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*861 THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

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Chief Judge

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Preliminary Statement

The **Civil Justice** Reform Act (CJRA), 28 U.S.C. §§ 471-82, requires each federal district court, assisted by an advisory group appointed by the Chief Judge of the District, to adopt a **plan** of action to reduce avoidable cost and **delay** in **civil** litigations. The **plan's** purpose 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." CJRA § 471. In accordance with CJRA § 472, the Advisory Group for this District has submitted to the Court a **Civil Justice Expense** and **Delay Reduction** Report and proposed **Plan**.

This Court, upon consultation with the Advisory Group and after carefully considering (1) the Advisory Group's Report and recommendations, (2) the § 473(a) and (b) principles and techniques of litigation management, (3) the § 473(b)(6) obligation to reflect upon other such features which might be appropriate for this **Plan**, and (4) the **Plan's** responsiveness to the problems identified in the Advisory Group Report, HEREBY ADOPTS A **CIVIL JUSTICE EXPENSE** AND **DELAY REDUCTION PLAN** for the District of North Dakota.

This **Plan** seeks to ensure that significant contributions are made by all litigation participants to the ends of just, timely, and cost-effective **civil** adjudications. The Court therefore encourages all federal court personnel, counsel, litigants, legislators, and executive officers in this District to study both this **Plan** and the Advisory Group Report. The Report explains in detail how each **Plan** provision came to be as well as the reasons for the changes or recommendations proffered to the Court by the Advisory Group.

ACCORDINGLY, IT IS SO ORDERED

(1) that this **Civil Justice Expense** and **Delay Reduction Plan** for the District of North Dakota is effective December 1, 1993 and will remain in effect unless and until amended by the Court upon reasonable notice;

***862** (2) that this **Plan** shall be read in conjunction with the Federal Rules of **Civil** Procedure, the Local Rules of

this District, and any other applicable rules, orders, and procedures governing the practice and administration of law in this Court;

(3) that copies of this **Plan** and the Advisory Group Report shall be transmitted to the Director of the Administrative Office of the United States Courts, the Judicial Council for the Eighth Judicial Circuit, and the Chief Judge of each District Court in the Eighth Judicial Circuit in accordance with CJRA § 472(d); and

(4) that the Advisory Group, with the Clerk's Office, shall assist the Court in its annual assessment of the District's criminal and civil docket in accordance with CJRA § 475, including the Clerk's preparation of trial and motion disposition reports. Over time, the Advisory Group shall consider the state of the civil case disposition in this District and the Plan's effectiveness in order to advise the Court whether additional actions should be taken to improve its case management practices.

In addition, the Advisory Group (a) will periodically review the 18-month trial date benchmark and sixty-day motion disposition benchmark, (b) 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, (c) will revisit the question whether ADR should be mandated by the court after a reasonable period of experience with voluntary ADR and review any collected ADR information, and (d) may give further consideration to proposed Federal Rule of Civil Procedure 26, once adopted or rejected, particularly in light of any actual experience under the rule.

Plan Provisions

1. Differentiated Case Management. To facilitate the Court's individualized pretrial management of civil cases and to assist both the judges and the Clerk's Office in following, reporting on, and disposing of the civil docket, the Court adopts a simple civil case classification system based on the judicial management time required for disposition. This system shall have two case classifications:

Class One-the express class-will 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 includes, but is not limited to, such cases as ***863** bankruptcy appeals, social security appeals, consent cases, collection actions, veterans' administration overpayments, foreclosures, and student loans.

Class Two-the standard class-will hold all other cases. Each case will be individually managed by the Court in accordance with the scheduling/discovery plan approved by the Court and counsel at the initial Rule 16(b) Scheduling Conference.

This civil case classification system is essentially an internal administrative concern of the Court and will not directly affect any other filing or case-processing responsibilities of counsel and clients. It will also help to generate case-aging reports that will 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. (See also ADVISORY GROUP REPORT pages 777-79).

2. Early and Ongoing Control of the Pretrial Process. The Court heartily endorses the basic procedures already used in this District by the Magistrate Judge to actively manage civil cases and prepare them for trial. To improve the Court's early, ongoing, uniform, and efficient control of the pretrial process, the Court adopts these supplemental practices and procedures:

Firm Trial Dates Set Early at the Rule 16(b) Scheduling Conference. The Court shall standardize the practice of setting the trial date and final pretrial conference date for each Class Two case at the initial Rule 16(b) Scheduling Conference, with trial to take place within thirty (30) days or so after the final pretrial conference. Both the final pretrial conference and trial dates shall be firm once set, subject only to extraordinary cause exceptions within the Court's discretion and to criminal docket demands. To ensure maximum fairness and minimal hardship to counsel and clients, the Court shall continue its practice of fully involving counsel in scheduling matters, particularly the setting of the final pretrial conference and trial dates, and of accommodating counsel as much as practicable within Civil Justice Reform Act and docket constraints. The Court shall also allow voluntary extensions of discovery and motion deadlines negotiated by counsel unless they disturb the final pretrial conference and trial dates.

