North Dakota Law Review

Volume 72 | Number 3 Article 15

1996

Second Annual Assessment of the Civil Justice Reform Act Advisory Group

SECOND ANNUAL ASSESSMENT
OF THE
CIVIL JUSTICE REFORM ACT ADVISORY GROUP

For the Plan Period
December 1, 1994 through June 30, 1996

DISTRICT OF
NORTH DAKOTA

September 18, 1996

THE CIVIL JUSTICE REFORM ACT
ADVISORY GROUP FOR THE DISTRICT OF NORTH DAKOTA 1995-96

The Honorable Karen K. Klein, Chair

Patti Alleva, Reporter

Attorney General of North Dakota Heidi Heitkamp
by William Peterson

David R. Bossart

Jay Fiedler

Douglas R. Herman

Michael Hinman

Jerome Kettleson

Edward J. Klecker, Clerk of Court

Steven C. Lian

Rebecca S. Thiem

United States Attorney for North Dakota John Schneider

Michael Unhjem

Michael J. Williams

Special Assistants to the Advisory Group

Vivian Sprynczynatyk
Chief Deputy Clerk of Court

Sheila M. Beauchene
Deputy Clerk of Court/Assistant Supervisor

SECOND ANNUAL ASSESSMENT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP

Table of Contents

I. INTRODUCTION 824

II. REASSESSMENT OF THE PLAN'S PROVISIONS 827

1. Differentiated Case Management 827
2. Early and Ongoing Control of the Pretrial Process .. 827

a. Firm Trial Dates Set Early at the Rule 16(b) Scheduling Conference 827
b. Eighteen Month Benchmark for Trials 829
c. The Intermediate Status Conference 832
d. Joint Jury Instructions 833
e. Sixty-Day Benchmark for Motions, Bench Trials, and Bankruptcy Appeals 834

3. Pretrial Monitoring of Complex Cases through Discovery-Case Management Conferences 835

- *Court-Appointed Experts and Science and Technology in the Courtroom* 835

4. Voluntary Information Exchange and Cooperative Discovery Devices 836

- *The Basic Requirements of Rule 26(a)(1) and (f)* 839
- *The Advantages and Intended Benefits of Initial Disclosure* 841
- *Case-by-Case Implementation* 847

5. Good Faith Certifications for Discovery Motions ... 849
6. Alternative Dispute Resolution 849
7. Extensive Utilization of the Magistrate Judge 851
8. Need for Second Full-Time Magistrate Judge 852
9. Division Boundaries 852
10. Resources for the Judiciary 852
11. Taxation of Costs 853

III. CONCLUSION 853

U.S. DISTRICT COURT
DISTRICT OF NORTH DAKOTA

SECOND ANNUAL ASSESSMENT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP

For the Plan Period
December 1, 1994 through June 30, 1996

I. INTRODUCTION

Congress enacted the Civil Justice Reform Act of 1990 (CJRA) to initiate a systematic study of case management practices in the federal trial courts in order to reduce cost and delay in civil litigation.[1] The CJRA required each district court, assisted by an advisory group appointed by the district's Chief Judge, to undertake a critical self-examination pursuant to general CJRA guidelines and to craft a concrete plan of action, tailored to local conditions and practices, to solve identified cost and delay problems in civil dispositions. This "expense and delay reduction plan" had "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."[2]

In accordance with CJRA mandates, the Advisory Group for this District submitted to the Court in 1993 an extensive Report[3] and a proposed Civil Justice Expense and Delay Reduction Plan, which the Court adopted, with virtually no change, effective December 1, 1993.[4] The Advisory Group then undertook the first of the yearly evaluations required by the Act[5] in order to determine the Plan's effectiveness in the context of the District's evolving civil and criminal dockets. In June 1995, the Advisory Group issued its First Annual Assessment, covering

---

1. 28 U.S.C. §§ 471-82 (1995).
2. *Id.* § 471.
3. *Report of the Civil Justice Reform Act Advisory Group for the District of North Dakota*, 69 N.D. L. REV. 741 (1993) [hereinafter *Report*].
4. *The Civil Justice Expense and Delay Reduction Plan for the District of North Dakota*, 69 N.D. L. REV. 860 (1993) [hereinafter *Plan*]. The Plan has 11 provisions. Each is reviewed in this assessment, which, along with the proposed second Plan amendment, the Reporter drafted for the Advisory Group's review, discussion, revision, and adoption.
5. Each district court must "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." 28 U.S.C. § 475.

the Plan period December 1, 1993 through November 30, 1994, and recommended only minor refinements to the Plan.[6] The Court adopted the Advisory Group's suggested First Amendment to the Plan, which became effective June 30, 1995.[7]

This is the Advisory Group's second annual assessment of the Plan. Picking up where the first annual assessment left off, this assessment covers the Plan's second "year" from December 1, 1994 through June 30, 1996. Because of budgetary constraints, the Advisory Group was unable to meet often enough to issue this assessment closer to the end of the Plan's actual second year (i.e., November 30, 1995) and decided instead to expand the scope of its coverage beyond a year in order to deliver a more current report to the Court.[8]

Now, with two and a half years of CJRA experience to draw upon, the Advisory Group is pleased to report that the Plan, and the practices developed or expanded under its influence, have notably augmented the Court's capacity to decide civil cases in a cost-efficient and timely fashion. In particular, we can state with renewed conviction that firm trial dates, set early in the pretrial stage, power the Plan as a whole. Like a stone dropped in a pond, firm trial dates have had concentric circles of positive impact on related aspects of the pretrial process, by inspiring a new respect for pretrial schedules on counsel's part, assisting basic compliance with the eighteen month trial and sixty-day motion benchmarks on the Court's part, encouraging increased trial consents before the Magistrate Judges, and even facilitating early settlements.

---

6. *First Annual Assessment of the Civil Justice Reform Act Advisory Group For the Period December 1, 1993 through November 30, 1994*, 71 N.D. L. REV. 897 (1995) [hereinafter *First Annual Assessment*]. As the Advisory Group stated:

> [T]he Plan's first year has been a successful one and . . . the District's case processing capabilities have improved under its provisions. While the Plan's full impact may not be evident for some time, there is little reason to make radical adjustments on its one year anniversary in light of the positive gains made so far. Accordingly, the Advisory Group unanimously reaffirms its commitment to the Plan and concludes that only minor refinements to the Plan are necessary at this time.

Id. at 900.

7. *First Amendment of the District's Civil Justice Expense and Delay Reduction Plan*, 71 N.D. L. REV. 905 (1995) [hereinafter *First Amendment to the Plan*].

8. A number of conclusions in this assessment derive from statistical reports compiled by the Clerk's Office, and are on file there. The Advisory Group extends its appreciation to the Clerk of Court and to those on his staff who collected this data. Very special thanks go to Deputy Clerk of Court Sheila Beauchene for her invaluable assistance and expertise in acting as the recording secretary and administrative backbone for the Advisory Group.

As part of this re-evaluation of the Plan, the Advisory Group revisited two subjects that the first generation of the Group had specifically reserved for re-examination: Rule 26(a)(1) (where we now recommend change) and voluntary alternative dispute resolution (where we do not). Rule 26 prompted the most vigorous discussion. After a close vote, and with an acknowledgment that no clear consensus on the rule's ultimate viability currently exists, the Advisory Group decided to recommend retaining, for now, the new rule, implementing its controversial initial disclosure provisions on more of a case-by-case basis (as the rule itself encourages), and re-evaluating this District's experiences with the rule at a later date. This recommendation is premised on the proper use of the Rule 26(f) conference provision, which generally has not received enough attention from the Bar, but is necessary to the successful functioning of the rule. The Advisory Group is hopeful that open-minded reconsideration of, and good faith compliance with, the rule will result in the efficiencies it was designed to provide.

