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THIRD ANNUAL ASSESSMENT
OF THE
CIVIL JUSTICE REFORM ACT ADVISORY GROUP

For the Plan Period
July 1, 1996 through September 30, 1997

UNITED STATES

DISTRICT COURT

DISTRICT OF
NORTH DAKOTA

October 8, 1997

THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE DISTRICT OF NORTH DAKOTA 1996-97

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Table of Contents

U.S. DISTRICT COURT
DISTRICT OF NORTH DAKOTA

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I. INTRODUCTION

This is the Advisory Group's third (and last) annual assessment of the Civil Justice Expense Delay and Reduction Plan (Plan) for the federal District of North Dakota (District). The Plan, activated pursuant to the Civil Justice Reform Act (CJRA)[1] on December 1, 1993, has been twice amended by the Court in accordance with Advisory Group suggestions made in the first and second Plan assessments.[2] This evaluation covers the Plan's third phase from July 1, 1996 through September 30, 1997 and recommends a third amendment to the Plan. The December 1, 1997 expiration of key CJRA provisions makes this assessment and proposed Plan amendment the Advisory Group's last.[3]

Substantively speaking, the Advisory Group's suggested revisions are minor. The Plan's core provisions seem to be working well, and

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1. For detailed background on the CJRA, the Plan, and the Advisory Group's role in its formulation, see *Report of the Civil Justice Reform Act Advisory Group for the District of North Dakota*, 69 N.D. L. REV. 741 (1993) [hereinafter *Report*], *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), and *Second Annual Assessment of the Civil Justice Reform Act Advisory Group for the Period December 1, 1994 through June 30, 1996*, 72 N.D. L. REV. 821 (1996) [hereinafter *Second Annual Assessment*].

2. The Plan and its first and second amendments can be found at *The Civil Justice Expense and Delay Reduction Plan for the District of North Dakota*, 69 N.D. L. REV. 860 (1993) [hereinafter *Plan*], *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*], and *Second Amendment of the District's Civil Justice Expense and Delay Reduction Plan*, 72 N.D. L. REV. 855 (1996) [hereinafter *Second Amendment to the Plan*].

3. On December 1, 1997, CJRA sections 471-78 will sunset. As the CJRA states: "The requirements set forth in sections 471 through 478 . . . shall remain in effect for seven years after the date of the enactment of this title [December 1, 1990]." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5089, 5096 (1990). In light of the CJRA's expiration, the Advisory Group thanks the NORTH DAKOTA LAW REVIEW for its invaluable assistance to the Group in publishing and distributing its work to the Bar and beyond.

there is no need to change the basic principles of civil case management they champion, especially the early and firm setting of trial dates and the Court's voluntary ADR procedures. Nonetheless, despite these successes, the Advisory Group targeted for more extended discussion two of the Plan's provisions (concerning Rule 26 disclosures and ADR) as well as two new issues relating to civil case processing—professional civility and the feasibility of a random case assignment system. In addition, the Group explored the effects of the CJRA's expiration on the District's Plan and on the Group's own existence.

As explained in section II, the Advisory Group recommends a third Plan amendment in order (1) to expand its prior endorsement of Rule 26 flexibility to the rule's expert disclosure requirements and (2) to sharpen its ADR provision. In addition, as explained in section III, the Advisory Group also recommends (3) follow-up study and education on civility concerns and (4) rejection of a random case assignment system. Lastly, the CJRA's approaching expiration prompts the Advisory Group to recommend (5) re-establishing the Plan's provisions, where necessary, by special court orders and local rule incorporation and (6) transplanting the Advisory Group's consulting function into the Federal Practice Committee. Should the Court adopt any of these recommendations, they will be announced in a separate Court order, a suggested draft of which accompanies this report to the Court.[4]

II. REASSESSING THE PLAN'S CORE PROVISIONS

To ensure that the Plan, as amended, is still effective, the Advisory Group reviewed statistics compiled by the Clerk of Court and the judicial officers themselves pertaining to the Plan's core provisions.[5] Items evaluated included the eighteen month trial benchmark, the Court's motion and bench trial calendars, rescheduled trials, cases heard on consent by the Magistrate Judges, and the ADR selections made by counsel. Based upon this review, the Advisory Group concluded that the Court has done well, on the whole, in processing civil cases and commends the Court for its currency and adherence to basic Plan principles.

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4. The Advisory Group Reporter drafted this assessment and the proposed third amendment to the Plan for the Advisory Group's review.

5. The CJRA requires the Court to annually assess the state of its docket to determine whether additional steps are necessary to reduce cost and delay and to improve litigation management. 28 U.S.C. § 475 (1990).

