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Wandering in the Wilderness of Dispute Resolution: When Do We Arrive at the Promised Land of Justice

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WANDERING IN THE WILDERNESS OF DISPUTE RESOLUTION: WHEN DO WE ARRIVE AT THE PROMISED LAND OF JUSTICE?

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I. INTRODUCTION

Since the inception of government-sponsored dispute resolution, proponents of judicial amelioration have wielded gavels of reform in an onerous struggle to refine not-so-malleable judicial institutions. Progress, although slow to come, has resulted. Encouragingly, past generations have witnessed the downfall of crude judicial procedures such as trial by battle[1] and trial by ordeal.[2] Due to this evolutionary course of action, the world is now home to two polar methods of dispute resolution—the adversarial[3] and inquisitorial[4] systems. The landscape, however, is ever-changing and the maps must be revised.

Whatever the method, it should be the goal of any adjudication to resolve conflicts in a just manner.[5] However, critics are unable to agree as to the best means of achieving this goal. Advocates of both the adversarial and inquisitorial systems claim to more fully effectuate some generally recognized features of fair adjudication, including: (1) impartiality on behalf of the decisionmaker;[6] (2) rationality underlying the decision;[7] and (3) participation in the proceeding by the parties.[8]

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1. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 320 (1989). "In battle, the litigant challenged his adversary to battle, though champions were often used to perform the actual fight in civil cases. The winner of the battle, who had also sworn an oath, thereby proved his case." *Id.* (footnote omitted).

2. *Id.* "In ordeal, the party who had the burden of proof was required to swear an oath, then submit to some test, such as holding a red-hot iron rod for a prescribed time; if the iron did not burn him, his case was proved." *Id.* (footnote omitted).

3. For an explanation of the adversarial system, see *infra* notes 9-26 and accompanying text. Factors leading to the development of the adversarial system include the following: (1) a tradition of party control over some aspects of adjudication; (2) a strong legal profession; (3) wide-spread democratic and individualistic ideals in England; (4) a growing faith in reason in decisionmaking; and (5) a growing faith in procedure as a substitute for God. Sward, *supra* note 1, at 326.

4. For an explanation of the inquisitorial system, *see infra* notes 27-34 and accompanying text.

5. *See* Sward, *supra* note 1, at 306.

6. *Id.* at 308.

7. *Id.* at 309.

8. *Id.* at 310.

A. THE ADVERSARIAL SYSTEM

A product of British tradition,[9] the American judicial process typifies the adversarial model of dispute resolution.[10] The adversarial system is known for its employment of a neutral and passive fact-finder,[11] party presentation of the evidence, and highly structured forensic procedures.[12] However, recent changes in federal and state rules of civil procedure, evidence, and professional conduct reflect the ongoing debate in America as to whether to continue the adversarial system of adjudication.[13]

"In the [adversarial] system, the judge is a relatively passive party who essentially referees investigations carried out by attorneys."[14] Proponents of the adversarial system claim that by resisting involvement, the judge lessens the risk of prematurely committing to one version of the facts—thereby remaining impartial throughout the proceeding.[15] Opponents of the adversarial system, on the other hand, believe that such minimal judicial involvement unnecessarily impedes the discovery of facts[16] and ascertainment of truth.[17]

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9. Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1193 (1992).

10. *See* Sward, *supra* note 1, at 301.

11. THE FEDERALIST No. 78, 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment." *Id.*

12. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983).

> The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.

Id.

> According to another commentator,
>
> [C]haracteristics of the adversary system include reliance on oral testimony, a dialectical paradigm for truth seeking, decision making by lay jurors, party-controlled procedures, the right of parties to waive procedural requirements by mutual agreement, emphasis on procedure over substantive result, and a neutral judge concerned only with the integrity of the process.

Franklin Strier, *What Can the American Adversary System Learn From an Inquisitorial System of Justice?*, JUDICATURE, Oct.-Nov. 1992, at 109.

13. *See* Landsman, *supra* note 12, at 714. "As proceedings became more adversarial, conflicting ethical demands were exerted upon lawyers. On the one hand, attorneys were expected to be officers of the court and seek the truth. On the other, they were expected to be keen advocates on behalf of their clients." *Id.* at 734-35 (citations omitted).

14. Strier, *supra* note 12, at 109. In the criminal justice system, "the principles of the adversarial model are respected by the assumption that at trial the prosecutor and the defense attorney can themselves best present the opposing views of fact and law." Marcus, *supra* note 9, at 1196.

15. Landsman, *supra* note 12, at 715. *See also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982). "Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially." *Id.* "[T]he judge is a neutral and detached magistrate whose function is to mediate and resolve the opposing parties' inevitable conflicts." Marcus, *supra* note 9, at 1193.

16. Sward, *supra* note 1, at 302. The main failures in the adversarial system are in the realm of fact-finding. *Id.* For example, the parties and their attorneys control the introduction of evidence; the parties may not have attorneys of equal skill; and the judge or jury is given too little information to make an intelligent well-informed decision in many cases, largely due to the passive role of the court.

17. Strier, *supra* note 12, at 162. "Critics have long contended that the truth is given too low a value in adversarial trials." *Id.*

Further, highly structured forensic procedures[18] are designed to ensure that the resolution of disputes will be rational and reasonably predictable, affording citizens the facility to determine the probable legal consequences of their actions.[19] Others maintain that the adversarial system places too much emphasis on the conduct of proceedings, needlessly diverting attention from the substance of the lawsuit.[20]

Finally, party presentation of the evidence is intended to reveal the facts and law that the litigants deem most important to their case, thereby leading to a decision specifically tailored to their individual needs.[21] Critics of the adversarial system contend that the private agendas of the parties frequently conflict with the agendas of the state.[22] Thus, the judge is often forced to reach a conclusion without the benefit of all relevant information, resulting in a decision which may not be the best policy response to a particular situation.[23]

Despite its continued popularity, many commentators believe that the adversarial system creates pointless animosity between the parties:[24]