What follows here is the Advisory Group's provision-by-provision reassessment of the original and first amended plan with recommendations for a second amended plan revising provisions 2a, 2b, 2d, 2e, 3, 4, and 10. Overall, this assessment of the Plan is a very positive one. While the Plan revisions recommended are important—particularly the Rule 26(a)(1) recommendation—none is directed at changing the basic principles of civil case management embodied in the original Plan and its first amendment.

Any changes to the Plan actually adopted by the Court in the wake of this second assessment will follow in a separate Court order, a suggested draft of which will accompany this report to the Court. For a current statement of the Plan in its entirety, the original Plan, the First Amendment to the Plan, and any Second Amendment to the Plan that the Court adopts, should be consulted. As an order of the Court, the Plan should be familiar to all District practitioners, who will be held to know and abide by its provisions. The Plan "shall be read in conjunction with the Federal Rules of Civil Procedure, the Local Rules of this District, and any other applicable rules, orders, and procedures governing the practice and administration of law in this Court."[9]

9. *Plan, supra* note 4, at 862.

II. REASSESSMENT OF THE PLAN'S PROVISIONS

1. Differentiated Case Management. The civil case classification system instituted by the Plan (which differentiated between express (Class One) and standard (Class Two) cases) has assisted the Court in tracking cases for scheduling purposes and in helping to ensure that no case, no matter how small, "falls between the cracks." This system works particularly well for keeping the Court's eye on Class One cases, which typically require little judicial management and which usually will not go to trial.[10]

The Advisory Group again considered whether a third class should be created for complex cases, but rejected the idea because of low case volume in this category. Accordingly, the Advisory Group is satisfied that the dual classification system works as originally designed and recommends no changes to this Plan provision.

2. Early and Ongoing Control of the Pretrial Process.

2a. Firm Trial Dates Set Early at the Rule 16(b) Scheduling Conference. In its original Report to the Court, the Advisory Group predicted some of the key cost and timing advantages of setting firm trial (and final pretrial conference) dates early in the action's life at the Rule 16(b) Scheduling Conference:

> Firm trial and final pretrial conference dates will help to keep the entire pretrial schedule in place. Under the old scheduling system, the case was "headless" and proceeded through the pretrial phase without a target trial date to inspire efficiency and respect for discovery and other deadlines. Now, with a firm trial date at the end of the pretrial line, both the Court and counsel will have great reason to enforce the schedule as set early in the case and to compress the time from filing to trial.
>
> . . .
>
> Setting firm pretrial conference dates to take place thirty or so days before the trial itself will also promote greater efficiencies. Counsel should not be forced to be ready for the final pretrial conference and trial, only to have their case sit for a long time after the pretrial conference, waiting for trial to take place. Thus, the firmness of the final pretrial conference and trial dates and the close proximity of both events will

10. *Plan, supra* note 4, at 862-63 (defining Class One cases).

> preclude wasteful "false starts" (from preparation for the final pretrial conference) and costly "re-starts" (for the re-preparation once a trial date is eventually assigned). This eliminates the "hurry up and wait" concern expressed in the bar survey.
>
> [F]irm trial dates are [also] excellent settlement incentives. As the inevitable reality of having to try a case approaches, it often pressures counsel into hard thinking about whether to risk this option for the client. Most often, they choose not to.[11]

These projections are soundly supported by this District's two and one half years under the Plan. These years reconfirm, with the convincing clarity of actual experience, that setting firm trial and final pretrial conference dates for each Class Two case is the key to civil case disposition efficiency.[12] Put more graphically, firm trial dates drive the pretrial process, whether in strengthening scheduling reliability, encouraging deadline compliance, minimizing discovery abuses, maximizing pretrial preparation efforts, or facilitating settlement. From the initial Rule 16(b) conference, through the intermediate status conference (if held), through the final pretrial and settlement conferences, through the start of trial, the firm trial-date-set-early is the glue which holds this pretrial sequence together, and whose strength is reinforced by the efficiency touch points provided by the various judicial conferences along the route to trial.[13]

A look at the Court's civil docket for the period under review reveals that only a few Class Two civil cases did not have firm trial dates. One reason for the Court's success in this area is counsel's apparent perception that trial dates, once set at the Rule 16(b) Conference, are in fact "firm." While well over one-half of the motions for continuance are granted, the total number of cases actually continued is relatively small. And, as a general rule, anecdotal information revealed that lawyers did not request continuances unless they had very good reason to do so. Thus, pre-Plan continuances were often based on discovery needs as they arose, not infrequently the result of missed deadlines or other scheduling abuses. Post-Plan, given the Court's new resolve to hold counsel to pretrial schedules capped in place with a firm trial date,

---

11. *Report, supra* note 3, at 781-82.

12. *See* 28 U.S.C. § 473(a)(2)(B) (1995) (endorsing the setting early of firm trial dates and an 18 month period from filing to trial).

13. As Congress noted in defining the goals of the CJRA effort: "Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . regular communication between a judicial officer and attorneys during the pretrial process . . . ." Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(5)(C), 104 Stat. 5089, 5089 (1990).

counsel most often based their requests on either substantial case concerns, such as joinder of new parties, where it made sense for the Court to grant additional time in the name of fairness and ultimate efficiency, or on unexpected developments that parties could not plan for, such as the illness of experts, the instability of plaintiff's medical condition, and family emergencies, where the Court had little choice but to grant additional time. The main point is that inattentiveness to deadlines rarely provided the impetus for continuance requests. Even if it had, the Court, particularly with the pretrial scheduling structure solidly in place, would have been reluctant to grant them.

Accordingly, the Advisory Group, once again, reaffirms its abiding belief that the Court's early setting of firm trial dates is the foundation of this Plan and praises the Court and counsel for embracing this important change. However, the Group does recommend that the Court keep more detailed track of continuances so that the Group can more accurately assess the number of continuances requested and the reasons for the requests. Thus, the Advisory Group requests that future reports to the Group make note of *all* continuances, whether granted or denied. In addition, the revised report should list the reason for the continuance request and the length of time granted.

2b. Eighteen Month Benchmark for Trials. The First Annual Assessment did not make any recommendations about the propriety of the eighteen month (from filing to trial) benchmark given the natural absence of information before the close of the first post-Plan eighteen month cycle. More experience under this Plan provision, however, now demonstrates its success: Few trials in this District start beyond the eighteen month vintage point. As reported, almost all cases that need a trial date have one[14] and they are being heard within eighteen months—a notable improvement for this District and one directly assisted by the Court's early and firm selection of trial and final pretrial conference dates. Worth reiterating is the rationale behind this improvement, from the Advisory Group's original Report to the Court:

> This new eighteen month lead time in setting trial dates—and setting them firmly—should help alleviate some of the scheduling problems resulting from Speedy Trial Act preemption by enabling the Court to

14. Typically, Class One (express track) cases do not receive trial dates because there is usually no expectation of a trial.

> schedule the criminal trials around a pre-existing civil calendar of firm trial dates (instead of vice versa).[15]

Accordingly, the Court and counsel should be congratulated for their efforts thus far to comply with the trial benchmark set by the Plan.

Questions did arise, however, about readjusting the benchmark. For example, one concern surfaced about the increase of criminal filings for the first half of 1996, a development which could adversely impact the Court's ability to schedule and hear civil trials within eighteen months. Another concern was dispositive motions made near the end of the pretrial period—particularly of the summary judgment variety—which, in a few recent cases, put tremendous pressure on the Court to act quickly in deciding these motions in order to preserve the final pretrial conference and trial dates within the eighteen month limit. If made too late in the period, these motions put the Court in the uncomfortable position of either having to move the trial date or to decide a key pretrial motion under a tight deadline.