The early-set and firm trial date has been the cornerstone of this District's Plan from its inception. And, from all appearances, it remains the force which powers the Plan as a whole. Thus, it comes as no surprise that the Judicial Conference's final report on the CJRA recently proclaimed the early selection of firm trial dates to be an essential ingredient of civil case management reform. The Conference stated:

> One of the most important findings of the RAND study is that an early and firm trial schedule, combined with limited time for discovery, can reduce delay in complex civil litigation without increasing costs. An early and firm trial date can reduce time to disposition in complex civil cases by up to two months . . . , but can also lead to increased lawyer work hours and cost. However, these additional costs can be mitigated if the time for discovery is shortened from 180 to 120 days, which reduces the median time to disposition by one and a half months . . . . This early case management was found to have no effect on lawyer satisfaction or views on fairness . . . .
>
> In light of these findings, the Judicial Conference recommends that its Committee on Court Administration and Case Management consider case management procedures that would encourage judicial officers to set early trial dates. It also recommends that its Committee on Rules of Practice and Procedure consider whether F.R.Civ.P. 16 should be amended to require a judicial officer to set the date of trial to occur within a reasonable time, and continue its ongoing project re-examining the nature and scope of discovery including whether specific time limitations on discovery should be required by national rule.[6]

Our District has already implemented the early trial date recommendation. The Court, in almost every Class Two case, sets the trial date at the Rule 16(b) scheduling/discovery conference. Adjournments are not granted lightly. In this way, the firm trial date is the cement which holds the pretrial schedule in place and keeps both counsel and the Court in steady motion toward disposition—not infrequently by settlement prompted by the impending trial. In short, nothing the Advisory Group found in its review of the Plan and practice under it suggested the need

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6. JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 19-20 (May 1997) (footnote and citations omitted). This report relied heavily upon the findings of a study done by RAND's Institute for Civil Justice. *See generally* RAND'S INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

to disrupt this basic pretrial framework. Two Plan provisions, however, merit slight refinement.

A. Rule 26 Addendum: Expert Witness Disclosures

In its Second Annual Assessment, the Advisory Group scrutinized the initial disclosure and conference provisions of Rule 26(a) and (f).[7] After intense debate, the Group finally agreed, subject to reconsideration after more experience with the Rule, to recommend continued application of the current initial disclosure provisions with renewed emphasis on both proper use of the Rule 26(f) conference and on the Rule's express flexibility for tailoring discovery to specific case needs. As we explained:

> [T]he 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 . . . 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 . . . the most immediate change should come in the way Rule 26(a)(1) and (f) are *practiced* under the existing rules . . . .[8]

The Advisory Group expressly left other sections of Rule 26 to future discussion.[9] Now, in considering the Rule's expert disclosure provisions, the Group reaches the same basic conclusion. Those provisions as written—as well as the Court's implementing procedures—should be given a flexible interpretation, on a case-by-case basis, to minimize the excessive cost and delay that too often accompany expert discovery. Rule 26(a)(2) explicitly provides for that flexibility. It states in pertinent part:

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7. *Second Annual Assessment, supra* note 1, at 836-49.

8. *Second Annual Assessment, supra* note 1, at 838 (emphasis added). As the Court itself confirmed in adopting the Second Amendment to the Plan offered by the Advisory Group:

> The Court agrees with the Advisory Group that no clear consensus about the operation of Rule 26(a)(1) has emerged in this District and more experience with this provision is needed before it is revised or rejected. Thus, the Court is inclined, at this time, to adhere to Rule 26(a)(1) as adopted and as interpreted by this District in Local Rule 26.1 because of the Rule's inherent flexibility and the need to give the Rule as written, in actual practice, a fair chance to realize the benefits of its intended application.

Second Amendment to the Plan, supra note 2, at 858. In the Second Amendment, the Court required clarification of its own Rule 16(b) scheduling/discovery order and its sample scheduling/discovery plan to state more explicitly the Court's expectations concerning initial disclosures and the Rule 26(f) conference. *Id.* at 858-59.

9. *Second Annual Assessment, supra* note 1, at 837 n.27.

> (A) [A] party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) *Except as otherwise stipulated or directed by the court,* this disclosure shall . . . be accompanied by a written report prepared and signed by the witness . . . .
>
> (C) *These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties,* the disclosures shall be made . . . .[10]

To implement this intended flexibility, the Advisory Group encourages open and ongoing communication between the Court and counsel, particularly about the timing and sequence of disclosing experts and their anticipated testimony. Flexibility in this area should work to eliminate or minimize the undue expense and wasted time which might result from identifying or hiring unnecessary experts, researching and preparing for expert issues that may not materialize at trial, or scheduling for experts who may not be needed. Accordingly, as a natural extension of its prior Rule 26 recommendation, the Advisory Group now suggests expanding Plan provision four to endorse Rule 26's flexibility in the area of expert disclosures.

