North Dakota Law Review

Volume 69 | Number 4 Article 1

1993

Report of the Civil Justice Reform Act Advisory Group

REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP

United States District Court

THE DISTRICT OF NORTH DAKOTA

September 29, 1993

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DISTRICT OF NORTH DAKOTA

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I. INTRODUCTION

In 1990, Congress passed the Civil Justice Reform Act[1] (CJRA or the Act) to launch a coordinated, nationwide assault on the spiraling costs and delays of civil litigation in the federal trial courts. The Act requires each federal district court to perform an intensive self-scrutiny and then to adopt "a civil justice expense and delay reduction plan" to address the problems uncovered.[2] Congress commissioned an advisory group of diverse membership for each district to assist the court in the plan's formulation.[3] The expense and delay reduction plan must work "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."[4] In this way, the CJRA is a vivid reminder that the fundamental promises of the first rule of civil procedure "to secure the just, speedy, and inexpensive determination of every action"[5] have been threatened by inordinate cost and delay in the federal judicial system.

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.[6] The Act advocates "reform from the 'bottom-up' "[7] and calls upon the spectrum of system users, administrators, and creators to contribute to the system's betterment.

The federal bench and bar in this State have done a commendable job in attempting to minimize the twin plagues of cost and delay. The Advisory Group applauds the high quality of work done by and within the North Dakota federal trial courts. Justice is certainly served here. Improvement, however, is possible. The CJRA presents a unique opportunity for that reassessment and

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1. 28 U.S.C. §§ 471-82 (1993) (enacted December 1, 1990; amended by Pub. L. 102-572, § 505 (Oct. 29, 1992)); The Judicial Improvements Act of 1990, Title I, Pub. L. No. 101-650, §§ 101-106, 104 Stat. 5089 (1990). For a congressional perspective on the CJRA's development and meaning, see S. REP. NO. 101-416, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 6802-6860.

2. 28 U.S.C. § 471.

3. *Id.* at § 472(a) & (b); § 478(a) & (b).

4. *Id.* at § 471.

5. FED. R. CIV. P. 1.

6. Pub. L. No. 101-650, § 102(2) & (3); *see also* 28 U.S.C. § 472(c)(3).

7. S. REP. No. 101-416, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 6802, 6817; *see also* Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 109-10 (1991).

reform both within and without the courtroom. The challenge will be to achieve the delicate balance of change and continuity in solving the problems of avoidable cost and delay within a system of just adjudication. To this end, the Advisory Group for the District of North Dakota submits this Report to the District Court to support adoption of a Civil Justice Expense and Delay Reduction Plan containing the Advisory Group recommendations set forth in this Report.

In summary, the Advisory Group has identified ten principal causes of avoidable cost and delay in this District: (1) the heavy criminal caseload and the statutory priority given criminal trials over civil trials, (2) the setting of civil trial dates late in the pretrial process, (3) the instability of civil trial dates, and to a lesser extent, discovery and scheduling deadlines, (4) the length of time between an action's filing and trial, including the lag between the final pretrial conference and the start of trial, (5) the wait for pretrial motion decisions, (6) the need to narrow issues for discovery and trial, (7) the use and abuse of expert witnesses, (8) extensive discovery, (9) the need for an additional judicial officer in the western part of the State to assist in civil dispositions, and (10) important miscellaneous procedures, such as the misallocation of cases between the eastern and western divisions and the current method for taxing final judgment costs.

All of these causes contribute to avoidable cost and delay. Solving one or two of these problems in isolation will not necessarily work a noticeable change. All must be addressed. Accordingly, the Advisory Group's Report and recommendations and the implementing Expense and Delay Reduction Plan for this District must address each of these principal causes and require significant contributions from all litigation participants in the common battle against avoidable cost and delay in civil adjudications.

A. GUIDING PRINCIPLES

In developing this Report and proposed Plan, the Advisory Group was mindful of several guiding principles:

Spirit of cooperation and civility. There already exists in this District an exemplary spirit of cooperation between the federal bench and bar. In addition, the professional trust quotient and level of civility between lawyers is relatively high given the small size of North Dakota's legal community. The Advisory Group

thought it important to make recommendations that preserved and advanced this level of cooperation and collegiality.

Reform as a cooperative and evolving venture. In keeping with this spirit, the Advisory Group viewed civil justice reform as a joint venture. 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. Thus, the Advisory Group does not pretend to offer—nor does the CJRA require—a plan which removes, once and for all, the obstacles impeding just and efficient civil case processing. The Advisory Group *does* offer a plan which suggests significant steps to be taken by all litigation participants in the evolutionary process of reform.

Vigorous, but respectful, case management. The Advisory Group interpreted the CJRA's call for "vigorous civil case management"[8] to be nonetheless respectful of counsels' responsibility to zealously represent their clients within appropriate professional bounds. Thus, in its recommendations, the Advisory Group attempted to accommodate lawyer prerogative within the congressional mandate to reduce cost, delay, and injustice in civil litigation.

The justice mandate. Although the CJRA emphasizes the cost and delay reduction aspects of case management, the Advisory Group consciously strove to keep an overall eye on the justice mandate of both the CJRA and the Federal Rules of Civil Procedure. Because handling cases expeditiously and inexpensively does not necessarily mean handling them justly, the Advisory Group sought whenever possible to make recommendations that advanced all three goals simultaneously and certainly, in every case, that comported with notions of basic fairness.[9]

B. BASIC STATUTORY REQUIREMENTS OF THE CIVIL JUSTICE REFORM ACT

Essentially, the CJRA directs the advisory group (1) to identify the principal causes of cost and delay in civil case processing by assessing the district's docket, the court's procedures, the litigation

8. Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing A Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 174 (1992).

9. *See id.* at 199.

practices of lawyers and litigants, and the impact of new federal laws, (2) to make recommendations to reduce cost and delay, to be adopted by the court in the form of a district-wide plan of action, and (3) to consult with the court in monitoring the plan's effectiveness. In particular, § 472(b) of the Act requires the Advisory Group to "submit to the court a report, which shall be made available to the public and which shall" provide:

1. An assessment of (a) the condition of the civil and criminal dockets,[10] (b) trends in case filings and demands on court resources,[11] (c) the principal causes of cost and delay in civil litigation (including court procedures and litigation practices),[12] and (d) the extent to which costs and delays could be reduced by better assessment of the impact of new legislation on the courts;[13]
2. The basis for developing a plan or selecting a model plan;[14]
3. The recommendations to reduce expense and delay;[15] and
4. An explanation of compliance with § 473 requirements.[16]

This last § 472(b) requirement provides the plan's centerpiece: While the CJRA leaves the court considerable discretion in its plan design, § 473 lists six principles (in subsection a) and six techniques (in subsection b) of litigation management that the court, in consultation with the advisory group, *must* consider and may include in the plan. We summarize them here because of their importance:

The Six Principles of § 473(a)

1. Differentiated case management (§ 473(a)(1))
2. Early and ongoing control of the pretrial process by involving a judicial officer in planning case progress and controlling discovery (§ 473(a)(2))
3. Careful and deliberate monitoring through discovery-case management conferences of complex and other appropriate cases (§ 473(a)(3))

10. *See* 28 U.S.C. § 472(b)(1) & (c)(1)(A).
11. *See id.* at § 472(b)(1) & (c)(1)(B).
12. *See id.* at § 472(b)(1) & (c)(1)(C).
13. *See id.* at § 472(b)(1) & (c)(1)(D).
14. *Id.* at § 472(b)(2).
15. 28 U.S.C. § 472(b)(3).
16. *Id.* at § 472(b)(4).

4. Encouragement of voluntary information exchange and cooperative discovery devices (§ 473(a)(4))
5. Requiring counsel's certification of good faith efforts to reach agreement with the adversary before the court will consider discovery motions (§ 473(a)(5))
6. Authorization to refer appropriate cases to alternative dispute resolution programs (§ 473(a)(6))

The Six Techniques of § 473(b)

1. A requirement that counsel jointly present a discovery-case management plan at the initial pretrial conference or explain their failure to do so (§ 473(b)(1))
2. A requirement that each party be represented at each pretrial conference by counsel who has the authority to bind that party (§ 473(b)(2))
3. A co-signature requirement that all requests for discovery or trial date extensions be signed by both counsel and client (§ 473(b)(3))
4. Establishment of a neutral evaluation program for a case presentation to a neutral court representative selected by the court at a nonbinding conference early in the case (§ 473(b)(4))
5. A requirement, upon court notice, that representatives of the parties with binding settlement authority be present or available by phone during any settlement conferences (§ 473(b)(5))
6. Such other features as the court considers appropriate (§ 473(b)(6))

Each § 473 principle and technique has been considered by the Advisory Group and will be discussed in connection with the recommendations made in Part IV of this Report.

The CJRA also requires the Advisory Group, in developing its recommendations, to "take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys"[17] and to "ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts."[18] The Act fur-

17. *Id.* at § 472(c)(2).
18. *Id.* at § 472(c)(3). *See also* Pub. L. No. 101-650, § 102(3), stating that "[t]he solutions

ther requires the court, in consultation with the advisory group, to annually assess the docket's post-plan condition to determine whether additional actions are necessary to improve the court's litigation management practices.[19]

Needless to say, the CJRA poses "daunting tasks"[20] for the courts and advisory groups, particularly because of the limited resources available to the court in making cost and delay assessments. Nonetheless, the collective experience and expertise of Advisory Group members, coupled with the able assistance of the Clerk's Office in providing the docket data underlying this Report and the information gathered from the bench, bar, and volunteer consultants, has provided a strong foundation for the recommendations made in this Report.

The Advisory Group thought it could best serve the public interest by crafting a "personalized" Expense and Delay Reduction Plan to meet the particular concerns of North Dakota federal practice instead of selecting a model plan.[21] This maximizes accommodation of local solutions and strengths within the national standards set forth in the Act. Accordingly, the Advisory Group solidly endorses both the Report and Plan as presented to the Court.[22] The entire group (Appendix A contains biographical sketches for the current committee) reviewed and discussed at length drafts of each document prepared by the Reporter. The final versions represent the unanimous agreement of all Advisory Group members about this Report, each of its recommendations, and the Plan proffered to the Court.

To ensure that the Report and Plan are readily available to the bar and public, the entire Report, with appendices, will be published in the NORTH DAKOTA LAW REVIEW (which is routinely sent to every member of the North Dakota bar) and will be available, free of charge, in reprint form from the Clerk of Court. The Plan is free-standing. Read alone, it should explain in sufficient

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to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch."

19. 28 U.S.C. § 475; *see also* Pub. L. No. 101-650, § 102(6) (noting the need for "ongoing consultation and communication" about docket management).

20. Administrative Office of the U. S. Courts & the Federal Judicial Center, GUIDANCE TO ADVISORY GROUPS MEMORANDUM at 2, Feb. 28, 1991.

21. *See* 28 U.S.C. § 472(b)(2), which requires the advisory group to include in its report the basis for its recommendation that the Court develop a plan or select a model plan. In connection with this choice, the Advisory Group reviewed the October 1992 Model Plan issued by the Judicial Conference.

22. The Advisory Group's proposed plan, presented to the Court with this Report, is on file with the Court.

detail the new procedures to be adopted by the Court.[23] Also, the Plan provisions and Report recommendations are both organized under the same eleven subject headings so that the two documents can be easily cross-referenced.

C. DISTRICT STATUS UNDER THE ACT

The District of North Dakota is neither an Early Implementation, Pilot, nor Demonstration District. Accordingly, this Report and accompanying Plan have been completed in accordance with the Act's December 1, 1993 implementation deadline.[24]

II. DESCRIPTION OF THE DISTRICT OF NORTH DAKOTA

A. DISTRICT DEMOGRAPHICS

The District of North Dakota, co-extensive with the State of North Dakota, encompasses 68,994 square miles.[25] It borders the Canadian provinces of Manitoba and Saskatchewan to the north, South Dakota to the south, Montana to the west, and Minnesota to the east. A recent census lists the state population as 638,800.[26] The four major cities, each with federal courthouses, are Fargo, Bismarck, Grand Forks, and Minot.

Other notable federal presence in North Dakota includes two major United States Air Force bases in Grand Forks and Minot respectively and U.S. Customs stations at the international border shared with Canada. The State also has four American Indian reservations: the Devils Lake Sioux Reservation, the Fort Berthold Reservation, the Standing Rock Reservation, and the Turtle Mountain Reservation. A fifth, South Dakota's Sisseton-Wahpeton Reservation, extends into North Dakota from the south.

The District, which is roughly rectangular in shape, has four divisions. As shown by the map below, two comprise the eastern portion of the State (*i.e.*, the Northeastern and Southeastern divisions) and two comprise the western portion of the State (*i.e.*, the Northwestern and Southwestern divisions).

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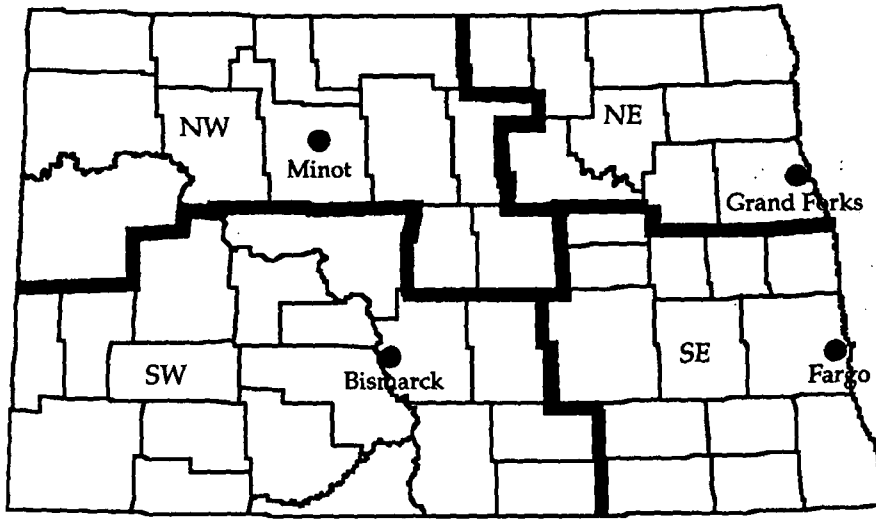
23. The Court has decided to adopt the Plan by general court order.

24. *See* Pub. L. No. 101-650, § 103(b).

25. Administrative Office of the U. S. Courts, Magistrate Judge Survey for the District of North Dakota, Court Profile Attachment (June 1993).

26. *Id.*



The District of North Dakota
With Division and County Lines

Only the Southeastern division, which holds Fargo, and the Southwestern division, which holds Bismarck, are permanently staffed. Chief Judge Rodney S. Webb is located in Fargo, the state's most populous city. Judge Patrick A. Conmy is situated 200 miles to the west, in Bismarck, the state capital. Court facilities for the unstaffed Northeastern division are in Grand Forks, 80 miles to the north of Fargo, and are served by Chief Judge Webb and clerk personnel in Fargo. Court facilities for the unstaffed Northwestern division are in Minot, 112 miles to the north of Bismarck, and are served by Judge Conmy and clerk personnel in Bismarck.

B. ARTICLE III JUDGES

1. *Assignments*

Chief Judge Webb and Judge Conmy are the district's two authorized active Article III judges. Three Senior Judges serve the district as well. Senior Judge Paul Benson resides in Fargo and carries both civil and criminal cases. He occasionally accepts an out-of-district assignment. Senior Judge Bruce M. Van Sickle resides in Bismarck. He carries a civil caseload and was responsible for the one hundred sixty-seven (167) personal injury asbestos cases filed in this District before they were transferred by July 29, 1991 order of the Judicial Panel for MultiDistrict Litigation for consolidated pretrial proceedings to the Eastern District of Penn-

sylvania. Judge Van Sickle routinely accepts out-of-district and out-of-circuit assignments. Senior Judge Ronald Davies resides in Fargo and has no assigned caseload.

Case assignments in this District are historically driven by geography. All civil and criminal cases from both eastern divisions are assigned to the district judge in Fargo. Correspondingly, all civil and criminal cases from both western divisions are assigned to the district judge in Bismarck. Random case assignments are precluded by the district's lack of jury-capable courtrooms.

2. *Basic Caseload Statistics*

Official statistics from the Administrative Office provide a starting point for understanding the condition of the dockets in this District. As this chart shows, case filing totals for the last five years have been without dramatic variation over the period:

Total Case Filings 1988-92
District of North Dakota[27]

1988 Filings	1989 Filings	1990 Filings	1991 Filings	1992 Filings
533	692	606	701	597

The individual Article III judgeship profile for 1992 shows other basic caseload statistics in conjunction with national averages:

1992 Per Judgeship Profile
District of North Dakota[28]

	District	National Averages	Standing
Total Cases Filed	299	403	81
Civil	226	350	84
Felony	73	53	22
Total Weighted Caseload	313	405	81
Total Cases Pending	232	402	87
Total Cases Terminated	372	416	59
Total Trials Completed	30	31	48

These statistics suggest several conclusions: While the District's overall case filings—notably in the civil area—are comparatively light, the criminal filings are comparatively heavy. In addition, the total number of case terminations and (especially) the total trials completed are much closer to national averages. The

27. Administrative Office of the U.S. Courts, Magistrate Judge Survey for the District of North Dakota 3 (June 1993) (based on 12 month statistical year ending June 30th).
28. *Id.* at 2.

criminal and civil dockets are explored in more detail in Parts III(A), (B), and (D)(4)(a) of this Report.

C. MAGISTRATE JUDGES

The District has four authorized magistrate judge positions: one full-time position headquartered in Fargo and three part-time positions headquartered in Bismarck, Minot, and Grand Forks, respectively. The Grand Forks position is approximately one-quarter (1/4) time. The Bismarck and Minot positions are about one-fifth (1/5) time.

Each of the magistrate judges handles the preliminary felony and misdemeanor proceedings[29] arising in his or her division of the District. In addition, each magistrate judge handles misdemeanor trials upon consent of the defendant.[30] By local rule the court has authorized a full-time or half-time magistrate judge to "exercise all powers and perform all duties in civil matters consistent with the Constitution and laws of the United States."[31] This delegation encompasses the full range of duties authorized by the Magistrates Act[32] and represents the court's commitment to extensive use of magistrate judges in processing the civil docket.

Because the criminal duties in the divisions with part-time magistrate judges consume all their time within their authorized salary levels, the district judges have not extended civil case duties to those positions. The full-time magistrate judge covers the civil case duties for the entire District. The large geographical area of the District, together with its often inclement weather, provide some built-in impediments and inefficiencies in managing the civil caseload. Extensive use of the telephone for case management conferences and discovery motion hearings helps alleviate this problem, but as described in more detail later in this Report, geography is nonetheless an ever-present factor.

The district judges employ an informal method of assigning civil case duties to the magistrate judge. Most case management functions and certain motions are automatically handled by the magistrate judge without a specific order of reference.

The first judicial contact with a civil case usually occurs through the full-time magistrate judge's Rule 16(b) Scheduling

29. See LOCAL RULE 28(B) for the District of North Dakota for a delineation of the preliminary criminal proceedings routinely handled by the magistrate judges.

30. *See* FED.R.CRIM.P. 58(a)(3).

31. LOCAL RULE 28(C).

32. 28 U.S.C. §§ 631-39 (1993).

Conference. The magistrate judge then handles additional discovery or status conferences as needed, and routinely handles final pretrial conferences and settlement conferences in most civil cases. Along the way, the magistrate judge automatically handles all non-dispositive motions, such as motions to amend pleadings and discovery motions, and occasionally handles case dispositive motions, such as motions to dismiss or for summary judgment by report and recommendation, upon request of the presiding judge in the case.

In addition, the full-time magistrate judge is authorized to conduct civil trials upon consent of the parties.[33] This function has gradually increased until, at present, civil trials consume a significant portion of the full-time magistrate judge's time. The court's modification of the Rule 16(b) Scheduling Conference format in early 1993 to require the parties to consider consenting to proceed before the magistrate caused a sharp increase in the number of consent cases. As of September 1993, thirty (30) civil cases are scheduled for trial before the magistrate judge upon consent of the parties. This increase is expected to continue.