Despite these points, the Advisory Group concluded that the eighteen month period should not be lengthened. In the absence of compelling reasons to do so, extending the eighteen month period would violate the CJRA's letter and spirit to cut cost and delay in civil litigation. If anything, the pretrial period should be reduced, not expanded. To relieve the dispositive motion crunch at the end of the pretrial period, the Advisory Group recommends that counsel, to the extent feasible, should plan to avoid heavy motion practice at this time. In particular, counsel and the Court should be careful to set motion deadlines a minimum of 90-120 days before the final pretrial conference in order to allow counsel sufficient response and reply time, and the Court, adequate ruling time. This minimum should also be considered by the Court in selecting the trial date and in approving the discovery deadlines proposed by counsel. And as to increased criminal filings, the Advisory Group will abide the actual impact, if any, of those increases before making any recommendations in this area.

Conversely, the Advisory Group thought it unwise to recommend shortening the eighteen month benchmark. This decision is premised on the acknowledgment that the benchmark is merely a target date. A client is free to press for an earlier trial date, and consistent with justice and thoroughness, the Court and counsel should do everything in their

---

15. *Report, supra* note 3, at 781.

powers to dispose of cases as quickly and fairly as possible without using the benchmark as a justification for procrastination in those cases which require less time to prepare.[16] Moreover, there are affirmative reasons why reducing the benchmark period does not necessarily work to the benefit of any litigation participant:

(1) In the last year and a half, though precise records were not kept on this issue, the Court recollects that there were relatively few requests for continuances. Their paucity suggests that counsel, overall, are satisfied with the eighteen month "filing to trial" target and that this time frame represents a good balance between sufficient trial preparation time and efficient disposition time. Indeed, this benchmark is suggested by the CJRA itself.[17]

(2) Too short a trial fuse could cramp counsel unfairly in discovery and trial preparation. This pressure, in turn, might encourage additional requests for continuances, upsetting the growing expectancy on the Bar's part that trial dates, once set, are firm unless there are very good reasons to change them. The Advisory Group felt any change that would erode or work against firm trial dates—the heart of this District's Plan—should be avoided.

(3) In addition, too condensed a pretrial period might create unnecessary tension between counsel, as well as between counsel and the Court, and generate animosity or anxiety that could undermine the constructive atmosphere necessary to initiate or successfully conclude settlement discussions.

(4) Further, precisely because of the Court's settlement success, the District has been able to make excellent use of juror time. There are few, if any, last minute settlements on the courthouse steps due to the District's institutionalization of effective pretrial settlement procedures, so that jurors, when called, almost always serve. This permits them to plan for their absences with increased predictability. Thus, respect for those citizens who give of their time for juror service offers yet another reason for not tampering with the current benchmark.

---

16. In fact, approximately 30% of the cases in the time period under review in this second assessment were set for trial in less than 18 months.

17. *See* 28 U.S.C. § 473(a)(2)(B) (1995) (endorsing an 18-month period from filing to trial and the early setting of firm trial dates).

Accordingly, the Advisory Group concluded that it is not worth jeopardizing this Court's excellent track record of firm trial dates, pretrial settlements, or efficient juror service by shaving a month or two off the eighteen month, CJRA-sanctioned benchmark. The Group urges counsel to explain to clients who resist the benchmark why eighteen months might be an acceptable span for trial preparation and settlement discussions. As one Group member put it, clients who initially object to the eighteen month "delay" but who are given a better understanding of "what happens along the way" usually come to accept the necessity for it. Otherwise, the Group recommends no changes to this Plan provision at this time, except to note its recommendations for scheduling dispositive motions earlier in the pretrial period.

2c. The Intermediate Status Conference. Last year, in the First Amendment to the Plan, the Court, upon advice of the Advisory Group, eliminated the mandatory nature of the Intermediate Status Conference as envisioned by the original Plan.[18] This change is working well. The Intermediate Conference, generally held by telephone, is now convened at counsel's request and takes place in about one half of the civil cases in this District. The Conference essentially serves three main purposes, as the Plan emphasizes:

> (1) to define or refine issues for trial, (2) to explore (rather than to impose) possible limits on the number and type of witnesses, particularly experts, and (3) to explore settlement prospects or revisit ADR options. This conference will give the Court an opportunity to monitor counsels' compliance with the discovery/scheduling plan and make necessary "midstream" adjustments without disturbing the final pretrial conference and trial dates.[19]

Counsel seem to be asking for this conference in appropriate cases so that the device is neither over nor under utilized. Similarly, it appears that the Court's time is maximized by this change because its involvement is now limited to those cases which really require judicial guidance. Accordingly, the Advisory Group is satisfied that last year's Plan revision, making the Intermediate Status Conference optional with the parties, works as intended and recommends no further changes to this Plan provision.

---

18. *First Amendment to the Plan, supra* note 7, at 907. *See also First Annual Assessment, supra* note 6, at 901-02 (recommending elimination of the conference's mandatory nature).

19. *Plan, supra* note 4, at 864.

2d. Joint Jury Instructions. As we noted in our Report, "Much court time could be saved if the parties presented the Court with a single set of [jury] instructions, with [any] disagreements briefed and presented to the Court for decision."[20] The judges of the District Court agreed, and, as part of the original Plan, required revision of then-Local Rule 8(G) to reflect this change. That Rule, adopted January 23, 1995 as new Local Rule 47.1CV(F), now reads:

> At least five days prior to the commencement of all jury trials, and after sincere attempts by counsel to resolve any disagreements about the instructions to be given, a jointly prepared single set of requested instructions shall be presented to the court and served upon each adverse party. The court may receive additional requests relating to questions arising during the trial at any time prior to the argument. All requests for instructions shall be plainly marked with the number of the case, shall designate the party submitting the same, and each requested instruction shall be numbered and written on a separate page, together with a citation of authorities supporting the proposition of law stated in the instruction. All disagreements about the instructions shall be briefed and presented to the court at least five days before the start of the trial.

The Advisory Group has reprinted the text of this Local Rule provision in full to reemphasize its significance in light of its frequent breach by counsel in this District. The Rule requires that, at least five (5) days before trial starts, counsel submit to the Court a jointly-prepared set of agreed-upon jury instructions, along with any separate proposed instructions where counsel could not agree to a joint version. These separate instructions must be accompanied by briefs supporting each party's version. Counsel are required to make "sincere attempts . . . to resolve any disagreements" before submitting the joint instructions in order to narrow the nature and number of disputed instructions.

These are important requirements, of great consequence to the Court, and ultimately, to the case and client. The Court is usually in no position—and should not be put in the position—to judge whether small differences between sets of instructions are vital or inconsequential to counsel or their clients. In addition, it may take the Court many staff hours to even spot those differences, particularly if they are minor word variations (which may or may not signify major substantive variations).

---

20. *Report, supra* note 3, at 784.

Counsel, not the Court, should be making those initial wording determinations, at the very least, in the best interests of their clients. The responsibility of ironing out reconcilable differences and presenting irreconcilable ones, with supporting arguments, to the Court belongs to counsel. The Local Rule requires this, and the Advisory Group urges counsel to improve compliance with its strictures.

The Advisory Group also notes that the joint instruction requirement—including mention of a joint verdict form as well—is part of the magistrate judges' final pretrial conference order. It reads, in pertinent part: "In jury cases, an agreed upon set of jury instructions and verdict form shall be submitted to the court seven [calendar or five working] days prior to trial. . . . A party requesting an instruction which cannot be agreed to should submit that instruction, along with a statement of authority to the court." Given the importance of the verdict form, the Advisory Group also recommends, consistent with the Court's final pretrial conference order, that Local Rule 47.1CV(F) be amended to require joint discussion and presentation of the verdict form as well as the jury instructions.

