ANNUAL ASSESSMENT REPORT

THE CIVIL JUSTICE REFORM ACT
ADVISORY GROUP
FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

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THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA Volume I

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I. INTRODUCTION

The Civil Justice Reform Act of 1990 ("the Act") requires each United States district court to implement a civil justice expense and delay reduction. 28 U.S.C. § 471. The Act further requires that "after developing or selecting [a Plan]..., each United States District Court shall assess annually the condition of the court's civil and criminal dockets ..." *See id.* at § 475. The purposes of a plan and the assessment are to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management and ensure just, speedy, and inexpensive resolutions of civil disputes," and to take any additional action which may be necessary to further these purposes. *Id.* at §§ 471, 475.

In accordance with the Civil Justice Reform Act, the United States District Court for the District of South Dakota (the "District Court") appointed an Advisory Group as mandated by § 478 of the Act. 28 U.S.C. § 478. The Advisory Group is comprised of a diverse group of lawyers representing the scope of civil litigants appearing regularly in the District of South Dakota. After extensively gathering information and data regarding the status of civil litigation in the District, the Advisory Group presented its twenty-three point Civil Justice Expense and Delay Reduction Recommendations to the District Court. *See* 138 *F.D.R.* 393 (1993). The District of South Dakota incorporated these recommendations into its "Civil Justice Expense and Delay Reduction Plan" ("the Plan"). The Plan became effective December 1, 1993. Copies of the Plan are available at each Courthouse and through the Advisory Group.

The recommendations made by the Advisory Group to the District Court, and which were implemented in the Plan, were relatively modest due to the expeditious and efficient

manner with which litigation was proceeding in the District prior to the Advisory Group's assessment. The Advisory Group considered it prudent to allow the Plan to be in effect for at least one year before making an assessment. This Report is the first annual assessment of the Plan since its implementation in the District of South Dakota.

As part of the first annual assessment, the Advisory Group polled lawyers within the District of South Dakota in December, 1994 regarding status of civil litigation within the District. The Advisory Group also reviewed the relevant statistical data and interviewed the District's Judges. The Report examines how the Plan is operating, its impact on civil litigation within the District, and the status of civil litigation in the District of South Dakota.

II. THE PLAN

As stated above, the Plan implemented by the District of South Dakota included relatively minor changes to the procedures then operational in the District. In researching the status of the District, the Advisory Group found that there was no excessive cost or delay occurring in the District. Therefore, due to the highly effective and expeditious civil procedures in place in the District, the Advisory Group urged the District Court to resist any major change in the practices of the Court.

The general principles of the District's Plan include: (1) refining and implementing measures proven successful in reducing delay, such as reasonable time-saving measures requested by counsel; (2) prioritizing prompt resolution of motions by the Court; (3) an annual appraisal by judges and their staff of delay reduction measures; (4) keeping the

Court informed of the latest technological advancements in information, management and office efficiency, delay reduction; (5) continuing use of pretrial conferences pursuant to Federal Rule of Civil Procedure 16; (6) encouraging quick and just disposition of civil cases; (7) monitoring by the Court of civil discovery to minimize abuse; (8) imposing sanctions as needed; (9) consulting with the Advisory Group to develop quantifiable, objective criteria and non-quantifiable, subjective criteria by which to measure the Court's success in reducing delay and cost; and, (10) maintaining the traditional collegiality between lawyers. *See* the Plan, § A at 3-5 (1993).

The Plan was implemented on December 1, 1993. The Advisory Group surveyed lawyers within the District in December 1994 and January 1995. At that time, the Plan had been in effect for approximately one year. Given that the civil procedures in effect in the District operated efficiently and expeditiously prior to the implementation of the Plan, the impact and effect of the Plan on the District has not been drastic. As will be discussed further below, the results of the poll, and other data, indicate that the expense levels, and rate of disposition of civil litigation within the District has remained largely unchanged. Where increased delay or costs have occurred, it appears to be the result of lack of familiarity with the new Federal Rules of Civil Procedure.

