FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DEC 1 1978

JOE R. ROMANE, Clerk
By _____ Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

IN RE AMENDMENTS TO THE CIVIL RULES FOR THE WESTERN DISTRICT OF WASHINGTON	ORDER

The Civil Rules for the Western District of Washington are amended by the adoption of a new rule, to read as follows:

CR 39.1

EMERGENCY PROCEDURES TO ALLEVIATE
CIVIL COURT CALENDAR CONGESTION

(a) TEMPORARY RULE

The Court finds that at the time this Rule is adopted a long-standing shortage of Judges in this District, together with sharply increased filings of criminal and civil cases and the imposition of Congressional requirements for the priority scheduling of criminal trials, have caused a chronic and serious backlog of civil cases to develop in the District. As a result, civil litigants have experienced and are experiencing severe delay and difficulty in obtaining adjudications of their rights and responsibilities. The objective of the Court and of the Federal Rules of Civil Procedure to secure the just, speedy, and inexpensive determination of every action cannot be achieved unless the civil case backlog is eliminated

or greatly reduced. An emergency therefore exists in the administration of civil justice in the District. This Rule is accordingly adopted for the purpose of alleviating congestion in the civil calendar while preserving to all parties their rights in full. The Rule is temporary. It shall be effective until December 31, 1979, unless sooner terminated by the Court. If the Court finds that the emergency still exists on that date, this Rule may be continued in effect thereafter by amendment hereto.

(b) REGISTER OF VOLUNTEER ATTORNEYS

(1) The Judges of the District shall establish and maintain a register of qualified attorneys who have volunteered to serve, without compensation, as Mediators, Special Masters and Arbitrators in civil cases in this Court in order to reduce its backlog of civil actions. The attorneys so registered shall be selected by the Judges of the District from lists of qualified attorneys at law, who are members of the bar of this Court, and who are recommended to the Judges by the Federal Bar Association of the Western District of Washington. The Federal Bar Association shall request the county bar associations within the geographical boundaries of the District to cooperate with the association in obtaining well-qualified volunteers for the register.

(2) Minimum Qualifications

In order to qualify for service as a Mediator, Special Master or Arbitrator under this Rule, an attorney shall have the following minimum qualifications:

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(a) Have been a member of the bar of a Federal district court for at least 7 years; and

(b) Be a member of the bar of the United States District Court for the Western District of Washington; and

(c) A substantial portion of his or her practice has been, or is, in Federal court.

(c) SETTLEMENT CONFERENCE

In every civil action designated by the Court as a "CR 39.1" case, the attorneys for all parties to the action, except nominal parties and stake-holders, shall meet at least once and engage in a good faith attempt to negotiate a settlement of the action. Such conference shall take place within two months after the parties are notified by the Clerk of the Court that the action has been designated as a CR 39.1 case.

(d) MEDIATION

(1) Selection of Mediator

If, after meeting, the parties are unable to agree upon a settlement, they shall attempt to agree upon the selection of a single Mediator for settlement purposes from the register of attorneys. If they agree upon a selection, they shall file notice of their selection with the Clerk of the Court and shall send a copy of that notice to the selected attorney, who will thereupon be the Mediator for that action unless he or she is unwilling or unable to so act. If the parties cannot agree upon the selection of a Mediator, the attorney for the plaintiff shall promptly apply to the Court for the designation of a

Mediator. The Court shall thereupon promptly designate a Mediator from the register and shall send notice of that designation to the Mediator and to all attorneys of record in the action.

(2) Mediation Procedure

A. Copy of Pretrial Order or Pleadings

Upon selection of a Mediator the parties shall provide the Mediator with a copy of the Pretrial Order, if one has been lodged in the cause. If a Pretrial Order has not been lodged, they shall provide the Mediator with copies of their then effective pleadings.

B. Time and Place

The Mediator shall fix a time and place for the mediation conference, and all adjourned sessions, that is reasonably convenient for the parties and shall give them at least 14 days' written notice of the initial conference.

C. Memoranda

Each party shall provide the Mediator with a memorandum presenting in concise form his contentions relative to both liability and damages. This memorandum shall not exceed 10 pages in length. Copies of this memorandum shall be served upon all other parties at least 7 days before the mediation conference.

D. Attendance and Preparation Required

The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any adjourned sessions of that conference. The attorney for

each party shall come prepared to discuss the following matters in detail and in good faith.

