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# SUPPLEMENTAL 1



Task Force *on the*  
Escalating Costs of Civil Litigation

**Final Report *to the***  
**Board of Governors**

June 15, 2015

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## Task Force Membership

<i>Chair</i>	Russell M. Aoki	
<i>WSBA Members</i>	Lincoln C. Beauregard Breean L. Beggs Cynthia F. Buhr Eric C. de los Santos Jessica L. Goldman William D. Hyslop	Don L. Jacobs Jerry R. McNaul Gail B. Nunn Todd L. Nunn Amit D. Ranade
<i>Judiciary Members</i>	The Hon. Marcine Anderson The Hon. Ronald E. Cox The Hon. Richard F. McDermott, Jr. The Hon. Debra L. Stephens	
<i>Clerk's Association</i>	Kevin Stock	
<i>Assisting Non-Member</i>	Isham M. Reavis	
<i>Research Student</i>	Martina Wong	
<i>BOG Liaisons</i>	Marc L. Silverman Ken Masters	
<i>WSBA Staff Liaison</i>	Jeanne Marie Clavere	
<i>WSBA Staff Support</i>	Darlene Neumann	

## Subcommittees

### **Alternative Dispute Resolution Subcommittee**

<i>Chair</i>	Jerry R. McNaul	
<i>Task Force Members</i>	Lincoln C. Beauregard	Cynthia F. Buhr
<i>Other Members</i>	Alan Alhadeff The Hon. Robert H. Alsdorf (retired) Gregg L. Bertram	Rina M. Goodman David J. Lenci
<i>Assisting Non-Member</i>	Andre Chevalier	

### **Discovery Subcommittee**

<i>Chair</i>	Todd L. Nunn	
<i>Task Force Members</i>	The Hon. Marcine Anderson Russell M. Aoki Breean L. Beggs The Hon. Debra L. Stephens	William D. Hyslop Don Jacobs
<i>Other Members</i>	J.M. Bouffard Thomas Breen Michael R. Caryl Jean Cotton Larry G. Johnson Leslie S. Johnson Miquette Karnan	Endel Kolde Luke LaRiviere Gregory D. Lucas Milton G. Rowland M. Edward Taylor Kinnon W. Williams

### **District Court Subcommittee**

<i>Chair</i>	The Hon. Marcine Anderson	
<i>Other Members</i>	The Hon. Alicia H. Nakata Linda M. Gallagher	The Hon. Donna Wilson Vonda M. Sargent

### **Pleadings and Motion Practice Subcommittee**

<i>Chair</i>	Eric C. de los Santos	
<i>Task Force Members</i>	The Hon. Ronald E. Cox	Jessica L. Goldman
<i>Non-Task Force Members</i>	Melissa Anderson Katherine Cameron Leslie Hagin	Andrea Smith Chrystina Solum

### **Survey Subcommittee**

<i>Chair</i>	Eric C. de los Santos	
<i>Members</i>	Russell M. Aoki Breean L. Beggs	Milton G. Rowland

### **Trial Procedure Subcommittee**

<i>Co-Chairs</i>	The Hon. Richard F. McDermott, Jr. Gail B. Nunn	
<i>Task Force Members</i>	Amit D. Ranade	Kevin Stock
<i>Non-Task Force Members</i>	Thomas Fain Kathleen Garvin Simeon Osborn	Jeffrey Tilden Lish Whitson

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## Introduction

The price of a lawsuit is high and growing higher. How costly, and the history and rate of growth, are difficult to measure directly, but lawyers—the individuals best positioned to witness the trend and effect of civil litigation costs—overwhelmingly report a problem. In a nationwide survey of 800 lawyers, the American Bar Association found 80 percent reported that civil litigation costs have become prohibitive.<sup>1</sup> Focusing only on members of its litigation section, a second ABA survey found that 81 percent of approximately 3,300 respondents believe that litigation is too expensive, and 89 percent believe litigation costs are disproportionate for small cases.<sup>2</sup> The WSBA surveyed its members in 2009, receiving 2,309 responses. Seventy-five percent of those responding *agreed* (39 percent) or *strongly agreed* (36 percent) that the cost of litigation has grown prohibitive.

In response, in April 2011 the WSBA Board of Governors chartered this Task Force on the Escalating Costs of Civil Litigation. The charter instructed the Task Force to:

- Assess the current cost of civil litigation in Washington State Courts and make recommendations on controlling those costs. “Costs” shall include attorney time as well as out-of-pocket expenses advanced for the purpose of litigation. The Task Force will focus on the types of litigation that are typically filed in the Superior and District Courts of Washington.
- In determining its recommendation, the Task Force shall survey neighboring and similarly situated states to compare the cost of litigation in Washington and review reports and recommendations from other organizations such as the Institute for the Advancement of the American Legal System, the American College of Trial Lawyers, the Public Law Research Institute.

Confronting escalating civil litigation costs also addresses access to justice. If litigation costs grow increasingly prohibitive, more individuals with meritorious claims will be unable to pay the price necessary to vindicate their rights, and more defendants will be forced to abandon valid defenses because of the costs for asserting them. Reining in civil litigation costs means increasing access to the civil justice system for all.

The Task Force has held regular meetings since July 2011, three times requesting that its initial charter be extended. It organized itself into six subcommittees, which also worked separately to address specific aspects of civil litigation. It heard presentations from WSBA Executive Director

<sup>1</sup> Stephanie Francis Ward, *Pulse of the Legal Profession*, 93 A.B.A. J. 30, 31 (Oct. 2007).

<sup>2</sup> ABA Section of Litigation Member Survey on Civil Practice: Full Report 2 (2009).

Paula Littlewood on the state of the legal profession; then-King County Superior Court Presiding Judge Richard McDermott on proposals to change the civil judicial system in King County; Jeff Hall, then-State Court Administrator, Administrative Office of the Courts, on statistics and trends examined by the AOC; U.S. District Court Judge James Robart on civil litigation and rules in the federal courts; and Task Force member Don Jacobs, a former president of the Oregon Trial Lawyers Association, on the expedited civil trial system in Oregon. Individual subcommittees sought extensive input from members of the bar and bench.

The Task Force reviewed literature from around the country, including other states' and federal courts' responses to rising civil litigation costs; case studies by the Institute for the Advancement of the American Legal System (IAALS) and the American College of Trial Lawyers (ACTL); and a nationwide litigation cost survey conducted by the National Center for State Courts (NCSC).

In accordance with its charge to seek input from affected lawyers, judges, and other entities, the Task Force also conducted its own survey of WSBA members involved in, or affected by, civil litigation. Over 500 bar members participated, most who reported themselves as experienced litigators. The respondents echoed the concerns found by previous surveys, identified specific factors contributing to runaway litigation costs, and expressed support for proposals aimed at curbing those costs. Preliminary versions of this report were circulated to litigation-related WSBA sections, minority bar associations and civil litigation associations the Washington State Association for Justice (WSAJ) and Washington Defense Trial Lawyers (WDTL) for comment, and the input received is reflected in the final report.

Based on this data and the work of the individual subcommittees, the Task Force has developed a set of recommendations. These recommendations seek to speed case resolutions—inside or out of the courtroom—while preserving the legal system's ability to reach just results. The centerpiece of the Task Force's recommendations is a system of early case schedules and discovery limits, assigned based on a case's complexity, counterbalanced by mandatory initial disclosures. Other recommendations address e-discovery, alternative dispute resolution, and judicial case management.

These recommendations come with a significant caveat: they do not specifically take up family law issues. During its fact-finding, the Task Force came to the conclusion that family law and its distinct constellation of concerns were beyond the Task Force's ability to fully consider without unreasonably extending its charter. Therefore, the Task Force's recommendations only reach family law to the extent they affect all other areas of civil litigation.

## Executive Summary

The Task Force organized itself into five subcommittees to explore different aspects of civil litigation. These five—the Alternative Dispute Resolution Subcommittee, the Discovery Subcommittee, the Pleadings and Motion Practice Subcommittee, the Trial Procedure Subcommittee, and the District Court Subcommittee—worked independently, and each generated a final report. The Task Force also formed the Survey Subcommittee, which developed and implemented the Task Force Survey of WSBA members. With input from the Survey Subcommittee, the Task Force as a whole considered the recommendations in these subcommittee reports in making its final recommendations.

### **1. Initial case schedule and judicial assignment**

The best way to control the length of litigation is setting a schedule at the outset. Upon filing, all cases will be issued a schedule setting out a trial date and other litigation deadlines.

The Task Force concluded that active judicial case management—including a willingness to enforce discovery rules—is indispensable in controlling litigation costs. Ideally, at the outset a single judge should be assigned to handle all discovery disputes and pretrial issues in a case. Recognizing this may not prove practical in the superior courts of some counties, the Task Force recommends amending the rules to describe such judicial assignment as a preferred practice.

### **2. Two-tier litigation**

Litigation is not one-size-fits-all. A case's length, the breadth of discovery, and the scope of trial should be proportional to its needs. Two litigation tiers would be created in superior court: cases in Tier 1 would proceed along a 12-month case schedule and be subject to presumptive limits on discovery, and Tier 2 cases would have 18 months to trial and more extensive discovery—tailored specifically to the case—than permitted in Tier 1.

Tier 2 would be reserved for cases presenting complex legal or factual issues, involving significant stakes, or marked by other factors indicating likely complexity. Upon filing, all cases would default to Tier 1, with option to move to Tier 2 for good cause shown.

### **3. Mandatory disclosures and early discovery conference**

In both superior court litigation tiers and in district court, case schedules would require an early discovery conference among the parties. Parties would also be required to make initial disclosures, expert witness material disclosures, and pretrial disclosures patterned on the federal rules of civil litigation. These recommendations are designed to promptly engage all parties in the discovery process and provide early access to necessary information. The Task Force considers these recommendations a necessary counterbalance to the new discovery limits and shorter case schedules also being recommended.

#### **4. Proportionality and cooperation**

Lowering litigation costs depends on keeping the costs of cases proportional to their needs, and on ensuring cooperation between attorneys as much as possible within our adversarial legal system. Proportionality and cooperation principles will be explicitly reflected in the rules.

#### **5. E-discovery**

Washington has already incorporated parts of the federal rules regarding e-discovery into CR 26 and CR 34. CR 26 and CR 37 will be amended to incorporate most of the remaining federal e-discovery rules. CRLJ 26 will be amended to follow the changes in CR 26.

Additionally, the Task Force recommends a state-wide e-discovery protocol for both superior and district courts. This will take the form of a model agreement and proposed order on e-discovery to be used on a case-by-case basis.

#### **6. Motions practice**

The Task Force recommends non-dispositive motions in superior and district court cases be decided on their pleadings, without oral argument. The court may permit oral argument on party request.

#### **7. Pretrial conference**

The current civil rules permit, but do not require, a pretrial conference aimed at focusing issues and laying out a framework for managing trial. In both superior and district court, the Task Force recommends requiring a pretrial meeting between the parties to reach agreement on trial management issues. The parties would then submit a joint report to the court, which would issue a pretrial order. For cases where a pretrial meeting does not occur or would be inappropriate, the current discretionary hearing will remain available.

#### **8. District court**

Most civil litigation occurs in superior court, but district court offers a potentially quicker and less expensive alternative for some cases. Many of the Task Force's recommendations apply to district court as well as superior court. In addition, the Task Force recommends extending concurrent jurisdiction to unlawful detainer proceedings, and issuing a case schedule in civil cases upon filing. District court cases would follow a 6-month schedule from filing to trial.

#### **9. Alternative dispute resolution**

The Task Force considered mediation, settlement conferences, private arbitration, and mandatory arbitration.

Mediation or settlement conferences often occur on the eve of trial, after the parties have incurred the bulk of litigation costs. The Task Force recommends mediation in the early stages of a case, well before completing discovery. Because different litigation types have different issues and timelines, the WSBA Sections should develop guidelines for what early mediation means in their respective practice areas.

The Task Force also recommends mandatory mediation in superior court cases no later than 60 days after party depositions (or 60 days before trial, if sooner). If one or more party wishes to forego mediation, the party or parties would have to file a statement following the early discovery conference that the case is not suited to mediation. The court could waive the mediation requirement for good cause based on such statements.

The Task Force also recommends a set of suggested mediation practices for parties to consider, including conducting mediation as a series of short meetings and pre-session contact between mediator, counsel, and client.

Most arbitration takes the form of a private contractual process. Though the Task Force makes no recommendation that would directly affect private arbitration, it recommends best practices for parties and arbitrators.

The Task Force makes no recommendation regarding the rules for mandatory arbitration in superior court.

## Material Considered by the Task Force

The Task Force gathered information from two main sources: literature, including reports from other states and the federal courts, studies, and law review articles; and the Task Force's survey of WSBA members involved in, or affected by, civil litigation.

The Task Force also considered final reports created by its ADR, Discovery, Pleadings and Motion Practice, and Trial Procedure Subcommittees. Beyond the information considered by the Task Force as a whole, the subcommittees researched and considered other literature. Two subcommittees conducted a series of in-person interviews: the Pleadings and Motion Practice Subcommittee spoke with judges from across the state, and the ADR Subcommittee with spoke attorneys and mediators. The subcommittees summarize these additional information sources in their separate reports.

Finally, the Task Force considered feedback from the stakeholders whose input was sought in the survey—litigation-related WSBA sections, the minority bar associations, the WSAJ, and the WDTL. The Task Force provided these stakeholders with a preliminary version of this report, and asked for comments. This final report reflects these stakeholders' input.

### **1. Subcommittee material**

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2. ADR Subcommittee Report: Arbitration, July 2014
3. Discovery Subcommittee Report, August 27, 2014
4. District Court Subcommittee Report, December 31, 2014
5. Pleadings and Motion Practice Subcommittee Report, January 17, 2014
6. Trial Procedure Subcommittee Report, August 2014
7. Alan Alhadeff, Revised Memorandum re Proposed Rules for Mandatory Mediation, December 23, 2014

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20. Spokane County Local Rules LAR 0.4.1 (2000)
21. Oregon Uniform Trial Court Rule UTCR 5.150 (2014)
22. Oregon Uniform Trial Court Rule UTCR 23.010 (2014)
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27. Oregon Court Fee Schedule (2011)
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34. Paula L. Hannaford-Agor, NCSC, Short, Summary & Expedited: The Evolution of Civil Jury Trials (2012)
35. IAALS&ACTL Task Force on Discovery and Civil Justice, A Return To Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs (2012)
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**3. Survey**

The Task Force also conducted a survey of WSBA members most likely to be involved in civil litigation, or affected by its rising costs. The ECCL survey was sent to members of the WSBA's Litigation, Family Law, Business Law, Corporate Counsel, Labor & Employment, Solo & Small Practice, Indian Law, Administrative Law, Civil Rights, Creditor Debtor Rights, and Health Law Sections; to members of the State Minority Bar Associations; and to members of the WSAJ and the WDTL.

Five hundred and twenty-one attorneys took the survey. Not all survey-takers responded to each question. As such, percentages in this summary are relative to the number of responses to a particular question instead of total respondents.

**a. Demographics and practice**

The overwhelming majority of survey respondents are experienced attorneys and dedicated litigators. The largest block of respondents, 25.9 percent, have practiced in Washington State

for more than 30 years. Practitioners of between 21 and 30 years comprise another 19.6 percent of respondents.

Nearly all (94.0 percent) include litigation as part of their practice,<sup>3</sup> with litigation comprising seven-tenths or more of the practice of a majority (54.3 percent), and comprising more than nine-tenths the practice of a full third (33.5 percent) of respondents. A majority (58.3 percent) has practiced litigation for 16 years or more, and 26.8 percent are veteran litigators of more than 30 years.

Most (89.6 percent) respondents litigate in Washington. Of those also practicing in other jurisdictions, Oregon practitioners ranked the highest with 23 responses, followed by California (14 responses), and Idaho (10 responses). State superior court is the most common forum with most respondents (79.9 percent) reporting over half of their litigation occurred there. Over half of them (55.7 percent) conduct more than three-quarters of their litigation in superior court. Only 13.8 percent conduct the majority of their litigation in federal court, and 5.1 percent in state district court. Survey responses were made in 24 of Washington's 39 counties. Most respondents (56.6 percent) practice in King County; the next most-reported seats of practice are Pierce County (9.2 percent) and Clark County (5.4 percent).

A slight majority of respondents (51.2 percent) reported that they represent plaintiffs or petitioners a majority of the time. For 33.6 percent of respondents, plaintiffs and petitioners comprised three-quarters or more of their clientele. On the defense side, 1 in 4 respondents (24.8 percent) reported that defendants represented three-quarters or more of their clientele. Most respondents (55.9 percent) have never represented indigent clients.

Nearly half (42.2 percent) of respondents' practices were at least one-quarter personal injury, wrongful death, or medical malpractice. The other top responses were family law (25.2 percent), business law (19.0 percent), and labor and employment (16.0 percent).

### ***b. Costs of litigation***

Survey respondents agreed that there are several solutions for lowering the costs of civil litigation without limiting the ability to effectively and justly resolve disputes. Of the proposed ideas, mandating good-faith mediation within 60 days of party depositions garnered the highest degree of support—its weighted average was 3.62 on a scale of 1 to 5. An average over 3 indicates agreement. The next-highest rated proposals were a standard list of discovery questions that must be answered by each party early in the litigation (3.55) and restrictions on the number or length of depositions with option to obtain more by court leave (3.48). All the specific proposals presented in the survey garnered general approval, with each averaging a 3.32 or higher.

<sup>3</sup> For purposes of the survey, "litigation" meant all stages of civil litigation from filing of a complaint to trial or settlement.

One hundred and fifty-eight respondents commented individually and provided additional ideas. Common suggestions were higher sanctions or better enforcement of existing rules (23 responses), and limiting expert witness fees or medical costs (17 responses). Interestingly, 17 respondents preferred no additional or even fewer restrictions.

The survey also asked respondents to identify the primary forces driving litigation costs. Attorney fees were identified most often, by over half (54.0 percent) of respondents. Other top factors identified were representation by larger firms (45.0 percent), overly broad discovery requests (43.5 percent), expert witness fees (43.5 percent), and unequal bargaining positions of the parties (42.8 percent). Additional factors identified in narrative responses include the insurance industry and defense lawyers (19 responses each), attorneys drawing out cases for their own compensation (19 responses), and discovery abuse (10 responses).

### *c. Discovery*

Asked to rate the effectiveness of discovery tools, respondents identified depositions as the most useful by far, and requests for admissions the least. On a scale of 1 to 5, with 1 being the least effective and 5 being the most, respondents on average assigned depositions a 3.92 rating, requests to produce a 3.49, and subpoenas duces tecum a 3.28. The remaining discovery tools were rated between *effective* and *slightly effective*.

Almost all respondents (95.0 percent) reported that they strive to keep discovery costs proportionate to the stakes in litigation. The most common methods include: limiting the number of depositions or records custodians (41 responses), limiting the scope of discovery to the most effective means (37 responses), and cooperating with opposing counsel or entering into informal discovery arrangements (35 responses).

Over half of the survey respondents (56.0 percent) reported no difference between jurisdictions regarding the costs or effectiveness of discovery practices. Thirty-seven respondents find discovery more effective in jurisdictions with case schedules and discovery limits. Twenty-four respondents called out federal courts as being less costly because of discovery limits and attentiveness to discovery abuse. Thirteen praised Oregon courts as less costly on account of their limited discovery and lack of expert depositions.

Of note is that most survey respondents (57.4 percent) would decline certain cases because of discovery-related costs. Of these respondents, 32 would turn down medical malpractice or negligence cases due to discovery costs; 23 would turn down cases with too many witnesses or experts; and 22 would turn down cases based on the ratio of discovery costs to recovery potential.

Respondents strongly agreed with the statement that parties are willing to invest more into litigating a case if the stakes are high by assigning the statement an average 4.29 on a scale of 1 to 5, with 1 indicating a strong disagreement and 5 indicating strong agreement. Any values over 3 would indicate agreement. They also agreed that parties "dig in" and litigate every little thing when a lot of money is involved (3.79 average), that existing discovery rules are not being

enforced (3.68), and that discovery costs induce settlements (3.44). When cases settle due to discovery costs, 70.0 percent of survey respondents think that justice is not served.

Two-hundred and fifty-five respondents provided narrative responses and volunteered ideas for curbing discovery abuse. The most common ideas underline the perceived need for court involvement. In fact, 138 responses called for more sanctions or greater enforcement of existing rules.

The survey asked respondents to identify common discovery abuses they have experienced. Most respondents report having experienced blanket objections to discovery requests (72.7 percent), failures to produce responsive documents (67.6 percent), and excessive or burdensome interrogatories (64.5 percent). A slim majority (51.3 percent) report excessive or burdensome production requests. The other 11 forms of abuse were commonly experienced by less than a third of respondents.

#### ***d. Electronically stored information***

ESI does not dominate the litigation practices of survey respondents. Though most respondents (72.7 percent) deal with ESI in their practice, a majority of those (54.3 percent) do so without the assistance of third-party vendors for services such as creating databases or making ESI searchable.<sup>4</sup> A clear majority (77.8 percent) report that managing and reviewing ESI comprises one-fifth or less of their litigation costs; in total 96.8 percent reported ESI as one-half or less of their litigation costs.

As noted, respondents rated ESI an only slightly effective discovery tool, assigning it a rating of 2.70 out of 5. On the other hand, respondents report less discovery abuses involving ESI than other discovery abuses. Of the respondents, 20.9 percent had experienced excessive or burdensome ESI requests, and only 10.6 percent had experienced excessive ESI productions—the least and third-least frequent forms of discovery abuse reported, as discussed.

When asked about primary forces driving litigation costs, only 17.1 percent of respondents identified ESI discovery requests as one of the factors, and only 11.5 percent identified ESI discovery disputes.

<sup>4</sup> The survey did not query respondents on their understanding of, or familiarity with, ESI. Though a slight majority of respondents reported managing ESI in-house, the survey did not distinguish between those who operate in-house discovery databases from those who merely scan and save paper documents.

## Recommendations

Many of the Task Force's recommendations will involve changes to the Civil Rules. Should the Board of Governors approve these recommendations, the Task Force contemplates the Court Rules and Procedures Committee, or a task force or subset of the Committee, would then review them for drafting and finalization. If approved by the Board of Governors, the proposed rules will be forwarded to the Supreme Court for consideration and public comment.

### **1. Initial case schedules**

#### ***a. Current practice***

The superior courts of King County, Pierce County, and Spokane County issue schedules in all civil cases; courts in some other counties do not.

#### ***b. Recommendation***

The Task Force recommends a case schedule be issued upon filing a civil case in either superior court or district court. All superior court cases will initially be set on a 12-month schedule, but may seek to move to an 18-month schedule as described below in the recommendation regarding litigation tiers. Cases filed in district court will receive a 6-month schedule at filing.

Case schedules will include deadlines for initial disclosures, joinder of parties, fact witness disclosure, expert witness disclosure, mandatory mediation, discovery cutoff, pretrial disclosures, and a trial date. A deadline for moving the court to change the assigned tier or to make other adjustments to discovery limitations will also be stated in the case schedule.

Beyond the total time allowed, the courts of individual counties will have discretion to craft their own case schedules. The court in a particular case may, in its discretion, change the case schedule on motion of a party for good cause shown, or on its own motion, considering, but not limited to, prioritizing criminal over civil trials; availability of judges, attorneys, or necessary witnesses; or scheduling conflicts with earlier-filed cases. Counties may also exempt certain categories of civil actions from schedules entirely, for example:

- Change of name;
- Adoption;
- Domestic violence protection order under Chapter 26.50 RCW;
- Anti-harassment protection order under Chapter 10.14 RCW;
- Unlawful detainer;
- Appeal from courts of limited jurisdiction;
- Foreign judgment;
- Abstract of transcript of judgment;
- Writ petition;
- Civil commitment;

- Proceedings under Title 11 RCW (probate and trust law);
- Proceedings under Title 13 RCW (juvenile courts and juvenile offenders);
- Proceedings under Chapter 10.77 RCW (criminally insane); and
- Proceedings under Chapter 70.96A RCW (chemical dependency).

***c. Reasons***

Case schedules are necessary to organize cases and keep parties moving toward resolution. A schedule is the backbone of case management, and is necessary to organize cases, impose a time frame on case resolution, impose deadlines to keep cases moving toward resolution, and implement cost-reduction methods.<sup>5</sup> Deadlines—including a certain trial date—prompt parties to efficiently evaluate and prepare cases, leading to resolution at trial or through negotiation.<sup>6</sup> There is empirical evidence that supports the use of early case management as a method of reducing litigation costs, especially when combined with setting a trial schedule early.<sup>7</sup> The automatic case schedule implements both of these methods.<sup>8</sup>

<sup>5</sup> IAALS & ACTL Task Force on Discovery, *21st Century Civil Justice System: A Roadmap for Reform: Pilot Project Rules 8* (2009) (“Early and ongoing control of case progress has been identified as one of the core features common to those courts that successfully manage the pace of litigation. Active court control, which includes scheduling, setting and adhering to deadlines, and imposing sanctions for failure to comply with deadlines, can ensure that each scheduled event causes the next scheduled event to occur, thereby ensuring that every case has no unreasonable interruption in its procedural progress.”); Rebecca L. Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. Kan. L. Rev. 877, 891 (2013) (“[F]irm trial dates, enforced timelines, streamlined motions practice, and judicial availability are other tools that are being used to move the process along and reduce the time and cost burden on litigants.”).

<sup>6</sup> See IAALS & ACTL Task Force on Discovery, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 20* (2009) (“There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates the settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.”).

<sup>7</sup> James S. Kakalik, *Analyzing Discovery Management Policies: Rand Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 No. 2 Judge’s J. 22, 25 (1998) (“In the main evaluation report, we found that early case management predicted significantly reduced time to disposition; coupling early management with setting a trial schedule early predicted significant further time reductions.”); IAALS, *Civil Case Processing in the Federal District Courts 84* (2009) (“[F]aster disposition times tend to be strongly correlated with setting a trial date early in the litigation, filing motions for leave to conduct additional discovery as soon as possible after the Rule 16 conference ..., and filing motions on disputed

In the Task Force's survey, respondents who practice in multiple jurisdictions found that jurisdictions issuing schedules in all cases, such as the federal courts, were less costly litigation forums. The Pleadings and Motions Practice Subcommittee also found support for universal case schedules from interviewing members of the state judiciary. Judges that the subcommittee interviewed viewed case schedules as an easy-to-implement and effective tool for controlling litigation cost.

The Task Force recommends allowing counties leeway to exempt certain cases from schedules because many civil actions fall outside the heartland of civil litigation to which the schedule recommendation is addressed. King, Pierce, and Spokane County, which issue civil case schedules, each make categorical exemptions for certain types of civil actions. The exemptions carved out by these counties represent practical experience that the Task Force believes should be preserved.

## **2. Judicial assignment**

### ***a. Current practice***

In some counties, cases are assigned to a single judge at the outset of the case. In many counties, they are not.

### ***b. Recommendation***

The Task Force recommends adding the following language to the civil rules on judicial assignment:

A judge shall be assigned to each case upon filing. The assigned judge shall conduct all proceedings in the case unless the court determines it is impracticable to do so.

### ***c. Reasons***

Court involvement in management during key stages of the case, including during the discovery phase, is necessary for any of the recommended cost reduction methods to be implemented

discovery, motions to dismiss and motions for summary judgment as soon as practicable in the life of the litigation.”).

<sup>8</sup> Implementation of mandatory discovery planning is necessary to get the full benefit of early case schedules and trial setting, and vice versa. Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 25 (“We estimate that early management with a mandatory discovery management planning policy is associated with a 104-day reduction when a trial schedule is set early, and with about an 85 day reduction for early management with a mandatory planning policy but without setting a trial schedule early. The estimated effect for early management with neither mandatory planning nor setting a trial schedule early is much smaller—only about twenty-nine days.”).

(proportionality, litigation tiers, court conferences to determine variation from discovery limits).<sup>9</sup> Many respondents to the Task Force's survey complained that judges' failure to enforce existing rules contributed significantly to driving up those costs. A judge responsible for overseeing a case from start to finish would be more familiar with the parties and issues, more able to efficiently resolve discovery disputes, and more willing to curb discovery abuse. This method has been endorsed and adopted by other states after studies or pilot projects.<sup>10</sup>

The Task Force ultimately decided against requiring judicial assignment. Many counties have only a few judges handling civil cases; denying those counties the flexibility to share the work associated with those cases as needed would be an administrative burden. The proposed language preserves this flexibility while making clear that assignment to a single judge for the life of a case is the strongly preferred option.

### **3. Two-tier litigation**

#### ***a. Current Practice***

Statewide, Washington makes few categorical distinctions between cases based on size or complexity. Mandatory arbitration, applicable to claims under \$50,000, is one such distinction. Another is the district court system, open only to claims of \$100,000 or less. Pierce County assigns different case schedules based on a case's subject matter or likely complexity.

#### ***b. Recommendation***

The Task Force recommends adopting a two-tier litigation system (sometimes referred to as multi-track litigation) in superior court cases, which would determine a case's presumptive case schedule and discovery limits based on the tier to which a case is assigned.

##### *Initial assignment to Tier 1*

All cases default to Tier 1 on filing. The Task Force anticipates most cases will remain in that tier.

<sup>9</sup> Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century*, *supra* note 5, at 891 ("Judicial caseflow management has been recognized as another essential element in moving a case fairly, efficiently, and economically through the process. Early judicial involvement in every case, by a single judge assigned to the case from start to finish, is more efficient."); IAALS & ACTL, *Final Report*, *supra* note 6, at 18 ("A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.").

<sup>10</sup> *E.g.* Reforming the Iowa Civil Justice System, Report of the Iowa Civil Justice Reform Task Force 30 (2012) ("One judge assigned to each case for the life of the matter will enhance judicial management, promote consistency and adherence to deadlines, and reduce discovery excesses.").

### *Reassignment to Tier 2*

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine in its discretion whether the case is sufficiently complex for Tier 2. In making this determination, the court may consider the number of parties, claims, witnesses, issues, the necessity of substantial investigation outside the State of Washington, and likely discovery needs; novel legal issues or substantial public interest; substantial monetary value of the stakes (for example, stakes over \$300,000); and other indicia of complexity.

The case schedule will set out a deadline to seek reassignment. After this deadline, a party may only move for tier reassignment if there is good cause for the delayed request.

The following model case schedule sets out example deadlines for a Tier 1 case, subject to modification by the court, or party request approved by the court:

<i>Event/deadline</i>	<i>Date (weeks from trial)</i>
Filing	52
Mandatory discovery conference*	44
Initial disclosures	40
Application for reassignment to Tier 2	30
Joinder of parties	30
Fact witness disclosures	22
Expert witness conference* and disclosures <sup>11</sup>	13
Rebuttal expert witness disclosures	9
Mandatory mediation	8
Discovery cutoff	7
Pretrial disclosures	4
Joint trial management report	2
Trial	0

*\* The discovery conference and expert witness conference are attorney meetings. Assuming attorney cooperation, they will not require court involvement.*

Any change to the case schedule in either tier must be approved by the court.

<sup>11</sup> The expert witness conference and disclosures are discussed in the recommendation regarding mandatory expert witness disclosures, *infra* page 26.

*Tier assignment does not limit award*

If monetary value is a basis for assigning a case to Tier 1 or Tier 2, it does not limit a party's potential recovery. Monetary awards in Tier 1 cases are not limited to any specific amount.

*Arbitration and district court*

Parties with claims of \$50,000 or less are still subject to mandatory arbitration; those with claims within the jurisdictional limit of the district courts can continue to file in district court.

***c. Reasons***

Proportionality is an important tool in the reduction of litigation costs. Many jurisdictions, including the federal courts, have or are adopting proportionality as an explicit limit on discovery. Ninety-five percent of the respondents to the Task Force's survey strive to keep discovery costs proportionate to litigation stakes. Litigating low-stakes cases, however valued, should cost less than litigating high-stakes cases.

Multi-tier litigation applies a measure of proportionality from a case's outset. The IAALS recommends moving away from "one size fits all" litigation rules. Courts in the Southern District of New York,<sup>12</sup> Minnesota,<sup>13</sup> Oregon,<sup>14</sup> Utah,<sup>15</sup> and Washington's Pierce County<sup>16</sup> have experimented with, or adopted, multi-tier litigation. Respondents to the Task Force's survey generally supported the idea, with 53.8 percent agreeing or strongly agreeing that a multi-track litigation system would be effective in lowering litigation costs without substantially limiting the ability to justly resolve disputes.

The general format of the tier system is closely modeled on the amended Utah Rules of Civil Procedure Rule 26(c)(5). The specific discovery limits in each tier were decided by the Task Force based on the available evidence, study, and the Task Force members' own professional experience.