2e. Sixty-Day Benchmark for Motions, Bench Trials, and Bankruptcy Appeals. The Court's Plan, as amended last year, provides a sixty-day benchmark for decisions on motions, bench trials, and bankruptcy appeals.[21] On the whole, the Court seems to be coming fairly close to meeting the target. The Advisory Group, in assessing the Court's degree of compliance, received varying levels of information from the judges. Those with the most complete and current information reported a few motion rulings beyond the benchmark. Most of those rulings were deferred for special or sound reasons, and were usually made before the next report cycle. In addition, some of the motions appearing on the reports were from cases that were not assigned trial dates — for example, in a few instances, rulings on pending social security appeals were deferred so that the Court could immediately consider motions in cases approaching trial.

In any event, the Advisory Group concluded, for the time being, that the sixty-day benchmark is probably appropriate, even though each judge will not always be able to meet it, primarily due to the fact that cases with impending trial dates are the priorities for rulings. In attempting to reassess the validity of the sixty-day time frame, the Group found

21. *First Amendment to the Plan, supra* note 7, at 907.

that it did not have the information necessary to make an accurate assessment of whether it is realistic or overly optimistic. Accordingly, the Group respectfully requests that the Clerk's Office prepare a revised motions status report that will better assist the Group in this endeavor, to be given to the Group sufficiently in advance of any CJRA meetings. That report would be most helpful (1) if uniform in format, the periods covered, and the information conveyed and (2) if reasons for non-decision could be provided. For efficiency's sake, the Clerk's Office has agreed to explore producing a centralized, computer-generated report that each judge could review and annotate on the last day of every second month. This would eliminate the necessity of having each judge prepare reports and would help capture current commentary on the reasons for non-decision while that information is still fresh and easily available.

3. **Pretrial Monitoring of Complex Cases through Discovery-Case Management Conferences.** In the First Annual Assessment, the Advisory Group encouraged—and the Court voiced commitment to—more active case management by the district judges in complex cases.[22] While there have not been many cases in this District requiring this involvement, the Advisory Group nonetheless strongly renews its encouragement should those cases arise, and concomitantly asks the Bar to inform the Court of cases which require or could benefit from the active involvement of the Article III judges. Otherwise, the Advisory Group recommends no changes to this Plan provision.

Court-Appointed Experts and Science and Technology in the Courtroom. The Advisory Group continued to be troubled by the perplexing problem of scientific evidence in the courtroom. The Group discussed a range of options to assist the Court, including the creation of an expert bank (that judges could draw upon for advice on a consultant basis at the parties' expense), judicial tutorials agreed upon by the Court and the parties, increased congressional funding for court-appointed experts, and use of the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE. As the Reference Manual explains, the ability of litigants to receive a fair, timely, and reasonably priced trial is endangered when complex issues of science and technology overrun the courtroom:

22. *First Annual Assessment, supra* note 6, at 902.

> The purpose of this manual is to assist judges in managing expert evidence, primarily in cases involving issues of science or technology. Such issues may rise across the entire spectrum of litigation . . . . The context in which they arise varies widely, but generally they share one characteristic: They challenge the ability of judges and juries to comprehend the issue—and the evidence—and to deal with them in informed and effective ways. As a result, they tend to complicate the litigation, increase expense and delay, and jeopardize the quality of judicial and jury decision making.
>
> . . . No longer can judges and jurors rely on their common sense and experience in evaluating the testimony of many experts . . . . The challenge the justice system faces is to adapt its process to enable the participants to deal with this kind of evidence fairly and efficiently and to render informed decisions.[23]

The Reference Manual, however, does more than identify the problems in this area. It attempts to provide both general and specific guidance to judges facing difficult science and technology questions. The Manual has three basic parts. The first is an overview, and discusses the management of expert evidence from the Federal Rules of Civil Procedure perspective as well as the evidentiary "framework for considering challenges to expert evidence" from the Federal Rules of Evidence perspective.[24] Next are seven reference guides for expert testimony in the areas of epidemiology, toxicology, survey research, forensic analysis of DNA, statistical inference, multiple regression analysis, and estimation of economic loss.[25] The last part concerns use of court-appointed experts and special masters.[26]

Given this helpful repository of information, the Advisory Group encourages the Court's review and use of the Reference Manual, when appropriate, but otherwise recommends no changes to this Plan provision at this time. The Group plans to resume discussion of this topic, particularly the expert bank concept, as part of its deliberations for the Third Annual Assessment.

4. Voluntary Information Exchange and Cooperative Discovery Devices. The Advisory Group's most provocative and extended discussion revolved around Federal Rule of Civil Procedure 26's early

23. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1 (1994).
24. *Id.* at 3.
25. *Id.*
26. *Id.* at 4.

disclosure provisions, an area the original Group reserved for further discussion.[27] As its Report stated:

> The Advisory Group's lengthy discussion about the proposed amendment of Rule 26, which would require voluntary disclosure of certain basic case information, ended inconclusively. While the Group supported the basic spirit of the proposed rule, it was reluctant to wholeheartedly embrace, at this time, the many changes it proposes without further study. . . . The Advisory Group thought it best to defer decision about the proposed rule pending its adoption and actual experience under the rule in order to permit a more informed decision about this subject, if appropriate, at a later stage in the Advisory Group's life.[28]

The new Rule 26, eventually adopted on December 1, 1993, provides an escape hatch from its early disclosure requirements, with an "opt-out" provision written right into the rule.[29] This District did not opt out across the board, but, by local rule, selectively exempted Class One cases, pro se prisoner petitions, and any other cases approved by the Court upon the parties' stipulation.[30] Thus, as it now stands, the Court has endorsed a balanced and pragmatic approach to the new provisions which permits the Court and the parties some latitude in applying them: While all Class Two cases in this District are subject to the early disclosure requirements, the Court may ultimately decide to excuse the parties from any or all of their strictures by court-approved stipulation.

Given the general consternation surrounding early disclosure, the Advisory Group vigorously debated the subject, keeping in collective mind the CJRA's emphasis on innovation and experimentation in the name of reducing cost and delay in civil cases. As the Chief Judge of this District put it at one Advisory Group meeting, the Bench and Bar now face the serious problem of "pricing" potential litigants "out of

---

27. The Advisory Group limited its discussion of the rule to the initial disclosure and early conference provisions in Rule 26(a)(1) and 26(f), respectively. The Group plans to examine other Rule 26 sections as part of the Third Annual Assessment.

28. *Report, supra* note 3, at 791.

29. FED. R. CIV. P. 26(a)(1) begins with the phrase "Except to the extent otherwise stipulated or directed by order or local rule."

30. See D.N.D. LOCAL R. 26.1, exempting Class One cases and pro se prisoner petitions "from the requirements of Fed.R.Civ.P. 26(a)(1) unless the court orders those requirements imposed in a particular case." The Local Rule further states that "[a]ll stipulations amending or exempting the requirements of Fed.R.Civ.P. 26 must be approved by the court." *See also* Standing Order of the District Court (D.N.D. Jan. 20, 1994) (applying to all cases filed after December 1, 1993); *Plan, supra* note 4, at 862-63 (defining Class One cases). Note, as well, that the Court's adoption of the new Rule 26 required revising the Plan, which itself had required less disclosure than Rule 26(a). *See First Amendment to the Plan, supra* note 7, at 907.

judicial resolution," and expressly requested the Group to consider ways to make discovery easier and less expensive.

In this spirit, and after lengthy discussion and reconsideration of both the Group's majority and minority perspectives that spanned several meetings and a mail ballot, the Advisory Group, focusing solely on the initial disclosure and conference provisions of Rule 26(a)(1) and (f), respectively, decided by a six to five (6 to 5) vote to recommend to the Court:

> Implement[ing Rule 26] on a somewhat more case-by-case basis; [with] parties permitted to define the scope of "voluntary disclosure" and of traditional discovery. This would take place in the Rule 26(f) conference.[31]

The Advisory Group reached this conclusion, in good part, because it was not convinced that the Bar has fully explored the requirements or the advantages of Rule 26(a)(1) and (f). Indeed, the Group's recommendation to implement the initial disclosure provisions on "a somewhat more case-by-case basis" requires no changes to the existing rules of this District, which, as noted above, already give the parties and the Court, by stipulation, latitude in using Rule 26(a)(1) in a way which will facilitate discovery in any particular case. Instead, at this juncture, as explained below, the most immediate change should come in the way Rule 26(a)(1) and (f) are practiced under the existing rules, in conjunction with a clarification of the Court's expectations in this newly developing area.

