternative measures and recommendations constitute the Judicial Conference's alternative expense and delay reduction program for the federal courts.

The Conference's Alternative Cost and Delay Reduction Program

Measures to be Implemented by the Judiciary

1. The CJRA Advisory Group Process Should Continue.

The Judicial Conference believes that the advisory group process proved to be one of the most beneficial aspects of the Act by involving litigants and members of the bar in the administration of justice. The Conference recommends that the district courts continue to use advisory groups to assess their dockets and propose recommendations for reducing cost and delay; that the courts, in consultation with the advisory groups, continue to perform regular assessments; and that Congress provide additional and adequate funding to continue the advisory group process.

2. Statistical Reporting of Caseflow Management Should Continue.

Because of its effectiveness in reducing case disposition time, the Conference endorses the docket reporting requirements established in the CJRA. The Conference plans to continue these reporting requirements after the Act has expired. In addition, the Conference encourages individual districts to develop or enhance internal statistical reporting capabilities to encompass all case types and judicial officers.

3. Setting Early and Firm Trial Dates and Shorter Discovery Periods in Complex Civil Cases Should be Encouraged.

One of the most important findings of the RAND study is that an early and firm trial schedule, combined with limited time for discovery, can reduce delay in complex civil litigation without increasing costs. This type of early case management was found to have no effect on lawyer satisfaction or views on fairness, and already exists under the Federal Rules of Civil Procedure. In light of these findings, the Conference recommends that its Committee on Court Administration and Case Management consider procedures to encourage judicial officers to set early trial dates. The Conference also recommends that its Committee on Rules of Practice and Procedure: (1) consider whether F.R.Civ.P. 16 should be amended to require a judicial officer to set the date of trial to occur within a certain time; and (2) continue its ongoing project re-examining the nature and scope of discovery, including whether specific time limitations on discovery should be required by national rule.

4. The Effective Use of Magistrate Judges Should be Encouraged.

The RAND study found that some magistrate judges may be substituted for district judges on non-dispositive pretrial activities without drawbacks and with an increase in lawyer satisfaction. Recommendation 65 of the *Long Range Plan for the Federal Courts* discusses the role of magistrate judges and notes that they are "indispensable resources readily available to supplement the work of life-tenured district judges in meeting workload demands." Therefore, the Conference recommends the effective use of magistrate judges, consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts.*

5. The Role of the Chief Judge in Case Management Should be Increased.

As recognized in the RAND report, the chief judge is an important institutional leader. The Conference directs its Committee on Court Administration and Case Management to expand its research agenda to include further study and recommendations relating, if appropriate, to the role and training of the chief judge in institutional caseflow management.

6. Intercircuit and Intracircuit Judicial Assignments Should be Encouraged to Promote Efficient Case Management.

Visiting judges can provide a great deal of assistance in reducing backlogged dockets, thereby enabling courts to set early and firm trial dates. Existing statutes allow judicial officers to be temporarily transferred to courts facing judicial emergencies due

to a backlogged dockets. Because these statutes provide powerful tools to address delays in civil cases and backlogged dockets, the Conference endorses their increased utilization. The Conference also directs the appropriate Conference committees to consider how best to streamline and expedite the use of intercircuit and intracircuit judicial assignments.

7. Education Regarding Efficient Case Management Should be Extended to the Entire Legal Community.

One of the primary benefits emanating from the CJRA has been its educational value to the judiciary. It has furthered the judiciary's longstanding commitment to judicial and staff education in case management and has brought to the bar, through the advisory groups appointed in each district, an increased understanding of both judges' and lawyers' responsibilities in managing litigation. The Conference recommends that this educational process be extended to the entire legal community. Law schools should be encouraged to include courses on efficient case management and ADR. Continuing legal education for lawyers should include various case management processes that reduce cost and delay. Continued education for the bench and increased training for the bar would greatly facilitate case management efficiency in the federal judicial system.

8. The Use of Electronic Technologies in the District Courts, Where Appropriate, Should be Encouraged.

The prudent use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The federal courts have been expanding the use of such technologies and are planning a number of future initiatives in this area.

Measures Requiring Congressional and Executive Branch Cooperation

1. The Impact of Judicial Vacancies on Litigation Delay Should be Recognized.

Thirty-nine of the CJRA advisory group reports cite the length of time required to fill a judicial vacancy as a fundamental cause of delay in the federal judicial system. Vacancies in some judgeships are a significant impediment to expeditious civil case processing because courts must function with less than a full complement of judges for extended periods of time. To ensure the ability of the federal courts to handle civil litigation in an efficient and timely manner, the Conference requests that the Executive and Legislative Branches give high priority to filling judicial vacancies. The Conference is also mindful of the need for carefully controlled growth of the Article III judiciary and the importance of exhausting other appropriate alternatives to creating new judgeships. However, once the Conference has determined that new judgeships are needed to meet the requirements of justice, prompt Congressional action to authorize those positions would aid the judiciary in reducing delay in litigation.

2. The Impact of New Criminal and Civil Statutes on a Court's Civil Docket and Resource Requirements Should Be Recognized.

While the CJRA review process has provided insight into the causes of civil litigation cost and delay, many advisory groups note that there are other factors that are beyond the control of the courts. These include: the increased volume of federal criminal prosecutions; the "federalization" of criminal law; and the creation of additional federal civil causes of action. It is certainly the prerogative of the Executive and Legislative Branches to pursue these policy objectives; however, it should be recognized that they may have an adverse effect on the overall disposition of civil cases. Congress should consider the impact of existing laws and pending legislation on the need to limit the size and contain the growth of the judiciary. Failure to balance these conflicting aims will increase the delay in litigation as dockets become overcrowded. When new legislation is enacted, Congress should allocate the resources necessary for its implementation.

3. Sufficient Courtroom Space Facilitates Case Management and Should be Available.

The assurance of an available courtroom allows judges to dispose of cases expeditiously by setting firm trial dates, which promotes settlement in civil cases and results in less time to disposition in those cases that do go to trial. The judiciary is aware of the current budget constraints and is actively exploring ways to contain the cost of space needed by the courts. However, the Conference counsels great caution in seeking cost savings by reducing the number of courtrooms.

Recommendations Regarding the Principles and Guidelines of the CJRA

1. The Differential Treatment of Civil Cases to Reduce Cost and Delay is Endorsed.

The Conference recommends that individual districts continue to determine on a local basis whether the nature of their caseload calls for the track model or the judicial discretion model for their differentiated case management (DCM) systems.

2. Early Case Management as Provided in F.R.Civ.P. 16(b) is Endorsed.

The RAND study found the principles of setting an early and firm trial date and setting a shorter discovery period to be two of the most effective elements of the CJRA. Therefore, the Conference endorses these principles and includes them in the "Measures to be Implemented by the Judiciary" (Measure No. 3, at pp. A-9, A-29).

3. The Use of Discovery Management Plans as Provided in F.R.Civ.P. 16 and 26(f) is Endorsed.

Currently, most district courts require the formation of a discovery schedule, and a corresponding scheduling order is typically issued pursuant to F.R.Civ.P. 16. In addi-

tion, the principle of staged discovery management was included in the 1993 amendments to F.R.Civ.P. 26. The Conference recommends that the Committee on Rules of Practice and Procedure continue its ongoing project re-examining the scope and substance of discovery, including whether the advantages of national uniformity outweigh the advantages of permitting locally developed procedures as an alternative to F.R.Civ.P. 26(f) and what the effect of courts using other alternative procedures might be.

4. Additional Information Regarding the Voluntary Exchange of Information is Recommended.

The RAND evaluation does not provide adequate information, separate from mandatory discovery, for the Conference to make a specific recommendation regarding the principle of voluntary exchange of information. Therefore, the Conference recommends that the Committee on Rules of Practice and Procedure re-examine the need for national uniformity in applying F.R.Civ.P. 26(a) as part of its ongoing project re-examining the scope and nature of discovery and disclosure, particularly whether the advantages of national uniformity in applying F.R.Civ.P. 26(a) outweigh the advantages of locally developed alternative procedures.

5. Requiring Counsel to Meet and Confer Before Filing Motions on Discovery Disputes With the Court is Endorsed.

The Conference notes that this principle was incorporated in the 1993 amendments to F.R.Civ.P. 37(a)(2)(A) and (B), 37(d), 26(c), and 26(f), which require attorneys to confer and certify in good faith that they have attempted to resolve their discovery disputes. Therefore, no further recommendation is necessary.

6. Appropriate Forms of Alternative Dispute Resolution are Encouraged.

Although many courts have found alternative dispute resolution (ADR) to be a benefit to litigants, the RAND analysis failed to discern a significant positive cost and delay impact associated with this principle. However, the Conference does believe that the positive attributes often associated with ADR argue for continued experimentation. Therefore, the Conference supports the continued use of appropriate forms of ADR and recommends that local districts continue to develop suitable ADR programs, including non-binding arbitration. The Conference also recommends that the Committee on Rules of Practice and Procedure review the courts' experiences with F.R.Civ.P. 16 regarding ADR and consider whether any changes in the Civil Rules are needed to enhance the role of ADR.

Recommendations Regarding the Techniques of the CJRA

1. The Submission of Joint Discovery Plans at an Initial Pretrial Conference is Provided for in F.R.Civ.P. 26(f).

The 1993 amendments to F.R.Civ.P. 26(f) incorporated the technique of requiring the submission of joint discovery plans at an initial pretrial conference. The rule re-

quires a general "meeting of the parties" that includes planning for disclosure and discovery, and permits local rules to exempt only particular categories of actions. In light of the RAND finding that this technique resulted in no significant change in time to disposition, the Conference does not recommend adoption of any further requirements, but it does recommend that the Committee on Rules of Practice and Procedure consider this technique as part of its ongoing project re-examining the scope and nature of discovery and disclosure.

2. Requiring a Representative With the Power to Bind the Parties to be Present at all Pretrial Conferences, as Provided in F.R.Civ.P. 16(c), is Endorsed.

The Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated the technique of requiring a representative with the power to bind the parties to be present at all pretrial conferences. Therefore, no further recommendation is necessary.

3. Requiring Requests for Discovery Extensions or Postponement of Trial to be Signed by The Attorney and the Party Making the Request is Not Endorsed.

Noting the almost universal rejection of requiring requests for discovery extensions or postponement of trial to be signed by the attorney and the party making the request, the Judicial Conference does not recommend this technique.

4. The Use of Early Neutral Evaluation is Endorsed.

The Conference supports the use of early neutral evaluation (ENE) as an appropriate form of ADR, which is endorsed in Recommendation 6 of the Act's Principles & Guidelines (Recommendation 6 at pp. A-13, A-52).

5. Requiring a Representative, With the Power to Bind the Parties, to be Present at all Settlement Conferences, as provided in F.R.Civ.P. 16(c), is Endorsed.

The Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated the technique of requiring a representative, with the power to bind the parties, to be present at all settlement conferences. Therefore, no further recommendation is necessary.

6. The Effective Use of Magistrate Judges Should be Encouraged.

The Conference recognizes the importance of the accessibility of judicial officers to supervise pretrial activities, and also recognizes that the use of magistrate judges can contribute to more efficient case management in the district courts and to attorney satisfaction. Therefore, the Conference supports the effective use of magistrate judges, consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts*, including their use in any district court ADR programs.

Concluding Observations

The CJRA has prompted intensive efforts by the judiciary, the bar, and other litigant representatives to study and experiment with various creative approaches to the management of federal civil litigation. Those efforts—the results of which are already being seen—will continue to affect the conduct of federal court business in a direct and positive manner. As the RAND study noted, the CJRA process has "raised the consciousness" of both bench and bar, facilitating actions that achieve the goal of speedier, less expensive civil proceedings and, in the broader sense, improve the efficiency and effectiveness of the entire civil justice system.