> The emphasis on "winning" in court can direct parties away from a cooperative search for a solution to their dispute. If there is a continuing relationship between the parties, this may cause problems between them by channeling energy to preparation for adversary encounters, rather than focusing on preventive actions to minimize disputes and develop problem-solving skills.[25]

Moreover, many believe that the adversarial system inspires attorneys to resort to "tricky" tactics, which add to the hostility between the parties.[26]

B. THE INQUISITORIAL SYSTEM

The inquisitorial system, the predominant means of adjudication throughout the world,[27] is characterized by judicial control over the gath-

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18. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are examples of some of the highly structured forensic procedures which comprise the American adversarial system. "[T]he rules confine the authority of the judge to manage the proceedings: judges are not free to pick and choose the evidence they think most appropriate, but are bound to obey the previously fixed evidentiary prescripts." Landsman, *supra* note 12, at 716 (citations omitted).

19. Sward, *supra* note 1, at 313.

20. *See* Strier, *supra* note 12, at 109.

21. Landsman, *supra* note 12, at 715.

22. Strier, *supra* note 12, at 109.

23. *Id.*; *see also* Landsman, *supra* note 12, at 714-15.

24. *See, e.g.*, KEITH JOHNSON, AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (WISCONSIN LEGISLATIVE COUNCIL STAFF) 4 (Apr. 5, 1985).

25. *Id.*

26. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 85 (1949).

27. Sward, *supra* note 1, at 301.

ering of evidence and the elicitation of testimony.[28] The parties and their attorneys assist the judge in this endeavor, but their role is merely supportive and supplementary:[29]

> Inquisitorial systems of adjudication are more communitarian than individualistic in nature. The goal is to seek the socially correct solution to the litigants' dispute by demanding cooperation among court and litigants in the development of evidence and argument. In theory, less importance is given to individual self-interest . . . . [T]he judge, with a broader, disinterested perspective, has a relatively free hand in pursuing investigations and is not confined to considering only the parties' interests and arguments.[30]

Opponents of the inquisitorial system fear that active participation by the judge in a proceeding increases the likelihood of partiality.[31] Further, they believe that such an approach may teach judges to value statistics, such as the quantity of pretrial dispositions more than quality.[32] Finally, judicial management in an inquisitorial system is usually less visible and more difficult to review.[33] Thus, safeguards against judicial abuse are not as prevalent in an inquisitorial system as they are in an adversarial system.[34]

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28. Marcus, *supra* note 9, at 1193. In the inquisitorial system, it is the judge who is primarily responsible for calling and questioning witnesses. Patricia Anne Kuhn, *Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U. L. REV. 1011, 1021 (1989).

"While the adversarial model looks to the partisan efforts of the [attorneys] to search for the truth and to protect the public and the [parties], the inquisitorial model depends upon the even-handed initiative of the judge." Marcus, *supra* note 9, at 1195. Features of the inquisitorial system include:

> [R]eliance on official documentation, a scientific paradigm for truth seeking, no juries but a career judiciary trained specifically for the bench rather than the American model of selecting judges from the ranks of practicing attorneys, nonpartisan state-controlled procedure, rigid state regulation of the legal process, and activist judges who intervene to ensure a solution based on the merits of the case.

Strier, *supra* note 12, at 109.

29. Marcus, *supra* note 9, at 1193. "[T]he judge has primary responsibility not only for determining the relevant facts, but also for gathering and eliciting those facts. The parties assist the judge in this task, but their role is only secondary and supportive." *Id.*

30. Sward, *supra* note 1, at 315. "[C]ountries employing the inquisitorial system look to the state for the resolution of social problems and the formulation of social policies; adjudication serves as a vehicle for the enforcement of state policies." Strier, *supra* note 12, at 109 (citation omitted).

31. Landsman, *supra* note 12, at 715. The "[a]dversary theory suggests that if the decision maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all of the evidence." *Id.* (citation omitted).

32. Resnik, *supra* note 15, at 380. "Judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation . . . ." *Id.* at 424-25.

33. *Id.* at 380. "In addition to enhancing the power of judges, management tends to undermine traditional constraints on the use of that power." *Id.* at 425. For example, when judges set rules regulating a proceeding, such as discovery timetables, they are "not forced to submit [these] ideas to the discipline of a written justification or to outside scrutiny." *Id.*

34. *Id.* at 380.

C. THE HYBRID SYSTEM

Both the adversarial and inquisitorial models of dispute resolution can achieve fair adjudication when properly implemented.[35] Both have desirable elements and built-in biases.[36] However, it should be noted that "the [adversarial] and inquisitorial systems are not alternatives for achieving the same theoretical objective: the [adversarial] system serves to resolve conflict, while the inquisitorial system serves to enforce state goals."[37] Accordingly, there has been a trend in the United States and elsewhere to develop a new system of dispute resolution, which combines the meritorious elements of each of the principal systems, thus resulting in a hybrid method of dispute resolution.[38]

Many of the elements of inquisitorial dispute resolution have already found their way into the American judical system.[39] This article will examine some of these concepts in the pretrial, trial, and posttrial phases of litigation, it will explore the role of nonadversarial dispute resolution as a part of the adjudication process, and finally, further refinements will be suggested in order to bring about a better judicial system.

II. INQUISITORIAL ELEMENTS IN AMERICAN ADJUDICATION

Many elements of the inquisitorial method of dispute resolution have already worked their way into the American judicial system. Moreover, the North Dakota rules of evidence and procedure, which are based on the corresponding federal rules, reveal many inquisitorial attributes in the pretrial, trial, and posttrial phases of litigation. Most American judges and litigators, though, are not familiar with these attributes. Therefore, a comprehensive examination of these rules and their application is necessary.

