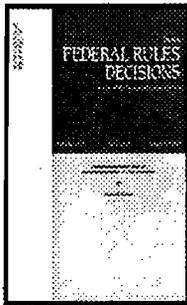


# CIVIL JUSTICE REFORM ROADMAP

by

**Carl Tobias**



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# CIVIL JUSTICE REFORM ROADMAP \*

by

CARL TOBIAS \*\*

Civil justice reform has become very controversial. Vice President Dan Quayle has engaged in a running feud over civil justice reform with the American Bar Association (ABA) since August 1991. Several ABA committees are analyzing this reform, the Bar Association published a voluminous study earlier this year that responds to Bush Administration civil justice reform proposals, and the ABA has described the reform as too significant to leave to the government.

All three branches of the federal government have instituted initiatives aimed at reducing expense and delay in civil litigation. On October 23, 1991, President Bush issued an Executive Order that imposes a number of requirements on government lawyers who participate in civil litigation. During February 1992, the Administration sponsored introduction of the Access to Justice Act, its legislative proposal for civil justice reform. The bill did not pass, because it included certain provisions that apparently proved unacceptable to many members of the House and Senate. One reason for this is that the legislation would have replicated in important specifics the Civil Justice Reform Act (CJRA), which Congress enacted in 1990 and that the federal judiciary is presently implementing.<sup>1</sup>

Regardless of how the controversy over civil justice reform is ultimately resolved, the reform effort will significantly change the nature of federal civil litigation. All attorneys who advise or represent individuals or entities that do or could litigate civil cases in federal court must be familiar with these new developments in civil procedure. This is especially true, because each of the ninety-four districts can adopt procedures which vary from those that every other district prescribes and from the Federal Rules of Civil Procedure.

This paper charts the course of these recent developments. The piece first explores relevant civil justice reform efforts in each branch of the federal government. It examines the legislative and judicial branch

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1. See Judicial Improvements Act of 1990, tit. I., Pub.L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (Supp.1992)).

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The views expressed are those of the author and do not necessarily reflect the views of the publisher.

endeavors together because they are closely linked. The paper then makes some predictions regarding the future course of the reform.

## I. CIVIL JUSTICE REFORM EFFORTS IN THE THREE BRANCHES

### A. Congress And The Federal Judiciary

#### 1. Congress

Congress enacted the Civil Justice Reform Act because it was concerned about litigation and discovery abuse in civil lawsuits, mounting expense and delay in those cases, and declining federal court access.<sup>2</sup> For nearly two decades, numerous federal judges, led by Chief Justice Warren Burger, had been contending that there was a litigation explosion and growing abuse of the civil litigation process.<sup>3</sup>

The Act requires that all ninety-four districts create civil justice expense and delay reduction plans by December 1993.<sup>4</sup> The "purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."<sup>5</sup> The districts must issue the plans once advisory groups submit reports and recommendations to the courts.<sup>6</sup>

These groups, that the districts named ninety days after the legislation's enactment, were to be balanced, including attorneys and other individuals representative of parties who participate in civil litigation in the courts.<sup>7</sup> The CJRA commands each advisory group to evaluate comprehensively the "state of the court's civil and criminal dockets," to "identify trends in case filings and in the demands being placed on the court's resources," and to delineate the "principal causes of cost and delay in civil litigation" in the district.<sup>8</sup> The Act also states that every group, in developing recommendations, is to take into account the specific needs and circumstances of the district, its parties and their attorneys while insuring that all three contribute significantly to "reducing cost and delay and thereby facilitating access to the courts."<sup>9</sup>

2. See Senate Comm. on Judiciary, *Judicial Improvements Act of 1990*, S.Rep. No. 101-416, 101st Cong., 2d Sess. 103 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6804-05. See generally Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (Summer 1991).

3. See, e.g., *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41, 95 S.Ct. 1917, 1927-28, 44 L.Ed.2d 539 (1975); *Dissent From Order Amending the Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980).