The Task Force considered basing tier assignment on pleadings. Instead, it decided to have Tier 1 be the initial default for all cases to ensure parties would not simply claim the stakes qualified for the more expansive Tier 2 in most cases. The lesson of Oregon's expedited civil

<sup>12</sup> Standing Order, In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, No. M10-468 (S.D.N.Y. Nov. 1, 2011).

<sup>13</sup> Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice, Nos. ADM10-8051, ADM09-8009, ADM04-8001 (Minn. May 8, 2013).

<sup>14</sup> Order Establishing the Oregon Complex Litigation Court and Adopting New UTCR 23.010, 23.020, 23.030, 23.050, and 23.060 Out-of-Cycle, No. 10-066 (Or. Dec. 2, 2010).

<sup>15</sup> Utah R. Civ. Pro. URCP 26(c)(5).

<sup>16</sup> Pierce Cnty. Local R. PCLR 3(h).

trial system, an underused option that allows parties to opt into a shortened litigation track by agreement, suggests at least one party will favor a longer case track in almost all cases.<sup>17</sup>

The Task Force considered basing tier assignment on information supplied during initial disclosures, with no tier assignment until those disclosures had been made. It decided on presumptive Tier 1 assignment both because this establishes a default preference for the shorter (and therefore presumably less expensive) litigation track, and also because it would avoid the necessity of requiring a case-assignment hearing for parties comfortable with remaining in Tier 1. This will result in less administrative burden on the courts.

#### **4. Mandatory discovery conference**

##### ***a. Current practice***

Under the current CR 26(f), one party may seek to frame a discovery plan with the other party, and if that party refuses to cooperate, the party seeking to frame the plan can make a motion to the court to hold a discovery conference.

##### ***b. Recommendation***

The Task Force recommends requiring a mandatory early discovery conference with a list of topics to be discussed in both superior court and district court cases. The parties will be required to meet by a deadline set by the case schedule to discuss the following subjects:

- Whether (if in superior court) the case should be assigned to Tier 2 instead of the default Tier 1;
- Whether the case is suitable for mediation or arbitration, and when early mediation might occur;
- What changes should be made in the timing, form, or requirement for initial disclosures, including when they will be made;
- Subjects on which discovery may be needed, when completed, and whether conducted in phases or focused on particular issues;
- Any issues about disclosure or discovery of electronically stored information, including the form of production;

<sup>17</sup> See Paula L. Hannaford-Agor, NCSC, Short, Summary & Expedited: The Evolution of Civil Jury Trials 60–61 (2012) (“The major disappointment expressed by the Multnomah County trial bench concerning the ECJT program was the unexpectedly slow start for an expedited designation. ... Several of the attorneys mentioned that they had asked the opposing counsel in a number of cases about filing an expedited designation motion before they found one willing to go forward.”).

- Any issues about claims of privilege or work product, whether there is any agreement for the procedure for raising these issues, and whether the court should enter an order under ER 502;
- What changes should be made in the limitation on discovery, and what other limitations should be imposed. For cases seeking reassignment to Tier 2, the parties are encouraged to submit an agreed discovery plan setting out discovery limits appropriate for the case, or submit proposals for the court to decide if no agreement is reached;
- Whether time limits are appropriate for the conduct of trial, including potential time limits on voir dire, opening and closing statements, and each party's presentation of its case, including rebuttal evidence but excluding pretrial motions; and
- Any other order that the court should issue under CR 26(c) or other rule, including whether a special master should be appointed to deal with any aspects of discovery, including electronic discovery.

Following the conference, the parties will submit a joint status report to the court regarding those topics discussed.

### ***c. Reasons***

Rule 26(f) conferences have been successful in federal court in avoiding later discovery disputes and thereby lowering the cost of litigation.<sup>18</sup> The mandatory early conference benefits the parties by making them think about discovery issues early in the litigation and attempt to reach agreement about those issues. If the parties cannot agree, they should at least flag their disagreements for the court in the early stages of the case. Other states are endorsing and adopting these conferences.<sup>19</sup>

<sup>18</sup> Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 25 ("We estimate that early management with a mandatory discovery management planning policy is associated with a 104-day reduction when a trial schedule is set early, and with about an 85 day reduction for early management with a mandatory planning policy but without setting a trial schedule early."); Emery G. Lee & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 *Sedona Conf. J.* 201, 202 (2010) ("It is safe to say that the amendments to Rules 26(f) and 16(b), which prompt the parties and the court to pay 'early attention' to potential e-discovery issues, are rated as the most effective amendments by the judges answering the survey."); IAALS & ACTL, *Final Report*, *supra* note 6, at 21 ("Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.").

<sup>19</sup> NCSC, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules 3 (2013) ("The requirement to meet and confer regarding case structuring[] is expected to reduce the number of in-court case structuring conferences.").

The Task Force also believed requiring the parties to consider how trial might be conducted at the early stages would be valuable. Limits on the conduct of trial would make trials less expensive and therefore more available. If the parties can agree on a trial time schedule from the outset, it would keep attorneys and litigants focused on getting their evidence before the court, avoid repetition, and limit the number of witnesses with repetitive testimony. This not only decreases the length and expense of trial itself, but should also streamline trial preparation. And even if the parties fail to reach an agreement, confronting the potential time and costs of trial early on may produce earlier resolutions in cases that would eventually settle anyway.

The Task Force considered requiring a judicial conference after submission of the parties' joint status report, similar to the scheduling conference required under Federal Rule of Civil Procedure 16(b). The Task Force decided against this practice because it would impose an additional burden on the courts and parties, and because the automatically issued case schedule would obviate the need for a scheduling conference in many Tier 1 cases.

## **5. Mandatory disclosures**

### ***a. Current practice***

There is currently no statewide provision for mandatory initial disclosures, expert-witness disclosures, or pretrial disclosures. Some county local rules provide for deadlines for certain fact witness disclosures.

### ***b. Recommendation***

The Task Force recommends requiring initial disclosures, expert-witness disclosures, and pretrial disclosures in both superior court and district court cases. The timing and subject matter of disclosures may be varied by party stipulation or court order. All mandatory disclosures will be subject to a duty of timely supplementation.

Those categories of civil actions a county exempts from receiving an initial case schedule, as discussed above,<sup>20</sup> are also exempt from initial disclosure requirements.

#### *Initial disclosures*

Initial disclosures, or "laydown" discovery, will be required in advance of formal discovery. Parties will be required to disclose all evidence known to that party that is relevant to the alleged claims or defenses of any party, and the names of all witnesses who have knowledge of that evidence. Because the recommended scope of disclosure relates to the claims or defenses of *any* party, rather than only those of the disclosing party, it will be broader than the disclosures required by the current federal rules. Because of this broad scope, there should be a safe harbor for good-faith failures to disclose.

<sup>20</sup> See *supra* page 19.

Parties will also have to disclose a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under CR 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based; and, for inspection and copying as under CR 34 or CRLJ 26(b)(3)(A), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Parties will be required to make these disclosures according to the deadline set out in the case schedule and the court rules.

Initial disclosures must be based on information reasonably available to a party. Delay based on the need to fully investigate, or another party's failure to disclose, is not excused. The rule should explicitly provide for sanctions for failing to make timely initial disclosures, subject to a good-faith safe harbor.

Later-appearing parties must make initial disclosures within 30 days of being served or joined.

#### *Expert witness disclosures*

Expert disclosures consistent with the federal rules should be required. The timing of the disclosures will be staggered. The party bearing the burden of proof on an issue discloses their expert and expert material first, by the deadline set out in the case schedule. The party or parties without the burden must disclose experts and expert material within 30 days of the first party's disclosure.

A party would disclose the following information (whether in a report or otherwise) if an expert witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony:

- A complete statement of all opinions the witness will express and the basis and reasons for them;
- The facts or data considered by the witness in forming them;
- Any exhibits that will be used to summarize or support them;
- The witness's qualifications, including a list of all publications authored in the previous 10 years;
- A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- A statement of the compensation to be paid for the study and testimony in the case.

Parties must confer regarding the number of expert witnesses. If the parties cannot agree, a party may object on the basis of cumulative or redundant witnesses, and the court will decide the number of expert witnesses permitted at trial. The party seeking to designate an objected-to expert witness bears the burden of demonstrating that the proffered testimony is necessary.

### *Pretrial disclosures*

Pretrial disclosures should be required, by the deadline set out in the case schedule. Disclosures must include:

- The name and, if not previously provided, contact information of each witness, separately identifying those the party expects to present and those it may call if the need arises;
- The designation of those witnesses whose testimony the party expects to present by deposition and a transcript of the pertinent parts of the deposition; and
- An identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises.

### ***c. Reasons***

Mandatory disclosures make available categories of information required to prepare almost every case without resort to discovery. This will allow parties to focus discovery on case-specific facts, and reduce discovery and trial preparation costs. Respondents to the Task Force's survey supported a standard list of questions that parties must answer in every case, with 34.0 percent agreeing and 25.8 percent strongly agreeing this approach would lower litigation cost without impairing just resolutions.

### *Initial disclosures*

Requiring parties to automatically provide certain basic information will mean less discovery has to be conducted and therefore lower costs. Mandatory disclosures are combined with limitations on other methods of discovery to lower costs. The Task Force believes that the requirement of mandatory disclosures will offset the limitation on interrogatories and requests for production that are proposed.<sup>21</sup> It should be noted that there is mixed evidence and opinion regarding the

<sup>21</sup> Douglas C. Rennie, *The End of Interrogatories: Why Twombly and Iqbal Should Finally Stop Rule 33 Abuse*, 15 Lewis & Clark L. Rev. 191, 259 (2011) ("Mandatory disclosures have already taken over many of the functions of interrogatories."); Phillip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 972 (2012) (discussing Utah's expansion of initial disclosure obligations, stating "[t]his change was especially important to achieve proportionality, [as] [d]iscovery tends to be more focused and thus more cost effective when parties know more about the case earlier."); Amy Luria & John E. Clabby, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 Chap. L. Rev. 29, 44 (2005) ("[I]n contrast to interrogatories, mandatory initial disclosures increase the efficiency of litigation.").

efficacy of mandatory disclosures as a means of lowering litigation costs.<sup>22</sup> But it should be further noted that disclosures are criticized for doing too little as well as too much, and while there are critics that propose eliminating disclosure, there are also critics that propose expanding disclosure.<sup>23</sup>

The Task Force considered two approaches to the scope of initial disclosures: the scope found in the current Federal Rule of Civil Procedure 26(a), requiring disclosures of information relating to the claims or defenses of the disclosing party, and the pre-2000 federal disclosures, which required disclosures relevant to the disputed facts alleged with particularity in the pleadings. Ultimately, the Task Force decided to recommend neither version of the federal rule.

The current federal approach to initial disclosures has been in place for 15 years, and many state task forces and pilot projects have endorsed or adopted it.<sup>24</sup> There is a wide body of case

<sup>22</sup> Compare Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 26 (“Our data and analyses do not strongly support the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours, and thereby reducing the costs of litigation, or as a means of reducing time to disposition.”); Special Comm. of the ABA Section of Litigation, *Civil Procedure in the 21st Century: Some Proposals 9–10* (2010) (proposing eliminating “the current requirement that the parties’ disclosures include documents” stating that only 33 percent of ABA Section of Litigation members surveyed believed that initial disclosures reduce discovery and only 26 believe that they save client money, and that “[t]he Committee members, like the ABA Survey respondents, believe that most initial disclosure is not useful”); Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association 73 (June 23, 2012) (collecting evidence that initial disclosures do not increase efficiency and recommending that the federal rules be amended to remove the document disclosure provisions); with Thomas E. Willging, Donna Stienstra, John Shapard & Deab Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 527 (1998) (“In general, initial disclosure appears to be having its intended effects ... [w]e found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure [and] [h]olding all variables constant, those with disclosure terminated more quickly.”). See also Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441, 1464–68 (2011) (contrasting proponents’ arguments that initial disclosures “foster exchange of discoverable information early,” “serve as tools to compel information sharing,” “advances litigation efficiency objectives,” in contrast to critics arguments that they do “not foster efficient discovery,” “foster over discovery,” and “do not fit comfortably in an adversarial system.”).

<sup>23</sup> IAALS & ACTL, *Final Report*, *supra* note 6, at 7 (proposing automatic production in initial disclosure, not just identification of documents that the party will use).

<sup>24</sup> Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 31 (“Many recommendations for case management and discovery limitations presume discovery reforms requiring basic information disclosure in all cases at the outset of litigation without the necessity of discovery requests from a party.”); Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force, *Final Report* 18 (2011) (“Rule 26(a) of the Federal Rules of Civil Procedure provides for three categories of automatic disclosure: initial disclosures[], expert disclosures[], and trial disclosures

law interpreting the scope of required disclosures. However, many stakeholders expressed concern these disclosures would be too narrow to effectively reduce the amount of discovery that would be necessary to investigate and try a case. Further, the disclosures would be asymmetric in nature: the party bearing the burden of proof would generally disclose more, while receiving little in return.

As for the pre-2000 federal disclosures, the Task Force was concerned that their scope, though broader, would be difficult to interpret or apply. The Task Force also hesitated to resurrect a standard that had been abandoned by the federal courts.

The Task Force recommends disclosures that will be broad enough to effectively replace discovery. Plaintiffs will be able to begin building their cases, and defendants advancing counterclaims or affirmative defenses will be able to begin preparing those arguments, on the basis of initial disclosures. And because the disclosures' scope is still tethered to claims and defenses (albeit those of any party rather than only the disclosing party), case law interpreting the scope of the federal rule will still provide some guidance. The safe-harbor exception will protect parties who make good-faith mistakes regarding what information must be disclosed.

#### *Expert disclosures*

Requiring the party offering the expert testimony to disclose certain basic information reduces the amount of discovery the responding party has to conduct, lowering costs.<sup>25</sup> Based on the Task Force member's experience, specifying which party needs to disclose expert material first should also head off discovery disputes over that issue. Expert witness depositions are a significant driver of discovery costs, and allowing objections based on cumulative or redundant experts will help contain needless costs in this area.

#### *Pretrial disclosures*

Mandatory pretrial disclosures allow attorneys to focus on the issues and evidence that will actually feature at trial, reducing discovery and trial preparation costs.

[and] [t]he task force reviewed all three categories of changes, and believes there is now enough experience with the operation of automatic disclosure in the federal courts to warrant the adoption of these federal court automatic disclosure requirements in Minnesota."); NCSC, *New Hampshire Pilot Rules*, *supra* note 41, at 3 ("[A]utomatic disclosures[] are expected to [(1)] reduce the time from filing to disposition ... through a reduction in the amount of time expended on ... discovery" and (2) "reduce the number of discovery disputes ... by making most of the previously discoverable information ... routinely available to the parties without need for court intervention.").

<sup>25</sup> Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 527 ("Like initial disclosure, expert disclosure appears to be having its intended effect, albeit with an increase in litigation expenses for 27% of the attorneys who used expert disclosure ... [but] slightly more attorneys (31%) reported decreased litigation expenses.").

## **6. Proportionality and cooperation**

### ***a. Current practice***

CR 26(b)(1) provides for discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ....” Proportionality between the burden or expense of discovery and a case’s needs, amount in controversy, the importance of the issues, and the parties’ resources is listed in CR 26(b)(1)(C) as a potential limit on discovery. There is no provision expressly requiring the cooperation of parties in the Civil Rules.

### ***b. Recommendation***

The Task Force recommends amending the rules to narrow the scope of discovery, specifically incorporating proportionality as a limit, and to require cooperation among the parties as a guiding principle in employing the Civil Rules.

#### *Proportionality*

- The scope of discovery stated in CR 26(b)(1) will be amended to read that parties may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense ....”
- The scope of discovery in CR 26(b)(1) will also be amended to include proportionality as a limit: “... and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>26</sup>

#### *Cooperation*

- The scope of the Civil Rules will be amended to specify that the courts and all parties jointly share the responsibility of using the rules to achieve the aspirational ends of the civil justice system: “They [the Civil Rules] shall be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.”
- Discovery sanctions will be amended to include a failure to cooperate during the discovery process: “If the court finds that any party or counsel for any party has willfully impeded the just, speedy, and inexpensive determination of the case during the discovery process, the court may, after opportunity for hearing, require such party or his

<sup>26</sup> Much of the proposed language already exists in CR 26(b)(1)(C) and will simply be moved from one part of that rule to another.

attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the impediment.”

### ***c. Reasons***

Narrowing the very broad scope of discovery and explicitly requiring the court to impose proportionality and cooperation should reduce the amount of discovery, or at least tie it closely to the amounts and issues at stake in each case, thereby lowering costs overall.<sup>27</sup> It should also reduce the number and severity of discovery disputes, which will lower costs. Proportionality has been effective in federal court,<sup>28</sup> and is a central proposal of most academic studies and state and federal pilot projects.<sup>29</sup> Several states have also endorsed and implemented an explicit proportionality requirement.<sup>30</sup> The Task Force’s recommended language is based on

<sup>27</sup> Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495 (2013) (“[N]arrowing the scope of discovery to focus on information that is neither privileged nor protected work product and that is relevant to the actual claims and defenses raised by the pleadings could greatly improve things, at least as long as there is a consensus that the purpose of the discovery rules is to prepare for trial,” and “institutionalizing the concept of cooperation during discovery into the rules of procedure—would work hand in glove with the other two recommendations to help trim unnecessary costs and burdens and focus on what facts truly are needed to resolve a particular dispute.”).

<sup>28</sup> Lee & Withers, *Survey of United States Magistrate Judges*, *supra* note 18, at 202 (“[M]ore than 6 in 10 of the judges who responded to the survey reported that the proportionality provisions in Rules 26(2)(C) and 26(c) were being invoked and that, when invoked, were effective in limiting the cost and burden of e-discovery.”).

<sup>29</sup> Final Report on the Joint Project of the IAALS & ACTL Task Force on Discovery, *supra* note 6, at 7 (“Proportionality should be the most important principle applied to all discovery.”); Seventh Cir. Elec. Discovery Pilot Program, Final Report on Phase Two 73–74 (2012) (finding that “Principle 1.03 [proportionality] continues to be well received” and “should be subject to continued testing” based on positive Phase Two survey responses (including 63 percent of judge respondents who “reported that the proportionality standards ... played a significant role in the development of discovery plans for their Pilot Program cases” while 48 percent of judge respondents “reported that the application of the Principles had decreased or greatly decreased the number of discovery disputes brought before the court”)); Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century*, *supra* note 5, at 883–34 (“[P]ilot projects have adopted proportionality as a guiding star throughout the case so that litigation remains just, speedy, and inexpensive.”).

<sup>30</sup> Favro & Pullan, *New Utah Rule 26*, *supra* note 21, at 970 (“To remedy this problem, Utah redefined the scope of permissible discovery. Today, Utah litigants ‘may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality.’ This simple yet profound change has effectively brought proportionality to the forefront of discovery practice.”); Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 30 (“Discovery should be proportional to the size and nature of the case. Overly broad and irrelevant discovery requests should not be countenanced.”); Minnesota Supreme Court Civil Justice Reform Task

language of the amendments to the federal rules that will go into effect (barring an act of Congress) on December 1, 2015.<sup>31</sup> Like other rule changes, however, an explicit proportionality provision in the rules will only be effective if courts enforce them in a thoughtful way.<sup>32</sup>

Similarly, an express cooperation requirement has been tested in federal and state pilot programs (and found to be effective) and implemented by some states.<sup>33</sup> The Task Force's cooperation recommendations both make cooperation an underlying principle of the civil rules, and make cooperation an enforceable requirement during discovery. The Task Force noted that the most recent proposed federal amendments declined to adopt an enforceable cooperation duty, citing to the potential for collateral litigation of conflict with a duty of effective representation. However, Washington's Rules of Professional Conduct require *diligent* rather

Force, *Recommendations*, *supra* note 24, at 17 (the task force recommended adopting proportionality rule which "would create a presumption of narrower discovery and require consideration of proportionality in all discovery matters, limiting discovery to the reasonable needs of the case," noting "[t]his recommendation is probably one of the most important recommendations the task force advances.").

<sup>31</sup> Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Sept. 2014), at 30–31. "After considering [2,300] public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some modifications as described below, will improve the rules governing discovery." *Id.* at 5–6. The Report goes on to discuss the reasons supporting the proposed proportionality language. *Id.* at 6–8.

<sup>32</sup> Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889, 908 (2009) ("[P]roportionality rules can be criticized equally for allowing opposite errors, both false negatives (failing to detect and halt discovery abuse) and false positives (finding disproportionate some costly discovery that actually is justified by high evidentiary value and case merit). Erroneous pro-plaintiff rulings unjustifiably increase litigation costs and pressure defendants to settle unmeritorious cases; conversely, erroneous pro-defendant rulings deny plaintiffs the ability to press meritorious claims successfully.").

<sup>33</sup> Seventh Cir. Elec. Discovery Pilot Program, *Final Report*, *supra* note 29, at 71–72 (finding that "Principle 1.02 [cooperation] continues to be well received" and "should be subject to continued testing" based on positive Phase Two survey responses); Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century*, *supra* note 5, at 883–84 ("The pilot projects are also a proving ground for the notion of cooperation among and between the parties. Attorneys who have put aside gamesmanship and embraced the concept of cooperation report that it has not undermined the zealous representation of their clients. In fact, it is becoming an essential component of appropriate representation—particularly in the area of electronic discovery—in order to achieve a just, speedy, and inexpensive determination for clients."); *see also* The Sedona Cooperation Proclamation, 10 Sedona Conf. J. 331 (2009 Supp.).

than *zealous* representation,<sup>34</sup> and in fact explicitly prohibit abuse of legal process<sup>35</sup> or tactical delays.<sup>36</sup> The Task Force considers these requirements entirely consistent with a duty of cooperation.

## 7. Discovery limits

### a. Current practice

Most counties do not limit discovery requests by category.

### b. Recommendation

The Task Force recommends presumptively limiting discovery in superior court cases assigned to Tier 1. Limits on discovery in district court should be reexamined in light of the limits in Tier 1. The Task Force offers no presumptive limits for Tier 2 and instead limits will be set by agreement between the parties, or as ordered by the court after the mandatory discovery conference.

<i>Discovery</i>	<i>Presumptive District Court limit</i>	<i>Presumptive Tier 1 limit</i>
Interrogatories, including all discrete subparts	15	25
Requests for production	20	40
Total fact deposition hours	20	40
Expert deposition hours per expert	4	4

Parties could vary these limits by stipulation or on a showing of good cause. Agreed changes to discovery limits do not require court approval unless they would affect deadlines in the case schedule. However, courts should not automatically give the presumptive limits greater weight than case-specific party proposals.

### c. Reasons

Discovery limits tied to case size are a direct, if inexact, means of imposing proportionality. Limits will force parties to be efficient with their use of the available discovery. Less discovery

<sup>34</sup> "A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." Wash. R. Prof'l Conduct RPC 1.3 cmt. 1.

<sup>35</sup> "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Wash. R. Prof'l Conduct RPC 3.1 cmt. 1.

<sup>36</sup> "Dilatory practices bring the administration of justice into disrepute. ... Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." Wash. R. Prof'l Conduct RPC 3.2 cmt. 1.

also means fewer discovery disputes and fewer opportunities for discovery abuse. On the Task Force's survey, respondents to practicing in other jurisdictions also noted that those with discovery limits generally involve less litigation cost.

Because limiting discovery may mean constricting litigants' access to information, the Task Force considers mandatory disclosures, discussed below, as a necessary accompaniment to this recommendation.

### *Interrogatories*

"Restrictions on the number of interrogatories with option to obtain more by court leave" were supported by a majority of respondents to the Task Force's survey. Limiting the number of interrogatories should mean less discovery activity. Additionally, there should be no prejudice to parties' ability to conduct discovery since interrogatories are generally of limited value in discovery,<sup>37</sup> and mandatory initial disclosures will allow parties to be more targeted in their use of interrogatories.<sup>38</sup> There is general support for the proposition that limits on interrogatories will reduce discovery costs and abuse, and empirical evidence that reduction in interrogatories reduces attorney work hours.<sup>39</sup> There are those who argue that interrogatories, or certain types of interrogatories, should be eliminated entirely.<sup>40</sup>

The specific numerical limits on interrogatories in each tier were derived from the federal rules. The current limit under Federal Rule of Civil Procedure 33 is 25 interrogatories, including discrete subparts, and other states are also implementing limitations.<sup>41</sup>

<sup>37</sup> Respondents to the Task Force's survey rated interrogatories, along with requests for admission, as sometimes ineffective and susceptible to abuse.

<sup>38</sup> As discussed in the Advisory Committee Notes to the 1993 amendments to FRCP 33(a) ("Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)–(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable.").

<sup>39</sup> Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 27 ("Our analysis lends support to the policy of limiting interrogatories as a way to reduce lawyer work hours and thereby reduce litigation costs.").

<sup>40</sup> Special Comm. of the ABA Section of Litigation, *Civil Procedure in the 21st Century*, *supra* note 22, at 13 ("No party may propound any contention interrogatory unless all parties agree or by court order."); Rennie, *The End of Interrogatories*, *supra* note 21, at 263 ("Interrogatory practice does nothing to advance the goals of the Federal Rules of Civil Procedure, and instead, contributes to the popular dissatisfaction with the American justice system both in the legal community and the public at large").

<sup>41</sup> NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 (limitation of interrogatories to 25 "were put in place in light of the amount for information that parties are now entitled to under [rule changes including

### *Requests for production*

In general, less discovery activity should mean lower costs. Limiting the number of requests for production should mean less discovery activity, and will force parties to be more efficient with the production requests they have available. There should be no prejudice to parties' ability to conduct discovery because mandatory initial disclosures will allow parties to be more targeted in their use of requests for production.

### *Depositions of fact witnesses*

"Restrictions on the number of or length of depositions with option to obtain more by court leave" were supported by a majority of respondents to the Task Force's survey. The Task Force also noted that while respondents overwhelmingly considered depositions *extremely effective* or *very effective* tools for justly resolving disputes, depositions are also the most expensive method of discovery.<sup>42</sup> In general, less discovery activity should mean lower costs. Limiting the number of hours of depositions should mean less discovery activity, and will force parties to be more efficient with the deposition hours they have available.<sup>43</sup> An hour-based limitation (instead of limiting the number of depositions) will provide parties with greater flexibility to take more, shorter depositions or fewer, longer depositions depending on the needs of the case.<sup>44</sup> The number of hours allowed at each tier should be sufficient for most cases. The goal is for parties to be thoughtful and efficient in how they conduct discovery.

### *Depositions of experts*

In general, less discovery activity should mean lower costs. Limiting the number of depositions for experts, and their length, should mean less discovery activity, and force parties to be more efficient with the expert deposition hours they have available. Given the breadth of the expert disclosures, this number of hours for a deposition of the expert was thought to be sufficient.

initial disclosures], which are expected to greatly reduce the amount of discovery needed to prepare for trial.").

<sup>42</sup> Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 576 (finding that "depositions accounted for about twice as much expense as any other discovery activity").

<sup>43</sup> IAALS & ACTL, *Final Report*, *supra* note 6, at 10 (suggesting numerical limits such as "only 50 hours of deposition time"); NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 ("PR 4 restricts ... the number of hours of depositions to 20 hours.").

<sup>44</sup> The hours limitation is modeled after the Utah Rules of Civil Procedure. The comments to Utah Rule 26(c) state "[d]eposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes"; *see also* R. of Superior Ct. of N.H. Applicable in Civ. Actions, Rule 26, Depositions ("[A] party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed 20 unless otherwise stipulated by counselor ordered by the court for good cause shown.").

## **8. E-discovery**

### ***a. Current practice***

The current Washington Court Rules have incorporated federal e-discovery rules in CR 34, and parts of CR 26.

### ***b. Recommendation***

#### *Rule changes*

The Task Force recommends incorporating parts of the federal rules, as recently amended into the Washington Court Rules:

- "Electronically stored information" will be added to the list of discovery methods in CR 26(a);
- CR 26(b)(1), discussing the scope of discovery, will be amended to specify that
  - A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The responding party must identify by category and type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information from the identified sources.
  - On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.
- CR 37 will be amended to provide: "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, that court: (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in litigation may (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default."
- CRLJ 26 will be amended to follow the changes made to CR 26.

### *Protocol*

The courts will promulgate a protocol and proposed order on electronically stored information, consistent with the Model Agreement re: Discovery of Electronically Stored Information used by the federal courts of the Western District of Washington.

#### ***c. Reasons***

The federal amendments have been relatively successful in lowering litigation costs associated with electronic discovery in federal court.<sup>45</sup> Other jurisdictions (federal and state) implementing protocols similar to the one recommended by the Task Force have reported beneficial results.<sup>46</sup> Other recommendations of the Task Force—case schedules; increased judicial management; the Rule 26(f) conference; proportionality—should also improve the course of e-discovery.<sup>47</sup>

### **9. Motions practice**

#### ***a. Current practice***

In most counties, even the simplest of motions require counsel to appear for oral argument. In King County Superior Court, most non-dispositive motions are decided without oral argument.

#### ***b. Recommendation***

Dispositive motions should always receive oral argument. The Task Force recommends that non-dispositive motions in superior or district court be decided without oral argument, unless

<sup>45</sup> Lee & Withers, *Survey of United States Magistrate Judges*, *supra* note 18, at 202 (“The responses [to a survey of magistrate judges] indicate that, by and large, the [e-discovery] rules are working to achieve the ‘just, speedy, and inexpensive determination of every action’ as dictated by Rule 1 of the Federal [Civil Rules]”).

<sup>46</sup> Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 46 (“The Task Force recommends that the bar, through the Iowa State Bar Association, develop a best practices manual for electronic discovery in civil litigation. This could address the issues of identification, scope, and preservation of electronically stored information likely to be involved in specific types of civil cases.”); Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 Rich. J.L. & Tech. 8, 38 (2013) (“At least thirty-two districts, however, have acknowledged the discovery of electronically stored information in civil litigation. Of these districts, seven merely make passing reference to e-Discovery in their local rules. Another twelve districts emphasize e-Discovery topics deemed most worthy of attention at Rule 26(f) conferences. Nine districts, as well as others using model orders, have adopted pragmatic solutions that address gaps in the Amendments more aggressively. At least five additional districts have released non-binding guidance for parties on the topic of e-Discovery.”).

<sup>47</sup> See The Sedona Conference Cooperation Proclamation: Resources for the Judiciary 9 (2014) (Public Comment Version) (making similar recommendations).

the court requests oral argument or grants a party's request for oral argument. Oral argument will otherwise only be permitted in the following instances:

- Motions in superior court for revision of a commissioner's rulings, other than rulings regarding involuntary commitment and Title 13 proceedings (juvenile offenders);
- Motions for temporary restraining orders and preliminary injunctions;
- Family law motions; and
- Ex parte and probate motions.

***c. Reasons***

Even brief oral arguments require an attorney to prepare, travel, wait in the court, present argument, and then return back to their office. Oral arguments also consume limited court time that could be dedicated to trial work. These costs can be avoided by allowing some motions to be decided on the pleadings alone. King County Superior Court and the U.S. District Courts of both of Washington's federal districts resolve most non-dispositive motions without requiring oral argument for non-dispositive motions.<sup>48</sup> Not requiring oral argument for all motions will also help make district court a more attractive forum for civil cases.

The Task Force's recommendation is based on King County Superior Court's Local Rule LCR 7(b)(3).

**10. Pretrial conference**

***a. Current practice***

The current civil rules do not provide statewide standards for trial management. CR 16 provides that a superior court may, in its discretion, hold a hearing on the conduct of trial. Trial management tends to be on a case-by-case basis, either based on the general practices of the trial court judge, or prompted by party objection.

***b. Recommendation***

The Task Force recommends the parties in superior court civil cases be required to prepare a Joint Trial Management Report, except in cases where a domestic violence protection order or a criminal no-contact order has been entered between parties. The report will include:

- The nature and a brief, non-argumentative summary of the case;
- A list of issues which are not in dispute;
- A list of issues that are in dispute;

<sup>48</sup> See King County LCR 7(b)(3); Local Rules W.D. Wash. LCR 7(b)(4); Local Rules E.D. Wash. LCR 7(h)(3)(C).

- Suggestion by either party for shortening the trial, including time limits for presenting each party's case at trial, and limits on the number of expert witnesses per part or per issue;
- An index of exhibits (excluding rebuttal or impeachment exhibits);
- A list of jury instructions requested by each party; and
- A list of names of all lay and expert witnesses excluding rebuttal witnesses.

The discretionary hearing currently available under CR 16 will remain available if the parties cannot reach an agreed report, if one of the parties refuses to cooperate, or if there is a domestic violence protection order or a criminal no-contact order entered between parties. After receiving a trial management report or holding a hearing, the court will enter a Pretrial Order as provided in CR 16.