To facilitate the Court's early setting of firm final pretrial conference and trial dates, the Magistrate Judge's current Rule 16(b) Scheduling Conference procedures shall be revised to require counsel to meet and confer at least seven (7) days in advance of the ***864** Scheduling Conference so that they can present their proposed scheduling/discovery plan to the Court at least two (2) working days before that conference. This will enable the Magistrate Judge to secure possible trial dates from the district court judge assigned to the case in time for discussion at the Rule 16(b) Scheduling Conference.

Eighteen-Month Benchmark for Trials. In addition, the Court adopts an eighteen (18) month benchmark for calendaring civil trials, starting from the date of filing, with exceptions for complex cases and criminal caseload demands as provided in CJRA § 473(a)(2)(B)(i)-(ii). [FN1] In short, at the initial case conference, the Court and counsel shall finalize a scheduling/discovery plan, topped by firm trial and final pretrial conference dates, which shall be designed to take the case to trial within eighteen (18) months of the complaint's filing. In the event of unavoidable conflict between trial of a criminal and civil case, the Court shall make every effort to have another judge available to try the civil case on the original trial date. (It should be noted that inviting another judge to assist in the disposition of trials at Fargo is not now possible due to the fact that only one jury-capable courtroom is available.) If the trial must be deferred, the case shall be reset for trial on a priority basis at the earliest possible date within ninety (90) days of the original date.

The Intermediate Status Conference. To help maintain pretrial momentum, the Magistrate Judge shall hold an Intermediate Status Conference between the initial Rule 16(b) Scheduling Conference and the Final Pretrial Conference in all Class Two cases. The Intermediate Status Conference shall 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 or revisit ADR options. This conference will give the Court an opportunity to monitor counsel's compliance with the discovery/scheduling plan and make necessary "midstream" adjustments without disturbing the final pretrial conference and trial dates.

***865** *Joint Jury Instructions.* To reinforce the importance of jointly submitted jury instructions and to provide appropriate notice to counsel, Local Rule 8(G) shall be amended to reflect the requirement that counsel shall confer on jury instructions and present to the Court, to the extent possible, an agreed-upon set of instructions. Disagreements shall be briefed and presented to the Court for decision.

Accordingly, immediately upon adoption of this Plan, the Clerk of Court shall initiate the formal administrative process for public comment on this proposed revision of Local Rule 8(G) (new text underlined and amended text struck through):

(G) REQUESTS FOR INSTRUCTIONS TO JURY

At least five days prior to the commencement of all jury trials, and after sincere attempts by counsel to resolve any disagreements about the instructions to be given, a jointly prepared single set of requested instructions shall

be presented to the Court and served upon each adverse party. The Court may receive additional requests relating to questions arising during the trial at any time prior to the argument. All requests for instructions shall be plainly marked with the number of the case, shall designate the party submitting the same, and each requested instruction shall be numbered and written on a separate page, together with a citation of authorities supporting the proposition of law stated in the instruction. All disagreements about the instructions shall be briefed and presented to the Court at least five days before the start of trial.

Sixty-Day Benchmark for Motions and Bankruptcy Appeals. Given the importance of efficient motion disposition to the entire trial scheme, the Court shall adopt a sixty-day benchmark for all 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 shall be the exception and not the rule. The Court shall adopt a sixty-day benchmark for bankruptcy appeals, also to be measured from the date that the last brief or supporting material is filed. (See also ADVISORY GROUP REPORT pages 779-86).

3. Pretrial Monitoring of Complex Cases through Discovery-Case Management Conferences. As indicated, the Court endorses the careful monitoring of civil cases during the pretrial phase ***866** through the appropriate use of court conferences on the theory that judicial presence-but not pestering-will encourage efficiency, preparedness, and accountability in all pretrial participants. To this end, in the most complex cases, the district judges shall assume a more active role, in a manner appropriate to the judge and case, in the pretrial management of these actions in order to smooth the transition to trial. In addition, the Court shall continue the use of telephone conferences to facilitate case monitoring without causing counsel, clients, and the court the unnecessary expense, lost time, and inconvenience of travel.

