ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

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December 20, 1990

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: Implementation of Civil Justice Reform Act of 1990

The Judicial Improvements Act of 1990, Public Law No. 101-650, was signed by the President on December 1, 1990. Title I of that legislation consists of the "Civil Justice Reform Act of 1990" (the "Act") which has been commonly known as the "Biden Bill." The main provisions of the Act are summarized in the attached document.

Included in the summary is a detailed discussion relating to the selection of advisory groups to develop expense and delay reduction plans which, according to the Act, must be accomplished in every district by March 1, 1991. This discussion incorporates the recommendations of the Subcommittee on Case Management of the Judicial Conference Committee on Court Administration and Case Management which met in Washington on November 19, 1990. This Subcommittee has been given the task of coordinating implementation of the Act. It will recommend to the full Committee that the Conference abrogate the 14 Point Plan which also dealt with the improvement of case management practices in the courts. The courts will be receiving more materials providing information and guidance on implementation of the Act early next year after the meeting of the Committee on Court Administration and Case Management.

The staff of the Court Administration Division is available to answer questions regarding the work of the Committee.

L. Ralph Mecham

Attachment

# Civil Justice Reform Act

The Civil Justice Reform Act requires the implementation of civil justice expense and delay reduction plans in all district courts within three years following enactment. The Act authorizes up to $25 million in funds to be appropriated for implementation, but no funds have been appropriated by Congress. The Act designates those courts which implement their plans by December 31, 1991, as "Early Implementation District Courts." These courts may receive additional resources, such as technological and personnel support once funds for implementation are appropriated. Early implementation may take place no sooner than June 30, 1991.

Each court may develop its own plan or adopt a model plan to be developed by the Judicial Conference. The purpose of each plan must be "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."

The chief judge of each district court must appoint an advisory group within 90 days after enactment of the bill to assist in the development of an expense and delay reduction plan. The group must include the United States attorney (or designee) and "attorneys and other persons who are representative of major categories of litigants in such court." The chief judge may designate a reporter for the group, who may be compensated according to guidelines established by the Judicial Conference if implementation funds become available.

Each advisory group is required initially to submit a report containing an assessment of the court's workload and a recommendation that the court adopt a model plan or recommend measures, rules, and programs that would constitute the court's plan. After considering the group's recommendations, the court must implement a plan and distribute copies to the judicial council of the circuit and all chief district judges in the circuit. The chief district judges and the chief judge of the circuit then serve as a committee to review each court's plan and suggest revisions. Each plan must be reviewed by the Judicial Conference, which may request the district court to make additional revisions.

The components of each court's plan are not mandated; however, in Section 473 the Act lists six principles and six techniques of litigation management and cost and delay reduction which the courts and advisory groups must consider and may include in their plans. The principles refer to the involvement during pretrial case management of a "judicial officer," which, by definition, includes a magistrate judge.

The first principle concerns differentiated case management of civil cases based upon such factors as complexity, pretrial time required, and the availability of judicial resources. The second principle proposes that a judicial officer plan the progress of the cases. Early, firm trial dates are to be set within 18 months of filing the complaint unless the judicial officer makes a certification as to the complexity of the case, the volume or complexity of the pending criminal cases, or that the "ends of justice" would not be met. It further proposes that the judicial officer control the extent and duration of discovery and establish early deadlines for motions along with a framework for their disposition. The third guideline provides that for cases determined to be complex, the judicial officer is to conduct one or more discovery-case management conferences to explore settlement, identify issues, prepare the discovery schedule and attempt to limit discovery, and set early deadlines for motions and a framework for their disposition. The fourth and fifth principles encourage the voluntary exchange of information among parties and the conservation of judicial resources by precluding the consideration of discovery motions unless the moving party certifies that a reasonable and good faith effort to resolve the issue has been made. The last guideline suggests that a plan incorporate alternative dispute resolution programs.