A. THE PRETRIAL PHASE

The Federal Rules of Civil Procedure have recently been changed to require mandatory disclosure of certain information.[40] Broadly stated, the new rules require parties to disclose, without request, information to opposing parties that under the old rules could have been withheld unless

35. Sward, *supra* note 1, at 316.
36. *Id.*
37. Strier, *supra* note 12, at 109.
38. *See Id.* at 162.
39. *See Id.*
40. *See* Colleen McMahon & Jordan G. Schwartz, *Proposed Revisions to the Federal Rules of Civil Procedure*, C780 ALI-ABA 815, 824 (June 3, 1993).

requested.[41] Discovery, especially mandatory discovery without request, is a nonadversarial element in adjudication.[42] Discovery allows the parties to learn facts that the opposing parties know, equalizing the knowledge possessed by the parties.[43] "In a sense, it is an admission that the assumption of equality behind adversarial theory is unfounded; to overcome the inequality, the parties must be required to share their factual information."[44]

Recently, judges have been playing a greater role in discovery and other pretrial aspects of litigation. Devices such as the pretrial conference[45] and the discovery conference enable judges to get involved in litigation before it proceeds to trial. Judges are able to establish and enforce schedules and timetables, rule on pretrial motions, and sanction parties before proceeding to trial.

For example, in *Gohner v. Zundel*,[46] the North Dakota Supreme Court held that under limited circumstances, a trial court judge can sanction a party for not appearing at a pretrial conference.[47] In *Gohner*, James Gohner sued Joseph Zundel for work which he had done on land that he had rented from Zundel.[48] Zundel denied the allegations and requested a jury trial.[49] Zundel also filed a counterclaim.[50] However, shortly before the scheduled pretrial conference, Zundel fired his attor-

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41. FED. R. CIV. P. 26. Under the new Rule 26, parties are required to disclose, without request: (1) the names, addresses, and phone numbers of individuals likely to have relevant, discoverable information; (2) copies or descriptions of all relevant documents or things in the disclosing party's possession or control; (3) a computation of damages claimed by the disclosing party and copies or materials upon which the computation is based; and (4) copies of insurance agreements under which an insurer might be liable for all or part of any judgment that might be entered. *Id.*

42. Sward, *supra* note 1, at 328.

43. *Id.* at 327.

44. Id. According to Sward,

> [D]iscovery is a non-adversarial element in adjudication. It works some changes in both party control and judicial passivity, but the scope of those changes is open to some debate. On the one hand, discovery was designed to operate independently of the judge to the extent possible. With rare exceptions, no judicial order is required to conduct discovery. The parties involve the judge only when they have a dispute over discovery. Thus, the traditional roles of the parties and the judge are preserved. On the other hand, the parties are required, under the threat of sanctions that could include loss of the case or contempt, to turn over facts in their possession to their opponent in the litigation. The party, then, loses some control over what he does with the information he has.

Id. at 328 (citations omitted).

45. According to the North Dakota Supreme Court,

> [T]he pretrial conference is generally accepted as an effective method to shorten and simplify litigation by eliminating uncontested issues and settling certain pretrial motions. In doubtful cases, the pretrial conference provides a vehicle for expedient, informal settlement. Its use is to be encouraged from the standpoint of saving time and expense to the litigants and valuable time and resources of the courts.

Fiebiger v. Fischer, 276 N.W.2d 241, 245 (N.D. 1979).

46. 411 N.W.2d 75 (N.D. 1987).

47. *Gohner v. Zundel*, 411 N.W.2d 75, 75 (N.D. 1987).

48. *Id.* at 76.

49. *Id.*

50. *Id.*

ney.[51] He did not appear at the pretrial conference.[52] Consequently, the trial court struck Zundel's counterclaim and request for a trial by jury.[53] Thereafter, Zundel sought a continuance and asked that his counterclaim and jury request be reinstated.[54] The trial court refused.[55]

On appeal, the supreme court applied an old version of Rule 16 of the North Dakota Rules of Civil Procedure and held that the sanction of dismissal could only be used against a plaintiff, "the party with the laboring oar," for not appearing at a pretrial conference.[56] Thus, the court treated Zundel as the plaintiff for purposes of his counterclaim, upheld the dismissal of the counterclaim, but reversed the dismissal of Zundel's request for a trial by jury.[57] The court thereby endorsed the power of a judge to make effective use of pretrial conferences but, at the same time, strictly limited that power to protect the litigants.[58]

B. THE TRIAL PHASE

> The general rule is that "[a] judge presiding on a trial is not a mere moderator, but has active duties to perform without partiality in seeing that the truth is developed, and it is his duty in the exercise of sound discretion to elicit the evidence upon relevant and material points involved in the case."[59]

Despite this empowering mandate by the North Dakota Supreme Court, trial judges, accustomed to the adversarial system, have been hesitant to comply. Moreover, due to general uncertainty as to the expanded limitations of this power and inexperience with aggressive judicial involvement, judges who have sought to become active participants in the trial process have found their actions subject to examination, and sometimes reversal, on appeal.

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51. *Id.*
52. *Gohner*, 411 N.W.2d at 76.
53. *Id.* at 77.
54. *Id.*
55. *Id.*
56. *Id.* at 79.
57. *Gohner*, 411 N.W.2d at 79.
58. *See, e.g., id.*
59. Pritchett v. Executive Director of the Social Serv. Bd., 325 N.W.2d 217, 222 (N.D. 1982) (quoting Messer v. Bruening, 156 N.W. 241, 242 (N.D. 1916)).

> It is the long-standing position [in North Dakota] that the trial judge has discretion as to how a trial shall be conducted and that he is more than a referee whose function it is to see that any contest is carried on in strict accordance with the rules, to the end that the decision may be awarded to the more skillful; rather, it is the duty of the trial judge to keep the examination of witnesses reasonably within bounds, so that the real issues may not be obscured but he must do so in a proper manner and without violation of any of the rules of evidence.

Bergquist-Walker Real Estate v. Clairmont, Inc., 353 N.W.2d 766, 769 (N.D. 1984).