4. See *Judicial Improvements Act of 1990*, tit. I, Pub.L. No. 101-650, § 103(b)(1).

5. See 28 U.S.C. § 471 (Supp.1992).

6. See 28 U.S.C. § 472 (Supp.1992).

7. See 28 U.S.C. § 478(b) (Supp.1992).

8. See 28 U.S.C. § 472(c)(1) (Supp.1992).

9. See 28 U.S.C. § 472(c)(2)-(3) (Supp.1992).

The courts, upon receipt of the groups' reports and suggestions, must examine the documents and confer with the groups and then must consider and might prescribe the eleven principles, guidelines and techniques in the CJRA and any other measures that they find appropriate to reduce delay and cost.<sup>10</sup> Thirty-five groups tendered reports and recommendations prior to December 31, 1991, and thirty-four districts adopted plans by this deadline, so that they could qualify for Early Implementation District Court (EIDC) status.<sup>11</sup>

## 2. Federal Judiciary

Lawyers who participate in federal civil litigation may want to analyze the advisory group reports and recommendations in districts where they litigate, because those documents constitute the material on which the districts based their civil justice plans. I emphasize the plans below, because they impose the procedures that affect judges, attorneys and parties and because the districts do not have to adopt the suggestions which the groups submit. Thorough analysis of all thirty-four plans is obviously beyond the scope of this essay, so that counsel must consult plans that relevant districts develop. Nonetheless, I provide a general overview and specific examples of certain aspects of civil justice planning that appear advisable and less advisable.

### a. Early Implementation District Courts

#### 1. Advisable Aspects

Numerous advisable aspects attended nascent implementation of the Act. Practically all of the districts, using the work of, and in consultation with, their advisory groups, seem to have participated in the type of self-analysis, and adopted the kinds of procedures, that Congress contemplated. Many courts appear to have followed closely the Act's instructions. These districts seem to have been sensitive to the congressional goals of reducing cost and delay in civil litigation, have assessed their dockets carefully, have taken into account and have prescribed, as warranted, the legislatively-listed principles, guidelines and techniques, have based these procedures only on substantiating information, and have tried to create baselines for analyzing the efficacy of their plans.<sup>12</sup> Most courts have closely conferred with their advisory groups or exchanged ideas with other districts, while some courts have thoroughly

10. See 28 U.S.C. §§ 472(a), 473(a)-(b) (Supp.1992).

11. See Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing of districts). For convenience, these districts will be called EIDCs here; they assumed that status upon being officially so designated in July. See, e.g., Letter to Gene E. Brooks, Chief Judge, United States District Court for the Southern District of Indiana, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992); Letter to Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992).

12. See, e.g., United States District Court for the Southern District of Indiana, Civil Justice Expense and Delay Reduction Plan (Dec. 31, 1991); United States District Court for the District of Massachusetts, Expense and Delay Reduction Plan (Nov. 18, 1991).

and clearly responded to the suggestions that their advisory groups submitted, explaining why courts adopted or rejected the recommendations.<sup>13</sup>

A few courts have carefully addressed certain issues of authority which civil justice reform implicates. For example, the Western District of Wisconsin rejected some of its advisory group's recommendations, finding that the court lacked sufficient authority to implement them.<sup>14</sup> The court similarly refused to rely on procedures that the Advisory Committee on the Civil Rules had proposed as part of a comprehensive package of Federal Rules amendments which cannot become effective until December 1993.<sup>15</sup>

Numerous districts prescribed new or innovative particular procedures or ones that promise to reduce cost or delay in civil litigation. For instance, the Eastern District of Texas was one of the few courts which attempted to attack directly the problem of expense by imposing ceilings on contingency fee arrangements.<sup>16</sup> Another novel approach is the Montana District's plan to employ a "peer review committee" of practitioners who will review alleged instances of discovery or litigation abuse that the court certifies to the committee.<sup>17</sup>

## 2. *Less Advisable Aspects*

Many of the less advisable features of early civil justice planning are the obverse of the commendable dimensions and, therefore, will be accorded less treatment. As general propositions, there may have been less interdistrict and intradistrict cooperation and interchange than Congress envisioned. Because all of the EIDCs were working simultaneously, they apparently had relatively few opportunities for exchanging ideas with one another. In the Montana District, there was comparatively little interaction between the advisory group and the local rules committee, so that the district judges assumed primary responsibility for devel-

13. See, e.g., United States District Court Southern District of Illinois, Civil Justice Delay and Expense Reduction Plan at 14-17, 19-21 (Dec. 27, 1991); United States District Court for the Western District of Wisconsin, Civil Justice Expense and Delay Reduction Plan at Appendix II (Dec. 31, 1991).