The six suggested techniques for litigation management are: 1) that counsel for each party submit a discovery-case management plan at the initial pretrial conference; 2) that an attorney with binding authority for each party be present at every pretrial conference; 3) that all requests for extensions of discovery or trial deadlines be signed by the attorney and the party making the request; 4) that a neutral case-evaluation program be established; 5) that representatives of the parties with binding authority be present or available by telephone during settlement conferences; and 6) such other features as the court considers appropriate.

The Act further requires the Judicial Conference to conduct pilot programs, with plans implemented by December 31, 1991, in ten districts to be designated by the Conference, five of which must encompass major metropolitan areas. The ten districts must include the six principles of litigation management and cost and delay reduction set forth in section 473(a) in their plans. The Conference will be selecting the pilot courts in the near future.

In addition, the Conference must conduct demonstration programs in the Western District of Michigan and the Northern District of Ohio, focusing upon assignment of cases to appropriate processing tracks. Demonstration programs also must be established in the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri, which must experiment with various methods of reducing cost and

delay in civil litigation, including alternative dispute resolution.

The Act requires that an independent organization with expertise in the area of federal court management compare the results from the ten pilot courts with ten comparable districts which were not required to adhere to the litigation management principles. The Judicial Conference must present the results of this independent study to Congress by December 31, 1995, and recommend whether some or all courts should be required to incorporate the six principles. If the principles do not prove effective, the Judicial Conference must adopt and implement alternative cost and delay reduction programs.

The district courts must assess their plans annually and, in so doing, must consult with their advisory groups. The Director of the Administrative Office is required to prepare a semiannual report, available to the public, that discloses certain information concerning the caseload of each federal district judge and magistrate judge, namely: 1) the number of motions pending for more than six months and the name of each case in which the motion has been pending; 2) the number and case names of bench trials that have been submitted for more than six months; and 3) the number and names of cases that have not been terminated within three years of filing.

## Advisory Groups

This section presents an overview of the advisory group as contemplated in the legislation and examines the bill with regard to appointment, composition, and the role and duties of the advisory group. Also included are suggestions to the courts from the Subcommittee on Case Management of the Judicial Conference Committee on Court Administration and Case Management regarding selection of advisory groups, reporters and funding.

1. Appointment of Advisory Groups.

The Act provides that "[w]ithin ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court...shall be appointed by the chief judge of each district court, after consultation with the other judges of such court." *28 U.S.C. § 478(a) (All references to Title 28 are included in Section 103 of the Act).* The advisory group must be appointed by March 1, 1991.

2. Composition of Advisory Groups.

Section 478(b) of Title 28 requires that an advisory group "shall be balanced and include attorneys and other persons who

are representative of major categories of litigants...as determined by the chief judge..."

The only definitive guidance on membership of the group contained in the statute is the requirement that the U.S. Attorney or his or her designee be a permanent member of the group. *28 U.S.C. § 478(d).*

The bill does not contain any provision governing the size of an advisory group but the Senate and House have made clear that, while size is left to the appointing authority, "it is anticipated that the group will be sufficiently large to accommodate the major categories of litigants in the district." *S. Rep. No. 101-416, 101st Cong., 2d Sess. 62 (1990); H. Rep. No. 101-732, 101st Cong., 2d Sess. 19 (1990).*

Section 478(b)'s requirement for balanced representation of the major categories of litigants has been amplified by the Senate as follows:

> The process for selecting members of an advisory group should ensure that each of the major categories of litigants in the district are represented. Lawyers who represent the Federal, State, and local governments in the district court should typically be included. It is anticipated that in most, if not all, districts, the U.S. Attorney or his or her designee would be a member of the advisory group. It is important that lawyers practicing in law firms of diverse sizes, in corporations, and for public interest groups representing different philosophic positions, should they litigate in the particular district, be represented.
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> Balance is also vitally important to the successful operation and functioning of an advisory group. It is anticipated that an equivalent number of plaintiff's and defense lawyers, corporate and public interest lawyers representing different philosophical positions, will be included.

