UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

# CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Adopted December 1, 1993

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The following Plan is hereby adopted by the United States District Court for the District of New Hampshire, pursuant to the authority granted by 28 U.S.C. §§ 471-482, on this 1st day of December, 1993.

Joseph A. DiClerico, Jr.
Chief Judge

Paul J. Barbadoro
United States District Judge

Steven J. McAuliffe
United States District Judge

Shane Devine
Senior United States District Judge

Martin F. Loughlin
Senior United States District Judge

William H. Barry, Jr.
United States Magistrate Judge

## I - INTRODUCTION, PRINCIPLES AND IMPLEMENTATION

### A. STATEMENT OF PURPOSE/INTRODUCTION

The United States District Court for the District of New Hampshire (Court) adopts this Civil Justice Expense and Delay Reduction Plan (Plan) pursuant to the requirements of § 471 of the Civil Justice Reform Act of 1990.[1] In developing the Plan, the Court has carefully considered the Report[2] (Report) of the Civil Justice Reform Act Advisory Group[3] (Advisory Group or Group) for the District of New Hampshire and the recommendations in that Report.

The Court has also considered the principles and guidelines of litigation management and cost and delay reduction set forth in § 473(a) of the Act as well as the litigation management and cost and delay reduction techniques contained in § 473(b) of the Act.

Appendix A sets forth a synopsis of each of the Report's recommendations, together with a reference to the section(s) of the Plan in which the recommendation is addressed.

Appendix B contains a summary of those recommendations of the Group which are more properly addressed to entities other than the Court for action.

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[1]The Civil Justice Reform Act of 1990 (Act) is the short title of Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990), codified at 28 U.S.C. §§ 471-482.

[2]A copy of the Report is available at the Clerk's Office.

[3]Brief biographical information for each member of the Group is included in Appendix A of the Report.

## B. ACKNOWLEDGEMENT

The Court is grateful and indebted to the members of the Advisory Group who donated hundreds of hours of work, travel, and personal time to prepare their Report. Their tireless dedication to the task made it possible for the Court to implement a plan that will serve its needs and those of the attorneys and litigants who come before it.

## C. GENERAL PRINCIPLES

This Plan consists primarily of procedures and techniques the Court will implement in this district to minimize unnecessary delay and expense. The Court recognizes that adherence to certain general principles is vital to effectively reducing delay and expense and maintaining a high level of quality in the administration of justice. Accordingly, in implementing the procedures set forth in the Plan, the Court will observe the following general principles.

### 1. Efficient Use of Resources

The Court will strive to make the most efficient use of the resources available to it in implementing the Plan, recognizing that the effectiveness of the judicial officers depends heavily on the efforts and efficiency of the entire Court staff. The Clerk's Office will have primary responsibility for maintaining current dockets and files, for developing information essential to productive case management, and for informing the Court of statistical information necessary to assess the success of the Plan.

The Court will continue to develop its automation plan to increase the efficiency and accuracy of routine record keeping tasks.

### 2. Consistency and Flexibility

Consistent adherence to the Court's procedures and scheduling deadlines is essential to reducing delay and expense. Delay reduction techniques and firm deadlines are effective only if all participants in the process understand that they will be adhered to on a consistent basis. The Court remains mindful, however, that exceptional circumstances may exist that will require deviations from the practices and deadlines imposed pursuant to the Plan. Where such exceptional circumstances exist, the rigid enforcement of practices and deadlines may result in injustice or may even increase the expense of litigation.

In implementing the provisions of the Plan, the Court will balance the needs for both consistency and flexibility in order to maximize the efficiency of the Court while minimizing adverse effects that may result from rigid adherence to procedures and deadlines. Because counsel and litigants are the most familiar with their cases, the Court must depend upon timely and appropriate motions to suggest when deviation from standard practices is appropriate.

### 3. Contribution By All Participants

Reducing delay and expense requires hard work and organization on the part of counsel appearing before this Court. The Court recognizes that it, too, must work hard to fulfill its commitments within the Plan. Even litigants will be required to contribute to the Plan's successful implementation. *See* Appendix C for a description of the contributions of the various participants.

### 4. Civility

As observed by the Group,[4] incivility among litigants, counsel, and the Court poses a substantial barrier to the efficient and fair administration of justice. Incivility results in unnecessary and costly motion practice, increasing all parties' expenses. In addition, it decreases the quality of justice and increases dissatisfaction with the judicial system. As the Group noted, it also increases stress in an already stress-filled profession. In implementing the Plan, the Court will strive to maintain a high level of courtesy toward the counsel and parties appearing before it. The Court expects litigants and their counsel to do the same.

## D. AVAILABILITY OF PLAN

The Plan will be available to all litigants and practitioners at the Clerk's Office and electronically through the Court Information System (CIS).

## E. IMPLEMENTATION OF PLAN

### 1. Effective Date

Unless otherwise noted in the Plan, the effective date of all provisions shall be March 1, 1994. For any changes requiring amendment of the local rules, the effective date shall be the later of March 1, 1994, or the date of any local rule amendments.

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[4]Report, pages 41-42

This delay in implementing the Plan will allow the Court sufficient time to revise its local rules to incorporate the Plan's procedures and will allow sufficient notice to practitioners and the general public.

After those dates, the Plan shall be considered implemented, subject to further modification by amendments as may be adopted by the Court to implement and promote the Plan's purposes.

### 2. Annual Assessments and Future Role of the Advisory Group

Section 475 of the Act requires that the condition of the civil and criminal docket be assessed annually to determine appropriate actions that will reduce cost and delay in civil litigation and improve the Court's litigation management practices. The Advisory Group will meet periodically to assist the Court in evaluating the effectiveness of the measures being implemented and to recommend changes or modifications.

## II - LITIGATION MANAGEMENT PRINCIPLES AND GUIDELINES

The Act identifies six "principles and guidelines of litigation management and cost and delay reduction."[5] Each district court, in consultation with its Advisory Group, "shall consider and may include" each of those principles in its Plan.[6]

This part of the Plan analyzes the Group's recommendations as to how these principles should be implemented in this district and sets forth the Court's response to those recommendations.

### A. SYSTEMATIC, DIFFERENTIAL TREATMENT OF CIVIL CASES FOR PURPOSES OF CASE-SPECIFIC MANAGEMENT

#### 1. Introduction

The Act directs the Court, in consultation with its Advisory Group, to consider "systematic, differential treatment of civil cases."[7] Differential case management is a system for managing cases based on their individual characteristics. Cases are divided into "tracks." Each track has procedures established to handle a particular

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[5]28 U.S.C. § 473(a).

[6]*Id.*

[7]28 U.S.C. § 473(a)(1). This section provides for "systematic, differential treatment of civil cases that tailors the level of individualized and case-specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial and the judicial and other resources required and available for the preparation and disposition of the case."

type of case most efficiently and economically, consistent with such case-specific management concerns as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.

The Court accepts the recommendations of the Group regarding differential treatment of civil cases with the modification that in most cases in the Expedited, Standard, and Complex tracks[8] the trial date will be set from the date of the preliminary pretrial conference, rather than from the date the case is filed. To do otherwise would unduly disadvantage defendants.

**2. Tracks**

Cases will be assigned to four tracks:

a. Administrative

b. Expedited ("rocket docket")

c. Standard

d. Complex

[8]The Administrative track is excluded because a trial is not held in cases on that track.

### 3. Definitions

Cases will be assigned to a particular track based on certain factors. The types of cases which fall within each track are set forth below.

#### a. Administrative

This track is for cases in which discovery is not permitted unless prior approval is obtained from a judicial officer. Such cases include those filed under 28 U.S.C. §§ 2241, *et seq.* (habeas corpus cases); social security disability cases; government collections of student loans and VA benefits; government foreclosures; special education appeals; bankruptcy appeals; and cases that, based on the Court's prior experience, are likely to result in default or consent judgments or can be resolved on the pleadings or by motion. These cases will ordinarily be resolved within six months after filing.