### ***c. Reasons***

Trial may be the single most expensive and time consuming aspect of litigation.<sup>49</sup> Perhaps for this reason, the number of civil jury trials is decreasing.<sup>50</sup> But because having a jury of your peers make a determination of the facts of a case has long been the backbone of the American civil justice system,<sup>51</sup> there will be a loss to our society if this method of resolving disputes

<sup>49</sup> See Paula Hannaford-Agor & Nicole L. Waters, NCSC, *Estimating the Cost of Civil Litigation* 7 (2013) ("For all case types, a trial is the single most time-intensive stage of litigation, encompassing between one-third and one-half of total litigation time in cases that progress all the way through trial.").

<sup>50</sup> "According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009." IAALS & ACTL, *A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs* 1 n.1. (2012); see also Marc Galanter & Angela Frozena, *Pound Civil Justice Inst.: 2011 Forum for State Appellate Court Judges, The Continuing Decline of Civil Trials in American Courts* 2 (2011) ("The recent data on civil trials can be summed up in two stories: no news and big news. The no news story is that the trend lines regarding the decline of trials are unchanged. The big news story is that the civil trial seems to be approaching extinction.").

<sup>51</sup> The federal constitution directs that the right to a jury trial shall be preserved, U.S. Const. amend. VII, and our state constitution declares that right "inviolable," Const. art. 1, § 21. See also *Parsons v. Bedford*, 28 U.S. 433, 466 (1830) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union .... As soon as the [U.S. C]onstitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.").

between people is lost due to the sheer expense to the parties.<sup>52</sup> It is also an access-to-justice issue—if the common man or woman cannot afford entry to the courtroom, they are denied access to the core of our justice system.

Requiring parties to consider limiting the length of trial, the number of witnesses, and focus on the issues actually in dispute, will encourage shorter, less costly, and therefore more available trials. Reducing the number of expert witnesses in particular should decrease costs, both in trial and preparation time. In the Task Force’s survey, nearly half of the respondents considered expert witness expenses as a driving force of rising litigation costs, and limiting experts was one of the respondents’ most-volunteered solutions.

The Task Force considered imposing presumptive limits on time available to the parties to present their case at trial and on the number of expert witnesses available to each party. However, the Task Force ultimately decided this would take too much away from the court’s discretion. Presumptive limits would also not take into account a case’s particular facts and needs. Instead, the Task Force decided to require the parties to consider adopting limits voluntarily, subject to the court’s approval. This will engage the parties in the task of containing trial cost while preserving judicial discretion and authority to manage the courtroom.

## **11. District court**

### ***a. Current practice***

District courts’ civil jurisdiction includes damages for injury to individuals or personal property and contract disputes in amounts up to \$100,000.<sup>53</sup> Aside from criminal cases, many of the cases filed in district court are infractions, collection actions, domestic violence or anti-harassment protection orders, or landlord–tenant disputes.

### ***b. Recommendation***

Many recommendations already discussed affect district court:

- Initial case schedule issued on filing, with a 6-month period from filing to trial, except in categories of cases as determined by individual county<sup>54</sup>;
- Mandatory early discovery conference<sup>55</sup>;

<sup>52</sup> “The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials.” IAALS & ACTLA, *A Return To Trials*, *supra* note 50, at 1.

<sup>53</sup> The \$100,000 civil jurisdictional limit becomes effective on July 24, 2015, as a result of SB 5125. This modifies RCW 3.66.020, which before this legislative action had set a \$75,000 jurisdictional limit.

<sup>54</sup> *See supra* pages 16–18.

<sup>55</sup> *See supra* pages 23–25.

- Mandatory initial, expert witness, and pretrial disclosures except for categories of cases exempt from initial case schedules<sup>56</sup>;
- Principles of proportionality and cooperation incorporated into discovery rules<sup>57</sup>;
- Number of interrogatories allowed without prior court permission brought in line with Tier 1 limits<sup>58</sup>;
- Remainder of federal e-discovery rules incorporated into state rules<sup>59</sup>; and
- Non-dispositive motions decided on the pleadings, unless the court permits oral argument.<sup>60</sup>

District court jurisdiction should also expand, concurrent with superior court jurisdiction, to include unlawful detainer proceedings under Chapter 59.12 RCW and anti-harassment protection orders involving real property, so long as the disputes remain within the jurisdictional limit.

### ***c. Reasons***

According to responses to the Task Force’s survey, though over half of respondents reported that over 20 percent of their civil litigation cases involved amounts under \$50,000—within the district court jurisdictional limit—the overwhelming majority, 85 percent, conducted less than a fifth of their civil litigation in district court.

The Task Force believes district courts can offer an expedited and less costly alternative to superior courts for some cases. Its recommendations will make district court a more viable and affordable forum for civil litigation: case schedules will keep litigation moving and focus attorney efforts; early discovery conferences, mandatory disclosures, and discovery limits will streamline discovery and reduce discovery abuse; eliminating the need for oral argument will greatly reduce the costs of motions practice.

<sup>56</sup> See *supra* pages 25–30.

<sup>57</sup> See *supra* pages 30–33.

<sup>58</sup> See *supra* page 34.

<sup>59</sup> See *supra* pages 36–37.

<sup>60</sup> See *supra* pages 38–38.

## **12. Alternative dispute resolution**

### ***a. Current practice***

#### *Mediation*

Litigants who engage in mediation mostly (but not invariably) do so in the form of a “summit conference”—late in the case, after discovery has been completed, sometimes on the eve of trial. To make mediation sessions more productive, mediators regularly engage in pre-session contact with attorneys or parties. District courts in Clallam, King, Pierce, Thurston, and Skagit County require pretrial settlement or mediation conferences.

#### *Private arbitration*

Private arbitration is entered into by contract between the parties. Arbitration has increasingly come to resemble full-scale litigation in terms of time and expense. As with civil litigation, much of the cost increase comes from expanding discovery practices.

#### *Mandatory arbitration*

The Mandatory Arbitration Act, Chapter 7.06 RCW, and the Mandatory Arbitration Rules make civil cases involving claims of \$50,000 or less subject to arbitration.

### ***b. Recommendation***

#### *Mediation*

The Task Force recommends requiring mediation in superior court cases before completing discovery unless the parties stipulate that mediation would be inappropriate, or one or more parties show good cause. Parties seeking to avoid mediation, or delay mediation until after discovery, will need to file their stipulation or reasons for good cause after holding the Rule 26(f) discovery conference. Unless the court then waives the requirement, the parties will be required to mediate no later than 60 days of completing depositions of the respective parties, or 60 days before the start of trial, whichever is sooner.<sup>61</sup> Unless excused by the court, all parties attending mediation must have in attendance a person with full settlement authority.

The recommended mediation deadline falls earlier than eve-of-trial summit mediation, but even earlier mediation may be possible and beneficial in many cases. The Task Force supports approaching the various WSBA sections about developing standards for the timing of early mediation within their respective practice areas.

The Task Force also recommends a set of suggested mediation practices:

<sup>61</sup> Settlement conferences will continue to be available in all cases, including after the deadline for mandatory mediation has passed.

- Parties should consider engaging in mediation at an earlier stage than required by the rules. Certain types of cases typically require little discovery. Very early mediation can be fruitful in such cases.
- Parties should consider engaging in limited-scope mediation focused on specific issues:
  - Even when there is little possibility of settling all issues in a dispute, or of settling issues before conducting discovery, the parties should consider mediating particular issues that might be resolved.
  - In cases where discovery is likely to be extensive or contentious, the parties should consider mediating the scope and conduct of discovery.
- Parties and mediators should consider varying the format of mediation, depending on the needs of the case and disposition of the parties:
  - Conducting mediation as a series of sessions rather than a one-day event; or
  - Using shuttle-style mediation, in which the mediator meets with the parties individually, to identify areas of potential settlement before the parties' positions are entrenched.
- Mediators should consider pre-session meetings, in person or by phone:
  - With counsel; or
  - With counsel and client.

#### *Private arbitration*

The Task Force recommends a set of suggested arbitration practices:

- The arbitrator should identify the scope of arbitration with input from the parties.
- Parties should consider limiting or eliminating the length and number of depositions and the extent of expert discovery.
- Parties should consider voluntarily narrowing the scope of arbitration at outset. For example, selecting a single arbitrator; conducting focused single-issue arbitration; establishing specific limitations on relief.
- If not already contractually agreed among the parties, arbitrators should consider scheduling planning and coordinating meetings upon selection to set the terms and conditions of the arbitration process.
- The following topics should be addressed in the arbitration contract. If they are not, the arbitrator or panel should address them in early rulings:
  - Whether there is a challenge to arbitration;
  - Whether arbitration should be global, addressing and resolving all issues, or whether its scope should be limited to one or more specific issues;

- What procedural rules will govern conduct and location of proceedings (for example, AAA, JAMS, JDR, or some other protocol);
- What limits will be placed on discovery, for example, lay-down discovery or e-discovery rules. Without some discovery limits, there is little difference between arbitration and full-scale litigation;
- What jurisdiction's substantive law will govern resolution of the dispute;
- Whether mediation is required either before arbitration or early in arbitration, and if so on what schedule;
- What interim relief, if any, will be available, whether injunctive or otherwise;
- Whether to allow expedited electronic exchange of briefs, submissions, and other documents;
- Whether to allow pre-hearing motions for summary judgment or partial summary judgment;
- What timing should be required for the arbitration process: (1) mandate either to conduct or consider early mediation; (2) date(s) to commence and complete discovery; (3) date for final coordinating conference prior to hearing on the merits; (4) date to commence hearing on the merits; (5) duration of the hearing day, and possible imposition of time limits on presentation of evidence and argument; and
- Final award: (1) time limit on the arbitrator or panel between completion of hearing and issuance of award; (2) form of award (basic, reasoned, or detailed findings and conclusions), including a specific statement if the parties do not want a compromise or "split the baby" award; (3) what permanent relief may be granted (legal or equitable); (4) whether to allow award of costs and fees; and (5) whether to allow judicial review.

### *Mandatory arbitration*

The Task Force makes no recommendation as to mandatory arbitration. Mandatory arbitration will continue to be available to parties in superior court civil cases involving claims of \$50,000 or less.

### ***c. Reasons***

#### *Mediation*

Early mediation offers benefits both over litigation and late-stage mediation.<sup>62</sup> When the ADR Subcommittee surveyed Washington State mediators, it found that parties who engaged in early mediation realized significant savings: costs associated with discovery, trial preparation, and expert witnesses could be largely avoided. Those parties also avoided other negative effects of undergoing litigation—often a stressful and disruptive process—by shortening the time between the emergence of a problem and finding a solution.

Respondents to the Task Force’s survey rated depositions as the most effective form of discovery for resolving disputes: 22.1 percent rated it *extremely effective*, and the combined total for *effective*, *very effective*, and *extremely effective* was 92.1 percent. After party depositions, both sides should have enough information to mediate effectively.<sup>63</sup>

The Task Force recommends mediation after party depositions because such depositions can occur before the bulk of other discovery costs have accrued, yet are highly effective at clarifying and resolving factual issues. This should not be viewed as an authoritative definition of early

<sup>62</sup> Judicial Council of Calif., Admin. Office of the Courts, Evaluation of the Early Mediation Pilot Programs (2004) (finding that, in a 30-month study of five early mediation programs, each program decreased the trial rate, the time to disposition, the litigants’ costs, and the courts’ workload; while increasing the litigants’ satisfaction with the dispute resolution process); Donna Stienstra, Molly Johnson & Patricia Lombard, Fed. Judicial Ctr., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 at 235–36 (1997) (finding that cases in a mandatory early assessment and mediation program reduced the average disposition time by two months and estimated litigation costs by \$15,000 per party over cases participating in optional mediation); John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolutions*, 24 Ohio St. J. on Disp. Resol. 81, 101 (2008) (“Time and cost savings are presumably related to the time in the process when parties begin mediation because cases that start mediation late in litigation have less time and money to ‘save’ compared to the normal litigation process.”).

<sup>63</sup> Mediation need not wait until the parties have complete information. A vast majority (from 76–89 percent, depending on the jurisdiction) of attorneys in cases within federal ADR demonstration programs reported that the first ADR contact (mostly mediation) occurred “at about the right time”—despite the fact that the cases were referred to ADR at very different stages. Stienstra, *et al.*, *Study of the Five Demonstration Programs*, *supra* note 62, at 20.

mediation, but rather as a date on which some of the benefits of truly early mediation may still be realized. Because the time at which early mediation will be most fruitful will vary depending on the type of case, the individual WSBA sections will be best positioned to develop guidelines about what early mediation means to their respective members.

Pre-session contact is a growing trend among mediators. More than half the mediators interviewed by the ADR Subcommittee reported that they regularly engaged in such contact, which helps familiarize the mediator with the facts and disputes, focus the attorneys on key issues, and lower barriers to resolution. As a result, the pre-session contact made actual mediation likelier to bring resolution. Breaking mediation into a series of short meetings can likewise increase the effectiveness of mediation by allowing more time for both sides to consider the issues, instead of concentrating the mediation process into a single high-stakes event.

#### *Private arbitration*

Arbitration's traditional advantage over civil litigation, reduced time and expense, has been eroded by the expanding scope of discovery in arbitration. Streamlining the typical arbitration would make the practice more efficient and attractive. However, private arbitration is a contractual affair between the parties, into which the Bar has little authority to intrude. For that reason, the Task Force recommends creating a series of best practices to which arbitrators and arbitrating parties can refer. These practices are based on the professional experience of the members of the ADR Subcommittee, as well as input from experienced arbitrators and lawyers who frequently participate in arbitration.

#### *Mandatory arbitration*

The mandatory arbitration rules were intended to give parties in low-stakes cases access to a trial-like procedure. However, the Task Force's recommendations will increase parties' access to relatively quick and affordable trials, by making the district courts more attractive to litigants and by introducing Tier 1 in superior court. Parties may choose to forgo mandatory arbitration once these other options become available. Further, currently courts and parties incur significant expenses because of de novo appeals from mandatory arbitration. At this point the Task Force cannot predict to what extent parties will continue to access mandatory arbitration. The Task Force therefore makes no recommendation at this time.

## Conclusion

Courts, litigants, and lawyers across the country are faced with escalating litigation costs. Litigants may lose access to the civil justice system if they cannot afford to vindicate or defend their rights in court.

Washington is not the first state to recognize the problem, nor the first jurisdiction that has decided to address it. The Task Force has benefited from the lessons learned, and the choices made, by similar task forces from outside Washington. Equally important, the Task Force has drawn on the experience and opinions of the judges, lawyers, and other knowledgeable parties whom it interviewed, surveyed, and met with—and of those who have agreed to serve as members. This report, and the recommendations it contains, rests on this broad base of practical knowledge.

The Task Force's recommendations aim to make our courts affordable and accessible while preserving the paramount goal of justly resolving disputes. Some of the recommendations are bold, some minor; none are made lightly. They are the result of four years of study and deliberation.

The ultimate success of these recommendations, should the Board of Governors approve, will depend on buy-in by the bench and bar. The Task Force urges the Board not only to adopt these recommendations, but to help educate the judges and lawyers who will be responsible for making the recommendations a reality. One of the recommendations relates to the principles of proportionality and cooperation, and these two principles infuse the entirety of the Task Force's work. Controlling litigation costs means making those costs proportional to the issues from which litigation arises. Achieving proportionality, or taking steps towards that goal, will take the cooperation of all of us who work in and use our state's courts. Only together can we ensure that justice is available for all.

# **SUPPLEMENTAL 2**



**WSBA**

BOARD OF GOVERNORS

**Report of the  
Board of Governors of the  
Washington State Bar Association  
  
On the Recommendations of the  
Escalating Costs of Civil Litigation Task Force**

**July, 2016**

## **I. INTRODUCTION**

In 2011, the Board of Governors (BOG) of the Washington State Bar Association established the Task Force on the Escalating Costs of Civil Litigation (ECCL Task Force). The ECCL Task Force Charter (Exhibit 1) references two foundational reports, which point to a rise in litigation spending: (1) the American Bar Association (ABA) report, "Pulse of the Profession;" and (2) the 2009 WSBA Member Survey. In 2007, 80 percent of those surveyed by the ABA described litigation as cost prohibitive. In 2009, 75 percent of WSBA members "agreed" (39%) or "strongly agreed" (36%) that litigation costs have become prohibitive in recent years.

The BOG chartered the Task Force to perform two essential functions:

- (1) Assess the current cost of civil litigation in Washington State Courts and make recommendations on controlling those costs. "Costs" shall include attorney time, as well as out-of-pocket expenses advanced for the purpose of litigation. The Task Force will focus on the types of litigation that are typically filed in the Superior and District Courts of Washington.
- (2) In determining its recommendations, the Task Force shall survey neighboring and similarly situated states to compare the cost of litigation in Washington and review reports and recommendations from other organizations such as the Institute for the Advancement of the American Legal System, the American College of Trial Lawyers, and the Public Law Research Institute.

In June of 2015, the Task Force issued its Final Report. Exhibit 2. The BOG reviewed the Final Report, thoroughly explored the issues involved, and received stakeholder feedback both in writing and through comment during public sessions. This Report of the Board of Governors recounts the BOG's methodology and proposes an action plan for implementing certain Task Force recommendations.

## **II. DEVELOPMENT OF THE ECCL TASK FORCE RECOMMENDATIONS**

The BOG appointed seventeen members to serve on the ECCL Task Force, including twelve WSBA members, one member from each of the four levels of the judiciary, and one representative from the Clerk's Association. During the course of its work, the Task Force enlisted thirty-two additional subcommittee members with experience in six specialized areas and received support from WSBA staff.

While the Task Force started with regular meetings in July of 2011, the BOG extended the Task Force's Charter three times to ensure sufficient time for the Task Force to complete its work. The Task Force organized itself into six subcommittees, which worked separately to address specific aspects of civil litigation. It heard presentations from multiple individuals knowledgeable about issues considered; it reviewed extensive literature and research from around the country, including from other states' and federal courts' responses to rising costs of civil litigation; and it reviewed case studies and nationwide litigation cost survey data. In accordance with its charge to seek input from affected lawyers, judges, and other entities, the Task Force even conducted its own survey of WSBA members involved in, or affected

by civil litigation, with over 500 WSBA members participating. The information collected formed the basis of the Task Force's initial findings, which it then circulated to multiple litigation-related WSBA sections, minority bar associations, and civil litigation associations for review and comment. Following this input, the Task Force issued its Final Report to the BOG in June, 2015.

According to the ECCL Task Force, its recommendations seek the following:

...[S]peed case resolutions—inside or out of the courtroom—while preserving the legal system's ability to reach just results. The centerpiece of the Task Force's recommendations is a system of early case schedules and discovery limits, assigned based on case's complexity, counterbalanced by mandatory initial disclosures. Other recommendations address e-discovery, alternative dispute resolution, and judicial case management.

Its Final Report further recognizes that "family law and its distinct constellation of concerns were beyond the Task Force's ability to fully consider without unreasonably extending its charter." Accordingly, the Task Force reserved this topic to future efforts except to the extent its recommendations also address this area of the law.

### **III. REVIEW BY THE BOARD OF GOVERNORS OF THE ECCL TASK FORCE RECOMMENDATIONS**

The BOG openly vetted the Final Report starting in the fall of 2015 and made the Final Report publicly available to all interested parties through the WSBA website. The Chair of the Task Force presented background information and the recommendations and the BOG received input and comments about the Task Force's recommendations through June of 2016. The BOG afforded the WSBA membership an opportunity to comment during three extensive sessions conducted during its January, March, and April 2016 public meetings. The BOG received live testimony from interested members and stakeholder groups on each of the twelve Task Force recommendations. The written materials and input considered by the BOG are attached as Exhibits 1 – 11.

### **IV. DECISIONS OF THE BOARD OF GOVERNORS ON THE ECCL TASK FORCE RECOMMENDATIONS**

Following review of the Task Force's Final Report, its survey and supporting work, written comments and input to the Task Force, and the written and oral comments and input to the BOG, the BOG considered and voted to support or not support the Task Force's recommendations at its June, 2016 meeting.

The Task Force issued twelve distinct recommendations in the Final Report (Exhibit 1), which details current civil litigation practices and provides support for each proposal. The following is a list of the recommendations by topic and the vote of the BOG as to the implementation of each:

#### ***1. Initial Case Schedules for all civil cases in either the superior court or the district court.***

The BOG supported this recommendation by a 13 to 0 vote, with 1 abstention.

**2. Individual judicial assignment for all civil cases upon case filing.**

The BOG supported this recommendation by a 14 to 0 vote.

**3. Two-tier litigation system in superior court cases.**

The BOG rejected this recommendation by a 10 to 1 vote, with 3 abstentions.

**4. Mandatory discovery conferences in both superior court and district court civil cases.**

The BOG supported this recommendation by a 12 to 2 vote.

**5. Mandatory initial disclosures in both superior court and district court civil cases.**

The BOG supported this recommendation by a 9 to 4 vote with 1 abstention. These disclosures should be conformed to discovery standards.

**6. Incorporating proportionality as a discovery limit and adding cooperation as a guiding principle in employing the Civil Rules.**

This recommendation was divided into two topics, with each topic voted upon separately. The BOG rejected incorporating proportionality as a discovery limit by a 12 to 2 vote. The BOG supported requiring cooperation as a guiding principle by a 14 to 0 vote.

**7. Adopting a system of presumptive discovery limits in superior court and district court cases.**

The BOG rejected this recommendation by a 12 to 1 vote, with 1 abstention.

**8. Incorporating parts of the federal rules, as recently amended, into the Washington Court Rules regarding E-discovery.**

The BOG rejected this recommendation by a 10 to 0 vote, with 4 abstentions.

**9. Eliminating oral argument for non-dispositive civil motions in superior or district court, unless the court requests oral argument or grants a party's request for oral argument.**

The BOG rejected this recommendation by a 6 to 7 vote, with 1 abstention.

**10. Require a pretrial conference where parties prepare and submit a Joint Trial Management Report followed by a discretionary hearing with the court.**

The BOG supported this recommendation by a 12 to 1 vote, with 1 abstention.

**11. Proposed District Court Changes.**

- a. This topic consists of multiple recommendations to be addressed to District Court civil cases.

The BOG voted by a 12 to 1 vote, with 1 abstention, to revise this recommendation consistent with the prior determinations as follows:

- Initial case schedule issued on filing (BOG supports);
  - Mandatory early discovery conference (BOG supports);
  - Mandatory initial expert witness and pretrial disclosures (BOG supports);
  - Principles of proportionality (BOG rejected);
  - Principle of cooperation (BOG supports);
  - Discovery limits on number of interrogatories (BOG rejected);
  - Federal e-discovery rules incorporated (BOG rejected);
  - Non-dispositive motions decided on the pleadings (BOG rejected);
- b. District court jurisdiction expanded, concurrent with superior court jurisdiction, to include unlawful detainer proceedings under Chapter 59.12 RCW, so long as the disputes remain within the jurisdictional limit.

The Board of Governors voted to reject this recommendation by an 8 to 5 vote with 1 member not present for voting.

- c. District court jurisdiction expanded, concurrent with superior court jurisdiction, to include anti-harassment protection orders involving real property, so long as the disputes remain within the jurisdictional limit.

The BOG voted to reject this recommendation by an 8 to 5 vote with 1 member not present for voting.

**12. *Requiring mediation in superior court cases before completing discovery, and recommending other alternative dispute resolution practices.***

The BOG voted to support this recommendation by an 11 to 2 vote, with 1 abstention.

**V. NEXT STEPS AND REQUEST TO THE SUPREME COURT**

The next step in the process of implementing the changes to the civil rules outlined above will be for the BOG to convene a rule-drafting group. It would be responsible for preparing and proposing necessary civil rule changes to effectuate the accepted recommendations. All agree that this would be a significant and enduring task. Before convening such a group of WSBA member volunteers, the BOG seeks guidance from the Supreme Court:

*Is there interest from Supreme Court to consider these rule changes for this process to proceed?*

In requesting this guidance, the BOG is mindful that the Court is not being asked for a binding or an advisory opinion. Rather, if there is modest interest from the Court to consider these rule changes, the BOG would take that information into serious consideration in deciding whether and how to proceed.

## VI. CONCLUSION

The BOG appreciates the significant effort of the members of the ECCL Task Force and their commitment to help “make our courts both affordable and accessible while preserving the paramount goal of justly resolving disputes.”<sup>1</sup> With the decisions by the BOG to support some of these recommendations, the BOG believes that the process begun in 2011 should continue toward implementation of meaningful change, which will have a positive impact upon the costs of civil litigation in Washington courts.

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<sup>1</sup> ECCL Task Force Final Report conclusion, page 45.

## EXHIBITS LISTING

1. ECCL Task Force Charter
2. ECCL Task Force Final Report
3. Outline of the ECCL Task Force Reconsiderations
4. ECCL Task Force Recommendations PowerPoint (PDF)
5. July 15, 2015, memo to the Board of Governors discussing changes between the Task Force preliminary and final recommendations
6. ECCL Task Force Survey Results Summary PowerPoint (PDF)
7. ECCL Task Force Survey Results memo
8. ECCL Task Force Survey questions and answers (including narrative responses)
9. Letters and emails to the ECCL Task Force with comments on the Task Force Draft Report and Recommendations
10. Letters and emails to the Board of Governors with comments on the Task Force Final Report and Recommendations
11. Portions of Board of Governors' meeting minutes regarding the ECCL Task Force Report and Recommendations for January 2016; March 2016; April 2016; June 2016; and July 2016.

# **SUPPLEMENTAL 3**

**COOPERATION COMMENTS RECEIVED**

Kitsap County Civil Practice and Procedure Committee for Superior Court  
Response to Proposed Rules

It is the stated primary policy goal of these proposed rules to reduce the costs of litigation. However, the general consensus of the Kitsap County Civil Practice and Procedure Committee for Superior Court is that two of these proposed Rules - the "Reasonable Cooperation" rule of CR 1 and the "the Mandatory Mediation" rule of requirement will not have a marked effect on the stated goal of reducing the cost of litigation. If anything, it is our view that these will both increase the costs of litigation.

Proposed Rule Regarding "Reasonable Cooperation"

This proposed rule suffers from a number of problems. First, it is redundant to existing Rules, including to RPC 3.4 and CR 26, where the attorneys are already required to act reasonably and in good faith. What else is this Rule adding to the practice of law in Washington state? If it is not adding anything new, it should not be included.

If it is meant to add something new or an additional duty, this is a bigger issue as the term is undefined and inherently subjective. Because it is undefined, it is going to be problematic as judges are given no guidance on what constitutes "reasonable" cooperation or not. This is especially concerning given its new prominence in Civil Rule 1 and throughout the other proposed Rules like the proposed case scheduling rule, etc. If this is truly an issue that needs to be addressed to supposedly save on the costs of litigation, then it should be easily defined so it can be implemented in a concrete and consistent manner throughout the State. This would also allow stakeholders to address concerns about the definition now.

Conversely, however, if the drafters cannot define this term, how do they expect lawyers, parties and judges to apply it on a case by case basis with any reasonable certainty? Do the drafters of this Rule view "reasonable cooperation" akin to pornography where they cannot define this term "but know it when they see it"? If so, the rule is inherently subjective - what may be subjectively viewed as legitimate litigation strategy and tactics by a judge in Kitsap County (and thus not subject to sanction) may be subjectively viewed as something totally different by a judge in Pierce County. Given this lack of guidance to both attorneys and judges, this is likely to lead to more litigation as people argue over "reasonable cooperation". This focus on trying to subjectively define reasonable cooperation between attorneys now personalizes the issue between the attorneys rather than keeping the focus on the case and clients. This appears to run counter to the stated intention of reducing the cost of litigation.

Proposed Rule on Mandatory Mediation:

The proposed mandatory mediation Rule will not have any marked effect on reducing the cost of litigation. If anything, it will increase the costs of litigation as parties who are not ready or willing to voluntarily mediate a case are compelled to do so at their cost. In these scenarios, this Rule simply becomes a "check the box" requirement. Mediation is only a good thing if both sides are ready and interested in it. Reluctant parties who are compelled to mediate are not likely to reach a positive outcome and if anything, they will feel resentment to the process and possibly further entrench their position and increase resentment against the other party as they must incur the expense of the mediation as part of the litigation. Conversely, it necessarily follows that if both sides are interested in mediation at any given point in the litigation (early or otherwise), there is no need for a Rule mandating it.

Because this Rule forces parties to spend money on mediation - including the mediator fees and their own attorneys - this means they are either having to spend more overall or they are not spending it on other matters that are more substantively productive such as on discovery.

In addition, the proposed Rule, as written, grants significant power to the mediator to decide things like the length of the mediation, parameters, required attendance, etc. There are no guidelines for this and has the potential for abuse by overzealous mediators.

The proposed Rule, as written, also has no limits or guidance on the length of time or the cost of the mandatory mediation. Where a mediator is appointed by the Court, the parties have no control as to duration, cost or other parameters - the only limitation is the hourly fee for the Court-selected mediator (under the proposed Rule, each County will set the fee schedule). However, this creates the problem that there are no limits or guidelines for each County, which can lead to widely disparate mediation costs between Counties. Moreover, the fee schedule is unclear whether this is an hourly fee or a flat mediation fee. Regardless, what are the guidelines as to any minimum or maximum lengths for the mediation?

In addition, in a private mediation, any party can terminate at any time and if they believe they are not getting anywhere. In a mandated mediation under this Rule, this Rule provides no guidance on whether there is a set minimum number of hours a party must attend to show "reasonable cooperation" as they would now be required to show under the proposed CR 1. Is it up to the discretion of the mediator to terminate the mediation or may the parties still do so and if so, under what terms so they do not run afoul of the new "reasonable cooperation" rule? The ambiguity of these issues seems to raise a lot more risk of an increase in the cost of litigation than it does in reducing litigation.

Regardless of whether the Rule incorporates some additional terms to clarify timing or cost, the bottom line is that if the parties are not ready mediate, they will more than likely not reach a settlement at a mandated mediation. Instead, they will spend at least several thousand dollars for their attorneys to prepare and appear for several hours just to comply with the mandatory

requirements of this Rule. This hardly seems like meeting the requirement of reducing the cost of litigation. And, while a party can always file a motion for relief from this mandatory mediation requirement if they feel that the mediation would be fruitless, this is simply more money being spent for that motion - again increasing rather than reducing the cost of litigation.

Given the above concerns and that these Rules are more likely going to increase the cost of litigation than reduce it, we strongly urge the Task Force and the Board of Governors to abandon both proposed Rules altogether.

Adopted and approved by the following members of the Civil Practice and Procedure Committee for Kitsap County Superior Court:

Isaac Anderson, Attorney

The Hon. Jeffrey Bassett, Kitsap County Superior Court

Kevin W. Cure, Attorney

Philip J. Havers, Attorney

David P. Horton, Attorney

Greg Memovich, Attorney

Todd Tinker, Attorney

## Litigation Section Executive Committee Response to Proposed Rules

The stated primary policy goal of the proposed Civil Rules is to reduce the costs of litigation. The Litigation Section Executive Committee has reviewed and discussed the proposed changes to the Civil Rules and supports many of the proposed changes, such as judicial pre-assignment and mandatory disclosures, but the Committee unanimously opposes two of the proposed rules - the "Reasonable Cooperation" and the "Early Mandatory Mediation" rules - because they run contrary to the goal of reducing the cost of litigation, and will likely have the opposite effect.

### **"Reasonable Cooperation" - Civ. Rule No. 1**

Our main concern with the reasonable cooperation rule is that "reasonable cooperation" is undefined and, thus, allows for subjective interpretation, which could lead to misuse and abuse. The rule is especially concerning given its new prominence in Civil Rule 1 and throughout the other proposed Rules. The rule should be clearly defined so that it can be implemented in a consistent manner throughout the State. This would also allow stakeholders to address concerns about the definition and scope of the requirement now, rather than through additional motions practice and argument before individual judges.

If the drafters are unable or unwilling to define this term, they should decline to enact this new rule rather than defer to lawyers, parties, and judges to define it with any reasonable certainty or consistency. What may be subjectively viewed as legitimate litigation strategy and tactics by a judge in one jurisdiction (and thus not subject to sanctions) may be viewed differently by a judge in another jurisdiction. Given the lack of guidance to attorneys and judges, additional litigation, motion practice and expenses will result as attorneys argue over the meaning of "reasonable cooperation" to the financial detriment of their clients, the litigants. Of equal concern, focusing on reasonable cooperation between attorneys may have the unintended consequence of personalizing the issue rather than keeping the attorneys focused on the case and clients. Simply put, the imposition of an undefined and generic reference to "reasonable cooperation" does not appear to further any of the valid and commendable goals that the rule is directed towards.