The judiciary will maintain its efforts to enhance the delivery of justice in civil cases. In doing so, however, the courts will confront a number of issues and challenges regarding civil justice reform: (1) increasing speed of disposition while preserving the quality of justice; (2) striking an appropriate balance between national uniformity and local option in development of litigation procedures; (3) assessing the differential financial impact of CJRA-sponsored procedural reforms on various kinds of litigants and on attorneys; (4) evaluating the specific data on the impact of individual case management methods on the speed and cost of civil litigation; and (5) perhaps most importantly, confronting the practical limits to which general rules and procedures can be used to manage litigation. With the needs of justice foremost in mind, the federal courts will pursue further improvements in civil case management. They welcome the continuing interest and support of the legislative and executive branches, the bar, and the public in that endeavor

PART I

Implementation of the Civil Justice Reform Act

Introduction

The Civil Justice Reform Act of 1990 (CJRA or the "Act")[1] was enacted in response to a perception that civil litigation in the federal courts costs too much and takes too long, limiting the public's access to justice. The CJRA identified six general case management principles and guidelines, along with a series of more specific techniques for implementing those principles and guidelines, and it required all 94 federal district courts to consider them in implementing plans to reduce expense and delay in civil litigation.

The Act required the Judicial Conference of the United States to designate 10 courts as pilot districts in which the effectiveness of the CJRA-mandated principles and guidelines in reducing cost and delay could be measured in comparison with the experience of 10 other, comparable districts in which application of those principles and guidelines was not mandatory. It also specifically designated five additional districts to participate in a demonstration program to test systems of differentiated case management and various methods of reducing cost and delay (including alternative dispute resolution) in civil cases.

Under sections 104(c) and 105(c) of the Act, the Judicial Conference is required to report to Congress on the delay and cost reduction experience of the CJRA pilot, comparison, and demonstration districts, including an assessment of whether some or all other district courts should adopt as a package the six case management principles and guidelines applied in the pilot districts. The Conference is required to propose alternative measures for reducing cost and delay in civil litigation if it does not recommend expanding to other courts the six principles and guidelines of the pilot program.

The following report is submitted by the Judicial Conference in accordance with the statutory mandate. It is based on the Conference's review of: (a) the RAND Corporation's independent evaluation of CJRA case management principles, guidelines, and techniques as implemented in the pilot courts; (b) a Federal Judicial Center report on the CJRA demonstration program; and (c) the experiences of all 94 district courts in implementing CJRA cost and delay reduction plans.

For the reasons stated below, the Conference does not recommend extending the entire pilot court package of principles and guidelines to other districts. Instead, this report proposes, in Part II, a program of alternative measures that should aid considerably in reducing costs and speeding dispositions in civil cases. Included in this alternative cost and delay reduction program are the Conference's separate findings, commentary, and recommendations on each of the CJRA's general case management principles and guidelines (see Part III), as well as the specific delay and cost reduction techniques suggested in the Act (see Part IV). Part V of this report offers concluding observations

[1] Pub. L. No. 101-650, tit. I, 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

on the impact of civil justice reform and the challenges that lie ahead as the federal courts continue to seek improved docket management capabilities.

The Judiciary's Approach to the CJRA

The federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation, and thus ensure the "just, speedy, and inexpensive" determination of civil actions called for in the Federal Rules of Civil Procedure (hereinafter "Civil Rule(s)" or "F.R.Civ.P.").[2] The CJRA has provided the federal courts with a format, as well as funding, to conduct a helpful and thorough evaluation of their dockets and case management procedures. Under the Act, the federal civil litigation process has undergone the most comprehensive review ever performed, with direct and continuing impact on the 94 district courts. Crucial to this process is Congress' recognition, in § 102(2) of the Act, that responsibility for the present cost and delay of civil litigation, and for developing solutions to the problem, is shared by all three branches of the federal government as well as by litigants and their attorneys.

As detailed in section C below, the federal courts have approached the CJRA and its mandates conscientiously. Although many judges initially viewed the legislation with some apprehension and skepticism, the federal courts have long been pioneers in the case management field. For 60 years, the abiding purpose of the Civil Rules, as explained in Rule 1, has been to deliver justice to civil litigants in a prompt and economical manner. Indeed the federal courts, to a large extent, have remained reasonably current with their civil dockets and have not experienced the same difficulties as their counterparts at the state level.[3]

During the CJRA's implementation, it became clear that the federal courts were already using many of the suggested case management procedures even though a number of new procedures were also tested and adopted. On the whole, the courts have found the CJRA process to be valuable, focusing judges' attention on possible new methods of managing their dockets while bringing the bench and bar together in common pursuit of constructive solutions. The partnership of judges and advisory groups inspired by the Act has moved the legal community as a whole toward greater concern for efficiency in litigation. The continuing dialogue and experimentation has produced information that should greatly aid future judicial administration. A striking example of the success of this endeavor is the reduction in volume of civil cases pending for more than three years. From 1990 to 1995, the number of such cases has dropped from 25,672 (10.6 percent of all civil cases) to 13,538 (5.6 percent of all civil cases).

Most of the CJRA's principles, guidelines, and techniques have already been formally embraced by the judiciary as sound methods for effectively managing ever-increasing caseloads. For example, the CJRA established in large measure the 1993 amendments to the Civil Rules, which authorize and encourage trial judges to reduce cost and delay in civil litigation, in many ways suggested by the Act. Two years later, the Conference endorsed CJRA principles—including the need for more innovative and enhanced case management, greater uniformity and attorney participation in develop-

[2] F.R.Civ.P. 1.

[3] Terrence Dunworth & Nicholas Pace, *Statistical Overview of Civil Litigation in the Federal Courts*, The RAND Corporation (1990).

ment of procedural rules, and better statistical information on court business—in the *Long Range Plan for the Federal Courts,* a document that commits the federal judiciary to maintaining sufficient flexibility to meet new challenges while preserving such "core" values as equal justice, judicial excellence, and the rule of law. Several recommendations in this report proceed along this path and, in some instances, expand on these approaches.

For the future, the Judicial Conference and its committees will continue to review the experience of local courts under their CJRA plans and otherwise consider possible improvements and enhancements of litigation procedures. The Advisory Committee on Civil Rules, for instance, has established a subcommittee that is undertaking a comprehensive study of discovery procedures. With appropriate study and evaluation, the judiciary will seek to implement successful innovations.

This report, and its appendices, is the final of three reports from the Judicial Conference under the CJRA. The first report, submitted on June 1, 1992, addressed the expense and delay reduction plans adopted by "early implementation districts."[4] The second report, submitted on December 1, 1994, incorporated the plans of the remaining 60 courts along with contents of the first report, providing a comprehensive summary and analysis of all 94 civil justice expense and delay reduction plans. In this report, prepared with the assistance of the Administrative Office of the United States Courts and the Federal Judicial Center (FJC), the Judicial Conference responds to its last two reporting obligations under the Act: (1) assessing the pilot courts' implementation of the six case management principles and guidelines set forth in 28 U.S.C. § 473(a) and making recommendations about expanding their implementation to other courts; and (2) describing the experience of the demonstration districts with differentiated case management and alternative dispute resolution.

Fulfillment of the Act's Previous Requirements

As noted above, the CJRA established the most comprehensive review ever performed of the civil litigation process in the federal courts. Listed below are the major requirements of the Act, as well as a description of how the judiciary complied with each of them.

- Section 478(a) of title 28 required the chief judge of each district court, within 90 days of the Act's enactment, to appoint a CJRA advisory group made up of attorneys and other litigant representatives from the district. By March 1, 1991, over 1700 individuals had been appointed to serve on advisory groups in the various districts. This resulted in probably the most extensive examination of a single branch of the federal government ever undertaken.

- Section 482(b) of title 28 required every district court to implement a civil justice expense and delay reduction plan within three years of the Act's enactment. By the statutory deadline of December 1, 1993, all of the district courts had adopted cost and delay reduction plans.

[4] Under Section 103(c) of the Act, the districts that implemented expense and delay reduction plans between June 30 and December 31, 1991—a total of 34 courts—became eligible for designation by Conference as "Early Implementation Districts."

- Section 474 of title 28 required a circuit committee to review the advisory group report and the expense and delay reduction plan for each district court in the circuit, and make suggestions for additional action or modification to the plans as the committee deemed appropriate. The reviews by the circuit committees were completed on time. Some courts received, from their circuit committees or the Judicial Conference's Court Administration and Case Management Committee, suggestions for improvements. Other courts were asked to provide clarification of plan provisions.

- Section 474 of title 28 also required each report and plan be reviewed by the Judicial Conference of the United States. All plans were reviewed by the Judicial Conference's Court Administration and Case Management Committee, which suggested that a number of courts include in their annual assessments, a report on the progress of certain programs or procedures.

- Section 477(a) of title 28 required the Judicial Conference to develop a model civil expense and delay reduction plan based on the plans adopted by the early implementation courts. The model plan developed by the Judicial Conference reflects the collective efforts of the early implementation courts, the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the Judicial Conference and its committees. It includes the principles, guidelines, and techniques of civil litigation management set forth in 28 U.S.C. § 473, which the district courts were required to consider in devising their plans. It also includes many new and creative techniques developed by the early implementation courts and their advisory groups. The model plan was completed and distributed to all United States district courts. It assisted those courts that had not yet developed plans and serves as a useful reference for those wishing to modify plans already in place.

In addition, the Administrative Office and the Federal Judicial Center launched a comprehensive effort to assist all courts in developing and improving their delay reduction programs by: creating a CJRA information clearinghouse; offering on-site training programs; and providing telephone and on-site consultation services for all aspects of plan development and implementation.

- Section 477(b) of title 28 required the Judicial Conference to submit a model Civil Expense Delay and Reduction Plan to the Judiciary Committees of the Senate and the House of Representatives. The model plan was submitted in October 1992.

- Section 475 of title 28 required each court, after it developed a cost and delay reduction plan, to "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court." In performing this assessment each court must consult with its CJRA advisory group. While the statute did not require courts to submit written reports of the annual assessments, many courts submit them to the Administrative Office and the Court Administration

and the Case Management Committee, to which the Judicial Conference delegated oversight responsibility for the CJRA. They reveal a wide variety of approaches, ranging from in-depth discussions between the court and advisory group to surveys sent to the bar and litigants. Most include an examination of caseload statistics that offer an update of the analysis done by the advisory group in preparing its initial report to the court. The Administrative Office and the Federal Judicial Center continue to provide assistance and consulting services to courts on the completion of their annual assessments, if requested.

- Section 479(a) of title 28 required the Judicial Conference to prepare a comprehensive report providing a summary and analysis of all the civil justice expense and delay reduction plans in place in United States district courts. That report was submitted in December 1994.

- Section 479(b) of title 28 requires the Judicial Conference to study, on an ongoing basis, ways to improve litigation management and dispute resolution services and make recommendations to the courts. Much of the work of the Conference and its committees is directed toward this task with the aid of the Administrative Office and the Federal Judicial Center.

- Section 479(c)(1) of title 28 required the Judicial Conference to prepare a "Manual for Litigation Management and Cost Delay Reduction," containing a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution (ADR) programs considered most effective by the Judicial Conference, the Federal Judicial Center and the Administrative Office. This Manual was completed by the Federal Judicial Center in September 1992.

- Section 103(c) of the Act required the Judicial Conference to submit to the Senate and House Judiciary Committees: (a) copies of the expense and delay reduction plans of the thirty-four early implementation courts; (b) the advisory group reports of the thirty-four early implementation courts; and (c) a report prepared by the Judicial Conference regarding the plans adopted by early implementation district courts. These were submitted in June 1992.