B. Alternative Dispute Resolution

As part of its core provision review, the Advisory Group revisited, once again, the District's voluntary ADR system. It did not take long for the Group to reaffirm, as it has in the past, that the Court's basic approach is working well and should not be altered, particularly its provision for early settlement conferences and neutral evaluations.

Nonetheless, the Advisory Group learned about instances when the scheduled conferences or evaluations were not as productive as they could have been—and actually resulted in wasted time and money—because they were premature, counsel was not ready to evaluate the case, or party representatives were unavailable. In some of these cases, counsel advised the Court of these complications in advance of the settlement conference or evaluation, but not always. This "failure to warn" proved to be particularly troubling when parties came great distances to attend

10. FED. R. CIV. P. 26(a)(2) (emphasis added).

settlement conferences only to find they had journeyed to the courthouse in vain and would need to do so again.

To address the cost and delay problems associated with futile settlement discussions, the Advisory Group recommends that there be increased communication, in appropriate cases, between the Court and counsel about the ADR schedule. For example, as the Chair noted at one Advisory Group meeting, a telephone conference between the Court and counsel two weeks prior to the scheduled conference or evaluation would permit an efficient update on counsel's settlement progress and preparedness as well as their party's availability for settlement discussions. This call would also enable the Court to assist the parties in preparing for the conference or evaluation and in selecting the most cost-effective time for the meeting should a date change be required. Any such change should be made without disturbing the trial date.

Accordingly, given its overwhelming success, the Advisory Group urges continuation of the current system of voluntary ADR with its encouragement of early settlement conferences and neutral evaluations. In addition, the Group recommends expanding Plan provision six to reflect the importance of pre-conference or pre-evaluation communication between the court and counsel, where appropriate, to head off the inefficiencies resulting from holding the conference or evaluation too early or having party representatives without full authority to settle present.

III. EXPLORING ADDITIONAL ISSUES

The Advisory Group spent considerable time discussing two new issues that implicate the CJRA's focus on undue cost and delay and could affect the Plan's implementation: professional civility and the prospect of random case assignments within the District.

A. Civility and the Litigation Process

"The practice of law," our Court recently stated, "has regrettably slouched down a path that reflects the increasing trend of incivility in

our society."[11] As this statement recognizes, civility is a collective concern that transcends, in origin and impact, the courtrooms of the federal system. As Advisory Group members argued, the responsibility to avoid or to stop reprehensible conduct lies with each person in the litigation process. This "global" approach to civility reinforces an important CJRA premise—that reform is "a cooperative and evolving venture."[12] We have previously explained: "As the Act itself directs, change should come not only from the court, but from counsel, clients, the Executive, and the Congress. Perhaps the most effective reform will ultimately derive, over time, from basic changes in our litigation culture about the best ways to resolve disputes."[13]

But bringing about "basic changes in our litigation culture" in the civility area is not an easy task. As Advisory Group discussions illustrated, these changes, in good part, depend upon adjusting attitudes and expectations, including those of lay clients, who are not subject to a "client code of professional responsibility" when making demands on their lawyers. So the plaguing, yet obvious, questions persist: how can litigation participants make meaningful changes in the area of civility? And what, if any, should those changes be?

A number of Advisory Group members agreed that simply adopting a set of civility rules for counsel would do little, if any good. These rules would only address one subgroup in the process and would inevitably present problems of interpretation, application, and enforcement. Further complicating reform in the civility area is defining the problem itself. A number of civility issues create sensitive ethical, moral, and professional dilemmas for practicing attorneys that sometimes elude easy identification or have no ready—or at least, satisfying—solutions. To

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11. Larson v. Fargo Women's Health Org., Inc., Civ. No. A3-94-142, slip op. at 4 (D.N.D. Feb. 27, 1997) (Klein, J.), *aff'd per curiam*, No. 97-1906ND, slip op. at 2 (8th Cir. Nov. 26, 1997). Similarly, as the President of the American Bar Association recently wrote: "Lawyers are not the cause of the breakdown of our society's sense of civility or traditional values of character, trust and community. The justice system is only a mirror of the society in which it works." N. Lee Cooper, *President's Message: All We Ask For Is Fairness*, 82 A.B.A. J. 6, 6 (1996).

12. *Report, supra* note 1, at 747.

13. *Report, supra* note 1, at 747. In addition, we noted that:

> A basic premise of the CJRA is that the federal judiciary alone is not to blame for the problems of cost and delay. The Act expressly acknowledges that five actors—the courts, the lawyers, the litigants, the Congress, and the executive branch—share responsibility both for creating and tackling the problems of excessive expense and delay. The Act advocates "reform from the 'bottom up'" and calls upon the spectrum of system users, administrators, and creators to contribute to the system's betterment.