The North Dakota Rules of Evidence grant trial courts broad discretion to control the presentation of evidence at trial:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.[60]

Particularly, Rule 614, which authorizes trial courts to call and interrogate witnesses, and Rule 706, which allows trial courts to appoint experts, enable judges to actively participate in the proceedings.

1. *Judicial Interrogation of Witnesses*

Rule 614 of the North Dakota Rules of Evidence, which is identical to the corresponding federal rule, grants to North Dakota trial courts the power to call and interrogate witnesses.[61] This rule causes a deviation from the court's traditional role in the adversarial system in which it was the parties and their representatives who were exclusively responsible for calling and interrogating witnesses.

However, this new grant of authority is justified only when applied according to certain precepts. On the one hand, the trial judge must be careful to vigilantly protect the parties' right to a fair trial. On the other hand, the court must be free to clarify testimony and ferret out elusive facts.[62] If judicial participation extends beyond these restraints, grounds for reversal may exist.

> "Factors that an appellate court may consider in evaluating the impact of the judge's questioning are whether the witnesses' testimony needed clarification, whether the witnesses were unusually hesitant and in need of assurance, whether the court used leading questions, whether the court interfered with cross-examination, whether the court's interruptions favored one side exclusively, whether the court instructed the jury to arrive at

60. N.D. R. Evid. 611(a).

61. Id. at 614. Rule 614 provides:

> (A) CALLING BY COURT. The court, on its own motion or at the suggestion of a party, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> (B) INTERROGATION BY COURT. The court may interrogate witnesses, whether called by itself or by a party.
>
> (C) OBJECTIONS. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Id.

62. State v. Yodsnukis, 281 N.W.2d 255, 260 (N.D. 1979).

> their own conclusions, whether the parties were being adequately represented, and whether an objection to the questioning was made."[63]

In *State v. Yodsnukis*,[64] the North Dakota Supreme Court applied the above factors and found that a trial judge's extensive interrogation of a witness in a criminal proceeding was unfairly prejudicial.[65] In *Yodsnukis*, a man wearing a stocking cap committed a robbery at a restaurant in Grand Forks, North Dakota.[66] An employee of the restaurant later identified Joseph Yodsnukis as the perpetrator.[67] During the ensuing trial, the judge asked the investigating officer, Ralph Downey, fourteen questions regarding the weather conditions and the motivation for the defendant to wear a stocking cap, suggesting that it may have been worn to disguise his long hair.[68] Yodsnukis objected to the line of questioning and asked for a new trial.[69] The trial judge denied Yodsnukis's motion.[70]

On appeal, the North Dakota Supreme Court held that Downey's testimony needed no clarification.[71] Specifically, the court determined that

> [a]lthough the judge interrogated witnesses for both sides, in large part favoring neither side, the leading questions posed to Officer Downey might well have led jurors to believe that the judge thought the robber wore a stocking cap to conceal his long hair. A jury might have properly drawn this inference from the testimony of various witnesses, but that inference should have been developed by the State, not the trial judge.[72]

Based on this determination, the court reversed the district court's denial of the defendant's motion and remanded the case for a new trial.[73]

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63. *Id.* at 261 (citation omitted).
64. 281 N.W.2d 255 (N.D. 1979).
65. *Id.*
66. *Id.* at 256.
67. *Id.* at 257.
68. *Id.* at 261-62. For example, the following dialogue took place when the trial judge asked the investigating officer questions:

> Q. I'm speaking or inquiring in terms of the robber wearing the stocking cap?
> A. Maybe someone wouldn't think about it but I would have a tendency to wonder about someone wearing a stocking cap in that type of a situation, but again the average man on the street probably wouldn't think anything of it.
> Q. To me wouldn't it indicate an attempt to disguise your hair for instance?
> A. I would think so.

Yodsnukis, 281 N.W.2d at 261.
69. *Id.* at 262.
70. *Id.* at 256.
71. *Id.* at 262.
72. *Id.* (citations omitted).
73. *Yodsnukis*, 281 N.W.2d at 262.

Notwithstanding its holding in *Yodsnukis*, in *Pritchett v. Executive Director of the Social Serv. Bd.*,[74] the North Dakota Supreme Court allowed extensive judicial participation in the elicitation of testimony for purposes of clarification.[75] In *Pritchett*, Meredyth Pritchett petitioned for the termination of her child's father's parental rights, claiming that he had never paid child support.[76] At the same time, Meredyth's current husband, Robert Pritchett, petitioned to adopt the child.[77] During the proceeding, the trial judge questioned the biological father regarding his financial ability to support himself and his daughter.[78] The father appealed, claiming that the questioning by the judge was improper.[79]

Upon review, the court affirmed the trial court and concluded that the examination was within the court's discretion.[80]

> In a criminal case the judge ordinarily asks questions to make testimony comprehensible to the jurors. In a civil case, and especially a termination-of-parental-rights case, we consider it proper and we encourage the trial judge to ask those questions necessary for his comprehension of the total situation.[81]

These cases demonstrate how far a trial judge can go in interrogating witnesses at trial. Generally, it appears a judge has complete authority to ask any questions which are necessary to elicit and clarify the facts. Beyond that, however, a judge has no legitimate role in the interrogation of witnesses under the North Dakota Rules of Evidence.[82]

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74. 325 N.W.2d 217 (N.D. 1982).

75. *Pritchitt v. Executive Director of the Social Serv. Bd.*, 325 N.W.2d 217, 222 (N.D. 1982).

76. *Id.* at 218.

77. *Id.*

78. *Id.* at 222. For example, the following dialogue took place, when the trial judge asked questions of the father:

> Q. You have earned $100 in three months. How else have you been living?
> A. My friend has been supporting me; things like that. I got a friend I owe two, three hundred for this.
> Q. This man you are living with feeds you and clothes you?
> A. We go and hunt whenever we can, like we did quite a bit of duck hunting and we do what we can. If it gets tight I shovel a sidewalk or whatever.

Id.

79. *Pritchitt*, 325 N.W.2d at 222.

80. *Id.* at 222-23.

