PART II

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Introduction

The Civil Justice Reform Act of 1990[7] requires that "there shall be implemented by each United States District Court in accordance with this title a Civil Justice Expense and Delay Reduction Plan . . . "[8] The Act goes on to provide an option for each district to either develop its own plan or to await a model plan to be developed at a later time by the Judicial Conference of the United States. Because the District Court of the Virgin Islands is an Early Implementation District, and it is the sense of the Advisory Group that a plan which is cognizant of the particular needs of the Virgin Islands is most desirable, the Advisory Group has determined to develop its own Expense and Delay Reduction Plan. This plan has been developed in response to the analysis of the needs of the District Court of the Virgin Islands as articulated in the report of the Advisory Group dated December 23, 1991.[9]

Principles and Guidelines of Litigation Management and Costs and Delay Reduction

The Act requires that each district court, in consultation with its Advisory Group, "shall consider and may include six principles and guidelines of litigation management and costs and delay reduction".[10] The Advisory Group has considered and discussed each of the principles. The Plan will discuss here in a summary fashion the Advisory Group's conclusion with respect to each of those principles and guidelines.

(1) Systematic Differential Treatment of Civil Cases.

The Advisory Group agrees with the concept underlying this principle, however, it is currently the practice of the magistrate judges and the district judges to tailor orders in conformity with the levels of complexity of civil cases. Thus it is believed that the spirit and import of this recommendation are presently in place.

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[7]28 U.S.C. § 471.

[8]Ibid.

[9]The findings and recommendations which are the basis for the Expense and Delay Reduction Plan commence on page 10 of the Report.

[10]28 U.S.C. § 473(a).

(2) Early and Ongoing Control of the Pre-trial Process Through Involvement of a Judicial Officer.

The Judicial Officers in the Virgin Islands issue necessary orders and convene the parties at an early time and continue to monitor the progress of cases. Trial dates are set and discovery is frequently adjusted to the exigencies of particular cases.

As reflected in the Advisory Group's report, it was concluded that the extent of discovery could be controlled beyond its present levels. As a result the action section of this plan will address with more specificity the limits of discovery practices through the enactment of a new local rule.

(3) Discovery Case Management Conference in Complex and Other Appropriate Cases.

The judicial officers in the Virgin Islands already conduct discovery case management conferences in complex and other appropriate cases.

(4) Cost Effective Discovery Through Voluntary Exchanges.

The opportunity to address discovery in a cost effective manner through the voluntary exchange of information is viewed with favor by the Advisory Group and will be addressed in the action section of this plan by the promulgations of a new local rule.

(5) Conservation of Judicial Resources in the Consideration of Discovery Motions.

The existing rules and practices of the District Court of the Virgin Islands now require parties submitting discovery motions to certify that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matter set forth in the motion.

(6) Authorization to Refer Appropriate Cases to Alternative Dispute and Resolution Programs.

The Advisory Group, for reasons articulated in its report, views with favor the opportunity to refer appropriate cases to an alternative dispute resolution program (ADR). The action section of this plan recommends a local rule in the nature of court annexed mediation.

Litigation Management and Cost and Delay Reduction Techniques

The Act also enumerates a number of cost and delay reduction techniques that each district "...shall consider and may include..."[11] in the formulation of its civil justice expense and delay reduction plan. The Advisory Group has considered and discussed each of the litigation management and cost and delay reduction techniques. The Plan will discuss here in a summary fashion the Advisory Group's

[11]28 U.S.C. § 473(b)(1) - (6).

conclusions with respect to each of those cost and delay reduction techniques.

(1) The requirement for each party to jointly present a discovery-case management plan.

It is the considered judgment of the Advisory Group that such a requirement would increase rather than reduce costs if applied to cases across-the-board. Indeed, it would very likely increase the costs for litigants with simple cases. In complex cases, the judicial officers in the Virgin Islands already employ the practice of bringing the parties together for a joint approach to discovery. Also, the court welcomes the joint voluntary submission of discovery-case management plans by the parties.