*S. Rep. 101-416, 101 Cong., 2d Sess. 61, 62 (1990).*

With respect to terms of membership, § 478(c) provides that "in no event shall any member of the advisory group serve longer than four years," except, as provided in § 478(d), that "the U.S. Attorney...or his or her designee, shall be a permanent member of the advisory group..."

Section 478(e) provides that "[t]he chief judge...may designate a reporter for each advisory group, who may be compensated

in accordance with guidelines to be established by the Judicial Conference..." According to Congress, a reporter is to be designated by the chief judge for the advisory group "to record the group's deliberations and prepare the report required under section 472(b)." *S. Rep. No. 101-416, 101st Cong., 2d Sess. 62 (1990); H. Rep. No. 101-732, 101st Cong., 2d Sess. 19 (1990).* The Congress provided no further guidance on the role or compensation of the reporter in the legislative history accompanying this bill.

Section 478(f) provides that "members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in performance of official duties of the advisory group and may not, solely by reason of service..., be prohibited from practicing law before such court."

3. Role and Duties of Advisory Groups.

Section 472(a) of Title 28 provides for the implementation and development or selection of a civil justice expense and delay reduction plan by each district court only "after consideration of the recommendations of an advisory group appointed in accordance with section 478..." The advisory group is required by § 472(b) "to submit to the court a report which shall be made available to the public" and which shall include: an assessment of the state of the court's civil and criminal dockets; the basis for its recommendation either to develop a new plan or to select a model plan; recommended measures, rules and programs; and a discussion of the principles and guidelines of litigation management and cost and delay reduction which are detailed in § 473.

Section 472(c)(2) provides that the recommendations of the advisory group also "take into account the particular needs and circumstances of the district court, litigants in such court and the litigants' attorneys." Section 472(c)(3) provides that the advisory group must "ensure that its recommended actions include significant contributions" made by these parties.

According to the legislative history, §§ 472(c)(2) and (c)(3) are intended to assure that the interests and particular needs of all players in the litigation process (district court, litigants, litigants' attorneys) are considered and that significant contributions from them are included in the advisory group's recommendations. As stated in the Senate and House reports,

> [c]ontributions by one source alone will not be sufficient to address adequately the cost and delay problems. All participants in the civil justice system must shoulder responsibility for reducing costs and delays and facilitating access to the courts.

*S. Rep. No. 101-416, 101st Cong., 2d Sess. 52 (1990); H. Rep. No. 101-732, 101st Cong., 2d Sess. 13 (1990).*

Section 472(d) directs the chief judge of the district court to transmit a copy of the plan implemented in the district and the advisory group's report to the Director of the Administrative Office, the judicial council of the circuit and to all other chief judges in the circuit. Congress has commented that, "[i]n this way each court within a particular district will be fully aware of the actions taken elsewhere in that circuit to reduce costs and delays." *S. Rep. No. 101-416, 101st Cong., 2d Sess. 52-53 (1990); H. Rep. No. 101-732, 101st Cong., 2d Sess. 13 (1990).*

4. Suggestions for Selection of Advisory Groups.

The Subcommittee on Case Management of the Judicial Conference Committee on Court Administration and Case Management recommends that advisory groups consist of 10 to 15 members. The subcommittee also recommends that two judges and one magistrate judge be selected as non-voting members. Participation by the clerk should be assured, either as a reporter to the advisory group, as discussed below, or as an unofficial member. Since there is a four year limit to a member's term of service, with the exception of the U.S. attorney who is to be a permanent member, it probably would be best not to designate the clerk as an official "member" of the advisory group.

In selecting an advisory group, the court must look at the major categories of litigants in its district and designate representatives from these categories. Nationwide, the major categories of civil litigation are: torts, prisoners suits, and contracts disputes. The local rules advisory committee appointed pursuant to 28 U.S.C. § 2077(b) may already contain a representative group of litigants which could form the nucleus of an advisory group.

The statute contemplates that "attorneys and other persons" serve on the advisory group. It is suggested by the subcommittee that at least one non-attorney be a member of the group. This person could be a member of a local advocacy group, such as a consumer or prisoners rights organization, or a representative from the business community such as the officer of a corporation or a representative of a business group such as the Chamber of Commerce.