As a final point, the proposed rule is redundant to existing Rules, and thus is unnecessary. Under RPC 3.4, attorneys are required to "act reasonably". Under CR 26, attorneys are required "to participate in good faith in the framing of a discovery plan", etc. Similar obligations exist throughout the rules governing attorneys and litigation. Put another way, to the extent there are issues with attorneys and litigants who fail to "reasonably cooperate," it is not due to a lack of rules.

### **Early Mandatory Mediation Requirement**

It is also the unanimous opinion of the Executive Committee for the Litigation Section that the proposed early mandatory mediation requirement will not have the intended effect on reducing the cost of litigation. Rather, it will likely increase the costs of litigation.

For instance, if the parties are not ready to mediate "early," they will now be required to spend thousands of dollars participating in a process that will not lead to meaningful advancement of the case. As most litigators will attest, a mediation undertaken prematurely without substantial knowledge of the facts from discovery and/or depositions can have dramatic consequences, causing the parties to entrench in their respective positions, fueling animosity, and ultimately undermining the parties' ability to secure a meaningful and amicable resolution of their dispute.

In addition, because parties who are not ready to mediate a case early will now be compelled to do so, the early mandatory mediation rule will simply become a "check the box" requirement—a well-known formality in counties, such as Benton/Franklin County, that already have a mandatory settlement conference requirement. In other words, early mediation is beneficial if both sides are ready and willing to resolve the matter. However, if both sides are prepared and willing to resolve the matter early, the parties are already free to mediate, and there is no need to enact a Rule mandating it.

At least two members of the Litigation Executive Committee practiced in Illinois before practicing in Washington. Illinois has a similar mandatory mediation rule and both executive members can attest that this Rule did not result in any reduction in the cost of litigation. Instead, although well-intentioned, it proved to be a bureaucratic waste of time, and increased the cost of litigation as parties who were not yet ready to mediate were forced to pay for a mediation they did not want and knew would be fruitless.

Further, because this proposed Rule forces parties to spend money on mediation - including the mediator fees and their own attorneys' fees and travel costs to prepare mediation briefs and attend half- to full-day mediations - they will be forced to either spend more in costs overall or utilize limited resources on mediation that could be better applied to substantive issues, such as discovery and case development.

In addition, the proposed Rule grants significant power to the mediator to decide the length of the mediation, parameters of the mediation, required attendance, etc. There are no guidelines for this, and there is a potential for abuse by overzealous mediators.

The proposed Rule is also silent on a number of mediation requirements and does not include limitations on the length of time or the cost of the mandatory mediation. For mediators

appointed by the Court, parties will have no control as to duration, cost, or other parameters - the only limitation is the hourly fee for the Court-selected mediator (under the proposed Rule, each County will set the fee schedule). Absent limits or guidelines for each County, there is a risk of substantially disparate mediation costs between Counties. It is also unclear whether the cost of mediation per the fee schedule will be an hourly charge or a flat mediation fee.

In addition, under the proposed Rule, there is no guidance on the minimum number of hours a party must attend to show the "reasonable cooperation" that would be required under the proposed CR 1. Likewise, it appears to be left to the sole discretion of the mediator to determine when, or if, the parties can terminate a mediation, and under what circumstances. The ambiguity of these issues leads directly back to the Committee's concerns regarding the proposed modifications to CR 1—by failing to provide at least some guidelines or parameters, the rule opens itself to the likelihood of increased litigation as parties dispute whether their opponents have properly complied.

It is also unclear whether the parties must participate in the early mediation. Although the proposed rule mandates that all persons necessary to settle the case must attend, the precise meaning of this requirement is unclear. In the context of a personal injury case, is the requirement satisfied if the insurance adjuster appears without the actual defendant? If the insurance adjuster only has authority up to a certain dollar amount, which is common, has the defendant violated their participation obligation? If only the adjuster appears, but the policy limits are insufficient to settle, does the absence of the named defendant constitute a violation? And what are the remedies and defenses for an alleged breach? If the insurer believed in good faith that the case could be settled for less than policy limits and did not request the defendant to appear, is this a defense to the breach of the rule that all persons necessary to settle the case must appear? The Rule is silent on these issues, leaving each Court without assistance in resolving the disputes that will certainly arise out of the proposed rule.

### **Conclusion**

For the above reasons, the Litigation Section Executive Committee opposes the proposed "Reasonable Cooperation" and the "Mandatory Mediation" rules. Although well-intentioned, neither rule will achieve the ends for which they are intended and, in fact, run the risk of increasing litigation costs.



May 24, 2018

Sherry Linder  
Washington State Bar Association  
Civil Litigation Rules Drafting Task Force  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101

RE: Proposed Rules

Dear Ms. Linder:

The Washington State Association for Justice would like to submit the following for consideration of the proposed rule changes.

**Cooperation -- proposed changes to CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26 and CR 37**

WSAJ strongly supports the purpose and intent of current Civil Rule 1 to “secure the just, speedy, and inexpensive determination of every action” and shares in the WSBA position that “all parties jointly share the responsibility of using the rules to achieve the aspirational ends of the civil justice system.” Because RPC 3.1, RPC 3.4, and RPC 8.4 all address and require cooperation, our members view this as an important ethical obligation, as well.

However, WSAJ has some concern whether the proposed changes to CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26 and CR 37 which purport to “inculcate a duty of cooperation” are necessary, are enforceable, and are perhaps an unnecessary risk for unintended and counterproductive consequences. At the core of these concerns is the inherently subjective mandate expressed in Proposed CR 1 and Proposed CRLJ 1 that “all parties and their legal counsel shall *reasonably cooperate* with each other and the court in all matters.” (Emphasis supplied). Every new rule increases the opportunity for interpretation and the likelihood of additional motion practice. “Reasonable cooperation” is often in the eye of the beholder and it is conceivable – perhaps inevitable – that these proposed new rules amendments will cause an exponential increase in the volume of motions our trial judges will need to make room for on their already overburdened calendars. Indeed, the proposed changes to CR 11 appear to invite such motion practice.

For these reasons, we feel that the WSBA should carefully consider what these proposed new rules add that *cannot* already be addressed by a trial court through existing rules. In the end, we believe the current Civil Rules provisions provide judges with adequate tools to address the concerns we all share.

Indeed, the Civil Rules enforcement is a critical issue, though only tangentially addressed by the ECCL Task Force in its June 15, 2015 Final Report to the WSBA Board of Governors ("ECCL Final Report"). Its Final Report relies for data on a handful of unscientific and anecdotal lawyer surveys conducted between 2007 and 2009 by the ABA and WSBA. Not surprisingly, the surveys suggest that lawyers believe litigation is too expensive. ECCL Final Report at p. 1. These surveys also demonstrate that, despite the suggestion of a variety of contributing factors, a prevailing, common belief among most lawyers surveyed is that *judicial enforcement of the Civil Rules generally and discovery rules in particular will solve the perceived problem.* The ECCL Task Force itself concluded that "active judicial case management – including a willingness to enforce discovery rules – is indispensable in controlling litigation costs." ECCL Final Report at p. 3 (emphasis supplied). The Final Report reflects "common suggestions" from attorneys surveyed for "higher sanctions" and "better enforcement of existing rules," and strong agreement among attorneys "that existing discovery rules are not being enforced." ECCL Final Report at p. 13-14 (emphasis supplied). The Final Report notes that "[m]any respondents to the Task Force's survey complained that judges' failure to enforce existing rules contributed significantly to driving up [litigation] costs." ECCL Final Report at p. 18. The Final Report admits that, even with regard to its proposals, "the rules will only be effective if courts enforce them in a thoughtful way." ECCL Final Report at p. 30.

Every identified goal of the WSBA ECCL Task Force in its June 15, 2015 and in the July 2016 Report of the WSBA Board of Governors can be achieved through strict judicial enforcement of our current Civil Rules. This is likely an area where more rules are unnecessary and the danger of an expansion of motion practice may be a significant unintended and counterproductive consequence.

#### **Mandatory Early Mediation – proposed new Superior Court civil rule**

WSAJ does not oppose the general idea of early mediation, or any other effort reasonably calculated to resolve civil lawsuits efficiently and fairly without compromising Washington citizens' right to access our courts and seek justice. However, our membership is deeply concerned that some ideas which appear to further that goal on paper will not be effective in practice and may have unintended consequences contrary to the stated goal of reducing the costs of civil litigation.

WSAJ believes that the WSBA's proposed Early Mandatory Mediation Requirement, as currently drafted, will not be effective in resolving cases early and will, in practice, unnecessarily increase the costs of litigation for plaintiffs in civil cases. Mediation is expensive for all parties – both because of the mediator's fee and because of the preparation required. Most cases cannot be resolved until discovery is complete or nearly complete, disputed legal issues are resolved by the Court, and each party can evaluate the likelihood of success at trial. There are simply too many variables to require across-the-board early mediation in every civil case before discovery is complete.

Most civil lawsuits involve insurance coverage and insurance adjusters. In those cases, whether a case settles depends almost entirely on whether the insurance adjuster has enough information, enough authority, and enough motivation to pay fair value to settle the case. As a practical matter, cases that do not settle before a plaintiff is forced to file a lawsuit will not settle until there has been a change in circumstances in the case – usually from new information obtained during discovery -- or a change in perspective of the assigned insurance adjuster – often the produce of a defense attorney's legal

analysis. A change in the insurance company's position almost never occurs until formal discovery occurs, the parties conduct depositions of key witnesses, the Court resolves significant legal issues, and the parties disclose some or all of their experts' opinions.

For these reasons, WSAJ opposes the current version of the proposed Early Mandatory Mediation Requirement. However, WSAJ's position may be different if the proposed rule was revised to make early mediation mandatory if, and only if, (a) one party requested early mediation and (b) the party requesting early mediation were required to pay the mediator's fees. In the case where a defendant's insurance company desired to mediate early, this would prevent a plaintiff from being required to incur the substantial expense of an early mediation while helping to assure, to some degree, that the defendant and the defendant's insurance company were "serious" about trying to resolve the case early.

Under such a procedure, early mediation would be mandatory if, and only if, one party requested it. The request would be required by a Court-imposed deadline, the requesting party would be responsible for the cost of mediation, and nearly all other elements of the current proposed Early Mandatory Mediation Requirement would be acceptable to WSAJ.

#### **Initial Disclosures – proposed changes to CR 26 and CRLJ 26**

WSAJ does not generally oppose the WSBA Draft Proposal to Amend Civil Rule 26 and Civil Rule of Limited Jurisdiction 26 pertaining to mandatory initial disclosures. WSAJ strongly favors limiting, as the proposed rule does, disclosures of only information that "supports the *disclosing party's* claims or defenses." Proposed CR 26(b)(1)(A) (emphasis supplied). We also strongly support the concept that this proposed new rule does not interfere with other discovery tools and allows discovery to be conducted without delay despite the initial disclosure requirement.

WSAJ does, however, strongly suggest some changes to the current proposal. First, the proposed rule lacks clarity as to *when* the initial disclosures must be made. WSAJ believes any proposed new rule should be realistic with regard to deadlines. A deadline of 60 or 90 days following service of the first defendant would be acceptable and realistic, in our view.

More importantly, while the current proposal does not appear to contemplate expert witnesses or their opinions as within the purview of this mandatory initial disclosure requirement, this exception must be explicit in any new rule. For instance, proposed CR 26(b)(1)(A) requires disclosures of "each individual that possesses any relevant information that supports the disclosing party's claims or defenses." This must be clarified to specifically exclude the identify of expert witnesses and the substance of expert opinions. Similarly, proposed CR 26(f)(1)(B) should be omitted entirely. The current discovery rules, including CR 26, CR 30, CR 33 and CR 34, provide adequate and time-tested methods of obtaining information concerning an opposing parties' experts. Any proposed new initial disclosure requirement should specifically exclude expert witnesses and their opinions from early disclosure. This can easily be accomplished by amending Proposed CR 26(b)(1)(A) to exclude experts and their opinions and by removing CR 26(f)(1)(B) entirely.

There are many good reasons to exclude experts from any mandatory initial disclosure requirement. Early, mandatory disclosure of experts and their opinions would be clearly unworkable and unfair because they require plaintiffs to disclose expert opinions prior to completion of meaningful and substantial discovery. In nearly every case, a retained expert needs the information a plaintiff obtains *through discovery* before he or she can provide an opinion. This includes depositions of key fact witnesses and medical providers. This discovery, in most cases, constitutes the facts and data used by the expert to formulate expert opinions.

Further, requiring initial disclosures of experts and their opinions will result in a dramatic increase in litigation costs, particularly for the party with the burden of proof. For instance, a medical negligence plaintiff will be required to pay an expert to prepare for these early initial disclosures and then again to evaluate discovery and revise standard of care opinions based on that discovery. An employment claim plaintiff would have a similar, unnecessarily expensive process once documents and information are obtained through discovery from an employer. This will no doubt create a corresponding increase in discovery motion practice.

WSAJ also has significant concerns about the proposed changes CR 26(b)(E) pertaining to insurance information. First, it is unclear why the proposed rules do not simply use the same language as the current CR 26(b)(2) (“insurance agreements”). In particular, the existing provision references “any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights).” CR 26(b)(2)(ii). Proposed CR 26(b)(1)(E) omits this language. There can be no reasonable basis for this omission: if the goal is to provide a true picture of insurance coverage, then the initial disclosure *must* include all documents which may in any way potentially affect coverage. Such documents are almost always uniquely in the possession or under the control of a civil defendant and the defendant’s insurance company. For this reason, Proposed CR 26(b)(1)(E) must be broadened at the very least to mirror the language of our current CR 26(b)(2) and include “any documents affecting coverage” with the specific examples included in the current rule.

Thank you for considering our views. Please contact us if you have any questions.

Sincerely,



Darrell Cochran  
WSAJ President



Peter Meyer  
Vice-Chair, WSAJ Court Rules Committee



*Justice... Professionalism... Service... Since 1886*

May 23, 2018

VIA EMAIL: CLTF@wsba.org

Civil Litigation Rules Drafting Task Force  
Washington State Bar Association

Dear Task Force Members:

The King County Bar Association Judiciary and Litigation Committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We are writing to provide our input regarding the draft Civil Rules that you have prepared in response to the WSBA Board of Governors recommendations from the Task Force on the Escalating Costs of Civil Litigation.

Before addressing the suggested changes to the Civil Rules, we would like to commend the effort and good work by the Civil Litigation Rules Drafting Task Force. We greatly appreciate the time that has been devoted by the Task Force members to attempt to reduce the cost of civil litigation. This is a very important topic and one that must be addressed by the Bar Association and the Supreme Court to reduce the escalating costs of civil litigation.

Our Committee's comments on the Civil Rules are limited to the following topics: (1) Cooperation; (2) Initial Disclosures; (3) Mediation; and (4) Initial Case Schedules. The comments regarding Cooperation, Initial Disclosures and Mediation are included in the enclosed memorandums. Subcommittees were formed to develop and draft the enclosed memorandums that were then reviewed and approved by our Committee.

As to the Initial Case Schedules, we have only one comment regarding the need for a separate complex case track assignment. The original final report of the ECCL Task Force included a recommendation for assignment of cases to a "Tier 2" case schedule for cases that were designated as complex. The ECCL Task Force's language on this topic is as follows:

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine in its discretion whether the case is sufficiently complex for Tier 2. In making this determination, the court may consider the number of parties, claims, witnesses, issues, the necessity of substantial investigation outside the State of Washington, and likely discovery needs; novel legal issues or substantial public interest; substantial monetary value of the stakes (for example, stakes over \$300,000); and other indicia of complexity.

ECCL Final Report, p. 19.

We believe that a separate case schedule for Tier 2 complex cases is still appropriate for the reasons identified by the ECCL in its Final Report. A separate Tier 2 complex case schedule is also appropriate given the Civil Litigation Rules Drafting Task Force's draft rules regarding Early Mandatory Mediation. We believe that complex cases often require additional time before a productive mediation can occur. Thus, a separate case schedule along with a later mediation date is appropriate for these types of cases. If the Task Force does not believe that a separate Tier 2 complex case schedule is appropriate, the Task Force should consider a later early mediation date for complex cases for the reasons stated above.

Our Committee previously reviewed and provided input to the Escalating Costs of Civil Litigation Task Force and to the WSBA Board of Governors regarding the proposed recommendations of the ECCL Task Force. Many of our Committee's recommendations were incorporated by the ECCL Task Force and eventually adopted by the WSBA Board of Governors. We are hopeful that our recommendations regarding Cooperation, Initial Disclosures, Mediation, and Initial Case Schedules will assist you in drafting the proposed rule changes recommended to the Board of Governors.

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We feel strongly that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. To that end, we request that the Civil Litigation Rules Drafting Task Force make revisions to the proposed rule changes as provided within.

Very respectfully yours,

**KCBA Judiciary & Litigation Committee**

Brett M. Hill, Co-Chair

cc: Andrew Prazuch

Attachments: Memos regarding (1) Cooperation; (2) Initial Disclosures; and (3) Mediation

# Memorandum

May 10, 2018

**To** WSBA Civil Litigation Rules Drafting Task Force

**From** King County Bar Association Judiciary & Litigation Committee

**Re** WSBA Civil Litigation Rules Drafting Task Force, draft proposals on “cooperation” amendments

This memo represents the comments of the King County Bar Association’s Judiciary and Litigation Committee to the WSBA Civil Litigation Rules Drafting Task Force, regarding that Task Force’s draft proposals implementing the “cooperation” requirement recommended by the WSBA Task Force on the Escalating Costs of Civil Litigation and approved by the WSBA Board of Governors.

The Committee generally approved of the goals of the draft proposals, which would amend CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26, and CR 37 to require reasonable cooperation between parties, and making available sanctions for a failure to cooperate. Reasonable cooperation between opposing parties during litigation is of course a laudable goal, which the WSBA Board of Governors have embraced. The Task Force’s draft proposed amendments would be a step towards moving litigants towards that goal.

The Committee has comments on four aspects of the draft proposals:

*First*, what constitutes “cooperation” in the context of an adversarial process—or, conversely, a failure to reasonably cooperate—is left open to interpretation in the draft proposals. The Committee is concerned that without guidance, reasonable minds may differ as to where the line between effective advocacy and noncooperation lies. This could produce additional litigation regarding (lack of) cooperation, underenforcement of the new rules, or both.

To avoid confusion, the Committee recommends the Task Force look to two sources. The first is the Guidelines of Professional Courtesy, developed by the King County Bar Association and adopted in 1999. The second is the WSBA’s Creed of Professionalism, adopted by the Board of Governors in 2001. Both these sources address the issue of civil, professional, and cooperative attorney conduct. The principles they contain may help guide attorneys in abiding by the new cooperation requirements. Copies of both the Guidelines of Professional Courtesy and the Creed of Professionalism are included as attachments.

*Second*, the Committee is concerned the amendments as drafted may be prone to underenforcement, because they would allow a court to impose no sanction even if it finds that a litigant unreasonably failed to cooperate with the court or opposing counsel. When the WSBA was in the process of considering the ECCL Task Force’s report in the

course of making its recommendations, multiple commenters identified lack of judicial enforcement as a significant problem, and a driver of the escalating litigation costs these amendments are meant to address. This was consistent with our group's experiences. With these proposed amendments, judges might be hesitant to impose any sanctions, even when there has been a clear and unreasonable failure by one party to cooperate.

Without *consistent* sanctions, there is little incentive to bring a failure to cooperate to the court's attention. Without consistent sanctions, there is likewise little deterrent to prevent strategic failures to cooperate. These failures unreasonably drive up litigation costs, consume court resources and are highly prejudicial to the administration of justice.

Compare a failure-to-cooperate motion to a motion to compel discovery. With the discovery motion, even without monetary sanctions, there remains an incentive to bring the motion—the possibility of obtaining of an order compelling production. But for a failure to cooperate, it is unclear what remedy beyond monetary sanctions would be appropriate.

The Task Force should go further in making cooperation an enforceable requirement. One way would be requiring at least some sanctions whenever a court finds that a party's conduct amounted to a failure to reasonably cooperate. We acknowledge this would be taking a step further than the original ECCL Task Force recommendation, which left the decision to impose sanctions for failures to cooperate discretionary. But in our opinion, requiring some sanction for a party's violation of the cooperation rule—even a small sanction—would be a significant step towards achieving the change in litigation culture the cooperation amendment was intended to achieve.

*Third*, there is a potential discrepancy between the remedies available in the proposed amendments to CR 37 and CR 11. The CR 11 amendment allows sanctions that include, but are not limited to, an award of costs and attorney's fees. But the CR 37 amendment only provides for costs and attorney's fees.

The proposed CR 37 amendment is in line with CR 37's existing award of attorney's fees to the prevailing party in a discovery motion. But it creates a mismatch between the two rules providing remedies for a failure to cooperate, which may lead to confusion. Additionally, attorney's fees for bringing a motion to find another party in violation of the cooperation requirement may be substantial. This may lead some judges to hesitate to find a violation for conduct that may constitute a failure to cooperate, but which the judge believes is not egregious enough to warrant a large monetary penalty. This also could lead to an issue of under-enforcement.

The Task Force should consider aligning the remedies for a failure to cooperate under CR 11 and CR 37, or alternatively making remedies available under only CR 11. If CR 37 is amended to include sanctions for failures to cooperate, the Task Force may want to consider making monetary sanctions other than attorney's fees available under that rule.

*Fourth*, there is a technical problem with the proposed amendments as drafted. Under the proposed rules, the parties must cooperate in bringing the motion for sanctions for failure to cooperate against one party. Specifically, proposed rule CR 11(c) provides that “[t]he moving party shall arrange for a mutually convenient conference in person or by telephone” and that “[a]ny motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.” It is thus impossible for a litigant who is the victim of noncooperation to bring a motion for sanctions for noncooperation without arranging for a mutually convenient conference, which in turn cannot be accomplished without the cooperation of the noncooperating non-movant.

As a solution to this, it may be appropriate to adopt the language of Federal Civil Rule 37(a)(1), allowing a certification that a movant “has in good faith [met] or attempted to [meet the conference requirements of this rule] with the person or party failing to [cooperate].”

# MEMORANDUM

**To:** WSBA Task Force  
**From:** King County Bar Association Judiciary & Litigation Committee  
**Date:** April 30, 2018  
**Subject:** Initial Disclosures

The KCBA Judiciary & Litigation Committee has reviewed the proposal on Initial Disclosures from the WSBA Task Force and offers the following comments.

## 1. Timing of Initial Disclosures

Under the Task Force proposed case schedule, Initial Disclosures would occur 13 weeks after filing. The KCBA Judiciary & Litigation Committee felt that this may prove to be unworkable for several reasons.

First, it is altogether possible that the complaint might not get served until the 13<sup>th</sup> week after filing. Under RCW 4.16.170 an action is deemed commenced on filing for purposes of the statute of limitations provided that it is served within 90 days. It is not uncommon for a plaintiff to file an action on the eve of the expiration of the statute of limitations and delay service while additional work is performed or the defendants are located. Since the date of commencement relates back to the date of filing, the Plaintiff is able to buy time in this manner. If Initial Disclosures are tied to the filing date, then there may well be insufficient time to meet the deadline in such circumstances. The KCBA Judiciary & Litigation Committee asks whether there might be a more practical way to schedule the disclosures? Under the FRCP the date for initial disclosures is determined by referencing the required discovery conference with the Court. (" A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order. . ."). Washington's Civil Rules makes a CR 26(f) conference optional as opposed to the federal mandatory procedure. In Washington CR 26(f) conferences are the exception and not the normal practice.

Second, Initial Disclosures may come too late. With the Task Force proposal creating a 52 week period from filing to trial, a 13 week deadline for

Initial Disclosures is 25% of the way through the process. That slow start to a case leaves everyone on their heels. Many lawyers serve discovery requests along with the summons and complaint and the Washington Civil Rules make express provision for such a practice by requiring responses within 40 days (as opposed to the normal 30 days) after service. See *e.g.* CR 33(a), CR 34(b)(3)(A), & CR 36(a). If Initial Disclosures are intended to be a less expensive substitute for traditional discovery,<sup>1</sup> then 91 days (13 weeks) may not satisfy the needs of lawyers who demand discovery within 40 days as a matter of course. Why wait twice as long to get started? The proposed rule encourages a dilatory practice.

One alternative approach would be to require Initial Disclosures to be made at the earlier of 13 weeks or filing or within 30 days of the service of a demand by any party for the making of Initial Disclosures, but not sooner than 40 days after service of the summons and complaint. That would at least reduce the late disclosure problem inherent in the existing draft.

Third, there is a danger that litigants may use the deadline for Initial Disclosures as an excuse for not providing timely responses to interrogatories and requests for production that are served during the first 13 weeks of filing. King County had just such an experience with its Local Civil Rule on case schedule requirements for identifying lay and expert witnesses. Litigants frequently responded to such interrogatory requests saying that the information would be provided on the date set in the case schedule and not a day sooner. The King County Superior Court Local Rules Committee took steps to counter this by adding the following comment to LCR 4.

6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

It is suggested that an expanded form of the comment be added as a part of the proposed Initial Disclosure rule so that it does not provide a means for subverting timely responses to traditional discovery. The expansion should extend to documents and other discovery covered by the new rule.

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<sup>1</sup> “the functional equivalent of court-ordered interrogatories. . .”

## 2. Scope of Required Disclosures

When the requirement of Initial Disclosures was first adopted by the federal courts in 1993, the scope of the disclosures was as follows:

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are **likely to have discoverable information relevant to the factual disputes between the parties**. All persons with such information should be disclosed, **whether or not their testimony will be supportive of the position of the disclosing party**. As officers of the court, **counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.**<sup>2</sup>

Emphasis added.

This broad scope of disclosures was narrowed in 2000. The Task Force proposal adopts the narrow standard of disclosure instead of using the standard of “relevance to the factual dispute.” Rather, a party is only required to disclose that which “supports the disclosing party’s claims or defenses,” or which is referred to in the party’s pleadings.

The differences between the old and new scope limitations is significant. A party can withhold from disclosure information harmful to its case since it only has to provide information and witnesses “supporting the disclosing party’s claims or defenses.” A party who relies upon the Initial Disclosures as an effective substitute for traditional discovery is walking into a trap and perhaps exposing him or herself to professional liability for errors and omissions because the Initial Disclosures will not provide the full vista of the case necessary to rebut the opponent.<sup>3</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> In *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993), the Washington Supreme Court interpreted the sanctions provisions of CR 26(g) by applying the report of the federal advisory committee, which in turn cited to the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “**Mutual knowledge of all the relevant**

The easy answer to this is to send an interrogatory that requests the “bad” stuff that hasn’t been supplied. But, if the intention of the proposed rules is to combat the escalating costs of civil litigation, then that purpose is defeated by making interrogatories just as necessary as before. What is saved by a rule so narrowly drafted?

Arizona has adopted the broader scope of initial disclosure in its Rule of Civil Procedure 26.1, which provides:

- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

The KCBA Judiciary & Litigation Committee recommends that if an initial disclosure rule is adopted that either the 1993 version of the rule be adopted or the Arizona rule be utilized. Each has the broader scope of “relevance to the factual dispute” rather than the limited disclosure that proposed by the Task Force Draft.

Finally, there are some omissions in the Task Force Draft of language that appears in the FRCP. The FRCP exempts from initial disclosure information that would be used solely for impeachment. The Task Force Draft is silent on this and should be modified to expressly state the exception. Next, the FRCP specifically requires production of “electronically stored information (ESI) and tangible things.” The Task Force Draft omits that language and instead says “document and other relevant evidence.” While relevant evidence might be read to include ESI and tangible things, it would be better to make that express. A court might well see the deviation from the FRCP as expressing an intention to not cover such material or as a reason to reject federal authority in interpreting the new state rule. Another difference in the Task Force Draft is that while it mimics the requirement that a plaintiff provide a description and computation of each category of damages, it omits the FRCP requirement that the underlying documentation also be made available;<sup>4</sup> once again forcing the defending party

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**facts gathered by both parties is essential to proper litigation.”** *Hickman v. Taylor*.

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“who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each

to resort to a request for production and reducing the intended cost saving. Consistent with the goal of reducing the costs of litigation, the KCBA Judiciary & Litigation Committee recommends that the federal version be adopted rather than the modification contained in the Task Force Draft.

### 3. Supplementation

A party making Initial Disclosures “is under no duty to supplement the disclosure” except where new witnesses are located, a new expert is identified, or when the party knows that the disclosure was incorrect when it was made or knows that the Initial Disclosure is no longer true (and withholding that fact is in substance a knowing concealment.” Other than that, there is no requirement to supplement. The same is true for interrogatories and requests for production.

The FRCP requirement is somewhat broader. It requires supplementation not just when the disclosure was incorrect, but also when it was “incomplete.” This seems to be a better approach because it picks up documents that would make the earlier disclosure more reliable. Here is the federal language.

#### (e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission— **must supplement or correct its disclosure or response:**

(A) **in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect**, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

The KCBA Judiciary & Litigation Committee recommends that this FRCP provision be adopted in place of the Task Force Draft. Alternatively, the Task

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computation is based, including materials bearing on the nature and extent of injuries suffered.”

FRCP 26(a)(1)(A)(iii).

Force may wish to consider the supplementation provision in Arizona Civil Rule 26.1(d)(2).<sup>5</sup>

#### 4. Sanctions

The Task Force Draft retains the present references to sanctions contained in CR 26(e)(4) [supplementation requirement] and CR 26(h) [signing of requests and responses]. The current provisions are vague in that they refer to “such terms and conditions as the trial court may deem appropriate,” and including “an order to pay the amount of the reasonable expenses incurred.” The KCBA Judiciary & Litigation Committee recommends that this language be stricken and a specific reference to CR 37 be substituted in order to make clear that the full panoply of allowable sanctions may be imposed.

The Arizona Initial Disclosure Rule discussed above is backed by stiff sanctions that don't exist in Washington. Under Arizona Court Rule 37 the evidence or witness may be excluded if not timely disclosed and unfavorable information not timely disclosed can lead to extreme sanctions such as dismissal.<sup>6</sup>

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5

Arizona Civil Rule 26.1(d)(2) *Additional or Amended Disclosures*. The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order--or in the absence of such a deadline, later than 60 days before trial--must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

6

Arizona Civil Rule 37(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) Failure to Timely Disclose. Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless such failure is

The disclosure rule works in Arizona because lawyers face serious, case destroying sanctions. Given the Washington Supreme Court's decision in *Jones v. Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) the Task Force cannot provide a means to enforce the requirements for Initial Disclosures with such sanctions.

### **Should an Initial Disclosure Rule Be Adopted?**

The Rules Drafting Task Force has been charged by the WSBA Board of Governors with multiple tasks. Principle among them is to:

Review the recommendations of the Board of Governors addressing the ECCL Task Force Report and determine whether amendments to Washington's Civil Rules are needed to implement the recommendations.

Consistent with that responsibility, the KCBA Judiciary & Litigation Committee offers the following comments.

Initial Disclosures require a new additional step to the discovery process, which necessarily adds the preparation time to the escalating costs of civil litigation. The rule should only be adopted if it would result in an overall reduction of costs. So the first question that must be answered is whether the rule

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harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) Inaccurate or Incomplete Disclosure. On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

Arizona Civil Rule 37(d) Failure to Timely Disclose Unfavorable Information. If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may impose serious sanctions, up to and including dismissal of the action--or rendering of a default judgment--in whole or in part.

modification as proposed saves money? The KCBA Judiciary & Litigation Committee submits that it does not.

The underlying failure in the rule is that it fails to produce the adverse information held by the opponent. Any competent litigator is therefore going to have to send out requests for production and interrogatories substantially similar to the ones currently being used. It is as if the parties are initially asked to answer a poorly drafted set of interrogatories and requests (the incomplete initial disclosure list) and then have to answer the discovery requests that would be expected under current practice. It is readily apparent that the initial disclosures saves nothing and adds to the burden and expense of litigation. Moreover, the late and perhaps uncertain deadline for initial disclosures discussed above, means that the diligent will have already drafted and served the inevitable discovery requests and that initial disclosures won't serve a useful function and, ironically, won't be "initial." Only those inclined toward procrastination will be served by the rule; often to their disadvantage due to the incomplete nature of that which would be required.

The lack of required supplementation also requires the diligent to follow up, just as they do today. There is no cost saving that can be found in this rule. A second cost increasing factor is that bulk delivery of documents at the start of a case requires the receiving party to dive through the material to figure out which documents apply to any given claim. Currently, carefully drafted requests for production require the responding party to identify the documents by request number, preventing the hiding of the needle in the haystack. There is an exception that allows documents to be produced in the form in which a business has maintained them. But that is an exception and the normal rule generally provides identified items. An initial disclosure rule as proposed would leave the recipient guessing and would add significantly to the costs of litigation.

