BRIEF SUMMARY OF COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON THE DRAFT REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar in general enthusiastically supports the conclusions and recommendations in the Draft Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia.

The Section agrees, for example, that: unnecessary delay and excessive cost are significant issues that need to be addressed on a comprehensive basis; a critical element to the efficient disposition of civil cases is the early entry of a scheduling order, including a firm trial date and realistic pretrial dates; a vital ingredient of case management is prompt decision by judges on pending matters; and the Court should continue to improve the availability and effectiveness of alternative dispute resolution options.

The Section suggests that the definition of "unnecessary" delay be modified to include the expectations of the reasonably diligent party as well as the reasonably conscientious judge. The Section also suggests changes relating to the recommendations concerning: tracking of civil cases; the timing of scheduling conferences in multiple-party cases; routine stays of discovery when dispositive motions are filed; presumptive numerical limits on interrogatories and the number and length of depositions; increasing civility in an adversarial system; informal handling of discovery disputes; increasing the utilization of magistrate judges; and use of staff attorneys to make reports and recommendations concerning pro se complaints.

SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON THE DRAFT REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON THE DRAFT REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar submits these comments concerning the Draft Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

General Comments. Generally speaking, the Section enthusiastically supports the conclusions and recommendations in the Draft Report of the Advisory Group. The Advisory Group has performed extraordinary service in its comprehensive analysis of the issues of unnecessary cost and delay in civil cases in this Court. The quality of its analysis and recommendations reflects the enormous amount of thought and time that obviously went into its efforts. As explained below, the Section suggests modifying some of the recommendations in the Draft Report, but these suggestions should not be understood to diminish the Section's strong endorsement of the general approach in the Draft Report.

More specifically, the Section agrees that:

- unnecessary delay and excessive cost are significant issues that need to be addressed on a comprehensive basis;

- a critical element to the efficient disposition of civil cases is the early entry of a scheduling order, including a firm trial date and realistic pretrial dates, based on the particular characteristics of the case;
- a vital ingredient of case management is prompt decision by judges on pending matters;
- a mandatory disclosure requirement in the pretrial stage should not be implemented;
- trials should proceed during normal business hours without interruptions for other cases;
- the Court should continue to improve the availability and effectiveness of alternative dispute resolution options;
- the resources of the clerk's office should be increased; and
- better statistics on case management ought to collected and analyzed on an ongoing basis.

This list of areas of our agreement with the Draft Report focusses on its primary recommendations, and is not exhaustive. Unless otherwise indicated below, the Section supports the other recommendations in the Draft Report.

Definition of "Unnecessary" Delay. The Draft Report defines (on page 37) unnecessary delay as "the time beyond which a reasonably conscientious judge would expect a case to move from filing to disposition." This approach defines delay from the perspective of the judge. As the

Advisory Group recognizes, the parties and their attorneys are often in a better position to evaluate how long a case should take to be resolved. We believe that the appropriate length of time should be defined in terms of the expectations of the reasonably diligent party as well as the reasonably conscientious judge.

We emphasize that we believe that this suggested change in the definition of unnecessary delay would not require any change in the Advisory Group's substantive recommendations.

Recommendation 1. The Section agrees with the recommendation to establish a tracking system for civil cases. We agree with the Draft Report's emphasis that the judge should decide the appropriate track for a case only based on consultation with counsel for the parties.

We suggest that the Advisory Group recommend guidelines for allocation of cases among the four categories. For example, we believe that a substantial majority of all civil cases ought to be in Categories 1 and 2 -- that is, ought to be resolved within 12 months from the date of the first scheduling conference. Cases in Categories 3 and 4 ought to be the exception, not the rule.

We recognize that decisions on tracking must be made on a case-by-case basis, and indeed strongly support the case-by-case approach recommended in the Draft Report. However, while this flexibility is important, and caseloads of individual judges may vary over time, it would be useful

to establish reference points for the tracking process. Among other benefits, such guidelines would assist in the evaluation of the tracking system, including whether cases are properly categorized.

The standing committee suggested in Recommendation 48 to make annual assessments of the Court's civil and criminal docket should review experience with the tracking system, both to analyze whether cases are properly categorized and whether they are completed within the scheduled time.

Recommendation 3. The Section supports the overall approach in this Recommendation and has only one refinement to suggest. We understand the draft recommendation to require in multiple party cases a scheduling conference within a fixed time after any defendant files an answer or motion. Because of delays in service of process or for other reasons, this requirement may force the Court to hold more than one scheduling conference -- a possibility recognized in the Draft Report (on pages 52-53). We believe that the certain costs of multiple scheduling conferences would outweigh any potential benefits in some cases of an earlier scheduling conference involving less than all of the parties. Holding the scheduling conference only when all parties have been served with process and given notice of the conference should not delay ultimate resolution of the case, particularly in light of the need for cooperation in discovery among all parties in multiple party cases.

Recommendation 11. The Section has one suggestion concerning the recommendation that stays of discovery be routinely granted if granting an outstanding motion would make the discovery unnecessary. If this recommendation is implemented as part of a case management plan, it is imperative that the 60-days-to-decision rule be met in all cases where such stays are granted -- not only in "most" cases as the Draft Report states. Otherwise, stays of discovery would only substantially delay ultimate resolution of the significant percentage of cases in which dispositive motions are denied.