D. COURT SUPPORT AND RESOURCES

1. *The Clerk's Office*

a. Staff

The Clerk's Office is currently staffed by sixteen (16) employees (including the Clerk and Chief Deputy). The headquarters office, with ten (10) staff members, is located in Bismarck, the center of most of the District's administrative functions. The divisional office in Fargo is staffed by six (6) employees, including a Deputy In Charge. Both offices are adequately staffed, but the Court's intensification of case management functions and the numerous administrative projects fostered by the CJRA and directed to the Clerk's Office, have created additional, and often time-consuming, burdens on the staff.

b. Automation

Civil docketing in the district is fully automated. Criminal docket automation is scheduled for completion in the fall of 1993. The computer servers for the district's docketing and financial operations are maintained in Bismarck. Each deputy clerk has a

33. 28 U.S.C. § 636(c); FED.R.CIV. P. 73; LOCAL RULE 28(C)(7).

computer at his or her work station. Training is on-going and several court forms are now being generated through the automated system. Already in place are computers in Fargo and Bismarck permitting on-site public access to the civil docket. Installation of computer equipment permitting off-site public access is expected within the year.

The District was a pilot court for the first voice-activated computer system in the federal courts. This system enabled the Chief Deputy, a quadriplegic, to interface with all office automation programs. The District has also been a pilot court for the CFS-II automated financial system. The Clerk's Office supports the automated financial operation of the Bankruptcy Court and the Probation Office.

2. *Court Facilities*

The western portion of the District has three jury-capable courtrooms. The Bismarck courthouse offers 15,680 square feet of space, including two jury-capable courtrooms, two chambers, one combination Grand Jury/Magistrate Judge courtroom (without jury facilities), one visiting judge's chambers, and the Clerk's Office. The Minot courthouse is an unstaffed facility of 4,435 square feet. It includes one jury-capable courtroom, one chambers, and small offices for the part-time Magistrate Judge and the Clerk.

There are only two jury-capable courtrooms in the eastern portion of the District. The Fargo courthouse offers 18,725 square feet, including one jury-capable ceremonial courtroom, chambers for an active judge, senior judge, magistrate judge, and bankruptcy judge, a bankruptcy courtroom, a small grand jury room, and separate clerks' offices for the district and bankruptcy courts. The Grand Forks courthouse is an unstaffed facility of 6,025 square feet. It includes a jury-capable courtroom, chambers, and a small Clerk's Office.

Congress has allocated $23,000,000 for construction of a new court facility in Fargo, a project the Advisory Group strongly supports. Having only one jury equipped courtroom at that location severely curtails the ability of the court to schedule matters simultaneously. The new facility will provide jury equipped courtrooms and chambers for each judicial officer as well as a visiting judge. Also, a Prospectus Development Study has been completed for the Bismarck court facility. Planned renovations will provide space

for the courtroom and chambers needs of a full-time magistrate judge as well as the visiting bankruptcy judge.

III. ASSESSMENT OF THE CRIMINAL AND CIVIL DOCKETS IN THIS DISTRICT

A true picture of North Dakota's civil dispositions and the principal causes of excessive cost and delay can only be ascertained in the broader context of the District's criminal caseload and the related impact of criminal legislation on the court's processing capacities. While the condition of the criminal and civil dockets in this District over the last five years has been relatively stable, a closer look at both caseloads reveals some important facts and trends which have affected and will continue to affect the nature and number of civil dispositions.

A. THE CRIMINAL DOCKET: CONDITION, TRENDS IN CASE FILINGS, AND DEMANDS ON COURT RESOURCES

The District's criminal caseload is relatively heavy. The judicial workload profile for the twelve month period ending September 30, 1992 ranks the District of North Dakota first (1) in the Eighth Circuit and twenty-first (21) in the nation in criminal filings per judgeship.[34] Despite this caseload, the District ranked first (1) in the Eighth Circuit and seventh (7) in the nation for median disposition time of its criminal cases.[35] Of the trials held in the district during this 12 month period, 70.6% were criminal cases.[36]

Over the last five years, as this chart shows, the criminal docket in this District has experienced gradual, although slightly uneven, growth in the total number of filings:

34. Administrative Office of the U.S. Courts, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 119 (for the twelve month period ending September 30, 1992).

35. *Id.*

36. JS-10 Monthly Report of Trials and Other Court Activity.

Criminal Caseload Trends 1988-1992
The District of North Dakota[37]

	1988	1989	1990	1991	1992
Felony Cases	109	149	159	152	145
Drugs	16	38	27	40	16
Fraud	22	16	39	31	35
Weapons/Firearms	8	10	12	11	18
Immigration	4	6	10	11	14
Other (and Transfers)	59	79	71	59	62

Even though the number of filings has not grown dramatically, the criminal docket is taking more and more judicial time to resolve. First, as noted, the district's criminal caseload is considerable. Second, the Sentencing Guidelines require additional judge time for the preparation and conduct of sentencing hearings. In particular, the court's assessment of the sentencing factors, particularly the cooperation factor (*e.g.*, the nature and extent of defendant's involvement in an offense) requires extensive study and record development, both in the courtroom and in chambers.

There is little or no discernible difference in the categories of criminal filings in the eastern and western divisions. As an historical rule, however, the number of criminal filings has been greater in the east, as illustrated by this chart:

Criminal Filings by Division for 1988-92
The District of North Dakota[38]

Year	NW	SW	NE	SE
1988	19	23	59	32
1989	38	37	61	44
1990	21	28	74	49
1991	11	33	73	46
1992	27	31	64	48
Totals	116	152	331	219

As shown, the heaviest criminal case filings emanate from the district's unstaffed Northeastern (Grand Forks) division.

37. Administrative Office of the U.S. Courts, Magistrate Judge Survey for the District of North Dakota 3 (June 1993) (based on 12 month statistical year ending June 30th).

38. This chart was compiled from the Clerk's Interoffice Monthly Report for the District of North Dakota, prepared for the judicial officers.

B. THE CIVIL DOCKET: CONDITION, TRENDS IN CASE FILINGS, AND DEMANDS ON COURT RESOURCES

As official statistics reveal, North Dakota's civil caseload appears relatively light. Administrative Office figures for the 12-month period ending September 30, 1992 show that this District ranked 77th (out of 94) in total cases filed, 80th (out of 94) in civil cases filed, and 71st (out of 94) in total weighted caseload.[39] But, for that period, only 2.1% of civil filings were more than three years old, giving the district a favorable rank of 4th in the Eighth Circuit and 15th in the nation.[40] Three year old cases have steadily declined from 1987, 1988, and 1989, when they represented 5.4%, 6.0%, and 7.0%, respectively, of civil filings.[41] The median time for disposition of civil cases in the District is now eighteen (18) months from issue to trial, placing the District sixth (6) in the Eighth Circuit and fifty-fifth (55) in the nation.[42] This median time is three months above the national average (of 15 months),[43] but it represents a decrease in this District from 27 months in 1987.[44]

As these figures suggest, the year 1987 is important to understanding the trends in civil dispositions in this District. More precisely, North Dakota's civil docket is best understood in a ten-year context and in light of criminal docket demands. During the preceding five year period from 1984 to 1987, the District suffered interruptions in available judicial personnel due to unfilled vacancies, illness, and security concerns. This created a civil backlog, particularly because any absences in a district of this small size are keenly felt. By 1987, with the vacancies filled, the illnesses past, and the security somewhat lessened, the Court was again operating at full capacity. Thus, this present five-year statistical period (1988-1992) represents the first in recent times in which the Court has worked with its entire complement of current judicial officers in place for a statistically significant time.

Even with all judicial personnel in place, the District's considerable criminal caseload and the increased demands of the sentencing guidelines have absorbed additional judicial energies, leaving less district judge time for the civil docket. Further, Speedy Trial Act strictures require the district judges to reserve

39. Administrative Office of the U.S. Courts, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 119 (for the twelve month period ending September 30, 1992).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 167 foldout.
44. *Id.* at 119.

large blocks of future time in their schedules for criminal trials. This makes calendaring civil matters much more difficult. And, occasionally, a civil trial is bumped for trial of a criminal matter in order to comport with Speedy Trial requirements. Moreover, the lack of jury-capable courtrooms in the eastern divisions limits the overall disposition capacity of the District. Thus, while the District has been making important strides in improving civil dispositions, other changes still need to be made.

Over the last five years, there have been few discernible differences in the categories of civil filings in the eastern and western divisions (*e.g.*, contract or torts). As an historical rule, the number of civil filings has been greater in the western divisions, as illustrated by this chart:

Civil Filings by Division for 1988-92
The District of North Dakota[45]

Year	NW	SW	NE	SE
1988	105	172	96	135
1989	73	186	80	122
1990	77	252	121	102
1991	95	152	83	125
1992	89	149	79	140
Totals	439	911	459	624

The western divisions lead in civil filings largely because the energy industry and the state government—both notable sources of civil litigation—are concentrated in the west. The Southwestern division, which holds Bismarck, the nerve center of state government, has the most civil filings. Over time, however, civil filings in the east may increase because of the State's shifting population from west to east.

The District has typically had a high diversity caseload. As this chart shows, diversity cases have comprised roughly 56%, 63%, 60%, 55%, and 54%, respectively, of the civil cases filed in this District within the last five years, for an average of nearly two-thirds of the civil caseload:[46]

45. This chart was compiled from the Clerk's Interoffice Monthly Report for the District of North Dakota, prepared for the judicial officers.

46. These percentages were compiled from the chart accompanying footnote 47, *infra*, by adding the number of cases in the contract, tort, and "other" categories for each year and calculating their percentage of total filings for that year.

Civil Caseload Filings By Case Category For 1988-92
The District of North Dakota[47]

	1988	1989	1990	1991	1992
Civil Cases	424	543	447	549	452
Prisoner	12	23	33	58	37
Contract	116	141	101	87	91
Tort	61	107	109	127	56
Civil Rights	19	19	17	28	46
Labor	12	6	10	6	10
Real Property	106	123	95	124	86
Forfeiture/Tax	20	15	11	20	12
Social Security	13	7	10	11	17
Copyright/Patent	5	6	4	2	2
Other	60	96	57	86	95

In this District, a number of the diversity actions are complex cases. The energy industry contract actions are generally document-intense. In addition, the contracts involved in these cases often require the court and counsel to study and resolve complicated issues of federal deregulation. Similarly, products liability cases, another special category of actions for this District, generally require substantially more—and substantially more complicated—discovery than the average civil cases. In particular, experts play central roles in these actions. Thus, both the energy industry and products liability cases not only involve complicated legal issues, but require intensive court management—two aspects which take considerable litigation time for the court and counsel. And, due to the growth of energy industries and of product offerings in this State, there is every reason to conclude that these types of cases will continue to be filed in this district.[48]

Clerk's Office Supplemental Civil Statistics. At the Advisory Group's request, the Clerk's Office undertook its own statistical survey of civil case dispositions in the District to supplement the Administrative Office statistics and to focus more specifically on the period of time from filing date until trial date. Clerk's Office representatives reviewed the civil caseload from October 1990 through May 5, 1993 (a little more than a two and a half year period) and studied two categories of cases: (1) cases tried (a total of 46) and (2) cases set for trial, but not tried because they settled

47. Administrative Office of the U.S. Courts, Magistrate Judge Survey for the District of North Dakota 3 (June 1993) (based on 12 month statistical year ending June 30th).

48. The District's asbestos cases comprise another category of complex diversity cases. In the late 1980s, these case filings surged. Since the 1991 transfer of the asbestos cases to the MultiDistrict Litigation Panel, the District has spent no judge time on them. As yet, none has returned to this Court for trial or other disposition.

or were otherwise disposed of by the court or by the parties (a total of 56). Thus, the Clerk's survey measured the average time from case filing to the case's scheduled trial date, whether or not actually tried. In each category, this average computation was done with and without the ten (10) oldest cases in that category, each of which had a peculiar history explaining its age but otherwise unfairly skewing the district's average.

Here, in summary form, are the Clerk's survey results:

Category I: Cases Tried:	46 cases
Average Time From Filing to Trial:	2.7 years
Excluding ten oldest cases (leaving 36 cases):	2.25 years
Category II: Cases Set for Trial, but Not Tried:	56 cases
Average Time From Filing to Trial Date:	2.9 years
Excluding ten oldest cases (leaving 46 cases):	2.2
Combined Case Totals (including oldest cases):	102 cases
Average Time From Filing to Trial or Trial Date:	2.5 years
Excluding twenty oldest cases (leaving 82 cases):	2.2 years

These statistics seem to show that the average disposition time from filing to trial or trial date for the 102 civil cases surveyed (including the ten oldest cases in each category) is approximately 2.5 years (or 30 months). Excluding the ten oldest cases in each category, a number of which can be justified because of their unique case biographies,[49] drops the average civil disposition time of the cases surveyed to approximately 2.2 years (or 26.4 months).

C. THE IMPACT OF NEW LEGISLATION ON THE DOCKET

Section 472(c)(1)(D) requires the Advisory Group to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." With respect to the civil docket, this District has a very high proportion of diversity cases and a relatively small diet of federal question cases. Accordingly, with the notable exception of the civil rights and banking acts, the flurry of new civil legislation and Congress's creation of new civil causes of action within the last ten to twenty years has not had a significant impact on North Dakota's docket

49. Examples of these cases include a medical malpractice action stayed for several years pending resolution of related state cases, a civil rights action delayed by an interlocutory appeal on the issue of qualified immunity, a contracts action delayed by bankruptcy proceedings, a complex products liability/wrongful death action comprised of three consolidated cases and multiple defendants, an anti-trust action with complex pretrial motions, and an extremely complex energy contract action.

and case management procedures. Congressional adjustments upward to the jurisdictional amount required to bring a diversity action under 28 U.S.C. § 1332 may affect the court's civil caseload, but probably not in dramatic ways.

On the criminal side, however, the impact assessment is radically different. The District's heavy criminal caseload—coupled with Speedy Trial Act requirements, expanded court procedures under the criminal sentencing guidelines (*e.g.*, the formal pre-sentence fact-finding process), and Congress's recent inclination to subject a growing number of wrongs to federal criminal jurisdiction—have threatened the prompt delivery of civil justice in this District. This impact is further discussed in Part III(D) below.

D. DETERMINING THE PRINCIPAL CAUSES OF COST AND DELAY IN CIVIL LITIGATION

Even with detailed information about the condition of the criminal and civil dockets, the Advisory Group found it necessary to look beyond the numbers and the legislative impact to identify the principal causes of cost and delay with greater certainty. In part this was so because the national reporting system for statistics on workload and case processing "was not specifically designed for identifying and analyzing causes of cost and delay."[50] In addition, court procedures, litigation practices, judicial resources, and the District's peculiar geography all uniquely affect the overall rate and nature of civil case dispositions in this Court.

Thus, the Advisory Group resorted to other information sources to supplement these statistics, including (1) the Court's civil case management procedures, (2) a survey of all North Dakota bar members, (3) a questionnaire to all federal judicial officers in the district and personal Advisory Group interviews of three district judges, the full-time Magistrate Judge, and the bankruptcy judge, and (4) the collective experience of the Advisory Group, which included the full-time Magistrate Judge, the Clerk of Court, the United States Attorney, the state's Attorney General, a law professor, lawyers with both plaintiff and defense backgrounds from large and small North Dakota firms in different parts of the state, and lay litigants.

With these national statistics and supplemental sources in mind, the Advisory Group was able—as the Act requires—to give

50. Administrative Office of the U.S. Courts & the Federal Judicial Center, GUIDANCE TO ADVISORY GROUPS MEMORANDUM at 7, Feb. 28, 1991. *See also id.* at 3 (noting the difficulty of identifying the principal causes of cost and delay "with precision").

due "consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation"[51] and to analyze "the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys . . . ."[52] That assessment follows.

1. *The Court's Civil Case Management Procedures*

To best assess the problems of avoidable cost and delay, it is important to understand the Court's civil case management procedures of the last several years. We describe them here in basic outline:[53]

1. After the complaint is filed and defendant responds, either by answer or Rule 12 motion, the full-time Magistrate Judge sets and conducts a Rule 16(b) Scheduling Conference, usually by telephone to save travel time and expense for out-of-town counsel and clients, with local area counsel personally appearing in the Magistrate's chambers. This typically occurs within 120 days of the complaint's filing or within 90 days of the defendant's appearance.

2. Before the Rule 16(b) Conference, counsel for each party confer in person or by telephone and jointly prepare a scheduling/discovery plan covering the items listed in the Court's sample plan (which accompanies the scheduling conference order) and any other appropriate items. The joint plan is submitted to the Magistrate Judge at least twenty-four (24) hours before the conference. The Magistrate requires that counsel who prepare the scheduling/discovery plan and handle the conference be authorized by their clients to bind them on all matters covered.

3. During the Rule 16(b) Conference, the court will address the scheduling/discovery plan items and establish a pretrial schedule, including a trial date in select cases. (Until very recently, the trial date was almost always set by the district judges after the Final Pretrial/Settlement Conference.) The plan, as ordered by the Court, typically includes deadlines for voluntary disclosure of potential fact witnesses, completion of fact discovery, identification of expert witnesses, completion of expert reports, motions to join additional parties, to amend the pleadings, or to challenge

51. 28 U.S.C. § 472(c)(1)(C).
52. 28 U.S.C. § 472(c)(2).
53. Information in this section primarily derives from the Magistrate Judge's form orders, a March 9, 1993 lecture by the Magistrate Judge to the University of North Dakota School of Law's Alternative Dispute Resolution class, and a January 30, 1991 letter from then Chief Judge Patrick A. Conmy to Advisory Group invitees.

jurisdiction or immunity, and dispositive motions. The plan also reflects counsels' agreement about the number of interrogatories to be served, including subparts (contention interrogatories are not permitted), about the estimated number of depositions to be taken, about consent to trial by the Magistrate Judge with appeal directly to the Eighth Circuit Court of Appeals, and about the parties' decision to have or forgo a settlement conference during early discovery. The Court's order will also state whether discovery shall be stayed during the pendency of jurisdictional and immunity motions and whether there shall be trial by jury. If at all possible, a trial date is set along with a corresponding date for the final pretrial/settlement conference.

4. The Magistrate Judge may hold additional conferences between the initial Rule 16(b) Scheduling Conference and the Final Pretrial/Settlement Conference. This usually happens at the parties' request in the form of a Rule 26(f) Discovery Conference or a Settlement Conference. Typically, the parties ask for settlement conferences after expert discovery enables them to more fully evaluate their cases. Even in the absence of early or other settlement conferences, the Magistrate Judge almost always explores settlement prospects at the Final Pretrial Conference.

5. For settlement conferences, the Magistrate requires the presence of lawyers who will try the case and of all parties, usually in person but occasionally by telephone, each of whom must have full authority to settle. Insurance company representatives, also with full settlement authority, must accompany insured parties or attend in their stead. Each party must submit to the Magistrate a relatively brief but candid settlement statement at least five days before the conference. These statements are for the Magistrate's exclusive use and will not be shown to other parties or become part of the case file. They must contain a specific fact (disputed and undisputed) recitation, a statement of unresolved issues, and the parties' position on settlement, including a present settlement proposal and a report on settlement efforts to date. Copies of critical documents not already part of the case file must also be attached.

6. In conducting the settlement conference, the Magistrate acts as an intermediary between the parties, seeking to facilitate settlement rather than to mandate it. She makes it clear that her role is to help resolve the case without the stress and expense of trial and asks only for good faith efforts from each side to reach this

goal. In some cases, the Magistrate Judge holds follow-up conferences, sometimes by telephone, again to save time and expense. The district judges are not involved in this settlement process. Currently, virtually all civil cases in this District are subject to the court-hosted settlement process. The few exceptions include administrative appeals, pro se prisoner civil rights petitions, and tax cases.