1. All liability issues.

2. All damage issues.

3. The position of his client relative to settlement.

E. Parties to be Available

The clients shall, in all cases, be available. The Mediator shall decide if they are to be present in the conference room. Parties whose defense is provided by a liability insurance company need not personally attend said mediation conference, but a representative of the insurer of said parties, if such a representative is available in this district, shall attend and shall be empowered to bind the insurer to a settlement if a settlement can be reached within the limits set by that insurer. The Mediator may in his discretion excuse a client from attending a mediation conference.

F. Failure to Attend

Willful failure to attend the mediation conference shall be reported to the Court by the Mediator and may result in the imposition of such sanctions as the Court may find appropriate.

(3) Proceedings Privileged

All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported,

recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.

(4) Notice to Clients of Mediator's Suggestions

If the Mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, the attorney for that party shall promptly transmit that suggestion to his client.

The Mediator shall have no obligation to make any written comments or recommendations but may in his discretion provide the attorneys for the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Clerk or made available in whole or in part, directly or indirectly, either to the Court or to the jury.

The attorneys for the parties shall forward copies of any such memorandum to their clients and shall advise them of the fact that the Mediator is a qualified attorney who has volunteered to act as an impartial mediator without compensation in an attempt to help the parties reach agreement and avoid the

time, expense and uncertainty of trial.

(5) Consideration of Special Master or Arbitration

If the Mediator is unable to mediate a settlement, he shall explore with counsel the desirability of the appointment of a Special Master or an Arbitrator under this Rule and whether such an appointment might lead to the resolution of all or any of the matters in controversy. With the consent of counsel the Mediator shall convey in writing to the Judge to whom the matter has been assigned, the conclusions of counsel and of the Mediator relative to the possible narrowing of issues and relative to the appointment of a Special Master or an Arbitrator.

(6) Notice of Compliance

If no settlement results from the private negotiations or from the mediation, the plaintiff shall promptly file with the Clerk a certificate showing that there has been compliance with the settlement and mediation requirements of this Rule but that no settlement has been reached.

(e) PROCEDURE UPON FAILURE OF MEDIATION

After the filing of the certificate specified in (d)(6) of this Rule, the Court shall as promptly as possible convene a conference of counsel in order to consider the appointment of a Special Master or of an Arbitrator pursuant to the following sections of this Rule.

(f) SPECIAL MASTER

(1) Appointment of Special Master

If all of the parties to an action

stipulate in writing to the reference of the action to a Special Master and agree upon a particular attorney from the register as Special Master, and if the Special Master and the Court consent to the assignment, an order of reference shall be entered. If the parties cannot agree upon the selection of a Special Master but stipulate in writing that there be a reference to a Special Master, the Court shall promptly designate a Special Master from the register and shall send notice of that designation to the Special Master and to all attorneys of record in the action.

(2) Powers and Duties

The powers and duties of the Special Master and the effect of his report shall be as set forth in Rule 53 of the Federal Rules of Civil Procedure, except as the same may be modified or limited by agreement of the parties and incorporated in the order of reference.

(3) Time and Place

The Special Master shall fix a time and place for hearing, and all adjourned hearings, which is reasonably convenient for the parties and shall give them at least 14 days' written notice of the initial hearing.

(4) Discovery

If discovery has not been completed, it may continue during the pendency of the matter before the Special Master, unless the Special

Master concludes that the matters before him require no further discovery and discovery would impede the exercise of his powers and duties, in which event he may order a stay of discovery.

(5) Other Special Master Appointments

This Rule shall not limit the authority of the Court to appoint compensated Special Masters to supervise discovery or for other purposes, under the provisions of Rule 53 of the Federal Rules of Civil Procedure.

(g) ARBITRATION

(1) Agreement for Arbitration

If all parties agree to submit the action to arbitration under this Rule, they shall reduce their agreement to writing and file the same with the Court. This Agreement to Arbitrate shall state whether or not the arbitration award is to be final and conclusive with trial de novo waived, or whether a party dissatisfied with the award may obtain a trial de novo upon timely application to the Court.

(2) Appointment of Arbitrator and Order Directing Arbitration

The parties may agree on the appointment of a particular attorney from the register as Arbitrator, and if that attorney and the Court consent to the assignment, an order directing arbitration and appointing that Arbitrator shall be entered. The parties may stipulate to arbitration under this Rule without agreeing upon an Arbitrator, in which event

the Court shall designate an Arbitrator from the register and shall send notice of that designation to the parties, together with its order directing arbitration. The order to arbitrate shall incorporate the terms set forth in the Agreement to Arbitrate.