Recommendation 16. The Section has previously taken the position that mandatory disclosure of the kind of information now obtained through discovery is inappropriate, and we therefore agree with the recommendation in the Draft Report against that approach. We also agree that any limits on discovery in individual cases ought to be tailored to the needs of the particular case. However, we believe that presumptive numerical limits on interrogatories and the number and length of depositions have a useful role to play by establishing a framework for counsel in meet and confer conferences. By the same token, the judge would properly exercise broad discretion on a case-by-case basis in deciding whether those guidelines are appropriate in a particular case.

This approach, we believe, meets the objections of some members of the Advisory Group, while addressing the

concern about overuse of interrogatories and depositions that we share with other members of the Advisory Group. Other districts have adopted such rules without the problems of satellite litigation that concerned some members of the Advisory Group.

Recommendation 18. The Section continues to support efforts by the District of Columbia Bar to educate counsel about the importance of civility in an adversarial system and about appropriate conduct in depositions and other discovery proceedings.

Recommendation 19. We agree that many discovery disputes can be handled on a more informal basis than is currently the norm. We do not believe that a formal change in the local rules would be necessary to permit parties to raise discovery disputes with the Court without extensive legal argument or citation of authority. Succinct motions on this subject are commonly filed under the existing rules, without objection from the Clerk's Office or the judges of the Court. To the extent that this practice needs additional encouragement, the initial scheduling order could make clear that written requests for judicial intervention in discovery disputes do not require extensive argument.

Recommendation 22. We agree with the Advisory Group that the role of magistrate judges in this District needs to be better defined, and we understand the concern that the current magistrate judges are underutilized. The experiment proposed in the Draft Report tries to strike an

appropriate balance between (a) the perceived benefits of increased utilization of magistrate judges in an overall delay and cost reduction plan and (b) the absolute right of parties to an Article III judge.

The Section is concerned that any experiment with increased use of magistrate judges avoid any direct or indirect pressure on the parties to consent to proceed before the magistrate judge for all purposes. District and magistrate judges must make clear to parties whose cases are automatically referred that they retain their unfettered right to have constitutional and other legal issues decided by an Article III trial judge -- including in diversity cases like personal injury and contract cases that are the focus of the proposed experiment. In addition, the need for automatic referrals to magistrate judges in an overall delay and cost reduction plan should be evaluated in light of the fact reported by the Advisory Group that, despite all of the demands placed on the Court, it has managed to rank among the fastest district courts in the nation in terms of median disposition time.

We also recommend that cases be automatically referred to magistrate judges as part of the proposed experiment for a period of eighteen months instead of three years. Because cases randomly referred would not be completed for some time after the automatic referrals ceased, an experiment involving three years of automatic referrals would not yield results for a prolonged time. Experimenting with automatic

referrals for eighteen months should permit referral of enough cases to generate meaningful results within a shorter time. Moreover, as the Draft Report recognizes, parties whose cases are included in this experiment may choose not to consent to proceed before the magistrate judge for all purposes. The result of the experiment could therefore be to increase cost and delay because, as the Draft Report correctly concludes, a primary goal of a sound case management plan must be to avoid duplication of effort and to have one judicial officer handle a case from start to finish. We are also concerned that any practice that continues for as long as three years may no longer be an experiment and tends to acquire a life of its own.

In addition to these suggestions, we propose the following guidelines for the experiment. First, we endorse the decision to limit the experiment to personal injury and contract cases, and we suggest that the experiment include only such cases that are classified as Category 1 or 2 in the tracking system. Second, the Advisory Group should decide the size of the random sample of cases automatically referred to magistrate judges; the sample should be no larger than necessary to accomplish the goals of the experiment. Third, the Advisory Committee should establish criteria for evaluating the experiment, including a methodology to measure the impact of referrals on the length of time to disposition and on the likelihood and timing of settlement.

We support the related Recommendations 23 and 24 to increase the role of magistrate judges in connection with ADR and settlement, as well as the recommendation against automatic referral of pro se cases to these judges. Recommendation 23 regarding appointment of an additional magistrate judge with expertise in settlement and ADR raises funding and other issues, and the Advisory Group may wish to consider whether one or more of the current magistrate judges could receive additional training in these areas to achieve the same goals.

The Section believes that if magistrate judges perform the functions outlined above, along with their responsibilities in criminal cases, the Court should be able to recruit and retain the best people for magistrate judgeships.

Recommendation 39. We support the recommendation to add staff attorneys to make reports and recommendations concerning pro se complaints. The mission of these attorneys should not be to search aggressively for possible justifications for dismissal of pro se cases. Rather, their goal should be to conduct a balanced, neutral evaluation of pro se complaints that considers the interests both in early termination of frivolous cases and in prompt disposition on the merits of cases that may raise significant constitutional or other issues. The Draft Report notes that in the Southern District of New York, 35% of all pro se cases are dismissed before assignment to a trial judge. The Section opposes any

use of any numerical guidelines to evaluate the performance of pro se staff attorneys individually or collectively.

Pro se staff attorneys should have the option to seek, even at the screening stage, the assistance of the bar in providing volunteer counsel to pro se litigants in potentially meritorious cases. The bar has made a commitment to the Court to assist in locating counsel in suitable cases to assist litigants who file complaints pro se. The Advisory Committee may also wish to consider whether the Federal Defender for the District of Columbia has an appropriate role to play in making recommendations at the screening stage in pro se cases filed by prisoners.