Id. at 745 (footnotes omitted).

re-color a familiar phrase, just what is "civil" litigation and when are acceptable lines crossed?

In this regard, the Advisory Group raised a number of questions and concerns that highlighted the ambiguities and challenges in eliminating, or even defining, professional incivility:

- When does zealous advocacy for the client interfere with the truth-seeking mission of the court? For example, should counsel, as fervent advocate for the client, refrain from objecting to the adversary's obnoxious behavior because that conduct is undermining their adversary's credibility or should counsel, as an officer of the court, object in order to stop this reprehensible conduct and help preserve the integrity of the fact-finding process? As one commentator noted in exploring the competing private and public duties that litigation lawyers have in the discovery arena:

> It is a truism that a lawyer must serve two masters. She is the zealous advocate or friend of her client . . . . In this role, the lawyer helps individuals realize their autonomy and capacity for self-government in a democratic society. At the same time, courts have "deputized" lawyers to assist in achieving the just resolution of disputes. In fact, the civil discovery system under the federal rules was conceived as being simultaneously a substitute for court-controlled investigation of facts and an extension of the adversary system, in which the litigants compete to develop the best factual position. This marriage of convenience between public and private goals creates profound structural tension within the discovery system.[14]

- Not all incivility results from unethical or deceitful lawyers. What about the brand of incivility that lawyers manifest "in the heat of battle" or when they feel financial or performance pressure? How much "incivility leeway" should be permitted within the bounds of professionalism given that the practice of law can be highly stressful?

- If the litigation "atmosphere" is to change, must not change start long before a case enters the court system? In law school? In high

14. W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 899 (1996) (footnotes omitted).

school? At home? How deep do the seeds of incivility lie and which individuals and institutions should be addressing them?

- And once a case is filed, what is the Court's responsibility to curb incivility, particularly if it is not always easy to identify? In a related area, the North Dakota Commission on Gender Fairness in the Courts, in concluding that state judges have a duty to intervene and stop gender biased behavior in the courtroom, nonetheless noted that "[i]ntervening judges have the unenviable task of deciding, often in a matter of seconds, what to say and whether to say it, knowing that the best of intentions can go astray, no matter what they do."[15]

- What best motivates lawyers to act civilly towards one another? How can lawyers learn to maintain their dignity and professionalism in the face of incivility? What if those lawyers who play by the rules are disadvantaged by those who do not? What incentives do they have to follow the abstract principles of professionalism when their opponents seem to score points by ignoring or bending them?

- Could the appeal to principled self-interest work in curbing incivility? For example, one commentator quoted a judge as saying: "Fanaticism and obstructionism are very unpopular with judges. A lawyer who obstructs, who breaks or bends the rules, who treats his opponent uncivilly, is sending a message to the judge's subconscious: 'Rule against me when you can.'"[16] Another commentator (himself a federal judge) quoted U.S. Supreme Court Justice John Paul Stevens in a similar vein: "I have long held the view that a lawyer's most important asset is [his or her] reputation for integrity. . . . An advocate who does not command the confidence of the judge bears a much heavier burden of persuasion than one who never misstates either the facts or the law."[17]

- Does incivility affect the merits of the case? At what point does it actually cloud the substantive issues before the court or distract the fact-finder from his or her obligation to decide the case dispassionately? As one Advisory Group member put it, the lawyers' conduct "should not be what decides the case."

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15. *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1167 (1997) [hereinafter *North Dakota Gender Fairness Report*]. For the Commission's discussion of judicial intervention in the gender bias context, see *id.* at 1159-69. The Advisory Group supports the Commission's efforts—and those of the Eighth Circuit Gender Fairness Task Force—to eliminate gender bias from the courtrooms of this State.

16. Wendel, *supra* note 14, at 943 (footnote omitted).

17. Hon. Marvin E. Aspen, *Let Us Be "Officers of the Court,"* 83 A.B.A. J. 94, 95-6 (1997).

- Should a special procedure for reporting patterns of uncivil conduct be established? Or do existing procedures provide appropriate channels for addressing and redressing this problem?[18]

Careful exploration of these and other civility concerns is necessary. As is obvious from the list above, they implicate issues far beyond those of undue expense and delay, which are but two possible by-products of incivility and professional irresponsibility. These deeply-rooted issues reach into the heart of our adversary system.

Accordingly, the Advisory Group stresses that incivility is a serious problem that can, among many other things, affect litigation cost and delay. The problem must be addressed jointly by the federal bench and bar. Both have an obligation to confront and improve the problem. To this end, and given the far-reaching effects of this behavior, the Advisory Group recommends that the Court continue to study and ultimately address incivility in the litigation process, including its ethical dimension, through a method to be determined by the Court. Education about the pitfalls of, and possible responses to, unprofessional behavior should be encouraged, especially as part of the State Bar Association's continuing legal education.[19] The Federal Practice Committee or other appropriate group should assist the Court in examining this multi-faceted concern.