- Section 105 of the Act required the Judicial Conference to submit to the Senate and the House Judiciary Committees a report on the results of the pilot program. The Act directs that the report be based upon an independent study of the civil justice expense and delay reduction plans established by the pilot and comparison courts. In May 1992, the Administrative Office contracted with the RAND Corporation to conduct the independent study. In September 1992, the contract was amended to incorporate an additional and more detailed study of the ADR programs developed by the courts in accordance with 28 U.S.C. § 473(a)(6). The amendment's objective was to determine if the ADR programs are helping to achieve the Act's goals of reducing cost and delay. The Judicial Conference assessments and recommendations contained in this report are drawn upon the adjunct ADR study as well as the findings of the RAND study, which are submitted herewith (Appendix A).

- Section 104 of the Act required the Judicial Conference to conduct a four-year study on the "experience of the courts under the demonstration program." The Federal Judicial Center conducted this study of the demonstration programs, and a separate report on this program is transmitted herewith (Appendix B).

- Section 476 of title 28 requires the Administrative Office of the United States Courts to prepare semiannual reports that disclose the motions pending more than six months, the bench trials submitted for more than six months, and the cases that have not been terminated within three years of filing. As required, the Administrative Office has published reports providing this information every six months. These reports are sent to both the Senate and House Judiciary Committees.

- Section 480 of title 28 requires the Federal Judicial Center and the Administrative Office to develop and conduct comprehensive education and training programs to ensure that court personnel are familiar with litigation management techniques that reduce cost and delay in civil litigation. The Federal Judicial Center and the Administrative Office have accomplished this task through educational programs, technical support, and publications. These have included early orientation programs for judges, clerks of court, and advisory group chairs; research assistance to advisory groups; technical assistance and workshops on ADR; and publication of: (1) *Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook* (The Federal Judicial Center, 1995) and (2) *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (The Federal Judicial Center and the CPR Institute for Dispute Resolution, 1996).

- Section 481 of title 28 requires the Administrative Office to ensure that district courts have the automated capability to retrieve information about the status of each case in that court. Between 1987 and 1992, all of the district courts implemented automated case management systems for managing civil cases, which include the capability to automatically retrieve information about the status of each case. Eighty-eight of the 94 districts implemented the Integrated Case Management System (ICMS), which was developed by the Federal Judicial Center and is maintained and supported by the Administrative Office. The other districts implemented similar locally developed and supported automated case management systems. In addition, between 1992 and 1995, at least 80 of the district courts implemented a related case management system for judges and chambers staff called Chambers Access to Selected Electronic Records (CHASER), which also includes the capability to automatically retrieve information about the status of each civil case.

The RAND Evaluation

As required in § 105(c)(1) of the Act, the Conference's assessment of the six case management principles is to be based on a comparative evaluation of the CJRA's pilot program. The pilot program consists of twenty district courts that were chosen by the

Judicial Conference based on their size, the complexity and size of their caseloads, the status of their dockets and their locations. To obtain representative results, courts were chosen and could not volunteer. And, pursuant to § 105(b) of the Act, at least five of the courts were located in metropolitan areas. The ten pilot courts[5] were required to include in their civil justice expense and delay reduction plans the Act's six principles and guidelines set forth in § 473(a). The plans of these pilot courts were to be assessed against ten "comparison courts,"[6] for which the principles and guidelines were discretionary.

- Section 105(c)(1) of the Act also specifies that the comparative evaluation, on which the Judicial Conference bases its examination of the six case management principles, shall be "conducted by an independent organization with expertise in the area of federal court management." As noted, in May 1992 the Administrative Office of the United States Courts contracted with the RAND Corporation to conduct this comparative evaluation. The RAND study was completed in September 1996 and is submitted herewith as Appendix A.[7]

The RAND evaluation compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. It found that "all the pilot districts complied with the statutory language in the Act, which provides loosely defined principles but leaves the operational interpretation of them to the discretion of individual districts and judicial officers." (Report at p. 31).

Findings of the RAND Evaluation

Generally, RAND found that the pilot project *per se* did not have a great impact on cost or delay reduction (Report at p. 5). For the reasons expressed throughout this report, the Conference recommends against imposing the pilot program package on a nationwide basis. The study did, however, find six procedures that may be effective in reducing cost and delay or in general appear to have beneficial effects:

- establishing early judicial case management;
- setting the trial schedule early;
- establishing shortened discovery cutoff;
- reporting of the status of each judge's docket;

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[5] The ten pilot courts are: 1) the Southern District of California; 2) the District of Delaware; 3) the Northern District of Georgia; 4) the Southern District of New York; 5) the Western District of Oklahoma; 6) the Eastern District of Pennsylvania; 7) the Western District of Tennessee; 8) the Southern District of Texas; 9) the District of Utah; and 10) the Eastern District of Wisconsin.

[6] The ten comparison courts are: 1) the District of Arizona; 2) the Central District of California; 3) the Northern District of Florida; 4) the Northern District of Illinois; 5) the Northern District of Indiana; 6) the Eastern District of Kentucky; 7) the Western District of Kentucky; 8) the District of Maryland; 9) the Eastern District of New York; and 10) the Middle District of Pennsylvania.

[7] The RAND report consists of four documents: a summary entitled *Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (the "Executive Summary"); a report on the results of the study entitled *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (the "Report"); a report detailing the implementation efforts in each of the districts entitled *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* (the "Implementation Report"); and a supplemental study of ADR programs in six of the pilot and comparison districts entitled *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (the "ADR Study").

- conducting scheduling and discovery conferences by telephone; and
- implementing the advisory group process.

These findings, which are themselves fairly cautious, must be set in the full context of the RAND report. First, the bench and bar have had little experience with some of the case management techniques measured by RAND, e.g., mandatory disclosure. Lawyers and courts are only now beginning to have substantial experience with the disclosure requirements put in place by amendments to the Civil Rules in 1993. A final assessment of the success or failure of these case management techniques should await several more years of experience.

Second, the RAND report often notes that it is not possible to draw conclusions as to causation. It can only suggest a possible correlation between a technique and a given result. Certain results seem to be associated with certain procedures, and often anecdotal observations seem powerful. But it remains possible that the results are explained by the fact that the procedures are used in the cases for which they are best suited, and that forcing all judges to use them in all cases would not lead to the same results.

Finally, the one clear RAND finding is that time to disposition can be reduced, without any cost increase but also without any cost saving, only by a combination of several techniques. There must be early judicial management that includes both shortened discovery cutoffs and a fixed trial date. Early judicial management alone shortens time to disposition, but also is associated with a significant increase in lawyer time. Adding the other feature alleviates the increase in lawyer time that is caused by early management alone.

The Judicial Conference makes its alternative recommendations (Part II of this report) and its recommendations regarding the Act's principles, guidelines and techniques (Parts III and IV of this Report) based on this background and these findings.

The RAND evaluation also made specific recommendations regarding early management of general civil litigation cases (Report at p. 91-92). The four recommendations are to: 1) monitor cases to ensure that deadlines for service and answer are met; 2) wait a short period after the joinder date before beginning judicial case management to see if a case will terminate; 3) set a firm trial date early; and 4) set a reasonably short discovery cutoff time. RAND notes that "the powers to use this approach already exist under the Federal Rules of Civil Procedure." (Report at p. 91). Procedures 1) and 2) are already used in many district courts; procedures 3) and 4) are included in the Conference's consideration of the Act's principles and guidelines (Part III of this report).

Overall, the study found that the implicit policy changes of the Act may have been as important as the explicit ones. The Report notes that many judges and lawyers commented that their CJRA plan "raised the consciousness of judges and lawyers and brought about some important shifts in attitude and approach to case management on the part of the bench and bar." (Report at p. 32).

Implementation and Findings of the FJC Demonstration Court Program

Section 104(b) of the CJRA also established five district courts as "demonstration courts." Two of these districts, the Western District of Michigan and the Northern District of Ohio, were instructed to experiment with systems of differentiated case

management. The other three districts, the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia, were instructed to experiment with various methods of reducing cost and delay in civil litigation including ADR.

Section 104(d) of the Act requires the Conference to report to the Senate and House Judiciary committees on the experience of the courts under the demonstration program. The findings in this document constitute that report, and are based upon a study conducted by the Federal Judicial Center (FJC), attached as Appendix B.[8]

The demonstration districts were established for a different purpose from the pilot courts, i.e., to demonstrate the effectiveness of comprehensive programs in differentiated case management and ADR rather than to implement the full package of case management principles required of the pilot courts. Nonetheless, similar findings emerged. Based on surveys of attorneys in the three case management districts, for example, the study concluded that early judicial case management, which may be manifested through several specific practices, is important for moving litigation along and reducing its cost.

[8] This report, entitled *A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* consists of three documents: an executive summary; a report on the case management demonstration programs; and a report on the ADR demonstration programs.

PART II

Alternative Cost and Delay Reduction Measures

Introduction

Section 105(c)(2)(C) of the Act requires the Judicial Conference to "identify alternative, more effective cost and delay reduction programs that should be implemented" if it does not recommend expansion of the pilot program. Although the Conference does not recommend requiring the district courts to adopt the entire pilot program, it does support many of the general innovations promoted by the Act. The Conference also supports many—indeed almost all—of the Act's case management principles, guidelines and techniques. Each of these is individually evaluated in Parts III and IV of this Report[9] and included in the Conference's alternative cost and delay reduction proposal. Thus, the alternative proposals listed below and the recommendations contained in Parts III and IV constitute the Judicial Conference's alternative expense and delay reduction program.

As explained further below, the empirical research is not entirely conclusive as to the impact of certain elements of the CJRA pilot program on cost and delay reduction. What is known however, is that combinations of the following have been associated with reductions in civil litigation delay: (1) early judicial management; (2) setting the trial schedule early, (3) shortened discovery cutoff; (4) having litigants at or available for settlement conferences; (5) public reporting of the status of each judge's docket; and (6) conducting scheduling and discovery conferences by telephone. In addition, the work of the advisory groups and the use of magistrate judges have proven to be beneficial. Based on these findings, the Conference is not persuaded that the Act's pilot program should simply be expanded. Rather, the Conference recommends that the following alternative cost and delay reduction measures—along with its recommendations regarding the Act's principles, techniques, and guidelines—be implemented by the courts and the legal community.

Alternative Cost and Delay Reduction Measures for the Judiciary

1. The CJRA Advisory Group Process Should Continue.

Section 478(a) of title 28 required the chief judge of each district court, within 90 days of the CJRA's enactment, to appoint an advisory group made up of attorneys and other litigant representatives from the district. By March 1, 1991, over 1700 individuals had been appointed to serve on advisory groups in the various districts.

[9] These evaluations include background information, findings of the RAND evaluation, findings of the Federal Judicial Center study, and a specific Judicial Conference recommendation.

The Conference believes this advisory group process proved to be one of the most beneficial aspects of the CJRA by involving litigants and members of the bar in the administration of justice. As was noted by the Advisory Group for the Southern District of Ohio in commenting on the RAND study, "public participation builds confidence in the court system. At a time when many citizens are skeptical about federal institutions involved in law enforcement, this has enormous value... Continuation of the program after 1997 should assist judges and court staff in learning about and implementing new technology, new ADR or case management practices, and other innovations derived through experience of the local bar and from local, non-federal institutions."

The Judicial Conference believes that the CJRA advisory group process, established under 28 U.S.C. § 478, should continue after this requirement of the Act has expired. Therefore, the Conference recommends that the district courts continue to use advisory groups to assess their dockets and propose recommendations for reducing cost and delay; that the courts, in consultation with the advisory groups, continue to perform regular assessments; and that Congress provide additional and adequate funding to continue the advisory group process.