The Advisory Group is well aware that the Court and Bar have only limited experience with practice under the rule (which is not yet three

---

31. Minutes of the CJRA Advisory Panel Meeting 10 (April 19, 1996) (on file with the Clerk of Court). Because of the importance of this issue, all Advisory Group members were given an opportunity to vote and comment, whether present or absent when the vote was taken at the April 19, 1996 Advisory Group meeting. Each member chose between three options:

> 1: Recommend that the court continue to implement Rule 26 as is. . . . 2: Implement [Rule 26] on a somewhat more case-by-case basis; parties permitted to define the scope of "voluntary disclosure" and of traditional discovery. This would take place in the Rule 26(f) conference. . . . [and] 3: Opt out entirely of the requirements of Rule 26.

Id. At the April 19th meeting, no votes were cast for option 1, four votes were cast for option 2, and three votes were cast for option 3. *Id.* The Chair, by mail ballot, then presented the issue to absent members in an explanatory letter, accompanied by a draft of the minutes and a check-off ballot of the three options with space for written comments. Letter from the Honorable Karen K. Klein, U.S. Magistrate Judge, U.S. District Court, District of North Dakota, to CJRA Advisory Group Members (May 24, 1996) (on file with Clerk of Court) [hereinafter Letter from the Honorable Karen K. Klein]. Two absentees voted for option 2 and two voted for option 3. The final vote tally was six for option 2 and five for option 3.

years old) and that no clear consensus regarding the merits of Rule 26(a)(1) has emerged. In light of these points, the Group recommends that continuing experience with the rule, to the extent court resources permit, should be monitored and ultimately evaluated in a reconsideration of the current rule. However, until this reassessment is made, the Group majority recommends retaining Rule 26(a)(1) while encouraging both the Court and counsel to take new or renewed advantage of the flexibility it—in conjunction with the District's local rule—expressly provides to judges and lawyers in designing, approving, and executing reasonable discovery plans.

Just what are the advantages of the new disclosure provisions? What latitude do they provide? How can they work to help counsel and the Court try cases with greater efficiency? And what will the Advisory Group's Rule 26(a)(1) recommendation mean for counsel and the Court, on a practical level, if the Court should adopt it? These questions are best answered by examining the basic requirements of Rules 26(a)(1) and (f), their intended benefits, and the Advisory Group's recommended refinements to the Court's Rule 16(b) scheduling order and sample scheduling/discovery plan, which, if adopted, will hopefully facilitate optimal use of the early disclosure provisions, on a case-by-case basis, by clarifying their meaning, operation, and flexibility.

The Basic Requirements of Rule 26(a)(1) and (f). As background to understanding the benefits of early disclosure, the Advisory Group thought it might help to provide an outline—in no way a substitute for a close reading of the rule itself or any pertinent case law or commentary—of the basic components of Rule 26 (a)(1) and (f):

1. The Four Categories of Initial Disclosures: Potential Witnesses, Documentary and Tangible Evidence, Damages, and Insurance. "Except to the extent otherwise stipulated or directed by order or local rule," and without waiting for formal discovery requests, the parties shall exchange four types of information: (A) the identification of witnesses "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information; (B) a copy or a description by category and location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;" (C) damages computation(s), with non-privileged, non-protected supporting materials available for inspection and copying; and (D) any insurance policies that may cover, in

whole or part, the judgment.[32] Rule 26(a)(1)(A)-(D). Note the provision's inherent flexibility in the stated exception.

The Advisory Committee notes explain the reasons behind this "pre-discovery exchange of core information" and, consistent with CJRA imperatives, call for application of the rule to minimize discovery costs and delays:

> As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery.
>
> . . .
>
> A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.[33]

The parties are free to use "traditional discovery methods to obtain further information regarding" initial disclosures, but—except when authorized by rule, order, or agreement of the parties—they may not begin formal discovery "until the parties have met and conferred as required by subdivision (f)."[34] Again, the stated exception encourages flexibility.

2. When Initial Disclosures Shall Be Made. "Unless otherwise stipulated or directed by the court," the initial disclosures "shall be made at or within 10 days after the meeting of the parties under subdivision (f)." Rule 26(a)(1). The exception once again encourages case-by-case consideration of the rule.

---

32. Note also the Rule 26(a)(1) requirement that "[a] party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." Rule 26(e) also imposes a duty to supplement Rule 26(a) disclosures.

33. Advisory Committee Notes to the Amendment of Federal Rule of Civil Procedure 26, 146 F.R.D. 627, 628, 629 (1993) [hereinafter Advisory Committee Notes]. For overviews of Rule 26(a)(1) and (f), respectively, see generally CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2053, 2051.1 (1994).

34. Advisory Committee Notes, *supra* note 33, at 628, 640; *see also* FED. R. CIV. P. 26(d).

3. The Rule 26(f) Conference: To Discuss Claims, Defenses and Settlement, Initial Disclosure Arrangements, and a Discovery Plan. "Except in actions exempted by local rule or when otherwise ordered," the parties, at this Rule 26(f) meeting, must do three things: "[A] discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, [B] make or arrange for the disclosures required by subdivision (a)(1), and [C] develop a proposed discovery plan." Rule 26(f). Again, the potential for case-specific latitude is stated in the rule.

4. The Discovery Plan. The proposed discovery plan "shall indicate the parties' views and proposals" about four items: [A] any changes concerning the "timing, form, or requirement" for the initial disclosures, including a statement about when they "were made or will be made," [B] the subjects of discovery, when discovery should be concluded, and whether it should be conducted by issues or in phases, [C] any changes to discovery limitations imposed by these or local rules and any other limitations that should be imposed, and [D] the need for protective or other court orders concerning discovery and the pretrial schedule. Rule 26(f)(1)-(4). This provision is an explicit invitation to counsel and the Court to tailor discovery to the particular case at hand.

5. Other 26(f) Conference Requirements: Attendance, Good Faith, and Written Report. Rule 26(f) holds counsel "jointly responsible" [A] for arranging and attending the conference, [B] "for attempting in good faith to agree on the proposed discovery plan, and [C] for submitting to the court within 10 days after the meeting a written report outlining the plan." In this District, the Court requires filing of the plan only, not the report.