#### b. Expedited

This track is for cases in which the parties have voluntarily agreed to go to trial within six months of the preliminary pretrial conference. Cases are assigned to this track subject to the approval of a judicial officer. In approving such assignments, the judicial officer will consider such factors as the complexity of the legal issues, the number of witnesses, the length of the trial, and the suitability of the case for alternative dispute resolution. Ordinarily, a case will not be assigned to this track unless it can be tried in fewer than five days. In the event that the assigned judge is unable to try the case as scheduled, the case will be reassigned to any other available judge to try.

**c. Standard**

This track is for cases which do not fall within any of the other three tracks. These cases will be tried within 12 months of the preliminary pretrial conference.

As recommended by the Group, in order to allow the trial bar to adjust to the new tracking procedures, this track will not be fully implemented immediately. For the first two years of the Plan, cases on this track will be scheduled for trial within 18 months. The Court agrees with the Group that it is wise to defer implementation of the 12-month scheduling plan, particularly because deferral will permit the Court to reevaluate the 12-month track in light of its docket, demands on the trial bar, federal-state relations, and litigants' needs to select their counsel of choice and to resolve disputes swiftly, before the track is fully implemented.

**d. Complex**

This track is for cases which require special or intense management by the Court due to one or more of the following factors: complex factual issues, complex legal issues, large number of parties, large volume of evidence, extensive discovery, length of time needed to prepare for trial or other disposition, number of preliminary issues that must be decided before trial or disposition, length of trial, and other comparable factors. Cases on this track will be scheduled for trial within two years of the preliminary pretrial conference.

### 4. Evaluation and Assignment

At the preliminary pretrial conference, a judicial officer will assign the case to one of the case management tracks. If the nature of the case subsequently changes, the judicial officer may reassign it to another appropriate track.

### 5. Initial Case Assignment

Since a case will not be assigned to a track until the preliminary pretrial conference, the Clerk's Office shall continue to assign new cases using existing random assignment procedures. The Court also accepts the Group's recommendation that case load statistics be kept by track. Therefore, the Clerk's Office and the judges shall endeavor to keep such statistics for further review.

### 6. Date of Application

This section shall apply to all civil cases filed on or after March 1, 1994. The case management tracking system may be applied to civil cases filed before that date if the judicial officer determines that inclusion in the tracking system is warranted and notifies the parties to that effect. (*See*, however, the phase-in plan under the "Standard" definition.)

## B. INVOLVEMENT OF JUDICIAL OFFICERS IN PRETRIAL PROCESS

### 1. Introduction

The assumption underlying many of the Act's provisions is that increased judicial involvement in the pretrial process will reduce cost and delay in civil litigation. Thus, the Act requires that the Court, with the Group's assistance, consider a program of "early and ongoing control of the pretrial process through involvement of a judicial officer"[9] in planning case progress, setting early and firm trial dates, controlling discovery, and setting deadlines for the filing and disposition of motions.

### 2. In General

Over the past year the Court has experimented with, or "field tested," different approaches to involving district judges more actively in the pretrial process of cases assigned to them. That experience leads the Court to some conclusions that differ slightly from those reached by the Group. The differences are ones of degree rather than kind.

Experience teaches that not every civil case will benefit substantially from the district judge's participation in the preliminary pretrial conference. Many cases are simple and straightforward, involve sophisticated counsel, and present no particular discovery, evidentiary, or other problems requiring attention by the assigned district judge. Requiring the district judge to routinely preside over preliminary pretrial conferences in these cases would not be an effective or efficient use of judicial time.

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[9] 28 U.S.C. 473(a)(2).

Experience also teaches, however, that even simple and straightforward cases can benefit from initial involvement of the assigned district judge. Early settlement probabilities or an opportunity to minimize delay and expense through case management directives may well warrant such intervention. The difficulty, of course, is identifying in advance which cases would benefit and which would not.

### 3. Pretrial Conferences

#### a. Judicial Handling of Pretrial Conferences

The Group has recommended that "this Court adopt a policy that in all cases (except in existing track cases) [i.e. administrative track cases] an initial pretrial conference be held before a district judge." The Group has also recommended that district judges handle all pretrial conferences, except those handled in the first instance by the magistrate judge.

Rather than accept outright the Group's recommendation, the Court will establish the following modified policy.

When an initial responsive pleading of any kind is filed, the Clerk will immediately forward the case to the assigned district judge. The district judge will then screen the case and make a determination, based upon the pleadings and general experience, whether to personally conduct the preliminary pretrial conference or refer the file to the magistrate judge to conduct such conference.

**b. Consideration of ADR**

The Group has recommended that the feasibility and timing of ADR be considered at the preliminary pretrial conference.

This recommendation is accepted with the limitation that the Court has declined to establish a formal ADR program, and thus the specific ADR referral is to be determined by the individual judicial officer in consultation with counsel for the parties.

**c. Contents of Final Pretrial Statements**

The Group has recommended and the Court accepts that final pretrial statements should be what they were originally intended to be: a specific listing of the issues, exhibits, and witnesses and a description of the case. A detailed, accurate pretrial statement is a valuable tool which focuses attorneys' attention on their case, promotes settlement, and makes the final pretrial conference more meaningful. This, however, will require the education of the bar. The Group and the Court acknowledge that if specific final pretrial statements are required, inadequate statements may be returned to counsel. The Group and the Court, however, believe such extra effort is worthwhile. Accordingly, the Group recommended and the Court accepts that all final pretrial statements shall meet at least the following requirements:

i. Exhibits should be specifically identified. The Group has recommended that the local rules should be clarified as to whether all

exhibits must be listed or whether a party must only list exhibits which it will offer as evidence in its case in chief. The Group has also recommended that the need to list impeachment exhibits be clarified and that a uniform practice among the judges on this issue be promulgated. Finally, the Group has strongly recommended that the court develop a standard policy for the following related issues:

aa. Disclosure vs. marking.

bb. Impeachment exhibits vs. cross examination exhibits.

cc. Rebuttal exhibits vs. impeachment exhibits.

The Court specifically accepts these recommendations and will adopt standard policies in connection with the Court's pending amendment of the local rules to implement the Plan.

ii. Witness lists should contain only the names of those witnesses who counsel, in good faith, believe will actually be called to testify. The purpose of the list of proposed witnesses is to inform the Court and opposing counsel, not to conceal information. However, because it is often difficult for counsel to know exactly which witnesses they will call, considerable flexibility is required.

iii. Final pretrial statements should begin with a brief statement of the case, agreed to by both parties, which the judge can read to the jury to concisely describe the case.

iv. The stipulations as to agreed facts should be binding on the parties. The present practice--merely requiring a unilateral statement of facts believed to be uncontested--accomplishes little. Consequently, judges should enforce the local rule which requires counsel to meet and stipulate to facts not contested[10].

**d. Documents To Accompany Final Pretrial Statements**

i. Requests for Jury Instructions should be filed as part of and attached to the final pretrial statements. The Court emphasizes that counsel should submit only the case-specific legal and factual elements that must be explained to the jury. Counsel need not include instructions that will be covered by the standard federal charges to the jury. This requirement will encourage counsel to think about the claims and theories behind their case earlier in the trial preparation process. The judicial officer will accept supplemental requests at the close of evidence only if new issues of law arise during trial.

ii. Motions in limine, to the extent they can be anticipated when final pretrial statements are filed, should be filed simultaneously with the statements so the Court can consider them at the final pretrial conference.

[10]The Court notes that there is no existing local rule requiring counsel to meet.