III. Sources of Information

Consistent with its original approach, the Advisory Group sought to utilize, for purposes of this annual assessment, a variety of informational sources. These sources included the statistical data provided by the Administrative Office of the United States

Courts, interviews with each of the District's Judges, the observations of the Advisory Group members and an empirical survey of practitioners. Each of these sources, and the information generated therefrom, are discussed further below.

The primary source of information used by the Advisory Group to assess the effect and impact of the Plan within the District was a Questionnaire sent to all of the lawyers who, during the first year of the Plan, practiced within the District. *See* Attachment A, for a copy of the Questionnaire. The Questionnaire solicited answers from practitioners regarding several issues: the general status of the District; involvement of the judiciary in the pretrial process; self-executing disclosure under the new Federal Rules of Civil Procedure ("the New Rules"); case management plans under the New Rules; representation by attorneys with power to bind or settle; and the use of alternative dispute resolution measures. Additionally, the Questionnaire solicited narrative answers regarding the impact of the Plan, and the New Rules, on attorneys' civil practice, on client expenses, and whether the Plan or New Rules have encouraged or discouraged litigation in the District.

Additionally, the members of the Advisory Group are a diverse group of litigators representing all segments of the bar who appear in the District. As such, the Advisory Group has had the benefit of the personal experience and knowledge of the Advisory Group members to supplement the findings of the attorneys polled in the District.

Finally, the Advisory Group was fortunate to have the continued assistance and participation from the District's then active Judges: the Honorable Chief Judge Richard

H. Battey; the Honorable John B. Jones; and the Honorable Lawrence L. Piersol. With their input, the Advisory Group has the invaluable benefit of having first-hand knowledge of the Plan and the New Rules as they play out in the District.

IV. The State of the Docket

As stated above, the District has been fortunate in that, prior to the implementation of the Plan, the District was well-managed and efficient in its disposition of civil litigation. As of 1992, for example, the District had the third-best record of all district courts for the least number of cases pending more than three years. Also, the median disposition time in the District in 1992 for civil actions was remarkably low—only eight months. Moreover, this median disposition time had remained constant for the three years—1989 to 1992.

A. An Overview of the District

During the first year of the Plan, the District experienced a number of important personnel and policy changes. These will be briefly reviewed here.

The first personnel change, in April, 1994, was the retirement of Senior District Judge Donald Porter. Judge Porter will continue to have office space in the Pierre Courthouse.

The next personnel change occurred in July, 1994, when Judge Richard H. Battey became Chief Judge, succeeding Judge John B. Jones. Chief Judge Battey remained at the Rapid City Courthouse.

In Sioux Falls, Judge Jones moved to offices on the third floor of the Courthouse, as Judge Lawrence L. Piersol took office in December, 1993. Judge Piersol will be located at the Sioux Falls Courthouse. (Although the two events were outside the time frame of this Report, it is also noteworthy that Judge Jones took senior status in January, 1995, and that Judge Charles B. Kornmann took office in May, 1995).

In sum, the judicial personnel changes have brought the District up to its allocated three active judgeships for the first time in several years. Moreover, Senior Judge Andrew W. Bogue, based in Rapid City, continues to serve on a nearly full-time basis. In the view of the Advisory Group, the District and civil litigation will benefit from having this full complement of judges.

Apart from these personnel developments, an important policy change occurred when Chief Judge Battey issued, in October, 1994, a new Standing Order for the District. This order standardized filing procedures for discovery materials District-wide (rather than allowing each Division to control filing). The new order should reduce confusion, as well as conserve limited Courthouse storage space.

B. The Statistical Data

In this section, the Advisory Group will review the condition of the District's docket during the Plan's first year—December 1, 1993 to December 1, 1994. The primary focus here is on the statistical data. The primary source of information is the District's annual "Profile"—a compilation prepared by the Administrative Office. The Profile data is based on the government's fiscal year.