2. Statistical Reporting of Caseflow Management Should Continue.

As a result of the CJRA, the courts have experimented with and adopted a number of new procedures. One result of the courts' efforts to manage cases efficiently is the reduction in the number of civil cases pending over three years. From 1990 to 1995, the percentage of civil cases over three years old has dropped from 10.6 percent to 5.6 percent of all cases. One of the reasons for this dramatic reduction is the public reporting of court dockets. The RAND study found that "[s]ince public reports on each judge were required (pursuant to section 476 of title 28), the total number of all civil cases pending has increased, but the number of cases pending more than 3 years has dropped by about 25 percent from its pre-CJRA level." (Summary at p. xxvi.) Because of its effectiveness in reducing case disposition time, the Conference plans to continue these reporting requirements after the Act has expired.

In addition, the Conference encourages individual districts to develop or enhance internal statistical reporting capabilities to encompass all case types and judicial officers. These reports should be specific regarding case types and individual caseloads, and should form the basis of an institutional caseflow management monitoring system.

3. Setting Early and Firm Trial Dates and Shorter Discovery Periods in Complex Civil Cases Should be Encouraged.

One of the most important findings of the RAND study is that an early and firm trial schedule, combined with limited time for discovery, can reduce delay in complex civil litigation without increasing costs. An early and firm trial date can reduce time to disposition in complex civil cases by up to two months (Executive Summary at p. xx), but can also lead to increased lawyer work hours and cost. However, these additional costs can be mitigated if the time for discovery is shortened from 180 days to 120 days, which reduces the median time to disposition by one and a half months (Report at p. 64). This early case management was found to have no effect on lawyer satisfaction or views on fairness (Report at p. 55).[10] RAND also notes that "the powers to use this approach already exist under the Federal Rules of Civil Procedure." (Report at p. 91).

[10] RAND's findings are based on its evaluation of the CJRA's second principle, which is discussed more fully in Part III of this Report.

In light of these findings, the Judicial Conference recommends that its Committee on Court Administration and Case Management consider case management procedures that would encourage judicial officers to set early trial dates. It also recommends that its Committee on Rules of Practice and Procedure consider whether F.R.Civ.P. 16 should be amended to require a judicial officer to set the date of trial to occur within a reasonable time, and continue its ongoing project re-examining the nature and scope of discovery including whether specific time limitations on discovery should be required by national rule.

4. The Effective Use of Magistrate Judges Should be Encouraged.

The RAND study considered the use of magistrate judges,[11] and found that "some may be substituted for district judges on non-dispositive pretrial activities without drawbacks and with an increase in lawyer satisfaction." (Report at p. 80). The Conference also considered the use of magistrate judges in Recommendation 65 of the *Long Range Plan for the Federal Courts*. As adjunct judicial officers of the Article III district courts, magistrate judges are indispensable resources who are readily available to supplement the work of life-tenured district judges in meeting workload demands. The district courts have flexibility to promote the most effective use of magistrate judges in each district in light of local conditions and changing caseload needs. Therefore, the Conference recommends the effective use of magistrate judges, consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts*.

5. The Role of the Chief Judge in Case Management Should be Increased.

Within the district court system, the chief judge is the most visible and important institutional leader. The RAND report notes the importance of this position within the federal court governance system, as well as its prominence in the literature on judicial administration and institutional caseflow management (Report at pp. 44-45). The *Long Range Plan for the Federal Courts* notes the significance of this position, and includes it with other issues requiring further study. Therefore, the Conference directs its Committee on Court Administration and Case Management to expand its research agenda to include study and recommendations relating to the role and training of the chief judge in institutional caseflow management.

6. Intercircuit and Intracircuit Judicial Assignments Should be Encouraged to Promote Efficient Case Management.

Pursuant to 28 U.S.C. §§ 291-297 and 28 U.S.C. § 636, visiting judges can provide a great deal of assistance in reducing backlogged dockets, thereby enabling courts to set early and firm trial dates.[12] As discussed in Recommendation 62 of the *Long Range Plan for the Federal Courts*, these statutes allow judicial officers to be transferred temporarily to courts that are facing a judicial emergency due to a backlogged docket. The ability to rely on a definite assignment, for a certain amount of time, can greatly assist

[11] RAND's findings are based on its evaluation of the CJRA's sixth technique, which is discussed more fully in Part IV of this Report.

[12] The Judicial Conference's Committee on Intercircuit Assignments was established to assist the Chief Justice in assigning and designating judges for service outside their circuits.

courts in setting early and firm trial dates and requiring parties to conduct early discovery. Because these statutes provide powerful tools to address delays in civil cases and backlogged dockets, the Conference endorses their increased utilization. The Conference also directs the appropriate Conference committees to consider how best to streamline and expedite the use of Intercircuit and Intracircuit judicial assignments.

7. Education Regarding Efficient Case Management Should be Extended to the Entire Legal Community.

One of the primary benefits emanating from the CJRA has been its educational value to the judiciary. First, it has furthered the judiciary's longstanding commitment to judicial and staff education in case management. Second, it has brought the bar, through the advisory groups appointed in each district, an increased understanding of both judges' and lawyers' responsibilities in managing litigation.

Within the judiciary, the CJRA has added the following items to an already-existing program of education, research, and publications on case management: a model civil expense and delay reduction plan that includes many new and creative techniques; a "Manual for Litigation Management and Cost Delay Reduction," which sets out the core techniques of judicial case management; semiannual reports that disclose each judges's motions and bench trials pending more than six months and cases that have not been terminated within three years of filing; the "Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook," which describes for each district the key elements of its CJRA plan; "ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers"; and the reports of the pilot and comparison courts, and the demonstration program (attached as Appendices A and B). These publications and studies provide additional resources for increasing judicial knowledge about effective case management. Also in response to the Act, the Federal Judicial Center expanded its case management training for judges and developed new programs on ADR.

Beyond the judiciary, the Conference recommends that this educational process now be extended to the entire legal community. Law schools should be encouraged to include training on efficient case management for lawyers, especially in view of the RAND finding that one of the primary drivers of litigation costs is attorney perceptions of case complexity (Report at p. 90).[13] Continuing legal education for lawyers should include various case management processes, including training in ADR and providing effective representation with limited discovery. Continued education for the bench and increased training for the bar would greatly facilitate case management efficiency in the federal judicial system.

8. The Use of Electronic Technologies in the District Courts, Where Appropriate, Should be Encouraged.

The use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The federal courts have been expanding the use of such technologies and are planning a number of future initiatives in this area. Congress should encourage and provide adequate funding for the judiciary's automation and technology efforts.

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[13] The RAND report also supports the recommendation of increased education, noting that "increased education and training could greatly facilitate change in the federal judicial system." (Report at p. 46).

For the past seven years, the judiciary's Electronic Public Access program has made access to court information faster, easier, and less expensive. The Public Access to Court Electronic Records (PACER) system allows any user with a personal computer to dial-in to a district or bankruptcy court computer and retrieve official electronic case information and court dockets usually in less than a minute. This type of access can significantly reduce the travel and time costs incurred by litigants when attorneys or messengers must go to the court to physically retrieve information. Although there is a charge for this access, resulting from a congressional directive that the information system be self supporting, this charge has decreased from $1.00 per minute to the present rate of 60 cents a minute, making it an even more substantial cost saving over travel time and costs. There are more than 30,000 registered users for the PACER system. Users made over 3 million requests for information in fiscal year 1996.

A companion public access program which is free of charge is the Voice Case Information System (VCIS) which uses an automated voice response system to read a limited amount of bankruptcy case information directly from the court's database in response to touch-tone telephone inquiries. This free service is now operating in approximately 75 bankruptcy courts and an appellate version is also being installed in a number of courts. These systems respond to over four million calls a year, and, like the PACER systems, save travel costs and time for attorneys and thus reduce the cost of litigation.

Conducting scheduling and discovery conferences by telephone, when appropriate, also saves time for attorneys and the court as well as expense for the litigants, and many courts are using teleconferencing extensively for appropriate pretrial proceedings. A more recent development has been the use of video telecommunications technology for certain courtroom proceedings.

Video technologies have the potential to speed the resolution of cases and reduce the cost of litigation. While the use of videoconferencing in courtroom proceedings may be limited by constitutional issues of fairness to litigants, its use has proven to be an effective tool in reducing cost and delay in civil litigation, particularly in prisoner civil rights pretrial hearings. The Conference encourages district courts to consider using on-line and video telecommunications technologies to facilitate more efficient judicial proceedings.[14] For prisoner pretrial hearings, this technology can also reduce security costs and risks by allowing prisoners to participate from remote locations. This procedure has facilitated early disposition of prisoner petitions. A pilot conducted by the Judicial Conference from 1991-1995 identified potential benefits and cost savings associated with the use of videoconferencing in prisoner pretrial litigation as well as the potential for case management efficiencies. The use of video for such proceedings has now progressed beyond the pilot stage to implementation. Twenty-one district courts with heavy prisoner dockets have received funding to implement videoconferencing in fiscal years 1996 and 1997, and further expansion of the program is planned.

Electronic filing technology is now being studied by the federal courts. Attorneys can save time and money for their clients by filing and serving court documents electronically. Costs to the court are also reduced by the potential elimination of the space required to store paper files. This technology is presently being piloted in courts with a large influx of certain types of cases, such as asbestos cases, or in courts with very large or "megacases," where many filings are expected. The judiciary has initiated an electronic case files project to study the potential for a broader use of this technology.

[14]Recommendations 69 and 70 of the Judicial Conference's *Long Range Plan for the Federal Courts* endorse the use of these technologies to improve the

Devices such as electronic evidence presentation systems can allow simultaneous viewing of evidence by many attorneys or the entire jury. In a trial with numerous exhibits, this can save a considerable amount of time. A study of the impact of the use of various courtroom electronic technologies is underway and should be completed by 1998.

The use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The courts have been expanding the use of such technologies and are planning a number of future initiatives in this area should Congress adequately fund them. However, the courts are also mindful that prudent technology management bespeaks caution about adopting unproved, costly technologies as a panacea to problems of cost and delay, when compared with similar expenditures for human resources.

Alternative Cost and Delay Reduction Measures Requiring Congressional And Executive Branch Cooperation

Section 102(2) of the Act states that "[t]he courts, the litigants, the litigants' attorneys, and the Congress, and the executive branch, share responsibility for cost and delay in civil litigation and its impact on the courts,... and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties." Section 102(3) of the Act states that "[t]he solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch." In addition to the foregoing proposals that can be implemented through judicial branch action, the Conference makes the following three requests to Congress and the executive branch. As with the proposals above, these requests are made in an effort to implement the RAND study finding that early, effective, and consistent judicial case management, including the setting of an early and firm trial date, can reduce delay in civil litigation. Cooperation between all three branches of the federal government will ensure that the judiciary has the requisite resources to effect this goal.

Throughout the judiciary's implementation of the CJRA, the 94 district advisory groups suggested measures for Congress to consider in its efforts to reduce cost and delay in civil litigation. These three requests represent the most common suggestions made by the advisory groups.

1. The Impact of Judicial Vacancies on Litigation Delay Should be Recognized.

Thirty-nine of the CJRA advisory group reports cite the length of time required to fill a judicial vacancy as a fundamental cause of delay in the federal judicial system. The lengthy delay in filling judicial vacancies is a significant impediment to expeditious civil case processing because courts have had to function with less than a full complement of judges for extended periods of time. Vacancies interrupt the ability of courts to set firm trial dates and dispose of cases quickly. For example, the Northern District of New York, which has only five authorized judgeships, has had one judgeship vacant since 1992 and, until recently, had three vacant judgeships. Not surprisingly, this has led to a severe backlog in the civil docket. The profile of the Northern District of Ohio described in the Demonstration Program Report (Appendix B) also indicates the extent to which judicial vacancies affect case management reforms: "At the time the court became a demonstra-

tion district it had just been allocated a twelfth judgeship, having had eleven since 1985. For most of the 1980's, however, the court had at least one vacancy, and it entered the demonstration period with two—three if we count the new unfilled judgeship. This condition worsened during the early 1990's, and by August 1992 five of the twelve judgeships were unfilled, a situation persisting until May 1994."