Initial Disclosures work in the federal courts because of a different structure for pretrial discovery. Federal judges push discovery management over to a staff of Magistrate Judges. Federal courts are more intimately involved in the pretrial process because they can financially afford it. Our superior and district courts are under-funded and don't even have the luxury of a law clerk let alone commissioners who would act like federal magistrate judges.

The KCBA Judiciary & Litigation Committee submits that the Draft Proposal will increase the costs of civil litigation, introduce uncertainty and create a trap for the unwary.

## MEMORANDUM

To: Washington State Bar Association Civil Litigation Rules Drafting Task Force  
From: KCBA Judiciary and Litigation Committee  
Date: May 12, 2018  
Subject: Early Mandatory Mediation

A subcommittee of the KCBA Judiciary and Litigation Committee consisting of Katie Comstock, Joseph Bringman, and Michael Wampold first met to review Washington State Bar Association Civil Litigation Rules Drafting Task Force's proposed Early Mediation Rule. The subcommittee then met with the KCBA Judiciary and Litigation Committee as a whole, and together we present the following comments and concerns.

We are in support of an early mandatory mediation rule. We agree that requiring mediation in superior court cases before completing discovery, could help reduce the cost of litigation and encourage early resolution. We feel that early mediation will only be successful if effective initial disclosures and case schedule rules are also adopted (see separate memorandums from regarding those topics from the KCBA Judiciary and Litigation Committee). In our opinion, for an early mediation to be successful all counsel should meet early to determine the discovery they need to conduct prior to discussing settlement, and if there are any motions that need to be filed prior to discussing settlement.

With regards to the language of the rule, we have the following comments:

- (b)(4) - We are concerned that this section of the rule, which requires that each court establish and maintain a recommended fee schedule, will create a higher burden on the court and may have little to no effect on early mediation. Mediation fees vary widely depending on the mediator, the subject-matter of the dispute, and the way in which the matter has ended up at mediation. Although we agree there can be a benefit to having the mediator's fee public (as set forth in (b)(3)(D)), we do not see a benefit to the court setting a recommended fee schedule.
- In section (c)(2), there does not seem to be an option for a party to file something with the court where the parties cannot come to an agreement on a mediator. We propose amending the rule to require the parties to file something regardless of whether they agree on a mediator. The document could be titled "notice of joint selection of mediator / notice of request for appointment of mediator." Placing the burden on the parties to file something, regardless of whether they agree on a mediator, makes it more likely that the deadline won't simply slip and that if the court does need to assign a mediator, you don't lose time while waiting for the court to realize that no "notice" has been filed.
- In section (d)(2), we would like to address the increasingly common scenario where when insurance is involved, a representative with meaningful settlement authority is not present at mediation, or if available by phone, becomes unavailable by 2:00 due to being in a different time zone. We propose that the rule is amended to reflect that to the extent insurance is implicated, a representative with settlement

authority of each participating insurance be required to attend. We propose that the representative attend in person, unless agreed to otherwise by the parties, or allowed by the court. Further, where a representative is allowed to attend by phone, they should be required to be available throughout the mediation.

- In section (d)(2), we do not believe that giving the mediator the authority to determine all issues related to attendance will have the desired result. The mediator does not have subpoena authority, or the ability to sanction conduct. Further, in this rule, the mediator is not required and may not even be allowed, to file pleadings with the court. We believe the court should retain the authority to determine all issues related to attendance.
- Section (d)(2) should refer to section (h) and emphasize that the failure to attend will result in sanctions.
- For section (f), mediator compensation, if the parties agree to a mediator, then it seems they have already agreed that the mediator's fee is reasonable. In that scenario, the rule should be clarified that the parties cannot challenge previously agreed mediator compensation.
- In section (h), the language about potential sanctions needs to be clarified. Is the referenced fee ("a fee sufficient to deter the conduct") a fee to be paid to the court, or to the other parties? Does it bear any relation to the other parties' attorney's fees? Also, what does the phrase "reasonable expenses" include – does it include attorney's fees?

**MEDIATION COMMENTS RECEIVED**

**From:** [David Alvarez](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** [Pam Loginsky](#); [Nichols, Mark \(Pros.\)](#); [Wendt, Brian](#)  
**Subject:** Mandatory early mediation  
**Date:** Monday, April 09, 2018 11:14:40 AM

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To the Task Force:

This is the opinion of one civil practitioner who has been practicing civil law on behalf of local governments in WA for 19 years and before that 9 years in NJ.

***This is my opinion and not the official opinion of the Clallam County Prosecuting Attorney's Office.***

I see that it is not mandatory unless the parties to a litigation want it. BUT....

For local governments, I don't see that early mandatory mediation is a tool that will have much purpose or usefulness.

For example, in the land use arena, mediation won't be useful because any result of any settlement or mediation STILL MUST conform to the existing zoning regulations.

This means any local government can't accept or agree to the end result of a mediation that allows greater residential density or reduced buffers unless there is a mechanism in the existing regulations or comprehensive plan that allows this variance from what is required OR authorized.

Such a deal arrived at through mediation that impacts the development of land may be seen as a "back room" deal when GMA and other land use statutes require "early and continuous" participation (transparency) before the County legislature makes policy decisions.

So mediation can't result in what amounts to a policy decision.

The squeaky wheel applicant or organization that goes to litigation should not obtain a special deal from the local government via mediation.

I have participated in mediation in land use matters twice and both times the

most the mediator could do was force one side or the other to interpret the existing rules differently or modify their proposal to the satisfaction of the aggrieved neighbor.

And most torts, particularly personal injury cases, already have mandatory arbitration, at least I think they do.

And if the matter to go to mediation is related to a personnel matter or job or work place conditions, wouldn't that be the subject of a collective bargaining agreement with the local government that would have built into it a grievance process, making mediation not necessary and probably an unfair labor practice?

Why have a list of "qualified mediators" if it is also possible for two litigants to choose someone NOT on that list to be their mediator?

How will a Judge impose sanctions on a litigant who doesn't comply with these "early mandatory mediation" rules?

There is a fine line between being cantankerous and not participating in mediation or not having resources (sanctioned) and not participating because the parties don't see any chance that early mandatory mediation will succeed (not sanctioned?).

And why is a firm or person making a living at mediation going to agree to some kind of court imposed fee schedule?

How are the courts qualified to set such a fee schedule?

Does "early mandatory mediation" amount to another way that civil litigation becomes more expensive and less accessible to the "working poor?"

I think mediation is a great idea, but there need not be a formal rule around "early mandatory mediation."

Not broken, don't fix it.

***David Alvarez***

Chief Civil Deputy Prosecuting Attorney, Clallam County

223 E. 4<sup>th</sup> Street, Suite 11

Port Angeles WA 98362

(360) 565-2720

**From:** [Deane Minor](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** new mediation rule  
**Date:** Monday, April 09, 2018 6:24:40 PM

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I agree with the concept and the rule looks fine with one exception:

A rule prohibiting a mediator from serving as an arbitrator is unnecessarily restrictive. I would suggest that if the parties are all represented by counsel that they should be able to stipulate to having the mediator move into the arbitrator rule if the mediator was willing to do so. In a case with smaller stakes, this can avoid incurring costs out of proportion to the value of the case.

Deane W. Minor

Tuohy Minor Kruse PLLC  
2821 Wetmore Avenue  
Everett, Washington 98201  
Phone: (425) 259-9194  
Fax: (425) 259-6240  
Website: [www.tuohyminorkruse.com](http://www.tuohyminorkruse.com)

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**From:** [Ione S. George](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** RE: Feedback Requested: WSBA Civil Litigation Rules Drafting Task Force/ New Civil Rule re Early Mandatory Mediation  
**Date:** Monday, April 09, 2018 1:19:40 PM  
**Attachments:** [image001.png](#)

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I am responding to the request for feedback regarding the proposed mandatory early mediation rule.

I do agree that certain cases may benefit from such a proposal. However, I believe that implementation of a mandatory requirement in all cases will do little but instigate a flurry of 'busy work' in efforts to avoid the mandatory requirement in the greater portion of the cases where such resolution is not yet realistic. As a representative of a governmental entity, I routinely look for ways to achieve early resolution, but my ability to obtain sufficient information to assess my entity's potential liability, exposure, or identify my best defenses is just not possible at the initial disclosure phase of a litigation. At that point I cannot fairly advise my client what resolution is in its best interest, and therefore, I cannot mediate a resolution. To that end, if I were faced with a mandatory mediation, my only option would be to spend time and resources, in virtually every case, justifying why I was not prepared to mediate. Thus, the proposed rule just adds one more step of not moving forward with my case, not benefitting my client, and wasting resources.

I think a better plan would be to provide the option, perhaps provide some kind of benefit for those who are able to capitalize on this early opportunity (reduced rates for court appointed mediators?) and make it somehow more accessible, rather than mandatory.

Thanks for hearing me out.

-Ione George

*Ione S. George*  
*Chief General Counsel*  
*Office of the Kitsap County Prosecuting Attorney*  
*614 Division Street, MS-35A*  
*Port Orchard, WA 98366*  
*Phone: (360) 337-4957*  
*Fax: (360) 337-7083*  
*Email: [lgeorge@co.kitsap.wa.us](mailto:lgeorge@co.kitsap.wa.us)*

>>> Sherry Lindner <[sherryl@wsba.org](mailto:sherryl@wsba.org)> 4/9/2018 9:50 AM >>>  
Greetings,

The Civil Litigation Rules Drafting Task Force is proposing to create a new civil rule to require early mandatory mediation. The Task Force is reaching out to stakeholders for comments and feedback on its proposal.

Stakeholder input is crucially important in rulemaking process and assists the Task Force in making an informed decision.

Attached please find Ms. Rothrock's letter and draft proposal.

**Please submit your feedback/comments to [CLTF@wsba.org](mailto:CLTF@wsba.org) by **May 21, 2018****

Thank you,



**Sherry Lindner | Paralegal | Office of General Counsel**

Washington State Bar Association | **T** 206-733-5941 | **F** 206-727-8314 | [sherryl@wsba.org](mailto:sherryl@wsba.org)

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | [www.wsba.org](http://www.wsba.org)

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**From:** [Ryan Brown](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** [David Sparks](#); [Ryan Lukson](#)  
**Subject:** Comments to Proposed Early Mediation Rule  
**Date:** Monday, April 09, 2018 11:09:02 AM

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To Whom It Concerns,

I represent a public entity (a mid-sized Eastern Washington county), and my staff and I have engaged in numerous successful mediations on its behalf.

I applaud the concept being proposed and, with the exception of one minor provision, strongly support the proposed rule as written.

The one exception is under section (d), Mediation Procedure, Attendance. Under subsection (d)(2), the proposed rule says “[a]ll persons necessary to settle the matter and who have the necessary settlement authority must attend . . . .”

While I concur that language is appropriate for private litigants, it is problematic for public entities that are subject to the Open Public Meetings Act. For these entities, that provision would require the governing board to determine, in open session, the maximum amount of settlement authority its representative shall be given. Obviously, having that information in the public domain and potentially available to the opposing party is unacceptable.

I have participated in numerous successful mediations on behalf of Benton County, and in none of them did we comply with subsection (d)(2). Instead, we discuss the matter ahead of time with our governing board in executive session to get a sense of what type of settlement the board would likely look favorably upon, and then attend the mediation usually with one board member. At the beginning of the mediation, we make clear that the board member does not have final settlement authority, but will agree to terms that he or she believes he can sell to a majority of the other board members.

Using this procedure, we have not in my experience had any settlements fall through after what we believed was a successful mediation.

With this in mind, I suggest and request that an exception to subsection (d)(2) be crafted for public entities that are subject to the Open Meetings Act. Failure to do so will, in at least certain circumstances, put public entity litigants at a disadvantage and possible result in unnecessary expenditure of tax dollars.

Thank you for your consideration of these comments.

Ryan K. Brown

Chief Deputy Pros. Attorney, Civil  
Benton Co. Pros. Attorney's Office  
Phone: (509) 735-3591  
Fax: (509) 222-3705

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**From:** [Matt Purcell](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Civil rule care out domestic application  
**Date:** Wednesday, April 11, 2018 12:03:30 AM  
**Attachments:** [image001.png](#)

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Can you please carve out an exception for Domestic Cases? Please? For example, mediators will often arbitrate a domestic case and that proves to be VERY helpful and cost effective given the unique application to family law. As a matter of fact, it would be great if that was taken into consideration when coming up with so many of these rules that apply because civil rules on the whole apply to domestic cases yet no one seems to consider that when drafting the rules...

I would write more but it seems like no matter how much time gets put into these comments they never seem to go anywhere... hopelessly hoping I guess with this one.

Truly,

**MATHEW M. PURCELL**  
Attorney



2001 N. Columbia Center Blvd.  
Richland, WA 99352  
Phone: (509) 783-7885  
Fax: (509) 783-7886

Please be aware that Domestic Court is held Monday morning, Tuesday all day and Wednesday morning each week; my ability to respond to email is limited during those days/times.

Heather Martinez: [HM@PurcellFamilyLaw.com](mailto:HM@PurcellFamilyLaw.com)  
Maria Diaz: [MD@PurcellFamilyLaw.com](mailto:MD@PurcellFamilyLaw.com)  
Mark Von Weber: [MV@PurcellFamilyLaw.com](mailto:MV@PurcellFamilyLaw.com)

Office Hours: Monday-Thursday from 9:00 a.m. to 5:00 p.m. Friday from 9:00 a.m. to 4:00 p.m.  
Closed for lunch from 12:00 p.m. – 1:00 p.m.

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Kitsap County Civil Practice and Procedure Committee for Superior Court  
Response to Proposed Rules

It is the stated primary policy goal of these proposed rules to reduce the costs of litigation. However, the general consensus of the Kitsap County Civil Practice and Procedure Committee for Superior Court is that two of these proposed Rules - the "Reasonable Cooperation" rule of CR 1 and the "the Mandatory Mediation" rule of requirement will not have a marked effect on the stated goal of reducing the cost of litigation. If anything, it is our view that these will both increase the costs of litigation.

Proposed Rule Regarding "Reasonable Cooperation"

This proposed rule suffers from a number of problems. First, it is redundant to existing Rules, including to RPC 3.4 and CR 26, where the attorneys are already required to act reasonably and in good faith. What else is this Rule adding to the practice of law in Washington state? If it is not adding anything new, it should not be included.

If it is meant to add something new or an additional duty, this is a bigger issue as the term is undefined and inherently subjective. Because it is undefined, it is going to be problematic as judges are given no guidance on what constitutes "reasonable" cooperation or not. This is especially concerning given its new prominence in Civil Rule 1 and throughout the other proposed Rules like the proposed case scheduling rule, etc. If this is truly an issue that needs to be addressed to supposedly save on the costs of litigation, then it should be easily defined so it can be implemented in a concrete and consistent manner throughout the State. This would also allow stakeholders to address concerns about the definition now.

Conversely, however, if the drafters cannot define this term, how do they expect lawyers, parties and judges to apply it on a case by case basis with any reasonable certainty? Do the drafters of this Rule view "reasonable cooperation" akin to pornography where they cannot define this term "but know it when they see it"? If so, the rule is inherently subjective - what may be subjectively viewed as legitimate litigation strategy and tactics by a judge in Kitsap County (and thus not subject to sanction) may be subjectively viewed as something totally different by a judge in Pierce County. Given this lack of guidance to both attorneys and judges, this is likely to lead to more litigation as people argue over "reasonable cooperation". This focus on trying to subjectively define reasonable cooperation between attorneys now personalizes the issue between the attorneys rather than keeping the focus on the case and clients. This appears to run counter to the stated intention of reducing the cost of litigation.

### Proposed Rule on Mandatory Mediation:

The proposed mandatory mediation Rule will not have any marked effect on reducing the cost of litigation. If anything, it will increase the costs of litigation as parties who are not ready or willing to voluntarily mediate a case are compelled to do so at their cost. In these scenarios, this Rule simply becomes a "check the box" requirement. Mediation is only a good thing if both sides are ready and interested in it. Reluctant parties who are compelled to mediate are not likely to reach a positive outcome and if anything, they will feel resentment to the process and possibly further entrench their position and increase resentment against the other party as they must incur the expense of the mediation as part of the litigation. Conversely, it necessarily follows that if both sides are interested in mediation at any given point in the litigation (early or otherwise), there is no need for a Rule mandating it.

Because this Rule forces parties to spend money on mediation - including the mediator fees and their own attorneys - this means they are either having to spend more overall or they are not spending it on other matters that are more substantively productive such as on discovery.

In addition, the proposed Rule, as written, grants significant power to the mediator to decide things like the length of the mediation, parameters, required attendance, etc. There are no guidelines for this and has the potential for abuse by overzealous mediators.

The proposed Rule, as written, also has no limits or guidance on the length of time or the cost of the mandatory mediation. Where a mediator is appointed by the Court, the parties have no control as to duration, cost or other parameters - the only limitation is the hourly fee for the Court-selected mediator (under the proposed Rule, each County will set the fee schedule). However, this creates the problem that there are no limits or guidelines for each County, which can lead to widely disparate mediation costs between Counties. Moreover, the fee schedule is unclear whether this is an hourly fee or a flat mediation fee. Regardless, what are the guidelines as to any minimum or maximum lengths for the mediation?

In addition, in a private mediation, any party can terminate at any time and if they believe they are not getting anywhere. In a mandated mediation under this Rule, this Rule provides no guidance on whether there is a set minimum number of hours a party must attend to show "reasonable cooperation" as they would now be required to show under the proposed CR 1. Is it up to the discretion of the mediator to terminate the mediation or may the parties still do so and if so, under what terms so they do not run afoul of the new "reasonable cooperation" rule? The ambiguity of these issues seems to raise a lot more risk of an increase in the cost of litigation than it does in reducing litigation.

Regardless of whether the Rule incorporates some additional terms to clarify timing or cost, the bottom line is that if the parties are not ready mediate, they will more than likely not reach a settlement at a mandated mediation. Instead, they will spend at least several thousand dollars for their attorneys to prepare and appear for several hours just to comply with the mandatory

requirements of this Rule. This hardly seems like meeting the requirement of reducing the cost of litigation. And, while a party can always file a motion for relief from this mandatory mediation requirement if they feel that the mediation would be fruitless, this is simply more money being spent for that motion - again increasing rather than reducing the cost of litigation.

Given the above concerns and that these Rules are more likely going to increase the cost of litigation than reduce it, we strongly urge the Task Force and the Board of Governors to abandon both proposed Rules altogether.

Adopted and approved by the following members of the Civil Practice and Procedure Committee for Kitsap County Superior Court:

Isaac Anderson, Attorney

The Hon. Jeffrey Bassett, Kitsap County Superior Court

Kevin W. Cure, Attorney

Philip J. Havers, Attorney

David P. Horton, Attorney

Greg Memovich, Attorney

Todd Tinker, Attorney

KING COUNTY PROSECUTING ATTORNEY'S OFFICE



DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY

JUSTICE  
COMPASSION  
PROFESSIONALISM  
INTEGRITY  
LEADERSHIP

May 17, 2018

Averil Rothrock  
Civil Litigation Rules Drafting Task Force Member  
Washington State Bar Association  
1325 Fourth Ave., Ste. 600  
Seattle, WA 98101-2539

Re: Draft Proposal to Require Early Mandatory Mediation

Dear Ms. Rothrock,

This letter is being submitted in response to your request for comments about the draft proposal to require early mandatory mediation prior to the completion of discovery. The comments and questions below represent the position of the Civil Division of the King County Prosecutor's Office.

Our office, in conjunction with our agency clients, believes that mediation is a powerful tool which we have often used successfully in the resolution of claims and lawsuits against King County. We litigate a variety of claims in state court including, but not limited to, tort and employment claims. Our defense of those claims and lawsuits always includes an analysis of whether early resolution is appropriate. If it is, we tailor our approach accordingly with respect to discovery, retention of experts, timing for mediation, etc.

The timeline for compliance contemplated in the proposed early mandatory mediation rule is our primary concern. First, the current ADR requirement in the case schedule provides that some form of ADR take place, usually within two weeks after the discovery cutoff. However, there is no restriction on how early on mediation can occur, thus there is flexibility depending on the circumstances and needs of a particular case. As discussed above, we are confident in our ability to identify those cases that are appropriate for early resolution. In our experience, other parties (plaintiffs and co-defendants) who have not sufficiently developed their case prior to mediation, do not resolve those cases at mediation. We believe that having early mediation as an option, rather than a requirement, best serves the needs of all parties. Second, requiring the parties to mediate prior to the completion of discovery puts the parties at a disadvantage. In all cases, the process of written discovery and obtaining documents is the most time consuming part of the case schedule. A requirement to mediate before meaningful discovery in the case will adversely

affect the parties' ability to analyze and value their cases and forces them to spend time and resources to seek relief from the court in a large percentage of matters. Third, experienced mediators are often booked months in advance. Again, the timeline contemplated by the proposed rule does not account for that contingency and would force one or both parties to seek relief from the court. That would also be an inefficient use of judicial resources.

In addition to our principal concern regarding the timing of early mandatory mediation, we also have the following comments/questions regarding the proposed rule:

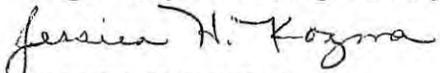
1. Assignment of a mediator if the parties fail to agree. The proposed rule provides that, if the parties do not jointly select a mediator, the court shall promptly appoint one from the approved list. This proposed provision could encourage one party to stall and refuse to agree to a mediator so that the court will be forced to choose one, even if that mediator may not be a good fit for a particular case. Additionally, it is concerning that a government entity (or any other defendant) with no control over whether it gets sued could be forced to pay a mediator it did not choose to help resolve a case that is not ripe for mediation.
2. Mediator control over the process. The proposed rule states that "the mediator has authority to determine the procedure of the mediation, for example its form, length, and content." Further, it provides that "the mediator shall hold a mediation *the mediator* considers appropriate in light of the circumstances and input from the parties." (emphasis added). The purpose of mediation is to assist the parties in reaching a resolution. It has always been a fundamental tenet of mediation that the parties select the format for mediation. It is the parties, after all, who are in the best position to select the process. The proposal to require the mediator to decide the duration of the mediation would create a conflict for the mediator, who would have a financial interest in the mediation's duration. We do not believe that giving the mediator control over the form, length and content of the mediation is conducive to resolving cases.
3. Opt-out provision or include mediation timeline as part of Early Discovery Conference. As discussed above, a one-size-fits-all approach requiring mediation prior to the discovery cutoff in every case does not serve the needs of the parties. We recommend that the committee give the parties the ability to jointly opt out or, alternatively, require that the parties address the timeline for mediation as part of their early discovery conference. Additionally, we recommend that pro se cases be exempt from this rule. If a party can request a pro bono mediator, there is a high likelihood that every pro se litigant would do so. It seems unlikely that the court could accommodate the volume of requests.
4. Impact of extension of deadlines in other proposed rules. This proposed rule directly interrelates with other proposed rules concerning Initial Case Schedules, Early Discovery Conferences and Initial Disclosures. The rule should account for the impact of extensions obtained by parties for other deadlines. For example, if the parties obtain an extension to the deadline by which they are to exchange initial disclosures, would that

automatically extend the deadline for mediation? Or would the parties still be required to seek relief from the court?

Thank you for your consideration of our comments on this proposal.

Sincerely,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney



JESSICA H. KOZMA  
Senior Deputy Prosecuting Attorney

**From:** [Linda Roubik](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** WSBA CLTF's proposed civil rule on mandatory early mediation  
**Date:** Monday, May 21, 2018 4:57:32 PM

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I have been a family law attorney for over 30 years, a former chair of the KCBA Family Law Section, and a follower of court issues for years. I'm at the Wechsler Becker firm, which is all family law, in Seattle.

As the proposed text for a civil rule on mandatory early mediation only mentions "early" in the title, I must mostly refer to the (undated) cover-memo by Averil Rothrock, attached to an email of 4/9/18 9:47 AM from paralegal Sherry Lindner of WSBA, to undisclosed recipients . . . which I only saw per a forward from the KCBA ADR Section. That cover-memo describes a broad scheme of new statewide court rules, for all types of civil litigation, to include case schedules, initial disclosures exchange, and an Initial Discovery Conference . . . along with the required mediation, 2 months after such (timing unspecified) initial exchange.

These proposals are the result of a WSBA task force concerned with Escalating Costs of Civil Litigation (ECCL).

Bottom line, for family law cases: this would likely instead lead to **increased costs**, plus "**access to injustice**".

1) Going back to 1985 when I was law-clerk bailiff to Judge Shellan, who was revered for his experience and judgment in all cases (and particularly in family law cases -- for which we held 3 settlement conferences each week), I always remember his firm belief that blanket rules for family law cases are bad.

Because of the countless combinations of facts and circumstances between 2 people, any blanket rule (no matter how well-intended) will have unintended bad consequences.

2) Starting in 2010, a WSBA effort to create statewide family law local rules went through many revisions, comment periods, committees and rewrites. Justice Madsen of the Washington State Supreme Court finally killed that effort, in her letter of 11/27/13, reporting that the Supreme Court Rules Committee unanimously recommended against the WSBA proposals, "based on the comments the court received".

I was on a KCBA Family Law Section ad-hoc committee which spent months reviewing that effort. Efforts to create acceptable blanket court rule language failed. It's an endless slippery slope. Proposals beget comments, which beget re-writes, which beget other problems.

Counties are very, very different in terms of needing, or implementing, court rules. (And that was just regarding family law cases.)

In the end, the efforts on this topic did not lead to a situation that on the whole would clearly save either the courts . . . or the parties . . . time, money and effort.

The best comment came from a Kitsap commissioner: "In all candor, my experience as both an attorney and a judicial officer over 3 1/2 decades in family law tells me most ardently that 'more' is rarely, if ever, better."

3) Options for assistance through the court are important. But these should remain *options*.

Free settlement conferences by judges and commissioners are still offered In King County. Until the 1980's, this was required for all family law cases in King County.

Now, many additional forms of assistance are available, including earlier in a case. These resources are especially aimed at the increasingly high numbers of pro-se litigants in these cases (estimates of one party pro-se in up to 85% of family law cases), and at lower-income individuals.

Over many years now, systems have been constructed in King County which provide pathways for perhaps "simple" family law cases to get resolved early. This involves case schedules, with a required early one-hour class for pro-se litigants which allows access to "ERCM's" (early resolution case managers, who are *attorneys*, hired by the county, to assist pro-se litigants through the court process . . . and who may also mediate such cases, charging on a sliding fee scale). At various later points on our case schedules, including at status conferences beginning about 4 months into the case, and at pre-trial conferences later, judges may additionally divert such litigants to the ERCM's. This is in addition to the availability of low-fee (\$30 per visit), courthouse-hired family law facilitators (who are non-attorneys), and the family law information centers. A specific Simple Dissolution Program is also available for joint filers who have no minor children, and are in basic agreement regarding property and debts.

*All* family law cases in King County, including attorney-represented cases, involving minor children additionally follow a tiered process towards resolving parenting plans: first a required early 3-hour class for all parties, then mediation by the court's Family Court Services (FCS) department (social workers who are child specialists), and then evaluations with reports to the court. The FCS services are also charged on a sliding fee scale.

Additionally, in King County , through the Superior Court's Volunteer Settlement Conference program, over 70 family *attorneys* (including myself), *who are required to have 9+ years of experience, primarily in family law*, provide free settlement conferences approximately 3 times per year. These sessions start at a 3-hour expectation but often exceed that time.

The court has always correctly steered away, however, from lending (what the public would perceive as) the court's seal of approval to outsourced justice, in the form of lists of private individuals, to be paid by the parties . . . let alone setting annual fee schedules for such individuals . . . the qualifications of which could, and would, be endlessly debated . . . for a mandatory process intended to *settle* a case. (This is different than maintaining a list of guardian ad litem, for example, who are given a specific role in a case.)

4) The elephant in the room, for family law cases, is that this proposed rule is either already designed for, or will undoubtedly lead to, requests for inclusion of non-attorney mediators on

such lists. That is a very large topic, that I will not attempt to cover here. It's the blind leading the blind ("access to injustice").

I already notice that neither this proposed rule, nor the cover-memo, requires the mediators to be attorneys.

5) This leads to the common comment "it's only family law". The problem with family law is that it's "only" about everything.

Family law is very complex, very important to the individuals involved, and very important to society. It's not just about a number, which might get solved with an early mediation.

6) In addition to a need to develop myriad factual and legal issues, emotional issues are key.

Long ago, our statutes set a 3-month "cooling off" period, before any divorce can be finalized. Early mediation could often take place in a situation where one side is still blindsided by the filing . . . especially when the other side often has been plotting the filing, likely for months or years.

Early is also a time when power imbalance dynamics of the marriage are strongest. This is not just a gender issue, but often it is, especially in pro-se situations. Women usually have the biggest need, and the most to lose. They are most often the primary caretaker of the kids. They can't "earn their way out of it" later.

Again, our statutes reflect this: **RCW 26.12.190 (1): "Court commissioners or judges shall not have authority to require the parties to mediate disputes concerning child support."**

Also, experienced family law attorneys know that there is real merit in waiting until closer to trial (as is reflected in the current King County case schedule deadline for ADR approximately 1 month before trial). The more argumentative spouse often needs to face the specter of a looming trial date, and the time, effort and costs that involves.

Of course, for many represented cases there is also a long time needed for discovery, parenting evaluations, etc., before one even sense the direction a case will take.

7) For every case that I am involved in, an added layer of an early mediation, or an ongoing mediator who will essentially "babysit" the case along, would be an extra layer of cost. Perhaps a good idea, for some cases . . . but we need to be able to decide that case by case.

8) One example of how the proposed rule flies in the face of much family law practice is the (b) (5) item, prohibiting a mediator from later being an arbitrator in the same case. We do that all the time in family law mediations, at varying levels. It works very well. It saves time, money and effort.

If this provision was of interest for personal injury cases, for example, it illustrates why cookie-cutter rules for different types of civil cases are bad.

9) Finally, please know that this proposal has gotten absolutely no play among the family law bar. I have heard zero about it from either the KCBA Family Law Section, or the WSBA Family Law Section, or other family law groups. While I do not personally keep up with the various family law listserves, I have inquired of those who do, and I understand it has not been mentioned on such sites, either.

Linda Roubik

Wechsler Becker LLP

(I believe my above comments reflect the views of my WB colleagues, but this is not a comment coordinated with them)

## Litigation Section Executive Committee Response to Proposed Rules

The stated primary policy goal of the proposed Civil Rules is to reduce the costs of litigation. The Litigation Section Executive Committee has reviewed and discussed the proposed changes to the Civil Rules and supports many of the proposed changes, such as judicial pre-assignment and mandatory disclosures, but the Committee unanimously opposes two of the proposed rules - the "Reasonable Cooperation" and the "Early Mandatory Mediation" rules - because they run contrary to the goal of reducing the cost of litigation, and will likely have the opposite effect.

### **"Reasonable Cooperation" - Civ. Rule No. 1**

Our main concern with the reasonable cooperation rule is that "reasonable cooperation" is undefined and, thus, allows for subjective interpretation, which could lead to misuse and abuse. The rule is especially concerning given its new prominence in Civil Rule 1 and throughout the other proposed Rules. The rule should be clearly defined so that it can be implemented in a consistent manner throughout the State. This would also allow stakeholders to address concerns about the definition and scope of the requirement now, rather than through additional motions practice and argument before individual judges.

If the drafters are unable or unwilling to define this term, they should decline to enact this new rule rather than defer to lawyers, parties, and judges to define it with any reasonable certainty or consistency. What may be subjectively viewed as legitimate litigation strategy and tactics by a judge in one jurisdiction (and thus not subject to sanctions) may be viewed differently by a judge in another jurisdiction. Given the lack of guidance to attorneys and judges, additional litigation, motion practice and expenses will result as attorneys argue over the meaning of "reasonable cooperation" to the financial detriment of their clients, the litigants. Of equal concern, focusing on reasonable cooperation between attorneys may have the unintended consequence of personalizing the issue rather than keeping the attorneys focused on the case and clients. Simply put, the imposition of an undefined and generic reference to "reasonable cooperation" does not appear to further any of the valid and commendable goals that the rule is directed towards.

As a final point, the proposed rule is redundant to existing Rules, and thus is unnecessary. Under RPC 3.4, attorneys are required to "act reasonably". Under CR 26, attorneys are required "to participate in good faith in the framing of a discovery plan", etc. Similar obligations exist throughout the rules governing attorneys and litigation. Put another way, to the extent there are issues with attorneys and litigants who fail to "reasonably cooperate," it is not due to a lack of rules.