1. *Filings*

During FY 1994, filings in the District rose by 4.6%. There were 704 civil cases filed in the District, up from 673 filings in FY 1993. Since the number of filings increased nationally by only 1.4%, the District experienced a higher-than-average increase.

Terminations also increased for the District. In FY 1994, 687 cases were terminated, up from 633 in FY 1993. The net result of this is that 524 cases were pending at the close of FY 1994, up just slightly from 512 in FY 1993.

2. *Actions per Judgeship*

The District has three active judgeships authorized, and in FY 1994, all three judgeships were finally filled. The District had only 2.4 vacant judgeship months when Judge Piersol was confirmed. With three active judges, the caseload per judge was 154. This places the District in the enviable position of having the lowest number of cases per judge within the Eighth Circuit. The workload for the judges is balanced by the relatively heavy trial load—here, the District's judges rank fifth in the Circuit.

Overall, the level of filings, when considered with the average caseload, presents a favorable situation for the District. This is reflected in the disposition times and the availability of judicial resources to assist in prompt resolution of cases.

3. *Median Disposition Times*

The Profile data indicates that the District's median disposition times remain quite favorable; there is no indication of undue delay. The filing to disposition time in FY 1994, remained the same as FY 1993—just nine months. This is generally consistent with the past five years, and it gives the District a second-place ranking in the Circuit.

The Profile also includes data on filing-to-trial times. Here, the average time was 18 months, up from 16 months in FY 1993. The Advisory Group did not see any reason for this increase, but it will monitor this issue.

While the Advisory Group's focus is on delay and expense reduction, we would also note that the District's statistics regarding the use of jurors showed, in FY 1994, substantial improvement. The District's Judges, as part of their concern for the experience of the jurors, had tried to reduce the number of jurors who were called but not used. These efforts apparently had some success, as the percentage of unused jurors dropped to a five-year low of 16.3%. These efforts not only serve the jurors well, but they will help to promote continued public confidence in the federal court system.

C. The Survey Data

In this section, the Advisory Group will summarize the data derived from its empirical survey of practitioners. In general, this data is supportive of this Report's general conclusions.

1. *General Conditions*

The survey responses indicate that the practitioners believe the District's Plan is working reasonably well. *See* Appendix A, at No. 1. To the extent that any "problems" are perceived, these are attributed to a lack of familiarity with the Plan. *See id.* at No. 2. The practitioners report that, with respect to both delay and expense, the conditions in the District have remained essentially the same under the Plan. *See id.* at No. 3. The second most frequent response to Question 3 indicates that the Plan is perceived as *improving* conditions in the District. *See id.* The narrative responses are largely consistent with these results. *See generally, id.* at No. 10.

2. *The New Rules and Mandatory "Disclosure"*

The survey data also provide some information about the practitioners' perceptions of the effect of new "disclosure" rules. For example, a sizeable majority of the practitioners indicate that they are making the discovery disclosures without waiting for a formal discovery request. *See id.* at No. 5.01. The practitioners also report that they are entering into cooperative discovery arrangements. *See id.* at No. 5.03. These are the type of results the drafters of the New Rules obviously hoped for.

The narrative responses to Question 11 suggest that the new disclosure provisions are requiring more work for attorneys in the early stages of litigation. Again, this was an expected consequence. In addition, the practitioners' narrative responses indicate that the new disclosure provisions may be having the consequence of discouraging litigation in federal court, as opposed to state court. *See generally, id.* at Nos. 11-13. Certainly, one

way to reduce "delay" in federal litigation is to have attorneys avoid federal court altogether. It is not clear, however, that the drafters of the New Rules had this as a goal. Under these circumstances, the Advisory Group will monitor the data to see whether, over time, the result in the District is a lower filing rate.

3. *Case Management and Joint Discovery*

An important facet of the New Rules are the provisions concerning joint discovery under a "case management" approach. Such case management has long been a feature of the District's practice (*e.g.*, each judge has used an initial "scheduling" letter to counsel), but the New Rules now formalize aspects of the case management process.