No matter how extensive the Court's monitoring of discovery matters, however, the primary responsibility for keeping discovery within acceptable and ethical bounds belongs to lawyers and clients and the Court reemphasizes counsel's duty to discover as well as disclose in a reasonable fashion. Similarly, communication and cooperation between adversaries is another essential.

Court-Appointed Experts and Science and Technology in the Courtroom. In complex and other cases, the court, with increasing frequency, must decide sometimes difficult questions of science and technology within the courtroom. Accordingly, the Court shall consider the possibility of greater utilization of court-appointed experts, consistent with the caveats expressed in the Advisory Group Report about their use, as one option for improving the fair and efficient processing of cases involving complicated issues of science or technology. In particular, the Court shall consider developing 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. (See also ADVISORY GROUP REPORT pages 786-89).

4. Voluntary Information Exchange and Cooperative Discovery Devices. To promote early, voluntary, and amicable disclosure of information between counsel and efficient document exchanges without the need for formal discovery requests and responses (but without prejudice to request the same and other information and documents through formal discovery devices), a category shall be added to the form scheduling/discovery plan attached to the Magistrate Judge's Rule 16(b) Scheduling Conference order stating, in these or similar words, that "The parties agree to voluntarily exchange [list documents or categories of documents and/or pertinent insurance agreements] by [stated deadline]."***867** At the Rule 16(b) Conference, the Magistrate Judge may inquire further of counsel who have not reached agreement on any document exchange as well as explore additional categories of documents for those counsel willing to make exchanges. (See also ADVISORY GROUP REPORT pages 790-91).

5. Good Faith Certifications for Discovery Motions. In order to reduce the number of unnecessary discovery motions and to promote cooperation between counsel, including the crafting of reasonable discovery requests, Local Rule 4(B)(4) shall be amended to expressly require that counsel actually confer in-person or by telephone (or other electronic

means) in attempting to resolve discovery disputes before seeking court intervention.

Accordingly, immediately upon adoption of this **Plan**, the Clerk of Court shall initiate the formal administrative process for public comment on this proposed revision of Local Rule 4(B)(4) (new text underlined):

(B) DISCOVERY

(4) 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 actually confer, whether in-person or by telephonic or other electronic means, in order 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. The requirement to actually confer is subject to waiver by the Court only in exceptional circumstances upon a sworn factual showing of the conference's futility.

(See also ADVISORY GROUP REPORT pages 791-92).

6. Alternative Dispute Resolution. While the Court at this time declines to make alternative dispute resolution procedures (other than the Magistrate Judge's settlement conferences) a mandatory part of the pretrial process for civil cases, the Court encourages counsel and clients to voluntarily explore the feasibility of ADR options in order to assist expeditious resolution of disputes. (See also ADVISORY GROUP REPORT pages 792-96).

7. Extensive Utilization of the Magistrate Judge. In light of the indispensable role played by the full-time Magistrate Judge in this District in managing and moving the civil case docket, the Court shall continue the extensive utilization of magistrates in this State in both the trial and pretrial phases of civil cases. In this connection,***868** the Court encourages counsel to continue consenting to civil trials before the Magistrate Judge and shall monitor the Magistrate's civil consent caseload to determine whether permissible incentives to counsel should be adopted to keep the number of consents firm. (See also ADVISORY GROUP REPORT pages 796-97).

8. The Need for a Second Full-time Magistrate Judge. Because the confluence of criminal docket demands, case filing patterns, and geographic complications contribute to the **expense** and **delay** in **civil** dispositions in this District, the Court strongly recommends that a second full-time magistrate judge be assigned to this District and chambered in Bismarck. (See also ADVISORY GROUP REPORT pages 797-99).

9. Division Boundaries. The Advisory Group Report recommends that the divisional boundaries of the District possibly be realigned to equalize the judicial business of the divisions. In furtherance of that recommendation the Court directs that the District's Federal Practice Committee study and review the matter and provide the Court with recommendations as to possible realignment. (See also ADVISORY GROUP REPORT pages 799-800).