81. *Id.*

82. *See, e.g.*, Miller v. Miller, 55 N.W.2d 218, 221 (1952) (discussing the trial judge's participation in the examination of witnesses).

According to the North Dakota Supreme Court,

> [A] trial judge has the right to propound such questions to witnesses as may be necessary to elicit pertinent facts, in order that the truth may be established, although some reviewing courts have declared that the practice of so doing except when absolutely necessary should be discouraged. "Accordingly, the trial court has power to recall a witness who has been examined, and propound questions to him. He may cross-examine a witness, or ask him leading questions. And he may elicit any relevant and material evidence, without regard to its effect, whether beneficial or prejudicial to one party or the other. Indeed, it has been declared to be the duty of the court to propound such

2. *Court-Appointed Expert Witnesses*

North Dakota courts have an inherent power to appoint expert witnesses.[83] Originally, though, because the judiciary was generally accustomed to party control over the presentation of evidence, this power was infrequently used and often misunderstood.

For example, in *Hultberg v. Hultberg*, the North Dakota Supreme Court held that a trial judge made improper use of court-appointed expert testimony.[84] In *Hultberg*, June Hultberg sought a divorce from her husband, Henning Hultberg, and asked that their jointly-held property be divided.[85] The trial court appointed an expert to appraise the value of the property, and, upon this report, divided the property between the parties.[86] The judge did not introduce the report into evidence or allow the parties to cross-examine the expert.[87] The defendant objected to the court's use of the report.

On appeal, the North Dakota Supreme Court held that although the trial judge had authority to commission the expert, the report should have been introduced into evidence and the expert should have been available for cross-examination.[88] Therefore, the issue of the division of property was remanded for a new hearing.[89]

Based on cases such as this, in 1977, North Dakota adopted Rule 706 of the Federal Rules of Evidence.[90] This rule sets forth a detailed

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questions to reluctant witnesses as will strip them of the subterfuges to which they resort to evade telling the truth. The extent to which such examination shall be conducted rests in the discretion of the judge, the exercise of which will not be controlled unless abused."

Id. at 221-22 (quoting 58 AM JUR. *Witnesses*, § 557 (1948)) (citation omitted). Moreover, it is not an abuse of authority for a trial judge to ask preliminary questions for the purpose of establishing the foundation necessary to admit evidence. State v. Olson, 244 N.W.2d 718, 722 (N.D. 1976).

83. Hultberg v. Hultberg, 259 N.W.2d 41, 45 (N.D. 1977) (discussing the district court's power to appoint a real estate expert to appraise the property in question).

84. *Hultberg*, 259 N.W.2d at 45.

85. *Id.* at 42.

86. *Id.* at 45.

87. *Id.*

88. *Id.*

89. *Hultbert*, 259 N.W.2d at 45. The Court stated that

> [t]he trial judge has wide discretion concerning the manner in which he uses an appointee's testimony, providing the parties' rights are not violated. We find that the district court erred by using the report of the court-appointed appraiser wherein the report was not introduced into evidence and the parties were not given an opportunity to cross-examine the appraiser.

Id.

90. Rule 706 of the North Dakota Rules of Evidence provides, in pertinent part:

> (A) APPOINTMENT. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may select expert witnesses of its own selection. An expert witness may not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any;

description of a trial court's ability to call and utilize expert witnesses.[91] Specifically, the rule provides that all court-appointed expert witnesses are subject to cross-examination by any party.[92]

As demonstrated by *Yodsnukis*, *Pritchett*, and *Hultberg*, judicial intervention is often necessary either to enhance the truth-seeking process or to protect the parties' right to effective representation.[93] "In these situations, the principles of the adversarial model are honored in the breach, that is, by permitting or even requiring judicial intervention to compensate for the failures of the [attorneys]."[94] Accordingly, trial judges should understand when to intervene in a judicial proceeding, and to what extent to participate thereby ensuring fair adjudication at the trial phase.

C. THE POSTTRIAL PHASE

In *Association for Retarded Citizens of North Dakota v. Sinner*,[95] a nonprofit corporation and individual mentally retarded persons, as a class, challenged the conditions of confinement and treatment in two state institutions.[96] The court determined that the institutions were violative of federal and state law, and issued a detailed implementation order which governed the states' actions over the next five and one-half years. This order was eventually extended to ten years.[97] The court retained jurisdiction to enforce the order.[98] Subsequently, many challenges to the state's compliance have been instigated, and the court has been forced to remain an active participant in the ongoing dispute.

With the increasing frequency of large-scale, public law litigation, trial courts, forced to implement complex decrees, have found themselves

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the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness is subject to cross-examination by each party, including a party calling the witness.

. . .

(c) DISCLOSURE OF APPOINTMENT. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
(d) PARTIES' EXPERTS OF OWN SELECTION. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

N.D. R. EVID. 706.

91. *Id.*

92. *Id.* at 706(a).

93. Marcus, *supra* note 9, at 1196.

94. *Id.* at 1196-97. The recent case of Dewitz by Nuestel v. Emery, 508 N.W. 2d 334 (N.D. 1993), also demonstrates the propriety of a trial judge admonishing attorneys if "they stray into improper areas and use improper questioning techniques." *Id.* at 336. However, if the admonishment might influence the jury, it should take place in chambers. *Id.* at 337.

95. 561 F. Supp. 473 (D.N.D. 1982).

96. Association of Retarded Citzens of North Dakota v. Sinner, 561 F. Supp. 473, 473 (D.N.D. 1982). "The position of unnamed class members presents the most obvious compromise of adversarial principles. Unnamed class members have no choice in the initiation of a suit that can affect them profoundly." Sward, *supra* note 1, at 333.

97. *See* Association of Retarded Citizens of North Dakota v. Sinner, 942 F.2d 1235, 1237 (8th Cir. 1991).