One goal of the joint discovery concept is to promote simultaneous discovery by the parties. The practitioners report that the new joint discovery provisions are being implemented, *see id.* at No. 6.01, and that discovery is proceeding simultaneously. *See id.* at No. 6.02. For both these issues, there were a large percentage of practitioners responding that they did not have sufficient information. *See id.* Under these circumstances, this situation may change once the District's lawyers gain greater familiarity with the joint discovery provisions.[1]

4. *Alternative Dispute Resolution*

One of the issues which the Advisory Group explored was the level of interest regarding Alternative Dispute Resolution ("ADR"). The Advisory Group had established

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[1] As the Judges noted in their interviews, they are aware that, in this first year under the Plan and the New Rules, practitioners must gain some familiarity with these new procedural reforms to develop efficiency and effectiveness.

an Alternative Dispute Resolution List ("ADR List") which identified ADR resou readily available in the District. A copy is located at the clerk's office in each Divisi

The survey data suggests that the ADR List is not being widely used as a reference. *Id.* at No. 9.01. The practitioners also did not seem to believe that a wider dissemination of the ADR List would improve its utilization. *See id.* at No. 9.02. Perhaps the lack of usage of the ADR List is explained by the overwhelming sentiment among practitioners *against* any type of *mandatory* ADR procedures. *See id.* at No. 9.03. Since the Judges and practitioners oppose mandatory ADR, the chances of any local adoption of mandatory ADR seems, at this point, quite remote.

5. *Litigation Expenses*

As the Advisory Group noted in its initial Report, measurement of the level of client expenses is difficult to ascertain. In the present assessment process, the Advisory Group surveyed the District's practitioners to determine the effects, if any, of the Plan and the New Rules on client expenses. The narrative responses indicate that the Plan and the New Rules may have *increased* client expenses. *See generally, id.* at Nos. 14-16. The narrative responses suggest that the increased costs, especially for defendants, are a consequence of the amounts of time required *early in a case* to comply with the mandatory disclosure provisions. *See id.*.

Of course, not all the practitioners saw increased expenses. *See id.* at No. 14. Some of the perceived increase in expenses may also be attributable to the "learning curve" involved with any new system. *Cf. id.*

Given the twin goals of the CJRA, it would be ironic if, in the process of reducing delay, expenses actually rose. Under these circumstances, the national data will be monitored closely, and not all the data are in. It should be noted, however, that the District's Advisory Group cautioned, in its initial Report, that a foreseeable consequence of "discovery reform" would likely be increased client expenses.

Although it was not an issue explored directly by the survey, there was one area where, in the view of the Advisory Group, the District's policies have clearly reduced litigation expenses. We believe the increased technology utilized by the District Court has resulted in increased time saving for litigants. Because court records are available through the use of computer systems at lawyers' offices, they need not use travel time for a record search but can print out their case docket sheet in their offices.

6. *Summary*

Overall, the results of the survey do not indicate that the District faces any serious problem with delay. As far as the goal of avoiding excessive expense, the survey data suggest that costs may be increased by the Plan and the New Rules. The area of client expenses, accordingly, should be monitored closely (although what can be done is by no means clear). Finally, the survey data generally suggest that the new discovery provisions may be discouraging the use of the federal court. If this proves, over time, to be nationally the case, there may be a need to reconsider the efficacy of the CJRA.

D. The Interview Data

Based on the positive experience during the Advisory Group's pre-Plan efforts, the Advisory Group voted, at its September 1994 meeting, to conduct interviews with each of the District's three active Judges and its one Senior Judge. Chief Judge Battey encouraged the Advisory Group, and all the Judges adjusted their schedules to accommodate the interviews.

Prior to the interviews, the Advisory Group divided into subcommittees to share the responsibility and to expedite the scheduling. At the request of the Advisory Group, the Reporter assembled a list of questions and distributed it to all the Judges and to the interviewers. This list assisted in establishing some degree of uniformity in the interviews.