14. See, e.g., Western District of Wisconsin Plan, *supra* note 13, Appendix II, at 6. See also United States District Court of the Southern District of Florida, Civil Justice Expense and Delay Reduction Plan at 95 (Nov. 1991).

15. See, e.g., Western District of Wisconsin Plan, *supra* note 13, Appendix II, at 2. See also Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure, reprinted in 137 F.R.D. 53 (1991); *infra* note 20 and accompanying text. See generally Randall Samborn, *U.S. Civil Procedure Revisited*, National L.J., May 4, 1992, at 1, 12.

16. See United States District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan at 7-8 (Dec. 20, 1991). Cf. *Schwazkof Technologies v. Ingersoll Cutting Tool*, 142 F.R.D. 420, 423 (D.Del.) (Delaware District's civil justice plan relies principally upon reduction in time delays as catalyst for cost reduction.) A major purpose of the CJRA is to reduce expense. See *supra* notes 2, 8 and accompanying text. The Act also expressly instructs advisory groups to guarantee that the court, litigants and their attorneys contribute significantly to reducing expense. See 28 U.S.C. § 472(c)(3) (Supp. 1992).

17. See United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan at 3 (Dec. 1991). See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT.L.REV. 91, 98 (1992).

oping proposed amendments to the local rules which accompanied issuance of their civil justice plan.<sup>18</sup>

Numerous districts included procedures in their plans that appear less advisable as a matter of authority or policy. Perhaps the most troubling authority issue is whether and, if so, the extent to which districts can adopt local rules that conflict with the Federal Rules. The Eastern District of Texas specifically stated that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."<sup>19</sup> Few other plans are so explicit, although some implement procedures that are inconsistent. The foremost example is mandatory pre-discovery disclosure. Many of these requirements are modelled on a 1991 proposal to amend the Federal Rules which has been highly controversial and may not be promulgated.<sup>20</sup>

#### b. Oversight Of Civil Justice Reform In EIDCs

Congress chose entities to monitor the Act's implementation, and assigned them general responsibilities, which made it unlikely that they would conduct vigorous oversight. The instrumentalities with reviewing duties are circuit committees, that include the chief circuit judge and all chief district judges in each circuit; the Judicial Conference, which has delegated its duties to the Committee on Court Administration and Case Management, and Congress itself.<sup>21</sup> Section 474(a) of the Act states that every circuit committee shall "review each plan and report submitted . . . and make such suggestions for additional actions or modified actions . . . as the committee considers appropriate for reducing cost and delay in civil litigation" in the particular district, and the legislative history essentially replicates the statute.<sup>22</sup> Most committees appear to have analyzed closely the plans, but relatively few have made recommendations for "additional actions or modified actions."<sup>23</sup>

18. This is premised on conversations with a number of attorneys who practice in Montana. See also Montana Plan, *supra* note 17, at 26-38 (proposed rules).

19. See Eastern District of Texas Plan, *supra* note 16, at 9. See generally Tobias, *supra* note 11, at 51, 52 n. 9.

20. See, e.g., United States District and Bankruptcy Court for the District of Idaho, The Civil Justice Reform Act of 1990 Expense and Delay Reduction Plan at 10-11 (Dec. 19, 1991); United States District Court for the Eastern District of New York, Civil Justice Expense and Delay Reduction Plan at 4-5 (Dec. 17, 1991). See also Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure 16, 26, reprinted in 137 F.R.D. 53, 83-84, 87-88 (1991). The Civil Rules Committee dramatically reversed course twice in two months on this issue. See Randall Samborn, *U.S. Civil Procedure Revisited*, National L.J., May 4, 1992, at 1, 12. In September 1992, the Judicial Conference forwarded a proposal for mandatory pre-discovery disclosure to the Supreme Court. See, *The Judicial Conference Would Alter Rule 11*, National L.J., Oct. 5, 1992, at 5.

21. See 28 U.S.C. § 474 (Supp.1992).

22. *Id.* See also Senate Report, *supra* note 3, at 50, 59, reprinted in 1990 U.S.C.C.A.N. 6802, 6839, 6848. See generally Tobias, *supra* note 11.