Recent statistics confirm that judicial vacancies continue to rise. In the second session of the 104th Congress, only 17 federal judges were confirmed, and 75 judicial vacancies remain. Since 1979, the only year in which a smaller number of judges was confirmed was in 1989, when 15 were appointed. During the same period, the time from nomination to confirmation also expanded to an average of 183 days, up from an average of 78 days.

The Conference is aware that the judicial nomination and confirmation process is reserved for the President and the Senate. However, a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and delay in the civil litigation process. To ensure the ability of the federal courts to handle civil litigation in an efficient and timely manner, the Conference requests that the Executive and Legislative Branches give high priority to filling judicial vacancies promptly.

In addition, the authorization of new judgeships in districts with burgeoning civil and criminal dockets should be acted upon promptly. The Judicial Conference is mindful of the need for carefully controlled growth of the Article III judiciary and the importance of exhausting other appropriate alternatives to creating new judgeships.[15] However, once the Conference has determined that new judgeships are needed to meet the requirements of justice, prompt congressional action to authorize those positions would aid the judiciary in reducing delay in litigation.

2. The Impact of New Criminal and Civil Statutes on a Court's Civil Docket and Resource Requirements Should be Recognized.

While the entire CJRA review process has provided insight into the reasons for civil litigation cost and delay, there are additional factors over which the judiciary has no control. These factors include: increased federal criminal prosecutions, particularly drug and firearm prosecutions, by United States Attorneys; the "federalization" of criminal law; and the creation of additional federal civil causes of action. While it is the prerogative of the Executive and Legislative Branches to pursue these objectives, it should be recognized that they will have an adverse effect on the disposition of civil cases when the number of criminal cases filed increases without an increase in the number of judges.

A court's criminal docket has a direct impact on its civil docket. Criminal procedural requirements such as the Speedy Trial Act and sentencing guidelines can be sources of delay in civil litigation. Thirty CJRA advisory group reports list such factors as significant sources of delay in civil litigation.[16] Setting early and firm trial dates is often difficult because of the precedence of criminal cases. Similarly, sentencing guidelines can complicate sentencing hearings, increase collateral litigation, and decrease plea bargaining. In addition, claims arising under federal statutes have grown steadily over the years due in large part to Congress's creation of new causes of action and a federal forum. For these reasons, Congress should consider the impact of existing laws

[15] *See:* Recommen-dation 15 of the *Long Range Plan for the Federal Courts* and Part II. D. of this report.

[16] The first five recommendations of the Judicial Conference's *Long Range Plan for the Federal Courts* reflect these concerns as well.

and pending legislation[17] on the need to limit the size and contain the growth of the federal judiciary. Failure to balance these conflicting aims will increase the delay in litigation as dockets become overcrowded. When new legislation is enacted, Congress should allocate the resources identified as necessary for its implementation.

3. Sufficient Courtroom Space Facilitates Case Management and Should be Available.

The assurance of an available courtroom allows judges to dispose of cases expeditiously. More specifically, a ready courtroom allows judges to set firm trial dates because courtroom availability is guaranteed. Firm trial dates promote settlement in civil cases as well as less time to disposition in those cases that do go to trial.

The judiciary is aware of the current budget constraints, and is actively exploring ways to contain the cost of space needed by the courts to conduct their business. In fact, the Judicial Conference has endorsed factors for courts to consider in determining the number of courtrooms needed in a new or renovated facility. Given the importance of the courtroom to the judge in providing a firm trial date, however, the Judicial Conference counsels great caution in seeking cost savings by reducing the number of courtrooms.

[17] The Conference has endorsed the proposition that any federal legislation having the potential of appreciably increasing federal judicial workloads be accompanied at the time of House or Senate consider-ation by an evaluation of the prospective quantitative impact on the courts (JCUS-SEP 86, p. 61 and Recommen-dation 13 of the *Long Range Plan for the Federal Courts*). The Administrative Office regularly prepares judicial impact statements on legislation that will have a substantial impact on the judiciary.

PART III

CJRA Principles & Guidelines: Analysis, Comment, and Recommendations

Introduction

As required by §105(c)(2)(A) of the CJRA, this report assesses whether "district courts should be required to include in their expense and delay reduction plans, the six principles and guidelines of litigation management and cost and delay reduction identified in § 473(a) of title 28." Because this pilot project, as a package, did not have a great impact on reducing cost and delay, the Judicial Conference does not recommend that it be applied nationally. However, the RAND report found some of the principles to be effective. Therefore, the Conference considers each component separately and makes individual recommendations for each principle and guideline.

One important reason for the Act's limited impact as tested empirically is that many of its case management procedures had already been adopted by the judiciary. In the Act, Congress identified potential solutions to civil litigation cost and delay, and the judiciary seriously considered and acted on them. Indeed, some of the 1993 amendments to the Civil Rules were directly influenced and shaped by the principles adopted by the CJRA. Other CJRA principles have been endorsed explicitly by the Judicial Conference in the *Long Range Plan for the Federal Courts*.[18]

This section sets out: the Act's principles and guidelines (in italics); background commentary on how they were implemented in the district courts nationwide as well as in the pilot districts; the findings of the RAND study of the ten pilot and ten comparison courts; and the comment and recommendations of the Judicial Conference. Although the RAND findings are, as required by the Act, the primary basis for the Conference's recommendations to Congress, the report also takes into account findings from the Demonstration Program Report, where applicable, and Advisory Committee Reports. As required by § 105(c)(2), the Conference also identifies the recommendations that may best be implemented by changes in the federal rules, and has requested the Committee on Rules of Practice and Procedure to review them.

The Six Principles and Guidelines of 28 U.S.C. § 473(a)

1. ***The systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;***

[18] Elements of the CJRA or the Conference's alternative recommendations that are addressed in the *Long Range Plan for the Federal Courts* include: uniformity in local rules (Recommendation 28); use of magistrate judges (Recommendation 65); ADR (Reco-mmendation 39); technology in the courts (Recommendations 69 and 70); judicial vacancies (Recommendation 67); federalization of criminal law and civil remedies (Recommendations 1-13); and case management education for federal judges (Recommendation 76).

General Information

The "systematic, differential treatment of civil cases..." is more commonly known as Differentiated Case Management (DCM). DCM was adopted, in some form, by 77 percent of federal district courts in their CJRA plans.

DCM systems establish processing "tracks" designed to encompass various types of cases. The categorization of the tracks is based upon case complexity or the needs of particular types of cases. The designation and scope of these tracks can be as simple as "expedited," "standard," and "complex." Each track has a specific set of procedures and event time lines that govern the cases assigned to it. The assignment of cases to tracks may be made in a variety of ways, including objective criteria, attorney selection, or judicial decision after initial review. Once a case is placed on a track, the DCM system monitors the time periods between each event particular to the case.

In the absence of a lack of clear statutory direction or definition, the courts that included DCM in their expense and delay reduction plans employed a variety of formats. In addition to specific track assignment systems, many court plans included an automatic track assignment process for certain types of cases. Administrative appeal cases such as bankruptcy and social security appeals were identified by their pleadings and automatically assigned to a special administrative case management track in some DCM systems.

Many courts have found that DCM systems work effectively for standard cases. Difficulties have arisen, however, when DCM is used for complex cases. Requiring individual parties or court clerical staff to assign a case to a particular track demands great emphasis on track descriptions and characteristics to ensure correct selection. In complex cases, it is difficult to determine to which track a case should be assigned based on the initial pleadings. For more complex cases, greater court involvement in the track assignment process is usually required, and most plans preserve judicial discretion to change a track designation in the interests of justice. Procedures for appeal to a district judge from an early non-judicial track assignment are usually established.

Many courts found that it is easier and less bureaucratic for individual judges to establish individual DCM schedules based on the characteristics of cases. This less formal system of DCM is referred to in the RAND study as the "judicial discretion" model, and is commonly employed by courts. The judicial discretion model allows courts to assess the particular needs of a case, and tailor its management appropriately.

RAND Report Analysis

While several of the pilot project courts initially planned to expand their DCM tracks, the difficulty of determining in which track to place a particular case, based on the initial case filings, made the policy impracticable. For this reason, most courts placed the vast majority of cases in the "standard" track (Report at p. 49). Also, many courts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks. The report notes: "there is a lot of inter-case variation in procedures used by judges, and the variation is a manifestation of a tailored approach to case management that, in principle, is not unlike the objectives of the general differential case management concept." (Report at p. 48.)

The RAND evaluation of differentiated case management in the pilot courts did not extend to tracks for cases that required "minimal management," such as prisoner petitions, social security administrative appeals, and bankruptcy decision appeals.

RAND found that the median reported number of lawyer work hours per litigant for these minimal management cases was about ten, as opposed to 50 hours for general civil cases. RAND did not evaluate this track, because these "cases are typically disposed of relatively quickly and cheaply." While these minimal management cases were not evaluated, many courts employed this expedited track system prior to the implementation of the CJRA, and find it to be an effective form of case management. Indeed, a tracking system that reduces judicial involvement for categories that do not need it, and redirects it to complicated cases is perhaps the most effective form of tracking.

The opposite of the "expedited" track is the "complex" track, which is reserved for cases that require intensive judicial involvement. RAND found it could quantify only one court's complex track in the pilot study, because the number of cases referred by the other courts was too small for statistical analysis.[19] Because RAND's evaluation excluded expedited tracks, which many courts employ, as well as complex tracks, it did not determine the effects of the DCM track approach in the pilot courts (Report at p. 49).

Findings of the FJC Demonstration Court Program

Interviews conducted for the Demonstration Court Report (Appendix B) indicate a generally favorable reaction to DCM. "It informs the attorneys about the judges' expectations for cases of various types, and consequently attorneys are better prepared to discuss the case realistically at the first case management conference. Tracks also set goals for scheduling various case events, with the target trial date being the principal guideline." However, several judges also indicated the limits of DCM. As one judge stated, "You still have to be a hardworking judge, you still have to meet deadlines. But it gives the hardworking judge an organizing principle." (Demonstration Court Report at 15.)

Judicial Conference Comment and Recommendations

The Judicial Conference encourages differential treatment of civil cases to reduce cost and delay. Such principles have long been recognized in the Federal Rules, have for many years been a basic component of training for new judges, and have been encouraged in the *Manual on Complex Litigation*, first published in 1969. The widespread use of case tracking for administrative or quasi-administrative case types (e.g., Social Security and student loan cases) is also endorsed. The DCM concept may provide its greatest benefits by offering standardized case management procedures to those plaintiffs whose claims are the least amenable to more formal adversarial procedures and whose litigation dollars are most limited. Track systems, however, may not always be the most efficient format for DCM. As the pilot courts demonstrated, such systems can be bureaucratic, unwieldy, and difficult to implement. For example, some courts found that they lacked sufficient information at the beginning of a case to know in which track a case belonged. (Report at p. 49.)

Therefore, the Conference recommends that individual districts continue to determine on a local basis whether the nature of their caseload calls for the more rigid track model or the judicial discretion model for their DCM systems.

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[19] It is important to note that assign-ment of a small percentage of cases to a "complex track" does not necessarily mean that the system was under-utilized. In fact, such categories should contain a very small percentage of the total number of cases on a court's docket. The Demonstration Program Report (Appendix B) indicates that the very successful DCM systems had complex tracks which handled only four percent of the total civil docket. These systems assigned cases to tracks only after judicial review of the case and discussion with attorneys at the scheduling confer-ence about the appropriate track assignment.