### **Early Mandatory Mediation Requirement**

It is also the unanimous opinion of the Executive Committee for the Litigation Section that the proposed early mandatory mediation requirement will not have the intended effect on reducing the cost of litigation. Rather, it will likely increase the costs of litigation.

For instance, if the parties are not ready to mediate "early," they will now be required to spend thousands of dollars participating in a process that will not lead to meaningful advancement of the case. As most litigators will attest, a mediation undertaken prematurely without substantial knowledge of the facts from discovery and/or depositions can have dramatic consequences, causing the parties to entrench in their respective positions, fueling animosity, and ultimately undermining the parties' ability to secure a meaningful and amicable resolution of their dispute.

In addition, because parties who are not ready to mediate a case early will now be compelled to do so, the early mandatory mediation rule will simply become a "check the box" requirement—a well-known formality in counties, such as Benton/Franklin County, that already have a mandatory settlement conference requirement. In other words, early mediation is beneficial if both sides are ready and willing to resolve the matter. However, if both sides are prepared and willing to resolve the matter early, the parties are already free to mediate, and there is no need to enact a Rule mandating it.

At least two members of the Litigation Executive Committee practiced in Illinois before practicing in Washington. Illinois has a similar mandatory mediation rule and both executive members can attest that this Rule did not result in any reduction in the cost of litigation. Instead, although well-intentioned, it proved to be a bureaucratic waste of time, and increased the cost of litigation as parties who were not yet ready to mediate were forced to pay for a mediation they did not want and knew would be fruitless.

Further, because this proposed Rule forces parties to spend money on mediation - including the mediator fees and their own attorneys' fees and travel costs to prepare mediation briefs and attend half- to full-day mediations - they will be forced to either spend more in costs overall or utilize limited resources on mediation that could be better applied to substantive issues, such as discovery and case development.

In addition, the proposed Rule grants significant power to the mediator to decide the length of the mediation, parameters of the mediation, required attendance, etc. There are no guidelines for this, and there is a potential for abuse by overzealous mediators.

The proposed Rule is also silent on a number of mediation requirements and does not include limitations on the length of time or the cost of the mandatory mediation. For mediators

appointed by the Court, parties will have no control as to duration, cost, or other parameters - the only limitation is the hourly fee for the Court-selected mediator (under the proposed Rule, each County will set the fee schedule). Absent limits or guidelines for each County, there is a risk of substantially disparate mediation costs between Counties. It is also unclear whether the cost of mediation per the fee schedule will be an hourly charge or a flat mediation fee.

In addition, under the proposed Rule, there is no guidance on the minimum number of hours a party must attend to show the "reasonable cooperation" that would be required under the proposed CR 1. Likewise, it appears to be left to the sole discretion of the mediator to determine when, or if, the parties can terminate a mediation, and under what circumstances. The ambiguity of these issues leads directly back to the Committee's concerns regarding the proposed modifications to CR 1—by failing to provide at least some guidelines or parameters, the rule opens itself to the likelihood of increased litigation as parties dispute whether their opponents have properly complied.

It is also unclear whether the parties must participate in the early mediation. Although the proposed rule mandates that all persons necessary to settle the case must attend, the precise meaning of this requirement is unclear. In the context of a personal injury case, is the requirement satisfied if the insurance adjuster appears without the actual defendant? If the insurance adjuster only has authority up to a certain dollar amount, which is common, has the defendant violated their participation obligation? If only the adjuster appears, but the policy limits are insufficient to settle, does the absence of the named defendant constitute a violation? And what are the remedies and defenses for an alleged breach? If the insurer believed in good faith that the case could be settled for less than policy limits and did not request the defendant to appear, is this a defense to the breach of the rule that all persons necessary to settle the case must appear? The Rule is silent on these issues, leaving each Court without assistance in resolving the disputes that will certainly arise out of the proposed rule.

### **Conclusion**

For the above reasons, the Litigation Section Executive Committee opposes the proposed "Reasonable Cooperation" and the "Mandatory Mediation" rules. Although well-intentioned, neither rule will achieve the ends for which they are intended and, in fact, run the risk of increasing litigation costs.



May 24, 2018

Washington State Bar Association  
Civil Litigation Rules Drafting Task Force  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101-2539  
Via email [CLTF@wsba.org](mailto:CLTF@wsba.org)

Dear Task Force Members,

Thank you for the opportunity to provide feedback on the changes and additions to the Civil Rules.

The Mason County Bar Association would like to focus its feedback on the proposed mandatory mediation rule.

As you may or may not be aware, Mason County has had a mediation rule since 2011. It is attached for your reference. We oppose any approach that would limit local flexibility and/or trump any local rule currently in place.

Perhaps an alternative approach would be a provision which allows for a local jurisdiction to enact its own rule so long as that rule substantially complies with the intent of the new civil rule. Another idea would be to grandfather in the jurisdictions with existing mediation rules.

We are concerned that the WSBA is taking a heavy-handed approach instead of considering the benefits of local control and maintaining local flexibility. We would ask that the Task Force err on the side of flexibility and local control in considering all of these rule changes.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Nichols", written in a cursive style.

JULIE NICHOLS, WSBA No. 37685  
MCBA President

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## Mason County Superior Court

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### LCR 40

#### STATUS CONFERENCES, MEDIATION, TRIAL SETTING CONFERENCES

##### 1. Status Conferences.

1.1 A status conference may be assigned at the time a case is filed, by notice from the court administrator's office, or upon motion of any party.

1.2 At the status conference, the court may direct the case to arbitration or mediation, and/or may set an additional status conference date. The court may determine and set a discovery deadline, a mediation deadline, a trial setting conference date, and other dates and deadlines as necessary.

##### 2. Mediation.

2.1 Presumption of Mediation. It is presumed that all contested civil and family law matters, with the following exceptions, will have completed mediation prior to trial:

- Dependencies and termination of parental rights;
- Uniform Parentage actions, up until establishment of paternity;
- Matters in which a domestic violence or sexual assault protection order is in place;
- Petitions for Civil Commitment (Sexual Predators);
- Actions regarding seizure of property by the State;
- Matters subject to Mandatory Arbitration Rules, or that are to be arbitrated by agreement, up until a request for a trial de novo;
- Matters that have been previously mediated consistent with the standards set forth in this rule; and
- By court order upon motion of any party, upon the court's determination that there is good cause not to require mediation.

Any party may move the court for an order that there is good cause to require

mediation in any matter, including those cases designated as exceptions above.

2.2 Mediators. Parties may agree to a mediator from among the three categories of mediators below. If the parties cannot agree, the court shall upon motion by any party appoint a mediator. Appointment of a mediator is subject to the mediator's right to decline to serve.

2.2.1 Mediation Panel. There shall be a panel of mediators established by the court. The list of court-approved mediators and their information sheets will be available to the public in the court administrator's office.

Parties may stipulate to using a mediator from the Mediation Panel. If the parties stipulate to using a mediator from the Mediation Panel, but are not able to agree on a specific mediator, a mediator will be assigned from the Mediation Panel.

2.2.2 Volunteer Mediation Panel. There shall be a panel of volunteer mediators established by the court. Parties may qualify for appointment of a mediator from the Volunteer Mediation Panel if income and asset tests as determined by the court are met. The list of court-approved volunteer mediators and their information sheets will be available to the public in the court administrator's office.

Parties who qualify may stipulate to using a mediator from the Volunteer Mediation Panel. If the parties stipulate to using a mediator from the Volunteer Mediation Panel, but are not able to agree on a specific mediator, a mediator will be assigned from the Volunteer Mediation Panel.

2.2.3 Other Mediators. Upon approval by the court, parties may stipulate to a mediator not on the Mediation Panel or the Volunteer Mediation Panel. The court may approve appointment of a proposed mediator upon satisfactory showing of qualifications and knowledge of subject matter. Any mediator certified as such by a Washington State dispute resolution center is qualified to serve as a mediator under this paragraph.

2.2.4 Application and Trainings. A person who wishes to be placed on the Mediation Panel and/or Volunteer Mediation Panel shall complete an information sheet on the form prescribed by the court, which shall demonstrate the person's qualifications as mediator, and as to specific subject matters. Mediators and any person who wishes to be considered as a mediator may participate in court-sponsored mediation trainings.

2.3 Cost of Mediation. Parties may stipulate to the allocation of mediation costs. If the parties are unable to agree, the court will order the same upon motion of any party. Parties using mediators from the Volunteer Mediation Panel may be charged an administrative fee as set by the court.

2.4 Mediation Orders and Process.

2.4.1 Mediation Status and Terms. An order shall be entered setting forth the following:

- Mediation status (whether the case is to be mediated); and

- Mediation terms (including but not limited to the mediator or category the mediator is to be chosen from, allocation of costs of mediation, mediation deadline, and identity of parties with authority required to attend mediation).

If the parties agree as to mediation status and/or terms, they may so stipulate and submit an agreed order for the court's approval prior to the status conference, or at any time thereafter prior to the discovery deadline.

If the parties are unable to agree to the status and/or all terms of mediation, a party may file and note a motion for entry of an order setting the status and terms of mediation.

2.4.2 Litigation Process During Period of Mediation. Pending mediation, all litigation processes such as discovery, motions for temporary orders, and motions for dispositive orders shall continue.

2.4.3 RCW ch. 7.07. All mediations undertaken pursuant to this Rule are subject to the provisions of RCW ch. 7.07, the Uniform Mediation Act, including its requirements regarding privilege and confidentiality.

2.4.4. Civil Mediation Statements. In civil actions, all parties shall prepare and deliver a Civil Mediation Statement to the mediator and opposing parties, no later than five working days prior to the mediation. The statement shall address the matters set forth in Appendix A. The statement shall not be filed with the court.

2.4.5. Family Law Mediation Statements. In family law actions, all parties shall prepare and deliver a Family Law Mediation Statement to the mediator, opposing parties, and the State of Washington, if the State is a party, no later than five working days prior to the mediation. The statement shall address the matters set forth in Appendix B. The statement shall not be filed with the court.

2.4.6. Appearance at Mediation. The parties shall appear in person at mediation unless the court orders in advance that they may be present by telephone or electronic means sufficient to allow full participation. Each party shall ensure the presence at mediation of persons who have sufficient authority to approve a settlement.

2.4.7 Mediation Report. Within five days after completion of mediation, the mediator shall file a Mediation Report indicating whether the case has been resolved. A copy of the Mediation Report shall be provided to the court administrator's office.

### 3. Discovery.

Discovery shall be completed in accordance with the discovery schedule set at the status conference. Exceptions will be made only upon prior approval of the court, and for good cause.

### 4. Trial Setting Conference.

4.1 A date for a trial setting conference may be set at the status conference, by notice from the court administrator's office, or upon motion of any party. A party may also request an accelerated trial date by motion at any time prior to the trial setting conference date.

4.2 Trial setting conferences shall not be continued absent a showing of good cause and upon prior approval of the court.

4.3 At the trial setting conference, the court shall consider compliance with dates and deadlines, the status of mediation, and readiness for trial.

4.4 Cases shall be assigned a secondary and/or primary trial setting to be determined by the court. Where out-of-state witnesses or substantial expert testimony is anticipated, the parties may request that the court dispense with the secondary trial setting.

4.5 The court may set schedules, deadlines and other pretrial dates as appropriate.

## 5. Compliance.

5.1 Counsel for the parties and pro se parties shall appear in person or by telephone at each of the conferences set by the court. Counsel appearing for a party shall preferably be lead counsel for that party. Any counsel appearing for a party shall be prepared with an understanding of the case and authority to enter into agreements as contemplated herein.

5.2 Failure to comply with deadlines, dates, or other requirements set out in these rules, or failure to appear at a conference set by the court, may result in sanctions being imposed, including terms. The court may also strike a trial date if mediation has not been completed by the applicable deadline.

[Amended effective 9-1-11]

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[Click here to view in a PDF.](#)

### RECORDS

Case Records  
Caseload Reports  
Court Dates  
Judicial Information System (JIS)  
JIS LINK  
Odyssey Portal  
Records Requests

### RESOURCES

Civic Learning  
Court News  
Court Program Accessibility  
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Resources, Publications and Reports  
Self Help  
State Law Library  
Whistleblower Policy

### QUICK LINKS

Court Closures  
Court Forms  
Court Opinions  
Court Rules  
Domestic Violence Forms  
Emergency Procedures  
eService Center  
Pattern Jury Instructions

### TRANSLATIONS

中文格式/Chinese  
한국어서류/Korean  
Русский/Russian  
Español/Spanish  
Tiếng Việt/Vietnamese

May 25, 2018

Washington State Bar Association  
Civil Litigation Rules Drafting Task Force  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101-2539  
Via email [CLTF@wsba.org](mailto:CLTF@wsba.org)

Dear Task Force Members,

Thank you for the opportunity to provide feedback on the changes and additions to the Civil Rules.

I would like to focus my feedback on the proposed mandatory mediation rule.

As you may or may not be aware, Mason County has had a mediation rule since 2011. I oppose any approach that would limit local flexibility and/or trump any local rule currently in place. Unfortunately, in our rural area your proposed rule would severely limit our ability to comply with the rule and our local judiciary the flexibility to tweak the local rule to ensure its efficacy for our community. For example, your limitations on the approved mediators would severely impact our already short list of mediators available to our litigants.

Perhaps an alternative approach would be a provision which allows for a local jurisdiction to enact its own rule so long as that rule substantially complies with the intent of the new civil rule. Another idea would be to grandfather in the jurisdictions with existing mediation rules.

I am concerned that the WSBA is taking a heavy-handed approach that may work for large jurisdictions such as King and Pierce counties instead of considering the benefits of local control and maintaining local flexibility needed in smaller rural jurisdictions. I would ask that the Task Force err on the side of flexibility and local control in considering all of these rule changes.

Thank you for your consideration of this matter.

Sincerely,

PATRICIA H. WHITE, WSBA No. 22510



*Justice... Professionalism... Service... Since 1886*

May 23, 2018

VIA EMAIL: CLTF@wsba.org

Civil Litigation Rules Drafting Task Force  
Washington State Bar Association

Dear Task Force Members:

The King County Bar Association Judiciary and Litigation Committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We are writing to provide our input regarding the draft Civil Rules that you have prepared in response to the WSBA Board of Governors recommendations from the Task Force on the Escalating Costs of Civil Litigation.

Before addressing the suggested changes to the Civil Rules, we would like to commend the effort and good work by the Civil Litigation Rules Drafting Task Force. We greatly appreciate the time that has been devoted by the Task Force members to attempt to reduce the cost of civil litigation. This is a very important topic and one that must be addressed by the Bar Association and the Supreme Court to reduce the escalating costs of civil litigation.

Our Committee's comments on the Civil Rules are limited to the following topics: (1) Cooperation; (2) Initial Disclosures; (3) Mediation; and (4) Initial Case Schedules. The comments regarding Cooperation, Initial Disclosures and Mediation are included in the enclosed memorandums. Subcommittees were formed to develop and draft the enclosed memorandums that were then reviewed and approved by our Committee.

As to the Initial Case Schedules, we have only one comment regarding the need for a separate complex case track assignment. The original final report of the ECCL Task Force included a recommendation for assignment of cases to a "Tier 2" case schedule for cases that were designated as complex. The ECCL Task Force's language on this topic is as follows:

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine in its discretion whether the case is sufficiently complex for Tier 2. In making this determination, the court may consider the number of parties, claims, witnesses, issues, the necessity of substantial investigation outside the State of Washington, and likely discovery needs; novel legal issues or substantial public interest; substantial monetary value of the stakes (for example, stakes over \$300,000); and other indicia of complexity.

ECCL Final Report, p. 19.

We believe that a separate case schedule for Tier 2 complex cases is still appropriate for the reasons identified by the ECCL in its Final Report. A separate Tier 2 complex case schedule is also appropriate given the Civil Litigation Rules Drafting Task Force's draft rules regarding Early Mandatory Mediation. We believe that complex cases often require additional time before a productive mediation can occur. Thus, a separate case schedule along with a later mediation date is appropriate for these types of cases. If the Task Force does not believe that a separate Tier 2 complex case schedule is appropriate, the Task Force should consider a later early mediation date for complex cases for the reasons stated above.

Our Committee previously reviewed and provided input to the Escalating Costs of Civil Litigation Task Force and to the WSBA Board of Governors regarding the proposed recommendations of the ECCL Task Force. Many of our Committee's recommendations were incorporated by the ECCL Task Force and eventually adopted by the WSBA Board of Governors. We are hopeful that our recommendations regarding Cooperation, Initial Disclosures, Mediation, and Initial Case Schedules will assist you in drafting the proposed rule changes recommended to the Board of Governors.

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We feel strongly that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. To that end, we request that the Civil Litigation Rules Drafting Task Force make revisions to the proposed rule changes as provided within.

Very respectfully yours,

**KCBA Judiciary & Litigation Committee**

Brett M. Hill, Co-Chair

cc: Andrew Prazuch

Attachments: Memos regarding (1) Cooperation; (2) Initial Disclosures; and (3) Mediation

# Memorandum

May 10, 2018

**To** WSBA Civil Litigation Rules Drafting Task Force

**From** King County Bar Association Judiciary & Litigation Committee

**Re** WSBA Civil Litigation Rules Drafting Task Force, draft proposals on “cooperation” amendments

This memo represents the comments of the King County Bar Association’s Judiciary and Litigation Committee to the WSBA Civil Litigation Rules Drafting Task Force, regarding that Task Force’s draft proposals implementing the “cooperation” requirement recommended by the WSBA Task Force on the Escalating Costs of Civil Litigation and approved by the WSBA Board of Governors.

The Committee generally approved of the goals of the draft proposals, which would amend CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26, and CR 37 to require reasonable cooperation between parties, and making available sanctions for a failure to cooperate. Reasonable cooperation between opposing parties during litigation is of course a laudable goal, which the WSBA Board of Governors have embraced. The Task Force’s draft proposed amendments would be a step towards moving litigants towards that goal.

The Committee has comments on four aspects of the draft proposals:

*First*, what constitutes “cooperation” in the context of an adversarial process—or, conversely, a failure to reasonably cooperate—is left open to interpretation in the draft proposals. The Committee is concerned that without guidance, reasonable minds may differ as to where the line between effective advocacy and noncooperation lies. This could produce additional litigation regarding (lack of) cooperation, underenforcement of the new rules, or both.

To avoid confusion, the Committee recommends the Task Force look to two sources. The first is the Guidelines of Professional Courtesy, developed by the King County Bar Association and adopted in 1999. The second is the WSBA’s Creed of Professionalism, adopted by the Board of Governors in 2001. Both these sources address the issue of civil, professional, and cooperative attorney conduct. The principles they contain may help guide attorneys in abiding by the new cooperation requirements. Copies of both the Guidelines of Professional Courtesy and the Creed of Professionalism are included as attachments.

*Second*, the Committee is concerned the amendments as drafted may be prone to underenforcement, because they would allow a court to impose no sanction even if it finds that a litigant unreasonably failed to cooperate with the court or opposing counsel. When the WSBA was in the process of considering the ECCL Task Force’s report in the

course of making its recommendations, multiple commenters identified lack of judicial enforcement as a significant problem, and a driver of the escalating litigation costs these amendments are meant to address. This was consistent with our group's experiences. With these proposed amendments, judges might be hesitant to impose any sanctions, even when there has been a clear and unreasonable failure by one party to cooperate.

Without *consistent* sanctions, there is little incentive to bring a failure to cooperate to the court's attention. Without consistent sanctions, there is likewise little deterrent to prevent strategic failures to cooperate. These failures unreasonably drive up litigation costs, consume court resources and are highly prejudicial to the administration of justice.

Compare a failure-to-cooperate motion to a motion to compel discovery. With the discovery motion, even without monetary sanctions, there remains an incentive to bring the motion—the possibility of obtaining of an order compelling production. But for a failure to cooperate, it is unclear what remedy beyond monetary sanctions would be appropriate.

The Task Force should go further in making cooperation an enforceable requirement. One way would be requiring at least some sanctions whenever a court finds that a party's conduct amounted to a failure to reasonably cooperate. We acknowledge this would be taking a step further than the original ECCL Task Force recommendation, which left the decision to impose sanctions for failures to cooperate discretionary. But in our opinion, requiring some sanction for a party's violation of the cooperation rule—even a small sanction—would be a significant step towards achieving the change in litigation culture the cooperation amendment was intended to achieve.

*Third*, there is a potential discrepancy between the remedies available in the proposed amendments to CR 37 and CR 11. The CR 11 amendment allows sanctions that include, but are not limited to, an award of costs and attorney's fees. But the CR 37 amendment only provides for costs and attorney's fees.

The proposed CR 37 amendment is in line with CR 37's existing award of attorney's fees to the prevailing party in a discovery motion. But it creates a mismatch between the two rules providing remedies for a failure to cooperate, which may lead to confusion. Additionally, attorney's fees for bringing a motion to find another party in violation of the cooperation requirement may be substantial. This may lead some judges to hesitate to find a violation for conduct that may constitute a failure to cooperate, but which the judge believes is not egregious enough to warrant a large monetary penalty. This also could lead to an issue of under-enforcement.

The Task Force should consider aligning the remedies for a failure to cooperate under CR 11 and CR 37, or alternatively making remedies available under only CR 11. If CR 37 is amended to include sanctions for failures to cooperate, the Task Force may want to consider making monetary sanctions other than attorney's fees available under that rule.

*Fourth*, there is a technical problem with the proposed amendments as drafted. Under the proposed rules, the parties must cooperate in bringing the motion for sanctions for failure to cooperate against one party. Specifically, proposed rule CR 11(c) provides that “[t]he moving party shall arrange for a mutually convenient conference in person or by telephone” and that “[a]ny motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.” It is thus impossible for a litigant who is the victim of noncooperation to bring a motion for sanctions for noncooperation without arranging for a mutually convenient conference, which in turn cannot be accomplished without the cooperation of the noncooperating non-movant.

As a solution to this, it may be appropriate to adopt the language of Federal Civil Rule 37(a)(1), allowing a certification that a movant “has in good faith [met] or attempted to [meet the conference requirements of this rule] with the person or party failing to [cooperate].”

# MEMORANDUM

**To:** WSBA Task Force  
**From:** King County Bar Association Judiciary & Litigation Committee  
**Date:** April 30, 2018  
**Subject:** Initial Disclosures

The KCBA Judiciary & Litigation Committee has reviewed the proposal on Initial Disclosures from the WSBA Task Force and offers the following comments.

## 1. Timing of Initial Disclosures

Under the Task Force proposed case schedule, Initial Disclosures would occur 13 weeks after filing. The KCBA Judiciary & Litigation Committee felt that this may prove to be unworkable for several reasons.

First, it is altogether possible that the complaint might not get served until the 13<sup>th</sup> week after filing. Under RCW 4.16.170 an action is deemed commenced on filing for purposes of the statute of limitations provided that it is served within 90 days. It is not uncommon for a plaintiff to file an action on the eve of the expiration of the statute of limitations and delay service while additional work is performed or the defendants are located. Since the date of commencement relates back to the date of filing, the Plaintiff is able to buy time in this manner. If Initial Disclosures are tied to the filing date, then there may well be insufficient time to meet the deadline in such circumstances. The KCBA Judiciary & Litigation Committee asks whether there might be a more practical way to schedule the disclosures? Under the FRCP the date for initial disclosures is determined by referencing the required discovery conference with the Court. ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order. . ."). Washington's Civil Rules makes a CR 26(f) conference optional as opposed to the federal mandatory procedure. In Washington CR 26(f) conferences are the exception and not the normal practice.

Second, Initial Disclosures may come too late. With the Task Force proposal creating a 52 week period from filing to trial, a 13 week deadline for

Initial Disclosures is 25% of the way through the process. That slow start to a case leaves everyone on their heels. Many lawyers serve discovery requests along with the summons and complaint and the Washington Civil Rules make express provision for such a practice by requiring responses within 40 days (as opposed to the normal 30 days) after service. See *e.g.* CR 33(a), CR 34(b)(3)(A), & CR 36(a). If Initial Disclosures are intended to be a less expensive substitute for traditional discovery,<sup>1</sup> then 91 days (13 weeks) may not satisfy the needs of lawyers who demand discovery within 40 days as a matter of course. Why wait twice as long to get started? The proposed rule encourages a dilatory practice.

One alternative approach would be to require Initial Disclosures to be made at the earlier of 13 weeks or filing or within 30 days of the service of a demand by any party for the making of Initial Disclosures, but not sooner than 40 days after service of the summons and complaint. That would at least reduce the late disclosure problem inherent in the existing draft.

Third, there is a danger that litigants may use the deadline for Initial Disclosures as an excuse for not providing timely responses to interrogatories and requests for production that are served during the first 13 weeks of filing. King County had just such an experience with its Local Civil Rule on case schedule requirements for identifying lay and expert witnesses. Litigants frequently responded to such interrogatory requests saying that the information would be provided on the date set in the case schedule and not a day sooner. The King County Superior Court Local Rules Committee took steps to counter this by adding the following comment to LCR 4.

6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

It is suggested that an expanded form of the comment be added as a part of the proposed Initial Disclosure rule so that it does not provide a means for subverting timely responses to traditional discovery. The expansion should extend to documents and other discovery covered by the new rule.

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<sup>1</sup> "the functional equivalent of court-ordered interrogatories. . ."

## 2. Scope of Required Disclosures

When the requirement of Initial Disclosures was first adopted by the federal courts in 1993, the scope of the disclosures was as follows:

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are **likely to have discoverable information relevant to the factual disputes between the parties**. All persons with such information should be disclosed, **whether or not their testimony will be supportive of the position of the disclosing party**. As officers of the court, **counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.**<sup>2</sup>

Emphasis added.

This broad scope of disclosures was narrowed in 2000. The Task Force proposal adopts the narrow standard of disclosure instead of using the standard of “relevance to the factual dispute.” Rather, a party is only required to disclose that which “supports the disclosing party’s claims or defenses,” or which is referred to in the party’s pleadings.

The differences between the old and new scope limitations is significant. A party can withhold from disclosure information harmful to its case since it only has to provide information and witnesses “supporting the disclosing party’s claims or defenses.” A party who relies upon the Initial Disclosures as an effective substitute for traditional discovery is walking into a trap and perhaps exposing him or herself to professional liability for errors and omissions because the Initial Disclosures will not provide the full vista of the case necessary to rebut the opponent.<sup>3</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> In *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993), the Washington Supreme Court interpreted the sanctions provisions of CR 26(g) by applying the report of the federal advisory committee, which in turn cited to the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “**Mutual knowledge of all the relevant**

The easy answer to this is to send an interrogatory that requests the "bad" stuff that hasn't been supplied. But, if the intention of the proposed rules is to combat the escalating costs of civil litigation, then that purpose is defeated by making interrogatories just as necessary as before. What is saved by a rule so narrowly drafted?

Arizona has adopted the broader scope of initial disclosure in its Rule of Civil Procedure 26.1, which provides:

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

The KCBA Judiciary & Litigation Committee recommends that if an initial disclosure rule is adopted that either the 1993 version of the rule be adopted or the Arizona rule be utilized. Each has the broader scope of "relevance to the factual dispute" rather than the limited disclosure that proposed by the Task Force Draft.

Finally, there are some omissions in the Task Force Draft of language that appears in the FRCP. The FRCP exempts from initial disclosure information that would be used solely for impeachment. The Task Force Draft is silent on this and should be modified to expressly state the exception. Next, the FRCP specifically requires production of "electronically stored information (ESI) and tangible things." The Task Force Draft omits that language and instead says "document and other relevant evidence." While relevant evidence might be read to include ESI and tangible things, it would be better to make that express. A court might well see the deviation from the FRCP as expressing an intention to not cover such material or as a reason to reject federal authority in interpreting the new state rule. Another difference in the Task Force Draft is that while it mimics the requirement that a plaintiff provide a description and computation of each category of damages, it omits the FRCP requirement that the underlying documentation also be made available;<sup>4</sup> once again forcing the defending party

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**facts gathered by both parties is essential to proper litigation."** *Hickman v. Taylor*.

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"who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each

to resort to a request for production and reducing the intended cost saving. Consistent with the goal of reducing the costs of litigation, the KCBA Judiciary & Litigation Committee recommends that the federal version be adopted rather than the modification contained in the Task Force Draft.

### 3. Supplementation

A party making Initial Disclosures “is under no duty to supplement the disclosure” except where new witnesses are located, a new expert is identified, or when the party knows that the disclosure was incorrect when it was made or knows that the Initial Disclosure is no longer true (and withholding that fact is in substance a knowing concealment.” Other than that, there is no requirement to supplement. The same is true for interrogatories and requests for production.

The FRCP requirement is somewhat broader. It requires supplementation not just when the disclosure was incorrect, but also when it was “incomplete.” This seems to be a better approach because it picks up documents that would make the earlier disclosure more reliable. Here is the federal language.

#### (e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission— **must supplement or correct its disclosure or response:**

(A) **in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect**, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

The KCBA Judiciary & Litigation Committee recommends that this FRCP provision be adopted in place of the Task Force Draft. Alternatively, the Task

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computation is based, including materials bearing on the nature and extent of injuries suffered.”

FRCP 26(a)(1)(A)(iii).

Force may wish to consider the supplementation provision in Arizona Civil Rule 26.1(d)(2).<sup>5</sup>

#### 4. Sanctions

The Task Force Draft retains the present references to sanctions contained in CR 26(e)(4) [supplementation requirement] and CR 26(h) [signing of requests and responses]. The current provisions are vague in that they refer to “such terms and conditions as the trial court may deem appropriate,” and including “an order to pay the amount of the reasonable expenses incurred.” The KCBA Judiciary & Litigation Committee recommends that this language be stricken and a specific reference to CR 37 be substituted in order to make clear that the full panoply of allowable sanctions may be imposed.

The Arizona Initial Disclosure Rule discussed above is backed by stiff sanctions that don't exist in Washington. Under Arizona Court Rule 37 the evidence or witness may be excluded if not timely disclosed and unfavorable information not timely disclosed can lead to extreme sanctions such as dismissal.<sup>6</sup>

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Arizona Civil Rule 26.1(d)(2) *Additional or Amended Disclosures*. The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order--or in the absence of such a deadline, later than 60 days before trial--must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

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Arizona Civil Rule 37(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) Failure to Timely Disclose. Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless such failure is

The disclosure rule works in Arizona because lawyers face serious, case destroying sanctions. Given the Washington Supreme Court's decision in *Jones v. Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) the Task Force cannot provide a means to enforce the requirements for Initial Disclosures with such sanctions.

## Should an Initial Disclosure Rule Be Adopted?

The Rules Drafting Task Force has been charged by the WSBA Board of Governors with multiple tasks. Principle among them is to:

Review the recommendations of the Board of Governors addressing the ECCL Task Force Report and determine whether amendments to Washington's Civil Rules are needed to implement the recommendations.

Consistent with that responsibility, the KCBA Judiciary & Litigation Committee offers the following comments.

Initial Disclosures require a new additional step to the discovery process, which necessarily adds the preparation time to the escalating costs of civil litigation. The rule should only be adopted if it would result in an overall reduction of costs. So the first question that must be answered is whether the rule

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harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) Inaccurate or Incomplete Disclosure. On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

Arizona Civil Rule 37(d) Failure to Timely Disclose Unfavorable Information. If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may impose serious sanctions, up to and including dismissal of the action--or rendering of a default judgment--in whole or in part.

modification as proposed saves money? The KCBA Judiciary & Litigation Committee submits that it does not.

The underlying failure in the rule is that it fails to produce the adverse information held by the opponent. Any competent litigator is therefore going to have to send out requests for production and interrogatories substantially similar to the ones currently being used. It is as if the parties are initially asked to answer a poorly drafted set of interrogatories and requests (the incomplete initial disclosure list) and then have to answer the discovery requests that would be expected under current practice. It is readily apparent that the initial disclosures saves nothing and adds to the burden and expense of litigation. Moreover, the late and perhaps uncertain deadline for initial disclosures discussed above, means that the diligent will have already drafted and served the inevitable discovery requests and that initial disclosures won't serve a useful function and, ironically, won't be "initial." Only those inclined toward procrastination will be served by the rule; often to their disadvantage due to the incomplete nature of that which would be required.

The lack of required supplementation also requires the diligent to follow up, just as they do today. There is no cost saving that can be found in this rule. A second cost increasing factor is that bulk delivery of documents at the start of a case requires the receiving party to dive through the material to figure out which documents apply to any given claim. Currently, carefully drafted requests for production require the responding party to identify the documents by request number, preventing the hiding of the needle in the haystack. There is an exception that allows documents to be produced in the form in which a business has maintained them. But that is an exception and the normal rule generally provides identified items. An initial disclosure rule as proposed would leave the recipient guessing and would add significantly to the costs of litigation.