**e. Time To File Final Pretrial Statements**

Although not a recommendation of the Group, the Court has determined that the time for filing such final pretrial statements will be changed to allow the attorneys enough time to meet the expanded requirements as to the contents of the final pretrial statements and to make the statements more relevant to the progress of the case. The statements shall be filed 30 days prior to the final pretrial conference, rather than the current requirement of filing such statements 15 days after the close of discovery.

**f. Duty To Update Final Pretrial Statements**

Unless otherwise ordered by the Court, in cases that have been continued, previously filed final pretrial statements may be updated no later than thirty days prior to the new final pretrial conference, unless the parties file a stipulation that the final pretrial statements previously filed require no change.

## 4. Setting of Trial Dates

### a. When Set

The Group has recommended that trial dates be set in the initial scheduling order, except in complex cases.

The Court accepts this recommendation. The trial date will be set at the preliminary pretrial conference.

In complex cases, the Group has recommended that the trial date be set after a settlement conference which would occur approximately six months after the complaint is filed.

The Court accepts this recommendation, although reference to a "settlement" conference will be amended to "status" conference.

### b. Stacking of Cases for Trial

The Group recommended continuing the current practice of "stacking" cases for trial. The Group also recommended that when the Court implements an integrated, automated calendar system, this information be made available to the public and the bar via computer.

The Court accepts both of these recommendations.

### c. Scheduling Courtroom Time

The Group has recommended that the Court should maximize the amount of time that judges are scheduled for courtroom use. With the availability of

state court facilities and the renovated magistrate judge courtroom, the Group recommended that four of the five judges, instead of the current three, be scheduled for courtroom time if sufficient cases are ready for trial and other resources permit.

The Court accepts this recommendation in part. Due to the increased use of state court facilities by the state courts, those facilities are not readily available for use by this Court. The use of the renovated magistrate judge courtroom will be increased and four judges will be scheduled for courtroom time when possible, recognizing that arraignments and other matters handled by the magistrate judge might interfere with this schedule from time to time.

**d. New Courthouse**

As a permanent solution to the lack of courtroom and other space, the Group has recommended that Congress and the General Services Administration proceed with the appropriation for, and the completion of, the new courthouse as soon as possible.

The Court accepts this recommendation and strongly supports the swift completion of the new courthouse.

## 5. Discovery and Motions

### a. Discovery Limitations

The Group has recommended increased attention in each case to judicial limitation of discovery under Rule 26 and that the preliminary pretrial conference form specifically require that discovery limitations be discussed at the preliminary pretrial conference.

The Court accepts these recommendations for the reasons set forth in the Report.

### b. Timing of Dispositive Motions

The Group has recommended that the filing and timing of dispositive motions be discussed and resolved at the preliminary pretrial conference conducted by the judge.

The Court accepts this recommendation, with the obvious modification that the assigned district judge may not always conduct the preliminary pretrial conference. (*See* § II.B.3.a., *supra*.)

### c. Oral Argument of Motions

The Group has urged the Court to carefully consider the efficacy of oral argument at the preliminary pretrial conference. It recommended that counsel be permitted to request oral argument on any motion with 20 minutes allotted for each side (unless counsel indicates why more time is necessary). Unless

counsel indicates otherwise, the hearing would be based upon facts in the record or offers of proof. The Court would not be required to grant the request for oral argument.

The Court accepts this recommendation with minor modifications. All judicial officers shall carefully consider any request for oral argument and grant such request if it is determined that oral argument would be helpful. If oral argument is granted, the judicial officer will determine the time to be allotted to such argument.

**d. Time Limit for Ruling on Dispositive Motions**

The Group has recommended that a guideline of 60 days for ruling on dispositive motions be accepted and that the Chief Judge have the discretion to reassign work when one judge's docket makes the guideline difficult to meet. Otherwise, the time lines for litigation will become unrealistic.

The Court declines to accept this recommendation at this time because the current case load renders the guideline unrealistic, and it would necessarily limit the Court's ability to carefully and thoroughly consider the merits of each motion. In addition, cases assigned to a trial judge are generally not subject to administrative reassignment, absent recusal or other unusual circumstances. The Court is sensitive to the need to issue timely rulings on dispositive motions

and will continue to make efforts to reduce the time between filing and disposition of motions. Obviously, some motions are easily disposed of, while others, particularly in complex cases, often require an investment of time and effort commensurate with resolution of legal issues on appeal.

**e. Consideration by Counsel of Dispositive Motions**

The Group has recommended careful consideration by counsel of the efficacy of dispositive motions. Some believe that a proportion of such motions are merely dilatory or, if not filed for delay, are filed to avoid later second guessing by the client.

The Court concurs with this recommendation to the bar.

**6. Final Pretrial Conference**

The Group has made several recommendations with respect to the final pretrial conference stage of litigation. They are set forth below.

**a. Uniform Procedure**

The Group has recommended that a uniform final pretrial conference procedure be used by all judicial officers so attorneys and parties can reasonably anticipate what will happen at such conferences.

The Group recommended that the following subjects be considered at the final pretrial conference:

i. The marking of exhibits (for identification or as full exhibits) and their exchange.

ii. The admissibility of exhibits not agreed to by counsel prior to the conference.

iii. Voir dire.

iv. Special questions.

v. Special problems with the case.

vi. View arrangements.

vii. Challenges, jury lists, and problems with specific jurors.

viii. Motions in limine.

ix. Order of witnesses (in terms of arrangements and scheduling problems, not precise trial strategy).

x. Order of presentation in multiparty cases.

xi. Jury instructions.

The Court accepts this recommendation. The above subjects, among other matters, will be considered by the judicial officer at all final pretrial conferences.

**b. Timing of Final Pretrial Conference**

The Group has recommended that the Court should continue its current practice of holding a final pretrial conference approximately two weeks prior to trial, since this appears to be an ideal time to effectuate settlement.

The Court accepts this recommendation.

**c. Length of Final Pretrial Conference**

The Group has recommended that the length of the final pretrial conference not be limited to thirty minutes. Additional time will allow discussion of any dispositive motions, motions in limine, or other questions that may facilitate the trial or settlement of the case. Most important, it will allow additional time for the judicial officer to be a catalyst in settlement negotiations.

The Court accepts this recommendation. The length of the conference shall be within the judicial officer's discretion.

**d. Emphasis on Settlement**

The Group has recommended that judicial officers place more emphasis on attempting to reach settlement at the final pretrial conference. If the case is not settled, at least the judicial officer can

assess whether the case will be tried to a conclusion, and thus will delay other cases on the trial list. To increase the likelihood of settlement, the Group has recommended that:

i. Attorneys with authority to settle cases should be present at the final pretrial conference.

ii. Clients should be required to attend unless excused by motion or specific exemption. Telephone availability should be required in all cases where a party is not present in person, except in cases involving the United States or the State of New Hampshire if the Attorney General's Office has settlement authority.

iii. No continuances should be granted except in extraordinary circumstances. Some members of the Group expressed concern about this recommendation, particularly because of trial counsel's scheduling conflicts between state and federal court. The Group suggested that trial conflicts could be reduced if a firm trial date were to be scheduled well in advance, perhaps as much as 8 to 12 months. The Group commended the Clerk's Office for using its computer capability to minimize internal conflicts.

Unfortunately, there is no complete or compatible computer-based system in the state trial courts. The Group strongly recommended that efforts be made to create an integrated system to minimize the need for continuances.

The Court accepts these recommendations and will instruct the Clerk's Office to investigate the creation of an integrated trial scheduling system with the state courts. The Court notes that even when the technical hurdles for the creation of such a system have been overcome, a statewide, conflict-free scheduling system for all civil cases may not be desirable, as it may itself create unnecessary expense and delay for all civil litigation.

## 7. Magistrate Judge Utilization

The Group has made certain recommendations with respect to the utilization of the magistrate judge. These recommendations, together with the Court's responses, are set forth below.