2. Early and ongoing control of the pretrial process through involvement of a Judicial Officer in—

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that —

(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

(ii) the trial cannot reasonably be held within such time because the complexity of the case or the number or complexity of pending criminal cases;

(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

(D) setting at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

General Information

This second principle, promoting "early and ongoing control of the pretrial process through involvement of a judicial officer...." was included, in some form, in ninety-one percent of all the district court CJRA plans. Subsections (A) and (B) also had nearly universal acceptance, with early and firm trial dates being included in the F.R.Civ.P. 16 scheduling order. Most of the practices enumerated in this principle were adopted by the judiciary through F.R.Civ.P. 16(b). That Rule requires judges to issue a scheduling order that includes dates for filing motions and completing discovery, including a trial date. Many courts included a specific time limit for trial dates in their CJRA plans, and set the time limit substantially lower than the Act's suggested 18 months.

The adoption of subsection (C), the principle of "controlling the extent of discovery and the time for completion of discovery" is in virtually all of the courts' CJRA plans, but how discovery deadlines were established varied greatly. Many districts established discovery deadlines in a scheduling order issued pursuant to F.R.Civ.P. 16. Others contained some form of time limit for discovery, usually in the range of four to six months for standard cases. Some districts adopted a DCM system with specific tracks for different types of cases. Among other things, these tracks typically established discovery periods of varying lengths, such as no discovery for certain types of administrative cases, four to eight months for standard cases, and longer periods for complex cases.

Some courts established discovery deadlines at the initial pretrial conference, and the lawyers were required to submit a joint case management plan prior to the conference that included limits and deadlines for discovery. In the absence of specific tracks, many districts have guidelines for the completion of discovery, although the assigned judicial officer has the discretion to determine the appropriate length of discovery for an individual case.

Subsection (C) also calls for courts to control the extent of discovery. Many court plans established limits or suggested that judicial officers place limits on interrogatories, depositions, or both. Typically, these limits are set within a DCM system and therefore vary by track and length of discovery; more complex cases are given more

time for discovery, and litigants are allowed a greater number of interrogatories and depositions. In the absence of a DCM system, these limits may also be determined at the pretrial conference or set in a scheduling order.

Subsection (D) calls for "setting at the earliest practicable time, deadlines for filing motions and a time framework for their disposition." Approximately 60 percent of the CJRA plans include a procedure for setting deadlines for filing motions, or indicate that such a procedure predated the CJRA. Typically, these deadlines are established through the Rule 16 scheduling order.

RAND Report Analysis

The RAND evaluation defined the principle of early judicial case management as "any schedule, conference, status report, joint plan, or referral to ADR [that occurs] within 180 days of case filing." (Report at p. 51). In addition to this principle, RAND included four of the six litigation techniques established in 28 U.S.C. § 473(b) (which are discussed in Part IV of this report) as part of early judicial case management. Before the CJRA, 58 percent of the general civil litigation cases in the pilot and comparison courts already received early judicial management. This increased to 65 percent after the CJRA (Report at p. 52).

The evaluation found that early judicial case management "significantly reduced time to disposition and significantly increased lawyer work hours." (Report at p. 55). The evaluation found a 1.5- to 2-month time reduction in disposition of cases that last over nine months, but a 20-hour increase in lawyer work hours. This increase in lawyer work hours also resulted in an increase in costs for litigants. RAND concludes that "These results debunk the myth that reducing time to disposition will necessarily reduce litigation costs." (Report at p. 55). However, when early judicial intervention is combined with shortened discovery, the increase in lawyer work hours is mitigated. "Reported lawyer work hours significantly decrease as the district median time to discovery cutoff gets shorter... We estimate approximately a 17-hour reduction in lawyer work hours for cases that survive at least nine months if the district median discovery cutoff is reduced from 180 days to 120 days." (Report at p. 64.) In addition, early judicial case management had no significant effect on lawyer satisfaction or views on fairness. (Report at pp. 55.)

The RAND evaluation also found that management of discovery increased in the pilot courts after the CJRA. The report notes that "in 1991, the fastest and slowest districts' median days from schedule to discovery cutoff were 100 and 274 days, respectively. In 1992-93, these medians had fallen to 83 and 217 days, respectively." (Report at p. 62.)

Findings of the FJC Demonstration Court Program

Findings from the Demonstration Program provide further evidence of the positive effects of early and ongoing judicial involvement in the pretrial process. Among a number of case management practices whose effects were rated by attorneys, "two-thirds to three-quarters ... identified two centerpieces of active judicial case management, the early scheduling conference with the judge and the scheduling order, as helpful in moving their cases along." (Demonstration Program Report at p. 10.)

Judicial Conference Comment and Recommendations

Based on RAND's finding that "If early case management and early setting of the trial schedule are combined with shortened time to discovery cutoff," the time to disposition of cases lasting more than nine months can be reduced by 30 percent with no significant cost penalty (Report at p. xix), the Judicial Conference supports the concept of early judicial case management.

The Conference endorses the principle of early judicial case management, and notes that it is already addressed by F.R.CIV.P. 16(b), which requires a court to enter a scheduling order within 120 days after a complaint has been served on a defendant. The Conference also endorses the principles of setting an early and firm trial date and setting a shorter discovery period, and notes that they are already addressed by F.R.Civ.P. 16(b)(4)-(6). The Conference, however, is opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin. A standard time limit might be counterproductive and slow down cases that could be disposed of much more quickly. Prescribing a national rule with specific trial deadlines could also lead to the same difficulties in case management that are caused by the Speedy Trial Act.[20] Therefore, the Conference makes the following recommendations:

(1) The Committee on Court Administration and Case Management should consider case management procedures that would encourage judicial officers to set early trial dates;

(2) The Committee on Rules of Practice and Procedure should consider whether F.R.Civ.P. 16 should be amended to require the judicial officer to set an individual trial date in each case; and

(3) The Committee on Rules of Practice and Procedure should continue its ongoing project re-examining the nature and scope of discovery, including whether specific time limitations on discovery should be required by national rule.

3. For all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery case management conference or a series of such conferences at which the presiding judicial officer—

(A) explores the parties' receptivity to, and the propriety of settlement or proceeding with the litigation;

(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

[20] Thirty CJRA advisory group reports list the Speedy Trial Act as a significant source of delay in civil litigation.

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery into two or more stages; and

(D) sets at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

General Information

This third principle of discovery management in complex cases was almost universally (96 percent) adopted, in some form, by the federal courts.

Subsection (A) recommends that the court explore "the parties' receptivity to, and the propriety of settlement, or proceeding with the litigation." Over sixty percent of the courts adopted this principle in their expense and reduction plans. The courts vary on how these settlement discussions are held. Some require that parties conduct settlement conferences by themselves, while others mandate a judicially hosted settlement conference.

Subsection (B) recommends that courts identify the principal issues in contention and, where appropriate, order the staged resolution or bifurcation of issues for trial. This principle aimed to expedite discovery and settlement by determining the core issues of contention in the complex case. Fifteen court plans specifically included the requirement that, in complex cases, the core issues of contention be considered at the pretrial conference. Only two courts, however, required the consideration of bifurcation of trial issues.

Subsection (C) recommends the preparation of a discovery schedule to limit the volume of discovery and to establish phases in the discovery process. Apart from the establishment of discovery deadlines, most district court plans called for the formation of a discovery schedule, and usually a scheduling order is issued pursuant to F.R.Civ.P. 16. Some districts limited discovery plans to complex cases.

Many courts also impose a requirement that counsel for all parties submit a joint discovery case management plan or a draft scheduling order before the initial pretrial conference. These joint plans address issues such as the trial date, deadlines for discovery, and the filing of non-dispositive motions. In the absence of such an agreement by counsel on a joint plan, many courts require both parties to submit separate plans to the court.

In addition to the requirements imposed by F.R.Civ.P. 16, Civil Rule 26 sets out a variety of discovery requirements, several of which are recommended by this principle. Specifically, Rule 26(f)(2) requires parties to meet and develop a proposed discovery plan that includes "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues." Local rules may exempt particular categories of actions from these requirements, but may not opt out of Rule 26(f) entirely.

As in the previous principle, subsection (D) calls for "setting at the earliest practicable time, deadlines for filing motions and a time framework for their disposition." Approximately 60 percent of the CJRA plans include a procedure for setting deadlines for filing motions, or indicate that such a procedure predated the CJRA. Typically, these deadlines are established through the Rule 16 scheduling order.

RAND Report Analysis

The RAND evaluation defined the special management of complex cases as a subset of differential case management, which was not implemented in a consistent enough way to permit evaluation. The key management device employed by the courts remains the judicial discretion model for individual cases. RAND did not believe these procedures were discernible from the court dockets. Therefore, it did not assess this principle (Report at p. 26).

Judicial Conference Comment and Recommendations

The Judicial Conference supports discovery management plans as an effective management tool in complex civil trials. Currently, most district courts require the formation of a discovery schedule, and a corresponding scheduling order is typically issued pursuant to F.R.Civ.P. 16. In addition, the principle of staged discovery management, established in §§(B)-(D) of this principle, was included in the 1993 amendments to F.R.Civ.P. 26. The Conference recommends that the Committee on Rules of Practice and Procedure continue its ongoing project re-examining the scope and substance of discovery, including whether the advantages of national uniformity outweigh the advantages of permitting locally-developed procedures as an alternative to F.R.CIV.P. 26(f) and what the effect of courts using other alternative procedures might be.

4. Encouragement of cost effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

General Information

The fourth principle, "encouragement of cost effective discovery through voluntary exchange of information..." is included in thirty of the courts' CJRA plans. However, 52 of the district court plans contain some form of required disclosure, typically involving the exchange of core information, such as: the name, address, and telephone number of each individual likely to have discoverable information relevant to disputed facts; a description by category and location of all documents that are relevant to disputed facts; and a computation of any category of damages claimed by the disclosing party and any relevant insurance agreement. Approximately half the plans that encourage voluntary exchange also require this exchange of core information, often through standard interrogatories that all parties must answer.

The amendments to F.R.Civ.P. 26(a), adopted in December 1993, require parties to disclose core information (e.g., names and addresses of witnesses and a description of documents) before undertaking formal discovery. The amended rule also permits courts, individual judges, and the parties to decide not to follow this requirement. Half the courts adopted the mandatory disclosure provisions contained in the federal rule, while three have similar local rules, and 17 authorize individual judges to impose the rule's disclosure requirements. (Federal Judicial Center, *Implementation of Disclosure in United States District Courts*, March 22, 1996, p. 5.)

RAND Report Analysis

The CJRA brought about a substantial change in early disclosure of information. After the CJRA, all pilot and comparison courts instituted some form of voluntary or mandatory exchange of information by lawyers. The Act did not, however, significantly alter a court's control of the volume and timing of discovery. The 1993 revisions to F.R.Civ.P. 26, which require the mandatory exchange of information, were also an impetus for some courts to adopt new procedures.

The RAND evaluation found it difficult to analyze the effects of voluntary discovery separate from mandatory discovery. "Very few districts had mandatory early disclosure policies in 1991, but between 1991 and 1992-93 many districts implemented such policies. Thus early disclosure cases in the 1991 sample primarily reflect voluntary early disclosure, but early disclosure cases in the 1992-93 sample also include mandatory disclosure. The difference between the two samples makes interpreting findings difficult." (Report at p. 64.)

While the RAND assessment found discovery deadlines to be a major factor influencing the cost and length of litigation (Report at p. 68), the number of courts requiring disclosure of information bearing on both sides of the dispute was too small to measure its effect confidently on lawyer work hours. Because of the small number of courts using this policy, the RAND report concluded that the policy had no statistically significant effect on lawyer work hours (Report Appendix E, at p. 16).

Findings of the FJC Demonstration Court Program

In the two demonstration districts that implemented the federal mandatory disclosure rule, over half the attorneys in cases where the rule had been applied reported that initial disclosure reduced litigation time in their case. Most others reported that it had no effect. Fewer attorneys, but still about 40 percent, estimated that initial disclosure had decreased litigation costs in their cases. Again, most of the others reported no effect on costs (Demonstration Court Report at pp. 115, 118, 154, 161).