23. See, e.g., Report of Seventh Circuit Review Committee (Mar.1992); Tenth Circuit Committee Review of the CJRA Reports and Plans (Mar. 30, 1992). *But cf.* United States District Court for the District of Alaska, Civil Justice Expense and Delay Reduction Plan, Miscellaneous General Order No. 698, Amendment No. 1 (Apr. 27, 1992) (plan revision in response to

The Judicial Conference seems to have been somewhat more rigorous in discharging its responsibilities to review independently every plan and to submit a report on the EIDCs to Congress by June 1, 1992.<sup>24</sup> Chief Judge Robert Parker, the chair of the relevant Conference subcommittee, stated publicly that it would closely evaluate specific plans.<sup>25</sup> The report to Congress is primarily descriptive.<sup>26</sup>

### c. Districts That Are Not EIDCs

The sixty districts that did not qualify for EIDC status are proceeding with civil justice planning. As many as a quarter of the advisory groups may issue reports by the end of 1992.<sup>27</sup> This could hamper the ability of the groups and of the districts to draw on the experience of the EIDCs, which will not publish annual assessments until then, although there appears to be considerable interchange among the sixty advisory groups and districts and between them and the EIDCs.<sup>28</sup>

## B. The Executive Branch

### 1. Executive Branch Experimentation

On October 23, 1991, President George Bush signed Executive Order 12778, which was intended to "facilitate the just and efficient resolution of civil claims involving the United States Government."<sup>29</sup> On January 30, 1992, the Department of Justice (DOJ) promulgated a memorandum that provides preliminary guidance to federal agencies and government lawyers on the Order's provisions which govern the conduct of government litigation.<sup>30</sup> The Order's central features are "reforms in the

suggestion of Ninth Circuit Review Committee); Report of First Circuit Review Committee (Mar.1992) (apparently rigorous review). See also 28 U.S.C. § 474(a) (Supp.1992).

24. See 28 U.S.C. § 474(b) (Supp.1992) (plan review); Judicial Improvements Act of 1990, tit. I, Pub.L. No. 101-650, § 103(c)(3) (report to Congress). See also Senate Report, *supra* note 2, at 50, 59, reprinted in 1990 U.S.C.C.A.N. at 6939, 6848 (plan review).
25. At a May meeting of the Seventh Circuit Bar Association, Judge Parker stated that the Committee intended to return plans to districts that did not directly provide for reducing expense. Telephone conversation with Lauren Robel, Professor of Law, University of Indiana, Bloomington (May 21, 1992). That apparently did not happen. See, e.g., Letters, *supra* note 11.
26. Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans by Early Implementation Districts and Pilot Courts (May 29, 1992).
27. This estimate is premised on conversations with, and correspondence from, judges and advisory group reporters and members. See, e.g., Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Western District of Missouri (Apr. 30, 1992); Letter from Barefoot Sanders, Chief Judge, United States District Court for the Northern District of Texas, to Carl Tobias (June 5, 1992).
28. Annual assessments are due one year after adoption of the plans, which for most EIDCs was in December 1991. See 28 U.S.C. § 475 (Supp.1992).
29. Executive Order No. 12778, reprinted in 56 Fed.Reg. 55,195 (1991).
30. See Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778, 57 Fed.Reg. 3640 (1992).

methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases.”<sup>31</sup> The Justice Department will finalize these interim guidelines after it receives comments from agencies and government counsel on their experience with experimentation.<sup>32</sup>

Section 1(a) of the Executive Order requires that government attorneys make reasonable efforts to notify individuals whom they contemplate suing civilly of governmental intent to file and to provide them an opportunity to settle the dispute.<sup>33</sup> The timing and content of reasonable attempts are situation-specific, while notice is not required in exceptional cases, such as when it would defeat the purpose of litigation.<sup>34</sup>

Section 1(b) requires government counsel to evaluate settlement possibilities, as soon as they have sufficient information.<sup>35</sup> The lawyers then have a continuous duty to assess these prospects and must offer to participate in settlement conferences, when warranted.<sup>36</sup> Section 1(c) is meant to encourage settlement by mandating that government attorneys participate in alternative dispute resolution (ADR) programs if doing so will lead to prompt, equitable, and efficient disposition of controversies.<sup>37</sup>

Section 1(d)(1) of the Order governs the disclosure of core information.<sup>38</sup> It instructs government counsel to offer to participate early in a lawsuit in the mutual exchange of this basic material.<sup>39</sup> The lawyers may do so, however, only if other litigants will exchange similar information and the court will adopt the agreement as a stipulated order.<sup>40</sup>

Section 1(d)(2) pertains to the review of proposed document requests.<sup>41</sup> Government attorneys cannot pursue document discovery until they comply with review processes meant to guarantee that the proposed

31. See Memorandum, *supra* note 30, 57 Fed.Reg. at 3640–41.

32. *Id.* at 3640.

33. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,195. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3641.

34. See Memorandum, *supra* note 30, 57 Fed.Reg. 3641.

35. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,195–55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3641.

36. See Memorandum, *supra* note 30, 57 Fed.Reg. 3641. Litigation counsel are to “move the court for such a conference,” when reasonable. *Id.*

37. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3641. In making this decision, government counsel “should consider the amount and allocation of the cost of employing ADR.” Memorandum, *supra*, 57 Fed.Reg. 3641.

38. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3641–42; *supra* note 20 and accompanying text.

39. See Memorandum, *supra* note 30, 57 Fed.Reg. 3641–42.

40. *Id.* In ascertaining the practicability of compliance, counsel must consider factors, such as the “utility of early issue-narrowing motions and devices, the scope and complexity of the disclosure that will be required [and] the time available to comply with the requirement.” *Id.*

41. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3642.

discovery is reasonable under the litigation's circumstances.<sup>42</sup> The lawyers are to premise the reasonableness determination on a list of factors that closely resemble those in current Federal Rule 26, namely whether the requests are duplicative or unduly cumbersome or expensive, considering the litigation's requirements, the amount in dispute, the significance of the issues at stake, and whether there is a more convenient means of securing the documents.<sup>43</sup> Section 1(d)(3) of the Order commands that government counsel attempt to resolve discovery disputes, including those over sanctions, with opposing attorneys or pro se litigants before requesting that the court resolve the controversy.<sup>44</sup>

Section 1(e) of the Order requires government lawyers to proffer only expert testimony that is reliable.<sup>45</sup> The attorneys must employ experts with knowledge, research or additional expertise in the relevant field and who premise their conclusions on widely-accepted explanatory theories, those propounded by a substantial minority of experts in the area.<sup>46</sup>

Section 1(f) of the Order relates to sanctions motions.<sup>47</sup> Government counsel are to request sanctions from opposing lawyers and litigants when proper, although they ordinarily must attempt to resolve the disputes with their opponents before filing motions.<sup>48</sup> Each agency must designate a "sanctions officer," who is to review government proposals to seek sanctions and sanctions motions that opponents file against the United States.<sup>49</sup>

Section 1(g) of the Order instructs government attorneys to employ efficient techniques of case management and to undertake reasonable efforts to expedite resolution of civil cases.<sup>50</sup> When appropriate, the lawyers must pursue summary judgment to end the litigation or to narrow the issues that will be tried.<sup>51</sup> They also should seek to stipulate

42. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3642.

43. See Fed.R.Civ.P. 26(g).

44. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3642. This requirement parallels the fifth guideline of the CJRA. See 28 U.S.C. § 473(a)(5) (Supp.1992).

45. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196-97. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3642-43.

46. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,196-97. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3642-43.

47. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

48. See Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

49. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

50. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

51. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

undisputed facts and request early trial dates when practicable.<sup>52</sup>

Section 1(h) of the Order states that government counsel shall offer to enter two-way fee-shifting agreements with opponents "to the extent permissible by law."<sup>53</sup> The Attorney General's review of authority revealed no legislation providing specifically for the agreements.<sup>54</sup> The DOJ, therefore, instructed counsel not to offer to enter the agreements until Congress enacted legislation or the Attorney General afforded authority.<sup>55</sup>

Governmental experimentation has proceeded under the preliminary guidance since January 30. Once the DOJ reviews the comments of agencies and litigation counsel regarding their experience, it will draw on the information in "deciding how the final guidelines can best refine the operation of the Order" and will promulgate that guidance.<sup>56</sup>

## 2. Access To Justice Act

On February 4, 1992, Senator Charles Grassley (R-IOWA) and Representative Hamilton Fish (R-NY) introduced the Bush Administration's civil justice reform legislation.<sup>57</sup> The bill was premised on the recommendations of the Council on Competitiveness Working Group on Civil Justice Reform that appear in its August 1991 report titled *Agenda for Civil Justice Reform in America*.<sup>58</sup>