B. Random Case Assignment System

Spurred by the observations of one of our District judges,[20] the Advisory Group explored the prospect of changing the case assignment system for this District. Traditionally, that method has been governed by geography: as a general rule, cases filed in the Eastern Divisions have

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18. *See North Dakota Gender Fairness Report, supra* note 15, at 1246 ("In addition to the formal disciplinary systems that exist for both judges and lawyers, there should be created a more informal system—to be used at the option of the person offended—by which those accused of gender bias infractions will first receive a notice and an opportunity to discuss the situation *before* any official disciplinary measures are considered").

19. In a similar vein, the North Dakota Commission on Gender Fairness strongly endorsed education as an important means to combat gender bias in the litigation process. The Commission recommended that "[s]pecial efforts should be made to present innovative and appropriate judicial and attorney training and education programs to enhance sensitivity to gender fairness issues. Programs should include specific reference to the complex issues of professionalism and judicial intervention, including when intervention is appropriate and how it should be accomplished." *North Dakota Gender Fairness Report, supra* note 15, at 1245. In another recommendation of parallel importance for any incivility study, the Commission suggested that "[t]he bench and bar should explore and develop mechanisms that will facilitate dialogue on gender fairness issues in the practice of law." *Id.*

20. *See* Letter from the Hon. Patrick A. Conmy to the Hon. Karen K. Klein (Feb. 25, 1997) (suggesting consideration of a different case assignment system for the District) (on file with the Clerk of Court in Fargo, North Dakota).

been assigned to Chief Judge Rodney S. Webb (permanently chambered in Fargo) and cases filed in the Western Divisions have been assigned to Judge Patrick A. Conmy (permanently chambered in Bismarck). As we noted in our first CJRA Report written in 1993:

> [The] great distance [between the Eastern and Western division courthouses and judges] has effectively created two district courts because neither district judge can easily or efficiently aid the other. At least three to four hours of driving separate them. The long and harsh North Dakota winters make this gulf even wider, particularly given the sometimes life-threatening road conditions and the absence of alternative and affordable public or private air or land transportation between the eastern and western parts of the State.[21]

We also noted in our Report that "[r]andom case assignments are precluded by the district's lack of jury-capable courtrooms."[22] That is, the Fargo courthouse could not have hosted two simultaneous jury trials because it had only one jury-capable courtroom.

Now, with the pending completion of the new annex to the courthouse in Fargo, and with it the creation of additional courtrooms, a random case assignment system (no longer based on the physical point of filing) becomes possible.[23] While randomly dividing the entire District's caseload would require a near-constant commute between courthouses for the judges, assigning every third or fourth case filed in the eastern divisions to judges in the western divisions (and vice versa) might be feasible. In theory, under this random system, the district and magistrate judge team initially assigned to the action would "follow the case" and hold court at the point of filing.

In assessing this new method of case allocation, the Advisory Group explored the potential disadvantages—and offsetting considerations—of the current assignment system. First, under the present scheme, if cases "fall where they are filed," the eastern and western divisions might develop uneven workloads. While this potential certainly exists, the Dis-

21. *Report, supra* note 1, at 771.

22. *Report, supra* note 1, at 753.

23. The Bismarck courthouse is also being renovated. Current courtroom number three will be used as a video conferencing room and the Clerk's Office will expand its automation room. Vacated first floor space will be made into a jury-capable courtroom, chambers for the Magistrate Judge and for a visiting judicial officer, and an office for the U.S. Probation Office, which will move from the fourth floor.

trict's actual caseload distribution, as an historical matter, has not proven to be a significant problem. When imbalances have arisen, the Court has achieved a more equitable allotment by special order.[24] It can continue to do so.

Second is the opportunity for judge shopping. In accordance with the general rule of geography, counsel know that cases filed in the eastern divisions will be handled by Judge Webb and Magistrate Judge Klein, while those filed in the western divisions will be handled by Judge Conmy and Magistrate Judge Kautzmann. While there is nothing inherently wrong with this predictability, its full realization is nonetheless mitigated by the fact that counsel will sometimes choose the convenience and cost-effectiveness of their local courthouse over the personality preferences that might come with the distant courthouse.

Further, there are distinct disadvantages to the proposed random assignment system. As noted above, if judges follow their cases, there will be significant time lost in travel (down "windshield time") by court personnel, not to mention the inefficiencies and inconveniences of operating out of two chambers for the same judge, of scheduling across the state and juggling the judges' availability, of ensuring that the case file is where it needs to be, and of processing and paying for lodging and meal expenses. Moreover, if the judges do not follow their cases, then counsel, clients, and witnesses will have to travel and may be subject to the same or similar hardships. The length and severity of North Dakota winters only intensify these concerns.