Initial Disclosures work in the federal courts because of a different structure for pretrial discovery. Federal judges push discovery management over to a staff of Magistrate Judges. Federal courts are more intimately involved in the pretrial process because they can financially afford it. Our superior and district courts are under-funded and don't even have the luxury of a law clerk let alone commissioners who would act like federal magistrate judges.

The KCBA Judiciary & Litigation Committee submits that the Draft Proposal will increase the costs of civil litigation, introduce uncertainty and create a trap for the unwary.

## MEMORANDUM

To: Washington State Bar Association Civil Litigation Rules Drafting Task Force  
From: KCBA Judiciary and Litigation Committee  
Date: May 12, 2018  
Subject: Early Mandatory Mediation

A subcommittee of the KCBA Judiciary and Litigation Committee consisting of Katie Comstock, Joseph Bringman, and Michael Wampold first met to review Washington State Bar Association Civil Litigation Rules Drafting Task Force's proposed Early Mediation Rule. The subcommittee then met with the KCBA Judiciary and Litigation Committee as a whole, and together we present the following comments and concerns.

We are in support of an early mandatory mediation rule. We agree that requiring mediation in superior court cases before completing discovery, could help reduce the cost of litigation and encourage early resolution. We feel that early mediation will only be successful if effective initial disclosures and case schedule rules are also adopted (see separate memorandums from regarding those topics from the KCBA Judiciary and Litigation Committee). In our opinion, for an early mediation to be successful all counsel should meet early to determine the discovery they need to conduct prior to discussing settlement, and if there are any motions that need to be filed prior to discussing settlement.

With regards to the language of the rule, we have the following comments:

- (b)(4) - We are concerned that this section of the rule, which requires that each court establish and maintain a recommended fee schedule, will create a higher burden on the court and may have little to no effect on early mediation. Mediation fees vary widely depending on the mediator, the subject-matter of the dispute, and the way in which the matter has ended up at mediation. Although we agree there can be a benefit to having the mediator's fee public (as set forth in (b)(3)(D)), we do not see a benefit to the court setting a recommended fee schedule.
- In section (c)(2), there does not seem to be an option for a party to file something with the court where the parties cannot come to an agreement on a mediator. We propose amending the rule to require the parties to file something regardless of whether they agree on a mediator. The document could be titled "notice of joint selection of mediator / notice of request for appointment of mediator." Placing the burden on the parties to file something, regardless of whether they agree on a mediator, makes it more likely that the deadline won't simply slip and that if the court does need to assign a mediator, you don't lose time while waiting for the court to realize that no "notice" has been filed.
- In section (d)(2), we would like to address the increasingly common scenario where when insurance is involved, a representative with meaningful settlement authority is not present at mediation, or if available by phone, becomes unavailable by 2:00 due to being in a different time zone. We propose that the rule is amended to reflect that to the extent insurance is implicated, a representative with settlement

authority of each participating insurance be required to attend. We propose that the representative attend in person, unless agreed to otherwise by the parties, or allowed by the court. Further, where a representative is allowed to attend by phone, they should be required to be available throughout the mediation.

- In section (d)(2), we do not believe that giving the mediator the authority to determine all issues related to attendance will have the desired result. The mediator does not have subpoena authority, or the ability to sanction conduct. Further, in this rule, the mediator is not required and may not even be allowed, to file pleadings with the court. We believe the court should retain the authority to determine all issues related to attendance.
- Section (d)(2) should refer to section (h) and emphasize that the failure to attend will result in sanctions.
- For section (f), mediator compensation, if the parties agree to a mediator, then it seems they have already agreed that the mediator's fee is reasonable. In that scenario, the rule should be clarified that the parties cannot challenge previously agreed mediator compensation.
- In section (h), the language about potential sanctions needs to be clarified. Is the referenced fee ("a fee sufficient to deter the conduct") a fee to be paid to the court, or to the other parties? Does it bear any relation to the other parties' attorney's fees? Also, what does the phrase "reasonable expenses" include – does it include attorney's fees?

**INITIAL CASE SCHEDULE COMMENTS  
RECEIVED**

**From:** [Mark Baumann \(Mark\)](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** CR 3.1 question  
**Date:** Wednesday, April 11, 2018 6:13:12 PM

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Dear Task Force,

Am I reading CR 3.1 correctly to say that all Washington counties are required to have these case schedules, and that Court's are free to adopt local rules exempting certain case types out of the rule?

I am concerned about such a rule in family law cases in Clallam County, population under 100,000.

Warm regards,

Mark Baumann  
WSBA #18632  
Port Angeles

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**From:** [Alan L. Miles](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** [Sherry Lindner](#); [pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org); [Greg Zempel](#); [Christopher Horner](#)  
**Subject:** RE: Comment on New Civil Rule 3.1  
**Date:** Monday, April 16, 2018 3:20:34 PM

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Dear WSBA: The Office of the Kitsap County Prosecuting Attorney joins in the comment of the Kittitas prosecutor's office on proposed new CR 3.1 with respect to property tax foreclosure actions filed pursuant to chapter 84.64 RCW.

Moreover, actions filed pursuant to chapter 35.50 RCW (local improvement foreclosure) should be automatically exempted from the requirements for the same reasons.

If you have any questions regarding our comments, please let us know.

Thank you for your consideration.

Very truly yours,

Alan Miles

Alan L. Miles, Senior Deputy Prosecuting Attorney  
Office of the Kitsap County Prosecuting Attorney, Civil Division  
614 Division Street, MS-35A  
Port Orchard, WA 98366-4676  
(360) 337-7223 (direct dial)  
(360) 337-7083 FAX  
[AMiles@co.kitsap.wa.us](mailto:AMiles@co.kitsap.wa.us)

**From:** Christopher Horner [mailto:[christopher.horner@co.kittitas.wa.us](mailto:christopher.horner@co.kittitas.wa.us)]  
**Sent:** Monday, April 16, 2018 1:41 PM  
**To:** 'CLTF@wsba.org' <[CLTF@wsba.org](mailto:CLTF@wsba.org)>  
**Cc:** 'sherryl@wsba.org' <[sherryl@wsba.org](mailto:sherryl@wsba.org)>; [pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org); [Greg Zempel](#) <[greg.zempel@co.kittitas.wa.us](mailto:greg.zempel@co.kittitas.wa.us)>; Alan L. Miles <[AMiles@co.kitsap.wa.us](mailto:AMiles@co.kitsap.wa.us)>  
**Subject:** Comment on New Civil Rule 3.1

I submit this comment in response to the proposed CR 3.1:

Each year Kittitas County, and several other counties, maintain property tax foreclosure actions under chapter 84.64 RCW. Kittitas County's practice is to file a notice, summons, and complaint when initiating the property tax foreclosure action. Typically, Kittitas County's property tax foreclosure action is no more than 5-6 months in duration, and is resolved by motion, not by trial.

As such, it is impracticable to comply with CR 3.1 in property tax foreclosure actions, so I believe foreclosure actions under chapter 84.64 RCW should be exempted from the proposed CR 3.1.

Sincerely,

Chris Horner  
Deputy Prosecuting Attorney  
Kittitas County

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Notice: Email sent to Kittitas County may be subject to public disclosure as required by law.  
message id: 38eb45916c6dcbdac24bb3719d004a14

**From:** [Christopher Horner](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** [Sherry Lindner](#); [pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org); [Greg Zempel](#); [amiles@co.kitsap.wa.us](mailto:amiles@co.kitsap.wa.us)  
**Subject:** Comment on New Civil Rule 3.1  
**Date:** Monday, April 16, 2018 1:41:21 PM

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I submit this comment in response to the proposed CR 3.1:

Each year Kittitas County, and several other counties, maintain property tax foreclosure actions under chapter 84.64 RCW. Kittitas County's practice is to file a notice, summons, and complaint when initiating the property tax foreclosure action. Typically, Kittitas County's property tax foreclosure action is no more than 5-6 months in duration, and is resolved by motion, not by trial.

As such, it is impracticable to comply with CR 3.1 in property tax foreclosure actions, so I believe foreclosure actions under chapter 84.64 RCW should be exempted from the proposed CR 3.1.

Sincerely,

Chris Horner  
Deputy Prosecuting Attorney  
Kittitas County

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message id: 38eb45916c6dcbdac24bb8719d004a14

**From:** [bjohnslaw@aol.com](mailto:bjohnslaw@aol.com)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** amending CR26 re: initial case schedules  
**Date:** Saturday, May 05, 2018 6:40:08 PM

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Mr Wynne,

family law cases (26.09) should be opted out of the proposed initial case schedule - as much that is covered by the proposed schedule is either not relevant in our cases - or not a good idea (i.e. "initial discovery conference" w/i seven weeks of filing and joint selection of mediator w/i 13 weeks of filing, etc).

we are already issued a case schedule upon filing a family law case. . and it is specific to family (i.e. NOTHING is required for about the 1st 4 months - so that - IF parties are agreed and will be able to finalize after the mandatory 90-day waiting period - there is NOTHING required of them/their attys).

I did not see 26.09 cases as being opted out of this 'NEW' initial case schedule - but they should be

pls give me a call if you have Qs or would like to discuss why much of what is listed on the proposed initial case schedule/timing is not in the best interest of most family law cases (those that are contested).

barbara

Barbara J Johnson, WSBA #16785  
2200 112th Ave NE #200  
Bellevue WA 98004  
425-452-9000

**From:** [Benway, Jennifer](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** ["Sherry Lindner "](#)  
**Subject:** Comments on CR 3.1 and CR 26 proposals  
**Date:** Wednesday, May 23, 2018 4:36:34 PM

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This comment is provided on behalf of DMCJA Court Rules Committee Chair Judge Frank Dacca:

Hello,

You recently provided an opportunity for the DMCJA Court Rules Committee to comment on several rules proposals under consideration by the WSBA Court Rules Committee. We appreciate the opportunity. The Committee met on May 8 and discussed the proposals, and I will respond to each proposal as it was received.

Thank you for allowing the DMCJA Rules Committee to review and comment on the proposals to create a new CR 3.1 and to amend CR 26. Taking the proposals in turn, with regard to the proposal to create a new CR 3.1, the Committee did not think that the new rule would impact Courts of Limited Jurisdiction. If CLJs would be subject to the rule, the Committee would not be in favor of the rule in its current form.

With regard to the proposal to amend CR 26, the Committee is concerned that the proposal would not be workable for Courts of Limited Jurisdiction statewide and is therefore not in favor of the proposed amendments in their current form. The Committee would like a further opportunity to review the proposal and possibly make recommendations that would work better for CLJs. Would it be possible to provide input to the Committee in that regard is they continue their deliberations?

Thank you again for the opportunity to review these proposals.

**Jennifer (J) Amanda Benway**  
Legal Services Senior Analyst  
Administrative Office of the Courts  
360-357-2126

Superior Court of the State of Washington  
for the County of Mason

AMBER L. FINLAY, Judge  
Department No. 1  
MONTY D. COBB, Judge  
Department No. 2  
DANIEL L. GOODELL, Judge  
Department No. 3



Commissioner:  
Robert Sauerlender

Court Administrator:  
Robyn Lockwood

P.O. Box "X"  
Shelton, Washington 98584  
(360) 427-9670 Ext. 348

May 25, 2018

Rule Committee  
Civil Litigation Rules Drafting Task Force

The Mason County Superior Court provides the following comment with regard to the proposed CR 3.1.

We have three judges and one part-time Court Commissioner in our Court. We also have one of the highest, if not the highest per capita rate of Dependencies in the State of Washington. On any given week, we will have upwards of four Dependency Fact-Findings or Termination Trials scheduled, along with our Criminal Trials and other civil trials. Our Court Administration does a great job of managing the schedules, recognizing when matters are settling and matters are moving forward and maximizes the efficient use of all of the judicial officers in our Court. In addition, this Court was one of the first Courts in the State to adopt a mandatory mediation rule for the majority of civil matters, first effective on September 1, 2011.

We recognize that the intent of the rule is to assist in accomplishing the goal of having all civil matters resolved within a 52-week time period from the date of the initial filing. However, it is notable that even with such high numbers of Dependency matters in our Court, during 2017, we were able to resolve 91.25% of Probate matters within the first 8 months, 93.18% of Civil matters within the first 12 months, and 72.50% of Domestic Relations matters within the first 10 months. We have also learned, although somewhat anecdotally, that the local bar is now more inclined to mediate matters before they are filed, recognizing that the Court will insist upon a mediation at a later date. As a result, we believe that with our mandatory mediation rule, the actual resolution rate of conflicts within the above time periods is higher than the above rates. We continue to work in an effort to improve on these percentages, utilizing our limited resources.

As a matter of practice, the court currently requires a mediation session before it grants a trial date. This process encourages the parties to accomplish a mediation sooner than later and keeps our trial calendars clear of matters that resolve themselves without a trial. Our concern is that the current proposed rule will fill our trial calendars with meaningless trial settings and make it much more difficult to manage the resulting congestion. The proposed rule will also impose a greater burden on the Clerk's office, who also has to cope with limited resources.

While we do not have issues with the remainder of the scheduling requirements of the new rule, we suggest that the proposed rule be modified so that the trial setting does not occur until after the mediation session is completed or waived and utilize the mediation schedule as the bench mark for the other schedules until a trial date is set. Or, in the alternative, provide a process where the smaller jurisdictions like ours are able to opt out of the proposed rule.

Thank you for your considerations.

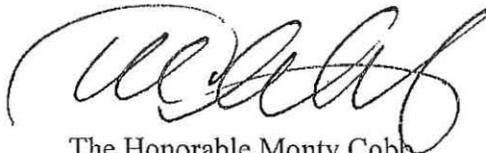
Sincerely,



The Honorable Daniel Goodell  
Mason County Superior Court



The Honorable Amber Finlay  
Mason County Superior Court



The Honorable Monty Cobb  
Mason County Superior Court



*Justice... Professionalism... Service... Since 1886*

May 23, 2018

VIA EMAIL: CLTF@wsba.org

Civil Litigation Rules Drafting Task Force  
Washington State Bar Association

Dear Task Force Members:

The King County Bar Association Judiciary and Litigation Committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We are writing to provide our input regarding the draft Civil Rules that you have prepared in response to the WSBA Board of Governors recommendations from the Task Force on the Escalating Costs of Civil Litigation.

Before addressing the suggested changes to the Civil Rules, we would like to commend the effort and good work by the Civil Litigation Rules Drafting Task Force. We greatly appreciate the time that has been devoted by the Task Force members to attempt to reduce the cost of civil litigation. This is a very important topic and one that must be addressed by the Bar Association and the Supreme Court to reduce the escalating costs of civil litigation.

Our Committee's comments on the Civil Rules are limited to the following topics: (1) Cooperation; (2) Initial Disclosures; (3) Mediation; and (4) Initial Case Schedules. The comments regarding Cooperation, Initial Disclosures and Mediation are included in the enclosed memorandums. Subcommittees were formed to develop and draft the enclosed memorandums that were then reviewed and approved by our Committee.

As to the Initial Case Schedules, we have only one comment regarding the need for a separate complex case track assignment. The original final report of the ECCL Task Force included a recommendation for assignment of cases to a "Tier 2" case schedule for cases that were designated as complex. The ECCL Task Force's language on this topic is as follows:

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine in its discretion whether the case is sufficiently complex for Tier 2. In making this determination, the court may consider the number of parties, claims, witnesses, issues, the necessity of substantial investigation outside the State of Washington, and likely discovery needs; novel legal issues or substantial public interest; substantial monetary value of the stakes (for example, stakes over \$300,000); and other indicia of complexity.

ECCL Final Report, p. 19.

We believe that a separate case schedule for Tier 2 complex cases is still appropriate for the reasons identified by the ECCL in its Final Report. A separate Tier 2 complex case schedule is also appropriate given the Civil Litigation Rules Drafting Task Force's draft rules regarding Early Mandatory Mediation. We believe that complex cases often require additional time before a productive mediation can occur. Thus, a separate case schedule along with a later mediation date is appropriate for these types of cases. If the Task Force does not believe that a separate Tier 2 complex case schedule is appropriate, the Task Force should consider a later early mediation date for complex cases for the reasons stated above.

Our Committee previously reviewed and provided input to the Escalating Costs of Civil Litigation Task Force and to the WSBA Board of Governors regarding the proposed recommendations of the ECCL Task Force. Many of our Committee's recommendations were incorporated by the ECCL Task Force and eventually adopted by the WSBA Board of Governors. We are hopeful that our recommendations regarding Cooperation, Initial Disclosures, Mediation, and Initial Case Schedules will assist you in drafting the proposed rule changes recommended to the Board of Governors.

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We feel strongly that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. To that end, we request that the Civil Litigation Rules Drafting Task Force make revisions to the proposed rule changes as provided within.

Very respectfully yours,

**KCBA Judiciary & Litigation Committee**

Brett M. Hill, Co-Chair

cc: Andrew Prazuch

Attachments: Memos regarding (1) Cooperation; (2) Initial Disclosures; and (3) Mediation

# Memorandum

May 10, 2018

**To** WSBA Civil Litigation Rules Drafting Task Force  
**From** King County Bar Association Judiciary & Litigation Committee  
**Re** WSBA Civil Litigation Rules Drafting Task Force, draft proposals on “cooperation” amendments

This memo represents the comments of the King County Bar Association’s Judiciary and Litigation Committee to the WSBA Civil Litigation Rules Drafting Task Force, regarding that Task Force’s draft proposals implementing the “cooperation” requirement recommended by the WSBA Task Force on the Escalating Costs of Civil Litigation and approved by the WSBA Board of Governors.

The Committee generally approved of the goals of the draft proposals, which would amend CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26, and CR 37 to require reasonable cooperation between parties, and making available sanctions for a failure to cooperate. Reasonable cooperation between opposing parties during litigation is of course a laudable goal, which the WSBA Board of Governors have embraced. The Task Force’s draft proposed amendments would be a step towards moving litigants towards that goal.

The Committee has comments on four aspects of the draft proposals:

*First*, what constitutes “cooperation” in the context of an adversarial process—or, conversely, a failure to reasonably cooperate—is left open to interpretation in the draft proposals. The Committee is concerned that without guidance, reasonable minds may differ as to where the line between effective advocacy and noncooperation lies. This could produce additional litigation regarding (lack of) cooperation, underenforcement of the new rules, or both.

To avoid confusion, the Committee recommends the Task Force look to two sources. The first is the Guidelines of Professional Courtesy, developed by the King County Bar Association and adopted in 1999. The second is the WSBA’s Creed of Professionalism, adopted by the Board of Governors in 2001. Both these sources address the issue of civil, professional, and cooperative attorney conduct. The principles they contain may help guide attorneys in abiding by the new cooperation requirements. Copies of both the Guidelines of Professional Courtesy and the Creed of Professionalism are included as attachments.

*Second*, the Committee is concerned the amendments as drafted may be prone to underenforcement, because they would allow a court to impose no sanction even if it finds that a litigant unreasonably failed to cooperate with the court or opposing counsel. When the WSBA was in the process of considering the ECCL Task Force’s report in the

course of making its recommendations, multiple commenters identified lack of judicial enforcement as a significant problem, and a driver of the escalating litigation costs these amendments are meant to address. This was consistent with our group's experiences. With these proposed amendments, judges might be hesitant to impose any sanctions, even when there has been a clear and unreasonable failure by one party to cooperate.

Without *consistent* sanctions, there is little incentive to bring a failure to cooperate to the court's attention. Without consistent sanctions, there is likewise little deterrent to prevent strategic failures to cooperate. These failures unreasonably drive up litigation costs, consume court resources and are highly prejudicial to the administration of justice.

Compare a failure-to-cooperate motion to a motion to compel discovery. With the discovery motion, even without monetary sanctions, there remains an incentive to bring the motion—the possibility of obtaining of an order compelling production. But for a failure to cooperate, it is unclear what remedy beyond monetary sanctions would be appropriate.

The Task Force should go further in making cooperation an enforceable requirement. One way would be requiring at least some sanctions whenever a court finds that a party's conduct amounted to a failure to reasonably cooperate. We acknowledge this would be taking a step further than the original ECCL Task Force recommendation, which left the decision to impose sanctions for failures to cooperate discretionary. But in our opinion, requiring some sanction for a party's violation of the cooperation rule—even a small sanction—would be a significant step towards achieving the change in litigation culture the cooperation amendment was intended to achieve.

*Third*, there is a potential discrepancy between the remedies available in the proposed amendments to CR 37 and CR 11. The CR 11 amendment allows sanctions that include, but are not limited to, an award of costs and attorney's fees. But the CR 37 amendment only provides for costs and attorney's fees.

The proposed CR 37 amendment is in line with CR 37's existing award of attorney's fees to the prevailing party in a discovery motion. But it creates a mismatch between the two rules providing remedies for a failure to cooperate, which may lead to confusion. Additionally, attorney's fees for bringing a motion to find another party in violation of the cooperation requirement may be substantial. This may lead some judges to hesitate to find a violation for conduct that may constitute a failure to cooperate, but which the judge believes is not egregious enough to warrant a large monetary penalty. This also could lead to an issue of under-enforcement.

The Task Force should consider aligning the remedies for a failure to cooperate under CR 11 and CR 37, or alternatively making remedies available under only CR 11. If CR 37 is amended to include sanctions for failures to cooperate, the Task Force may want to consider making monetary sanctions other than attorney's fees available under that rule.

*Fourth*, there is a technical problem with the proposed amendments as drafted. Under the proposed rules, the parties must cooperate in bringing the motion for sanctions for failure to cooperate against one party. Specifically, proposed rule CR 11(c) provides that “[t]he moving party shall arrange for a mutually convenient conference in person or by telephone” and that “[a]ny motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.” It is thus impossible for a litigant who is the victim of noncooperation to bring a motion for sanctions for noncooperation without arranging for a mutually convenient conference, which in turn cannot be accomplished without the cooperation of the noncooperating non-movant.

As a solution to this, it may be appropriate to adopt the language of Federal Civil Rule 37(a)(1), allowing a certification that a movant “has in good faith [met] or attempted to [meet the conference requirements of this rule] with the person or party failing to [cooperate].”

# MEMORANDUM

**To:** WSBA Task Force  
**From:** King County Bar Association Judiciary & Litigation Committee  
**Date:** April 30, 2018  
**Subject:** Initial Disclosures

The KCBA Judiciary & Litigation Committee has reviewed the proposal on Initial Disclosures from the WSBA Task Force and offers the following comments.

## 1. Timing of Initial Disclosures

Under the Task Force proposed case schedule, Initial Disclosures would occur 13 weeks after filing. The KCBA Judiciary & Litigation Committee felt that this may prove to be unworkable for several reasons.

First, it is altogether possible that the complaint might not get served until the 13<sup>th</sup> week after filing. Under RCW 4.16.170 an action is deemed commenced on filing for purposes of the statute of limitations provided that it is served within 90 days. It is not uncommon for a plaintiff to file an action on the eve of the expiration of the statute of limitations and delay service while additional work is performed or the defendants are located. Since the date of commencement relates back to the date of filing, the Plaintiff is able to buy time in this manner. If Initial Disclosures are tied to the filing date, then there may well be insufficient time to meet the deadline in such circumstances. The KCBA Judiciary & Litigation Committee asks whether there might be a more practical way to schedule the disclosures? Under the FRCP the date for initial disclosures is determined by referencing the required discovery conference with the Court. ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order. . ."). Washington's Civil Rules makes a CR 26(f) conference optional as opposed to the federal mandatory procedure. In Washington CR 26(f) conferences are the exception and not the normal practice.

Second, Initial Disclosures may come too late. With the Task Force proposal creating a 52 week period from filing to trial, a 13 week deadline for

Initial Disclosures is 25% of the way through the process. That slow start to a case leaves everyone on their heels. Many lawyers serve discovery requests along with the summons and complaint and the Washington Civil Rules make express provision for such a practice by requiring responses within 40 days (as opposed to the normal 30 days) after service. See e.g. CR 33(a), CR 34(b)(3)(A), & CR 36(a). If Initial Disclosures are intended to be a less expensive substitute for traditional discovery,<sup>1</sup> then 91 days (13 weeks) may not satisfy the needs of lawyers who demand discovery within 40 days as a matter of course. Why wait twice as long to get started? The proposed rule encourages a dilatory practice.

One alternative approach would be to require Initial Disclosures to be made at the earlier of 13 weeks or filing or within 30 days of the service of a demand by any party for the making of Initial Disclosures, but not sooner than 40 days after service of the summons and complaint. That would at least reduce the late disclosure problem inherent in the existing draft.

Third, there is a danger that litigants may use the deadline for Initial Disclosures as an excuse for not providing timely responses to interrogatories and requests for production that are served during the first 13 weeks of filing. King County had just such an experience with its Local Civil Rule on case schedule requirements for identifying lay and expert witnesses. Litigants frequently responded to such interrogatory requests saying that the information would be provided on the date set in the case schedule and not a day sooner. The King County Superior Court Local Rules Committee took steps to counter this by adding the following comment to LCR 4.

6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

It is suggested that an expanded form of the comment be added as a part of the proposed Initial Disclosure rule so that it does not provide a means for subverting timely responses to traditional discovery. The expansion should extend to documents and other discovery covered by the new rule.

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<sup>1</sup> “the functional equivalent of court-ordered interrogatories. . .”

## 2. Scope of Required Disclosures

When the requirement of Initial Disclosures was first adopted by the federal courts in 1993, the scope of the disclosures was as follows:

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are **likely to have discoverable information relevant to the factual disputes between the parties**. All persons with such information should be disclosed, **whether or not their testimony will be supportive of the position of the disclosing party**. As officers of the court, **counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.**<sup>2</sup>

Emphasis added.

This broad scope of disclosures was narrowed in 2000. The Task Force proposal adopts the narrow standard of disclosure instead of using the standard of “relevance to the factual dispute.” Rather, a party is only required to disclose that which “supports the disclosing party’s claims or defenses,” or which is referred to in the party’s pleadings.

The differences between the old and new scope limitations is significant. A party can withhold from disclosure information harmful to its case since it only has to provide information and witnesses “supporting the disclosing party’s claims or defenses.” A party who relies upon the Initial Disclosures as an effective substitute for traditional discovery is walking into a trap and perhaps exposing him or herself to professional liability for errors and omissions because the Initial Disclosures will not provide the full vista of the case necessary to rebut the opponent.<sup>3</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> In *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993), the Washington Supreme Court interpreted the sanctions provisions of CR 26(g) by applying the report of the federal advisory committee, which in turn cited to the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “**Mutual knowledge of all the relevant**

The easy answer to this is to send an interrogatory that requests the “bad” stuff that hasn’t been supplied. But, if the intention of the proposed rules is to combat the escalating costs of civil litigation, then that purpose is defeated by making interrogatories just as necessary as before. What is saved by a rule so narrowly drafted?

Arizona has adopted the broader scope of initial disclosure in its Rule of Civil Procedure 26.1, which provides:

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

The KCBA Judiciary & Litigation Committee recommends that if an initial disclosure rule is adopted that either the 1993 version of the rule be adopted or the Arizona rule be utilized. Each has the broader scope of “relevance to the factual dispute” rather than the limited disclosure that proposed by the Task Force Draft.

Finally, there are some omissions in the Task Force Draft of language that appears in the FRCP. The FRCP exempts from initial disclosure information that would be used solely for impeachment. The Task Force Draft is silent on this and should be modified to expressly state the exception. Next, the FRCP specifically requires production of “electronically stored information (ESI) and tangible things.” The Task Force Draft omits that language and instead says “document and other relevant evidence.” While relevant evidence might be read to include ESI and tangible things, it would be better to make that express. A court might well see the deviation from the FRCP as expressing an intention to not cover such material or as a reason to reject federal authority in interpreting the new state rule. Another difference in the Task Force Draft is that while it mimics the requirement that a plaintiff provide a description and computation of each category of damages, it omits the FRCP requirement that the underlying documentation also be made available;<sup>4</sup> once again forcing the defending party

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**facts gathered by both parties is essential to proper litigation.”** *Hickman v. Taylor*.

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“who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each

to resort to a request for production and reducing the intended cost saving. Consistent with the goal of reducing the costs of litigation, the KCBA Judiciary & Litigation Committee recommends that the federal version be adopted rather than the modification contained in the Task Force Draft.

### 3. Supplementation

A party making Initial Disclosures “is under no duty to supplement the disclosure” except where new witnesses are located, a new expert is identified, or when the party knows that the disclosure was incorrect when it was made or knows that the Initial Disclosure is no longer true (and withholding that fact is in substance a knowing concealment.” Other than that, there is no requirement to supplement. The same is true for interrogatories and requests for production.

The FRCP requirement is somewhat broader. It requires supplementation not just when the disclosure was incorrect, but also when it was “incomplete.” This seems to be a better approach because it picks up documents that would make the earlier disclosure more reliable. Here is the federal language.

#### (e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission— **must supplement or correct its disclosure or response:**

(A) **in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect**, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

The KCBA Judiciary & Litigation Committee recommends that this FRCP provision be adopted in place of the Task Force Draft. Alternatively, the Task

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computation is based, including materials bearing on the nature and extent of injuries suffered.”

FRCP 26(a)(1)(A)(iii).

Force may wish to consider the supplementation provision in Arizona Civil Rule 26.1(d)(2).<sup>5</sup>

#### 4. Sanctions

The Task Force Draft retains the present references to sanctions contained in CR 26(e)(4) [supplementation requirement] and CR 26(h) [signing of requests and responses]. The current provisions are vague in that they refer to “such terms and conditions as the trial court may deem appropriate,” and including “an order to pay the amount of the reasonable expenses incurred.” The KCBA Judiciary & Litigation Committee recommends that this language be stricken and a specific reference to CR 37 be substituted in order to make clear that the full panoply of allowable sanctions may be imposed.

The Arizona Initial Disclosure Rule discussed above is backed by stiff sanctions that don’t exist in Washington. Under Arizona Court Rule 37 the evidence or witness may be excluded if not timely disclosed and unfavorable information not timely disclosed can lead to extreme sanctions such as dismissal.<sup>6</sup>

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Arizona Civil Rule 26.1(d)(2) *Additional or Amended Disclosures*. The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order--or in the absence of such a deadline, later than 60 days before trial--must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

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Arizona Civil Rule 37(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) Failure to Timely Disclose. Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless such failure is

The disclosure rule works in Arizona because lawyers face serious, case destroying sanctions. Given the Washington Supreme Court's decision in *Jones v. Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) the Task Force cannot provide a means to enforce the requirements for Initial Disclosures with such sanctions.

### **Should an Initial Disclosure Rule Be Adopted?**

The Rules Drafting Task Force has been charged by the WSBA Board of Governors with multiple tasks. Principle among them is to:

Review the recommendations of the Board of Governors addressing the ECCL Task Force Report and determine whether amendments to Washington's Civil Rules are needed to implement the recommendations.

Consistent with that responsibility, the KCBA Judiciary & Litigation Committee offers the following comments.

Initial Disclosures require a new additional step to the discovery process, which necessarily adds the preparation time to the escalating costs of civil litigation. The rule should only be adopted if it would result in an overall reduction of costs. So the first question that must be answered is whether the rule

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harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) Inaccurate or Incomplete Disclosure. On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

Arizona Civil Rule 37(d) Failure to Timely Disclose Unfavorable Information. If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may impose serious sanctions, up to and including dismissal of the action--or rendering of a default judgment--in whole or in part.

modification as proposed saves money? The KCBA Judiciary & Litigation Committee submits that it does not.

The underlying failure in the rule is that it fails to produce the adverse information held by the opponent. Any competent litigator is therefore going to have to send out requests for production and interrogatories substantially similar to the ones currently being used. It is as if the parties are initially asked to answer a poorly drafted set of interrogatories and requests (the incomplete initial disclosure list) and then have to answer the discovery requests that would be expected under current practice. It is readily apparent that the initial disclosures saves nothing and adds to the burden and expense of litigation. Moreover, the late and perhaps uncertain deadline for initial disclosures discussed above, means that the diligent will have already drafted and served the inevitable discovery requests and that initial disclosures won't serve a useful function and, ironically, won't be "initial." Only those inclined toward procrastination will be served by the rule; often to their disadvantage due to the incomplete nature of that which would be required.

The lack of required supplementation also requires the diligent to follow up, just as they do today. There is no cost saving that can be found in this rule. A second cost increasing factor is that bulk delivery of documents at the start of a case requires the receiving party to dive through the material to figure out which documents apply to any given claim. Currently, carefully drafted requests for production require the responding party to identify the documents by request number, preventing the hiding of the needle in the haystack. There is an exception that allows documents to be produced in the form in which a business has maintained them. But that is an exception and the normal rule generally provides identified items. An initial disclosure rule as proposed would leave the recipient guessing and would add significantly to the costs of litigation.