5. Appointment, Role, and Compensation of Reporter.

Priority consideration should be given to appointing the clerk of court as the reporter to the advisory group. The Subcommittee believes that this role is within the normal functions of the clerk and that the clerk's intimate understanding of court

operations will contribute greatly to the advisory group's effectiveness. In addition, there are, at present, no funds available to compensate a reporter. Should funding become available, the Subcommittee will recommend guidelines for compensation of reporters at that time.

6. Guidelines for Expenditure of Funds for Advisory Group.

The Subcommittee suggests that the advisory groups be reimbursed for travel and transportation expenses in the same manner as the local rules advisory committees are reimbursed in accordance with 5 U.S.C. § 5703. *See 28 U.S.C. § 2077(b)*. However, as is the case with compensation of reporters, no funds are presently available to fund this travel. If travel funds are necessary for your district, you may wish to wait for funds to be appropriated for that purpose before convening the advisory group.

7. Report to Subcommittee on Case Management.

The Subcommittee requests that, after appointing the advisory group by the deadline mandated in the bill, each chief judge send a list of advisory group members, providing the affiliation as well as the names of the members, to the Court Administration Division of the Administrative Office. This will enable the subcommittee to keep abreast of the progress of implementation.

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
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January 16, 1991

MEMORANDUM TO ALL: CHIEF JUDGES, UNITED STATES
COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: Recommendations of the Judicial Conference Committee on Court Administration and Case Management regarding the implementation of the Civil Justice Reform Act of 1990

In a memorandum dated December 20, 1990, I provided you with an overview of the requirements of the Civil Justice Reform Act of 1990 (the "Act") (Public Law No. 101-650, title I), along with the early recommendations of the Case Management Subcommittee of the Judicial Conference's Committee on Court Administration and Case Management relating to the selection of advisory groups pursuant to the Act. At that time I indicated that additional information and guidance on implementation of the Act would be forthcoming after the meeting of the full Committee on Court Administration and Case Management.

As indicated in the earlier memorandum, each court must appoint an advisory panel by March 1, 1991. The primary task of this advisory panel is to develop a case management plan. The work of the panel will be time-consuming. Plans are to be submitted and implemented by courts by December 1, 1993, with the exception of the ten designated pilot courts whose plans are to be implemented by December 31, 1991.

The Congress has yet to appropriate funds for the purpose of meeting the requirements of the Act. A supplemental appropriations request for the fiscal year 1991 to meet these needs will be submitted to the Congress shortly. However, it is unlikely that any additional funds will be made available before mid-summer.

The full committee met on January 3-4, 1991, and after considerable discussion made several policy recommendations regarding the selection of advisory groups. The following recommendations are intended to establish suggested parameters and to provide guidance to the district courts regarding selection of advisory groups.

## Advisory Groups

### Size of Advisory Groups

While the Act is silent as to the size of advisory groups, the committee points out that the Senate and House have made it clear that, while size is left to the appointing authority, "it is anticipated that the group will be sufficiently large to accommodate the major categories of litigants in the district". *S. Rep. No. 101-416, 101st Cong., 2d Sess. 62 (1990); H.R. Rep. No. 101-732, 101st Cong., 2d Sess. 19 (1990).*

The committee advises, however, that districts guard against the appointment of advisory groups too large to be effective. It believes that a group of fewer than 10 members would not meet the intent of the Act and suggests that a group of 10 to 15 members would be optimum in most districts. The largest districts may need to consider a group of 15 to 20 members.

### Composition of Advisory Groups

As I indicated in my earlier memorandum on this subject, Section 478(b) of Title 28 requires that an advisory group "be balanced and include attorneys and other persons who are representative of major categories of litigants. . . as determined by the chief judge. . . ." The committee suggests that one or more non-attorney members should be appointed to the advisory group. This person could be a member of a local advocacy group, such as a consumer or prisoner rights organization, or a representative from the business community such as the officer of a corporation or a representative of a business group such as the Chamber of Commerce. It is the further belief of the committee that it is critical that the advisory group be representative in order to ensure input from the community and that appointments accurately reflect the profile of litigation in the district and the major categories of litigation to the extent feasible.