Each interview was scheduled at the Judge's convenience. The Advisory Group interviewers were uniformly impressed with the amount of pre-interview preparation each of the Judges had obviously invested in the CJRA interview process.

As a general matter, the interviews revealed that all three active Judges have been closely observing the state of the District's docket and the effects of both the Plan and the New Federal Rules. In this section, the Advisory Group will present some of the general assessments and observations made by the Judges.

The Judges, as a general matter, do not think that either the Plan or the New Rules have had any substantial effect on delay or expense within the District. The District

continues to have expeditious disposition times, and the Judges were not aware of any data suggesting any change in civil litigation expenses.

Two of the Judges observed that the District's criminal docket, which necessarily must be given priority, has had a negative impact on scheduling civil matters. Neither Judge considered this to be currently a serious problem, as in some urban districts, but the Judges are carefully monitoring the impact of the increasing criminal docket in South Dakota.

The interviews revealed some common approaches by all three Judges to the related issues of settlement and alternative dispute resolution (ADR). All of the Judges routinely suggest that the parties to a civil action consider settlement. The Judges will raise the settlement issue at a pre-trial conference, and the Judges are utilizing the District's Magistrate Judges for settlement conferences. Although the Judges appear to be routinely encouraging the parties to consider non-judicial resolution of the dispute, all of the judges told the Advisory Committee interviewers that they were opposed to any *mandatory* ADR system for the District. The Judges do not see any need for mandatory ADR, and they appear to share the view of the Advisory Group that mandatory ADR would actually increase litigation expenses.

One of the major changes created by the new Federal Rules is the change in procedures for the discovery of expert witnesses. Under the New Rules, expert discovery is tightly regulated and subject to the self-executing disclosure provisions. One Judge observed that the new expert discovery rules were burdensome on the lawyers and were

creating greater litigation expenses. (The other Judge who commented on the expert discovery issues had not seen any "new" problems created by these new rules.) The Advisory Group's members had observed that, as it may apply to the discovery of experts, the mandatory early disclosure system of the New Rules creates greater litigation expenses. The Advisory Group believes that this is an area which needs continued monitoring.

Finally, under the December, 1993 Amendments to the Rules, each District has the opportunity to "opt out" of the new discovery rules. As of December, 1993, there was support for opting out from the Advisory Group and in the State Bar. The interviews of the Judges indicate that, despite some misgivings about minor facets of the New Rules, the active Judges are not likely to "opt out" of the New Rules.

In summary, the Advisory Group concludes that the interviews indicate that the District's Judges are conscientiously observing the principles of delay and expense reduction which underlie the District's Plan. The Judges are aware that 1993-94 has been a transition period for lawyers under the new Rules. The District's Judges are watching the state of the docket closely, and they remain ready to make necessary changes, by Local Rules or other orders.

V. Self-Executing Disclosure

The New Rules require self-executing disclosures. The basic concept of the Rules is that each litigant is obligated to provide the adversary with certain information without waiting for a formal request. The familiar mechanisms of discovery—interrogatories,

depositions, requests to produce and admit—all remain available, but these are now supplemental to self-executing disclosures.

The results of the survey indicate that counsel are making self-executing disclosures without waiting for formal requests and that opposing counsel are doing so as well. *See* Appendix A, at No. 2. It appears that the self-executing disclosure is working satisfactorily, even though it was not well received among lawyers in the District. *Id.* While the majority of those responding indicated that postponing formal discovery to allow for disclosure does not cause delay, there was also a significant number of those that felt postponing formal discovery to allow for disclosure was causing delay. *See id.*, (37% responded that there was no delay by postponing formal discovery, while 31% responded that there was delay).

Some narrative responses are illustrative: "troublesome that [rules] delay discovery by disallowing it until the parties have initially met," "the New Rules limit discovery" "delay in taking depositions [due to] waiting period," "clients with recalcitrant attitudes toward discovery seem to gain the advantage over clients who are more reasonable and not represented by the 'Rambo' litigators." *See*, Appendix A, at Nos. 4-6. The survey responses suggest that the District's litigators are adjusting to the Plan and the New Rules. Although they are experiencing some difficulties, these may be a reasonably foreseeable "transitional" phenomena.