(3) Oath or Affirmation

The Arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453.

(4) Pleading and Discovery

The arbitration shall be conducted on the basis of the order to arbitrate, the pleadings before the Court (or the Pretrial Order if theretofore filed) and the pretrial discovery had before the Court. Further proceedings before the Court shall be stayed during the pendency of the arbitration; provided, however, that the Arbitrator may authorize additional discovery and may order hearing briefs and memoranda filed with him.

(5) Time and Place of Hearing

The Arbitrator shall designate a place and time for hearing the case on its merits as early as possible consistent with the parties' needs to complete their preparation for the hearing.

(6) Conduct of Hearing

All testimony shall be given under oath or affirmation administered by the Arbitrator. In receiving evidence, the Arbitrator shall apply the Federal Rules of Evidence. Attendance of witnesses and production of documents may

be compelled in accordance with Rule 45, Federal Rules of Civil Procedure. The Arbitrator may make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing and pre-hearing proceedings. Failure, without good cause, to comply with the Arbitrator's rules and orders shall be reported to the Court for its imposition of sanctions as provided in Rule 37 of the Federal Rules of Civil Procedure and Local Rule GR 2 of this Court.

(7) Transcript or Recording

A party may cause a transcript or recording to be made of the proceedings at his expense but shall, at the request of the opposing party, make a copy available to any other party upon the payment by that party of the cost of this copy. In the absence of agreement of the parties, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial except for purposes of impeachment.

(8) Ex Parte Communication

There shall be no ex parte communication between the Arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

(9) Filing of Award

The Arbitrator shall file his award with the Clerk's Office with reasonable promptness following the closing of the hearing. The

Clerk shall transmit copies of the award to all parties.

(10) Form of Award

The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief, if any, which is awarded. Unless otherwise required by the Agreement to Arbitrate, the award need not disclose the facts or reasons in support of the award. The award shall be in writing and signed by the Arbitrator.

(11) Vacation, Modification or Correction of Award

A. Within 30 days of the filing of the award, any party may move the Court to vacate and set aside the award on one or more of the grounds set forth in 9 U.S.C. § 10, or may move to modify or correct the award on one or more of the grounds set forth in 9 U.S.C. § 11. Thereafter, the Court shall hear and determine the issues raised therein, and enter order in conformity therewith.

B. After said 30-day period, and any extended time required for hearing and determining the issues presented by motion filed under (11) A. above, the Court may direct the entry of judgment on the award in accordance with Rule 58, Federal Rules of Civil Procedure. The judgment shall thereupon have the same force and effect as that of any other judgment of the Court in a civil action.

(12) Trial De Novo

A. Time for Demand

Notwithstanding any other provisions of this Rule, if the parties in the Agreement to Arbitrate did not agree to waive trial de novo, either party may, within 30 days of the filing of the award, serve and file a written demand for trial de novo and thereafter the action shall proceed as a trial de novo before the Judge to whom the case has been assigned.

B. Limitation of Evidence

At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence except that statements made by a witness at the arbitration hearing may be used for impeachment only.

C. Costs and Attorney's Fees

If trial de novo is not had, costs and attorney's fees will not be assessed against any party unless authorized by contract or specific statute and itemized and included in the arbitration award. If trial de novo is had, costs and attorney's fees may be assessed as in any other proceeding before the Court; provided, however, that if the party who requested the trial de novo fails to obtain a judgment which is more favorable to that party than was the arbitration award, a reasonable attorney's fee may be assessed against that party by the Court.

(13) Other Agreements for Arbitration

Notwithstanding the provisions of this Rule, the parties to any action or proceeding may stipulate to its referral to arbitration upon such terms as they may agree to, subject to approval of the Court. In the event of such referral, the applicable provisions of state and federal law governing voluntary arbitration shall control.

(h) CRITERIA FOR DESIGNATIONS

In designating a Mediator, a Special Master or an Arbitrator, the Judge shall take into consideration the nature of the action and the nature of the practice of the attorneys on the register. When feasible, the Judge shall designate an attorney who has had substantial experience in the type of action in which he is to act as Mediator, Special Master or Arbitrator.

(i) EFFECTIVE DATE OF RULE

This rule shall become effective on January 1 1979.

DATED: December 12, 1978

Walter T. McGovern
Chief Judge
United States District Court

Morell E. Sharp, Judge
United States District Court

Donald S. Voorhees, Judge
United States District Court

Jack E. Tanner, Judge
United States District Court