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CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

INTRODUCTION

In accordance with the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-82 ("CJRA"), this court appointed an advisory group to conduct a study, make findings, and present recommendations for the reduction of cost and delay in civil litigation in the Western District of Washington. The advisory group includes a broad cross-section of lawyers in private and public practice, two district judges, one magistrate judge, and the clerk of the court. Over a period of more than a year and a half the group made a thorough study, gathered data and opinions, and prepared its recommendations. The advisory group's report was delivered in January 1993.

The court now approves the advisory group's report in its entirety. A copy of the report is attached.

The plan now adopted will improve litigation management; promote the just, speedy, and inexpensive resolutions of civil disputes; and meet all objectives of the CJRA. It does not attempt to codify all case management techniques used in the district, but supplements the local rules, which were extensively revised in 1992 to accomplish the same purposes.

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PLAN

The court adopts, effective August 1, 1993, the following twelve-point plan which reflects the substance of the advisory group's recommendations.

1.

The judges will make more active use of the tools presently available for managing discovery on an individualized, case-by-case basis.

The advisory group and the court considered establishing special procedures and timetables for "tracks" of cases. However, after assessing the results of the advisory group's information-gathering efforts, which included a detailed docket audit, comprehensive attorney surveys, and numerous in-depth interviews, the court determined that a formal designation of case management tracks is unnecessary. Appropriate management can be provided based upon the specific needs of each case. Adequate provisions for management conferences and plans already exist in the local rules.

2.

The judges will use more frequently their authority under Local Rule CR 16(n)(2) to permit the preparation of an abbreviated pretrial order, or to waive its preparation altogether.

This promotes the individualized management of cases in the early pretrial and planning phases, including dispensing with procedures that increase, rather than reduce, the cost of litigation.

3.

In complex cases, and in others where a limited issue (e.g., the statute of limitations) may be dispositive, the court will consider resolving one or more issues first and phasing the discovery and motions accordingly.

The court believes that flexible management, based upon the needs of each case, is more helpful than rigid controls on discovery or predetermined motions deadlines.

4.

The court will assure that all motions are promptly decided. In some instances the time period for briefing called for by the local rules may be shortened by the judge. The court will monitor the effectiveness of the recently-adopted local rule stating that "[a]ll motions will be decided as soon as practicable and normally within thirty days following the noting date."

An analysis of how timely the judges have been in ruling on motions was made as part of the docket audit, and will continue to be part of the annual assessment of the condition of the docket.

5.

The court will encourage the use of Local rule CR 7(f) for telephone resolution of motions where appropriate.

Local Rule CR 7(f) states: "Upon the request of any party, and with the court's approval, a motion may be heard by telephone without the filing of motion papers." Increased use of this provision can reduce the costs of litigation.

6.

The judges are committed to achieving efficient and cost-effective discovery in every civil case, and expect counsel, as officers of the court, to work on a cooperative basis to accomplish this objective. To this end, the court requests the Federal Bar Association of the Western District of Washington to address the problem of incivility and other litigation behavior of counsel that tends to increase costs, and to suggest potential solutions.

The existing Federal Rules of Civil Procedure and the local rules of this district provide ample means of controlling discovery expense. Any set of rules will only work well, however, if counsel conduct themselves civilly and professionally. Suggestions from the Federal Bar Association on how to promote civility and appropriate litigation behavior among attorneys will be carefully considered.

7.

The court will continue to limit the time period for discovery in all cases. In some cases, the judge may limit discovery to particular measures approved by the court, or to that discovery necessary to prepare a case for early mediation. The trial judge will be alert to the potential need for court-ordered discovery limits even in cases in which no counsel has complained.

The discovery cutoff date is the most basic tool, and is essential, but often is not enough to assure that discovery costs are held to reasonable limits. Especially in complex cases, or cases which for some other reason involve major pretrial discovery, the judges will take further steps to assure reasonableness and control costs.

8.

The practice of advising counsel at the start of each civil case that all discovery matters are to be resolved by agreement if possible, and that they can obtain a prompt ruling on a discovery dispute through a telephone conference call to the judge, is beneficial and will be continued. In addition, the court will issue an order governing the conduct of depositions and discovery in every civil case.

The local rules require that discovery motions be accompanied by certification by the moving party that a good-faith effort was made to reach agreement with opposing counsel. Experience has shown that if agreement is not reached, time and expense are often saved by submitting the question to the judge in a telephone conference call. The issuance at the start of each case of an order governing the conduct of counsel and witnesses at depositions, and in other discovery procedures, has also proved beneficial.

9.

The court will expand the local rules to provide for the option of summary court trials before a district judge or magistrate judge.

The local rules provide a range of alternative dispute resolution alternatives, including mediation, voluntary arbitration, settlement judges, and summary jury trials. The advisory group considered whether summary court trials and early neutral evaluation should be added to these options. The court agrees with the advisory group's conclusion that summary court trials should be added through a local rule change, and that early neutral evaluation need not be adopted at this time in view of the other procedures available.

10.

The responsibilities of the recently-appointed ADR coordinator will include monitoring cases to assure that ADR procedures have been followed, and evaluating the success of those procedures.

CJRA funding has enabled the court to designate a deputy clerk as ADR coordinator, and to use a computer employee to assist in automated case management efforts. The district's ability to continue these efforts depends upon our retaining these positions. The court requests that its two temporary CJRA positions be made permanent.