7. At the Final Pretrial/Settlement Conference, the Magistrate Judge puts the case into its final trial posture and makes a last determination whether the case can be settled. This conference must be attended by lawyers for all parties who are authorized to act on their behalf. At the conference, the Court and counsel typically discuss issue simplification, amendments to the pleadings, issue separation, limits on the number of expert witnesses, and other pertinent matters. The Magistrate Judge's Pretrial Order directs counsel to confer, pre-conference, in order to prepare and sign a joint Pretrial Statement and to ready the exhibits for trial. The Pretrial Order also directs counsel to submit to the Court at least a week before trial any jury instruction requests (which can be supplemented at trial for matters that cannot be reasonably anticipated) and to file any motions in limine at least thirty days before trial.

8. The Pretrial Statement, as specified by the Court, must contain an exhibit list, a list of documents for which foundations have been stipulated or waived, the uncontroverted facts, the controverted and unresolved issues, the witnesses each party expects to call (except for rebuttal) including experts, and a list of discovered information to be offered in evidence (e.g., depositions and interrogatory answers). The parties also have another opportunity to consent to trial before the Magistrate and to indicate their agreement in the Pretrial Statement.

9. At or after the Final Pretrial/Settlement Conference, the Court attempts to calendar the case for trial. The general rule has long been that the district judges set their own trial dates. They usually wait until discovery is completed and the final pretrial conference has been held before consulting with the Magistrate Judge or counsel about scheduling the trial. The Magistrate Judge also tries civil cases on consent of both parties.

In sum: The full-time Magistrate Judge is the pretrial manager of all civil cases filed in this District. Two of her more important management tools are (1) the scheduling/discovery plan,

which provides the individualized framework and timetable for the pretrial processing of each case and (2) the judicial conference, which keeps the court in close contact with counsel and case status. The Magistrate Judge routinely holds two conferences in each case—the Rule 16(b) Scheduling Conference and the Final Pretrial/Settlement Conference—and encourages the parties to hold additional Settlement Conferences and Rule 26(f) Discovery Conferences as needed.

2. *The North Dakota Attorney Survey*

An invaluable source of information for the Advisory Group has been the North Dakota Attorney Survey (contained in Appendix B). The fifteen page survey, drafted by the Advisory Group, was mailed in February 1992 to all lawyers admitted in North Dakota. Basically, the survey sought to ascertain the bar's perception of the principal causes of avoidable cost and delay and its suggestions for addressing those problems. Of the 1,174 surveys mailed, 445 were returned for a 38% response rate. Ninety-five (95) of those 445 respondents had not represented a party in a civil case in the district. That left 350 respondents who had represented a party in a federal civil case in North Dakota within the last ten years. What follows is a unscientific summary of the 350 federal court practitioner responses in three areas: (1) delay, (2) expense, and (3) case management.[54]

Delay Questions. When asked which types of cases took more than a reasonable amount of time to litigate from start to finish (Question 4a), personal injury, asbestos, and contract cases finished as the top three. Those respondents who experienced unreasonable delay (Question 4b) primarily pointed their finger at (a) the priority given the criminal docket, (b) the need for better scheduling, (c) the wait on pretrial motion decisions, (d) excessive discovery, (e) attorney inaction, and (f) the lag between the final pretrial conference and the actual start of trial. As one lawyer expressed this last point, the delay between the completion of discovery and the start of trial created a "counterproductive version of 'hurry up and wait.'" Interestingly, a good number of lawyers said that they had not experienced unreasonable delay at all.

To the question (no. 10a) about how delay might best be

54. By far, as the answers to survey Question no. 3 show, the top three categories of cases litigated in federal court were (1) personal injury, (2) contract, and (3) bankruptcy matters. Civil rights, banks and banking, and asbestos cases followed.

reduced, the first ranked response seemed to be setting and enforcing time limits on allowable discovery. Getting prompt rulings on pretrial motions was the next most common response. Other suggestions, from individual comments (Question 10b), included getting more judges in the district and utilizing the Magistrate Judge more fully for trials. A number of commentators reiterated that there was no delay problem.

Expense Questions. Personal injury, asbestos, and contract actions again finished as the top three, this time for the most unreasonably expensive cases (Question 5a). Excessive discovery or discovery seemed the most common response to the question (no. 5b) inquiring why cases generated unreasonable cost. Next were the respondents who had no complaints about excessive cost, and behind them were lawyers who thought the use of experts created unreasonable expense. To the question (no. 11a) about how unreasonable expense could best be reduced, the first ranked response seemed to be narrowing issues through conferences or other methods, followed by setting and enforcing time limits on allowable discovery, and then holding pretrial activities to a firm schedule.

Case Management Questions. In characterizing the overall level of case management by the judges of cases in this District (Question 6a & b), the most common response was "moderate," followed by "high." "Intensive" received relatively few votes. And overwhelmingly, the respondents felt that the overall level was "just right," with the next response of "not enough" lagging far behind.

Then, in evaluating certain types of case management actions that the court should or could be taking (Question 7), the most favored response was prompt rulings on pretrial motions. The next favored case management action was narrowing issues through conferences or other methods. And the third favored action was reference to the Magistrate Judge for pretrial proceedings. In this connection, the Advisory Group asked (Question 8) which factors contributed to parties and/or their lawyers' decisions not to consent to trial before the Magistrate Judge. Of those responses offered in the survey, the most common chosen was desire by a party and/or counsel to delay disposition of the case. The response with the smallest return concerned the Magistrate's gender. In the "other" category, repeat refrains included "judge-shopping" and the desire for a "real judge" often because this sig-

naled to counsel or the client that the case was more important if tried by the district judge.

3. *The Judicial Questionnaire and Judicial Officer Interviews*

Another invaluable source of information has been our federal judges and magistrate judges. All judicial officers in the district received a 39-page questionnaire (contained in Appendix B) drafted by the Advisory Group. The questions centered around fourteen subjects of CJRA concern, including case tracking, magistrate judges, Federal Rule of Civil Procedure 16, discovery, motion practice, scheduling trials, court resources and facilities, alternative dispute resolution, and the impact of the criminal caseload. The Advisory Group also invited the district judges, the bankruptcy judge, and the full-time Magistrate Judge to Advisory Group meetings for follow-up discussions. We greatly appreciated the time all judicial officers devoted to addressing CJRA concerns.

The Advisory Group learned many things of interest and importance from the judges, including the fact that there was no apparent agreement about the extent of the cost and delay problem in our District. However, some judges thought it necessary, as a general matter, to compress the time between the complaint's filing and the trial. Some causes of expense and delay cited were setting trial dates late in the pretrial process, over-discovery, the Speedy Trial Act, judicial leniency in granting extensions, the time it took to decide pending motions, and spending time on issues not really in dispute. In addition, judges seemed to agree that the steady growth of the criminal caseload, the Sentencing Guidelines, and Congress's expansion of federal criminal jurisdiction have also affected the time available for, and the ease and reliability of setting, civil trials.

Several judges seemed to agree that setting the trial date and "sticking to it" was one of the most—if not the most—effective tools to expedite civil cases. Some, but not all, judges favored a tracking system where different types of cases might be placed on different speed tracks based on case complexity. Pretrial conferences in non-bankruptcy civil cases were generally seen as very helpful forms of litigation management, particularly when they were used to schedule pretrial matters, to sharpen issues for trial, or to discuss settlement prospects. And at least one judge encouraged alternative dispute resolution (ADR) for complex cases and applauded the Court's use of settlement conferences with cli-

ents in attendance as very successful. Noted, in particular, were the advantages of having the parties themselves hear and feel the impact of the other side's case directly without a second-hand summary from counsel. Not all of our judges, however, favored importing ADR techniques (other than the court-hosted settlement conferences) into the litigation process.

4. *Advisory Group Observations and the Particular Needs and Circumstances of this District*

There is no clear evidence about how long just adjudication of a case "should" take from start to finish.[55] Nor is there clear evidence about the reasonable price of just adjudication. The Advisory Group operated upon the premise, supported by the accumulated statistical and anecdotal information before it, that court procedures and litigation practices in this District left some room for improvement—improvement which, by its nature, seemed to translate into cost and time savings under a common sense perception of those terms.

Thus, the Advisory Group focused on "treatable" cost and delay—cost and delay that could be cured or lessened consistent with the fair adjudication of cases. In this way, avoidable cost is "attributable to inefficiency, duplication, or waste."[56] Avoidable delay is time not spent in the careful search for and reasonable processing of information consistent with just resolution of the action.[57] Whatever the operative definition of "cost" and "delay," it is probably safe to assume that delay reductions will probably result in cost reductions.

In attempting to discern the principal causes of avoidable cost and delay in civil case processing, the Advisory Group worked with a composite picture of this District which reflected its peculiar personality, needs, and circumstances.

a. The District Composite

The docket of this District at first glance presents a puzzling picture. Looking solely at statistical comparisons in traditional categories for civil cases, North Dakota's civil caseload seems not only

55. Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 101 (1991).

56. Summary of the Advisory Group Report and Plan for the Southern District of California, contained in Administrative Office of the U.S. Courts, *Summaries: Civil Justice Expense and Delay Reduction Plans and Advisory Group Reports: Pilot Courts and Early Implementation Districts*, Appendix I (June 1992) at 22.

57. *See id.*

manageable, but relatively light. As previously noted, Administrative Office figures for the 12-month period ending September 30, 1992 show that this District ranked 77th (out of 94) in total cases filed, 80th (out of 94) in civil cases filed, and 71st (out of 94) in total weighted caseload.[58] Moreover, the District's ratio of magistrate judges to district judges (1/2) accords with the national average (1/1.7).[59] These numbers alone did not seem to justify the comparatively lengthy median time from issue to trial for civil cases in this District, which (according to Administrative Office statistics) is three months above the national average (18/15).[60]

But that is precisely the point. These numbers simply cannot be taken alone, and must be viewed in the larger context of the Court's overall civil and criminal caseload, the District's east-west imbalance, the disadvantages of distance, the number and type of judicial officers, court procedures (particularly in setting trial dates and deciding motions) and facilities, and litigation practices. The composite puts a very different spin on the civil statistics and lays bare some of the principal causes of cost and delay in this District.

Unlike its civil caseload, North Dakota's criminal caseload is very heavy. Felony filings ranked 1st in the Eighth Circuit and 21st in the country per judgeship.[61] In addition, these criminal cases are concentrated in the eastern divisions of the District in Fargo and Grand Forks, which are 200 and 280 miles, respectively, from the other district judge, chambered in Bismarck. This great distance 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. (Moreover, counsel and clients sometimes have no choice but to make these costly and time-consuming trips in order to be present at court proceedings.)

In this context, the low civil numbers take on new and more accurate meaning. The Chief Judge is inundated with criminal

58. Administrative Office of the U.S. Courts, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 119.

59. Administrative Office of the U.S. Courts, Magistrate Judge Survey for the District of North Dakota 16 (June 1993) (based on 12 month statistical year ending June 30th).

60. Administrative Office of the U.S. Courts, 1992 FEDERAL COURT MANAGEMENT STATISTICS at 119 and 167 foldout.

61. *Id.* at 119.

cases in the east (Fargo). He is left with relatively little time to try civil cases. Civil actions ready for trial may not be heard for months because of his heavy criminal caseload or, if already set for trial, may be preempted by virtue of Speedy Trial Act requirements. The other district judge who might share the criminal and civil workload in the east is approximately 200 miles away and is, for all practical purposes, unavailable.

Further, the District's sole full-time Magistrate Judge, who is headquartered in the east (Fargo), cannot be available at all court facilities at all times. At present, she is operating at full capacity, handling all the District's civil pretrial management (including all required and requested pretrial conferences, all non-dispositive motions, and a substantial—and growing—number of trials on consent) and a notable number of criminal matters, including preliminary proceedings in felony cases, misdemeanor cases, and petty offense cases. Because the civil caseload (unlike the criminal caseload) is heavier in the west, the Magistrate Judge must make the time-consuming trip to Bismarck with some frequency (and also to a lesser extent, to Minot and Grand Forks) to perform her district-wide civil case management responsibilities. In short, the Magistrate Judge's current caseload and travel demands essentially prevent her from performing either additional criminal or civil duties to assist the Chief Judge. It is nothing short of wondrous, given these undesirable circumstances, that North Dakota ranked 1st in the circuit and 7th in the country in its median processing time for criminal felony cases (measured from filing to disposition).[62]

In this regard, senior judges have been important to this District. One has maintained an active, though reduced, load of both civil and criminal cases to help ease the strain on the other judicial officers. Another senior judge often assists other districts around the country, but still handles a few civil cases here, one of which is a long-standing and complicated litigation. Before the multidistrict transfer, he also handled all asbestos cases filed in this District. Thus, the eventual retirement of our senior judges, in combination with the other factors described above, will have a noticeable impact on the Court's capacity to dispose of cases.

Congress's admonition that the "problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the

62. *Id.*

district court's resources by both civil and criminal matters"[63] is especially pertinent to this District. The court's heavy criminal caseload, combined with the requirements of the Speedy Trial Act, has made hearing civil trials and setting reliable civil trial dates a challenging task. That task has been exacerbated by the shortage of judicial resources, both in terms of the number of judges available to hear cases as well as the number of courtrooms in which they can be heard, even if a judge is free to hear a case. The Fargo courthouse can handle only one jury trial at a time despite the usual presence of three judges on premises.

There is, however, a countervailing consideration which sometimes, by circumstance, helps to relieve the civil trial burden: Experience demonstrates that a majority of civil cases settle before trial. And these cases most often settle when the Court sticks to firm and clear deadlines. As one of our judges put it, the reality is that

> Settlements seem to come when "the shadow of the courthouse falls across the bodies of the litigants." Settlements seem to come when clear deadlines have been established and are nearing. Only the court can set such deadlines. . . . The ultimate deadline is the setting of a trial date.[64]

Thus, the Advisory Group has learned again and again that the trial date seems to drive the pretrial process. How early and firmly it is set has a great impact on how seriously and efficiently counsel conduct that case.[65] Simply put, a relatively firm trial date makes counsel sit up and pay attention. But in this District, there have been at least three obstacles to setting firm trial dates: (1) the unfortunate scheduling complications created by the District's weighty criminal docket demands, (2) the time at which the trial date is set, and (3) the different methods used by the judges in setting those trial dates.

Traditionally, as noted earlier, the district judges have set

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63. Pub. L. No. 101-650, § 102(1).

64. Letter from the Honorable Patrick A. Conmy to Advisory Group Invitees 1 (Jan. 30, 1991).

65. The Advisory Group's view was confirmed by the Honorable Kathleen Weir, judge from the Seventh Judicial District Court in Minnesota, who we invited to discuss her district's recently-adopted and highly successful civil case management plan. Its key features: Setting relatively firm trial dates early on, adhering to schedules set, and being consistent about both. Judge Weir stressed the importance of this consistency and consequent predictability in the court's setting and enforcing firm trial dates. As a result of this new plan, the average time from filing until trial date dropped dramatically (*i.e.*, in 1992, from three years to less than a year). About 95% of the cases have been settling. The initial resistance to the court's setting of schedules and trials dates dissipated once counsel became aware that they had input into discovery deadlines.

their own trial dates and have usually abided the completion of discovery and the final pretrial conference before scheduling the trial. No matter how efficiently a case has been prepared for trial, it may sit without a trial date or take months to be heard. Setting the trial so late in the pretrial process means that the second-in-time civil trial date must somehow be worked into the pre-existing criminal and civil trial calendar—a calendar which, due to the District's heavy criminal caseload, is not infrequently disrupted by Speedy Trial Act requirements. In short, counsel may have to wait months after the Final Pretrial Conference until there is a free range of dates in the judge's calendar for a trial. This delay and uncertainty not only create great frustration for counsel and clients, but add months to disposition time and extra dollars to the clients' bills. Counsel must put the case aside when they are most prepared to try it, only to reactivate it and re-traverse costly preparation ground when the trial date finally arrives.

Counsel who consent to civil trial before the Magistrate Judge are more likely to get a firm trial date, set early at the initial Rule 16(b) Conference, because the Magistrate does not conduct felony criminal trials and has control over her own trial dates. As noted, however, the Magistrate has decreasing flexibility in her current workload to take additional civil trials. Further, not all counsel agree to try their cases before the Magistrate.

It has come as no surprise, then, that there seems to be a perception at the bar, shared by a notable number of practitioners, that the federal court in this State is not necessarily the place to file civil cases—even if counsel would otherwise prefer to be there—because of this disposition uncertainty and delay.

b. Principal Causes of Avoidable Cost and Delay

From this mix of information about the docket, procedures, practices, personnel, and geography of this District, the Advisory Group has isolated ten principal causes of avoidable cost and delay in this Court:

1. The heavy criminal caseload, the statutory priority given criminal trials over civil trials, and the preclusion or preemption of timely civil trials (addressed primarily by recommendations under subject nos. 2, 6, 7, 8, and 10),[66]

66. These parentheses cross reference the subject headings (in Part IV(B) of this Report) under which the primary recommendations addressing the pertinent principal cause of cost and delay are to be found.

2. The setting of civil trial dates late in the pretrial process (addressed primarily by recommendations under subject nos. 2, 3, and 7),

3. The instability of civil trial dates, and to a lesser extent, discovery and scheduling deadlines (addressed primarily by recommendations under subject nos. 2, 3, and 7),

4. The length of time between an action's filing and trial, including the lag between the final pretrial conference and the start of trial (addressed primarily by recommendations under subject nos. 1-4 and 7),

5. The wait for pretrial motion decisions (addressed primarily by recommendations under subject nos. 2 and 3),

6. The need to narrow issues for discovery and trial (addressed primarily by recommendations under subject nos. 2, 3, and 7),

7. The use and abuse of expert witnesses (addressed primarily by recommendations under subject nos. 2, 3, and 7),

8. Extensive discovery, whether for legitimate reasons, such as record development for appeals or for malpractice protection, or for bad faith reasons, such as delaying the case, harassing the adversary, or obstructing easy access to information (addressed primarily by recommendations under subject nos. 2-5 and 8),

9. The need for an additional judicial officer in the western part of the State to assist in civil dispositions (addressed primarily by recommendations under subject nos. 8 and 10), and

10. Important miscellaneous procedures, such as the misallocation of cases between the eastern and western divisions (addressed primarily by recommendations under subject nos. 8 and 9) and the current method for taxing final judgment costs (addressed by recommendations under subject no. 11).

As indicated, each of these causes will be addressed in the Advisory Group recommendations, which appear under the eleven numbered subject headings contained in the next part of this Report.

IV. ADVISORY GROUP RECOMMENDATIONS AND THEIR BASES

A. SIGNIFICANT CONTRIBUTIONS BY THE COURT, COUNSEL, LITIGANTS, THE EXECUTIVE BRANCH, AND THE CONGRESS

With its cooperative approach to reform, the CJRA requires Advisory Group recommendations to include significant contributions by the court, counsel, litigants, the Executive Branch, and the Congress.[67] Our recommendations primarily ask for contributions from the Court and counsel because they are the front-line actors in reform,[68] and secondarily, but not less importantly, from the Congress and the Executive Branch, who are less visible but nonetheless potent forces in the daily delivery of civil justice in this country.[69] Fewer of our recommendations speak directly to the litigants themselves.[70]

However, these recommendations—indeed, the CJRA itself—implicitly ask for a significant contribution from all actual and putative litigation participants—a change in attitudes and expectations, particularly those of clients about what lawyers should reasonably do on their behalf and those of lawyers about the nature of zealous advocacy and adversariness itself. The CJRA really asks for nothing less than that judges, lawyers, and lay persons alike open themselves up to new ways of thinking about resolving disputes in less costly and less time-consuming ways than full-fledged litigation.

A good part of that change may come from a realization that resolving civil disputes does not necessarily mean a polarized fight in a courtroom by posturing adversaries who see cooperation as weakness and unreasonable demands as powerful. That change will facilitate the view that shaking hands rather than fists may be the most expeditious, inexpensive, and humane way of settling disagreements. In short, the CJRA, at its heart, forces courts, counsel, and clients to explore the fundamental "fight" premise of our adversarial system and to think about alternative approaches to resolving disputes more quickly and less expensively. That, perhaps, is the most significant, long-term contribution it asks of all citizens.

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67. Pub. L. No. 101-650, § 102(3); *see also* 28 U.S.C. § 472(c)(3).
68. Those recommendations pertain to subject nos. 1-7 & 11.
69. Those recommendations pertain to subject nos. 2, 8-10.
70. Those recommendations pertain to subject nos. 3 & 6.