VI. CONCLUSION

As noted in the Advisory Group's Report, the District has traditionally enjoyed appropriate judicial resources and a strong, self-regulating Bar. With the absence of serious delay or expense problems, the goal of the Plan, and the District generally, is to maintain its positive record.

From all the data reviewed by the Advisory Group for this annual assessment, the Advisory Group concludes that the District has achieved its goal of keeping a "good thing going." The Plan, and its reflective and conscientious implementation by the District's Judges, is serving the District well. Although the District did not face a crisis—where improvement would be easily discernible—the District's litigants and citizens are the distinct beneficiaries of a federal judicial system which promises, by all indications, to respond appropriately to any difficulties which may arise.

Appendix A

CJRA Advisory Group
1994 Annual Assessment

ADVISORY GROUP TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

SURVEY RESULTS REGARDING
DELAY AND EXPENSE
In Civil Litigation*

I. AN OVERVIEW

1. **Is the Plan working reasonably well?**

   Yes = 24/26.4% No = 10/11% Insufficient basis to respond = 55/60.4%

   No response = 2/2.2%

2. **If problems have developed, check each one of the following that is responsible:**

   Opposing counsel do not cooperate = 8/9%

   Provisions are not familiar to the attorneys and hence are not used = 24/26.4%

   Failure to apply the Plan, or misapplication of the Plan, on the part of the judicial officers = 2/2%

   Other = 15/16.5%

   No response = 51/56%

3. **How does civil litigation in District compare to civil litigation before the Plan went into effect?**

   a. Disposition time:

      Improved = 17/18.7% Same = 40/44% Slower = 4/4.4%

      No response = 30/33%

   b. Client expense:

      More = 15/16.5% Same = 42/46.1% Less = 4/4.4%

      No response = 30/33%

II. SPECIFIC PROVISIONS

4. INVOLVEMENT OF JUDICIAL OFFICERS IN THE PRETRIAL PROCESS

   4.01 **Are trial dates set early in the course of the litigation?**

      Yes = 39/42.9% No = 24/26.4% N.I. = 18/19.8%

      No response = 10/11%

   4.02 **Have dispositive motions been decided promptly?**

      Yes = 45/49.5% No = 15/16.5% N.I. = 22/24.2%

      No response = 9/10%

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* 91 surveys were returned. Unless otherwise indicated, all questions called for one answer only.

5. SELF-EXECUTING DISCLOSURE UNDER NEW RULES

5.01 Have you had occasion to make disclosure to your opponent without awaiting formal requests?

Yes = 59/64.8% No = 18/19.8% N.I. = 7/7.7%

No response = 7/7.7%

5.02 Has your opponent done so?

Yes = 49/53.8% No = 22/24.2% N.I. = 12/13.2%

No response = 8/8.8%

5.03 Have you had occasion to enter into cooperative discovery arrangements as envisioned by the New Rules?

Yes = 51/56% No = 20/22% N.I. = 13/14.3%

No response = 7/7.7%

5.04 Does the provision postponing formal discovery to allow for disclosure cause delay?

Yes = 28/30.8% No = 34/37.4% N.I. = 24/26.4%

No response = 5/5.5%

5.05 To the best of your knowledge do the rules governing self-executing disclosure appear to be working well?

Yes = 32/35.2% No = 24/26.4% N.I. = 28/30.8%

No response = 7/7.7%

6. JOINT DISCOVERY - CASE MANAGEMENT PLANS UNDER NEW RULES

6.01 Is the provision concerning development of joint discovery-case management plans being implemented?

Yes = 49/53.8% No = 9/10% N.I. = 28/30.8%

No response = 5/5.5%

6.02 Is discovery by both parties proceeding simultaneously?

Yes = 48/52.7% No = 16/17.6% N.I. = 22/24.2%

No response = 5/5.5%

7. REPRESENTATION BY ATTORNEY WITH POWER TO BIND

7.01 Is the provision in the Plan authorizing the court to require the presence at pretrial conferences of an attorney with power to bind being utilized?