### a. Track Assignment and Trials By Consent

The Group has recommended that parties be encouraged to consent to the assignment of certain cases, especially expedited track (rocket docket) cases, to the magistrate judge. The Group has also recommended that the

Court "consider at the pretrial conference, trials by consent before the magistrate judge when counsel know they are going to be ready, need a Court date for the convenience of distant witnesses or the certain resolution of the dispute and/or, where the assigned judge's schedule is uncertain."[11]

The Court accepts both of these recommendations.

**b. ADR Participation**

The Group has recommended that the Court explore the magistrate judge's involvement in any anticipated Alternative Dispute Resolution (ADR) program.

The Court accepts this recommendation, although it has not accepted any formal ADR program other than the possibility of summary jury trial as a last resort. In the event that summary jury trial is utilized, it is expected that the magistrate judge will conduct it. The Court also accepts the Group's recommendation that the current practice of allowing juror questioning after the summary jury trial be continued.

**c. Social Security Cases**

As the magistrate judge presently has a full work load, the Court declines to accept the Group's recommendation that the number of Social Security review cases assigned to him be increased. Unless significant change occurs,

[11]Report, page 35

the Court will continue the current policy of assigning one-sixth of these cases to the magistrate judge. This matter shall be reviewed during the annual assessment.

**8. Attendance by Those with Settlement Authority**

The Group has recommended that clients (or people with real decision-making authority) be required to attend both preliminary and final pretrial conferences unless counsel file a motion to excuse their attendance and assure that they will be available by telephone, except in cases involving the United States when the United States is represented by the United States Attorney's Office or agency counsel, and in cases involving the State of New Hampshire when the Attorney General's Office has settlement authority.

The Court construes the recommendation as requiring clients to be present. Insofar as this recommendation relates to clients' presence at preliminary pretrial conferences, the Court rejects the recommendation. We feel that such a requirement would be more costly to litigants and unnecessary in most cases. The Court reserves the right to require such attendance on a case-by-case basis. At the preliminary pretrial conference, and after consultation with parties, the Court will decide at which critical stages clients will be required to attend. As ADR will be discussed, the judicial officer may order that the client attend a subsequent meeting.

The Court ordinarily will not require a representative of the United States or State of New Hampshire to be present. However, the Court may require such representative to appear upon special notice.

## C. MANAGING COMPLEX CASES

### 1. Introduction

The Act requires consideration of a variety of devices in complex "and any other appropriate" cases.[12] The Court's differential case management approach contemplates the use of each of these devices for cases which have been assigned to this two-year track.

### 2. Complex Case Management Devices

The Group has made the following recommendations with respect to the management of complex cases:

a. Judges would hold preliminary pretrial conferences with the parties at which settlement would be explored.

b. Up to five status and pretrial conferences would be held in the two-year period, reflecting the Group's belief that judicial involvement is necessary in complex cases.

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[12]28 U.S.C. § 473(a) states that "[i]n formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group . . . shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction . . . (3) for all cases that the court or an individual judicial officer determines are complex . . . ."

c. As a result of the preliminary pretrial conference, a case management order should issue and be followed. It should only be revised if absolutely necessary.

d. Appropriate limitations on, and sequencing of, discovery will be considered.

The Court accepts these recommendations with minor modifications. Complex cases require more individualized management than any other category of cases. Therefore, such cases can best be managed through the use of detailed case management orders, the content of which must be developed through close consultation with the parties. Ordinarily, a district judge will conduct the preliminary pretrial conference in cases which are likely to be designated as complex cases. Following the preliminary pretrial conference, either a case management order will be issued by the Court or the parties will be directed to prepare and file a joint proposed case management order. Case management orders will address matters such as limitations on and the sequencing of discovery, the scheduling of status and settlement conferences, and deadlines for dispositive motions. The number of regularly scheduled status conferences that will be held in each complex case will depend upon the circumstances of each case.

## D. VOLUNTARY EXCHANGE OF INFORMATION

### 1. Introduction

The Act requires[13] that the Group and the Court consider voluntary exchange of information as a discovery technique. The Group concluded that discovery disputes are not currently a significant source of expense and delay in this district. Accordingly, the Group has proposed, and the Court accepts, only minor adjustments to current practices in this area.

### 2. Specific Discovery Recommendations

The Group has made the following specific recommendations with respect to discovery:

a. In each case, the Court should pay increased attention to judicial limitation of discovery under Rule 26.

b. The preliminary pretrial conference form should specifically require that discovery limitations be discussed at the preliminary pretrial conference.

c. By local rule, the Court should opt out of the proposed changes to Rule 26(a).

d. For certain types of cases, the Court should develop a series of standing discovery orders to be considered at the preliminary pretrial conference.

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[13]28 U.S.C. § 473(a)(4).

e. The Court should reevaluate its decision to opt out of Rule 26(a) after considering other districts' experience with full voluntary disclosure and this district's experience with the proposed standing orders.

The Court accepts these recommendations. Thus, limitations on discovery will be considered at all preliminary pretrial conferences, and limitations will be imposed on discovery to the extent that such limitations are consistent with Federal Rule of Civil Procedure 26(b)(1). The Court will also consider the use of standing orders to limit discovery in certain classes of cases where such limitations can fairly be established. Finally, the Court will adopt a local rule specifying that the proposed changes to Rule 26(a) will not be implemented in this district at the present time. The Court will annually reexamine the need for discovery reform, including the usefulness of a local rule change implementing Rule 26(a).

## E. ATTEMPTING TO REACH AGREEMENT BEFORE FILING DISCOVERY MOTIONS

### 1. Introduction

The Act[14] requires the Court to consider adopting for discovery motions the current practice which is mandated for all motions by Local Rule 11(b) and reinforced by Judge Devine's opinion in *Perkins v. HHS*, Civil No. 88-43-D, (D.N.H. 1988). Local Rule 11(b) requires that "the moving party shall certify to the Court that he has made a good faith attempt to obtain concurrence in the relief sought." The Group has recommended that the Court retain Local Rule 11(b) in its current form.

[14]28 U.S.C. § 473(a)(5).

### 2. Change of Motion Practice

The Court declines to accept this recommendation. Instead, the Court will amend the local rules to change the way in which motions are filed in this district. When this local rule change is implemented, a moving party will be required to serve a copy of his or her motion on the opposing party, and the opposing party will be required to serve an original and a copy of a response on the moving party within the time period provided under the Court's local rules and the Federal Rules of Civil Procedure. The moving party shall then be responsible for filing both the original motion and the original response with the Court. If the moving party does not receive a timely response to his or her motion, the moving party will file the motion and attach a certification that the motion was served on the opposing party and that a timely response was not received.

The Court believes that this change in local practice will further two desirable ends. First, it will compel parties to consider the merits of each other's positions before a motion is filed with the Court. Second, it will significantly decrease the administrative burden on the Clerk's Office.

## F. ALTERNATIVE DISPUTE RESOLUTION (ADR)

### 1. Introduction

Under the Act,[15] the Court is to consider whether "to refer appropriate cases to alternative dispute resolution programs." The Group recommended that the Court should utilize ADR. To summarize the Group's recommendations, the Court should:

a. Utilize ADR in appropriate cases.

b. Before the preliminary pretrial conference, have the parties fill out a simple ADR form so that the issue will be discussed at the preliminary pretrial conference and a referral made to an agreed-on neutral, unless the Court orders otherwise.

c. Based upon experience and such other accepted criteria, refer parties to "approved" neutrals from a list kept by the Clerk's Office.

d. Have the parties each pay the neutrals one-half of their regular fee (with a reasonable cap), provided that the neutral agrees to take a small number of cases annually for no or half fee.

e. By rule, make it clear that ADR results are confidential and inadmissible (subject to any relevant exceptions required by law).

f. Arrange for ADR in the courthouse if possible.

g. Evaluate ADR closely after 18 months of data is compiled and then annually thereafter.

h. Allow either the parties or the Court to make referrals to ADR.