B. RECOMMENDED MEASURES, RULES, AND PROGRAMS

For more immediate and tangible problems, this section contains the Advisory Group's recommendations for alleviating and eliminating the principal causes of avoidable cost and delay in this District. These recommendations are organized under and pertain to eleven general subjects: (1) differentiated case management, (2) early and ongoing control of the pretrial process, (3) pretrial monitoring through discovery-case management conferences, (4) voluntary information exchanges and cooperative discovery devices, (5) good faith certifications for discovery motions, (6) alternative dispute resolution, (7) extensive utilization of the Magistrate Judge, (8) the need for a second full-time magistrate judge, (9) division boundaries, (10) resources for the judiciary, and (11) taxation of costs.

For ease of cross-reference to the CJRA, the first six subjects (nos. 1-6) correspond to the first six § 473(a) litigation management principles. Each principle is noted beneath the subject title. Also, each of the six § 473(b) litigation management techniques is explicitly addressed within these subject discussions. Each technique, when discussed, is noted beneath the pertinent subject title. Also noted beneath the subject title is the number of the ten principal causes of avoidable cost and delay (from Part III(D)(4)(b) of this Report) addressed by the particular subject discussion and the recommendations it contains.

1. Differentiated Case Management

Principle § 473(a)(1)
Technique § 473(b)(1)
Addressed: Principal Cause No. 4 and avoidable cost and delay generally

Section 473(a)(1) requires the Advisory Group to consider the wisdom of adopting a systematic, differential treatment of cases where each case is individually managed according to its complexity, the time needed for trial preparation, and the resources for processing it. Without much debate, and after review of alternative tracking systems proposed for other districts, the Advisory Group concluded that the North Dakota docket did not justify an elaborate multi-track system.

As a matter of practice, the Court already accords all civil cases individualized pretrial treatment in readying cases for trial and has been informally "tracking" cases as a result of case-specific management procedures. Setting particular discovery deadlines

crafted to fit the case, as the Court does, is the equivalent of tracking and eliminates the need to create abstract categories of cases which may or may not be accurate or actually assist in case disposition. Accordingly, there is no need to put cases into artificial categories which may do little but hinder their individualized handling.

Of greater utility for this District would be a simple "classification" (as opposed to "tracking") system, much like the one currently used by one of our district judges. This system would essentially classify cases on the basis of the judicial management time required for disposition and would assist both the judges and the Clerk's Office in following these cases, reporting on them, and readying them for disposition. The system would essentially be an internal administrative concern of the Court and would not directly affect any other filing or case-processing responsibilities of counsel and clients.

Accordingly, the Advisory Group recommends that the Court adopt a simple sorting system with two classifications:

1. Class One—the express class—would hold those cases requiring minimal judicial management and which could be disposed of more quickly than cases requiring more intensive coordination or control. This class would include such cases as bankruptcy appeals, social security appeals, consent cases, collection actions, veterans' administration overpayments, foreclosures, and student loans.

2. Class Two—the standard class—would hold all other cases. Each would be treated individually, with a carefully tailored discovery plan to fit the case and continual court monitoring to meet on-going case requirements. Each case would receive special treatment on its own "track" best-suited to its expeditious and just resolution. Thus, each Class Two case would be closely managed by the Court in accordance with the scheduling/discovery plan that counsel jointly presented to the Magistrate Judge at the initial Rule 16(b) Scheduling Conference as envisioned by Technique § 473(b)(1), which the Advisory Group heartily endorses.

This recommendation is a strong endorsement of the individualized case treatment the Court provides when working with counsel in setting discovery time frames and trial dates based on the type of case, parties involved, and number of witnesses. The Advisory Group also recommends that this classification system double as an aging report system to generate reports that would

ultimately lead to letters to counsel from the Clerk's Office in order to prompt some action in dormant cases, particularly those in which no answer has been filed and no motion for default has been made.

2. **Early and Ongoing Control of the Pretrial Process**
Principle § 473(a)(2)
Techniques § 473(b)(2),(3) & (5)
Addressed: Principal Cause Nos. 1-8

Section 473(a)(2) requires the Advisory Group to consider the efficacy of "early and ongoing control of the pretrial process through involvement of a judicial officer" in planning case progress, setting early and firm trial dates, managing discovery, and setting, as soon as possible, deadlines for filing and deciding motions. Notably, this section recommends scheduling trials to take place within 18 months after the complaint is filed unless a judicial officer certifies that the case is too complex or pending criminal cases interfere.

The Advisory Group strongly supports the Court's early and ongoing control of the pretrial process and applauds the basic pretrial procedures already used by the Court to actively manage cases. This District has the great advantage of uniformity in those management procedures because they are centralized in the Magistrate Judge. Each action is governed by the scheduling/discovery plan, jointly-conceived by counsel and the court early in the litigation at the initial Rule 16(b) Scheduling Conference. The plan provides a tailor-made framework for the pretrial progress of each case, including discovery and motion deadlines.

The Court also uses the conference as the backbone of efficient case management throughout the pretrial life of the case. Conferences put the court and counsel in face-to-face communication about case status and encourage accountability about case preparation and progress on both sides of the bench. It is this direct and periodic contact with counsel which enables the Court to maximize individualized treatment of each case with greatest efficiency. While too many conferences would tax both judicial, lawyer, and litigant resources, several well-placed meetings do much to facilitate the steady forward movement of the case towards trial. As Technique § 473(b)(2) contemplates, this is particularly so when the lawyers who attend pretrial conferences have the authority—as the Court now expects—to bind their cli-

ents regarding all matters previously identified by the Court for discussion and all reasonably related matters.

Moreover, the Magistrate Judge's willingness to communicate with counsel, and to lend the prestige of her position to exploring case resolution short of trial at settlement conferences, provides counsel with "built-in" opportunities to resolve disputes in a cost and time effective way.[71] For several years, our Court has been providing—as part of the pretrial litigation process—institutional incentives to resolve controversies under the authority of a federal judicial officer but without the need for trial.

Firm Trial Dates Set Early at the Rule 16(b) Scheduling Conference. In conjunction with these basic procedures, the Advisory Group urgently recommends that the Court standardize the practice of setting the trial date and final pretrial conference date for each case at the initial Rule 16(b) Scheduling Conference, with trial to take place within thirty (30) days or so after the final pretrial. It is vital that the Court announce and enforce a rule that both of these dates are virtually immovable, subject only to extraordinary cause exceptions within the Court's discretion and to criminal docket demands. This procedure represents a significant change in District practice by integrating trial date selection into the early pretrial planning phase and putting new emphasis on its fixed nature.

To ensure maximum fairness and minimal hardship to counsel and clients, the Court should continue its practice of fully involving counsel in scheduling matters, particularly the setting of the final pretrial and trial dates, and of accommodating counsel as much as practicable within CJRA constraints. The Court should also allow voluntary extensions of discovery and motion deadlines negotiated by counsel unless they disturb the final pretrial conference and the trial dates. In any event, Technique § 473(b)(3)'s cosignature requirement that all requests for discovery or trial date extensions be signed by both counsel and client is unwarranted. The Advisory Group thought that there was no need to question counsels' motives or trustworthiness in these matters.

To facilitate the Court's early setting of firm trial and final pretrial dates, the Advisory Group recommends a slight revision of the Magistrate Judge's current Rule 16(b) Conference procedures:

71. An important element of their effectiveness is the Court's requirement that a representative of the parties with binding settlement authority be present during any settlement conferences. This is Technique § 473(b)(5) and the Advisory Group strongly endorses it.

Counsel should meet and confer at least seven (7) days in advance of the Scheduling Conference so that they can present their proposed scheduling/discovery plan to the Court at least two (2) working days before that conference. The Magistrate Judge will then have more time to secure possible trial dates from the district court judge assigned to the case and be able to present counsel with those dates for finalizing during the conference.

Eighteen-Month Benchmark for Trials. In addition to this emphasis on firm trial dates set early in the process, the Advisory Group recommends adoption of an eighteen (18) month benchmark for calendaring (and hopefully hearing) civil trials, starting from the date of filing, with exceptions for complex cases, cases where service of process is not promptly made, and criminal caseload demands. Thus, the Advisory Group endorses CJRA § 473(a)(2)(B)(i)-(ii) as written. The Advisory Group will review this benchmark periodically to ascertain whether it is being met.

In short, at the initial case conference, the Court and counsel should finalize a scheduling/discovery plan, topped by firm trial and final pretrial conference dates, which will take the case to trial within eighteen (18) months of the complaint's filing. These recommendations address several of the principal causes of cost and delay:

1. 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.

2. 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 schedule the criminal trials around a preexisting civil calendar of firm trial dates (instead of vice versa). In the event of unavoidable conflict between trial of a criminal and civil case, the Advisory Group recommends that the Court make every effort to have another judge available to try the civil case on the original trial date unless the case is complex. If the trial must be deferred, the case should be reset for trial on a priority basis at

the earliest possible date within ninety (90) days of the original date.

3. The more advance notice counsel and clients have for trial dates, the more cost-effectively and carefully they can prepare their cases. This will increase certainty and predictability for counsel and clients.[72] The onus will then shift to counsel to make good use of the lead time they have to prepare for trial. As one Advisory Group member put it, the most trouble seems to come when a trial attorney has several cases with no trial dates rather than when he or she has several trial dates all set firmly and early on in the pretrial process. Moreover, the new eighteen-month benchmark should not only effect time, but cost savings as well, given the general rule that the longer a case lasts, the more it costs.

4. 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 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. In addition, there are direct savings for the Court. The Magistrate Judge will no longer need to spend time revisiting cases which, if firmly set for trial in the first place, would not necessarily need a second look.

5. And as earlier noted, firm trial dates are 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.

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72. Given this stress on predictability, the Advisory Group considered and rejected a preemptory calendar or "stacking" approach to trial calendaring. The Group thought that this method (of filling in sudden holes in the trial schedule (because of settlement, for example) from a list of ready trials in a "holding pattern") while of great merit to the court, created too much uncertainty for counsel and the parties, and could itself generate additional cost, particularly in complex cases which need significant start-up time or involve distant witnesses or experts (in or out of state) who need dates certain. The Group concluded that a system of setting firm trial dates early in the process produced greater efficiencies in the fairest way. However, maintaining a calendar of cases which could be set on short notice for trial is not nearly as problematic if counsel voluntarily agree to be placed on such a calendar.

The Intermediate Status Conference. To help maintain the efficient momentum of the pretrial push to trial, the Advisory Group recommends that the Magistrate Judge hold a new Intermediate Status Conference between the initial Rule 16(b) Scheduling Conference and the Final Pretrial Conference in all Class Two cases. This conference would give the Court an opportunity to monitor counsels' compliance with the discovery/scheduling plan and make necessary "midstream corrections"—without disturbing the final pretrial conference and trial dates—before it is too late and before counsel waste time and money on unnecessary case preparation and discovery.

The Advisory Group envisions that the Intermediate Status Conference would serve three main purposes: (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. Each of these areas have particular relevance for the timing of this conference.

Issue refinement, if done properly, can be a great time and money saver for both counsel and the court. However, changing, eliminating, or clarifying issues for trial should come early enough in the pretrial process so that the parties can still conduct any necessary discovery to be fully prepared for trial, but late enough so that the key issues will have emerged for meaningful discussion about their relative importance. Narrowing issues for the first time at the Final Pretrial/Settlement Conference may be too late in the pretrial process to promote efficient preparation and to give counsel fair warning of what to expect at trial, particularly, as recommended in this Report, if the trial follows within thirty days of the final pretrial conference. In any event, the Court should be loathe to change or expand the issues to be tried (consistent with the liberal amendment rules) once they have been finally narrowed at the pretrial conference unless injustice results from keeping to them. This should be particularly so with liability admissions, plaintiff's liability theories, and defendant's defenses.

While experts are some of the most important witnesses, they are also the most expensive. The Advisory Group thought that the Court should take a more active role in managing the parties' use of experts by routinely exploring with both sides at the Intermediate Status Conference the nature and number of experts to be used with the ultimate goal of encouraging the parties to agree upon limitations. The Advisory Group rejected the idea of court-imposed restrictions on experts as too much of an interference

with counsels' case control prerogatives, but welcomed the idea of requiring the parties to discuss their experts and their intended use before and during trial.

The subject of experts ties directly to the subject of issue refinement—parties may agree to eliminate issues, and therefore experts, and therefore expense and preparation time. Again, it is crucial that these discussions do not take place too early or too late in the pretrial process to be of most value to the ends of efficiency and fairness. The parties must know enough about their case to be confident in narrowing witnesses and issue options, but still have enough time to supplement discovery in light of any status conference refinements by the Court.

Timing is also the crucial issue for the success of settlement discussions, and the Intermediate Status Conference would provide an excellent opportunity for the Court to open or revisit settlement possibilities long before the Final Pretrial/Settlement Conference. With a sizable portion of discovery completed, the parties will be in a better position to evaluate their cases, yet it will be early enough in the pretrial process to consider the significant savings to be achieved by resolving the dispute short of the last phases of intensive trial preparation (let alone the trial itself). The Magistrate Judge might also find it appropriate to revisit any feasible ADR options with the parties at this time.

Joint Jury Instructions. Also, hand in hand with the concept of issue refinement is the subject of jury instructions. Much court time could be saved if the parties presented the Court with a single set of instructions, with disagreements briefed and presented to the Court for decision. While the directive for counsel to confer on instructions is included in the Magistrate's final pretrial conference order, it is absent from Local Rule 8(G), which governs requests for instructions in jury trials. This important requirement should be conveyed to counsel at an earlier point in the pretrial period, especially if the trial follows within a month of the Final Pretrial Conference.

Accordingly, the Advisory Group recommends that Local Rule 8(G) be amended to reflect the requirement that counsel should confer on jury instructions and present to the court, as far as feasible, an agreed-upon set. In addition, the Magistrate Judge might remind counsel at the Intermediate Status Conference of this responsibility.

Sixty-Day Benchmark for Motions and Bankruptcy Appeals. Coupled with the concerns of efficient case processing and firm trial dates is the problem of delayed decisions on pretrial motions. Once the Court and counsel have set the comprehensive pretrial schedule at the Rule 16(b) Conference, it is imperative that any discovery or dispositive motions made before trial be decided with a dispatch that permits fair consideration. Dispositive motions often stop the clock for lawyers. Their efficient disposition is essential not only to preserving the integrity of the pretrial schedule and trial date and reducing delay generally, but to eliminating the start-up costs to counsel caused by long stretches—sometimes, many months—of inactivity on a case.

Given the importance of efficient motion disposition to the entire trial scheme, the Advisory Group recommends adoption of a sixty-day benchmark for motion dispositions to be measured from the date that the last brief or supporting material is filed. The Court may exclude periods needed for additional discovery or may waive the benchmark time for other appropriate reasons because the motion is unripe for decision. Waiver should be the exception and not the rule. The Advisory Group considered and rejected different benchmarks for dispositive and non-dispositive motions because the two are often intertwined and would defy easy categorization as either type of motion. In addition, the Advisory Group recommends adoption of a sixty-day benchmark for bankruptcy appeals, also to be measured from the date that the last brief or supporting material is filed, especially given the sometimes urgent need for speedy dispositions in this area and the current delays in resolution time.

Sixty-Day Motion Disposition Report and § 476 Criticisms. In addition, the Advisory Group recommends that the District adopt a motion disposition report based on the sixty-day cycle, to be generated by the Clerk's Office every two months. This sixty-day reporting recommendation is a purposeful variation from the semi-annual (six month) reporting requirement of CJRA § 476. The Act's requirement of reporting, only twice a year, all motions filed for more than six months is overinclusive to a fault. The Act measures pendency from the filing of a motion and consequently nets motions that are not ready for decision. As a practical matter, these motions should not be counted as "undecided." And, ironically, the six month reporting requirement itself encourages delays in dispositions. Given the press of other judicial business and human nature, what would have taken the Court short of two

months to decide may now take short of six months to decide. Thus, the CJRA reporting method is not an accurate indication of the state of the court's motion docket and is actually a step backwards because it encourages delay.

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

Principle § 473(a)(3)
Addressed: Principal Cause Nos. 2-8

Section 473(a)(3) requires the Advisory Group to consider the value of purposeful monitoring of complex and other appropriate cases through the vehicle of discovery management conferences at which the judicial officer explores settlement, identifies the principal issues in contention, provides for staged resolution or bifurcation, prepares a discovery schedule and plan consistent with any court deadlines to complete discovery and/or to limit or phase discovery, and sets, as soon as possible, motion deadlines and a time frame for their disposition.

The Advisory Group's recommended pretrial conference structure, discussed in the preceding section, covers this principle and soundly endorses it. With a minimum three-conference requirement in place, and the flexibility for additional settlement conferences and Rule 26(b) discovery conferences when needed, the Court will be able to carefully and deliberately monitor the pretrial development of all Class Two civil cases filed in this District and perform a range of supervisory functions, including trimming discovery, enforcing the scheduling/discovery plan deadlines, identifying and refining issues for trial, exploring the propriety of staged discovery or merits presentations, inquiring about settlement prospects, and generally keeping the lines of communication with counsel open so that trouble spots can be quickly identified and resolved.

And in the most complex cases, the Advisory Group recommends that the district judge assume an active involvement, in a manner appropriate to the judge and case, in the action's pretrial management in order to smooth the transition to trial and to minimize any time and effort necessary to bring the Court up to speed on case peculiarities and the issues to be tried. Also, the Advisory Group encourages the continued use of telephone conferences to facilitate case monitoring without causing counsel, clients, and the Court the unnecessary expense, lost time, and inconvenience of travel. Again, the implicit theory here is that judicial presence—

but not pestering—will encourage preparedness and accountability in all pretrial participants.

Thus, discovery excesses are less likely—or at least less "useful"—under this modified surveillance structure. Discovery abusers may be disinclined to employ bad faith tactics if judicial detection and reaction is imminent because of the Court's availability and familiarity with counsel and the case. Further, with the new system of early and firm trial dates in place, there will be less time for—and the Court should have less tolerance for—diversionary or dilatory discovery tactics. The Court will emphatically enforce the pretrial schedule to preserve the trial date and bad faith delays will not necessarily advantage those who seek them. Moreover, those who over-discover in good faith to protect the record on appeal or to stay their malpractice fears will have much less reason to do so if the Court takes a firm hand in defining the issues for discovery and trial as clearly and early as it can so that the legal bases to be covered have been clarified and narrowed.

In any event, the primary responsibility for keeping discovery within acceptable and ethical bounds belongs to lawyers and clients. Counsel's duty to discover as well as disclose in a reasonable fashion cannot be stressed enough. These duties must be conveyed to the client so that the parties respect, rather than resist, their counsel's good faith compliance with procedural rules. Moreover, discovery excesses may be curbed by clients who participate more actively in their own cases by watching fees and helping to determine the nature and extent of the discovery to be sought. And, communication between adversaries is another essential. Lawyers waste too much time and money being "rambo lawyers" when cooperation, particularly in discovery matters, would be the more valiant and respectable course.

Court-Appointed Experts and Science and Technology in the Courtroom. The subject of court-appointed experts created some controversy for the Advisory Group. In theory, the court-appointed expert, particularly in complex cases concerning complicated scientific or technological matters, could work to promote CJRA goals to resolve civil cases fairly and expeditiously. In the very least, these experts might assist the court in (1) understanding and narrowing the issues for trial and weeding out those that should not be tried, (2) facilitating settlement by giving a knowledgeable "third party's objective" view of case strengths and weaknesses, and (3) determining the admissibility and scope of

expert testimony.[73] Indeed, court-appointed experts might help counter the problems recently described by the Task Force of the Carnegie Commission on Science, Technology, and Government:

> The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology . . . issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations.[74]

On the other hand, the actual use of court-appointed experts is not without difficulties, some of which are contrary to adversarial safeguards provided by the litigation process. They include (1) the erosion of the integrity of the judicial decision making process given the impossibility of finding purely neutral and objective experts to advise the court, (2) the related problem of the parties' right to confront and cross-examine any experts advising the court ex parte, particularly if the court relies upon that advice in conducting pretrial proceedings, making any rulings, or even reaching preliminary conclusions about the meaning and resolution of case issues, (3) the loss of control that counsel will have over information flow and case presentation to the judge, which in turn may disadvantage case preparation because counsel will never know

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73. This point is peculiarly pertinent in light of Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 Sup. Ct. 2786 (1993). There, the Supreme Court (per Justice Blackmun) rejected the *Frye* general acceptance test as "an absolute prerequisite to admissibility" for scientific evidence, *id.* at 2794, and stressed that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 2795. The Court concluded:

> Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 2796 (footnotes omitted). The Court then expressed its "confiden[ce] that federal judges possess the capacity to undertake this review." *Id.* Chief Justice Rehnquist criticized the Court's "impos[ing on judges] either the obligation or the authority to become amateur scientists" in order to perform their Rule 702 "gatekeeping responsibility." *Id.* at 2800 (Rehnquist, C.J., concurring in part and dissenting in part).

