

DEC 13 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

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

12 (b) REGISTER OF VOLUNTEER ATTORNEYS

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

29 (2) Minimum qualifications

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

- 1 (a) Have been a member of the bar of a
2 Federal district court for at least
3 7 years; and
4 (b) Be a member of the bar of the United
5 States District Court for the Western
6 District of Washington; and
7 (c) A substantial portion of his or her
8 practice has been, or is, in Federal
9 court.

10 (c) SETTLEMENT CONFERENCE

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

20 (d) MEDIATION

21 (1) Selection of Mediator

22 If, after meeting, the parties are unable
23 to agree upon a settlement, they shall attempt
24 to agree upon the selection of a single
25 Mediator for settlement purposes from the
26 register of attorneys. If they agree upon a
27 selection, they shall file notice of their
28 selection with the Clerk of the Court and shall
29 send a copy of that notice to the selected
30 attorney, who will thereupon be the Mediator
31 for that action unless he or she is unwilling
32 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

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

6 (2) Mediation Procedure

7 A. Copy of Pretrial Order or Pleadings

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

14 B. Time and Place

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

20 C. Memoranda

21 Each party shall provide the Mediator with
22 a memorandum presenting in concise form his
23 contentions relative to both liability and
24 damages. This memorandum shall not exceed 10
25 pages in length. Copies of this memorandum
26 shall be served upon all other parties at least
27 7 days before the mediation conference.

28 D. Attendance and Preparation Required

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

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

- 3 1. All liability issues.
4 2. All damage issues.
5 3. The position of his client relative
6 to settlement.

7 **B. Parties to be Available**

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

22 **F. Failure to Attend**

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

28 **(3) Proceedings Privileged**

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

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

10 (4) Notice to Clients of Mediator's Suggestions

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

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

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

1 time, expense and uncertainty of trial.

2 (5) Consideration of Special Master or Arbitration

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

16 (6) Notice of Compliance

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

24 (e) PROCEDURE UPON FAILURE OF MEDIATION

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

31 (f) SPECIAL MASTER

32 (1) Appointment of Special Master

If all of the parties to an action

1 stipulate in writing to the reference of
2 the action to a Special Master and agree
3 upon a particular attorney from the register
4 as Special Master, and if the Special Master
5 and the Court consent to the assignment, an
6 order of reference shall be entered. If
7 the parties cannot agree upon the selection
8 of a Special Master but stipulate in writing
9 that there be a reference to a Special Master,
10 the Court shall promptly designate a Special
11 Master from the register and shall send notice
12 of that designation to the Special Master and
13 to all attorneys of record in the action.

14 (2) Powers and Duties

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

22 (3) Time and Place

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

28 (4) Discovery

29 If discovery has not been completed, it
30 may continue during the pendency of the matter
31 before the Special Master, unless the Special
32

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

6 (5) Other Special Master Appointments

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

12 (g) ARBITRATION

13 (1) Agreement for Arbitration

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

23 (2) Appointment of Arbitrator and Order Directing
24 Arbitration

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

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

7 (3) Oath or Affirmation

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

10 (4) Pleading and Discovery

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

21 (5) Time and Place of Hearing

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

27 (6) Conduct of Hearing

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

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

13 (7) Transcript or Recording

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

24 (8) Ex Parte Communication

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

29 (9) Filing of Award

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

1 Clerk shall transmit copies of the award
2 to all parties.

3 (10) Form of Award

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

14 (11) Vacation, Modification or Correction of Award

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

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

1 (12) Trial De Novo

2 A. Time for Demand

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

11 B. Limitation of Evidence

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

18 C. Costs and Attorney's Fees

19 If trial de novo is not had, costs and
20 attorney's fees will not be assessed against
21 any party unless authorized by contract or
22 specific statute and itemized and included in
23 the arbitration award. If trial de novo is
24 had, costs and attorney's fees may be assessed
25 as in any other proceeding before the Court;
26 provided, however, that if the party who
27 requested the trial de novo fails to obtain
28 a judgment which is more favorable to that
29 party than was the arbitration award, a
30 reasonable attorney's fee may be assessed
31 against that party by the Court.
32

1 (13) Other Agreements for Arbitration

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


10 (b) CRITERIA FOR DESIGNATIONS

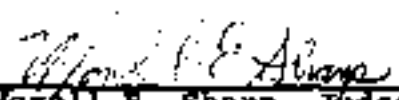
11 In designating a Mediator, a Special Master
12 or an Arbitrator, the Judge shall take into
13 consideration the nature of the action and the
14 nature of the practice of the attorneys on the
15 register. When feasible, the Judge shall designate
16 an attorney who has had substantial experience
17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

19 (i) EFFECTIVE DATE OF RULE

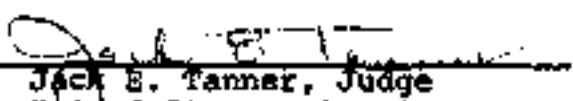
20 This rule shall become effective on January 1
21 1979.

22 DATED: December 12, 1978

23
24 
25 Walter T. McGovern
26 Chief Judge
27 United States District Court


28 Morrell E. Sharp, Judge
29 United States District Court

30
31 
32 Donald S. Voorhees, Judge
United States District Court


Jack E. Tanner, Judge
United States District Court