Report of the Supreme Court Advisory Committee on Expedited Civil Actions

April 2014

PREAMBLE

In May of 2013, Chief Justice Stuart Rabner of the New Jersey Supreme Court announced the formation of the Supreme Court Advisory Committee on Expediting Civil Actions (Committee). The goal of the Committee was to develop a program that will achieve speedier justice without sacrificing due process and fairness to litigants, thereby decreasing the costs of litigation and making the Court system more accessible to the public. The Committee was charged with developing proposals that will streamline actions filed in the Civil Part of the Law Division, focusing on, among other things, the types of cases receptive to expedited practice and pretrial and trial procedures to expedite civil actions.

The Chief Justice appointed Justice Faustino J. Fernandez-Vina (then Camden Vicinage Assignment Judge) and Thomas R. Curtin, Esquire, of the law firm Graham Curtin, P.A., as Co-Chairs of the Committee.

The report containing the Committee's recommendations follows.

COMMITTEE'S CHARGE

The Committee was directed to consider and make recommendations to the Supreme Court regarding the following issues:

a. the types of cases receptive to expediting civil practice;

b. pretrial procedures to expedite civil actions, *e.g.*, automatic disclosures, limitations on discovery and expert reports, case management conferences, motion practice, and trial scheduling;

c. trial practices to expedite civil actions, *e.g.*, jury size and selection limitations, time limits on opening, closings and presentation of evidence, applicability of rules of evidence; use of expert reports; number of lay and expert witnesses and pretrial authentication and marking of documents;

d. incentives for plaintiff and defense bar to use the expedited program;

e. needed civil staff case management modifications for an expedited program;

f. whether the Court Rules would need to be amended or new rules would need to be adopted for such a program;

g. whether the expedited civil action program is a voluntary or a mandatory practice for certain case types;

h. the manner in which to best educate practitioners in the appropriate, effective, and efficient manner in which to successfully utilize the program to achieve a positive result for litigants.

ACTION BY THE COMMITTEE

The Committee created three subcommittees to address various issues surrounding the creation of expedited civil actions — Trial Subcommittee, Pretrial Subcommittee and

Education/Liaison Subcommittee. These subcommittees held several meetings to develop an appropriate program for New Jersey including consideration of programs initiated in other jurisdictions relating to civil expedited programs. After thorough consideration, the Committee concluded that it would recommend to the Court the adoption of a program to expedite civil actions in Tracks I and II with the right to apply to the court to opt out of the program for cause consistent with the guidelines set forth herein. It is the expectation of the Committee that the types of cases in the program would primarily be cases involving two or three parties, contracts or commercial transactions, debt collection, simple personal injury claims, simple insurance coverage claims, and cases in which minimal discovery is needed. Cases involving name changes, forfeiture, summary action and the Open Public Records Act would be excluded from the program. With respect to cases in Tracks III and IV, parties would be given the right to apply to the court to opt into the expedited civil litigation program.

Considerations of the Committee

The Committee initially considered developing a program to expedite civil actions in all tracks. It became apparent that there were significant differences between the discovery focuses amongst the different tracks, and even for different types of cases within the same track which would not be readily susceptible to a uniform, streamlined approach. The more complex the case, the greater the difference of opinion was as to where and how meaningful time savings could be achieved without overly compromising the parties' right to a full and fair adjudication of their dispute. Ultimately, there was a consensus that most Track I and Track II cases could be handled in a more uniform, streamlined manner, particularly if the trial bar is well educated in the practical steps that will lead to successful handling of cases subject to the program. The Committee also felt that as feedback is received on cases litigated under the current proposal,

further consideration should be given to defining categories of cases within the different tracks that could benefit from more specialized expedited handling.

The most discussed and researched topic was whether or not the program should be voluntary or mandatory, in other words an "opt in" or an "opt out." It was noted that in every jurisdiction considered where a voluntary program was implemented, participation was minimal. There was also no data to suggest that the voluntary programs directly contributed to a public perception of increased, cost-effective access to the court system.

Balanced against these considerations was the desirability of achieving the "buy in" of those constituents most impacted by the program, including but not limited to attorneys, judges, businesses that regularly rely upon the court system to resolve disputes, individual litigants who are looking for cost-effective, timely resolution of disputes, and the public at large. The Committee is cognizant of participant concerns of being forced into a system that will restrict discovery. It concluded that educating participants on the best methods to utilize the program and the ability to remove cases not appropriate for the program will minimize those concerns.

Finally, from the perspective of judicial administration, achieving a meaningful reduction in the time and cost associated with bringing a dispute to resolution is best advanced by having greater participation in the program thereby making more efficient use of judicial resources. A sufficient statistical sampling will help increase the public's confidence that the court system can resolve basic disputes that are now considered too costly and time consuming to justify resort to the courts.

As a result, a balance was struck by recommending an "opt out" program with clear parameters defining the basis for removal that will need little to no interpretation by the court. Rather than adopting standards such as "for good cause shown" which are capable of being inconsistently and subjectively applied, the proposal specifically defines the circumstances under which a case will be removed. A "catch all" category allowing for removal by consent of the

parties allows the subjective concerns of the litigants to be addressed by the parties as they believe will best serve their respective interests.