(2) Binding authority of attorneys in pre-trial conferences.

It is presently the practice in the Virgin Islands for attorneys to be present at pre-trial conferences with the authority to bind their clients respecting all matters previously identified by the court for discussion.

(3) Party signature to requests for extension of discovery deadline or trial date.

The Advisory Group has considered the proposal and recommends strongly against it. We believe that an attorney's signature alone is sufficient to request an extension or continuance, and any rule to the contrary may suggest distrust of the attorney-client relationship. In conclusion, we find no basis for such a suggestion nor do we find that cost and delay issues will be advanced by the promulgation of such a rule.

(4) Neutral evaluation programs.

The principal difference between our proposed mediation program and an early neutral evaluation program is that the latter calls for an evaluator with expertise in the particular area of litigation. This expertise is necessary because the program calls for an impartial assessment by a knowledgeable neutral. Although we think this is an attractive ADR option, we believe the limitations of the geography and the population size of the Virgin Islands preclude its effective use in this district court.

(5) Representatives with authority to settle.

It is presently the practice in the District Court of the Virgin Islands to have attorneys come to conferences with the authority to settle, or, in appropriate cases, to bring clients to such a conference or have them available by telephone during any settlement conference.

(6) Additional features the Advisory Group may choose to recommend.

In the interest of expediting the attention given to motions for summary judgment, the Advisory Group in its action plan recommends a new local rule which addresses the manner in which the response to a motion for summary judgment will be processed and considered by the court.

Action Plan

In furtherance of the Act's directives, and the findings recommended in the Report of the Advisory Group, the following changes to civil practice and procedure in the District Court of the Virgin Islands are enacted:

(1) Response to motion for summary judgment.
(2) Court-annexed mediation plan.
(3) Discovery rule.
(4) Expert witness rule.
(5) Education program for Virgin Islands Bar.

Detailed Description of Plan Components

1. Response to Motion for Summary Judgment. [A New Local Rule]

Any party adverse to a motion for summary judgment shall respond within twenty (20) days after filing of the motion, or within the same twenty (20) day period move for additional time to respond. In the absence of timely response, the court may render an appropriate judgment on the merits.

2. Court-Annexed Mediation. [A New Local Rule]

1."Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving and exploring settlement alternatives.

2.(a)Referral by Presiding Judge. Except as hereinafter provided, the presiding judge may order any contested civil matter or selected issues to be referred to mediation, upon agreement of the parties. The parties to any contested civil matter may file a written stipulation to mediate any issue between them at any time. Such stipulation shall be incorporated into the order of referral.

(1)Conference or Hearing Date. Unless otherwise ordered by the Court, the first mediation conference shall be held within 60 days of the order of referral.

(2)Role of counsel. Unless otherwise ordered by the Court, counsel to the parties shall not participate in, interfere with, or attend any portion of the mediation conference. The role of counsel shall be limited to general consultation pursuant to the rules governing the attorney-client privilege.

(3)Notice. Within 10 days after the order of referral, the Court or its designee, who may be the mediator, shall notify the parties in writing of the date, time, and place of the conference.

(4)A mediator is authorized to change the date and time for the mediation conference, provided the conference takes place within 15 days of the date set forth in (a) (1). Any continuance of the conference beyond this 15 day period must be approved by the judge to whom the case is assigned.

(5)The mediation conference shall take place in a courtroom designated by the Court or any other place designated by the Court.

(b)Motion to Dispense with Mediation. A party may move, within 15 days after the order of referral, to dispense with mediation if:

(1)The issue to be considered has been previously mediated between the same parties;

(2)The issue presents a question of law only;

(3)The order violates the exclusions rule, pursuant to 5 V.I.C. App 5 R---(b) [exclusions of mediation]; or

(4)Other good cause is shown.