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[15] 28 U.S.C. §473(a)(6).

i. Consider having an intermediate pretrial conference to schedule ADR if it is not feasible to do so at the preliminary pretrial conference.

j. Be careful to avoid the appearance of conflict between the judge's role as case manager and the judge's role as fact finder.

### 2. Court Consideration

The Court has carefully considered the recommendations of the Group regarding ADR, recognizes the value of alternative dispute resolution, and endorses the concept that ADR should be a part of the dispute resolution process.

The Court presently employs a number of procedures to attempt to resolve actions without trial and, with the acceptance of several of the Group's other recommendations, will continue to be even more proactive.

The Court agrees with the Group that ADR should be voluntary and that the decision to use this technique should be made on a case-by-case basis. The litigants will be given the opportunity to choose from a menu of ADR techniques, including neutral evaluation, mediation, nonbinding arbitration, binding arbitration, summary jury trial, and mini-trial.

### 3. Procedures Accepted and Rejected

The Court will promote settlement efforts at every stage of the proceedings, but only insofar as is consistent with fairness to the litigants. The Court encourages alternative dispute resolution.

The Court declines, however, to establish formal procedures for arbitration or mediation at this time. After careful consideration, and given the uncertainty concerning the availability of resources that would be needed to oversee an ADR program, we conclude that a formal program is not warranted at this time. Therefore, the recommendations contained in subsections "b," "c," "d," and "f" above are not accepted at this time. However, rather than wait 18 months (as per subsection "g" above), a review of this decision shall be part of the statutorily required annual assessment of the Plan.

In the interim, the Court will continue to encourage the voluntary use of ADR by litigants who will make their own arrangements to obtain neutrals, arbitrators, and mediators to hear their cases. If the magistrate judge's schedule so permits, summary jury trials may also be scheduled before him. The Court believes, however, that even the consensual use of summary jury trials and mini-trials generally should be limited to cases in which the actual trial would be unusually expensive, either because of its length or because of the stakes involved.

## III. - LITIGATION MANAGEMENT TECHNIQUES

The Act, at 28 U.S.C. § 473(b), lists five specific "litigation management and cost and delay reduction techniques" which we discuss here briefly.

### A. JOINT PRESENTATION OF DISCOVERY CASE MANAGEMENT PLANS

Proposed Federal Rule of Civil Procedure 26(f) requires the parties to meet and develop a proposed discovery plan. Should Congress adopt this proposed rule, the Group recommended that the Court exercise its prerogative to opt out of this requirement at this time and reevaluate its decision after the Plan has been implemented.

The Court agrees with the Group and accepts the recommendation.

### B. REPRESENTATION AT EACH PRETRIAL CONFERENCE BY A LAWYER WITH AUTHORITY

Local Rule 10(a) requires that the "attorney in charge of the case, or one with the same authority, shall be present at the [preliminary pretrial] conference." Local Rule 10(b), which governs the final pretrial conference, does not explicitly contain this requirement. The Group and the Court agree with the importance of having "at each pretrial conference . . . an attorney who has authority to bind that party," 28 U.S.C. § 473(b)(2).

The Court accepts the Group's recommendation and will amend the local rules to include the language "at the preliminary pretrial conference and each and every pretrial and status conference thereafter."

(*Note*: This recommendation will be moot if proposed Rule 16(c) survives Congressional review as it requires that "at least one of the attorneys for each party [who] participates in any conference . . . shall have authority to enter into stipulations . . . regarding all matters that the participants may reasonably anticipate . . . .")

## C. ALL EXTENSIONS SIGNED BY ATTORNEY AND PARTY

The Group considered requiring a party to sign any requests for extension of deadlines but rejected the idea as resulting in unnecessary expense, except for trial continuances. The Group believed a modification of New Hampshire Superior Court Rule 49 (which requires, *inter alia*, a certificate of counsel that the client has been notified) would properly balance the need to have clients informed of extensions and the reasons for them against the difficulty and expense of obtaining client approval for routine or unexpected reasons for extensions.

The Court accepts this recommendation and will incorporate it into the local rule amendments.

## D. NEUTRAL EVALUATION PROGRAM

The Group recommended that neutral case evaluation be one of the ADR techniques specifically considered by the parties at the preliminary pretrial conference (and, if appropriate, at subsequent conferences). As lawyers become more familiar

with the Superior Court's Alternative Dispute Resolution program (Rule 170), where neutral case evaluation is one of the more popular techniques, we will likely see increased use of this technique in this Court.

Also, 28 U.S.C. § 473(b)(4) suggests the use of "a neutral court representative selected by the court." Insofar as the Court has declined to formally adopt an ADR "program," it will not yet maintain any lists of experienced attorneys. Parties wishing to use this type of ADR will have to obtain their own neutrals.

## E. AVAILABILITY OF PARTIES WITH AUTHORITY TO BIND AT SETTLEMENT CONFERENCES

The Group recommended that parties be present at both the preliminary and final pretrial conferences. The Court has accepted this recommendation in part, requiring parties to be present at final pretrial conferences. See §§ II.B.6.d. and II.B.8., *supra*.

## IV - MISCELLANEOUS RECOMMENDATIONS AND PROVISIONS

### A. INTRODUCTION

There were several recommendations of the Group that do not necessarily fit within the list of techniques which Congress has mandated that the Court consider. The Court has considered these recommendations and accepted or rejected several of them as set forth below.

### B. TIME LIMITS TO ANSWER

The Court accepts the Group's recommendation that the Clerk grant only one extension of time (for no more than 40 days) for filing an answer. Any subsequent extensions will require judicial approval. (Report, page 33)

### C. *PRO SE*/PRISONER LITIGATION

#### 1. Magistrate Judge Screening

The Court accepts the Group's recommendation that the practice of having the magistrate judge screen all *pro se* complaints prior to service be codified as a local rule. (Report, page 34)

### 2. Lawyer Assistance

The Group recommended that the Court consider a closer liaison with the New Hampshire Bar Association's *Pro Bono* Program so that its resources can be tapped when *pro se* complaints survive the initial screening and counsel could help resolve the case. The Court accepts the recommendation but amends it to include all Bar services (Lawyer Referral and Information Service, Reduced Fee Referral Program, and *Pro Bono* program). The Court will provide to *pro se* litigants, after the initial screening by the magistrate judge, a list containing information about various Bar Association services. (Report, pages 43-44)

### 3. Prisoner Litigation

The Court notes the observations and suggestions of the Group (Report, page 46) regarding prisoner litigation. We agree with the Group that the area of prisoner litigation requires special attention. In this regard, we would encourage state and county officials to develop a procedure for in-house nonbinding review of prisoner complaints before an independent board. Such a procedure will, in all likelihood, reduce the number of prisoner complaints filed in both the state and federal courts.

## D. CRIMINAL DOCKET

### 1. Federal Defender Program

The Court agrees with the recommendation regarding the Defender Program (Report, pages 50, 54). The establishment of such a New Hampshire branch is presently underway. All necessary approvals have been sought. We anticipate that the program will begin in early 1994.

### 2. Standard Discovery Order

The Court agrees with the recommendation for the adoption of a standard discovery order to eliminate the need for many discovery motions. The Court is presently in the process of developing such an order. (Report, page 51)

### 3. Final Pretrial Conference

The Court agrees with the recommendation to hold a final pretrial conference in all criminal cases approximately two weeks before trial. Such conferences have generally been held, and the practice will continue. (Report, page 54)

## E. COMMUNICATION AND COORDINATION

In accordance with the acceptance of recommendations on page 36 of the Report, the Court will:

1. Make local rules available on LEXIS and any CD ROM services. In addition, the Court plans to make the rules available through our new Court Information Service, scheduled to go on line by early 1994.