Yes = 21/23.1% No = 12/13.2% N.I. = 53/58.2%

No response = 5/5.5%

7.02 If so, is it working satisfactorily?

Yes = 17/18.7% No = 7/7.7% N.I. = 58/63.7% No response = 9/10%

8. REPRESENTATIVES WITH AUTHORITY TO SETTLE

8.01 Is the provision authorizing the court to require that representatives of the parties with authority to settle be present or be available by telephone being utilized?

Yes = 27/29.7% No = 12/13.2% N.I. = 47/51.6%

No response = 5/5.5%

8.02 If so, are both alternatives (telephone availability and presence) being utilized?

Yes = 25/27.5% No = 7/7.7% N.I. = 52/57.1%

No response = 7/7.7%

8.03 Is this provision of the Plan working satisfactorily?

Yes = 22/24.2% No = 8/8.8% N.I. = 47/51.6%

No response = 14/15.4%

9. ALTERNATIVE DISPUTE RESOLUTION

9.01 Have you used the Alternative Dispute Resolution Resource List established by the Court to identify ADR resources available in the District or the adjacent region?

Yes = 9/10% No = 55/60.4% N.I. = 20/22% No response = 7/7.7%

9.02 If the ADR List were sent by the Court to all counsel of record rather than (as at present) simply available upon request at the Clerk's office would this:

Increase use of ADR in the District = 19/20.9%

Have no effect = 24/26.4%

Decrease use of ADR in the District = 1/1.1%

N.I. = 22/24.2%

No response = 25/27.5%

9.03 Would you favor <u>mandatory</u> ADR procedures in the District?

Yes = 7/7.7% No = 64/70.3% N.I. = 10/11%

No response = 10/11%

III. NARRATIVE QUESTIONS

0. What has been the impact, (*e.g.*, costs and/or benefits) of the District's Plan on your civil practice?

The responses indicate that, although people are not yet comfortable with the Plan, it is working to accelerate litigation. Some representative responses are:

"New rules favorably received."

"The rules require disclosure that is often not immediately available within 30 to 60 days [of the initiation of the suit]."

"Slightly more voluntary 'cooperation.'"

"More cost, more conflict, more burdensome."

"Lawyers are reluctant, hesitant and unsure. It's cumbersome - but proceeding in good faith."

"Speeding up discovery and trial date."

11. What has been the impact of the New Rules, particularly, the new disclosure rules, on your civil practice?

The responses indicate that, as of December, 1994, there is some difficulty implementing the rules, and that the rules require more work for attorneys at the beginning stages of a case in order to meet deadlines. Examples of representative responses are as follows:

"More work in early stages of litigation."

"Greatly increases costs."

"It's a pain in the @&$%!"

"Total avoidance of federal court -- but wasn't that the real purpose of the rules!"

"Can't see any impact but I know I like old rules better."

"[D]efinitely beneficial impact in that it forces parties to immediately start preparing their cases instead of filing and sitting on a case for 9 months."

"Makes it easier on plaintiffs [because] court does their work."

"I will not be filing suit in federal court as a result of the new rules."

"[T]roublesome that [rules] delay discovery by disallowing it until the parties have initially met. This delay has already caused difficulties in at least one, if not more, of my cases."

"[N]ew rules too plaintiff oriented."

"Better preparation of case."

12. Has the Plan affected (encouraged or discouraged) you from litigating in the District?

The majority of those who responded indicated, without explanation, that the Plan has discouraged litigating in the District Court.

13. Have the New Rules, including but not limited to, the "disclosure provisions," affected (encouraged or discouraged) you from litigating in the District?