74. Task Force on Judicial and Regulatory Decision Making, *Report of the Carnegie Commission on Science, Technology, and Government*, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 11 (March 1993).

precisely what the judge knows about the subjects to be argued or tried, (4) the question of maintaining the expert's detachment if he or she is permitted or required to testify at trial, (5) the undue influence that a testifying court-sanctioned expert may have on the jury, (6) the problem of finding pools of experts to serve the court and then selecting an appropriate expert with or without party input, and (7) the question of resources—who will pay for court-appointed experts, particularly if the parties do not directly benefit from their use?

Despite these important cautions, the reality remains that federal judges find themselves facing, with increasing frequency, sometimes incomprehensible and perhaps insoluble problems of science and technology within their courtrooms. Solutions to this dilemma of decision making must be explored, including the restrained use of court-appointed experts to aid the court. Accordingly, the Advisory Group encourages the Court to consider the possibility of greater utilization of court-appointed experts, consistent with the caveats expressed, as one option for improving the fair and efficient processing of cases involving complicated issues of science or technology. In particular, the Court might develop procedures for the use of court-appointed experts in appropriate cases based upon the science and technology reference manual currently being prepared for federal judges by the Federal Judicial Center and the Carnegie Commission Task Force. That manual will:

> outline[] the wide range of techniques that judges have used to manage S&T [science and technology] issues in litigation. It focuses on process and on the encouragement of judicial control rather than suggesting substantive outcomes on contested science and technology issues. To facilitate easy use by judges, the manual is organized thematically by litigation stages. It will alert judges to the wide range of options available for resolving a given issue and refer them to S&T cases where the various techniques have been used.[75]

Included among the manual's various procedural and evidentiary devices for science and technology issue management and improved juror comprehension are the use of explanatory written material, pretrial tutorials for the judge and jury by the parties' experts, and the use of court-appointed experts.[76]

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75. *Id.* at 38.

76. *Id.* at 37. The Task Force report notes that courts have "rarely availed themselves" of court-appointed experts, but suggests that they can be used in ways to "avoid some of the

4. **Voluntary Information Exchange and Cooperative Discovery Devices**
Principle § 473(a)(4)
Addressed: Principal Cause No. 8

Appropriately, § 473(a)(4) requires the Advisory Group to consider the value of voluntary information exchanges and cooperative discovery devices. As a general matter, the Advisory Group favored the amicable exchange of information between counsel as much as possible within the current procedural rules. There is little debate that the most cost-effective discovery is often the most effortless and least time-consuming.

The Magistrate Judge already requires the parties to reach agreement about voluntarily disclosing potential fact witnesses as part of the Scheduling/Discovery Plan. In addition, she requires the parties to prepare and exchange expert witness reports. The Court should continue to play an active role in not only encouraging such cooperative exchanges concerning lay and expert witnesses, but in requiring the parties to consult, during preparation of the scheduling/discovery plan for the initial Rule 16(b) Scheduling Conference, about the possibility of early voluntary disclosure and exchange of documents. This document exchange would be without prejudice to request the same and other documents through formal discovery devices. It would benefit cooperative counsel who wished to get a quick start in trial preparation by saving the time and expense needed to draft and respond to formal discovery requests. It would also help counsel to begin an early settlement assessment. In this connection, the exchange of insurance agreements might be part of this voluntary disclosure.

Accordingly, the Advisory Group recommends that a category be added to the form scheduling/discovery plan attached to the Magistrate Judge's Rule 16(b) Conference order stating that "The parties agree to voluntarily exchange [list documents or categories of documents and/or pertinent insurance agreements] by [stated deadline]." At the Rule 16(b) Conference, the Magistrate could inquire further of counsel who have not reached agreement on

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concerns that have inhibited" these appointments. *Id.* Thus, the Report explains that court-appointed experts "may be most useful when asked to report on particular, narrowly focused issues, and when they appear in connection with pretrial proceedings rather than at trial. Instead of providing another opinion about the ultimate issues in a case, the court-appointed expert might assist the judge in understanding the concepts that form the basis of the party-retained experts' opinions. The reference manual suggests how special masters can work in tandem with court-appointed experts to provide assistance to judges in framing questions." *Id.*

any document exchange as well as explore additional categories of documents for those counsel who are willing to make exchanges.

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. In addition, the rule's possible adoption is only weeks away. The Advisory Group thought it best to defer final 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.

5. Good Faith Certifications for Discovery Motions

Principle § 473(a)(5)
Addressed: Principal Cause Nos. 3, 4, 8

Section 473(a)(5) requires the Advisory Group to consider requiring counsels' certification of good faith efforts to reach agreement about discovery disputes before the Court will consider resulting discovery motions. Local Rule 4(B)(4) for this District already requires this:

> To curtail undue delay in the administration of justice, the Court shall refuse to hear any motion to compel discovery or for protective order unless the moving party shall first advise the Court, in writing, of sincere attempts by counsel to resolve differences without involving the Court. This statement shall also recite the date, time, and place of such conference, and the names of all participating parties.

This rule has often been circumvented by counsel who claim that their adversaries are unwilling to discuss discovery differences and merely offer the court copies of harsh correspondence as proof of their sincere attempts to resolve those differences. This does not satisfy the spirit or letter of Local Rule 4(B)(4). It not only undermines its purpose to minimize unnecessary discovery motions to the court with their consequent cost and delaying effects, but hinders its goal to promote cooperation between counsel in their conduct of cases.

Accordingly, the Advisory Group recommends an amendment to the local rule which would require that counsel actually confer in-person or by telephonic conference in seeking to resolve discovery disputes. Because there may be a few occasions when

discussion is impossible, the requirement of "actually conferring" will be subject to waiver only in exceptional circumstances upon a factual showing of the futility of the in-person or telephonic conference. Fortifying this rule should have the direct effect of inhibiting unnecessary discovery motions and the indirect effect of forcing counsel to craft more reasonable discovery requests in order to minimize the prospect of adamant resistance from the opponent.

6. Alternative Dispute Resolution

Principle § 473(a)(6)
Techniques § 473(b)(4) & (6)
Addressed: Principal Cause No. 1 and avoidable cost and delay generally

The Advisory Group had its most spirited debate about § 473(a)(6)'s requirement that the Advisory Group consider court-authorized referrals to alternative dispute resolution (ADR) programs. While the Advisory Group quickly and unanimously decided to favorably recommend ADR in this Report, we discussed with vigor, over several meetings, whether to recommend making ADR a mandatory or voluntary part of the pretrial process. A mandatory ADR requirement that counsel in each case must try an alternative form of resolution might include an opt-out provision for cases ill-served by ADR if the parties could persuade the court to exempt their case. A voluntary approach to ADR would merely encourage the parties to explore litigation alternatives.

Evidence before the Advisory Group indicated that the North Dakota bar, on the whole, seems either resistant to, skeptical, or at least cautious about ADR as a viable litigation alternative. The topic has not been very well received at the federal practice seminar. The answers to bar survey question (no. 7e) concerning case management actions that "could be taken" by the court showed the choice "Refer the case to alternative dispute resolution, such as mediation or arbitration" to be the least favored and most disfavored response. However, it was also, by far, the response which had the highest number of "No opinions." This suggested the need for getting more information to the bar about ADR so that lawyers themselves felt comfortable pursuing those options and advising their clients about them. Thus, the bar's apparent suspicion or caution may in good part be "fear of the unknown" rather

than affirmative rejection of the ADR concept.[77]

An indication of the bar's receptivity to at least one form of ADR has been its growing acceptance of the Magistrate Judge's settlement conference procedures. Those procedures reinforce two of the most important aspects of ADR for the Advisory Group: (1) offering an alternative to the time and expense required for pretrial and trial preparation and (2) giving the client back the case. ADR lets the client hear the issues, problems, and strengths of the case directly—they are not filtered or screened through counsel. And in many cases, clients need to see for themselves that the other side exists and that there are weaknesses in their stories.

Despite these and other advantages of ADR, the Advisory Group ultimately endorsed a voluntary ADR recommendation, with a promise to revisit the mandatory question, based on these factors:

1. Not every case is a candidate for ADR. And, any ADR technique or procedure chosen must match the case. Advisory Group guest Michael Liffrig, who operates a private mediation service in Bismarck, emphasized these points. The Advisory Group thought it wise for the Court and counsel to gain more experience with ADR to better assess which types of cases are most amenable to which types of procedures and which cases should be excepted from ADR altogether.

2. Forcing the parties to ADR will not work. Mr. Liffrig stressed that the idea of ADR is most acceptable to counsel and clients when they are receptive to it, feel an ownership interest in it, and trust the parties involved. Pushing unwilling parties into ADR will probably be a waste of time and money.

3. Encouraging the parties to explore feasible alternatives to litigation is one thing, but making them jump through an additional hoop just for the sake of the jump is another. It was absolutely essential to the Advisory Group that any ADR referral procedure should not merely add another layer of cost and time to the litigation process—particularly if the parties themselves would end up paying for it, as they would here because of the Court's

77. Other points which might keep counsel from using or even considering ADR techniques include (1) fear of unnecessarily exposing case strategy before trial, (2) fear of unilateral revelation or bad faith participation by the adversary, (3) plaintiffs' wish to preserve trial by jury, (4) the loss of rights and protections associated with the trial process for both parties, (5) counsels' desire to make more money by trying cases, and (6) the potential waste of time and money with a failed ADR attempt.

complete lack of resources for creating and administering any ADR programs. There simply has not been enough experience with ADR in this District to determine whether ADR provided a hoop or a help.

4. Also, given the bar's apparent qualms about ADR, mandating it at this time could provide another reason for counsel to avoid federal court for civil case filings. Allowing a period of experimentation with, and education about, ADR may go a long way in changing the fundamental expectations and understanding of both counsel and clients about what ADR is and what it can do that traditional adversarial techniques cannot. These things must be learned, not legislated.

5. Moreover, too much change without corresponding evidence of its value may be counterproductive in this District. Given what we hope will be the new and improved system of setting early and firm trials dates within eighteen months of filing and the new sixty-day benchmark for efficient motion disposition, it will be important to reinforce a more positive public perception about federal court efficiency and in turn strengthen the bar's confidence in the Court's ability to process its civil cases quickly and fairly. In this new environment of trust, counsel—already suspicious of ADR—may be more willing to approach ADR with open minds. In short, the Advisory Group thought it best to adopt a "wait and see" posture about ADR, rather than to impose it in the face of resistance and in the absence of judicial experience with even a voluntary approach.

Voluntary ADR and Education. Accordingly, the 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.

In this connection, along with an encouragement to ADR from the Magistrate Judge, the Advisory Group recommends that on-going ADR education in the state be intensified, if possible, with programs by the State Bar Association, the Federal Practice Committee, the School of Law, and any other appropriate educational source in order to better acquaint the bar—as well as lay

litigants—with ADR options, particularly if the court will one day mandate its use.

ADR Menu. The Advisory Group recommends that the Court's encouragement to counsel to explore ADR options should come early in the pretrial process so that counsel are predisposed to considering alternatives as they move through the case and will not miss opportunities to attempt resolution in alternative manners. At the initial Rule 16(b) Scheduling Conference, the Magistrate Judge would encourage the parties, in appropriate cases, to explore possible ADR methods from an ADR menu listing she will provide to them. That menu would include: early settlement conferences with the court, mediation, arbitration (binding or non-binding), early neutral case evaluation (possibly with experts), court-appointed experts, and mini-trials before someone other than the trial judge. The menu could be included in the form scheduling/discovery plan sent by the Magistrate to counsel before the Scheduling Conference with a directive that the parties be prepared to discuss the desirability of these options at the conference.

Implicit in this recommendation is rejection of Technique § 473(b)(4)'s suggestion to require early neutral evaluation of cases. The possible problem here lies in overkill: The Advisory Group felt strongly that the Magistrate Judge should still conduct her settlement conferences (currently, the Court's only mandated ADR device) in each case in addition to any other ADR methods voluntary undertaken by the parties, including their request for an early settlement conference with the court. Thus, requiring early neutral evaluation on top of the Court's standard settlement conferences and its new encouragement of ADR at the initial Rule 16(b) conference through the menu option discussion (which will include early neutral evaluation as an offering) seemed too much ADR—at least at this point—to require of counsel and litigants.

ADR Reports. In light of its recommendation to revisit the question of mandatory ADR, the Advisory Group thought it important that the Court, at least informally, secure statistics about the voluntary ADR approach. The Group had concerns about the Magistrate's receiving reports about any ADR attempts from third party mediators or evaluators given (1) the possibility that the Magistrate may make determinations that affect the merits (whether in the non-dispositive or dispositive motion settings or at a consent trial), (2) the "ex parte" nature of the communication

and the possible appearance of impropriety, and (3) the Court's lack of control over third parties to enforce their submission of reports.

Any form to be adopted by the Court to survey ADR attempts by the parties could be sent to counsel along with a copy of the Magistrate Judge trial consent form with the order for the Rule 16(b) Scheduling Conference.[78] Or, its contents could be incorporated in the form scheduling/discovery plan. Then the Magistrate Judge could informally inquire of counsel, at the conference, whether ADR is feasible. In addition, the Magistrate could also ask the parties at or before any settlement conferences to generally state what ADR mechanisms have been explored or attempted and, without soliciting specifics, ask counsel to indicate the results of these attempts. Other questions the Court might ask include: Are some issues appropriate for ADR if not the entire case? Are there novel questions of science or technology that are particularly ripe for ADR? Does the client have a policy about ADR?[79]

7. Extensive Utilization of the Magistrate Judge

Addressed: Principal Cause Nos. 1-4, 6-7

As is evident from this Report, the full-time Magistrate Judge is at the center of all civil pretrial activities in this District. Her involvement in the pretrial setting, particularly in the areas of scheduling and settlement conferences, has made a vital difference in this District's ability to process the civil calendar justly and efficiently. The Magistrate has gained considerable credibility within the State bar, including a solid reputation as a settlement judge. This in part is illustrated by the fact that the number of consent trials before the Magistrate (now approximately 25% of the newly-filed civil cases) has grown to the point where she has less time available to handle additional consents and still fulfill her other civil and criminal caseload responsibilities.[80]

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78. The Advisory Group advises against including any ADR report form with the early consent to trial form sent from the Clerk's Office. Sending out both forms that early in the case is probably a waste of time and resources.

79. Technique § 473(b)(6) is the only mandated point yet to be considered. It is directed to the Court and provides for its consideration of "other features" that the Court finds "appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title." The Expense and Delay Reduction Plan specifically includes this provision.

80. The Advisory Group discussed in detail the possibility of putting the Magistrate Judge in the loop for trial assignments with the district judges while preserving the parties' absolute right to receive an Article III decision maker. The Group ultimately rejected this idea for several reasons, an important one being that putting the Magistrate in the loop for trial assignments without changing the rest of her workload would most assuredly create

Accordingly, the Advisory Group enthusiastically recommends the continued and extensive utilization of magistrates in this District in both the trial and pretrial phases of civil cases. In this connection, the Advisory Group strongly encourages counsel to continue consenting to civil trials before the Magistrate Judge. As a number of lawyers have already learned, she provides a key alternative to the district judges who may find themselves unavailable to hear civil trials because of criminal caseload pressures. The Advisory Group also recommends that the Magistrate's civil consent caseload be monitored over the next several years to determine whether permissible incentives to counsel should be adopted to keep the number of consents firm.

8. **The Need for a Second Full-time Magistrate Judge**
Addressed: Principal Cause Nos. 1, 9, 10

Hand in hand with our strong endorsement of extensive magistrate judge use in this District is our recommendation that a second full-time magistrate judge be appointed to this Court and chambered in Bismarck. Earlier this year, the Advisory Group sent a letter urging this appointment to the Chief Judge of this District and cited a number of supporting factors, including: (1) the appropriate use of the full-time Magistrate Judge and the non-use of the part-time magistrates for civil dispositions, (2) the increasing number of counsel requesting the Magistrate Judge for trial, leaving her less time for pretrial and settlement work, (3) the inefficient use of the Magistrate's time for travel between courthouses, (4) the possible retirement of senior judges, and (5) the difficulties in giving prompt attention to the civil calendar, particularly in the eastern divisions, because of the heavy criminal caseload.[81]

Collectively, these factors meet each requirement that the Judicial Conference considers when evaluating full-time magistrate requests.[82] First, the commitment of this Court and Advi-

more of an overload for her, even in a hybrid system where every sixth case (for example) was assigned to her.

81. Letter from Patrick W. Durick, Advisory Group Member, to the Honorable Rodney S. Webb 1-2 (March 26, 1993).

82. Those general requirements are "(A) the comparative need of the district judges for the assistance of magistrate judges and the overall workload of the district court; (B) the commitment of the court to the effective utilization of magistrate judges; and (C) the availability of sufficient work of the sort that the district judges wish to assign to magistrate judges to justify the authorization of additional full-time positions." Letter from Thomas C. Hnatowski, Chief of the Magistrate Judges Division of the Admin. Office of the U.S. Courts, to Vivian Sprynczynatyk, Chief Deputy Clerk, U.S. District Court, District of North Dakota 1-2 (Jan. 21, 1993). In addition, "[t]he authorization of a higher than average ratio of

sory Group to the effective utilization of magistrate judges is unquestioned. Further, the Court *is* making full and extensive use of the Magistrate Judge. Second, there is more than sufficient work for another full-time magistrate judge. She or he could provide much needed assistance to the current Magistrate Judge in civil pretrial and trial dispositions out of the western divisions so that she, in turn, could assist the Chief Judge, who himself is working to full capacity in the east handling the heavy criminal caseload and finding diminished time for civil trials.

Third, as mentioned, the Court's overall workload coupled with the peculiarities of North Dakota's physical geography and case filings profile also justify a second full-time magistrate judge. This District's seemingly manageable civil caseload takes on a strikingly different cast in light of the District's heavy criminal caseload and the considerable distance between the federal courthouses. As earlier explained, the other district judge is too far away to be of practical assistance to the Chief Judge. The Magistrate Judge, while chambered in the same courthouse as the Chief Judge, is preoccupied with all of the District's pretrial civil case management and is often needed in the west because of the sizable civil caseload there.

The Advisory Group is not unsupportive of the preferential treatment given to criminal defendants by virtue of the protections found in the Speedy Trial Act and other statutory or constitutional sources. Solving the problems of cost and delay in the civil docket does not mean disfavoring the criminal docket. It does mean, however, properly staffing and funding the district court so that both dockets can be handled simultaneously and effectively. This District should be able to offer all litigants—criminal and civil—a speedy and affordable trial. At present, this promise for civil litigants is questionable, in part because of the impact recent criminal laws and sentencing procedures have had on the Court's ability to process both dockets at once.