(c)Selection of Mediator.

(1)Certification of Mediators. The Court shall certify as many mediators as it determines to be necessary.

(2)Each individual certified as a mediator shall take the oath or affirmation prescribed by Title 28, U.S.C. Section 453 before serving as a mediator.

(3)A list of all persons certified as mediators shall be maintained with the Court.

3.(a)The mediator has a duty to define and describe the process of mediation and its costs during an orientation session with the parties before the mediation conference begins. The orientation should include the following:

(1)Mediation procedures;

(2)The differences between mediation and other forms of conflict resolution, including therapy and counseling;

(3)The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(4)The confidentiality provision as provided for by Title 5, Section 854 of the Virgin Islands Code;

(5)The duties and responsibilities of the mediator and the parties;

(6)The fact that any agreement reached must be reached by mutual consent of the parties;

(7)The information necessary for defining the disputed issues.

(b)The mediator has a duty to be impartial, and to advise all parties of any circumstances bearing on their possible bias, prejudice or lack of impartiality. Any person selected as a mediator shall be disqualified for bias, prejudice or impartiality as provided for by Title 28, U.S.C. Section 144 and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. Section 455 to disqualify themselves if they were a judge or magistrate.

(c)A mediator appointed by the Court pursuant to these rules shall have judicial immunity in the same manner and to the same extent as a judge.

(d)Disqualification of a Mediator. Any party may move the Court to enter an order disqualifying a mediator for good cause. Mediators have a duty to disclose any fact bearing on their qualifications which would be grounds for disqualification. If the Court rules that a mediator is disqualified from hearing a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. The time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

4.(a)Completion of Mediation. Mediation shall be completed within 45 days of the first mediation conference unless extended by order of the Court or by stipulation of the parties, but in any event the process shall not exceed 90 calendar days.

(b)Exclusions from Mediation. The following actions shall not be referred to mediation:

(1)Criminal actions;

(2)Appeals from rulings of administrative agencies;

(3)Forfeitures of seized property;

(4)Habeas corpus and extraordinary writ;

(5)Declaratory relief;

(6)Any case assigned by the court to a multidistrict tribunal;

(8)Any litigation expedited by statute or rule, except issues of parental responsibility; or

(9)Other matters as may be specified by order of the presiding judge in the district.

(c)Discovery. Discovery may continue throughout mediation. Such discovery may be delayed or deferred upon agreement of the parties or by order of the Court.

(d)Disclosure privilege. Each party involved in a court-ordered mediation conference has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceeding.

(e)Inadmissibility of mediation proceedings. Any or all communications, written or oral, made in the course of a mediation proceeding, other than an executed settlement agreement, shall be inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

5.(a)Interim or Emergency Relief. A mediator may apply to the Court for interim or emergency relief at any time, at the initiation of the mediator upon consultation with the parties, or at the parties' request. Mediation shall continue while such a motion is pending absent a contrary order of the Court or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods where mediation is interrupted pending resolution of such a motion.

(b)Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the Court upon motion shall impose sanctions, including an award of mediator and attorney fees and other costs, against the party failing to appear. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1)The party or its representative having full authority to settle without further consultation; and

(2)A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation.

(c)Adjournments. The mediator may adjourn the mediation conference at any time and may set a date and a time for reconvening the adjourned conference, provided the mediation conference takes place within 15 days of the date set pursuant to App 5 R--(a) (1) [Conference or Hearing Date]. Any continuance beyond this 15 day period must be approved by the presiding judge to whom the case is assigned. No further notification is required for parties present at the adjourned conference.

(d)Role of Counsel. Mediation will proceed in the absence of counsel, unless otherwise ordered by the Court. Counsel shall only be permitted to communicate privately with their clients, when the parties are not attending scheduled mediation proceedings.