The majority of those who responded indicated, without explanation, that the New Rules have discouraged litigating in the District Court. Some illustrative examples are:

"If they were intended to decrease the caseload of the federal courts, they are probably working as intended . . . the new discovery rules act as discouragement, not encouragement, to enter the federal system."

"Extremely difficult to harmonize other rules, i.e., motion to dismiss. Do you disclose before or after motion? Judges on different side of state handle differently."

14. What has been the impact of the Plan on the client's expenses associated with civil litigation?

The majority of those who responded indicated, without explanation, that the Plan has increased client expenses associated with civil litigation. Some representative examples are below:

" More for defendant because [the Plan requires] more time."

"Overall, save expense [for client] but more expense earlier in case."

"Increased [expense] due to unnecessary additional work."

"[T]he Plan has some benefits, but [ ] to date [it has] increased client expenses. Hopefully, it is because the Rules are new."

"It is an added expense for our clients without any benefit. Our sophisticated business clients question the additional expenses. We explain that the court changed the rules, not the lawyers."

"Decreased [expense]. I don't have to work as hard to obtain necessary disclosures which means less time and money billed to my clients."

"Fewer delay expenses."

15. What has been the impact of the New Rules on the client's expenses associated with civil litigation?

The majority of those who responded indicated, without explanation, that the New Rules have increased client expenses associated with civil litigation.

16. Please identify the specific ways your clients have been impacted by the Plan or the New Rules.

The responses indicated that, although the Plan and the Rules require more time and client expense initially, the earlier exchange of information between the parties results in expedited resolution of litigation. Some illustrative examples are provided below:

"The New Rules limit discovery, i.e., interrogatories, [which] are a very cost effective means of getting information."

"Increased costs."

"Cases resolved faster."

"Discovery obtained with less effort."

"Additional travel time and 'wasted' time. A lot of what was implemented by the Rules was taking place informally."

"Delay in taking depositions of key witnesses [due to] waiting period."

"Clients with recalcitrant attitudes toward discovery seem to gain the advantage over clients who are more reasonable and not represented by the 'Rambo' litigators."

"In a medical malpractice case, defense counsel got a good look at the main issues without resorting to depositions. [This] forced issues and settlement earlier rather than later in the case."

"As the defendant, my client has essentially had to bear the expense of preparing the plaintiff's case."

17. **Have you had any problems with the new Rules regarding discovery of experts (*e.g.*, Rules 26(a)(2) and 26 (b)(4))?**

The responses indicate that the reporting deadline for expert disclosure may be required before litigants have determined whether the need for an expert exists. There also appears to be some difficulty in getting opposing counsel to comply with the reporting requirements. Some representative responses are produced below:

"Experts are being disclosed and handled the same way as they were prior to the Plan's implementation."

"Difficulty getting experts' reports - often told reports don't exist and end up having to depose without reports."

"Needs flexibility."

"Deadline for report is too soon."

"Doesn't allow enough discovery [ ] before the use of experts; doesn't allow experts to change position on an issue."

"Difficulty getting required previous testimony records and report of all opinions."

"I expect the government to hide the weenie just like it has for the past decade."

IV. MY RESPONSES ARE BASED ON . . .

My responses are based on (please check all applicable boxes):

18.01 **Personal experience litigating in the District Court since December 1, 1993:**

71/78% No response = 20/22%

One case = 17/18.7% 2-5 cases = 48/52.7% More than 5 = 3/3.3%

No response = 23/25.3%

18.02 **(This question elicited 101 responses)**

Discussion with other lawyers concerning = 42/41.6%

Specific cases = 26/28.6%

General conditions in the Court = 33/36.3%

18.03 Other = 9/10%

19. **What is your total litigation experience in federal courts (both before and after the New Rules were adopted):**

0-5 = 18/19.8% 50-75 = 10/11% No response = 7/7.7%

5-25 = 31/34.1% 75-100 = 6/6.6%

26-50 = 16/17.6% 100+ = 3/3.3%

20. **Gender:**

Female = 16/17.6% Male = 65/71.4% No response = 10/11%