In short, the Court cannot give the civil docket more of the attention it deserves because of this confluence of criminal docket demands, case filing patterns, and geographic complications. These factors make a second full-time magistrate judge, who can share in civil pretrial case management and consent dispositions, imperative. Compliance with the letter and spirit of the CJRA

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magistrate judge positions in a district generally requires (1) a heavy per judgeship caseload; (2) extensive utilization of existing magistrate judge resources; or (3) other special caseload factors or unusual circumstances." *Id.* at 2.

requires nothing less.[83]

9. **Division Boundaries**
Addressed: Principal Cause No. 10

As part of its discussion about the east-west dichotomy in North Dakota, the Advisory Group considered the issue of shifting certain division boundaries in order to even out the judicial business in the State and to reduce the time and cost that counsel expend in travel to and from distant courthouses. Five eastern counties were the subject of this discussion: Rolette (in the Northeastern Division), Towner (in the Northeastern Division), Benson (in the Northeastern Division), Eddy (in the Southeastern Division), and Foster (in the Southeastern Division). All five seem more properly a part of the Northwestern Division. As one Advisory Group member explained:

> There are three significant benefits to the delivery of justice by a realignment of divisions. First, litigants, attorneys, and jurors would cut down on wasted time involved in traveling. . . . A second advantage is that the realignment would create a better utilization of judicial personnel. The impact of transferring counties from Eastern divisions to Western divisions obviously would result in a higher caseload for the West than now [exists]. If, as our committee is recommending, the future judicial personnel would include two full time Magistrates, this would create a more even work flow between those two officers. Finally, the realignment would create a better utilization of Court facilities. The Court facilities in Grand Forks/Fargo are not sufficient to handle existing caseload let alone any growth. The facilities in Bismarck/Minot are significantly better. For example, there can be three jury trials going simultaneously in the West and only two jury trials going simultaneously in the East.[84]

This District has already begun an experimental reassignment from east to west. From July 1, 1992 through December 1, 1993, all criminal actions arising in Rolette County (in the Northeastern Division) will be treated as Northwestern division cases, with ini-

83. Letter from Patrick W. Durick, Advisory Group Member, to the Honorable Rodney S. Webb, at 2 (March 26, 1993) ("Given the vast geographical boundaries of the district, the only reasonable solution the Panel can see to remedy the problem, and comply with the spirit and intent of the Civil Justice Reform Act, is to have a full time Magistrate Judge in the east, based out of Fargo, and one in the west, based out of Bismarck.")

84. Letter from Richard P. Olson, Advisory Group Member, to the Honorable Karen K. Klein (May 10, 1993).

tial trial venue at Minot.[85] The Advisory Group supports this case reallocation as an important step in the study of division changes aimed at equalizing the criminal caseload between the eastern and western divisions. In this regard, the Advisory Group recommends that the Federal Practice Committee of the District review the division boundaries in this District and make recommended changes to the District Court and the Congress concerning the realignment of the five counties described above.

10. **Resources for the Judiciary**
Addressed: Principal Cause Nos. 1, 9 and avoidable cost and delay generally

The noble goals of the CJRA will remain such unless the Congress provides the Judiciary with the funding necessary for the courts to carry out their responsibilities with dignity and dispatch. The nationwide adoption of creative, responsive, and responsible expense and delay reduction plans will be cruel exercises in futility if Congress cannot keep its end of the reform bargain and provide the resources required to make the improvements that it has mandated. As noted, the CJRA itself reaffirms that all three branches of the federal government share both the blame for creating, and the responsibility for solving, the problems of cost and delay:

> [T]he courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties. . . . The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.[86]

Congress must truly accept this self-assigned responsibility, and as one of its significant contributions, help to make civil justice reform possible. As the President of the American Bar Association recently wrote:

> [I]nnovative and creative solutions to pieces of the problem [of

85. Temporary Order (D.N.D. June 5, 1992); Order (D.N.D. Dec. 22, 1992); Continuation Order (D.N.D. May 27, 1993). To help ensure that criminal defendants tried in the west receive a fairly cross-sectioned jury of their peers from their community, the Order makes special provision for inclusion of jurors from Rolette County in the Northwest criminal panel list. Order (D.N.D. Dec. 22, 1992); Continuation Order (D.N.D. May 27, 1993).

86. Pub. L. No. 101-650, § 102(2) & (3).

> limited resources] are simply not enough. We must recognize that the government has an obligation to adequately fund our justice system, and we must do what we can to ensure that the government shares that recognition and meets its obligation.[87]

Indeed, it is a tragic irony that amidst the great experiment sparked by the CJRA, the Judiciary has run out of funds for such fundamental protections as civil jury trials and court-appointed criminal defense counsel. A further irony is Congress's inability or unwillingness to fully fund the CJRA effort itself.

Accordingly, the Advisory Group urgently recommends that Congress provide the federal courts with immediate funding sufficient for the Judiciary to carry out the expense and delay reduction plans specifically designed to ensure the just, speedy, and inexpensive resolution of civil disputes. Moreover, the Advisory Group suggests that Congress can no longer legislate without considering the impact of its actions on the federal court system. We urge that congressional decisions about substantive rights enforcement and jurisdictional claim allocations be informed by the possible case management consequences for both the federal and state court systems.

New legislation is only one source of possible coordinate branch impact on the processing-capacity of the federal court system. Administration policies and pressures that guide the interpretation of both old and new legislation may have a significant impact on the types and numbers of cases brought to the federal courts. Thus, the Executive Branch, as well as the Congress, should be responsible for assessing the probable effect that its policies will have on federal court litigation, particularly those of the United States Attorney and the myriad administrative agencies that interpret and enforce a multitude of federal rights and regulations. Prosecutorial charging decisions by the Department of Justice, for example, have had a notable impact on the number and types of criminal cases brought before the federal courts.

In short, the Congress and the Executive Branch must be accountable for the effect of their actions on the Third Branch. Rights created by Congress or championed by the Executive ultimately have little meaning if they cannot be vindicated with due speed and reasonable cost in the courts of the United States. Whatever substantive or jurisdictional legislative decisions are made, an assessment of their impact upon the processing-capacity

87. Michael J. McWilliams, *Dwindling Judicial Resources*, A.B.A. J. (July 1993) at 8.

of the federal trial courts should follow and with it, any funding necessary to ensure that processing does not impede the enforcement of rights or access provided.

11. Taxation of Costs

Addressed: Principal Cause No. 10

Federal Rule of Civil Procedure 54(d) states the general rule that costs shall be allowed to the prevailing party as part of a final judgment and permits those costs to be taxed by the clerk with provision for court review. Local Rule 23 of this District provides the procedure for the Clerk's assessment. To start the process, the prevailing party must file with the Clerk a Bill of Costs and Disbursements distinctly setting forth each item to be charged and verifying the existence and necessity of each item. By statute, these costs can include such items as trial and deposition transcripts, witness fees, printing fees, and interpreter fees.[88] The Clerk shall consider any objections to the Bill and may even conduct a hearing before taxing costs. The Court will review the Clerk's determination upon motion of a dissatisfied party. The Court in this District has adopted a "reasonably necessary" standard to determine whether costs are taxable and has followed a "rule of fairness" in exercising its wide discretion in awarding costs to the prevailing party.[89]

Representatives of the Clerk's Office have called to our attention that their task of taxing costs has become increasingly difficult as cases have become more complex. Certainly in these, and even in less complex cases, the Clerk's Office cannot help but be unfamiliar with important case details which may affect decision about what costs are "reasonably necessary," even sometimes after explanation by counsel (when it is provided). This unfamiliarity makes it very difficult to fairly assess costs. In addition, the judges in this District have different views about taxing costs so that the Clerk's Office receives conflicting guidance about the appropriateness of any particular taxation.

Accordingly, the Advisory Group recommends that the taxation of costs for final judgment be eliminated as a Clerk's Office function and be handled directly by counsel and the Court. Counsel should confer on costs, and within twenty days after notice of the entry of a judgment allowing costs, present a stipulation of

88. *E.g.*, 28 U.S.C. § 1920(2),(3) & (6).

89. *E.g.*, Koch Hydrocarbon Co. v. MDU Resources Group, Inc., No. A1-87-009, slip op. at 2 (D.N.D Aug. 19, 1992).

undisputed costs to the Clerk (in a Stipulated Bill of Costs), and present any disputed costs (in a Statement of Controverted Costs) to the Court in the form of a motion. With that motion, counsel should also submit a certification that sincere attempts were made (involving, as we recommended with respect to discovery motions, actual in-person or telephonic conferences) to resolve differences about costs without troubling the court. Local Rule 23 should be amended to reflect these changes. In addition, the Advisory Group urges that the Court strive to reach reasonable uniformity on the taxation of costs throughout the District to ensure fairness and consistency in those decisions.

These changes would have several cost, delay, and fairness benefits. First, the taxation decision could be made more efficient by an authority knowledgeable about the case and more likely to know whether particular costs were reasonably necessary. Of course, time would be saved for the Clerk's Office. Second, because the court would only examine disputed costs, there will be a net savings in time and effort on these decisions which formerly involved consideration of all costs. In addition, the decision would be made only once. Further, if counsel would need to justify each disputed item directly to the Court, they may be more selective about the costs they incur and the discovery they undertake.

C. THE FUTURE ROLE OF THE ADVISORY GROUP

The Advisory Group recommendations represent merely the first level of reassessment required by the CJRA. Section 475 of the Act directs the district court to annually assess the condition of its civil and criminal docket to determine whether additional steps must be taken to reduce cost and delay in civil case processing and to improve the court's case management practices. The Advisory Group shall be the Court's consultant in this monitoring phase.

In view of its continuing role in the CJRA process, the Advisory Group will continue to meet and monitor, to the extent possible, both the Plan's effect on cost and delay reductions in civil dispositions and the reaction to the Plan by the bench and bar of this State. In particular, as priorities already recommended in this Report, the Advisory Group (1) will periodically review the 18-month trial date benchmark and sixty-day motion disposition benchmark for compliance, (2) will periodically review the Magistrate Judge's civil consent caseload to determine whether additional incentives to counsel should be adopted to keep the number of consents firm, (3) will revisit the question whether ADR should

be mandated by the court after a reasonable period of experience with voluntary ADR and review of collected ADR information from counsel about their ADR efforts, and (4) may give more consideration to proposed Federal Rule of Civil Procedure 26, once adopted or rejected, particularly in light of any actual experience under the rule. The Group thanks the Clerk's Office in advance for its ongoing assistance in gathering any pertinent information for the Group's consideration.

Ascertaining how the Plan is working and how it is being received may require (1) additional interviews with our judicial officers, particularly the Magistrate Judge, (2) discussions with bar leaders, whom the Advisory Group might invite to future meetings once the Plan has been in effect for a reasonable period, and (3) a short, follow-up survey to federal practitioners in North Dakota about the Report and Plan. In the meantime, the bar may direct any written comments about this Report and Plan to the Advisory Group Chair.

Given the pretrial concentration of the CJRA mandate, this Advisory Group primarily focused on the Court's pretrial case management procedures. Future generations of the Group may wish to turn more of their collective attention to (1) the problems of avoidable cost and delay in the trial phase, (2) the impact of technology on trial preparation and presentation, (3) the attitudes and expectations of both lawyers and clients about civil litigation and how they influence cost and delay, (4) cooperation between federal, state, and tribal judicial sovereigns in solving cost and delay problems that may derive from inter-systemic issues, (5) a review of all forms currently used by the Court and Clerk's Office to determine whether they contribute to avoidable cost and delay, and (6) the flow of information within and between courthouses in this District, including possible inefficiencies resulting from having one judicial officer prepare the case and another try it (the team player approach).

V. CONCLUSION

The Civil Justice Reform Act tolerates no excuses. It requires all participants in the civil litigation process to take responsibility for doing something about the debilitating and demoralizing effects of avoidable cost and delay. The perception—and reality—that the price of justice is too high or that justice itself is too far off in the distance of delay to be attainable must change. The CJRA is one route to reexamine—indeed, rediscover—the "just" in justice

so that speedy and affordable relief is not merely an aspiration, but an entitlement for us all. This Report and Plan are offered in the hope, rooted in the reality of what is now possible, that tangible and positive change can be achieved in the near future.

Respectfully submitted,

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

Appendix A

Biographical Sketches of the Current Advisory Group for the District of North Dakota

Karen K. Klein was appointed full-time U.S. Magistrate Judge for the District of North Dakota on December 1, 1985. She served as a half-time Magistrate Judge from January 1985 until the full-time appointment. She received her juris doctor degree from the University of North Dakota School of Law, Grand Forks, North Dakota in 1977 where she served as Editor-in-Chief of the Law Review. She served as law clerk to Chief Judge Paul Benson, U.S. District Court, Fargo, North Dakota from 1977 to 1979. She was in private practice in the Fargo area from 1979 until 1985. Magistrate Judge Klein is a member of the U.S. Judicial Conference Committee on the Administration of the Magistrate Judges System, the North Dakota Supreme Court's Judiciary Standards Committee, and a member and former chair of the North Dakota State Bar Association's Alternative Dispute Resolution Committee.

Patti Alleva is an Associate Professor of Law at the University of North Dakota School of Law where she teaches Federal Courts, Advanced Civil Litigation, and Trial Advocacy. She received her juris doctor degree from Hofstra University School of Law, where she was Articles Editor of the Law Review and a teaching fellow in civil procedure. After graduation, Professor Alleva served as law clerk to Chief Judge Clarkson S. Fisher, U.S. District Court, District of New Jersey and then practiced law in New York City at Proskauer Rose Goetz & Mendelsohn in the firm's Litigation Department. Professor Alleva has published in the area of federal jurisdiction and is a member of the Executive Committee of the American Association of Law Schools' Section on Federal Courts. She has also served on the New York City Bar Association's Council on Judicial Administration. In 1989, Professor Alleva received the University of North Dakota's Lydia and Arthur Saiki Prize for Graduate and Professional Teaching Excellence.

Lynn Crooks is a 1965 graduate of the University of North Dakota School of Law. From 1965 to 1969 he served as a Special Assistant Attorney General for the State of North Dakota. His primary responsibility was to defend the North Dakota Unsatisfied Judgment Fund. In 1969 he accepted his current position as an Assistant United States Attorney for the District of North Dakota. During his tenure as an Assistant United States Attorney, he has been continuously engaged in a broad variety of trial work, involving both civil and criminal cases. He was the lead prosecutor in the Kahl murder trial in 1983 in which two followers of tax protester Gordon Kahl were convicted of the murder of the United States Marshal for the District of North Dakota and one of his deputies. He has also served the United States Attorney's Office as Senior Litigation Counsel, Chief of the Civil Division and First Assistant.

Patrick W. Durick is a practicing attorney at Bismarck, North Dakota at the law firm of Pearce & Durick. He was admitted to the Bar of the State of Nebraska in 1973 and to the North Dakota

bar the following year. Mr. Durick was a law clerk to U.S. District Judge Robert Denny in the District of Nebraska from 1973-1974. From 1989-1991 he was the Chair of the North Dakota Federal Practice Committee for the U.S. District Court.

Ronald F. Fischer received his juris doctor degree from the University of North Dakota School of Law in 1980, graduating with distinction. In 1977 he received his Bachelor of Science degree at the University of Mary, Bismarck, North Dakota, with majors in Business and Accounting. Mr. Fischer also is a Certified Public Accountant and has been since 1978. He is a member of the Board of Governors North Dakota Trial Lawyers Association. From 1980-1985, Mr. Fischer was a trial attorney at the U.S. Department of Justice Tax Division in Washington, DC. He is currently a principal of the Pearson, Christensen, Larivee & Fischer law firm in Grand Forks, North Dakota, with a concentration in civil litigation of all types.

Cameron W. Hayden is an Assistant United States Attorney for the District of North Dakota. His responsibilities include defending Federal Tort Claim Act lawsuits filed against the United States, its agencies and employees. Mr. Hayden is a cum laude graduate of the University of North Dakota where he completed his undergraduate education. He earned his law degree in 1982 from the University of North Dakota School of Law where he graduated with distinction. He is admitted to practice law in North Dakota and Minnesota. Mr. Hayden is a member of the State Bar Association of North Dakota.

Douglas R. Herman is a shareholder in the law firm of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd. in Fargo, North Dakota, where his legal work is evenly split between business litigation and business counseling. Mr. Herman is a 1975 graduate of the University of Michigan Law School.

Edward J. Klecker has been the Clerk of the U.S. District Court of the District of North Dakota since 1984. His employment prior to that date includes the Project Director at the School of Medicine, University of North Dakota at Grand Forks; the Director of Institutions for the State of North Dakota; the North Dakota State Coordinator for the Mt. Plains Education & Economic Development Corporation and a Peace Corps officer. Mr. Klecker received his post high school education at the Minot State University at Minot, North Dakota. In 1991 Mr. Klecker received the Director's Award for Administrative Excellence for U.S. Courts.

Joseph R. Maichel joined Montana-Dakota Utilities Company in Bismarck, North Dakota in 1971 as an attorney. He became general counsel and corporate secretary of the company in 1976 and was promoted to vice president, general counsel and corporate secretary in 1979. Mr. Maichel became group vice president-distribution in 1982. In 1985, he became president, and in May 1990, advanced to his present position of president and chief exec-

utive officer of MDU. He also served as a director of MDU Resources Group, Inc. from 1982-1990. Mr. Maichel obtained his bachelor of science degree in business administration with a major of accounting in 1957, a juris doctor degree in 1959 from the University of North Dakota School of Law, and a juris doctor degree with Distinction in 1969 from that University. He is also a graduate of the executive program at Stanford University. Before joining MDU, he was a special assistant attorney general of the state of North Dakota assigned to the tax area.

Mary Muehlen Maring received her juris doctor degree from the University of North Dakota School of Law in 1975. She was the law clerk for the Honorable Bruce C. Stone, Hennepin County District Court, Minneapolis, Minnesota, from 1975 to 1976. Since 1976, she has been in private practice and has concentrated in the area of personal injury litigation. Ms. Maring is the immediate past president of the North Dakota Trial Lawyers Association and the East Central District Bar Association.

Richard P. Olson was admitted to the North Dakota Bar in 1974. He graduated from Concordia College cum laude in 1971 and received his juris doctor degree from the University of Minnesota in 1974. Mr. Olson has been the past president of the Ward County Bar and is currently Chair of the Local Bankruptcy Rules Committee and a member of the North Dakota Federal Practice Committee, Commercial Law League of America, American Bankruptcy Institute, and Conference on Consumer Finance Law. Mr. Olson has been listed in four editions of THE BEST LAWYERS IN AMERICA in the areas of corporate law, business litigation, and bankruptcy.

William L. Strate is an Assistant Attorney General for the State of North Dakota, Civil Litigation Division. Mr. Strate is a 1979 graduate of North Dakota State University and 1982 graduate of the University of North Dakota School of Law. Before joining the Attorney General's office, Mr. Strate was in private practice for ten years. He is a former Tribal Judge and City Attorney. Mr. Strate has also served as attorney for a number of school districts.

Michael B. Unhjem graduated from the University of North Dakota School of Law in 1978. He practiced law in Jamestown, North Dakota for three years, then worked for Norwest Bank before spending two years doing fund-raising work for the Anne Carlson School and Jamestown College. Mr. Unhjem joined Blue Cross Blue Shield of North Dakota as legal counsel and Vice President of Corporate Affairs in 1986. In 1989 he was named Assistant to the President and General Counsel, and in 1991 he was elected to the position of President and Chief Executive Officer of the Company.

Vernon Wagner graduated from the North Dakota State University in Fargo, North Dakota in 1949 with a bachelor of science

degree in pharmacy. His past employment includes the Service Drug and the Manager of the Clinic Pharmacy in Bismarck. In 1967 Mr. Wagner joined the North Dakota Medical Association as an Assistant Executive Secretary and in 1976 became that organization's Executive Vice President. He has served on a variety of committees involving the health industry.

Appendix B

The Advisory Group's Survey of the North Dakota Bar and Questionnaire for Federal Judicial Officers in North Dakota

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
U.S. DISTRICT COURT - DISTRICT OF NORTH DAKOTA

February 10, 1992

Dear Member of the Bar:

In 1990 Congress passed the **Civil Justice Reform Act of 1990 ("Act")** based upon a public perception and concern that litigating in the federal courts is too lengthy and too expensive (in costs and attorney's fees). The Act requires each federal district to create an advisory group, composed of lawyers and non-lawyers, to assist the court in developing and adopting, by December of 1993, a civil justice expense and delay reduction plan for the district. The purpose of each plan is 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" (28 U.S.C. Section 471).