Accordingly, the Advisory Group recommends against the Court's adoption of a random case assignment system. The Group strongly suggests that assignments across east-west division lines be done only to alleviate substantial caseload imbalances that would cause inordinate cost and delay in processing the District's caseload. The Group advises, at best, cautious use of random assignments only when absolutely necessary to equalize workload (or to accommodate recusals). The extra cost and delay—for either the Court or counsel—that would result from the commuting, administrative difficulties, and lodging requirements occasioned by "across the state" assignments weigh in strongly against the change, particularly when the advantages of the random method seem meager.

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24. *See Report, supra* note 1, at 799-800 (describing the Rolette County reassignment).

C. The Future of the CJRA Plan

The core provisions of the CJRA sunset on December 1, 1997.[25] In light of the Act's expiration, the Administrative Office of the United States Courts has alerted the federal district courts "that if their plans were implemented pursuant to this legislation alone, rather than through a court order or local rule, the authority for the plans will sunset with the Act."[26] In this connection, the Advisory Group urges the Court to re-confirm the Plan's authority beyond the Act's expiration and to give its provisions greater visibility in this District. To assist the Court in this endeavor, the Advisory Group has reviewed the District's Plan, provision by provision, including the first and second amendments adopted by the Court, and summarizes below what action, if any, the Court might take to re-establish the eleven basic Plan provisions.

In particular, the Advisory Group respectfully recommends three action steps. First, Plan provisions primarily directed towards the Court's internal housekeeping procedures and aspirational benchmarks should be included in a special Administrative Order of the Court. Second, provisions directed towards the Court's pretrial case management procedures should be included in a special Case Management Order to be drafted and entered by the magistrate judges. Third, provisions primarily directed towards the practice of lawyers before the Court should be incorporated into the District's Local Rules. Fortunately, as shown below, some of these Local Rule changes have already taken place. In addition, several other Plan provisions have already been achieved or are without need of further implementation.

If the Court adopts the special Administrative and Case Management Orders, the Advisory Group also recommends that the Plan provisions incorporated, including any of their amendments, be restated in full. The footnotes provided below within each provision reference their original sources to facilitate drafting in this fashion. This consolidation will eliminate the need to reference the underlying Plan or amendments, will insure that all Plan provisions not contained in the Local Rules will be collected, in their entirety, in one of two places, and will make those provisions available to counsel in an easy-to-reference format.

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25. *See supra* note 3.

26. Memorandum from Leonidas Ralph Mecham, Director, Administrative Office of the U.S. Courts, Attachment at 1 (August 28, 1997) (concerning Sunset of the Civil Justice Reform Act of 1990).

1. **Differentiated Case Management.** This provision, because it addresses the Court's management, scheduling, and tracking of civil cases, is essentially a housekeeping concern and should be included in the Court's Administrative Order.[27]

2. **Early and Ongoing Control of the Pretrial Process.**

Firm Trial Dates Set Early at the Rule 16(b) Scheduling Conference. The provision for firm and early-set trial dates, the recognized heart of the Plan, should be included in Local Rule 16.1 governing civil case management.[28] If the Court agrees, upon adoption of the Plan's third amendment, the Clerk of Court should initiate the formal administrative process for public comment on this new subsection (b) of Rule 16.1:

> (b) TRIAL AND FINAL PRETRIAL CONFERENCE DATES
>
> (1) The trial and final pretrial conference dates for each non-exempt civil case shall be set at the Rule 16(b) Scheduling Conference, with trial, when practicable, to take place within thirty (30) days or so after the final pretrial conference. Both the trial and final pretrial conference dates shall be firm once set, subject only to extraordinary cause exceptions within the Court's discretion and to criminal docket demands.
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> (2) To facilitate the Court's early setting of the trial and final pretrial conference dates, counsel shall meet and confer at least seven (7) days in advance of the Rule 16(b) Scheduling Conference so that their proposed scheduling/discovery plan can be presented to the Court at least two (2) working days before that conference.

In addition, the Court's Administrative Order should also direct the Clerk's Office to keep track of trial continuances (including those requested and denied), the reasons for the continuance, and the length of time granted.[29]

Eighteen-Month Benchmark for Trials. The Court's Administrative Order should include the eighteen-month benchmark for calendaring

27. *See Plan, supra* note 2, at 862-63.
28. *Plan, supra* note 2, at 863-64.
29. *Second Amendment to the Plan, supra* note 2, at 856.

civil trials, starting from the date of filing, with the exceptions noted.[30] The order should also restate the Court's related commitment (1) to finding another judge to try civil cases preempted from trial by more pressing criminal cases[31] and (2) to reset the preempted case for trial "on a priority basis at the earliest possible date within ninety days of the original date."[32] Similarly, the Case Management Order should restate the Court's commitment (3) to setting dispositive motion deadlines, when feasible, "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"[33] and (4) to considering this minimum "in selecting the trial date and in approving the discovery deadlines proposed by counsel" at the Rule 16(b) Scheduling Conference.[34]

The Intermediate Status Conference. This provision as amended, allowing for a status conference between the Rule 16(b) Scheduling Conference and the Final Pretrial Conference when necessary or appropriate,[35] should be included in the Case Management Order.