Ultimately, there was a consensus that a "soft mandatory" approach will gain widespread acceptance, and create sufficient participation so as to gain meaningful savings of cost and time for both the litigants and the court system. Additionally, a successful program that improves access to the courts will increase public confidence in the court system as a forum to resolve simple but meaningful disputes. Moreover, success at the Track I and Track II level will provide a platform for consideration of expanding the program to other cases that can be appropriately expedited.

The Committee recommends implementation of a pilot program in no fewer than two and no more than three targeted counties, where a statistically significant sampling can be developed over a defined period, *i.e.*, two years. Consideration should be given to implementing the program in each of those counties through no more than one or two judges who will handle the discovery phase of eligible cases. It is also recommended that consideration be given to selecting judges who have significant trial experience as both lawyers and judges in order to maximize the court's ability to address the more nuanced issues that inevitably arise in a new program. Centralized administration will also create more efficiency for the court system and litigants, and will allow for meaningful input from the judiciary as to any adjustments that may need to be made at the conclusion of the program based upon a concentrated exposure to a significant sampling of eligible cases.

The Committee also selected case management and dispute resolution devices that are modeled on the federal system for several key elements necessary to expedite cases in the manner proposed. The initial case management conference was seen as a critical event for success of the program. This is the point at which any request to "opt out" will be addressed (without costly and time consuming motion practice), and is a point by which initial discovery

must be exchanged to allow the court to meaningfully manage the case consistent with the goals of the program. As a general rule, attorneys favor hands-on case management as the most effective and efficient way to create the accountability necessary to foster successful outcomes on a case by case basis. In addition, discovery disputes will be handled during discovery without motion practice allowing for quicker and less costly resolution of the type of simple discovery disputes that may arise in cases included in the program. These time and cost saving devices are viewed as critical components achieving the overall goal of the program and assuring that the timing benchmarks set forth in the program are met.

The Committee also recommended that cases included in the program be removed from the mandatory non-binding arbitration program. This results in a substantial time savings in the life of the case and will significantly reduce the cost to litigants in simple cases. Once again, if the goal is to shorten the time it takes to bring basic cases to a conclusion, a substantially earlier trial date will be assigned without arbitration and can, in fact, be assigned at the initial case management conference.

The benchmarks built in to the discovery phases differ for Track I versus Track II cases based upon the Committee's differentiation between the types of eligible cases from each track. It is important to note that the total discovery time for each track is meaningfully reduced from the current time permitted with no provision for extensions (without removing the case from the program).

The trial portion of the program also achieves significant savings. Cases included in the program will be given priority for purpose of trial assignment. For the program to succeed, the court must deliver on the promise of trial certainty that those invested in the system will be told is a critical element of expediting those cases included in the program. In addition, the proposal strictly limits the number of adjournments that can be granted to parties without being returned

to the general list, thereby holding the bar and litigants accountable for their failure to expedite the case.

A substantial time savings is also achieved by reducing the number of peremptory challenges in expedited matters. Many of the cases included in this program can be tried to a conclusion in as few a one and as many as five days. Under the current system, jury selection can take from one half day to a full day. Reducing the time spent on jury selection by lowering the number of peremptory challenges will achieve a meaningful savings without compromising the parties' ability to select a fair jury. Along with this reduction, it is believed that the trial court will need to be mindful of the reduction when considering challenges for cause that are raised by the parties.

Limitations on the time for opening and closing arguments are also included to save time without sacrificing or unduly restricting the parties' rights to a fair and complete presentation of their respective cases. Similarly, experts may be presented through video or reports by mutual agreement of the parties which can achieve a significant trial time savings. The court also has the discretion to limit cumulative testimony. Individually, and in combination, these measures will reduce the time and expense associated with the trial of matters eligible for the program.

It is also recommended that the Committee remain in service to this court to evaluate the practical function of the program and make timely recommendations for revisions that become necessary to achieve the goals of the program during its pilot phase, as well as to make recommendations for its continued implementation. In addition, the Committee can take the experience of the pilot program and consider and recommend expedited procedures for cases not currently recommended for inclusion in the program.

RECOMMENDATIONS

The Committee presents the following recommendations for the Court's consideration:

PILOT PROGRAM

1. Institution of a pilot program ("Pilot Program") in two Vicinages for an expedited civil litigation track for all Track I and Track II cases except cases involving name changes, forfeiture, summary action and the Open Public Records Act, subject to the provisions of Recommendation #2 below.

2. Any party may initially object to inclusion in the Pilot Program by serving a letter of intent setting forth the reasons why that matter should be removed from the Pilot Program. Among the factors that shall be considered presumptive grounds for removal from the Pilot Program are: (a) a request by all parties for removal; (b) multiple parties, not including derivative or per quod claimants; (c) multiple or complex theories of liability, damages or relief; (d) necessity for extended discovery; or (e) any other factor that demonstrates that assignment to the Pilot Program would substantially affect a party's right to a fair and just resolution of the matter. The party seeking removal shall file and serve its letter of intent generally setting forth the basis for removal no less than ten (10) days prior to the initial Case Management Conference. Any party objecting to removal shall file and serve its letter setting forth the basis for the objection no less than five days before the initial Case Management Conference.