2. Continue to participate in continuing legal education programs to educate the bar on changes in the Court and utilize the Bar Association's Committee on Cooperation with the Courts to exchange ideas and concerns.

3. Seek input from the bar and the public prior to evaluation of the implementation of the Plan but, consistent with the Act, do so as part of the annual assessment rather than the 18 months as recommended.

## F. PAGE LIMITS FOR MEMORANDA

The Group has recommended that there be a 25-page limitation on legal argument, except for good cause, and a 50-page limitation for memoranda on dispositive motions in cases on the complex litigation track. (Report, page 40)

The Court accepts the recommendation in principle but rejects it as written. Instead, the Court will amend the local rules to provide for a 25-page limitation on memoranda on all motions. There will be no exception for dispositive motions. The Court believes that a limit of 25 pages will be sufficient in most instances and will encourage counsel to focus on the issues. An exception to the 25-page limitation will, of course, be considered upon motion by counsel.

## APPENDIX A

## CONSIDERATION OF ADVISORY GROUP RECOMMENDATIONS

Pursuant to § 473(b)(6) of the Civil Justice Reform Act of 1990, the Court has considered carefully the recommendations of the Advisory Group for the District of New Hampshire. The following is a summary of the Court's actions on those recommendations. The page references cite the Group's Report; the section references point to the section(s) in the Plan in which the recommendation is addressed.

### B. DESCRIPTION AND ANALYSIS OF AREAS EXAMINED FOR POTENTIAL REDUCTION OF COSTS AND DELAY

**The Court's Resources**

Building and Facilities — Report Pages 28-9

We recommend that:

1.) Congress and the General Services Administration proceed with the appropriation for, and the completion of, the new courthouse.

***Section II. B. 4. d.***

2.) Until then the Court should minimize the amount of time that judges are not scheduled for courtroom time. With the availability of state court facilities and the renovated magistrate judge courtroom, the Group recommends that four of the five judges, instead of the current three, be scheduled for courtroom time if sufficient cases are ready for trial and other resources permit.

***Section II. B. 4. c.***

**Court Procedures**

Assignment Procedures — Report Page 32

The Group supports the continuation of the random assignment system for the time being and recommends that after the implementation of a Plan with differential case management, the Clerk's Office and the judges keep case load statistics by track for further review.

***Section II. A. 5.***

Time Limits — Report Page 33

We recommend that only one extension of time for filing an answer be granted by the Clerk before Court review of subsequent extensions and that the extension be for no more than 40 days, for a total of 60 days.

***Section IV. B.***

Magistrate Judge — Report Pages 34-5

The Group recommends that the practice of having the magistrate judge screen *pro se* complaints be adopted as a local rule.

***Section IV. C. 1.***

We recommend that the Court consider the following to utilize the magistrate judge's skills, expertise, and authority:

1.) Increase the number of Social Security cases assigned to the magistrate judge.

***Section II. B. 7.c.***

2.) Resume summary jury trials to be conducted by the magistrate judge.

***Sections II. B. 7.b. and II. F. 3.***

3.) Assign, by consent, part of the voluntary "rocket docket" to the magistrate judge.

***Section II. B. 7.a.***

4.) Consider at the pretrial conference, trials by consent before the magistrate judge when counsel know they are going to be ready, need a court date for the convenience of distant witnesses or the certain resolution of the dispute, and/or where the assigned judge's schedule is uncertain.

***Section II. B. 7.a.***

5.) Explore the magistrate judge's involvement in any anticipated Alternative Dispute Resolution (ADR) program.

***Section II. B. 7.b.***

Senior and Visiting Judges — Report Page 35

We recommend that every effort be made to accommodate the needs and facilitate the efforts of Senior Judges Devine and Loughlin.

***The Court concurs with this recommendation.***

Communication and Coordination — Report Page 36

We recommend the following to retain this Court's tradition of communication:

1.) Local rules should be available on LEXIS and any CD ROM services.

2.) The judges should continue to participate in continuing legal education programs to educate the bar on changes in the Court and utilize the Bar Association's Committee on Cooperation with the Courts to exchange ideas and concerns.

3.) Input from the bar and the public should be sought prior to evaluation of the implementation of the Plan after 18 months of operation.

4.) The judges should continue to maintain the collegiality and cooperation that are the hallmark of this Court and its staff.

***Section IV. E.***

**Litigant and Attorney Practices**

Settlement and Client Participation — Report Pages 39-40

We recommend:

1.) Clients (or people with real decision-making authority) be required to attend both preliminary and final pretrial conferences unless counsel file a motion to excuse their attendance while assuring their availability by telephone, except in cases involving the United States when the United States is represented by the United States Attorney's Office or agency counsel and in cases involving the State of New Hampshire when the Attorney General's Office has settlement authority.

***Section II. B. 8.***

2.) Consideration of the feasibility and timing of ADR at the preliminary pretrial conference.

***Sections II. B. 3.b. and II. B. 8.***

3.) Judicial handling of all pretrial conferences (except those handled in the first instance by the magistrate judge).

***Section II. B. 3.a.***

Page Limit for Memoranda — Report Page 40

We recommend that there be a 25-page limitation on legal argument, except for good cause, and a 50-page limitation for memoranda on dispositive motions in cases on the complex litigation track.

***Section IV. F.***

**Special Problems: *Pro Se* Litigation** Report Pages 43-4

We make the following observations and recommendations:

2.) As nonlawyers who "help" promote litigation are not bound by the Rules of Professional Conduct, cannot be disciplined, and are usually without the resources to pay (or be deterred by) financial sanctions, the Attorney General's Office and the Bar Association must continue to be vigilant in enforcing their statutory authority under N.H. Rev. Stat. Ann. § 311:7-a *et. seq.* to prevent the unauthorized practice of law.

3.) The Group recommends that the Court consider a closer liaison with the *Pro Bono* Program, so that its resources can be tapped when *pro se* complaints survive the initial screening and counsel could help resolve the case.

4.) The Clerk's Office, in conjunction with the Law Center and/or the relevant Bar Association Committee, should find or develop a handbook to give to *pro se* litigants after they file.

***Section IV. C.***

**Special Problems: State and Local Litigation and 28 U.S.C. §472(c)(1)(C)**

Other Prisoner Litigation Report Page 46

We suggest that the new Commissioner of Corrections may want to consider the adoption of an ombudsman-type system with review of complaints by an independent person or board.

Inmates and their advocates should educate themselves more about the State Board of Claims, which may be faster, easier, and more appropriate than federal court.

The New Hampshire Bar Association and/or public interest groups could and should develop a prison/jail project to reduce the cost and delay created by prisoner litigation. Such a project, devoted to monitoring correctional facilities, might reduce the need for legal action and provide counsel to facilitate litigation when it became necessary.

***Section IV. C.***

**Assessment of Criminal Docket and Legislation** Report Pages 49-54

Sentencing has become far more complex under the Sentencing Reform Act. The specialized knowledge and experience required to understand and use the guidelines leads to our recommendation that the Massachusetts Federal Defender Office implement its plan to have a branch of the Federal Defender Program in New Hampshire.

***Section IV. D.1.***

The Group recommends the adoption of a standard discovery order to eliminate the need for many discovery motions and that a final pretrial conference be scheduled two weeks before trial.

***Section IV. D.2., 3.***

**ADR**

Summary Jury Trials (SJT) Report Page 57

The Group agreed that this method of ADR should be a last resort for litigants because it consumes a significant amount of court time and resources. When used, however, we recommend that the Court allow SJT juror interviews.

***Section II. B. 7.b.***

**Trial and its Antecedents**

Pretrial Statements Report Pages 61-3

Pretrial statements should be returned to what they were originally intended to be--a rather specific listing of the issues, exhibits, and witnesses and a description of the case. The Group believes that a detailed, accurate pretrial statement is a valuable tool which will focus attorneys' attention on their case, promote settlement, and make the final pretrial conference more meaningful. This, however, would require the (re)education of the Bar.