Chief Judge Conmy appointed an advisory panel in January of 1991, which has begun study of the civil and criminal case docket in this district.

Because the Act contemplates a community effort, the panel decided that a survey of the members of the North Dakota Bar Association, and other lawyers that have appeared in our court, should be taken to help the panel identify perceived strengths and weaknesses in the delivery of civil justice in our court. To this end, we respectfully request that you complete the enclosed survey and return it to us by **March 2, 1992,** in the accompanying postage paid return addressed envelope. The survey includes questions for criminal practitioners as well as civil practitioners.

Simply put, we perceive your insights, experience, information and comments to be important predicates to our crafting a case management plan that the court and the members of the bar will ultimately find workable, acceptable, and responsive to the mandates of the Act. We thank you in advance for your time in completing the enclosed survey. Feel free to contact any of the members of the panel concerning any questions you may have, or further information you may require.

Sincerely yours,

THE CIVIL JUSTICE REFORM ACT ADVISORY PANEL

KAREN K. KLEIN, Chairperson

Survey subcommittee:
Patti Alleva
Sidney Fiergola
Ronald Fischer

U.S. DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SURVEY OF LAWYERS

1(a). Have you, within the past ten years, represented a party in a civil case in the United States District Court for the District of North Dakota ("USDC-ND")?

_____or_____
Yes No

[If your response to 1(a) was "Yes", please go on to complete the rest of this survey. If your response was "No", please explain in the space below why you have not been involved in civil litigation in the USDC-ND and then go on to answer questions 12, 13, 14, and 15]

I have not represented a party or witness in a civil case in the USDC-ND within the past ten years because_____
_____

1(b). Please indicate whether you represented a party and/or witness:

_____ Party and/or _____Witness

2. Please put a check mark next to the number of USDC-ND civil cases you have been involved in as an attorney for one of the parties within the past ten years:

A. _____ 1 to 5
B. _____ 6 to 10
C. _____ 10 to 15
D. _____ 15 to 20
E. _____ more than 20

3. The following is a list of categories of cases for which the court maintains statistics. For each category in which you have been involved in representing a party in the USDC-ND, please write in the approximate number of such cases you have been involved in:

A. _____ Asbestos
B. _____ Bankruptcy
C. _____ Banks and Banking
D. _____ Civil Rights

E. _____ Commerce: ICC Rates, etc.

F. _____ Contract

G. _____ Copyright, Patent, Trademark

H. _____ ERISA

I. _____ Forfeiture and Penalty

J. _____ Fraud, Truth in Lending

K. _____ Labor

L. _____ Land Condemnation, Foreclosure

M. _____ Personal Injury

N. _____ Prisoner

O. _____ RICO

P. _____ Securities, Commodities

Q. _____ Social Security

R. _____ Student Loan and Veterans

S. _____ Tax

T. _____ Other (Please identify):_____
_____

4(a). Please put a check mark next to each type of case which takes more time than you feel is reasonable (from commencement to final resolution) to process through the USDC-ND.

A. _____ Asbestos

B. _____ Bankruptcy

C. _____ Banks and Banking

D. _____ Civil Rights

E. _____ Commerce: ICC Rates, etc.

F. _____ Contract

G. _____ Copyright, Patent, Trademark

H. _____ ERISA

I. _____ Forfeiture and Penalty

J. _____ Fraud, Truth in Lending

K. _____ Labor

L. _____ Land Condemnation, Foreclosure

M. _____ Personal Injury

N. _____ Prisoner

O. _____ RICO

P. _____ Securities, Commodities

Q. _____ Social Security

R. _____ Student Loan and Veterans

S. _____ Tax

T. _____ Other (Please identify):_____

_____

4(b). (Optional) Please explain why, in your opinion, the types of cases you checked (in 4(a), above) take longer than you feel is reasonable to process through the USDC-ND. (Feel free to attach additional comment sheets, or write on the back of this page, if the space below is insufficient for all of your comments.)

_____

_____

5(a). Please put a check mark next to each type of case which, in your opinion, is more expensive (in costs and attorneys' fees) than you feel necessary to litigate in the USDC-ND.

A. _____ Asbestos

B. _____ Bankruptcy

C. _____ Banks and Banking

D. _____ Civil Rights

E. _____ Commerce: ICC Rates, etc.

F. _____ Contract

G. _____ Copyright, Patent, Trademark

H. _____ ERISA

I. _____ Forfeiture and Penalty

J. _____ Fraud, Truth in Lending

K. _____ Labor

L. _____ Land Condemnation, Foreclosure

M. _____ Personal Injury

N. _____ Prisoner

O. _____ RICO

R. _____ Student Loan and Veterans

P. _____ Securities, Commodities

S. _____ Tax

Q. _____ Social Security

T. _____ Other (Please identify):_____

5(b). (Optional) Please explain why, in your opinion, the types of cases you checked (in 5(a), above) are more expensive than you feel is reasonable to litigate in the USDC-ND. (Feel free to attach additional comment sheets, or write on the back of this page, if the space below is insufficient for all of your comments.)

_____

_____

6. "Case management" refers to oversight and supervision of litigation by the judge, or by routine court procedures such as standard scheduling orders. Some civil cases are intensively managed through such actions as detailed scheduling orders, frequent monitoring of discovery and motions practice, substantial court effort to settle the case or to narrow issues, or by requiring rapid progress to trial. Some cases may be largely unmanaged, with the pace and course of litigation left to counsel and with court intervention only when requested.

(a) How would you characterize the overall level of case management by the USDC-ND in cases you have been involved in? Please circle one.

1. Intensive
2. High
3. Moderate
4. Low
5. Minimal
6. None
7. I'm not sure

(b) In your opinion, was the overall level of case management (please check one):

(1) Too much _____

(2) Just right_____

(3) Not enough_____

(c) Why? (optional)_____

_____

7. Listed below are several case management actions that could be taken by the USDC-ND in civil litigation. For each listed action, please circle one number to indicate whether you favor, disfavor, or have no opinion regarding the action.

		Favor	Disfavor	No Opinion
a.	Hold pretrial activities to a firm schedule.	1	2	3
b.	Set and enforce time limits on allowable discovery.	1	2	3
c.	Narrow issues through conferences or other methods.	1	2	3
d.	Rule promptly on pretrial motions.	1	2	3
e.	Refer the case to alternative dispute resolution, such as mediation or arbitration.	1	2	3
f.	Set an early and firm trial date.	1	2	3
g.	Conduct or facilitate settlement discussions.	1	2	3
h.	Exert firm control over trial.	1	2	3
i.	Refer the case to the Magistrate Judge for pretrial proceedings (e.g. discovery disputes, motion disposition).	1	2	3

j.	Trial of the case by the Magistrate Judge (including presiding at jury trials) with direct appeal of the outcome to the Court of Appeals.	1	2	3
k.	Other (please specify):_____ _____	1	2	3

8. For some time now the USDC-ND has been advising the parties and their counsel of the right to consent to a trial (including jury trials) to be conducted by the Magistrate Judge, with direct appeal to the Eighth Circuit. In many cases, this would result in a trial much sooner than if consent is not given. Please indicate what factors contribute to parties' and/or their lawyers' decision **not** to consent to a trial of the case to be conducted by the Magistrate Judge.

a. Desire by a party and/or counsel to delay disposition of the case;

b. Perceived inexperience of the Magistrate Judge;

c. Perceived lack of competence of the Magistrate Judge to conduct a trial;

d. Gender of the Magistrate Judge;

e. Other (please explain):

_____

_____

9. If any of the USDC-ND civil cases in which you have represented a party actually took longer to conclude than you believed reasonable, please indicate what factors contributed to the delay (circle one or more):

a. Excessive case management by the court.

b. Inadequate case management by the court.

c. Dilatory actions by counsel.

d. Dilatory actions by the litigants.

e. Discovery abuses.

f. Court's failure to rule promptly on motions.

g. Backlog of cases on court's calendar.

h. Other (please specify):_____

i. Describe the category of case involved [see question 3, above, for categories]:_____
_____

10(a). Please rank (with the **most effective** being "1" and the **least effective** being "10") each of the following actions in reducing DELAY in disposing of civil cases in the USDC-ND:

a.	Hold pretrial activities to a firm schedule.	Rank_____
b.	Set and enforce time limits on allowable discovery.	Rank_____
c.	Narrow issues through conferences or other methods.	Rank_____
d.	Rule promptly on pretrial motions.	Rank_____
e.	Refer the case to alternative dispute resolution, such as mediation or arbitration.	Rank_____
f.	Set an early and firm trial date.	Rank_____
g.	Conduct or facilitate settlement discussions.	Rank_____
h.	Exert firm control over trial.	Rank_____
i.	Refer the case to the Magistrate Judge for pretrial proceedings (e.g., discovery disputes, motion disposition).	Rank_____
j.	Trial of the case by the Magistrate Judge (including presiding at jury trials) with direct appeal of the outcome to the Court of Appeals.	Rank_____
k.	Other (please specify):_____	

_____

10(b). (Optional) If you believe that delay is a problem in the USDC-ND for disposing of civil cases, are there any other actions that could be taken (not identified in 10(a), above) to reduce that delay? (Please specify) _____

_____

11(a). Please rank (with the **most effective** being "1" and the **least effective** being "10") each of the following actions in reducing the COSTS AND/OR ATTORNEYS' FEES associated with civil litigation in the USDC-ND:

a. Hold pretrial activities to a firm schedule. Rank____

b. Set and enforce time limits on allowable discovery. Rank____

c. Narrow issues through conferences or other methods. Rank____

d. Impose more sanctions pursuant to Rule 11 or Rule 37 of the Federal Rules of Civil Procedure. Rank____

e. Refer the case to alternative dispute resolution, such as mediation or arbitration. Rank____

f. Shift attorneys' fees to the losing party in **all** cases. Rank____

g. Conduct or facilitate settlement discussions. Rank____

h. Exert firm control over trial. Rank____

i. Refer the case to the Magistrate Judge for pretrial proceedings (e.g., discovery disputes, motion disposition). Rank____

j. Trial of the case by the Magistrate Judge (including presiding at jury trials) with direct appeal of the outcome to the Court of Appeals. Rank____

k. Other (please specify):_____

_____

11(b). (Optional) If you believe that costs and/or attorneys' fees associated with litigating civil cases in the USDC-ND are too high, are there any other actions (not identified in 11(a), above) that could be taken to reduce those costs and/or attorneys' fees? (Please specify) _____

_____

12. Currently, the United States Congress is contemplating significant amendments to the Federal Rules of Civil Procedure. If approved, the proposed amendments will become effective in December of this year (1992). Listed below are summaries of several amendments which would affect discovery in civil cases. For each proposal, please indicate whether you favor, disfavor, or have no opinion regarding the proposal.

a. An amendment to Rule 16 which would permit the Court to consider and issue an order establishing a reasonable limit on the time allowed for the presentation of evidence and the number of witnesses and documents that may be presented.

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

b. An amendment to Rule 16 which would permit the Court to consider and issue an order requiring the parties, or their representatives or insurers, to attend a conference to consider settlement and to participate in special proceedings to assist in resolving the dispute.

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

c. An amendment to Rule 26 that would require each party, without awaiting a discovery request, to provide every other party with:

(1) The name, and if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

(2) A copy of, or description by category and location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____
_____

(3) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____
_____

(4) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____
_____

d. An amendment to Rule 26 which would require each party, before they can present expert testimony at trial, to provide every other party with a written report prepared and signed by the expert which includes a complete statement of all opinions (and their underlying bases) to be expressed, the information relied upon in forming such opinions, supporting exhibits, the expert's qualifications, and a list of other cases in which the witness has testified as an expert at trial or deposition within the preceding four years?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____
_____

e. An amendment to Rule 26, which may be altered by local rule for particular types of cases, which would limit the number:

(1) Of depositions?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

(2) Of interrogatories?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

(3) Of witnesses?

1. FAVOR____ 2. NEUTRAL____ 3. DISFAVOR____

Why? (optional):_____

_____

13. (Optional) Are there any other amendments to the discovery rules which you would like to see to cut excessive litigation costs and/or to minimize delay in case dispositions?

_____

_____

14. If you have been involved, within the past ten years, in representing either the Government or a defendant in one or more criminal cases in the USDC-ND, please give us your opinion on the following:

a. Was there any delay in the prompt disposition of the case(s), and if so, why?

b. How could the case(s) have been handled more efficiently?

c. What impact, if any, did the case(s) have on the USDC-ND Civil docket?

15. Please choose one of the following categories to describe your practice of law:

a. _____Private Practice, primarily plaintiff representation
b. _____Private Practice, primarily defense representation
c. _____Public Interest Litigator
d. _____Corporate Counsel
e. _____Government Attorney
f. _____Other (describe):_____
_____

WHILE YOU ARE NOT REQUIRED TO IDENTIFY YOURSELF TO PARTICIPATE IN THIS SURVEY, WE MAY FIND IT HELPFUL TO DO A FOLLOW-UP SURVEY AS A RESULT OF THE RESPONSES WE RECEIVE TO THE FOREGOING QUESTIONS. IF YOU WOULD BE WILLING TO PARTICIPATE IN SUCH A FOLLOW-UP SURVEY, AND DO NOT MIND WAIVING YOUR ANONYMITY, PLEASE PROVIDE YOUR NAME, ADDRESS, AND TELEPHONE NUMBER BELOW:

Name: _____
Address: _____
_____

Telephone: _____

PLEASE RETURN THIS SURVEY, WITH YOUR RESPONSES (INCLUDING ANY SUPPLEMENTAL SHEETS OF COMMENTS), IN THE ENCLOSED POSTAGE PAID ENVELOPE, ON OR BEFORE **MARCH 2, 1992.**

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
U.S. DISTRICT COURT - DISTRICT OF NORTH DAKOTA

February 5, 1992

Honorable Patrick A. Conmy
U.S. District Court Judge
P.O. Box 1578
Bismarck, ND 58505

Dear Honorable Patrick A. Conmy:

As part of our statutory duty to devise a civil justice expense and delay reduction plan for the District of North Dakota, the Advisory Panel must assess the state of the District's civil and criminal dockets and attempt to identify the principal causes of avoidable costs and delay in case processing. To this end, we respectfully request your assistance in completing this Judicial Questionnaire,[1] which is essentially designed (1) to discover the current practices and procedures used by the district's judges and magistrates that might impact upon case processing and (2) to solicit your expertise and input about the improvements necessary 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" (28 USC Section 471). For your convenience, we enclose a copy of the Civil Justice Reform Act of 1990 for your review.

In short, we perceive your insights, information and advice to be crucial predicates to our crafting a case management plan that the Court will ultimately find workable, acceptable, and responsive to the specifics of fair and efficient case processing in North Dakota. We apologize in advance for any inconvenience this survey may cause.

As part of this survey process, we would very much appreciate your supplying the Advisory Panel with copies of any of these items (if you use them):

---

[1] As you know, we will send a Practitioner's Questionnaire to every member of the North Dakota bar.

1. A Scheduling Order
2. A Discovery Order
3. A Preliminary Pretrial Conference Order
4. A Final Pretrial Conference Order
5. Any collection of rules, requirements, or procedures that you provide to counsel, whether for pretrial or trial stages.

If you do not provide counsel with a standard form of these orders, feel free to send a copy of any order actually submitted to you by counsel that you endorse as a suitable example of what you require or find most helpful in processing cases.

We greatly appreciate your vital assistance in this important task and respectfully request the return of your survey and accompanying sample documents to Ed Klecker no later than **Monday, March 16, 1992.** Do not hesitate to contact any of the panel members with any questions you may have or for further information you may require.

Respectfully,

THE CIVIL JUSTICE REFORM
ACT ADVISORY PANEL

Karen K. Klein

KAREN K. KLEIN
Chairperson

Survey Subcommittee Members:
Patti Alleva
Sidney Fiergola
Ronald Fischer

The Civil Justice Reform Act Advisory Panel
For the U.S. District Court of North Dakota

Judicial Questionnaire

January 1992

Some of the questions in this survey derive from the work done by the Advisory Panels for the Southern Districts of New York and Florida and from the March 1989 study done by Louis Harris and Associates, Inc. We thank them for their contributions.

JUDICIAL QUESTIONNAIRE TOPICS

A. CASE CLASSIFICATION AND TRACKING

B. MAGISTRATE JUDGES

C. RULE 16

D. DISCOVERY

E. MOTION PRACTICE

F. SCHEDULING TRIALS

G. BIFURCATION

H. PRO SE CASES

I. COURT RESOURCES AND FACILITIES

J. IMPACT OF LEGISLATION OR CONGRESSIONAL ACTION

K. ALTERNATIVE DISPUTE RESOLUTION

L. IMPACT OF CRIMINAL CASELOAD

M. GENERAL COMMENTS

N. PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

JUDICIAL QUESTIONNAIRE

This Questionnaire seeks to gather information to assist the Advisory Panel in satisfying the Civil Justice Reform Act's requirement to "promptly complete a thorough assessment of the state of the court's civil and criminal dockets" as the basis for its report and recommendations to the court. 28 U.S.C. § 472(b)(1), (c)(1). Section 472(c)(1) requires the Advisory Panel (A) to determine the condition of those dockets, (B) to identify trends in case filings and in the demands upon the court's resources, (C) to identify the principal causes of cost and delay in civil litigation through consideration of court procedures as well as the manner in which counsel and clients conduct litigation, and (D) to analyze whether costs and delays could be reduced by a better assessment of the impact on the courts of new legislation. Id.

To the extent that the specific questions listed below (1) do not solicit this or related information and/or (2) do not provide sufficient space for your responses, we invite you to append separate sheets of comments to your completed survey. In addition, live follow-up interviews or your live comments to the Advisory Panel at one of its meetings may provide other avenues for expression of your thoughts. We encourage your feedback and guidance in any form acceptable to you.

A. CASE CLASSIFICATION AND TRACKING

1. Do you favor a tracking system where different types of cases are placed on different speed tracks based on case complexity?

Yes _____ No _____

Why?

_____

_____

2. Other than the categories of cases already used by the court for statistical purposes, can you suggest any means you think would be useful for differentiating cases on your docket for the purpose of minimizing delay or expense?

_____

_____

3. What particular types of cases, if any:

(a) cause more delay in your calendar than others?

_____

_____

(b) generate higher costs?

_____

_____

(c) are most difficult to decide because of subject matter or expertise required?

_____

_____

4. Approximately how many cases presently listed on your civil docket, excluding Multi-District Litigation and the asbestos cases, would you consider to be complex?

_____

_____

5. Please identify by name and number three (3) of the most complex cases currently listed on your civil docket.

(a) Name/Number:

_____

Why is it complex?_____

_____

(b) Name/Number:

_____

Why is it complex?_____

_____

(c) Name/Number:

_____

Why is it complex?_____

_____

6. Do you support the use of a non-judicial administrator to assign cases and to actively manage the flow of cases through the system?

Yes _____ No _____

B. MAGISTRATE JUDGES

7. Do you assign civil cases on your docket to a Magistrate Judge?

Yes _____ No _____

8. For which of the following purposes do you assign the case? (Please check the appropriate categories to indicate assignment.)

(a) Discovery _____

(b) Pretrial matters other than discovery _____

(c) Settlement _____

(d) Jury selection _____

(e) Other purposes (please identify them) _____
_____

9. How do you determine which cases to send to the Magistrate Judge?
_____
_____

10. In your view, would the existence of standards with respect to the referral of work to Magistrate Judges assist in reducing delay and expense in the conduct of civil litigation?

Yes _____ No _____

11. Do you have any suggestions as to what those standards should be?
Suggestions:_____
_____

12. Do you think that a Magistrate Judge who decides a dispositive pretrial motion on report and recommendation to you

(a) reduces the total time you spend on that motion?

Yes _____ No _____

(b) reduces the total time that the court system devotes to that motion?

Yes _____ No _____

13. Do you encourage counsel to consent to trial before a Magistrate Judge?

Yes _____ No _____

If yes, at what stage in the proceeding?