(e)Communication with Parties. The mediator may meet and consult with the parties or their counsel, on any issue pertaining to the subject matter of the mediation. Should the mediator wish to discuss a matter with the parties or their counsel, the mediator must inform all parties to the mediation of the location and subject matter of such meeting. The mediator can consult with any party or their counsel, only upon agreement of all parties. The mediator shall keep a written record of any and all meetings conducted with the parties or their counsel, and such record shall be made available to the parties.

(f)Appointment of the Mediator.

(1)Within 10 days of the order of referral, the parties may agree upon a stipulation with the Court designating:

(i)A certified mediator; or

(ii)A mediator who does not meet the certification requirements of the rules but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

(2)If the parties cannot agree upon a mediator within 10 days of the order of referral, the plaintiff or petitioner shall so notify the Court within 10 days of the expiration of the period to agree on a mediator, and the Court shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the judge in the district in which the action is pending.

(g)Compensation of the Mediator. The mediator shall be compensated by the parties. The presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Each party shall pay one half or such other proportionate share of the total charges of the mediator as may be agreed upon, unless the mediator and/or the court determines that one party has not mediated in good faith.

6.(a)No Agreement. If the parties do not reach any agreement as to any matter as a result of mediation, or if the mediator determines that no settlement is likely to result from the mediation, the mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(b)Agreement. If an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement shall be filed when required by law or with the parties' consent. If the agreement is not filed, a joint stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the Court.

(c)Imposition of Sanctions. In the event of any breach or failure to perform under the agreement, the Court upon motion may impose sanctions, including costs, attorney fees, or other appropriate remedies including entry of judgement on the agreement.

7.(a)Certification of Mediators. For certification, a mediator:

(1)Must complete a minimum of 20 hours in a training program approved by the District Court; and

(2)Must observe a minimum of four district or other mediation conferences conducted by a certified mediator and conduct four district court mediation conferences under the supervision and observation of a Court certified mediator;

(3)Standing: A mediator must also meet one of the following minimal requirements:

(i)The mediator may be a member in good standing of the Virgin Islands Bar with at least five years of Virgin Islands practice, and be an active member of the Virgin Islands Bar within one year of application for certification; or

(ii)Paragraph (i) notwithstanding, the chief judge, upon written request setting forth reasonable and sufficient grounds, may certify as a district Court mediator a retired judge who was a member of the bar in the state in which the judge presided. The judge must have been a member in good standing of the bar of another state for at least five years immediately preceding the year certification is sought and must meet the training requirements of subsection (a) (1); or

(iii)The mediator may be the holder of a master's degree and be a member in good standing in his or her professional field with at least five years of practice in the Virgin Islands; and

(4)Notwithstanding the foregoing procedures which are the preferred method of certification, the Court may, in the absence of an available pool of certified mediators, appoint as a mediator a qualified person acceptable to the Court and the parties. Also, a person certified as a mediator by the American Arbitration Association, or any other national organization approved by the District Court shall be deemed to qualify under this section as a District Court Mediator.

3. Discovery. [A New Local Rule]

(a)Depositions.

Time and participation limits.

(1)One hour for the direct examination and one hour for cross-examination per party of non-party witnesses; and three hours direct for party and expert witnesses and an equal amount of time for each party for cross.

(2)No more than one attorney for each party may question the deponent, except as extended by stipulation of the parties or upon order of the court.

(b)Cooperative Discovery Devices.

(1)Cooperative discovery arrangements in the interest of reducing delay and expenses are encouraged.

(2)The parties may, by stipulation, extend the scope of the obligation for self-executing discovery.

(c)Discovery - Duty of Self-Executing Disclosure.

(1)Required disclosures.

