SUMMARY OF LITIGATION SECTION COMMENTS TO THE REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP

On the whole, the Litigation Section supports the conclusions and recommendations contained in the Advisory Group's Draft Report.

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 Litigation Section believes that the District Court can achieve the stated goals if, in addition to implementation of the Advisory Groups recommendations, the Court:

(a) Fully utilizes and incorporates Magistrate Judges into the resolution of discovery disputes and alternative dispute resolution;

(b) Provides attorneys specific written guidelines at an early stage; and

(c) Schedules criminal pleas and sentencing on a designated day of the week.

LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE LITIGATION SECTION 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 Litigation Section of the District of Columbia Bar and not those of the Bar or its Board of Governors.

COMMENTS OF THE LITIGATION SECTION 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 Litigation Section 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 ("Draft Report"). Comments submitted by the Section represent only its views, and not those of the D.C. Bar or its Board of Governors.

I. General Comments

On the whole, the Section enthusiastically supports the conclusions and recommendations set forth by the Advisory Group in its Draft Report. The Report is a thorough and insightful analysis of the demands and processes which currently exist in the District Court. The Section commends the Advisory Group and the Court for their unselfish efforts in this endeavor.

Upon receipt, the Draft Report was circulated to the Litigation Section's Steering Committee for comments. We believe that the following comments will aid the Court and Advisory Group in realizing a reduction in the cost and delay associated with litigation in the District Court.

II. Specific Comments

A. Definition of "Unnecessary" Delay: The Section agrees with the comments made by the Section of Courts, Lawyers and the administration of Justice 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.

B. Recommendation 1: The Section believes that the general idea of categorizing cases is a good one. The Draft Report, however, incorrectly assumes that the only factor relevant to categorization is "complexity"; the more complex the case, the more time allowed for disposition. This is too simplistic. This ignores the fact, for example, that Congress has required by statute that certain types of cases be expedited or given priority over others. See, e.g., 28 U.S.C. § 1657. It also ignores the fact that the practical circumstances of a specific case may require expedited treatment, regardless of the case's complexity. Take, for example, cases in which the relief sought is principally injunctive, not monetary. The bottom line is that if cases are going to be categorized, the factors determining the categorization must be expanded beyond "complexity."

C. Recommendation 3: The Section agrees with the Courts, Lawyers Section's comment that the informal attorney conference should be held after all parties have been served with process.

D. Recommendation 4: The Section believes it is important that guidelines for case management be available to all counsel prior to the first meet and confer meetings set forth in Recommendation No. 3. Either the Court as a whole or each judge individually should prepare written guidelines which specifically delineate discovery, dispositive motions, Rule 16 pre-trial conferences, jury selection and jury instructions. Such guidelines will help counsel facilitate case management ideas at their meet and confer conference. Then, at the Court's first scheduling conference, modifications and adjustments to the guidelines based on the specific case can be discussed, agreed upon and memorialized.

E. Recommendation 16: The Section agrees with the Courts, Lawyers Section's comment that mandatory disclosure is inappropriate. Any limits on discovery in individual cases ought to be tailored to the needs of the, particular case by the Judge assigned to the matter at the Court's first scheduling conference.

F. Recommendation 17: This recommendation - that discovery disputes should not be referred to magistrate judges, with only one exception, is a serious mistake.

The Draft Report cites three bases for the recommendation, none of which has any merit. First, it is not fair to say that the "magistrate judges do not know the case as well as the trial judge" or are "not as well situated as the judge to whom the case is assigned to resolve disputes expeditiously." Particularly in cases where all discovery disputes are referred to a magistrate judge, the magistrate judge will know the case as well as - or even better than - the district judge, and will be as well - or even better - situated to resolve discovery disputes expeditiously. Take, for example, the Eastern District of Virginia, where magistrate judges routinely handle discovery disputes. Discovery motions that are filed by Wednesday are generally heard and decided on Friday of the same week.

Second, it is wrong to say that "referral usually adds another step to the process by offering litigants two opportunities to argue the point, one to the magistrate judge and another to the trial judge." As a practical matter, very few rulings by magistrate judges on discovery issues are ever appealed. The reason is that the losing party must convince the district judge that the magistrate judge's ruling was clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a). But even where appeals are filed, they rarely slow the case down. In the Eastern District of Virginia, for example, an appeal of a magistrate judge's ruling will typically be resolved by a district judge within 2 weeks of the date of the original ruling.

Third, the notion that discovery motions should be resolved by district judges instead of magistrate judges because "most discovery disputes are a matter of judgment and reason and are not governed by complicated legal precedents" is simply not a fair conclusion. Magistrate judges are fully capable of exercising judgment and reason and they are fully capable of deciding issues not governed by complicated legal precedents. The further notion that a district judge must resolve all discovery disputes in order to maintain "management and control of the case" is also not a fair conclusion. If the district judge refers all discovery disputes to a magistrate judge, the district judge will have more - not less - time available to manage and control the case.

What the Draft Report overlooks in its recommendation is that magistrate judges can make an enormous contribution to the reduction of the expense and delay of litigation when they are given the responsibility of handling discovery disputes as a matter of routine practice. That has certainly been the case, for example, in the Eastern District of Virginia. Thus, it is the Section's position that the recommendation made should be the opposite of that stated in the Draft Report: All discovery disputes <u>should be</u> referred to a magistrate judge for resolution unless the district judge determines otherwise for a particular case or particular motion.

G. <u>Recommendation 21</u>: This recommendation should be rephrased to conform to the text that follows the recommendation. It should read: Senior judges who participate in this cooperative plan should be given a vote at the Executive Session of the Court, be included in all administrative decisions made by the judges of the Court, and be provided their own courtrooms and necessary support staff.

H. <u>Recommendation 23</u>: This recommendation implies that the existing three magistrate judges are so lacking in training and experience in alternative dispute resolution and settlement that a fourth one should be appointed who has that special training and experience. There is nothing to support the suggestion that any or all of the existing magistrate judges have any such deficiency. Even if there were some deficiency, the solution would not lie in the appointment of a fourth magistrate judge with specialized training and experience. The solution would be to provide whatever training the Advisory Group seems to think may be lacking to the existing magistrate judges. It is important to remember that, like the district judges, magistrate judges are generalists. It would make no more sense to appoint a fourth magistrate judge based on the individual's specialized training and experience in ADR and settlement than it would to appoint the next district judge on that basis.

I. <u>Recommendation 36</u>: The certification should be made by counsel at the time the first appearance is made in the case.

J. Recommendation 42: The recommendation should identify the specific areas in which "better statistics" are contemplated.

K. Recommendation 44: As part of this recommendation, the Section believes that the Court should establish a specific day of the week (i.e., Monday 8:00 a.m. to 12:00 p.m.) for criminal pleas and sentencing.

L. Recommendation 46: The word "must" should be changed to "should" to conform with the rest of the recommendations.