98. *Id.* at 1238.

supervising the litigants long after the original trial has concluded.[99] Judicial orders to combat the effects of racial prejudice in employment, promote school desegregation, and encourage humanitarian efforts to improve state-run institutions all demonstrate the need for extended judicial involvement in litigation. Such long-term involvement was not authorized under the traditional adversarial system. Instead, litigants were forced to initiate new proceedings every time that they wished the court to intervene. Now, because of the strong inquisitorial influence, American courts can maintain jurisdiction over a dispute for a prolonged period of time, thereby saving the litigants and society unnecessary delay and expense.

III. FURTHER REFINEMENTS AND RECOMMENDATIONS

The adversarial system and the inquisitorial systems were undoubtedly products of the social and economic conditions under which they developed. To the extent that we have adopted some features of the inquisitorial method within our adversarial system is a recognition that our current dispute resolution culture is evolving toward more active judicial management of the dispute at an early stage of the proceeding.

Judicial case management techniques, such as discovery conferences,[100] scheduling orders setting dates for completion of pretrial procedures,[101] and settlement conferences[102] are useful in the resolution of disputes before trial. These procedures produce settlements in many cases because various court orders require lawyers to meet and discuss various issues and prepare discovery plans, settlement proposals and pretrial statements. Settlements are much more likely to result when lawyers have pretrial deadlines to meet and are required to prepare the case in a climate of cooperation with opposing counsel. Early setting of a firm trial date provides the impetus to prepare thoroughly and settle the case before incurring additional expense for the client in the form of a trial. If pretrial management of the case is effective, both sides should be pre-

99. Sward, *supra* note 1, at 353. Sward noted:

> This analysis suggests some uncertainty over the proper approach to social change. On the one hand, it has traditionally been considered a legislative function to determine the direction society will take. The legislative process is investigative, inquisitorial. It requires active investigators, and the concept of a "party" is non-existent in the legislative process. On the other hand, the value of a debate, in which the strongest cases are made for and against the proposed change, is also unquestionable. . . . [I]n combination with the nonadversarial devices that help judges and parties evaluate factually complex issues and join all interested parties, it is not surprising that the adversary system has taken on the challenge of such socially transforming litigation.

Id. at 353-54 (footnotes omitted).

100. N.D. R. Civ. P. 26(f).

101. N.D. R. Civ. P. 16(a).

102. N.D. R. Civ. P. 16(b)(7).

pared to discuss settlement much earlier in the proceeding, thereby avoiding "courthouse step" settlements and needless trials. Although there is no statistical evidence available, it is certainly true that the more unprepared the parties are during the pretrial phase, the more likely it is that a trial will result. All too often, such trials are sorry spectacles of unprepared attorneys doing their discovery work during the trial itself.

It is, therefore, not surprising that judicial activism, or case management, is seen as a necessary reform to the adversary system; a survival technique for the judicial system as a whole. If the passive judge model epitomized by the adversary system were continued, with parties and lawyers controlling the proceeding, the judicial system would sink under the ever-increasing caseload. The legal cultural mileau requires that greater numbers of cases be settled at earlier times so that scarce judicial resources can be allotted more efficiently to the disputes that truly require a jury or court trial.

The introduction of court-sponsored mediation and other alternative dispute resolution (ADR) techniques create another revolutionary shift within the judiciary, in which judges play a much different role than played by the traditional adjudicator. Courts are now in a different mode and procedure than contemplated by either the adversary or the inquistorial systems.[103] The issue thus becomes whether courts are well suited for this role, and whether limitations should be placed on judicial ADR programs.[104] In North Dakota, the settlement judge concept is growing

103. Actually, court-sponsored ADR may be another facet of judicial activism or case management since the judge is actively participating in the settlement phase of the proceeding, rather than passively waiting for the parties to exhaust their own negotiation efforts.

104. It could be argued that judges should restrict their activity to judging, thus forcing the litigants themselves to settle the vast majority of cases without help from the courts. Furthermore, if ADR in the courts is not limited to Rule 16 settlement conferences, the demands on the court for other services, such as summary jury trials, minitrials, and arbitration, will overwhelm the resources available to carry out the primary function of adjudication under the adversary system.

in the state courts.[105] The federal courts, through the efforts of Magistrate Karen Klein, have been using the technique since 1985.[106]

The use of judges to settle disputes through nonadversarial means is an important and fundamental innovation. Carried to its logical conclusion, the judiciary may be divided into settlement judges and trial judges. Specialization is a powerful force in the world today, and the judiciary is no exception. Tax courts,[107] probate courts,[108] family courts,[109] and juvenile courts[110] are but a few examples of the ways that courts have specialized in substantive areas of the law.

The concept of settlement through nonadversarial means presents many questions. First, should judges be assigned to this task, or should ADR be conducted outside the judicial system by private practitioners?[111] Are judges in power roles particularly unsuited for settling disputes by "alternative" techniques?[112] Will the parties have a right of recourse to the adversarial process if they are dissatisfied with ADR?[113] What advantages are there to court-sponsored ADR that are not available through the private sector?[114] Is the cost to the parties of private ADR a significant

105. District Judge Lee A. Christofferson, Northeast Judicial District, in Devils Lake, North Dakota and North Dakota Supreme Court Justice William A. Neumann (formerly a district court judge in the Northeast District) developed a settlement conference procedure under Rule 16 of the North Dakota Civil Rules Procedure. Pursuant to the settlement conference, the trial judge does not participate in the conference, and the conference is not of record. The participants are encouraged to be open and to negotiate in good faith. The settlement judge acts as a facilitator in the process but does not serve an adjudicatory role, except as may be incidental to providing the parties with an evaluation of the strengths and weaknesses of each side. Judge Christofferson emphasizes that the process must be voluntary and that the parties and counsel must be committed in attempting to settle their case. He indicates that out of sixteen cases utilizing this conference, thirteen have settled. Interview with Judge Lee A. Christofferson, Northeast Judicial District (Feb. 10, 1994).

I have also used this settlement conference technique, both as a settlement judge for other trial judges in the Northeast Central Judicial District and as a trial judge requesting settlement conference services from participating judges in the district.