Appointment of a Reporter

The Act allows the chief judge to designate a reporter for the group, who may be compensated according to guidelines established by the Judicial Conference if implementation funds become available. The committee believes that the use of a reporter will be of critical importance to the work of the advisory groups. The committee envisions two potential functions for the reporter. The first is that of secretary, providing primarily administrative support to the advisory group. The second is that of an expert in case management to assist in the assessment and analysis of the court's dockets and the development of specific recommendations for the district's plan.

The committee has identified two options for the appointment of an advisory group reporter. The first is to utilize the clerk of court to perform these functions. The committee believes that this role is within the normal functions of the clerk and that the clerk's intimate understanding of court operations will contribute greatly to the advisory group's effectiveness. The committee strongly believes that the clerk, if not utilized as the reporter, should in any case, serve as an ex officio non-voting member of the group.

The second option is to enlist the services of a local law professor, court administrator, or other person with the appropriate expertise in civil litigation. The committee notes, however, that the Congress has not yet provided the funds to compensate a reporter. Until funds are appropriated and the Judicial Conference issues the approved guidelines, the use of any outside expert would be on a pro bono basis.

Role of Judicial Officers on Advisory Groups

The committee considered whether judges and magistrate judges should be appointed to advisory groups. Although the Act is silent on the appointment of judicial officers and clerks to the advisory groups, the committee believes that their involvement in the work and deliberations of the group would be beneficial in order to provide insight into the operation and case management practices of the court. However, the committee believes that the involvement of judicial officers should be limited to one or two members in a non-voting capacity.

The Use of Multiple Advisory Groups Within Districts

The committee considered whether the use of more than one advisory group in districts with large or remote divisional offices would be advantageous. It was determined that a single assessment of the district would be necessary to develop an effective plan.

Manner of Adopting Plans

The committee considered the manner in which a district could adopt the expense and delay reduction plan proposed by its advisory group. It concluded that the preferable method would be through the court's existing voting practice used to adopt general orders or local rules of court.

Selection of Pilot Courts

The committee will recommend to the Judicial Conference that 10 courts serve as pilots pursuant to Section 105 of the Act under the following criteria:

1. At least five of the courts must be from large metropolitan areas pursuant to Section 105(b) of the Act.

2. The other five should include small and medium size courts.

3. Each pilot court selected should have one or more "comparable courts" to be used for comparison and evaluation purposes by the "independent organization" selected to evaluate the effects of the Act pursuant to Section 105(c).

4. To the extent possible, each geographical area of the country should be represented.

5. No more than two courts should be from the same circuit.

6. Whether a particular court desires to participate should not be a determining factor in the selection process.

7. Factors tending to skew results should be avoided.

8. Courts heavily impacted with criminal cases should be represented.

9. Courts that have problems occasioned by the district being spread over a large geographical area should be included.

10. Some statewide districts should be included.

11. The 10 pilot courts should be made up of districts that from a statistical standpoint can be perceived as having maximum, medium and minimal success in disposing of their civil cases expeditiously.

The committee made every effort to ensure that the 10 pilot courts to be recommended for consideration by the Judicial Conference represent a statistical cross section of all districts in order to ensure a valid test of the mandatory provisions of the Act. The recommended pilot courts are:

New York Southern
Georgia Northern
Pennsylvania Eastern
Texas Southern
California Southern
Delaware
Tennessee Western
Oklahoma Western
Wisconsin Eastern
Utah

Conclusion

The committee and its subcommittee will continue to provide courts with the necessary guidance in this area. The Administrative Office and Federal Judicial Center will provide materials and guidance for advisory groups to assist in their assessment of courts' dockets as well as training material for pilot courts and early implementation courts.

Any questions regarding these matters may be directed to Abel Mattos of the Court Administration Division at FTS 633-6221.

L. Ralph Mecham