The Advantages and Intended Benefits of Initial Disclosure. As the close Advisory Group vote demonstrates, a notable number of members chose to opt out of Rule 26 entirely, arguing that initial disclosure saved neither time nor money, but in fact created delay and extra expense. In particular, they emphasized that Rule 26(a)(1) was an unnecessary step which created an additional layer, slowing down discovery and postponing the inevitable exchange of traditional discovery requests, which ultimately get at the same information anyway. In addition, untrustworthy or uncooperative adversaries undermine the informal exchange by hiding or withholding pertinent information, so that the process unfairly becomes a "one way street." Moreover, counsel can lose control over their cases and are forced to make predictions of relevance that may

benefit the adversary, particularly if counsel feel compelled to turn over damaging information in the absence of formal requests. Clients are also uncomfortable with their lawyers "voluntarily" making harmful admissions. While Rule 26(a)(1) may work best with cooperative adversaries, it is precisely in this situation that the rule is unnecessary. At least one Advisory Group member has advised clients to avoid federal court because of the requirement.[35]

These actual and potential negatives, however, have counters and should be seen in the context of the unique benefits early disclosure offers—benefits specifically designed to reduce cost and delay in the discovery process. The Advisory Group, in voting to retain Rule 26(a)(1), hopes to give the rule more time to manifest these advantages in a manner that stresses the rule's flexibility and strengths in a more case-by-case approach. This is especially warranted in light of the fact that the rule as written may not be receiving its intended application in this District. As the outline above demonstrates, a necessary predicate to its successful operation is an earnest Rule 26(f) conference, and the Advisory Group had reason to believe, from its discussions, that this rule provision has not always been followed. And, as the Advisory Group Chair observed:

> [C]ounsel seem to be ignoring the requirement of Rule 26(f) that counsel have a conference (face to face or at least by telephone, not by fax) to define the scope of the disclosures they will make. The rule contemplates that counsel will let each other know what they are looking for and then agree how much of it will be done "voluntarily" through Rule 26(a)(1) and how much of it will proceed through traditional discovery requests. Counsel seem not to realize that they have this flexibility and are spending their efforts instead in resisting the concept of disclosures as "mandatory." The Rule 26(f) conference is contemplated as part of the planning of the discovery schedule which takes place . . . before the scheduling/ discovery conference.[36]

The Advisory Committee Notes confirm this notion of the 26(f) conference as a time for counsel—aided by the advantages of live exchange—to get beyond the paper allegations and to take responsibility

35. *See also* 146 F.R.D. 507, 507 (1993) (Scalia, J., dissenting statement, joined by Thomas, J., and joined in relevant part by Souter, J.) (disagreeing with the Supreme Court's adoption of amendments to Rule 26 and noting that "the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system").

36. Letter from the Honorable Karen K. Klein, *supra* note 31.

for planning a mutually acceptable discovery program that will help facilitate a fair and efficient resolution of the action:

> [I]t is desirable that the parties' proposals regarding discovery be developed through a process where they *meet in person*, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.[37]

Thus, an earnest effort to comply with Rule 26(f) requires both a *substantive* discussion about claims, defenses, and relevant issues as well as the more *procedural* discussion about dates, deadlines, and discovery devices. Good faith is essential to these discussions. It is expressly required by the rule when counsel discuss the discovery plan, and, the Advisory Group believes, it is implicitly required for the other aspects of Rule 26(a)(1) and (f) as well.

Thus, the Rule 26(a)(1) initial disclosure provisions, when linked to a good faith Rule 26(f) conference and interpreted in light of their intended flexibility, not only seem viable innovations, but powerful ones. There are a number of important advantages which flow from their intended use and work against the negatives noted above:

(1) Early informal disclosure can provide a head start on, or "jump start" to, the traditional discovery process. By requiring counsel to meet near the action's inception and to talk as earnestly as possible, person to person, about what information both counsel really seek and why they seek it, the rule eliminates the immediate need for technical paper discovery requests and speeds the exchange of core information that might otherwise take weeks or months to extract under more formal discovery methods. In short, by informally front-loading the discovery process, the rule envisions that key information, that both sides would request anyway, can be unearthed more quickly and effortlessly.

(2) Requiring good faith discussion about the substantive contours of discovery starts counsel, early on, down the road of defining and refining the factual and legal issues to be explored during the pretrial and trial stages. This facilitates early case clarification and will hopefully help to eliminate or at least to minimize unnecessary or overly broad discovery requests once formal discovery begins. Indeed, the rule envisions that the 26(f) conference will assist counsel in sharpening discovery issues and requests, including those concerning the Rule

37. Advisory Committee Notes, *supra* note 33, at 642 (emphasis added).

26(a)(1) initial disclosures, which should be tailored, by counsel, to the specific evidentiary needs of the individual case. The Advisory Committee notes explain this very practical, common sense bent of the rule:

> Although paragraphs [26(a)](1)(A) and(1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of [Federal Rule of Civil Procedure] 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.[38]

(3) Thus, taken in the spirit intended, the 26(f) discussions can significantly alter the discovery process, making it much more focused from its inception, and much more a product of mutual negotiation than unilateral inquisition. In effect, the "meet and confer" requirement of Rule 26(f) can work to set a more positive and civil tone for litigation relationships, with its emphasis on exploration rather than obfuscation, and cooperation rather than confrontation. In this way, Rule 26(a)(1) resists the more rigid and undesirable side of the adversarial model which can lead to obstruction and delay and instead reinforces the side which prizes adversaries who cooperate without compromising their client's best interest. This is entirely consistent with CJRA litigation management principles, which expressly endorse "cost-effective discovery through voluntary exchange of information among litigants and their attorneys through the use of cooperative discovery devices."[39]

(4) At the heart of the initial disclosure provisions is good faith—a professional obligation that transcends this context, and one which the CJRA doubtless relies upon in its cornerstone notion that courts, lawyers, and clients alike share responsibility for solving the problems of cost and delay in civil litigation.[40] And "good faith" is counsel's recourse when an adversary will not cooperate—at or before the Rule 16(b) conference, the Court should be informed of lapses in good faith and measures should be taken, where appropriate, to ensure compliance with the requirement.

---

38. *Id.* at 631.

39. 28 U.S.C. § 473(a)(4) (1995).

40. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(2)-(3), 104 Stat. 5089, 5089 (1990).

Unfortunately, counsel who bury documents or withhold information plague the judicial system no matter how discovery is done, whether with or without traditional document requests. But discarding an otherwise thoughtful discovery rule because of those who violate it by non-cooperation sends the wrong message. Instead, the Court should require compliance with its strictures until they become the norm and the four-category exchange required by Rule 26(a)(1) becomes as automatic as it was intended to be, subject to any restrictions the Court approves for particular cases.

(5) And, under any discovery system, either formal or informal, counsel must make difficult calls about relevance and about turning over harmful, but responsive documents. As two commentators observe:

> Another criticism of the initial disclosure requirement is that it places lawyers in an awkward conflict by forcing them to reverse roles from adversary to abettor. The lawyer to the disclosing party now must abet the opposing parties by insisting that her client disclose information that will be helpful to them or risk later preclusion of the evidence and other sanctions. . . . This criticism may overstate the impact of required disclosures. The rule fully preserves a party's right to withhold privileged matter or work product, subject to the foundation-laying requirement of Rule 26(b)(5). In making initial disclosure, lawyers arguably do little more than they already must in many cases when their clients are served with broad interrogatories and document production requests tied generally to the allegations of a pleading. They may have to guess at the opposing party's legal theories in order to determine what materials fall within the rule's relevancy standard, but in a notice pleading system they must do the same in framing answers and replies.[41]

Thus, not only is speculating about relevance an old problem, but the new Rule 26 actually has a built-in mechanism for alleviating it: The 26(f) conference now provides official impetus and opportunity for clarifying any ambiguities. Questions of relevance can be explored during the 26(f) conversation, so that the adversary, and not the information proponent, must define what relevance means to him or her, along with the particular types of information and documents sought. This, in good measure, will relieve counsel of guessing at the adversary's idea of relevance, and in fact, will do more to advance mutual understanding of

41. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 310-11 (2d ed. 1994) (footnote omitted).

the case than might otherwise have happened, especially at this early a stage in the action's life.

(6) In this District, the Rule 26(f) conference, at least in form if not in name and extent, should be no stranger to the Bar. Counsel in Class Two cases are already required to meet and confer, at least fourteen days in advance of the Rule 16(b) conference with the Court, in order to jointly prepare a scheduling/discovery plan, which must include a list of discovery issues as well as verification that counsel have discussed, both between themselves and with their clients, ADR options. Rule 26(f) expands this practice by requiring counsel, very pointedly, as described above, to do more on a substantive level—they must "discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case."