Other judges throughout the state are also working in an informal network to provide settlement conference services. One of the first priorities for the network is to arrange for training of interested judges in ADR techniques, primarily mediation and arbitration.

106. Honorable Karen K. Klein, Address to the North Dakota Judicial Institute, University of North Dakota Law School (May 19, 1993).

107. 26 U.S.C. §§ 7441, *et. seq.* (1988).

108. N.Y. SURR. CT. PROC. ACT, § 201 (McKinney 1967 & Supp. 1994).

109. R.I. GEN. LAWS ch. 8-10 (1985 & Supp. 1993).

110. N.D. CENT. CODE Ch. 27-20 (1991).

111. *See supra* note 104. Courts may be eager to provide ADR services in an effort to meet competition from the private sector. Private judging and other ADR services available through private profit making entities, such as EnDispute, Judicate, Judicial Arbitration & Mediation Services, Inc. (JAMS), are making significant inroads, especially in the area of commercial disputes. *Exploring the Issues In Private Judging*, 77 JUDICATURE 203 (Jan.-Feb. 1994).

112. ADR must be voluntary and any decisions must be made by the parties. Canon 3(B)(7)(d) of the NORTH DAKOTA CODE OF JUDICIAL CONDUCT states that: "[a] judge may with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." *Id.*

113. An ABA committee strongly suggest that such recourse is necessary. ABA Judicial Administration Comm. on Standards of Judicial Administration, Standards Relating to Court Organization 1.12.5(a) (1990).

114. One important advantage of court-sponsored ADR, at the present time, is its low cost to the parties. Since there is no separate charge for the mediating services of a settlement judge, the

reason for increasing the availability of court-sponsored ADR?[115] Will court-sponsored ADR result in a net overall saving of judicial resources?[116]

Each jurisdiction will have to answer each issue (and others) for itself. It would appear, however, that it is no longer a question of whether court-sponsored ADR in some form is desirable. Rather, the only question that remains is the place of ADR within the system and how court resources will be allocated to implement its use. The courts must closely examine legal process to determine if ADR should be only a part of the usual adjudicative process, or whether separate (or additional) processes should be identified. An example of such a separate process is mediation

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parties are not faced with a bill for such services. If the case does not settle, the trial judge simply tries the case (again without cost to the parties).

Private ADR can be expensive. The litigants must pay for the cost of such services, even when ADR is unsuccessful, unless there is some sort of contingent fee arrangement with the private ADR services. Query, if a contingent fee arrangement for private ADR is appropriate, might not the mediator press too hard for settlement when the fee is earned only if a settlement is reached? In what types of cases should a contingent fee arrangement be used and how should the fee be computed?

The private ADR industry typically charges $400 per hour. *See Exploring the Issues in Private Judging*, *supra* note 111, at 204. This will be no small cost if ADR fails to produce a settlement and litigation is required.

Another advantage of court-sponsored ADR is that of finality. A court-mediated or arbitrated dispute may be reduced to judgment with all enforcement and collection tools available through the court. In private ADR, there is no similar court process available unless and until action is brought on the agreement. The right of appeal is not available privately and the procedural processes in private ADR are not as developed as court process. *Id.* at 206. However, the rigid court rules and adversarial fact finding are precisely the reason many parties choose to avoid the courts.

115. By providing court-sponsored ADR at no cost (or at a nominal cost) to the parties, there is a risk that the courts will be flooded with demands for ADR services, and judges will be assuming a task that knows no end. Litigants may rely too much on the courts to settle their disputes out-of-court. It should be an obligation of every attorney to work for settlement of disputes *before* an action is filed. *See* EXEC. ORDER NO. 12,778, 3 C.F.R. 359 (1992) (*reprinted in* 28 U.S.C. § 519 sec. 1(a) (1992)). In Executive Order No. 12,778, former President George Bush directed all federal attorneys to emphasize ADR. Executive Order No. 12,778 provides:

> (a) *Pre-filing Notice of a Complaint.* No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.
>
> . . . .
>
> (c) *Alternative Methods of Resolving the Dispute in Litigation.* Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.
>
> (1) Whenever feasible, claims should be resolved through informal discussion, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding.

Id.

116. No data exists to reasonably answer this question. It is doubtful that judicial resources will be saved since the time necessary to conduct ADR will have been wasted if the parties would have settled the case themselves, without any help from the court. However, if attorneys and other nonjudicial personnel acted as third-party neutrals, judicial resources would be saved. Such savings are based on the assumption that the cost of obtaining third-party neutrals to assist the court would be partially offset by fees paid by litigants or by *pro bono* services.

with judicial arbitration, in which the judge uses mediation to resolve most issues and then arbitrates any remaining issues.[117]

The crucial task is defining the future role of courts in dispute resolution. It will take the combined effort of all judges, court managers, lawyers, and legislators to shape the new vision of dispute resolution in the twenty-first century. We should not limit ourselves to the traditions of the adversarial and inquisitorial systems. The advent of judicial case management and ADR present an opportunity to create a rich menu of procedural choices, thus allowing the parties and the court to customize dispute resolution procedures to fit each case.[118] Alternative dispute resolution must be finely sifted to place it within the redefined process of resolving disputes through the courts. There should no longer be any necessity for using the term "ADR" as it relates to the courts. It is essential that ADR be integrated into an adjucicatory process that includes nonadversarial components. This is true especially in actions based upon continuing relationships between the parties when adversarial fact finding is not worthwhile, and the interests of the parties can best be served by seeking solutions to problems rather than by assigning blame.

The first step in any future planning or visioning for the judiciary is to determine the present and anticipated needs of the people to be served by the system. In that regard, continuing change in our economic and social culture is inevitable, and planners must build flexibility into the dispute resolution system, including any ADR components.