Judicial Conference Comment and Recommendations

While this principle pertains to voluntary discovery, the RAND evaluation does not provide adequate information, separate from mandatory discovery, for the Conference to make a specific recommendation. Therefore, the Conference recommends that the Committee on Rules of Practice and Procedure re-examine the need for national uniformity in applying F.R.CIV.P. 26(a) as part of its ongoing project re-examining the scope and nature of discovery and disclosure, particularly whether the advantages of national uniformity in applying F.R.CIV.P. 26(a) outweigh the advantages of locally-developed alternative procedures.

5. Conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion;

General Information

In order to reduce the number of discovery disputes that require judicial intervention, almost half the CJRA plans required that counsel meet and confer before filing

motions with the court. One-third of these plans also stated that if a discovery motion is filed, the moving party must certify that a reasonable and good faith effort was made to resolve the discovery dispute without judicial intervention. Many districts had a local rule imposing this requirement prior to the CJRA. More than half the plans that require parties to meet and confer indicate that this requirement predated the plan.

In addition, the 1993 amendments to several federal rules require attorneys to confer and certify in good faith that they attempted to resolve their discovery disputes, including changes to Civil Rules 37(a)(2)(A) and (B), 37(d), 26(c), and 26(f). These rules govern all important discovery and disclosure requirements.

RAND Report Analysis

The RAND evaluation stated that the effectiveness of this principle could not be measured because there was little change among the pilot and comparison courts, due to the fact that "all but one district had rules governing this before the CJRA; these have been continued or strengthened." (Report at p. 62).

Judicial Conference Comment and Recommendations

This principle has been endorsed by the Judicial Conference and is reflected in the 1993 amendments to F.R.Civ.P. 37(a)(2)(A) and (B), 37(d), 26(c), and 26(f), which require attorneys to confer and certify in good faith that they have attempted to resolve their discovery disputes. Therefore no further recommendation is necessary.

6. Authorization to refer appropriate cases to alternative dispute resolution programs

that—

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary trial.

General Information

Although ADR is rapidly growing and changing nationwide, it is still a relatively new concept that may require a permanent investment in personnel, automation, and management resources. Nonetheless, all but 13 federal district courts authorize judges to assess the suitability of ADR for individual cases on their dockets. Various forms of ADR have emerged in the federal courts, many prior to the CJRA.[21] These include arbitration, mediation, early neutral evaluation, settlement weeks, summary jury trials, and mini-trials. Under the CJRA, the application of these ADR processes expanded into many courts.

Many districts incorporated into their CJRA plans, or their local rules, language encouraging the use of ADR mechanisms. For example, a number of courts instruct judicial officers and parties to discuss at the initial case management conference the feasibility of using some form of ADR. Judges are permitted by these plans to refer

[21]For example, 20 courts were desig-nated in 1988 as pilot courts for mandatory and voluntary arbitration under the authority of 28 U.S.C. §§ 651 *et seq*.

appropriate cases, usually with party consent, to authorized ADR programs. These programs may be affiliated with the court ("court-annexed") or outside the court.

The most common ADR practice, reflected in two-thirds of the cost and delay reduction plans, is the traditional settlement conference with a judicial officer. However, these conferences vary from mandatory conferences to assistance upon a party's request. Particularly noteworthy in this process is the expanding role of magistrate judges, many of whom conduct settlement conferences and preside over summary jury trials and other forms of ADR.

Mediation is the most frequently used form of ADR after judicial settlement conferences. A third of the courts' CJRA plans authorized a court-annexed program which maintains a roster of court-approved attorney neutrals, establishes criteria for the selection of cases and assignment of neutrals, and sets rules for procedural matters such as the conduct of ADR sessions.

A third of the courts also authorized referral of cases to arbitration, although mandatory referral is found only in the courts authorized by 28 U.S.C. § 651 to establish such a referral method. Of the courts that authorize the use of arbitration, approximately 20 have established court-based programs. The remainder simply authorize judicial officers to suggest that parties consider using the services of a private-sector arbitrator. Less common than mediation and arbitration, early neutral evaluation (ENE) is authorized by only 14 courts. This form of ADR is specifically included as a litigation management technique in section 473(b) of title 28, and is discussed more fully in the next section of this report. Only a handful of courts indicated an intention to establish occasional settlement weeks. Other forms of ADR mentioned in a few plans are mini-trials, summary trials, and the use of special masters as settlement officers.

RAND Report Analysis

All of the 20 pilot and comparison districts permitted the use of ADR techniques in their CJRA plans, although their use was limited. The RAND report noted that "[t]he Act fails to define the term 'alternative dispute resolution' with specificity, but mentions a number of approaches such as neutral evaluation, mediation, mini-trial, and summary jury trials." (Report at p. 71). The evaluation found that the volume of an ADR program depends greatly on the details of how it is designed and implemented. "Programs that permit ADR but are not structured and administratively supported generate very little volume and have very few costs and effects." (Report at p. 76). RAND's statistical analysis detected no major effect on cost and delay resulting from mandatory arbitration. (Report at p. 74).

Because of the importance of this topic, the Judicial Conference requested that RAND conduct a separate study of mediation and early neutral evaluation in six districts to supplement the ADR component of the main CJRA evaluation. This supplemental study, entitled *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act,* found only slight significant statistical evidence that either time to disposition or lawyer work hours are affected through the use of ADR, although participants in these programs generally support them. Most participants found them worthwhile both in general and in their cases (ADR Study at p. 4), with no particular antipathy to the mandatory, non-binding, procedures. RAND further noted that the mediation and ENE programs did not show effects that could be measured at a higher degree of statistical significance in the time to disposition and litigation costs, but that smaller positive effects were probably present, such as reducing time to disposition in

certain programs (ADR study at 48). Thus, RAND concluded that mediation and neutral evaluation programs, as implemented, are not a "panacea" for the perceived problems of cost and delay in federal civil litigation (ADR Study at p. 4).

Findings of the FJC Demonstration Program

The CJRA demonstration program was established for a different purpose than was the pilot program. The demonstration program experimented with differentiated case management systems and ADR procedures whereas the pilot program, and the subsequent independent evaluation, assessed the extent to which cost and delays were reduced as a result of the Act's specific principles and guidelines set forth in 28 U.S.C. § 473. Because of their different goals, the two studies were conducted differently. For example, the five demonstration courts often had pre-existing programs and chose to participate in the program, whereas the participation of the twenty pilot courts was required. Also, the research methodologies used to evaluate the two programs were substantially different. Nonetheless, findings from the two studies were usually similar.

Alternative Dispute Resolution is one area where the demonstration program findings by the FJC differ from the pilot program findings by the RAND Corporation. In the three demonstration districts that implemented ADR programs, a majority of attorney survey responses indicated that they believed that the procedures reduced litigation costs (Demonstration Program Report at p. 10). The majority of attorneys in the Northern District of California also estimated that the court's ADR procedures reduced litigation time, but fewer than a majority reported this effect in the Northern District of West Virginia. The most significant findings of the three demonstration courts regarding ADR's effects on disposition time were in the Western District of Missouri, where cases in one experimental group terminated 2.7 months faster than cases in the control group (Demonstration Program Report at pp. 16-17). Effects on disposition time in the other two participating districts were more difficult to discern.

The findings in the Western District of Missouri warrant further attention. However, due to the different findings of the pilot program, they do not justify mandating any type of national program.

Judicial Conference Comment and Recommendations

While many courts have found ADR to be a benefit to litigants, the RAND analysis cautions against requiring any particular form of ADR to be implemented on a judiciary-wide basis. Despite the failure to find positive cost and delay reducing impacts, the Conference does believe that the positive attributes often associated with ADR (and reflected in the FJC demonstration data and findings), such as increased lawyer and litigant satisfaction, argue for continued experimentation. Avenues for exploration include expanded settlement roles for magistrate judges, effective use of court staff for administering ADR programs, and cooperative ADR programs with state courts and bar associations.

The Conference supports continued use of appropriate forms of ADR, as recognized in Recommendation 39 of the *Long Range Plan for the Federal Courts.*[22] Many courts have shown the ability and commitment to administering court-annexed ADR pro-

[22] The Conference endorses the use of all suitable forms of ADR, including non-mandatory arbitra-tion. Therefore, it believes that there is no need to extend the pilot arbitration program established under 28 U.S.C. § 658.

grams under judicial supervision that yield increased satisfaction with the court's fairness and responsiveness while not increasing cost or delay. Therefore, the Judicial Conference recommends that local districts continue to develop suitable ADR programs, including non-binding arbitration. The Conference also recommends that the Committee on Rules of Practice and Procedure review the courts' experiences with F.R.Civ.P. 16 regarding ADR and consider whether any changes in the civil rules are needed to enhance the role of ADR.

PART IV

CJRA Techniques: Analysis, Comment, and Recommendations

Introduction

Section 473(b) of title 28 lists a set of litigation management techniques for the courts to consider in developing their expense and delay reduction plans. While the CJRA does not require the Judicial Conference to evaluate these techniques in this final report to Congress, they are considered because of their importance in reducing cost and delay in civil litigation. This section sets out the techniques, provides background commentary on how they were implemented in district courts nationwide, presents the findings of the RAND study on the pilot and comparison courts, presents the FJC findings of the Demonstration Program, and states the opinions and recommendations of the Judicial Conference regarding their future implementation. The pilot and comparison districts had mixed reactions to the techniques. As noted in Part III, an important reason for the difficulty of measuring the effects of the Act is that many of its principles, guidelines, and techniques were adopted by the judiciary through the 1993 Civil Rules amendments and the Judicial Conference's *Long Range Plan for the Federal Courts*. The Conference recommends that the Committee on Rules of Practice and Procedure review some of these techniques to consider the extent to which they have been implemented by the 1993 amendments and whether any rules changes are needed for more effective implementation.

The Six Techniques of 28 U.S.C. § 473(b)

1. ***A requirement that counsel for each party to a case jointly present a discovery case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;***

General Information

Requiring the submission of joint discovery plans at an initial pretrial conference was added by F.R.Civ.P. 26(f) in 1993, and approximately 75 percent of the districts included it in their local rules. This technique had almost universal acceptance in the CJRA court plans.

RAND Report Analysis

The RAND report notes that prior to the CJRA, only one pilot or comparison court employed this technique. Four pilot districts included it in their CJRA plan, and the nine remaining pilot or comparison courts adopted it after the December 1993 changes to F.R.Civ.P. 26(f). The evaluation found no consistently significant change in the

predicted time to disposition resulting from the requirement of a joint discovery management plan. There was also no significant change in predicted lawyer work hours, even if only complex cases were considered.

Findings of the FJC Demonstration Court Program

Three demonstration districts included a requirement that attorneys file a joint management plan before the initial Rule 16 Conference. In all three districts, at least half the attorneys who responded estimated that this requirement helped move their cases along. Most of the other responding attorneys reported that the requirement had no effect. In two districts, only about a quarter of the responding attorneys estimated that a case management plan reduced costs , while in the third district, 40 percent of the attorneys responded that it reduced costs. Approximately one quarter believed that it increased costs (Demonstration Court Report at p. 13).

Judicial Conference Comment and Recommendations

The 1993 amendments to F.R.Civ.P. 26(c), 26(f), 37(a)(2)(A) and (B), and 37(d) require that attorneys confer before making discovery motions. The 1993 amendments to F.R.Civ.P. 26(f) adopt a general "meeting of the parties" requirement that includes planning for disclosure and discovery, and permits local rules to exempt only particular categories of actions. Given the findings of the RAND evaluation, the Conference does not recommend adoption of any further requirements regarding this technique, but it does recommend that the Committee on Rules of Practice and Procedure review this technique as part of its ongoing project re-examining the scope and nature of discovery and disclosure.