Joint Jury Instructions and Verdict Form. The part of this provision requiring joint discussion and preparation of jury instructions has already been incorporated into Local Rule 47.1CV(F).[36] Accordingly, no further action by the Court is necessary. However, a related provision, from the second Plan amendment, requiring joint discussion and presentation of the verdict form[37] has yet to be incorporated into that Rule. The second Plan amendment contains the Court-approved text of the revision.[38] As stated in that amendment, the Clerk of Court, as soon as practicable, should initiate the formal administrative process for public comment on this change.

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30. *Plan, supra* note 2, at 864. The Advisory Group considered incorporation of this provision in Local Rule 16.1 because of the critical role counsel plays in ensuring that a case is promptly tried. However, because the benchmark is more a matter of court policy than a rule of practice, the Group recommended its inclusion in the Administrative Order.

31. *Plan, supra* note 2, at 864.

32. *Plan, supra* note 2, at 864.

33. *Second Amendment to the Plan, supra* note 2, at 856-57.

34. *Second Amendment to the Plan, supra* note 2, at 857.

35. *Plan, supra* note 2, at 864; *First Amendment to the Plan, supra* note 2, at 907.

36. *See Plan, supra* note 2, at 865.

37. *Second Amendment to the Plan, supra* note 2, at 857.

38. *Second Amendment to the Plan, supra* note 2, at 857.

Sixty-Day Benchmark for Motions, Bench Trials, and Bankruptcy Appeals. The Court's Administrative Order should include the sixty-day benchmark for disposition of all motions, bench trials, and bankruptcy appeals.[39] The Order should also direct the Clerk's Office to continue preparation of the motions status report as described in the second amendment.[40]

3. **Pretrial Monitoring of Complex Cases Through Discovery-Case Management Conferences.** The most important aspect of this provision is the Court's express commitment to more active case management by the district judges in complex cases and the Court's corresponding request that the Bar "inform the Court of cases which might benefit from the earlier and active involvement of the Article III judges."[41] That commitment and request should be incorporated in the Case Management Order.

4. **Voluntary Information Exchange and Cooperative Discovery Devices.** This amended provision, which called for revisions to the Court's Rule 16(b) Scheduling/Discovery order and Sample Scheduling/Discovery Plan in order to clarify and emphasize the operation of Rule 26(a)(1) initial disclosures and the Rule 26(f) conference, has already been implemented. However, additional explanation of Rule 26(a)(1), particularly its "inherent flexibility,"[42] should also be included in the Case Management Order. In addition, if the Court adopts the Advisory Group's proposed third Plan amendment, the Plan would then include a similar endorsement of Rule 26(a)(2)'s flexibility concerning expert disclosures. This provision should also be included in the Case Management Order.

5. **Good Faith Certifications for Discovery Motions.** This provision, requiring that counsel "actually confer" in attempting to resolve discovery disputes before seeking court intervention,[43] has already been incorporated in Local Rule 16.1(B)(4). Accordingly, no further action by the Court is necessary to implement this Plan provision.

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39. *Plan, supra* note 2, at 865; *First Amendment to the Plan, supra* note 2, at 907; *Second Amendment to the Plan, supra* note 2, at 857-58.

40. *Second Amendment to the Plan, supra* note 2, at 858.

41. *Second Amendment to the Plan, supra* note 2, at 858.

42. *Second Amendment to the Plan, supra* note 2, at 858.

43. *Plan, supra* note 2, at 867.

6. **Alternative Dispute Resolution.** The Case Management Order should include a statement encouraging counsel and clients to voluntarily explore the feasibility of participating in ADR at an early stage of the case.[44] In addition, if the Court adopts the Advisory Group's proposed third Plan amendment, the Plan would then include a direction for increased pre-settlement conference or pre-neutral evaluation communication, in appropriate cases, between the Court and counsel about the ADR schedule. This provision should also be included in the Case Management Order.

7. **Extensive Utilization of the Magistrate Judge.** Given the Court's longstanding commitment to the extensive use of the magistrate judges in civil case dispositions, there is nothing further about this provision to incorporate or implement.

8. **The Need for a Second Full Time Magistrate Judge.** With the October 1, 1996 upgrade of Magistrate Judge Dwight Kautzmann's position to full-time, this need has been met. Accordingly, no further action by the Court is necessary.