(A)Unless otherwise directed by the court, each party shall, without awaiting a discovery request, disclose, produce or make available for

inspection to all other parties:

(i)The name and last known address of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(ii)A general description, including location, of all documents, data, compilations, the existence and contents of medical records, claims, and tangible things in the possession, custody, or control of that party that are likely to bear significantly on the claims and defenses;

(iii)The existence and contents of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of the judgment that may be entered in the action, or indemnify or reimburse for payment made to satisfy the judgement, making available such agreement for inspection and copying, as well as reports or documents bearing on reservation of rights or denial of coverage;

(iv)Unless the court otherwise directs, these disclosures shall be made (1) by each plaintiff within thirty (30) days after service of an answer to its complaint; (2) by each defendant within thirty (30) days after serving its answer to the complaint; and, in any event (3) by any party that has appeared in the case within thirty (30) days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosure, or, except with respect to the obligation under clause (3), because another party has not made its disclosures.

(2)Supplementation of Disclosures -- A party who has made a disclosure under subdivision (1) is under a duty to reasonably supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

(3)Signing of Disclosures -- Every disclosure or supplement made pursuant to subdivision (a) or (c) by a party represented by an attorney shall be signed by at

least one attorney of record and the party. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure, and, in addition, constitutes a certification that the signer has read the disclosure, and to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(4)Duplicative Disclosure -- At the time the duty to disclose arises it may cover matters already fully disclosed in the same civil action pursuant to an order of the court, to a requirement of law or otherwise. In that event duplicative disclosure is not required and a statement that disclosure has already been made discharges the obligation imposed under this section.

4. Expert Witness. [A New Local Rule]

(a)Written Report of Experts.

At least thirty (30) days prior to any party's expert deposition, the opposing party shall be entitled to have a written report encompassing all of the criteria detailed in Rule 26(b)(4) of the Federal Rules of Civil Procedure.

(b)Testimony and the Experts' Written Report/Deposition.

The testimony of an expert witness at trial shall be based upon the opinions advanced in the written report and/or the expert's deposition referenced in section (a). Experts shall not be permitted to testify on matters beyond the scope of the subjects and the opinions expressed in the referenced written report and the depositions, absent extenuating circumstances based upon newly discovered evidence, all of which is subject to the Court's judicial discretion in regard to trial testimony. In the exercise of its discretion, the Court shall consider timely notice and prejudice to the parties.

(c)Video Taping of Expert Testimony.

(1)The video taping of the testimony of expert witnesses is encouraged.

(2)Absent good cause shown, if a firm trial date has been set at least forty-five (45) days in advance of trial, and the testimony of an expert witness has not been video taped, and the witness is unavailable for the trial, the parties will be required to proceed at trial without the benefit of the expert's testimony.

(d)Payment for Expert Witness Deposition.

(1)The attorney noticing the expert's deposition shall be responsible for the expert's reasonable charges for the time spent in the deposition unless the parties

or their attorneys have agreed to the contrary in writing. The noticing party shall have a reasonable time to pay the expert's fees. However, upon receipt of a proposed bill indicating the expert's charges, the reasonableness of the charges shall be subject to the review of the Court. If the deposing party intends to object to the charges and their reasonableness, an application shall be made before the deposition to the Court to obtain a ruling on the reasonableness of the charges.

(2)To the extent an expert demands payment in advance of the deposition date, then absent agreement, the party who has noticed the expert for deposition must advance or otherwise secure such sums.

5. Education Program for Virgin Islands Bar.

In order for the members of the Virgin Islands Bar to understand the import of the Act, the Report, the Plan and its accompanying rules changes, an educational program for the bar should be conducted on St. Thomas and St. Croix at an early time. Such a program can also be a vehicle to discuss the draft of the local rules governing practice and procedure in civil cases.

Continuing Membership of Advisory Group

Facilitating access to justice, and reducing delay and expense in civil litigation is a continuing process and the Act recognizes this. Periodic reassessment of the condition of the Court's docket is required,[12] and the Advisory Groups are created as continuing bodies with individual memberships limited to four years, except the United States Attorney, who is a permanent member.[13]

[12]28 U.S.C. § 475 (calling for annual reassessment).

[13]28 U.S.C. § 478(c) - (d).