The Group recommends:

1.) Exhibits be specifically identified. Witness lists should contain only the names of those witnesses whom counsel, in good faith, believe will actually be called to testify.

2.) Final pretrial statements should begin with a "brief statement of the case," agreed to by both parties, which the judge could read to the jury to concisely describe the case.

3.) The stipulations as to agreed facts should be binding on the parties.

4.) Where a pretrial statement has been previously filed and the case continued or not reached when assigned, updated pretrial statements should be filed no later than thirty days prior to the final pretrial conference.

5.) Requests for jury instructions should be filed simultaneously with the filing of the pretrial statements. The Group emphasizes that counsel should submit only the case-specific legal and factual elements that must be explained to the jury.

6.) Motions in limine, to the extent they can be anticipated by the time of filing pretrial statements, should be filed with the final pretrial statements so they can be considered by the Court at the final pretrial conference.

***Section II. B. 3.c.-f.***

Trial Scheduling — Report Page 63

The Group recommends continuing the current practice of "stacking" cases for trial. The Group also recommends that when the Court implements an integrated, automated calendar system, this information be made available to the public and the bar via computer.

***Section II. B. 4.b.***

Final Pretrial Conference — Report Pages 63-5

The Group recommends:

1.) A uniform pretrial procedure should be used by all judges so that attorneys and parties can reasonably anticipate what will happen at all pretrial conferences. The Report lists 11 subjects which should be considered at the final pretrial conference.

***Section II. B. 6.a.***

2.) The Court should continue its current practice of holding a final pretrial conference approximately two weeks prior to trial since this appears to be an ideal time to effectuate settlement.

***Section II. B. 6.b.***

3.) The length of the final pretrial conference should not be limited to thirty minutes.

***Section II. B. 6.c.***

4.) More emphasis should be placed by the trial judge in attempting to reach settlement at the final pretrial conference. To increase settlement, the Group recommends that:

a.) Attorneys with authority to settle cases should be present at the pretrial conference.

b.) Attendance of clients is required unless excused by motion or specific exemption. Telephone availability should be required in all cases where a party is not present in person, except in cases involving the United States or the State of New Hampshire, if the Attorney General's Office has settlement authority.

c.) Judges' training conferences and seminars should give special consideration to the role of judges in the promotion of settlement.

***The Court supports this recommendation.***

d.) Counsel should endeavor to give more accurate estimates of the length of trial to allow the Court to better schedule cases. If counsel are able to disclose the order of witnesses and order of proof without compromising legitimate advocacy, this will facilitate more accurate estimates.

***The Court supports this recommendation.***

e.) No continuances should be granted except in extraordinary circumstances. The Group strongly recommends that efforts be made to create an integrated system with the state system to minimize the need for continuances.

f.) With respect to exhibits, the local rules should be clarified as to whether all exhibits must be listed or only exhibits which will be offered by a party as evidence in their case in chief. The need to list impeachment exhibits should be clarified and a uniform practice among the judges on this issue should be promulgated. We strongly recommend that the judges discuss and develop a standard policy for the related, but different, issues which arise with exhibits:

1. Disclosure vs. marking.
2. Impeachment exhibits vs. cross examination exhibits.
3. Rebuttal exhibits vs. impeachment exhibits.

***Section II. B. 3.c., II. B. 6.d.***

Drawing Juries — Report Page 66

We recommend that counsel arrive at court at least 45 minutes early on the day of the draw.

***While the Court agrees with the intent of the recommendation, it is not necessary to adopt such requirement as part of the Plan. All judicial officers are sensitive to the jurors' time and will not keep the panel waiting.***

## C. CONTENT OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

**Systematic, Differential Treatment of Civil Cases for Purposes of Case-Specific Management** Report Pages 69-70

The Group believes that several compatible goals can be achieved by building upon and expanding the current differential treatment of cases. First, those cases that are currently handled in an established and satisfactory manner should be handled no differently.

All other cases will gradually be slotted into one of three tracks--a voluntary six-month "rocket docket," a one-year track from complaint to trial for most cases, and a two-year track for complex litigation. The Group recommends phasing in the tracks.

***Section II. A.***

**Involvement of Judicial Officers in Pretrial Process**

Assessing and Planning the Progress of the Case Report Page 76

We urge that this Court adopt a policy that in all cases (except in existing track cases) an initial pretrial conference be held before a judge.

***Section II. B. 3.a.***

Early, Firm Trial Dates Report Page 78

The trial date should be established early in the litigation. In most cases, the date can be set in the initial scheduling order under Fed. R. Civ. P. 16. For complex cases, we recommend that the trial date be set after a settlement conference which would occur approximately six months after the complaint is filed.

***Section II. B. 4.a.***

Control of Discovery Report Page 80

We recommend increased attention on a case-specific basis to the tools already in Rule 26.

***Sections II. B. 5.a., II. D. 2.***

We recommend that the preliminary pretrial conference form specifically require that discovery limitations are to be discussed at the pretrial conference.

***Sections II. B. 5.a., II. D. 2.***

Setting at the Earliest Practicable Time
Deadlines for Filing Dispositive Motions,
and a Time Framework for Their Resolution — Report Page 81,2

We recommend that the filing and timing of dispositive motions be discussed and resolved at the preliminary pretrial conference conducted by the judge.

***Section II. B. 5.b.***

We recommend:

1.) Careful consideration of the timing of filing dispositive motions and the efficacy of oral argument at the preliminary pretrial conference. We recommend that counsel be permitted to request oral argument on any motion with 20 minutes allotted for each side.

***Section II. B. 5.b., c.***

2.) A guideline of 60 days for ruling on dispositive motions should be adopted, and the Chief Judge should have the discretion to reassign work when one judge's docket makes the guideline difficult to meet.

***Section II. B. 5.d.***

3.) Careful consideration by counsel of the efficacy of dispositive motions.

***Section II. B. 5.e.***

**Managing Complex Cases** Report Page 84

As the Time Limit Chart for Complex Cases on page 75 and our other recommendations indicate:

1.) Judges would hold preliminary pretrial conferences with the parties at which settlement would be explored.

***Section II. C. 2.***

2.) Up to five status and pretrial conferences would be held in the two-year period, reflecting the Group's belief that judicial involvement is necessary in complex cases.

***Section II. C. 2.***

3.) A case management order should issue as a result of the preliminary pretrial conference and be followed or revised but only if absolutely necessary.

***Section II. C. 2.***

4.) Appropriate limitations on, and sequencing of, discovery will be considered.

***Section II. C. 2.***

**Voluntary Exchange of Information** Report Page 88

We recommend that:

1.) By local rule, this District opt out of the proposed changes to Rule 26(a).

***Section II. D. 2.***

2.) The Court develop a series of standing discovery orders, for certain types of cases, to be considered at the preliminary pretrial.

***Sections II. B. 5.a., II. D. 2.***

3.) The Court reevaluate its decision to opt out of Rule 26(a) after consideration of experience in other districts with full voluntary disclosure and experience here with the proposed standing orders.

***Section II. D. 2.***

**Attempting to Reach Agreement Before Filing Discovery Motions** Report Page 88

The Group recommends that the practice outlined in Local Rule 11(b) be continued.

***Section II. E. 2.***

**ADR** Report Pages 88-9

The Group recommends that the Court should utilize ADR. To summarize the recommendations previously discussed, the Court should:

1.) Utilize ADR on a case-by-case basis where appropriate.

2.) Have the parties fill out in advance of the preliminary pretrial conference a simple ADR form so that the issue will be discussed at the preliminary pretrial conference and a referral can be made to an agreed-on neutral, unless the court orders otherwise.