10. Resources for the Judiciary. The Court recommends that Congress provide the federal courts with immediate funding sufficient for the federal Judiciary to carry out the CJRA **expense** and **delay reduction plans** specifically designed to ensure the just, speedy, and inexpensive resolution of **civil** disputes. In addition, because Congress and the Executive Branch must be accountable for possible case management consequences on both the federal and state court systems of their decisions concerning substantive rights and jurisdictional allocations, an assessment of their impact upon the processing-capacity of the federal trial courts should follow and with it, any funding necessary to ensure that processing problems do not impede the vindication of rights or the forum access Congress intended to provide. (See also ADVISORY GROUP REPORT pages 800-02).

11. Taxation of Costs. To promote efficiency, fairness, and consistency in the taxation of costs allowed to the

prevailing party as part of a final judgment pursuant to Federal Rule of Civil Procedure 54(d), Local Rule 23 shall be amended to eliminate the Clerk's Office role in these assessments. The taxation process shall be handled directly by counsel and the Court in accordance with a new procedure requiring counsel to confer, stipulate to undisputed***869** costs, and refer to the Court, by motion, only those disputed costs.

Accordingly, immediately upon adoption of this Plan, the Clerk of Court shall initiate the formal administrative process for public comment on this proposed revision of Local Rule 23(A)-(C) (new text underlined and amended text struck through): [FN2]

TAXATION OF COSTS

(A) STIPULATED BILL OF COSTS; MOTION TO THE COURT FOR TAXATION OF DISPUTED COSTS

(1) Within twenty days after notice of the entry of a judgment allowing costs, the prevailing party shall (a) confer with the attorney for the adverse party, (b) serve on that attorney and file with the Clerk, a Stipulated Bill of Costs and Disbursements, reflecting all undisputed costs agreed upon by counsel, and (c) file with the Court, if necessary, a Statement of Controverted Costs reflecting all costs disputed by counsel, ***870** which shall be treated as a motion pursuant to Rule 5 of these rules. The Court shall refuse to hear any Motion for Taxation of Disputed Costs unless the moving party certifies to the Court, in writing, of sincere attempts to actually confer with opposing counsel, whether in-person or by telephonic or other electronic means, about the disputed items in order to resolve differences without court involvement. This certification shall also recite the conference date, time, place, and the names of conference participants. The requirement to actually confer is subject to waiver by the Court only in exceptional circumstances upon a sworn factual showing of the conference's futility.

(2) The Bill of Costs and Disbursements and any Statement of Controverted Costs shall briefly and distinctly set forth each item so that the nature of the charge can be readily understood, and shall be verified by the applicant's attorney, stating that the items are correct and that the services were actually and necessarily performed and the disbursements were necessarily incurred in the action or proceeding.

(3) Upon failure to comply with this rule, all costs shall be waived.

(4) No hearing on the Motion for Taxation of Disputed Costs will be had unless granted by the, Court, in its discretion. Notice of the time of any hearing shall be given by the Court to counsel at least three days prior to the hearing.

(B) OBJECTIONS

Opposing counsel may object to any item or items contained in, the Statement of Controverted Costs by serving upon the prevailing party and filing with the Court written objections thereto, together with any affidavits or other supporting evidence, in accordance with Rule 5 of these rules. After due consideration given to the Statement of Controverted Costs, objections thereto, any briefs submitted by counsel, and any oral argument entertained by the Court, the Court shall tax costs and direct the Clerk to insert the amount of costs taxed in the blank left in the judgment and in the docket.

***871** (See also ADVISORY GROUP REPORT pages 802-03).

SO ORDERED.

Dated October 8, 1993

[FN1]. That section provides for "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that-(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or (ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases[.]"

[FN2]. For easier reading, here is the retyped text of proposed Rule 23(A)-(C):

(A) STIPULATED BILL OF COSTS; MOTION TO THE COURT FOR TAXATION OF DISPUTED COSTS

(1) Within twenty days after notice of the entry of a judgment allowing costs, the prevailing party shall (a) confer with the attorney for the adverse party, (b) serve on that attorney and file with the Clerk, a Stipulated Bill of Costs and Disbursements, reflecting all undisputed costs agreed upon by counsel, and (c) file with the Court, if necessary, a Statement of Controverted Costs reflecting all costs disputed by counsel, which shall be treated as a motion pursuant to Rule 5 of these rules. The Court shall refuse to hear any Motion for Taxation of Disputed Costs unless the moving party certifies to the Court, in writing, of sincere attempts to actually confer with opposing counsel, whether in-person or by telephonic or other electronic means, about the disputed items in order to resolve differences without court involvement. This certification shall also recite the conference date, time, place, and the names of conference participants. The requirement to actually confer is subject to waiver by the Court only in exceptional circumstances upon a sworn factual showing of the conference's futility.

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