

Time for a Change

Over the course of the last 30 years this legal practitioner has spent in the Oregon court system, the practice has taken on a decidedly fast pace, for the expressed purpose of expediting the administration of justice. Unfortunately, despite this worthy goal, our systems of promoting speedy civil trials have evolved to the point of costing the court system and private litigants enormous sums in litigation costs, far exceeding the need.

In 1976, when I was first admitted to the Bar, civil cases in the Portland tri-county area made their way toward trial at a more civil pace. Although the exact timing of most cases is beyond the scope of this article, it is my recollection that personal injury cases often went to trial between 12 and 18 months after they had been filed, but from time to time circumstances were such that a case was tried 18 and 24 months or more from filing, although a two-year old case was a rarity. Sometimes, a case was complex enough, from the standpoint of multiple parties being added along the way, protracted discovery taking additional time, or even the time it took for the plaintiff's medical condition to become stationary, that the particular presiding judge would agree that a trial date after 24 months from filing was appropriate for the case. In Multnomah County, such cases would often be designated "green card" cases, although the actual green card originally used for notification of the trial date gave way to a white card on which the court staff typed the words "Green Card". The meaning of the language was clear to all—unless a party or attorney chose the date designated to have a heart attack—or some other equally good reason came to pass—the case was going to trial on the scheduled date. In those days, judges had discretion to exercise judgment.

In those good old days, judges made continuance decisions based on the needs of the par-

Life in the Judicial Fast Lane—At What Cost?

— by Jay D. Enloe

ties and their attorneys, and without regard to deadlines requiring cases to be tried within a certain number of months. Occasionally, an attorney would not move the case ahead at a pace consistent with what the other side would see as justice (a plaintiff would want to get paid sooner, or a defendant would want to be proven right sooner), and when that happened Judge Crookham or some other wise judge would see to it that the case was set for trial at a time more in keeping with notions of justice and fair play.

Then, about 10 or 15 years ago (if memory serves), there was a movement to see civil cases disposed of by settlement or trial within 12 months from the filing date of the Complaint. That deadline has now been modified in practice somewhat (but not in the Uniform Trial Court Rules), and differs in application a bit in each county, but this is still the driving force behind current trial setting procedures, and the culture that seems to control the process for resetting a trial date when necessary. It is not uncommon these days for the parties to an injury case to agree that their case should be reset to another trial date, either because the needs of the parties or their witnesses require it, yet the court will resist a motion to continue. While often such resistance can be overcome, doing so requires the filing of motions and affidavits, and often the setting of hearings on such motions, at which hearings the judge often agrees with the parties' request to change the trial date, but only after a good deal of time is taken by all to get to that point.

It is the sense of this litigator that the public interest in speedy justice for civil cases has taken on a disproportionate role in this area. Private litigants are spending enormous sums of money dealing with prematurely and unrealistically assigned trial dates, including receiving early trial notices, calendaring such

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dates and notifying parties and witnesses of such dates (along with an admonition that the date is likely to change, because it is unrealistically early), filing motions to continue such dates (often several times over the course of the lifetime of the case), and finally acting on a “firm” trial date in the small percentage of cases that actually go to trial.

Not only are litigants, and those financing the litigation, spending significant time and large sums of money processing paper for unrealistic trial dates, but the court system itself surely spends considerable time issuing early trial date notices, entering such dates into the Oregon Judicial Information Network, and then processing requests and motions to change early trial settings to more realistic dates. If the court could remove itself from the business of setting trial dates before the case is ready for trial, think of the money the public judicial system could save!

In addition to the cost of processing early and unrealistic trial dates, the present system that tries to get all cases to trial within a certain number of months increases the cost of defending cases by creating pressures to engage in complete discovery early on, or face the prospect of running out of time to complete discovery before a 12 month trial date. As a practical matter, many cases can be settled without a need for exhaustive and expensive discovery. Often, settlement can be achieved as a result of the plaintiff finally understanding what jurors award in similar cases, and their unreasonable expectations being abandoned. Frequently, this is a function of time as much as anything else. The plaintiff’s deposition is often a critical piece of the plaintiff’s education, soon after which is often a productive time to discuss settlement. The expense of completing further discovery can be avoided if the case can be settled early on.

With cases having to go to trial within 12 months, and with busy attorney schedules (plaintiff as well as defendant) frequently preventing early depositions, the parties must

struggle with the question of whether to move quickly to complete full discovery. The defense needs to decide whether to defer full records discovery and a record review or an IME until after the plaintiff’s deposition, but in so doing running the risk of having insufficient time to complete those tasks after the deposition if the case does not settle. The option is to go ahead and spend the insurer’s money to complete exhaustive discovery before the plaintiff’s deposition is taken. If such discovery could be delayed until following the plaintiff’s deposition, the case might settle and the additional discovery expense would not have to be incurred.

Another problem with requiring trial settings within 12 months is that some counties (for example, Washington County, the population of which has grown beyond the capacity of the existing number of judges) will reset civil trials, even the day before the trial date, because criminal cases take all the available judges. In those cases, money has been spent by the parties to get ready for trial, much of which will need to be spent at a new trial setting.

The current system of trying to get cases to trial within 12 months was codified in Uniform Trial Court Rule 7.020(5). Due to the practicalities of there often being too few judges to handle all civil trials within 12 months, together with court’s granting of motions to continue trial dates after 12 months, the UTCR 7.020(5) admonition that “the trial date must be no later than one year from date of filing” is more a hope than a requirement in fact. Amending UTCR 7.020(5) to allow for the setting of trial dates on a schedule of the parties’ choosing would be a useful way to refocus civil litigation to the desired goal of resolving cases by settlement, and would save the court system money in the processing of trial dates that are never required because of settlement.

There is a “parallel universe” that exists for the resolution of injury cases, but which does

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not involve court oversight for the setting of dates. That system is binding arbitration. In binding arbitration, the arbitration hearing date is set by agreement of the parties. When a problem arises requiring a change in the date, the parties just agree on a new date. Occasionally, the parties disagree about the need to reset the date. When that happens, the arbitrator decides the issue. The need for the arbitrator to become involved in scheduling decisions arises only rarely, because the parties themselves are actively involved in the setting of dates and are usually in agreement when a change is required.

If the existing system of setting civil trial dates were modified, so as to put this function more into the hands of the parties, the occasional problem of a party dragging its heels in moving the case toward trial could be dealt with by allowing any party who wanted to move the case more quickly to file a motion to set the case down for trial. Furthermore, a system that allowed the parties the first opportunity to set a realistic

trial date by agreement could still allow for oversight by the court. If a trial date had not been set by the one-year anniversary date, a trial date could be set by the court. Trial dates could generally be set in months 13 through 24, so as to allow settlement opportunities to run their course without the parties having to incur expensive trial preparation costs. Trial dates beyond 24 months could be set in the court's discretion (much like today's abatement system). Trial dates could still be set within the first 12 months, if the parties agreed or if the court so ordered. The system could allow for changes in a trial date by agreement of the parties. Such a system would essentially get the court out of the business of assigning unrealistically early trial dates, and would allow the court to use its limited financial resources for more pressing matters. ❖

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