2. A requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

General Information

Requiring a representative with the power to bind the parties to be present at all pre-trial conferences was adopted by two-thirds of the courts' CJRA plans. In addition, the 1993 amendments to F.R.C.P. 16(c) included this requirement: "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."

RAND Report Analysis

The RAND report stated that because all 20 pilot and comparison districts already required this technique prior to and after enactment of the CJRA, there was no variation between the districts. Therefore, RAND was unable to evaluate the technique's effectiveness (Report at p. 77).

Judicial Conference Comment and Recommendations

The Judicial Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated this technique. Therefore, no further recommendation is necessary.

3. A requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

General Information

Only nine court plans included a rule requiring requests for discovery extensions or postponement of trial be signed by the attorney and the party making the request. Several of these districts limited these requirements to the discretion of the judicial officer. Twenty-two courts expressly stated that they did not have such a rule, and 13 explicitly rejected the rule as unnecessary or inappropriate. Many courts expressed a concern that this technique would lead to undue interference with attorney-client relations as well as create additional time-consuming and expensive procedural hurdles.

RAND Report Analysis

The RAND report noted that attorneys generally did not support this technique, because it was unnecessary, increased costs, and created the implication that there was insufficient trust in the attorney-client relationship. RAND did not evaluate this technique because there was no variation in policy between districts.

Judicial Conference Comment and Recommendations

Noting the almost universal rejection of this technique by the bar and the courts, and the lack of any positive evidence supplied by the RAND evaluation, the Judicial Conference does not recommend this technique.

4. A neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

General Information

Early neutral evaluation (ENE) is a non-binding ADR process that, early in the course of the lawsuit, provides litigants with an advisory evaluation of the likely outcome of a case if it were to go to trial. The neutral evaluator is usually a disinterested private attorney with expertise in the subject matter in dispute. The evaluator can clarify issues and identify strengths and weaknesses in a case. Fourteen courts instituted an ENE program.

RAND Report Analysis

All of the 20 pilot and comparison districts permitted the use of ADR techniques in their CJRA plans, although its use was limited. The RAND supplemental report entitled

An Evaluation of Alternative Dispute Resolution Under the Civil Justice Reform Act notes that comparing different ADR programs is difficult because while the programs may have had the same name, they had different designs and were implemented differently. "Conversely, a program named 'mediation' may be indistinguishable from another program named 'neutral evaluation' if they are designed and implemented in the same way." (ADR Study at 29). As with ADR in general, the Act fails to define the term 'neutral evaluation program' with specificity.

As discussed under the principle pertaining to ADR (principle 6), RAND's ADR report found no significant statistical evidence that either time to disposition or lawyer work hours were affected through the use of ADR as implemented in the study courts. It concluded that mediation and neutral evaluation programs, as implemented, are not a "panacea" for the perceived problems of cost and delay in federal civil litigation (ADR Study at p. 4).

Finding of the FJC Demonstration Court Program

One court in the Demonstration Program had an ENE program; for that court, it was the form of ADR most frequently selected by parties when given a choice among the court's ADR options. Attorney estimates of ADR's effects on litigation time and costs did not, however, vary by the type of ADR to which the case was referred.

Judicial Conference Comment and Recommendations

See Part III § 6 of this report, which discusses the Judicial Conference's recommendation on ADR generally (Recommendation 6 at p. A-52).

5. A requirement that upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference.

General Information

Requiring a representative, with the power to bind the parties, to be present at all settlement conferences, was adopted by over two-thirds of all the districts. In addition, the 1993 amendments to F.R.C.P. 16(c) included this requirement: "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."

RAND Report Analysis

Before CJRA eight of the twenty pilot and comparison districts employed this technique, and another five included it in their CJRA plans. The evaluation found that having litigants at, or available, for settlement conferences predicts reduced time to disposition (Report at p. 78). It had, however, no significant effect on cost as measured by lawyer work hours spent. "This policy appears worth implementing more widely because it has benefits without any offsetting disadvantages." (Report at p. 80).

Findings of the FJC Demonstration Court Program

In the three demonstration courts that employed ADR, the parties were required to be present at ADR sessions. The Demonstration Program Report found that in two of these districts, 70 percent of the attorneys who responded to the survey indicated that the client's presence helped resolve the case. In the other district, 76 percent of the responding attorneys believed that the client's presence made the session more useful (Demonstration Court Report at pp. 50, 82, 108).

Judicial Conference Comment and Recommendations

The Judicial Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated this technique. Therefore, no further recommendation is necessary.

6. Such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

General Information

In developing their CJRA plans, courts established a wide array of innovative procedures aimed at reducing civil litigation cost and delay. Some of the innovative procedures that the Judicial Conference finds to be effective are included in the recommendations made in Part II of this report. In addition, many of these case management techniques and practices will be presented to courts through publications and through training conducted by the Federal Judicial Center.

RAND Report Analysis

The RAND analysis of innovative procedures, aimed at reducing civil litigation cost and delay, focused on the use of magistrate judges in the civil pretrial process. RAND found that the role of magistrate judges varied in each of the pilot and comparison courts. The evaluation measured magistrate judge activities by the number of civil hearings (e.g., motions, conferences, hearings) performed but did not address the use of magistrate judges to try civil cases with the consent of the parties. It found no significant effect on time to disposition or on lawyer work hours, and no significant effect on views of fairness associated with changing the level of magistrate judge activity, and that "districts with higher levels of magistrate judge activity on civil cases usually are using them to conduct pretrial processing that would otherwise be conducted by a district judge." (Report at p. 79). In addition, RAND's data indicated that increased magistrate judge activity in civil cases strongly increased attorney satisfaction, because magistrate judges are seen as being more accessible. "These findings suggest that some magistrate judges may be substituted for district judges on non-dispositive pretrial activities without drawbacks and with an increase in lawyer satisfaction." (Report at p. 80).

Judicial Conference Comment and Recommendations

The Judicial Conference recognizes the importance of the accessibility of judicial officers to supervise pretrial activities, and recognizes that the use of magistrate judges

can contribute to more efficient case management in the district court and attorney satisfaction. Therefore, the Conference supports their effective use consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts*, including their use in any district court ADR programs.

PART V

Concluding Observations: Prospects for Continued Civil Justice Reform

Under the CJRA, the judiciary, with the aid of more than 1,700 attorneys and other litigant representatives on advisory groups in every district, has devoted an enormous amount of time, energy, and creative thought to experimentation and study of civil litigation processes. These efforts have had, and will continue to produce, direct and positive effects on how the federal courts conduct their business. As the RAND study noted, the implicit policies of the Act may have been just as important as its more explicit provisions. Indeed, the CJRA "has raised the consciousness of judges and lawyers and brought about some important shifts in attitude and approach to case management on the part of the bench and bar." (Report at p. 32). The fruits of this consensus are visible not only in actual cost and time reductions, but also in the promotion of many other case and court management innovations that will further improve the efficiency and effectiveness of the entire civil justice system.

There are, however, significant issues and challenges that must be considered as we move ahead. First, as the RAND report notes, many lawyers and judges are concerned that the procedural innovations prompted by the CJRA pose the risk of emphasizing speed at the expense of justice (Report at p. 34). This concern is also common among state judges, and is often mentioned in the literature on litigation cost and delay reduction. Because the federal courts are committed to ensuring "just" as well as "speedy and inexpensive" determinations of civil actions (see F.R.Civ.P. 1), efforts to improve case management must take into account the potential impact of new procedures on the quality of justice rendered in federal civil proceedings.

Second, the process of experimentation and innovation under the CJRA raises serious questions about the relative balance between national uniformity and local option in development of litigation procedures, and the interplay between national and local rules has complicated efforts to evaluate the "before and after" effects of local CJRA plans. As explained above, the Judicial Conference has pursued civil justice reform at the national level through a series of amendments to the Civil Rules and adoption of the *Long Range Plan for the Federal Courts*. The 1993 amendments to Rule 26(a) were known to be controversial and, in keeping with the experimental nature of the CJRA, individual districts were allowed to modify or "opt out" of the new disclosure requirements. The plan was to study the experiences of different courts with various disclosure regimes and then reconsider the proper scope of a national rule. The Advisory Committee on Civil Rules has now launched such a study as part of a broader review of the nature and scope of discovery procedures. The advisory committee, along with the Standing Committee on Rules of Practice and Procedure and the Conference itself, will be responsible for assessing the extent to which a uniform national disclosure rule (and other rules governing case management) is advisable.

Third, a number of important research questions are yet to be addressed. Among these are: 1) the possible differential impact of CJRA procedural reforms on small law firms, solo practitioners, and those serving under contingent fee arrangements; 2) the

impact of "front-loading" litigation costs for all lawyers and plaintiffs under accelerated case management programs (RAND Report at p. 14); and the effects of the CJRA on particular case disposition types (*Id*. at p. 7, footnote 2, and RAND Report Appendix C at p. 16). Reforms that actually *increase* costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims.

Fourth, litigants, lawyers, and judges have had only limited experience with some of the case management principles, guidelines, and techniques set forth in the CJRA. For this reason, final assessment of the success or failure of these procedures should await more experience. In this context, the RAND report is very cautious, often noting that conclusions cannot be drawn as to which measures actually reduce cost and delay. Although certain results seem to be associated with particular procedures, and while anecdotal observations are powerful, it is possible to find different explanations for the results reported by RAND and the FJC. Mandating use of these procedures in all cases may not lead to similarly positive results.

Finally, and perhaps most importantly, there are limits to the courts' ability to effect delay and cost reduction in civil litigation through procedural reforms. Although rules provide an appropriate structure for managing litigation, there is a need for individualized attention to each case that a "one size fits all" approach cannot satisfy. In addition, the RAND report notes that reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in "time to disposition" (Report at p. 90). More broadly, it should be recognized that, while public concerns about cost and delay in civil litigation apply to courts of all jurisdictions, the potential for additional cost and delay reduction in the federal courts (the only forum governed by the CJRA) is not unlimited. Compared with many state trial courts, the federal courts dispose of their cases in relatively short order. The median time from filing to disposition for civil cases in district courts is approximately eight months—a figure that has remained fairly constant, never exceeding ten months, over the past seven years.[23]

Indeed, a RAND Corporation study published in 1990, just prior to enactment of the CJRA, found that delay was not an increasing problem in the federal courts: "[W]hen federal district courts were considered as a whole, delay was about the same in 1986 as it was in 1971, and... there was little evidence in overall system statistics to support the view that time to disposition has been lengthening."[24] The assessment of each court's docket under the Act reinforced this view. Advisory groups composed of attorneys and litigant representatives reported no substantial problem in more than half the districts. In the remaining districts, the advisory groups reported some concerns about existing or anticipated delays but attributed them to mostly expanding criminal dockets and unfilled judgeships.

It is certainly possible for the courts, aided by technology and adequate human and other resources, to achieve even greater efficiency in case management. However, there is a point beyond which the quantum of time needed for the judicial process—a fair statement of the claim, reasonable notice to affected parties, discovery and develop-

[23] Statistics Division, Administrative Office of the United States Courts, *1995 Federal Court Management Statistics*.

[24] Dunworth and Pace, *supra* note 3, at 75.

ment of evidence, skilled advocacy and presentation of the best legal position, and a principled decision after analysis and reflection—cannot be reduced without infringing on the core values we all hold dear.

Through the history of our civil justice system, independent judicial officers have been called upon to strike the balance between efficiency and justice. The consequences of tilting that balance in favor of standardized procedures cannot be measured solely in numbers and percentages. The "quality of justice" delivered in our courts must remain foremost in the minds of judicial policy makers. We in the federal judiciary intend to maintain our efforts to improve the manner in which justice is dispensed in civil proceedings; the continued interest and support of the other branches of government, the bar, and the general public are a necessary part of that endeavor.