3. Any party in the Pilot Program may file a subsequent application for removal from the Pilot Program no later than 30 days prior to the discovery end date for good cause shown, based upon changed circumstances.

PRETRIAL ASPECTS OF THE PILOT PROGRAM

4. Each party in the Pilot Program shall be limited to the form interrogatories currently mandated by the Rules of Court (if applicable) and five supplemental interrogatories

without subparts. In the event there are no mandated interrogatories, the parties may each serve no more than 15 interrogatories without subparts. Any request for production of documents shall be limited to 10 requests. No more than two total depositions may be conducted in a Track I case and no more than five depositions may be conducted in a Track II case unless otherwise permitted by consent of the parties or by the court for good cause shown. In all cases in which there are form interrogatories, answers to the form interrogatories shall be served by the plaintiff within 20 days of receipt of an answer from a party. A defendant's answers to form interrogatories shall be served within 20 days of receipt of the plaintiff's answers to interrogatories.

5. There shall be an initial Case Management Conference ("CMC") conducted by the court within 45 days of the filing of the first responsive pleading. Among the subjects to be addressed at the CMC are: (a) any timely filed request for exclusion from the Pilot Program; (b) any discovery plan proposed by the parties; (c) the entry of a Scheduling Order that is proportional to the needs of the case with a presumption that discovery shall be completed within 105 days for Track I cases eligible for the program and within 195 for Track II cases eligible for the program; and (d) setting a trial date which shall be within 45 days of the discovery end date. In cases involving personal injury claims, plaintiff must bring executed HIPAA forms to the CMC. Cases in the Pilot Program shall not be subject to Arbitration under Court Rule 4:21A unless all parties request arbitration of the matter.

6. In the event of a discovery dispute, the parties must meet and confer in an attempt to resolve the dispute. If a good faith effort to resolve a discovery dispute is unsuccessful, the parties shall send a joint written request to the managing judge for an informal conference to resolve the issue. The letter must present the issue(s) in dispute and the position of each party in no more than one page. The managing judge may decide the issue on the papers or schedule a phone or in-person conference in his/her discretion.

7. Cases in the Pilot Program will be given a date certain trial date which should receive trial priority over other cases that appear on the same trial calendar. Cases in the Pilot Program may be adjourned once by unanimous consent of all counsel/parties. A case in the Pilot Program may be given a second date certain trial date, but if that case is subsequently adjourned at the request of the parties, it shall be returned to the general trial calendar.

TRIAL ASPECTS OF THE PILOT PROGRAM

Information Exchange

8. For all tracks, attorneys handling an expedited civil trial under the Pilot Program shall submit any factual stipulations, a list of any proposed deposition or interrogatory readings, *in limine* or trial motions, and pre-marked copies of all non-objectionable proposed trial exhibits seven days before the date set for trial. Attorneys may cross-examine witnesses concerning the content of non-objectionable pre-marked exhibits.

Cumulative Witnesses

9. For all tracks, attorneys handling an expedited civil trial under the Pilot Program may move before trial to exclude witnesses whose testimony is cumulative.

Peremptory Challenges

10. Track I and Track II cases in the Pilot Program shall be limited to three (3) peremptory challenges. Track III and Track IV cases in the Pilot Program shall be limited to four (4) peremptory challenges. For all tracks, pursuant to Court Rule 1:8-3(c), the trial court may allow additional peremptory challenges where there are multiple adverse parties separately represented.[1]

[1] Inasmuch as the number of peremptory challenges is voluntarily reduced in the Pilot Program, it is expected that the trial court, in the exercise of its discretion, will take into consideration the limitations on attempts to rehabilitate prospective jurors. *See, Catando v. Sheraton Poste Inn*, 249 *N.J. Super*. 253 (App. Div. 1991).

Opening Statements and Summation

11. For Track I cases, opening statements should be limited to no more than 30 minutes. For Track II cases opening statements should be limited to no more than 30 minutes for uncomplicated cases and up to 60 minutes for more complex cases. For Track III and Track IV cases, opening statements should be limited to no more than 90 minutes.

12. For Track I cases, summations should be limited to no more than 30 minutes. For Track II cases summations should be limited to no more than 30 minutes for uncomplicated cases and no more than 90 minutes for more complex cases. For Track III and Track IV cases, summations should be limited to no more than 120 minutes.

Expert *Voir Dire*

13. For all tracks, attorneys handling an expedited civil trial under the Pilot Program may *voir dire* the proffered expert.

Expert Testimony

14. For all tracks, attorneys handling an expedited civil trial under the Pilot Program may mutually agree to present expert testimony by video recording or reports rather than live testimony.

Respectfully submitted,

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