(7) Further, the Rule 26(f) conference is a natural predecessor to the Rule 16(b) conference and the two smoothly segue into each other: Designing a workable, realistic discovery schedule can best be done when counsel have some idea about the nature of the information sought, the witnesses to be called, the issues that may be tried, and the damages requested. In this way, the Rule 26(f) conference inspires—and requires—counsel to have as clear a grasp as possible of their cases from the start, which will make for a more productive Rule 16(b) conference and aid in the efficient conduct of the action as a whole.

(8) All of this, of course, is done without waiving traditional discovery avenues. Moreover, the rule provides tremendous flexibility to counsel in designing their proposed discovery program, both in its formal and informal aspects. Subject to court approval, counsel may decide what information should be exchanged formally and informally by proposing changes to the "timing," "form," or even the "requirement for disclosures" under Rule 26(a)[42] and may decide when and whether discovery should proceed in phases or by issues or by both methods.[43] And as noted, Rule 26(a)(1) even allows counsel to stipulate out of the initial disclosures listed. The Advisory Committee Notes to Rule 26(a)(1) confirm the rule's inherent flexibility and sensitivity to circumstance:

> By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or

42. FED. R. CIV. P. 26(f)(1).
43. FED. R. CIV. P. 26(f)(2).

> local rule, can stipulate to elimination or modification of the requirements for that case. *The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.*[44]

Case-by-Case Implementation. In this context, it is difficult to categorize the initial disclosure provisions as either "mandatory" or "voluntary" in the sense that the parties—under Rule 26 and this District's Local Rule adopting it—are free to exchange the necessary information, essentially as they see fit, as long as they stand ready to justify the methods and time frame chosen and the Court agrees that the parties have paid proper respect to Rule 26(a)(1) and CJRA Plan requirements in designing their discovery schedule. This is true even if the Court ultimately excuses Rule 26(a)(1) compliance in whole or in part.

In sum, Rule 26 charges counsel with designing a discovery approach to their case which facilitates information exchange and dispute resolution. Because of its inherent flexibility and pragmatic orientation, the rule permits counsel to customize discovery and to fashion a program that will work best for their particular case, subject, of course, to good faith attempts at full compliance with its provisions. In any case, the Court will have the power to grant the parties' "opt-out" request as long as they can demonstrate to the Court's satisfaction that the early disclosure provisions are not appropriate for their case.

In stating this, however, the Advisory Group strongly cautions that this opt-out feature is a limited one and should only attach after the parties have convinced the Court, after good faith attempts at compliance, that early initial disclosures would only add cost and delay to the discovery process and undermine the purposes of Rule 26. Thus, at the very least, as a predicate to making this showing, the parties must hold a Rule 26(f) conference, either in person or over the telephone, and discuss, in the meaningful detail Rule 26(f) requires, the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and the proposed discovery plan. In addition, and also at the very least, the parties must discuss the possibility of informally exchanging, without written discovery requests, the information delineated in the four Rule 26(a)(1) categories. That discussion must include, to the extent feasible, identifying what they need and why they need it.

---

44. Advisory Committee Notes, *supra* note 33, at 629 (emphasis added).

Accordingly, the Advisory Group recommends that Plan provision number four be amended to reflect these recommendations and that the Court's Rule 16(b) conference order and Sample Scheduling/Discovery Plan be similarly revised. In particular:

1. the Court's Rule 16(b) scheduling/discovery order to counsel should be revised (a) to expressly require the Rule 26(f) conference and counsel's good faith, in-person (whether face-to-face or over the telephone) participation, (b) to expressly require compliance with Rule 26(a)(1) unless, in good faith, counsel agree, with particularized reasons set out in the scheduling/discovery plan, that application of the mandatory discovery provisions of the rule is inappropriate in this particular case, (c) to state that counsel are free to delineate any areas—including or beyond those listed in Rule 26(a)(1)—for initial informal exchange, and (d) to state, as part of the discovery plan, that counsel must delineate which information will be exchanged informally and formally;

2. the Court's Sample Scheduling/Discovery Plan should be revised to include a statement that the parties have, in good faith and in a live in-person or telephonic exchange, discussed (a) the nature and basis of their claims and defenses in reasonable detail sufficient to put counsel on notice of the basic issues to be explored in discovery and of the key information counsel seek in discovery and why, (b) the possibilities for a prompt settlement or resolution of the case, (c) the proposed discovery plan, and (d) the informal exchange, without written discovery requests, of the information delineated in the four Rule 26(a)(1) categories, especially what they need and why they need it, based on information then reasonably available to them; and

3. the Court's Sample Scheduling/Discovery Plan should also be revised to require counsel to define the extent of initial disclosures they agreed to make and/or their reasons for failing to informally exchange the information listed in Rule 26(a)(1). This explanation will serve as the basis for the Court's assessment of good faith compliance so that the reasons listed must demonstrate, to the Court's satisfaction, that early disclosure has been completed to the extent feasible at this point in the litigation, would only add cost and delay to the discovery process, or would otherwise be unnecessary or unjust.

These changes, we hope, will assist the Bar in navigating Rule 26 (a)(1) and in capitalizing on the many benefits to be had under a discovery rule that bravely bucks a common presumption and perception that

discovery must be a painful, costly, and time-consuming process. Should this Court adopt these Rule 26 recommendations, the Advisory Group will revisit them after the Court and counsel have more experience with them. In the meantime, the Group urges both cooperation and creativity from the Bar concerning initial disclosure, and suggests that those lawyers critical of these provisions give them a second look and a second chance when next attempting compliance. Given its laudable goals to promote justice while reducing cost and delay in the discovery process, Rule 26(a)(1) deserves a full and fair "hearing" before final condemnation. It is arguably our responsibility to give it one,[45] even if this requires a period of transition as the rough edges of early disclosure are polished down by proper use of the rule.

5. Good Faith Certifications for Discovery Motions. The District's new Local Rule 16.1(B)(4), adopted January 23, 1995 at the behest of the Court and Advisory Group, now expressly requires that counsel actually confer in-person or by telephone (or other electronic means) in order to resolve discovery disputes before requesting court intervention. On the whole, there has been compliance with this rule and the Court has observed an improved level of cooperation between counsel. Accordingly, the Advisory Group recommends no changes to this Plan provision.

6. Alternative Dispute Resolution. This is another area that the original Advisory Group left open for re-examination as time and experience unfolded. As we stated in the Report:

> [T]he Advisory Group unanimously recommends the Court's encouragement of voluntary ADR between the parties, with a vocal minority of the Group also favoring mandatory ADR at this time. Without foreclosing the possible adoption of an ADR requirement, the Advisory Group recommends revisiting the question of whether ADR should be mandated by the Court after the District has had a period of experience and experimentation with voluntary ADR.[46]

---

45. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. A lawyer should . . . help the bar regulate itself in the public interest. . . .

Preamble: A Lawyer's Responsibilities, *North Dakota Rules of Professional Conduct*, N.D. CENT. CODE COURT RULES ANN. 810-11 (1996-97).

46. *Report*, *supra* note 3, at 794.

And, as explained in the Advisory Group's First Annual Assessment:

> This Court's decision to encourage participation in ADR has been implemented by a new provision in the Scheduling/Discovery Plan which asks counsel to confirm that they have "discussed between themselves and explored with their clients early involvement in alternative dispute resolution." In addition, the Scheduling/Discovery Plan asks counsel to indicate which, if any, ADR options would be appropriate for the case and offers an ADR "menu" of options for counsel to consider. The Scheduling/Discovery Plan further requires counsel to explain their response if they indicate that no ADR option is appropriate.[47]

From the data gathered by the Court, it is clear that counsel, in overwhelming numbers, want some kind of early ADR and that the court-hosted, "early" settlement conference is their ADR method of choice.[48] It appears that more parties are willing to participate in early settlement conferences—and participate more seriously—because of the Court's post-Plan earnestness about firm trial dates. As a general rule, the Court permits the parties to decide what is "early," and this can be at any time before the final pretrial conference.