9. **Division Boundaries.** This provision's question concerning realignment of the District's division boundaries to equalize the District's caseload between the eastern and western divisions has already been referred by the Court to the Federal Practice Committee.[45] Accordingly, no further action by the Court is necessary.

10. **Resources for the Judiciary.** This provision is a policy statement from the Court concerning the need for Congress to fund CJRA activities and court-appointed experts.[46] Accordingly, no further action by the Court is necessary.

11. **Taxation of Costs.** This provision, requiring revisions to the Court's method of taxing costs allowed to the prevailing party,[47] has already been incorporated into Local Rule 54.1(A)-(B). Accordingly, no further action by the Court is necessary.

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44. *Plan, supra* note 2, at 867.
45. *Plan, supra* note 2, at 868.
46. *Plan, supra* note 2, at 868; *Second Amendment to the Plan, supra* note 2, at 859-60.
47. *Plan, supra* note 2, at 868-71.

D. The Future of the CJRA Advisory Group

In its final report on the CJRA, the Judicial Conference stated:

> [The] advisory group process proved to be one of the most beneficial aspects of the [Act] by involving litigants and members of the bar in the administration of justice. . . .
>
> . . . [T]he Conference recommends that the district courts continue to use advisory groups to assess their dockets and propose recommendations for reducing cost and delay; that the courts, in consultation with the advisory groups, continue to perform regular assessments; and that Congress provide additional and adequate funding to continue the advisory group process.[48]

We second this recommendation. The CJRA created a unique "advisor system" for the federal district courts by giving counsel and their clients a direct voice in court administration. This reform channel has worked to enrich both the procedures and products of civil case disposition in this District. The Court and its advisors have gained valuable insights about each other's problems and perspectives, including a better grasp of the challenges confronting all camps in balancing fair with efficient adjudication. These insights have increased mutual understanding and respect—both predicates for true change.

The advantages of this working partnership should not be lost with the Act's expiration. Accordingly, the Advisory Group recommends that the Federal Practice Committee should take on the mission of the current Advisory Group at the CJRA's expiration. We respectfully suggest that the Federal Practice Committee's general charge be expanded to include the consultant function that the Advisory Group has provided for the Court. This will keep alive—and institutionalize—the beneficial dialogue among system participants prompted by the CJRA and ensure a continuing forum for the review and discussion of the Court's civil case management procedures. In addition, the Group encourages the Court to appoint Advisory Group members to the expanded Federal Practice Committee in order to provide continuity of work and a smooth transition.

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48. JUDICIAL CONFERENCE OF THE U.S., *supra* note 6, at 19.

For this merger to succeed, it is essential that the Court reprise the vital role it has played in the Advisory Group process. The Group's effectiveness in good part stemmed from the Court's invaluable contribution to civil docket assessment, especially its active participation in—indeed, leadership of—the Group's work and its willingness to dedicate Court time and resources to the CJRA enterprise.

Accordingly, the Advisory Group urges the Court to support the expanded Federal Practice Committee in its new role as vigorously as it supported the Advisory Group, including the continued provision of staffing for the Committee, of reports about the Court's compliance with pertinent Plan provisions, and of regular funding. In this vein, the Advisory Group also recommends that Congress, in the original spirit of the CJRA, provide the money necessary to fund the Advisory Group's "successor" in order to preserve the Group's unique consultant function beyond the CJRA's expiration.

IV. CONCLUSION

As this assessment shows, the CJRA Plan for this District has withstood the test of time. While fine tuning has been necessary, the core provisions of the Plan, revolving around the imperative of firm trial dates set early in the pretrial process, have weathered almost four years of experience and experimentation with dignity. A tribute to the Plan's success is the Advisory Group's recommendation that the Court reconfirm its provisions to increase their visibility and affirm their continued viability despite the CJRA's expiration.

By these praises, however, the Advisory Group does not suggest that cost and delay concerns have evaporated in our District. They have not. More needs to be done. The problem of incivility must be confronted. Purely random case assignments should be avoided. And the Court must be ever vigilant to ensure the efficiencies that we have come to expect from it.

On the eve of the CJRA's sunset, the Advisory Group wishes to thank the Court for the privilege of serving it and working together to improve the administration of justice. The Group also commends the Court, its staff, and the lawyers who practice before it for their continuous efforts to give CJRA principles life in this District—with a word of special appreciation for the Group's Chair who played a pivotal

role in making CJRA reform a reality. The Act's expiration, far from signaling an end to the battle against inordinate cost and delay in civil litigation, merely heralds the start of a renewed effort to maintain the strides made under the CJRA and to reach for even greater gains on the morrow.

Respectfully Submitted,

The Civil Justice Reform Act Advisory
Group for the District of North Dakota