3.) Refer parties to "approved" neutrals from a list kept by the Clerk's Office based upon experience and such other criteria as may be adopted.

4.) Have the parties each pay the neutrals one-half of their regular fee (with a reasonable cap), provided that the neutral agrees to take a small number of cases annually for no or half fee.

5.) By rule, make it clear that ADR results are confidential and inadmissible (with any relevant exception required by law).

6.) Arrange for ADR in the courthouse if possible.

7.) Evaluate ADR closely after 18 months of data is compiled and annually thereafter.

8.) Allow the parties or the court to make referrals to ADR.

9.) Consider having an intermediate pretrial to schedule ADR if it is not feasible to do so at the preliminary pretrial conference.

10.) Be careful of the appearance of conflict between the judge's role as case manager and the judge's role as fact finder.

***Section II. F. 2., 3.***

**Litigation Management Techniques in 28 U.S.C. §473(b)** Report Pages 90-2

Joint Presentation of Discovery Case Management Plans: Should Congress adopt this proposed rule, it is our recommendation that the Court exercise its prerogative to opt out of this requirement at this time.

***Section III. A.***

Representation at Each Pretrial Conference by a Lawyer with Authority: We recommend that Local Rule 10(a) be amended to include the language "at the preliminary pretrial conference and each and every pretrial and status conference thereafter." (This recommendation is moot if proposed Rule 16(c) survives Congressional review.)

***Section III. B.***

All Extensions Signed by Attorney and Party: We believe a modification of the State Superior Court Rule 49 properly balances the need to have clients informed of extensions and the reasons for them with the difficulty and expense of obtaining client approval for routine or unexpected reasons for extensions. Accordingly, we recommend the adoption of a local rule that reads as follows:

> All motions for continuances or postponement or extension of deadlines in any civil action shall be signed and dated by counsel. Each motion, except in cases involving the federal or state government, shall contain a certificate by counsel that the client has been notified of the reasons for the continuance or postponement or extension and, in the case of continuances of trial, has assented thereto either orally or in writing and, with all motions for extensions of deadlines, has been forwarded a copy of the motion. In short or routine extensions, the motion to the Court can serve as the notification.

***Section III. C.***

## APPENDIX B

## OTHER RECOMMENDATIONS OF THE ADVISORY GROUP

As a final matter, the Court acknowledges other recommendations made by the Advisory Group in its Report; however, these issues are better left to the discretion of the U.S. Congress, the Administrative Office, and other entities for action.

### A. ASSESSMENT OF CIVIL AND CRIMINAL DOCKETS

**Summary of Docket Analysis** Report Pages 24-5

3.) Congress and the President have an important impact. Judgeships must be created and filled in a timely fashion when case loads or vacancies warrant.

### B. DESCRIPTION AND ANALYSIS OF AREAS EXAMINED FOR POTENTIAL REDUCTION OF COSTS AND DELAY

**Court Procedures**

Senior and Visiting Judges Report Page 35

We recommend that the AO have the ability, on short notice, to temporarily move a judge or magistrate judge and staff to a district when there is an unanticipated increase in litigation.

**Special Problems: State and Local Litigation and 28 U.S.C. §472(c)(1)(C)**

Other Matters Related to State and Local Litigation Report Page 47

With litigation becoming more fast paced in this jurisdiction, public officials and their counsel need to be aware of the changes contained in this Report; otherwise, the changes designed to reduce costs could lead to even greater costs if cases are unnecessarily tried before officials are willing or able to settle. Similarly, we recommend that plaintiffs and their counsel in "impact" cases must carefully evaluate settlement early in the case and make and consider realistic settlement offers.

**Examining the Impact of New Legislation on the Court, 28 U.S.C. §472(c)(1)(D)**

Civil Legislation — Report Pages 48-9

The Advisory Group accepted Congress's invitation 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." However, the Group has seen no evidence of any Congressional assessment of the impact of new legislation on the courts.

We recommend a judicial impact statement for each proposed law.

Legislative Inaction — Report Page 49

We recommend that the judicial impact statement for any legislation contain answers to the following questions:

1.) Is there a private right of action?

2.) If so, who is allowed, or not allowed, to bring suit?

**Assessment of Criminal Docket and Legislation** — Report Pages 49-54

A majority of the Group recommends[8] to Congress and the Executive Branch that:

1.) Before passing and signing another measure in the war on crime and drugs, allocating additional resources to law enforcement or prosecution, and/or adjusting the sentencing procedure any further, they remember that each step in the process from initial appearance to disposition involves expenditures of scarce judicial and, with appointed counsel, public resources. Congress and the Executive Branch must take responsibility for their role in the delay of civil cases, unless they rectify the delay to civil litigants by providing the courts with the same increase in resources that is provided to the Justice Department and the investigative agencies.

[8]The U.S. Attorney's Office disagrees with the Group's recommendations and dissents from the majority's recommendations, except as otherwise noted.

2.) Congress should reconsider the sentencing guidelines and mandatory minimum sentences on the ground of efficiency.

3.) The Speedy Trial Act should be reconsidered for those not incarcerated.

The majority of the Group recommends that the United States Attorney:

1.) Institute an open discovery policy.

2.) Continue to work with the Probation Office to increase pretrial diversion (a recommendation in which the United States Attorney's Office can generally join).

**Alternative Dispute Resolution**

Our Recommendations re ADR Report Page 61

We recommend that (1) the bar examination be updated to include competency testing for dispute resolution; (2) further CLE programs be held on ADR and related skills; (3) a pamphlet be developed to provide relevant information for clients on ADR options; and (4) the new-lawyer training program should include a component on ADR issues.

## APPENDIX C

## CONTRIBUTIONS BY PLAN PARTICIPANTS

### INTRODUCTION

Pursuant to § 472 (c)(3) of the Act, the Advisory Group included recommendations that would require "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." The Court's Plan includes a majority of those recommendations. These procedures are likely to bring cases to an earlier resolution, thereby decreasing the cost to litigants and increasing the efficiency of judicial administration.

### THE COURT

The judicial officers will take an active role earlier in the litigation and strive for prompt rulings on matters before them. Closer case management and more time devoted to various settlement methods should bring cases to conclusion sooner. Working with counsel to control discovery and a cooperative effort by judicial officers to reach all cases set for trial should ultimately reduce costs for litigants in the various stages of a pending case. Less quantifiable, but important to improving overall relations, is the judicial officers' receptivity to oral argument, continued participation in legal education programs, and willingness to consider further recommendations for improved procedures.

The Clerk's Office is charged with maintaining current dockets and files, developing information essential to positive case management, developing local rules and procedures to accomplish the Plan's goals, and providing the court with statistical information necessary to assess the success of the Plan.

### THE LITIGANTS

Litigants' contributions are not as clear. The Report calls for greater involvement in the litigation and more responsibility for decision makers to enter the process earlier. Public officials need to be aware of the changes contained in the Plan. Parties are also called upon to attend certain court proceedings, e.g. pretrials and settlement conferences, either as a standing policy or at the request of the court, which will certainly impose an additional time burden but hopefully will result in resolution of cases in a more timely manner. Judicial officers will continue to encourage alternative dispute resolution procedures which will require the participation of parties. *Pro se* cases will continue to be reviewed by the magistrate judge to eliminate the time and expense involved in responding to frivolous claims.

## THE ATTORNEYS

Counsel are required to make significant contributions throughout the Plan. They will certainly feel the impact of changing procedures in the court. The Report notes the Group's reservations that with both the state and federal courts imposing requirements for the speedier resolution of cases, the tradition of civility among New Hampshire lawyers may suffer, and additional stress will be added to an already stress-filled profession. The Plan calls for earlier and more concentrated attention to cases, more thorough pretrial preparation, steps to control and limit discovery, and participation in ADR. The Plan also endorses increased use of the New Hampshire Bar Association's services for pro se parties.