The ultimate goal for North Dakota should be to provide a court system that is responsive to the needs of the people, not just to the needs of judges and lawyers. Some features of that court system include:

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117. Mediation with arbitration is the preferred process in at least two reported programs of court-sponsored ADR. Judge Mary Davidson, of the District Court in Hennepin County, Minnesota, has created a "divorce with dignity" process for divorcing couples, in which mediation, intensive case management, and arbitration are combined to eliminate the adversarial nature of divorce actions. *See* NORTH DAKOTA STATE BAR ASSOCIATION FAMILY LAW SECTION ANNUAL SEMINAR PROCEEDINGS Jan. 21, 1994, Bismarck, ND.

Another court using mediation with arbitration is the Clackamas County Family Court in Oregon City, Oregon. That court offers arbitration panels consisting of three members including a mental health professional. The panel is used in custody and visitation disputes. The present program is being examined to determine if it can be made binding on the parties. *Beyond Mediation: An Integrative Response to Resolving Custody Disputes*, NEWSLETTER (Ass'n of Family and Conciliation Courts), Fall 1993, at 2.

Judges operate from a power position in the system, and the use of mediation (or mediation with arbitration) would represent a loss of the hierarchal position in our vertical system of justice. Can the courts serve as an effective arbiter of societal conflict without relying to a large extent on the power prerogatives reserved to judges? It is ironic that court-sponsored ADR relies upon a more horizontal structure of power among equals (and therefore less power for the judiciary), while increased case management by the judiciary relies upon seizing control of litigation from the parties and their attorneys, thereby appropriating more power to the judiciary.

118. *See Exploring the Issues in Private Judging*, *supra* note 111, at 210.

1) Establishing a family court,[119] with specialized rules emphasizing nonadversarial procedures (including mediation with arbitration), which will be responsible for the disposition of cases that presently comprise over two-thirds of the total caseload in district court.[120]

2) Expanding small claims court jurisdiction[121] to allow for informal procedures, with mediation and arbitration components, in a greater variety of cases in terms of both dollar amount of the claims and the types of cases to be heard.

3) Revising the Rules of Civil Procedure to simplify and diversify procedures, thus making the courts more accessible to the people. The Federal Rules of Civil Procedure are useful for complex civil litigation found in the federal system, but too complex and unresponsive to the needs of the litigants in most state court litigation. The rules should be reviewed and revised to fulfill the promise of Rule 1 of the North Dakota Rules of Civil Procedure which provides for a "just, speedy, and inexpensive determination of every action."[122]

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119. *See* Bruce E. Bohlman, *A Family Court for North Dakota*, 67 N.D. L. REV. 353 (1991) (advocating the creation of a family court system to better protect the needs of the family). In addition to the features described in the article, the family court structure would ideally include all juvenile court jurisdiction so that one judge would be dealing with one family. Presently, a district judge may be presiding over a divorce between mother and father while the children may be in juvenile court before a referee. Neither the judge nor the referee may be aware of the other proceeding. The one family, one court approach is much more conducive to effective judicial intervention and management. *See* Sanford Katz and Jeffrey Kuhn, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RECOMMENDATIONS FOR A MODEL FAMILY COURT: A REPORT FROM THE NATIONAL FAMILY COURT SYMPOSIUM (May 1991).

120. Actually, in 1992, 60% of all actions in the district courts of North Dakota consisted of domestic relations cases and 10% consisted of juvenile cases. ANN. REP. NORTH DAKOTA CTS. at 7 (1992).

121. N.D. CENT. CODE ch. 27-08.1 (1991 & Supp. 1993). The small claims court should be of record, however, so that appeals may be directed to the North Dakota Supreme Court as in any other district court case.

122. N.D. R. CIV. P. 1. The rules should be variegated so that the parties and the court could design the most appropriate dispute resolution process for each case. The appropriate dispute resolution process will depend on the type of problem to be resolved and the relationship between the parties. The dispute resolution process can range from mediation to adversarial fact finding with the ability to design a total process that might include different techniques for different issues within the case. For example, in Order 93-13, the Wisconsin Supreme Court created section 802.12 of the Wisconsin Rules of Civil Procedure, in which ADR is extensively set forth as an integral part of the court system. Section 802.12 allows the court to use the following tools for the resolution of its disputes:

(a) Binding arbitration;
(b) Direct negotiation;
(c) Early neutral evaluation;
(d) Focus groups;
(e) Mediation;
(f) Mini-trials;
(g) Moderated settlement conferences;
(h) Nonbinding arbitration; and
(i) Summary jury trials.

4) Providing specific directions for differentiated judicial case management[123] and defining the role of the judge in nonadversarial discovery conferences, settlement conferences, mediation with arbitration, minitrials, and summary jury trials.

IV. CONCLUSION

The above suggestions are only a start. Law is a tradition-bound profession, as shown by the firm historical grip of the adversarial system on our dispute resolution process. But the public is not satisfied with the expensive and contentious present system. It will take some breathtaking daring and courage to redesign the entire justice delivery system.

The North Dakota Judicial Planning Committee has proposed a vision for the year 2020. The vision proposes that "[t]he Judiciary will provide universal access to fair, humane, affordable and cost efficient legal dispute resolution. Access will be quick with swift decision making by specialist judges with assistance of lay experts, mediation, arbitration and specialized resolution centers."[124]

In the end, the goal is not dispute resolution, alternative or otherwise, but delivery of justice. Such a goal is worthy of, and indeed demands, the most creative efforts we are capable of giving. Anything less will produce only a mirage in the wasteland, rather than the promised land of justice.

The rule becomes effective July 1, 1994, and will be monitored for effectiveness over a three year period. *See* 507 N.W.2d at LVII-LXI (Advance Sheet No. 4, Dec. 28, 1993) (reprinting rule 802.12).

123. Differentiated case management refers to the practice of using case management techniques and time schedules in different types of litigation. ABA JUD. ADMIN. DIVISION, 2 STANDARDS OF JUD. ADMIN. § 2.51 (1992).

124. Preliminary Report of the North Dakota Supreme Court Judiciary Planning Committee (Nov. 8-9, 1993 meeting).