This system is extremely successful. Anecdotally, the Court has learned how court-hosted settlement conferences can contribute to both the quantity and quality of settlements:

(1) While there is no way to calculate the number of settlements that take place *because* of the Court, counsel have reported, with complimentary consistency, that the Court's involvement in the process has played a central role in the timing, nature, and/or even the possibility of settlement. A frequent refrain is that "this case might not have settled without the Court's involvement." And because of that involvement, it appears that a number of cases have accelerated settlements. The Court's presence and prestige, and its provision of structured opportunities for discussion, can bring the parties together earlier and more earnestly.

(2) At the very least, whether or not settlement discussions are successful, they often assist the parties in refining the issues for trial. This invaluable incident of court-hosted settlement discussions supplements

---

47. *First Annual Assessment, supra* note 6, at 903.

48. In most Class Two cases, the court-hosted, post-discovery settlement conference is mandatory, and usually takes place at or around the time of the final pretrial conference. The parties, however, who are free to engage in whatever other ADR method they wish, most often chose an early, court-hosted conference in addition to, or instead of, the required post-discovery conference.

the Court's other institutional attempts (such as the Intermediate Status Conference) to narrow the issues and surface the significant ones in order to streamline the trial.

(3) And, whether or not settlement results, clients report a marked satisfaction with and through the court-hosted settlement process because of the greater control they exert over presentation and discussion of their claims or defenses. The informality of the settlement conference enables clients to speak for themselves, to express their frustrations, and to literally "state their claims with particularity" directly to the Court. They experience, first hand, a representative of the federal judiciary who takes them seriously, listens to them with an official ear, and treats their allegations with respect. For some, this translates into a rough equivalent of "getting their day in court," which may ultimately help to encourage settlement. If it does not, at least the clients have the satisfaction of personal participation in the resolution process, which in the long run may increase respect for the system or in the least improve understanding of its complexities.

The Advisory Group sees no reason, particularly in the absence of contrary sentiment by the Court and counsel, to disrupt this process and its benefits. Given what appears to be the Bench and Bar's continuing preference for a voluntary ADR program and their consistent utilization of the current procedure to great effect, the Advisory Group recommends that the system remain as is for the time being.

7. **Extensive Utilization of the Magistrate Judge.** Now that the District has had more experience under the Plan and with its central commitment to early and firm trial dates, the Advisory Group can more accurately determine the effect on the magistrate judges' consent docket. One thing is very clear: Most consents to trial before the Magistrate Judges are taking place earlier than ever before—usually at the initial Rule 16(b) Scheduling Conference (where the firm trial dates are now set) instead of at the final pretrial conference. While the assigned district judge reserves the right to override these consents, they are usually approved.

Early consents mean that the magistrate judges are trying more cases and deciding more dispositive motions, while the district judges are handling more settlement conferences. This partial "role reversal" has

several benefits for all of the judges as well as for the federal bar practicing before them. First, the district judges bring their vast and well-respected trial experience to the settlement process. Similarly, the magistrate judges bring their well-respected settlement experience to the trial process. This cross-fertilization of talent and broadened range of experience work to accentuate the many strengths of our Federal bench as a whole. It also promotes versatility. Moreover, the magistrate judges' growing trial and dispositive motion experience will add to their credibility as settlement mediators as well as to their quotient of professional satisfaction.

The Advisory Group is again very pleased with the Court's utilization of the magistrate judges for trials and settlement efforts as well as with pretrial management. Accordingly, the Advisory Group recommends no changes to this Plan provision which encourages extensive utilization of the magistrate judges as an integral and essential part of the District's judicial life.

8. Need for Second Full-Time Magistrate Judge. In its original Report and First Annual Assessment, the Advisory Group strongly urged that this District secure a second full-time magistrate chambered in Bismarck, even with the intervening appointment of half-time Magistrate Judge Dwight Kautzmann.[49] Accordingly, the Group was very pleased to learn that this half-time position has been up-graded to a full-time position starting October 1, 1996 and expresses its deep appreciation to the Magistrate Judges Committee of the Judicial Conference and the Judicial Conference itself for a decision that will ultimately result in more timely and cost-efficient civil dispositions for this District, particularly in the western divisions.

9. Division Boundaries. In accordance with the Plan, the issue of division boundary realignment has been referred to the District's Federal Practice Committee. The Advisory Group still supports this referral and recommends no changes to this Plan provision.

10. Resources for the Judiciary. Particularly in light of our inability to meet on a more consistent basis because of diminished and interrupted congressional funding, the Advisory Group reaffirms the

49. *Report, supra* note 3, at 797-99; *First Annual Assessment, supra* note 6, at 903.

resources statement it recommended to the Court, which adopted it as part of the original Plan:

> The Court recommends that Congress provide the federal courts with immediate funding sufficient for the federal Judiciary to carry out the CJRA expense and delay reduction plans specifically designed to ensure the just, speedy, and inexpensive resolution of civil disputes. In addition, because Congress and the Executive Branch must be accountable for possible case management consequences on both the federal and state court systems of their decisions concerning substantive rights and jurisdictional allocations, an assessment of their impact upon the processing-capacity of the federal trial courts should follow and with it, any funding necessary to ensure that processing problems do not impede the vindication of rights or the forum access Congress intended to provide.[50]

Thus, at the very least, we encourage Congress to provide the funding for this Group to complete its tasks as requested. Moreover, given the growing importance of science and technology in the courtroom, the Advisory Group supports congressional funding for restricted, but nonetheless possible, use of court-appointed experts in those cases where the Court cannot depend upon the resources of the parties to provide the expertise needed for a just adjudication. Otherwise, the Advisory Group recommends no other changes to this Plan provision.

11. Taxation of Costs. The new taxation procedures originally recommended by the Advisory Group, subsequently adopted by the Court, and ultimately incorporated in new Local Rule 54.1(A)-(B) are,from all accounts, working well and the Advisory Group recommends no changes to this Plan provision.

III. CONCLUSION

At the end of the Plan's first year, the Advisory Group "look[ed] forward to a second year of even greater progress in eliminating the enemies of inordinate cost and delay as the Plan matures in its beneficial effects."[51] Now, with two and one half year's worth of experience behind it, the Advisory Group concludes that the Plan has played a crucial role in improving the District's capacity to process its civil case calendar. Its central theory, that firm trial dates set early in the pretrial process can have a profound and positive effect on getting cases to trial

50. *Plan, supra* note 4, at 868. *See also Report, supra* note 3, at 800-02 (amplifying this Plan provision).

51. *First Annual Assessment, supra* note 6, at 904.

in a timely and cost-efficient manner, has thus far proven to be true. The challenge is not only to maintain the gains made, but to improve upon them, more and more.

The Advisory Group is hopeful that a fresh look at, and proper use of, Rule 26's informal disclosure provisions will add even greater efficiencies to the discovery process without sacrificing fairness along the way. It is our collective responsibility as professionals and public servants to give the new rule—which our Court has adopted—a fair chance before rejecting it. Revisiting the Rule 26(f) conference, as we suggest, may help extend the efficiencies of our current pretrial conference sequence—the Rule 16(b), intermediate, final, and settlement conferences—back one step in the pretrial chain. This could have tremendous benefits for all counsel, and ultimately, for all clients. We ask the assistance of the Bench and particularly the Bar in making this possible, and respectfully request open-minded reconsideration of Rule 26's informal disclosure provisions, which do not have to complicate, prolong, or undermine the adversary process if good faith and case-to-case flexibility are the guides for maximizing its intended benefits. The CJRA, which holds each of us responsible for making justice more affordable and therefore more attainable, requires no less.

Respectfully Submitted,

THE CIVIL JUSTICE REFORM ACT
ADVISORY GROUP FOR THE
DISTRICT OF NORTH DAKOTA