Several important components of the proposal would impose requirements similar to those presently included in the CJRA or Executive Order 12778. For example, section 104 of the bill would require plaintiffs to give opponents written notice of their specific claims and the actual damages sought before filing suit.<sup>59</sup> Section 106 would correspondingly create a multi-door courthouse program to be implemented by one district in each federal circuit for three years.<sup>60</sup> These districts would have to adopt ADR plans that allow litigants to select particular methods for resolving disputes without litigation.<sup>61</sup>

52. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

53. See Executive Order, *supra* note 29, 56 Fed.Reg. 55,197. See also Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

54. See Memorandum, *supra* note 30, 57 Fed.Reg. 3643.

55. *Id.*

56. *Id.* at 3641.

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

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

59. See S. 2180, 102d Cong., 2d Sess., § 104 (1992). See also *supra* notes 33-34 and accompanying text (similar requirements in Executive Order).

60. See S. 2180, 102d Cong., 2d Sess., § 106 (1992).

61. *Id.* The forms of ADR contemplated include early neutral evaluation, mediation, minitrials, summary jury trials and arbitration.

Section 102 of the bill would institute another procedure which is controversial. That section provides for fee shifting in diversity cases, entitling prevailing parties to the attorneys' fees they spent in prevailing, restricted to that amount in fees which the nonprevailing litigant sustained.<sup>62</sup> The legislation includes a miscellany of additional provisions that are related less directly to civil justice reform.<sup>63</sup>

## II. THE FUTURE OF CIVIL JUSTICE REFORM

The future course of civil justice reform is uncertain. Congress is reviewing the plans that the thirty-four EIDCs prepared and is monitoring civil justice planning in the remaining sixty districts. Certain congressional action might be warranted. For instance, it may be advisable to restructure some aspects of the legislation, to adjust the time frames for completing activities, such as the December 1993 deadline for plan adoption in the districts which do not have EIDC status, and to clarify whether districts can prescribe procedures that conflict with the Federal Rules.

Nonetheless, Congress appears unlikely to amend the CJRA in the near term. It may be too early to ascertain whether civil justice reform will be effective, whether changes might improve the Act's implementation, and precisely what modifications would be most effective. Moreover, 1992 is an election year, and each branch of government apparently is vying to outdo the others in the area of civil justice reform. Once the election is over and after Congress has digested the June Judicial Conference report to it, the annual assessments that the thirty-four EIDCs conduct, and the DOJ's analysis of the requirements imposed on government lawyers, Congress will be able to evaluate more accurately whether the CJRA's revision is warranted and, if so, in precisely what manner. Congress probably did not pass the Access to Justice Act this year for some similar reasons. The bill would have duplicated in important respects the experimentation that is ongoing under the CJRA and the Executive Order. The proposal also includes controversial provisions, such as that regarding fee-shifting, which Congress has frequently rejected.

The EIDCs will soon complete their annual assessments, and these should yield valuable information, especially for the remaining sixty districts. Those districts may want to await the studies before finalizing their civil justice plans and should draw broadly on the prior work of the EIDCs. A number of circuit committees apparently have evaluated the EIDCs' efforts less rigorously than they might. Nevertheless, that could be what Congress intended, and the committees may analyze more closely the planning of the non-EIDCs, once the committees gain experience in reviewing districts' work. Moreover, the Judicial Conference may conduct relatively rigorous oversight.

62. See S. 2180, 102d Cong., 2d Sess., § 102 (1992).

63. For example, section 108 governs the immunity of state judicial officers and section 109 would amend section seven of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997e).

The Executive Branch will continue to press for enactment of the Access to Justice Act, although passage seems unlikely in 1992. The DOJ is compiling and evaluating the comments of agencies and litigation counsel regarding their experience with the Administration's experiment in civil justice reform. The Department plans to issue final guidelines for implementing Executive Order 12778 during 1992.<sup>64</sup>

In sum, it currently remains unclear precisely what form civil justice reform ultimately will assume. It is certain, however, that civil justice reform has become a significant fixture of federal civil litigation and will remain so for the rest of the decade. It, therefore, behooves all attorneys who practice in federal court to understand this important new change in civil procedure. Lawyers should closely monitor the civil justice reform activity of the advisory groups and the courts in every district in which they litigate.

64. See *supra* notes 32, 56 and accompanying text.