_____

_____

C. RULE 16

14. Should Rule 16 pretrial conferences be required?

Yes _____ No _____

Why? (Optional) _____

_____

15. What is your practice with respect to calling pretrial conferences?

_____

_____

16. When should a Magistrate Judge be assigned to handle the Rule 16 conference?

_____

_____

17. What subjects do you typically cover in a Rule 16 Conference?

_____

_____

18. Do you use a scheduling order?

Yes _____ No _____

Why? (Optional) _____

_____

19. Are scheduling orders more effective in particular types of litigation than in others?

Yes _____ No _____

If yes, in what types of cases do you believe such orders are useful?

_____

_____

20. In what types of cases do you believe such orders are *not* useful?

_____

_____

21. Do you call a Final Pretrial Conference as a regular practice?

Yes _____ No _____

22. Do you always explore settlement possibilities during the Final Pretrial Conference?

Yes _____ No _____

23. Do you typically explore settlement possibilities at any other times or through any other vehicles during the pretrial or trial stages?

Yes _____ No _____

If yes, when and how?

_____

_____

24. Do you ever hold multiple pretrial conferences in a case?

Yes _____ No _____

Why? (Optional) _____

_____

25. At what points in the pretrial and trial phases do you usually hold them?

_____

_____

26. Do you use a standard final pretrial order in every civil case?

Yes _____ No _____

27. Do you believe that a final pretrial order is useful in every category of civil cases?

Yes _____ No _____

If not, in what types of cases do you believe a final pretrial order is not useful?

_____

_____

D. DISCOVERY

28. What categories of cases, if any, generate a disproportionate number of discovery disputes?

_____

_____

29. Is discovery abuse by counsel one of the fundamental causes of litigation delay in your court?

Yes _____ No _____

30. Are noteworthy numbers of discovery abuses related to:

(a) counsel who unfairly withhold discoverable information?

Yes _____ No _____

(b) counsel who over-discover rather than focus on pertinent issues?

Yes _____ No _____

(c) counsel who seek irrelevant material?

Yes _____ No _____

(d) counsel who use discovery as an adversarial tool or tactic?

Yes _____ No _____

(e) counsel who seek to generate hours solely for billing purposes?

Yes _____ No _____

31. What, in your view, would be the single-most effective deterrent to abusive discovery practices by counsel?

_____

_____

32. Can you single out plaintiff's or defendant's lawyers as a group more likely to abuse the discovery process?

Yes _____ No _____

If yes, are they (a) Plaintiffs _____ or (b) Defendants _____?

33. Do you favor the use of monetary sanctions to deter discovery abuses:

(a) against counsel?

Yes _____ No _____

Why? (Optional) _____

_____

(b) against clients?

Yes _____ No _____

Why? (Optional) _____

_____

34. Have you imposed monetary sanctions on counsel or clients within the last three years?

Yes _____ No _____

Why? (Optional) _____

_____

35. Should federal judges and magistrates take a more active hand in controlling the discovery process?

Yes _____ No _____

36. Can you list three (3) ways in which the Federal Rules of Civil Procedure could be improved to facilitate the court's control of discovery?

(a) _____

_____

(b) _____

_____

(c) _____

_____

37. Do you support or oppose these means of controlling the discovery process by:

	SUPPORT	OPPOSE
(a) Setting a time limit on discovery (e.g., 12 months)?	_____	_____
(b) Limiting the number of interrogatories or depositions unless counsel demonstrates the need for more?	_____	_____

	SUPPORT	OPPOSE
(c) Issuing standing orders on discovery which instruct counsel how to proceed?	_____	_____
(d) Requiring early discovery conferences soon after the case is filed?	_____	_____
(e) Requiring counsel to arrive at a discovery plan before the first pretrial conference?	_____	_____
(f) Assigning magistrates to supervise the discovery process?	_____	_____

38. Do you set cut-off dates for discovery?

Yes _____ No _____

At what stage?_____

39. Describe your procedures and practices regarding controlling the scope and volume of discovery.

_____

_____

40. Do you call Rule 26(f) discovery conferences?

Yes _____ No _____

If so, describe the scope of the conference.

_____

_____

41. Describe your use of Magistrate Judges for resolving discovery disputes.

_____

_____

42. Do you believe that formal discovery motions should be prohibited and replaced initially by a letter to you or the Magistrate Judge?

Yes _____ No _____

43. Do you think that the use of standard interrogatories in particular categories of cases would be useful (e.g., some courts required asbestos plaintiffs to answer standard exposure and injury interrogatories at the outset of the case)?

Yes _____ No _____

44. In what particular categories of cases do you think such a device would be useful?

_____

_____

45. Do you require a discovery conference soon after the case is filed?

Yes _____ No _____

46. Do you require counsel to adopt a discovery plan?

Yes _____ No _____

When?

_____

_____

E. MOTION PRACTICE

47. Do you encourage motions in limine concerning evidentiary questions that might arise at trial?

Yes _____ No _____

Why? (Optional) _____

_____

48. What are your criteria for granting oral argument on motions?

_____

_____

49. What is your procedure for monitoring the filing of motions, responses, and briefs?

_____

_____

50. Do you use proposed orders from attorneys?

Yes _____ No _____

51. How can they be improved to save the Court work?

_____

_____

52. What is your practice regarding extension of time to respond to complaints or motions?

_____

_____

53. What procedures have you found most effective in enforcing those time limits?

_____

_____

54. Do you permit letter briefs on pretrial motions?

Yes _____ No ____

If not, why not? _____

_____

55. Do you set page limitations on motion submissions?

Yes _____ No _____

What are they? _____

_____

56. Can you estimate in what percentage of your cases you grant the relief requested in a motion that is totally or substantially dispositive of the case?

_____%

57. Do you believe that courts should, when appropriate, encourage parties to move for summary judgment?

Yes _____ No _____

58. When might that be appropriate?

_____

_____

59. Do you favor the use of Rule 11 sanctions?

Yes _____ No _____

If not, why not?

_____

_____

If so, why do you favor them?

_____

_____

F. SCHEDULING TRIALS

60. What are your methods for scheduling trials?

_____

_____

61. What procedures have you found most effective in enforcing trial dates?

_____

_____

62. When a civil case is ready for trial, how long on the average does it take you to reach that case for trial:

(a) A matter of days _____

(b) A matter of weeks _____

(c) Three months or less _____

(d) Three to six months _____

(e) More than six months _____

63. If you cannot try a case when it is ready, do you routinely ask that it be assigned to a "ready" judge for trial?

Yes _____ No _____

64. Do you think it would be helpful to place all "ready" cases on a central trial list for the next available judge?

Yes _____ No _____

65. Do you require counsel to premark all trial exhibits?

Yes _____ No _____

66. How much in advance of trial do you require premarking?

_____

_____

67. Who premarks them?

_____

_____

68. What is your marking system?

_____

_____

G. BIFURCATION

69. Do you routinely bifurcate trials (e.g., separating liability and damage issues)?

Yes _____ No _____

70. Do you believe it would be more useful to require bifurcation in certain categories of cases rather than in others?

Yes _____ No _____

71. In what types of cases would required bifurcation be useful?

_____

_____

72. Do you find that bifurcating a trial into liability and damages phases

	YES	NO
(a) Speeds up the trial?	____	____
(b) Reduces litigation costs?	____	____
(c) Unclutters the issues to be tried and improves juror or court comprehension?	____	____
(d) Improves outcome fairness?	____	____
(e) Expedites settlements?	____	____

H. PRO SE CASES

73. Do you (as opposed to the court as an institution) employ any special procedures for screening pro se cases to identify ones not likely to be meritorious?

Yes _____ No _____

If yes, what are those special procedures?

_____

_____

74. Do you think it would be useful for the court to develop a standard set of interrogatories to be used in prisoner cases?

Yes _____ No _____

I. COURT RESOURCES AND FACILITIES

75. Does the Court have sufficient personnel to carry out its responsibilities?

(a) Law clerks? Yes _____ No _____

(b) In-Chambers secretarial? Yes _____ No _____

(c) Clerk's Office? Yes _____ No _____

(d) District Judges? Yes _____ No _____

(e) Magistrate Judges? Yes _____ No _____

76. Is the physical plant of your Courthouse sufficient?

Yes _____ No _____

77. If not, which areas need improvement:

(a) Number of courtrooms? Yes _____ No _____

(b) Design or size of courtrooms? Yes _____ No _____

(c) Design or size of libraries? Yes _____ No _____

(d) Design or size of your office? Yes _____ No _____

(e) Design or size of your law clerks' area? Yes _____ No _____

(f) Design or size of Clerk's Office? Yes _____ No _____

(g) Storage areas? Yes _____ No _____

(h) Parking for judicial personnel? Yes _____ No _____

(i) Parking for counsel? Yes _____ No _____

78. Do you see these items as high or low priority for the expeditious processing of cases both in the courtroom and in Chambers:

(a) New computers in Chambers? High _____ Low _____

(b) Video equipment in the Courtroom, (including monitors for the bench, witness box, counsel table, the jury box, and the jury deliberations room)? High _____ Low _____

(c) Electronic mail capacity between and within the various courthouses and chambers? High _____ Low _____

(d) Overhead projectors in the courtroom? High _____ Low _____

(e) Expanded use of phone conferences for motion hearings and pretrial conferences? High _____ Low _____

(f) Improved/computerized courtroom reporting/transcript services? High _____ Low _____

79. Do you and your law clerks have sufficient research materials in your courthouse libraries?

Yes _____ No _____

80. Do you and your law clerks spend too much time securing needed research materials from other sources?

Yes _____ No _____

If yes, what types of materials are the subject of out-of-courthouse searches?

(a) _____

(b) _____

(c) _____

J. IMPACT OF LEGISLATION OR CONGRESSIONAL ACTION

81. Have the Sentencing Guidelines impacted the time you have available for your civil docket?

Yes _____ No _____

In what ways?

_____

_____

82. Has the Speedy Trial Act contributed to delay in handling your civil docket?

Yes _____ No _____

In what ways?

_____

_____

83. What other types of legislation have impacted the time you have available for your civil docket?

_____

_____

84. How do you cope with such an impact?

_____

_____

85. What suggestions do you have for reducing the impact of such legislation?

_____

_____

86. Does Congress contribute to the need for litigation by:

(a) its failure to express its intent clearly in substantive statutes by declarations on the face of the statute about the law's objectives?

Yes _____ No _____

(b) its failure to enact legislation that would ease the burden on the courts in certain types of cases that require special treatment?

Yes _____ No _____

87. In particular, do these examples of Congressional inaction add to the types of questions that courts and counsel must decide?

(a) Implied causes of action in regulatory statutes?

Yes _____ No _____

(b) Unspecified statutes of limitations?

Yes _____ No _____

(c) Choice of law issues?

Yes _____ No _____

(d) Federal common law?

Yes _____ No _____

88. With regard to jurisdictional statutes:

(a) Should Congress either eliminate or narrow the diversity jurisdiction granted to the federal courts under 28 U.S.C. § 1332?

Yes _____ No _____

Why? (Optional)_____

_____

(b) Should Congress more clearly articulate the standard for jurisdiction under 28 U.S.C. § 1331, the general federal question statute, in order to avoid disputes involving threshold forum concerns?

Yes _____ No _____

(c) Should Congress, if it sees fit, err on the side of providing explicitly for federal jurisdiction within particular substantive statutes rather than relying on the courts to adjudicate such issues on a case-by-case basis?

Yes _____ No _____

89. Are there aspects of the Civil Justice Reform Act which trouble you or undermine the Congressional objectives of the Act?

Yes _____ No _____

If yes, what are they?

_____

_____

K. ALTERNATIVE DISPUTE RESOLUTION

90. Do you think that alternative forms of dispute resolution should be encouraged by the court or provided by the judiciary?

Yes _____ No _____

91. Have you ever used any form of alternative dispute resolution?

If so, what form(s)?_____

_____

92. Do you support the concept of "multi-door courthouses, providing a wide range of dispute resolution services under one roof that would screen complaints and match them to appropriate procedure[s]"? (HARRIS REPORT 58)

Yes _____ No _____

93. Do you think the court should encourage the use of these alternative dispute resolution devices:

(a) Arbitration? Yes _____ No _____

(b) Early neutral evaluation? Yes _____ No _____

(c) Mediation? Yes _____ No _____

(d) Mini-trials? Yes _____ No _____

(e) Settlement conferences hosted by judicial officers? Yes _____ No _____

(f) Summary jury trials? Yes _____ No _____

(g) Others? (Identify) _____

_____

94. Should Congress appoint another part-time Magistrate Judge for this District for the sole purpose of using any or all of these dispute resolution techniques on a regular basis?

Yes _____ No _____

L. IMPACT OF CRIMINAL CASELOAD

95. Over the past five years, how have criminal cases impacted processing of civil cases on your docket?

_____

_____

96. Do you have any suggestions for easing the strain imposed upon this District because of its criminal caseload?

_____

_____

97. In particular, what can the U.S. Attorney do to expedite the handling of criminal cases?

_____

_____

98. What can defense lawyers do, if anything, to expedite the handling of criminal cases?

_____

_____

99. Are you satisfied with the procedures for referral of criminal matters to the Magistrate Judges?

Yes _____ No _____

If no, what might be done to improve referral?

_____

_____

100. Are you satisfied with the method of reporting on criminal matters from the Magistrate Judge to the District Judge?

Yes _____ No _____

If no, what can be done to improve these reporting procedures?

_____

_____

M. GENERAL COMMENTS

101. Is there anything peculiar to North Dakota, such as its geography, its weather, its sparse population, its rural nature, or its "personality" which might affect the Court's ability to fairly and efficiently dispose of the cases filed in this District?

_____

_____

102. Do you feel that counsel, on the whole, exhibit a proper respect for the court?

Yes _____ No _____

103. Take court deadlines seriously?

Yes _____ No _____

104. On the whole, is counsel's courtroom decorum satisfactory to you?

Yes _____ No _____

105. Is there an informality which undermines the expeditious resolution of cases?

Yes _____ No _____

106. Does counsel generally make bona fide efforts to move cases along to final resolution in a timely fashion?

Yes _____ No _____

If not, where does counsel falter?

_____

_____

107. Do you think civil cases take too long (i.e., from start to finish) in this District?

Yes _____ No _____

If so, what one thing would you like to see to help decrease the duration of litigation?

_____

_____

108. Do you think it costs too much to litigate civil cases in this District?

Yes _____ No _____

If so, what one thing would you like to see done to decrease the costs of litigation?

_____

_____

109. What, in your opinion, is the most effective tool or process to expedite civil cases?

_____

_____

110. What peculiar difficulties have you encountered in moving your civil case docket that you have not yet mentioned in this Questionnaire?

_____

_____

111. Do you agree that high litigation costs lead to unequal justice by:

(a) impeding use of the federal courts by ordinary citizens?

Yes _____ No _____

(b) giving unfair advantage to certain groups or individuals that can afford these costs?

Yes _____ No _____

112. What is the most time consuming aspect of your docket?

_____

_____

113. What would assist you in handling this aspect of your docket?

_____

_____

114. Do you support or oppose these actions by federal trial judges in their role as case managers:

	SUPPORT	OPPOSE
(a) More active use of pretrial and status conferences to monitor and limit discovery?	_____	_____
(b) Scheduling early and firm trial dates?	_____	_____
(c) Devising a comprehensive discovery schedule early on?	_____	_____
(d) More frequent use of protective orders?	_____	_____

	SUPPORT	OPPOSE
(e) More frequent use of sanctions?	_____	_____
(f) Use of experienced lawyers with special expertise in the subject of dispute resolution as neutral evaluators at an early point in the litigation?	_____	_____
(g) Use of a litigation budget based on a conference of attorneys and clients called by the judge soon after the complaint is filed?	_____	_____
(h) Penalizing the parties for last minute settlements?	_____	_____

115. Please indicate whether these items are (1) a major cause, (2) a minor cause, or (3) not a cause of excessive litigation costs and/or undue delay in the federal court system:

	Major	Minor	Not
(a) The increasing complexity of litigation	____	____	____
(b) Too few judges for the caseload	____	____	____
(c) Frivolous suits without merit	____	____	____
(d) Inexperienced or incompetent lawyers	____	____	____
(e) Expansion of the substantive law	____	____	____
(f) The way the calendar is set and managed	____	____	____
(g) Frivolous defenses without merit	____	____	____
(h) Counsel who wish to win at any cost	____	____	____
(i) Lawyers worried about malpractice suits	____	____	____
(j) Discovery	____	____	____

116. Do you believe that particular categories of cases would benefit from judicial non-interference--that is, leaving the parties alone?

Yes _____ No _____

If yes, in what categories of cases should the courts adopt this hands-off approach?

_____

_____

117. In your view, what are the three (3) principal causes of expense in the conduct of civil litigation?

(a) _____
(b) _____
(c) _____

118. Are there any trends with respect to the types of cases before you that are factors in causing expense?

Yes _____ No _____

What are they?

_____

_____

119. In your view, what are the three (3) principal causes of delay in the conduct of civil litigation?

(a) _____
(b) _____
(c) _____

120. Are there any trends with respect to the types of cases before you that are factors in causing delay?

Yes _____ No _____

What are they?

_____

_____

121. What are the three (3) most important things that counsel could do, as a general matter, to ensure the expeditious processing of their cases?

(a) _____

(b) _____

(c) _____

122. What other recommendations or suggestions do you have for addressing the cost or delay of civil cases?

_____

_____

N. PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

123. Do you favor or disfavor an amendment to Rule 16 which would permit you to consider and issue an order establishing a reasonable limit on:

(a) the length of time allowed for the presentation of evidence?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(b) the number of witnesses or documents that may be presented?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

124. Do you favor or disfavor an amendment to Rule 16 which would permit you to consider and issue an order requiring the parties, or their representatives or insurers, to attend a conference to consider possibilities of settlement and to participate in special proceedings to assist in resolving the dispute?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

125. Would you favor or disfavor an amendment to Rule 26 that would require each party, without awaiting a discovery request, to provide every other party with:

(a) The name, and if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(b) A copy of, or description by category and location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(c) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(d) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

126. Would you favor or disfavor an amendment to Rule 26 which would require each party that may present expert testimony at trial to provide every other party with a written report prepared and signed by the expert which includes a complete statement of all opinions (and their underlying bases) to be expressed, the information relied upon in forming such opinions, supporting exhibits, the expert's qualifications, and a list of other cases in which the witness has testified as an expert at trial or deposition within the preceding four years?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

127. Would you favor or disfavor an amendment to Rule 26, which may be altered by local rule for particular types of cases, which would limit the number

(a) Of depositions?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(b) Of interrogatories?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(c) Of witnesses?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

(d) Of exhibits per side?

FAVOR _____ NEUTRAL _____ DISFAVOR ____

WHY? (Optional) _____

_____

128. Are there any other amendments to the discovery rules which you would like to see to cut excessive litigation costs and/or to minimize delay in case dispositions?

_____

_____

Please attach any supplemental sheets of comments to this survey along with copies of your sample documents.

Thank you for your cooperation.

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

CHAMBERS OF
RODNEY S. WEBB
CHIEF JUDGE

U.S. COURTHOUSE
655 FIRST AVENUE NORTH
FARGO, NORTH DAKOTA 58108-3164

TELEPHONE
(701) 239-5293
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P.O. BOX 3164

October 8, 1993

Honorable Karen K. Klein
Chairperson, Civil Justice
Reform Act Committee
Fargo, North Dakota

Re: Transmittal of Civil Justice Reform Act Plan for the District of North Dakota

Dear Judge Klein:

We are pleased to transmit the final Civil Justice Expense and Delay Reduction Plan of the District Court for the District of North Dakota. As the active judges of this District we have executed the Plan on this date and it has become a part of our case management system.

It is our understanding that the Committee has arranged for the publication of the Report of the Advisory Committee and the Plan in the North Dakota Law Review. We think this is an excellent method of advising the legal community of the existence of this Plan.

We also take this means of commending you and each member of the Advisory Committee for the effort you have expended on behalf of the federal judicial system. Your effort will certainly result in reduction of expense and time for litigants in the federal courts. Please accept and extend to each member of the Committee our great appreciation.

Yours very truly,

RODNEY S. WEBB, CHIEF JUDGE

PATRICK A. CONMY, JUDGE