11.

The court will strengthen its practice of assigning and preserving firm and early trial dates. To this end, the district judges will continue to try cases for each other when necessary, and reasonable steps will be taken to encourage a higher number of consents to trials by magistrate judges.

The docket audit conducted during the summer of 1992 did not show any significant problem with trial delays and continuances, nor any evidence to justify a new requirement that any request for an extension, continuance, or postponement be signed by a party as well as counsel. Therefore, no additional requirements in this area are proposed.

12.

The court will consider, following publication for comment, the adoption of a local rule that would generally permit the court to award attorney fees and litigation costs to a party who has reasonably incurred them after having made

a written offer of judgment that was rejected, where the final judgment is more favorable to the offering party than the rejected offer would have been. (See Appendix A for further explanation and the text of a proposed local rule).

CONCLUSION

This plan is adopted to achieve the goals of the Civil Justice Reform Act of 1990, which are also the goals of the court. The administration of justice is a dynamic, demanding and every-changing process. The steps provided for herein will need to be tested by experience, and evaluated and improved, as time goes on. The court will continue to consult with the advisory group, and with others, in its ongoing effort to provide full, speedy, and affordable justice in all civil cases.

So ordered this 14th day of July, 1993.

Barbara J. Rothstein

Barbara J. Rothstein, Chief U.S. District Judge
Western District of Washington

cc: District and Magistrate Judges, Western District of Washington
Members of the CJRA Advisory Group
Director, Administrative Office of the U.S. Courts
Chief Judges of the Ninth Circuit
U.S. Attorney, Western District of Washington
U.S. Public Defender, Western District of Washington
Members of the Court's ADR and Local Rules Committees
Presidents of the Federal, Washington State, and County Bar Associations
Western District of Washington Lawyer Delegates to the Ninth Circuit Judicial Conference

APPENDIX A

The proposal for a local rule that would permit partial fee-shifting on the basis of rejected offers of judgment is justified by the advisory group's finding that while delay is not a serious problem in this district, cost is, and from its recognition of the need to "take the economic incentive out of consideration as to whether to litigate endlessly or not." Report at ii-vii, 19. As noted in the report, "[a] provision of this nature will promote economy by encouraging settlements and will serve justice by shifting fees in appropriate cases." Id. at 19.

The advisory group has raised the question whether the court has the power to adopt such a rule. While the question has not been adjudicated under the Civil Justice Reform Act, the statute may be interpreted to permit such an element to be included in the plan, bearing in mind that each district's plan is subject to review by a committee composed of the chief judge of the circuit and the chief judges of all district courts in the circuit, and by the Judicial Conference of the United States. 28 U.S.C. § 474.

The Civil Justice Reform Act grants the district courts wide discretion in designing and implementing their civil justice expense and delay reduction plans. The statute contains a list of principles and guidelines that the advisory groups may consider and include. 28 U.S.C. § 473. It empowers each district court to adopt "such other features as the district court con-

siders appropriate after considering the recommendations of the advisory group . . . ." 28 U.S.C. § 473(b)(6).

On the basis of this statutory authority, many of the pilot and early implementation courts have provided for mandatory pretrial disclosure of certain information without regard to discovery requests. See Civil Justice Reform Act Report, June 1, 1992, at 12. Such local rules go substantially beyond what is required or permitted by the existing Federal Rules of Civil Procedure governing discovery.

On the same statutory basis, the Eastern District of Texas has adopted a rule providing that "[i]f the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10%, then the party who rejected the offer must pay the litigation costs [including reasonable attorney fees] incurred after the offer was rejected." See Civil Justice Expense and Delay Reduction Plan, E.D. Tex., effective December 31, 1991, at 12.

This court's proposed rule is based upon a draft amendment to Rule 68 suggested by the Hon. William W Schwarzer, director of the Federal Judicial Center. See his article in Judicature, Oct. - Nov. 1992, at 147-53. The text, attached, will be published for comment before the court considers adopting it as a local rule.

WESTERN DISTRICT OF WASHINGTON

PROPOSED NEW LOCAL RULE CR 68

(a) At any time, any party may serve upon an adverse party a written offer to allow judgment to be entered for the money or property or to the effect specified in the offer, with costs then accrued. If within 21 days after service of the offer, or such additional time as the court may allow, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk, or the court if so required, shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs and reasonable attorney fees. If the judgment finally obtained is not more favorable to the offeree than the offer, the offeree must pay the costs and reasonable attorney fees incurred after the expiration of the time for accepting the offer, but only to the extent necessary to make the offeror whole for costs and reasonable attorney fees incurred as a consequence of the rejection of the offer, and in no case shall an award of costs and attorney fees exceed the amount of the judgment obtained. A court may reduce an award of costs and attorney fees to avoid the imposition of undue hardship on a party. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment,

but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial, except that a court may shorten the period of time an offeree may have to accept an offer, but in no case to less than 10 days.

(b) An offeror shall not be deprived of the benefits of an offer by a subsequent offer, unless and until the offeror fails to accept an offer more favorable than the judgment obtained.

(c) If the judgment obtained includes non-monetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer included all such non-monetary relief.

(d) This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2, or to claims brought under statutes with fee-shifting mechanisms.