Initial Disclosures work in the federal courts because of a different structure for pretrial discovery. Federal judges push discovery management over to a staff of Magistrate Judges. Federal courts are more intimately involved in the pretrial process because they can financially afford it. Our superior and district courts are under-funded and don't even have the luxury of a law clerk let alone commissioners who would act like federal magistrate judges.

The KCBA Judiciary & Litigation Committee submits that the Draft Proposal will increase the costs of civil litigation, introduce uncertainty and create a trap for the unwary.

## MEMORANDUM

To: Washington State Bar Association Civil Litigation Rules Drafting Task Force  
From: KCBA Judiciary and Litigation Committee  
Date: May 12, 2018  
Subject: Early Mandatory Mediation

A subcommittee of the KCBA Judiciary and Litigation Committee consisting of Katie Comstock, Joseph Bringman, and Michael Wampold first met to review Washington State Bar Association Civil Litigation Rules Drafting Task Force's proposed Early Mediation Rule. The subcommittee then met with the KCBA Judiciary and Litigation Committee as a whole, and together we present the following comments and concerns.

We are in support of an early mandatory mediation rule. We agree that requiring mediation in superior court cases before completing discovery, could help reduce the cost of litigation and encourage early resolution. We feel that early mediation will only be successful if effective initial disclosures and case schedule rules are also adopted (see separate memorandums from regarding those topics from the KCBA Judiciary and Litigation Committee). In our opinion, for an early mediation to be successful all counsel should meet early to determine the discovery they need to conduct prior to discussing settlement, and if there are any motions that need to be filed prior to discussing settlement.

With regards to the language of the rule, we have the following comments:

- (b)(4) - We are concerned that this section of the rule, which requires that each court establish and maintain a recommended fee schedule, will create a higher burden on the court and may have little to no effect on early mediation. Mediation fees vary widely depending on the mediator, the subject-matter of the dispute, and the way in which the matter has ended up at mediation. Although we agree there can be a benefit to having the mediator's fee public (as set forth in (b)(3)(D)), we do not see a benefit to the court setting a recommended fee schedule.
- In section (c)(2), there does not seem to be an option for a party to file something with the court where the parties cannot come to an agreement on a mediator. We propose amending the rule to require the parties to file something regardless of whether they agree on a mediator. The document could be titled "notice of joint selection of mediator / notice of request for appointment of mediator." Placing the burden on the parties to file something, regardless of whether they agree on a mediator, makes it more likely that the deadline won't simply slip and that if the court does need to assign a mediator, you don't lose time while waiting for the court to realize that no "notice" has been filed.
- In section (d)(2), we would like to address the increasingly common scenario where when insurance is involved, a representative with meaningful settlement authority is not present at mediation, or if available by phone, becomes unavailable by 2:00 due to being in a different time zone. We propose that the rule is amended to reflect that to the extent insurance is implicated, a representative with settlement

authority of each participating insurance be required to attend. We propose that the representative attend in person, unless agreed to otherwise by the parties, or allowed by the court. Further, where a representative is allowed to attend by phone, they should be required to be available throughout the mediation.

- In section (d)(2), we do not believe that giving the mediator the authority to determine all issues related to attendance will have the desired result. The mediator does not have subpoena authority, or the ability to sanction conduct. Further, in this rule, the mediator is not required and may not even be allowed, to file pleadings with the court. We believe the court should retain the authority to determine all issues related to attendance.
- Section (d)(2) should refer to section (h) and emphasize that the failure to attend will result in sanctions.
- For section (f), mediator compensation, if the parties agree to a mediator, then it seems they have already agreed that the mediator's fee is reasonable. In that scenario, the rule should be clarified that the parties cannot challenge previously agreed mediator compensation.
- In section (h), the language about potential sanctions needs to be clarified. Is the referenced fee ("a fee sufficient to deter the conduct") a fee to be paid to the court, or to the other parties? Does it bear any relation to the other parties' attorney's fees? Also, what does the phrase "reasonable expenses" include – does it include attorney's fees?

**INDIVIDUAL JUDICIAL ASSIGNMENT  
AND PRETRIAL CONFERENCES  
COMMENTS RECEIVED**

**From:** [Scott Marinella](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** CR 16  
**Date:** Friday, April 20, 2018 4:57:46 PM

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Taking the discretion away from the trial court judge is something that is outside the purview of the Bar, and I am not in favor of the change proposed.

G. Scott Marinella  
Marinella & Boggs  
P.O. Box 7, 338 E. Main Street  
Dayton, WA 99328  
(509)382-2541  
FAX (509)382-4634  
[scott@smkb-law.com](mailto:scott@smkb-law.com)

**From:** [Tyler Hinckley](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Proposed Amendment to CR 16  
**Date:** Tuesday, May 01, 2018 5:37:18 PM

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The proposed amendment to CR 16 will most likely INCREASE the cost of litigation for our clients. Whether to require pretrial reports should be left to the discretion of the various counties. And not every case is so complex or complicated as to require the additional time and expense that will necessarily go into preparing a pretrial report and holding a pretrial conference. It is already difficult enough to get a summary judgment hearing date or a trial date in many counties that adding mandatory pretrial conferences to the docket will only serve to make it more likely that trials and hearings are bumped, thereby costing litigants more. The judges of the various counties are in the best position to determine whether it is necessary, and whether it will expedite trial, to require pretrial reports and conferences. Many counties have local rules addressing some of the components of the proposed CR 16(a). The discretion given to trial courts under current CR 16 should be maintained. Proposed CR 16(a) should read: "By order, or on the motion of any party, the court may in its discretion direct the attorneys for all parties in the case to confer in completing a joint pretrial report no later than the date provided in the court's order." Proposed CR 16(b) appears to preserve the trial court's discretion by adding the language "if scheduled". That language could be fleshed out more to make clear that the court has discretion. For example, "if the court orders a pretrial conference" instead of "if scheduled". CR 16(c) should read "*If a pretrial hearing is held* the court shall enter an order *that* recites the action taken . . ." (As an aside, "that" is proper usage in the sentence instead of "which").

What may work well in King County does not necessarily work well in Yakima County or Grant County. The amended CR 16 also favors defense attorneys who can bill their clients for additional time sent preparing reports and conferring with plaintiff attorneys and makes taking on cases for plaintiffs where damages are potentially lower, or the probability of success is somewhat lower, much less attractive and thereby serves as a bar to access to justice.

**Tyler M. Hinckley**

Attorney  
MONTOYA HINCKLEY LAW FIRM  
4301 Tieton Drive  
Yakima, WA 98908  
Phone: (509) 895-7373  
Fax: (509) 895-7015  
Email: [tyler@montoyalegal.com](mailto:tyler@montoyalegal.com)  
[www.montoyalegal.com](http://www.montoyalegal.com)

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**From:** [Rebecca Bernard](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** CR16 Suggested Amendments  
**Date:** Wednesday, May 02, 2018 10:45:36 AM

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I have a few questions.

First, will there be a pattern form for the "joint pre-trial report" which has a section for all seven of the items that report shall contain?

Second, what happens if a party or parties decline to "confer" in completing a joint pre-trial report? Are we at liberty to set forth what we understand to be the "agreed" facts and the disputed issues if the other party declines to "confer"? I use to set a settlement conference before requesting a trial to see if the parties could "confer" but I stopped holding them because more often than not, the parties would failed to come. But they would come to trial. Even if I tried to confer by telephone, many pro se parties do not provide a telephone number. Some keep changing address or changing phone number. Hard to "confer" (much less agree) if parties are non-cooperative or non-communicative (not to mention belligerent or combative).

Third, may an attorney for one party provide the court with a list of the witnesses he/she is aware will likely testify if the other party (or parties) fail to provide a witness list after one has been requested? Although I routinely request a witness list when I request a trial setting, it is a rare event for me to ever receive a witness list, even from attorneys, much less *pro se* parties.

Fourth, what is the consequence if a party does not provide exhibits or a witness list? Will the court exclude witnesses from testifying or documents from entry if not provided in advance, or will the court continue certain issues so there is time to review the tardy items? Will the court have discretion to decide either way?

I have had many situations where only at trial does the noncustodial parent suddenly provides pay stubs and/or tax returns or other evidence which was never provided before although repeatedly requested. Such evidence in a child support case could mean the difference between imputing income to a party versus setting support based on actual earnings. But DCS wants me to only enter "right-sized" orders.

Similarly, I have had situations where a pro se party never provided a witness list but brought witnesses to trial. But if those witnesses are excluded from testifying because no witness list was provided, will we get to the truth? If witnesses are excluded, will we protect the child's best interests? If witnesses are excluded, will the public believe the court delivers justice or merely bureaucracy?

"Shall" is more inflexible. I am an attorney for the State dealing with child support issues, and consequently, I deal with a lot of *pro se* parties. For a variety of reasons (ranging from ignorance to recalcitrance), parties have failed to provide witness lists, failed to provide exhibits until trial (or until directly ordered at trial to provide it), failed to meet to confer, refused to confer, been too combative to confer, etc. However, despite the fact that these parties have not done what he/she ought to have done (which is usually the reason why we are in court in the first place), I prefer to let the court remain flexible enough to let in evidence so that truth is not excluded or obscured. I am therefore concerned when court rules start to become more inflexible and more bureaucratic.

Respectfully,

Rebecca Bernard  
Deputy Prosecuting Attorney  
Family Support Division  
Grays Harbor County Prosecutor's Office  
(360) 249-4075

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**From:** [Benway, Jennifer](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** ["Sherry Lindner "](#)  
**Subject:** Comment on proposal to amend CR 16  
**Date:** Wednesday, May 23, 2018 4:33:55 PM

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This comment is provided on behalf of DMCJA Court Rules Committee Chair Judge Frank Dacca:

Hello,

Thank you for providing the DMCJA Court Rules Committee the opportunity to comment on the proposal to amend CR 16. The Committee considered the proposal at its May 9 meeting. The Committee is taking no position on the proposal because it does not appear the amendments would impact the Courts of Limited Jurisdiction.

Please let me know if I can be of any further assistance

Thank you!

**Jennifer (J) Amanda Benway**

Legal Services Senior Analyst  
Administrative Office of the Courts  
360-357-2126

**From:** [Craig Liebler](#)  
**To:** [Civil Litigation Task Force](#)  
**Cc:** [Ron St. Hilaire](#)  
**Subject:** CR77  
**Date:** Sunday, February 25, 2018 1:45:45 PM

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It's about time. Although I am now retired ( former bar # 6891) pre assignment was encouraged by me as local Bar president and in my Bench Bar communications over the last 20 years of my 38 year active practice. My concern is giving counties with a lot of judges the "out" of impracticability. Also the rule change copy I reviewed apparently said " A judge should be assigned to each se (case??) upon filing. I am not sure if this applies to domestic cases ( which are generally handled by a court commissioner in my former counties) or similar civil cases ( i.e. probate, guardianship, estate,) which are designed to be under TEDRA resolution. The Domestic and Criminal Dockets in my former counties take up 90+% of the judicial time already, and it would be nice to be able to hear motions etc.by one judge throughout the process. The Federal Courts do this and I see no real reason why multi judicial counties cannot.

As an aside, another way to increase judicial efficiency and mitigate the costs of litigation is to increase the mandatory arbitration threshold to at least \$100,000.  
My 2 cents. Respectfully Craig M. Liebler.

**From:** [Duane Crandall](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** FW: Feedback on Draft Proposal to Amend CR 77  
**Date:** Tuesday, February 27, 2018 10:13:59 AM  
**Attachments:** [image001.png](#)  
[Proposed Rule Changes to CR 77.pdf](#)

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Hillary Graber,

Duane Crandall is agreeable with the proposed "Suggested Amendment" regarding CR 77 as written.

Thank you,

*Sylvia*

*Sylvia Archibald*  
*Legal Assistant to Duane Crandall*  
*Crandall, O'Neill, Imboden & Styve, P.S.*  
*1447 Third Ave., Ste. A/PO Box 336*  
*Longview, WA 98632*  
*P: (360) 425-4470*  
*F: (360) 425-4477*

---

**From:** CWBA [<mailto:cowwahbar@gmail.com>]  
**Sent:** Sunday, February 25, 2018 8:50 AM  
**To:** Lisa Waldvogel  
**Subject:** Fwd: Feedback on Draft Proposal to Amend CR 77

Hello everyone,

Please see the attached request for feedback on a proposed amendment to CR 77 regarding judicial assignments.

Please send your comments directly to Hillary Graber at [CLTF@wsba.org](mailto:CLTF@wsba.org) by April 1, 2018.

Best,  
Meredith

----- Forwarded message -----

From: **Sherry Lindner** <[sherryl@wsba.org](mailto:sherryl@wsba.org)>  
Date: Fri, Feb 23, 2018 at 12:35 PM  
Subject: RE: Stakeholder Feedback on Draft Proposal to Amend CR 77  
To: "[steve@sackmannlaw.com](mailto:steve@sackmannlaw.com)" <[steve@sackmannlaw.com](mailto:steve@sackmannlaw.com)>, "[khawkins@clarkandfeeney.com](mailto:khawkins@clarkandfeeney.com)" <[khawkins@clarkandfeeney.com](mailto:khawkins@clarkandfeeney.com)>, "[diana.ruff@co.benton.wa.us](mailto:diana.ruff@co.benton.wa.us)" <[diana.ruff@co.benton.wa.us](mailto:diana.ruff@co.benton.wa.us)>, "[travis@brandtlaw.net](mailto:travis@brandtlaw.net)" <[travis@brandtlaw.net](mailto:travis@brandtlaw.net)>, "[stephaniehyatt@icloud.com](mailto:stephaniehyatt@icloud.com)" <[stephaniehyatt@icloud.com](mailto:stephaniehyatt@icloud.com)>, "[mark@sampath-law.com](mailto:mark@sampath-law.com)" <[mark@sampath-law.com](mailto:mark@sampath-law.com)>, "[cowwahbar@gmail.com](mailto:cowwahbar@gmail.com)"

<cowwahbar@gmail.com>, "cpirnke@insleebest.com" <cpirnke@insleebest.com>, "Lamatt50@yahoo.com" <Lamatt50@yahoo.com>, "trevor@huberdeaulaw.com" <trevor@huberdeaulaw.com>, Jean Cotton <walawj99@yahoo.com>, "president@islandcountybar.com" <president@islandcountybar.com>, "eileen@AIMwisely.com" <eileen@aimwisely.com>, "AndrewP@KCBA.org" <AndrewP@kcba.org>, "amaron@scblaw.com" <amaron@scblaw.com>, "tweaver@tomweaverlaw.com" <tweaver@tomweaverlaw.com>, "jufkes@johnufkeslaw.com" <jufkes@johnufkeslaw.com>, "j.gallagher.law@gmail.com" <j.gallagher.law@gmail.com>, "sam@chehalislaw.com" <sam@chehalislaw.com>, "rmcguire@cmd-lawfirm.com" <rmcguire@cmd-lawfirm.com>, "julie@whitehousenichols.com" <julie@whitehousenichols.com>, "tedreinbold@gmail.com" <tedreinbold@gmail.com>, "edwardpenoyar@gmail.com" <edwardpenoyar@gmail.com>, "hwebb@glpattorneys.com" <hwebb@glpattorneys.com>, "omearalawoffice@gmail.com" <omearalawoffice@gmail.com>, "ksmythe@robinsontait.com" <ksmythe@robinsontait.com>, "lynn@spokanebar.org" <lynn@spokanebar.org>, "marlah@feltmanewing.com" <marlah@feltmanewing.com>, "nforce@co.stevens.wa.us" <nforce@co.stevens.wa.us>, "tpcbal@aol.com" <tpcbal@aol.com>, "dclarks@co.pierce.wa.us" <dclarks@co.pierce.wa.us>, "tzandell@phillipsburgesslaw.com" <tzandell@phillipsburgesslaw.com>, "mmulhern@co.walla-wall.wa.us" <mmulhern@co.walla-wall.wa.us>, "dbrown@brettlaw.com" <dbrown@brettlaw.com>, "luke@baumgartenlaw.com" <luke@baumgartenlaw.com>, "qdalan@ywcayakima.org" <qdalan@ywcayakima.org>

Apologies, but there was a typo in the proposed draft language. Attached please find the correct version.

Thank you,

Sherry Lindner | Paralegal | Office of General Counsel

Washington State Bar Association | T 206.733.5941 | F 206.727.8314 | sherryl@wsba.org

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539

---

**From:** Civil Litigation Task Force

**Sent:** Friday, February 23, 2018 11:50 AM

**To:** 'steve@sackmannlaw.com'; 'khawkins@clarkandfeeney.com'; 'diana.ruff@co.benton.wa.us'; 'travis@brandtlaw.net'; 'stephaniehyatt@icloud.com'; 'mark@sampath-law.com'; 'cowwahbar@gmail.com'; 'cpirnke@insleebest.com'; 'Lamatt50@yahoo.com'; 'trevor@huberdeaulaw.com'; Jean Cotton; 'president@islandcountybar.com'; 'eileen@AIMwisely.com'; 'AndrewP@KCBA.org'; 'amaron@scblaw.com'; 'tweaver@tomweaverlaw.com'; 'jufkes@johnufkeslaw.com'; 'j.gallagher.law@gmail.com'; 'sam@chehalislaw.com'; 'rmcguire@cmd-

lawfirm.com'; 'julie@whitehousenichols.com'; 'tedreinbold@gmail.com'; 'edwardpenoyar@gmail.com';  
'hwebb@glpattorneys.com'; 'omearalawoffice@gmail.com'; 'ksmythe@robinsontait.com';  
'lynn@spokanebar.org'; 'marlah@feltmanewing.com'; 'nforce@co.stevens.wa.us'; 'tpcba1@aol.com';  
'dclarks@co.pierce.wa.us'; 'tzandell@phillipsburgesslaw.com'; 'mmulhern@co.walla-wall.wa.us';  
'dbrown@brettlaw.com'; 'luke@baumgartenlaw.com'; 'qdalan@ywcayakima.org'

**Cc:** Ken Masters; Kevin Bank; Hillary Evans Graber

**Subject:** Stakeholder Feedback on Draft Proposal to Amend CR 77

Greetings,

The Civil Litigation Rules Drafting Task Force is proposing to amend Civil Rule 77. The Task Force is reaching out to stakeholders for comments and feedback on its proposal.

Stakeholder input is crucially important in rulemaking process and assists the Task Force in making an informed decision.

Attached please find Ms. Graber's letter and a redline copy of the CR 77.

Please submit your feedback/comments to [CLTF@wsba.org](mailto:CLTF@wsba.org) by April 1, 2018.

Thank you,



**Sherry Lindner | Paralegal | Office of General Counsel**

Washington State Bar Association | **T** [206-733-5941](tel:206-733-5941) | **F** [206-727-8314](tel:206-727-8314) | [sherryl@wsba.org](mailto:sherryl@wsba.org)

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | [www.wsba.org](http://www.wsba.org)

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**From:** [George Steele](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** CR 77  
**Date:** Thursday, March 01, 2018 10:14:56 AM

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A good rule to follow is if something is not broken, do not fix it. I would think that making it the norm, instead of the exception, to require courts to pre-assign a case is foolish. We should assume that local control of our courts, by the judges, can result in solutions that work for that particular court.

**From:** [James S. Berg](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Comment on proposed change to CR 77  
**Date:** Tuesday, February 27, 2018 12:02:48 PM

---

Dear Hillary:

I am in support of the proposed change to Rule 77. It makes a lot of sense to me.

Very truly yours,

***JAMES S. BERG***

***LARSON BERG & PERKINS PLLC***

105 North 3rd Street  
P.O. Box 550  
Yakima, WA 98907  
Phone: (509) 457-1515  
Fax: (509) 457-1027  
E-mail: [jsberg@lbplaw.com](mailto:jsberg@lbplaw.com)

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**From:** [James Elliott](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Draft CR 77  
**Date:** Friday, March 16, 2018 8:10:50 AM

---

I fully support this idea of having one judge assigned

HALVERSON NORTHWEST

James S. Elliott, Attorney

p. 509.248.6030 f. 509.453.6880

[jelliott@hnw.law](mailto:jelliott@hnw.law)

405 E. Lincoln Avenue, Yakima, WA 98901

[halversonNW.com](http://halversonNW.com)

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Halverson Northwest Law Group P.C.

**From:** [Blaine Gibson](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Proposed Amendment to CR 77(i)  
**Date:** Tuesday, March 20, 2018 11:44:30 AM

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Hillary,

I do not see how this proposed amendment changes anything. Presently, some counties automatically pre-assign civil cases and others do not. Some do it only on a motion from the parties or on the court's own motion. Every county has weighed the pros and cons of pre-assignment and made a decision that best fits that county's situation. The proposal does not require any county to do anything different from what it is already doing.

A rule amendment that changes nothing is not necessary.

Judge Blaine Gibson  
Yakima County Superior Court

**From:** [Robert McSeveney](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** FW: Comment before April 1?  
**Date:** Thursday, March 29, 2018 2:51:32 PM

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Dear Ms. Graber,

A local attorney and one of our court commissioners contacted me about proposed rule CR77. Her comments and our discussion below identifies areas of concern. My suggestion is for the committee to include language that is inclusive of court commissioners/pro tem judges who are authorized under RCW 2.08/2.24 to hear cases . GR 29 vests the presiding judge with the exclusive authority to delegate the courts caseload. It is my opinion that the proposed rule may be conflict with GR 29.

Thank you.

Judge Robert McSeveney  
Chelan County Superior Court

---

**From:** Rani Sampson [<mailto:Rani@overcastlaw.com>]  
**Sent:** Thursday, March 29, 2018 2:38 PM  
**To:** Robert McSeveney <[Robert.McSeveney@CO.CHELAN.WA.US](mailto:Robert.McSeveney@CO.CHELAN.WA.US)>  
**Subject:** RE: Comment before April 1?

Yes. That's an efficient way to comment. Smart.

**Rani K. Sampson**

Overcast Law Offices, PS | Attorney  
23 S Wenatchee Ave Suite 320 Wenatchee WA 98801 | (509) 663-5588 ext 108

---

**From:** Robert McSeveney [<mailto:Robert.McSeveney@CO.CHELAN.WA.US>]  
**Sent:** Thursday, March 29, 2018 2:35 PM  
**To:** Rani Sampson  
**Subject:** RE: Comment before April 1?

Are you ok with me forwarding our conversation on to the WSBA contact?

**From:** Rani Sampson [<mailto:Rani@overcastlaw.com>]  
**Sent:** Thursday, March 29, 2018 2:33 PM  
**To:** Robert McSeveney <[Robert.McSeveney@CO.CHELAN.WA.US](mailto:Robert.McSeveney@CO.CHELAN.WA.US)>  
**Subject:** RE: Comment before April 1?

I think you're right.

The Board of Governors intends to increase judicial efficiency by having "one judge assigned to a civil case from start to finish." *See Cover Sheet.* The BOG might not have considered "judicial officers" when drafting this proposed rule.

**Rani K. Sampson**

Overcast Law Offices, PS | Attorney

23 S Wenatchee Ave Suite 320 Wenatchee WA 98801 | (509) 663-5588 ext 108

---

**From:** Robert McSeveney [<mailto:Robert.McSeveney@CO.CHELAN.WA.US>]

**Sent:** Thursday, March 29, 2018 2:23 PM

**To:** Rani Sampson

**Subject:** RE: Comment before April 1?

I think the bigger problem is that this rule conflicts with the powers of the presiding judge under GR 29 (f). Take a look at it.

(f) Duties and Authority. The judicial and administrative duties set forth in this rule cannot be delegated to persons in either the legislative or executive branches of government. A Presiding Judge may delegate the performance of ministerial duties to court employees; however, it is still the Presiding Judge's responsibility to ensure they are performed in accordance with this rule. In addition to exercising general administrative supervision over the court, except those duties assigned to clerks of the superior court pursuant to law, the Presiding Judge shall:

(1) Supervise the business of the judicial district and judicial officers in such manner as to ensure the expeditious and efficient processing of all cases and equitable distribution of the workload among judicial officers;

(2) Assign judicial officers to hear cases pursuant to statute or rule. The court may establish general policies governing the assignment of judges;

(3) Coordinate judicial officers' vacations, attendance at education programs, and similar matters;

(4) Develop and coordinate statistical and management information;

(5) Supervise the daily operation of the court including:

(a) All personnel assigned to perform court functions; and

(b) All personnel employed under the judicial branch of government, including but not limited to working conditions, hiring, discipline, and termination decisions except wages, or benefits directly related to wages; and

(c) The court administrator, or equivalent employee, who shall report directly to the Presiding Judge.

**From:** Rani Sampson [<mailto:Rani@overcastlaw.com>]

**Sent:** Thursday, March 29, 2018 2:20 PM

**To:** Robert McSeveney <[Robert.McSeveney@CO.CHELAN.WA.US](mailto:Robert.McSeveney@CO.CHELAN.WA.US)>

**Subject:** RE: Comment before April 1?

You're the fastest statute/rule investigator I know!

I'd be more comfortable with the rule if it were the "assigned judicial officer" instead of the "assigned judge."

**Rani K. Sampson**

Overcast Law Offices, PS | Attorney

23 S Wenatchee Ave Suite 320 Wenatchee WA 98801 | (509) 663-5588 ext 108

---

**From:** Robert McSeveney [<mailto:Robert.McSeveney@CO.CHELAN.WA.US>]

**Sent:** Thursday, March 29, 2018 2:17 PM

**To:** Rani Sampson

**Subject:** RE: Comment before April 1?

Doesn't this cover your concern?

**RCW 2.28.030**

**Judicial officer defined—When disqualified.**

A judicial officer is a person authorized to act as a judge in a court of justice....

**From:** Rani Sampson [<mailto:Rani@overcastlaw.com>]

**Sent:** Thursday, March 29, 2018 2:09 PM

**To:** Robert McSeveney <[Robert.McSeveney@CO.CHELAN.WA.US](mailto:Robert.McSeveney@CO.CHELAN.WA.US)>

**Subject:** Comment before April 1?

Dear Judge McSeveney:

The WSBA is accepting comments today and tomorrow on proposed Civil Rule 77. I am concerned that the proposed requirement that the “assigned judge shall conduct all proceedings in the case” might preclude commissioners from conducting hearings because a commissioner is rarely the “assigned judge.” Such an interpretation would hamper the effective administration of justice.

But I might be interpreting the proposed rule incorrectly.

Would you please review the rule and submit a comment if you believe that would be helpful?

Thank you,

**Rani K. Sampson**

Overcast Law Offices, PS | Attorney

23 S Wenatchee Ave Suite 320 Wenatchee WA 98801 | (509) 663-5588 ext 108

**From:** [Kerry Lawrence](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** Proposed Amendment to CR 77  
**Date:** Monday, February 26, 2018 10:50:15 AM

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Hilary: I think the proposal is great, but there is a strange typo in the suggested amendment. I do not think you intended it to read:

"...judge should be assigned to each se upon filing."

I live in Benton County, but almost all of my litigation is in King County with assigned judges. When King County went to assigned judges I noticed a number of favorable impacts with: fewer overall motions, more summary judgments granted, and lawyers being a bit less hostile toward each other.

Benton County is a nightmare to litigate in, and I do my best to refer out cases here because I do not want to have to deal with the court administration, overwhelmed judges and lawyers who only make things worse for the litigants.

Kerry

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**Kerry C. Lawrence**  
Pillar Law PLLC  
1420 Fifth Avenue, Suite 3369  
Seattle, WA 98101  
Phone: 425-941-6887  
[kerry@pillar-law.com](mailto:kerry@pillar-law.com)

# Superior Court of the State of Washington For Thurston County

Anne Hirsch, *Judge*  
Carol Murphy, *Judge*  
James Dixon, *Judge*  
Erik D. Price, *Judge*  
Christine Schaller, *Judge*  
Mary Sue Wilson, *Judge*  
John C. Skinder, *Judge*  
Christopher Lanese, *Judge*



2000 Lakeridge Drive SW • Building Two • Olympia WA 98502  
Telephone: (360) 786-5560 Website: [www.co.thurston.wa.us/superior](http://www.co.thurston.wa.us/superior)

Pamela Hartman Beyer,  
*Court Administrator*  
Indu Thomas,  
*Court Commissioner*  
Jonathon Lack,  
*Court Commissioner*  
Nathan Kortokrax,  
*Court Commissioner*

March 22, 2018

To: Ms. Hillary Graber  
Civil Litigation Rules Drafting Task Force  
sent via email to [CLTF@wsba.org](mailto:CLTF@wsba.org)

Re: Draft Proposal to Amend Civil Rule 77

Dear Ms. Graber,

The Thurston County Superior Court appreciates that you reached out to stakeholders regarding the draft proposal for Civil Rule 77. As a busy trial court, we are interested in increasing efficiencies and fairness in civil cases. We voluntarily developed a local practice of pre-assigning judges, and want to share that rule with the Task Force and also raise some concerns.

Our Court requires, under Local Court Rule 3 (attached), that almost all civil cases are assigned to a trial judge at the time of filing. This had brought clarity and consistency to case management. Our court is a medium sized one with five judges assigned to the civil caseload at a given time. This works well for our court, but we can understand that much larger or smaller courts may have different needs. We hope you fully hear those needs from the diverse courts in our State.

We strive to have all matters in a civil case heard by the assigned judge. It is our internal goal to have matters heard by the judge assigned to the case. However, flexibility is important. Requiring “reassign[ment] to a different judge on a temporary or permanent basis” seems to create a procedural hurdle for the court to generate, file, and serve a notice of reassignment (twice, probably). This is burdensome and erodes the court’s discretion to manage its cases.

Further, our Court has determined that certain types of civil cases should not be pre-assigned to a judge. This discretion should be maintained. "Civil cases" are an extremely broad category in the law. Many types of civil cases will be extremely unlikely to or will never go to trial and will be resolved in one motion. For this reason, we have excluded from assignment tax warrants, foreign subpoenas, and the like. Some cases that are civil cases fall under the ambit of our Court's management of criminal matters, such as department of licensing appeals and the unlawful detainer docket. Whether these exclusions from judge assignments make sense in our individual court is an ongoing discussion that has generated changes through the years as the court's case management changes.

Assigning judges to civil cases, in a medium-sized court like ours, is a helpful tool for case management. This court urges you, however, to consider the various needs of different types of courts. The court also asks for flexibility and discretion in any rule that is ultimately proposed to the Supreme Court.

Sincerely,



Christine Schaller,  
Presiding Judge  
Thurston County Superior Court

attached: Thurston County Local Court Rule 3

### Thurston County Local Court Rule 3: COMMENCEMENT OF ACTIONS

(e) **Procedures at Time of Filing.** The following procedures shall be followed when a civil case is filed, unless a special procedure applies or otherwise directed by the court.

(1) *Assignment and Reassignment of Judge.*

(A) Cases that are assigned to a judge. All civil cases shall be assigned to a trial judge, unless these rules provide otherwise. The County Clerk will assign the case by random selection to a judge in the trial department, who will hear and decide all issues in the case unless the assigned judge or the court's presiding judge directs otherwise. The case will be reassigned if the assigned judge recuses, is disqualified from hearing the case, or is no longer assigned to the trial department. The court will not individually notify parties when a case is reassigned because a judge is no longer assigned to the trial department. The court will instead make public notices about such reassignments.

(B) Cases that are not assigned to a judge. The clerk will not assign a judge for the following types of cases:

- (i) Unlawful detainer cases;
- (ii) Appeals from a department of licensing revocation;
- (iii) Civil, non-traffic infraction appeal cases;
- (iv) Civil, traffic infraction appeal cases;
- (v) Tax warrants;
- (vi) Petitions for relief from registration as a sex or kidnapping offender;
- (vii) Petitions to restore firearm rights; and
- (viii) Foreign subpoenas.

A party may file a motion to ask for a judge assignment for these cases. The court may also direct the clerk to issue a judge assignment on its own motion.

...

[Adopted effective September 1, 2010; amended effective September 1, 2011, September 1, 2013, September 1, 2014, September 1, 2017.]

**INITIAL DISCLOSURES COMMENTS  
RECEIVED**

**From:** [Deane Minor](#)  
**To:** [Civil Litigation Task Force](#)  
**Subject:** suggested change to CR 26  
**Date:** Monday, April 09, 2018 6:18:27 PM

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I agree with the suggested change to CR 26.

I have no opinion on the suggested change to the criminal rule.

Thank you to the task force for your hard work.

Deane W. Minor

Tuohy Minor Kruse PLLC  
2821 Wetmore Avenue  
Everett, Washington 98201  
Phone: (425) 259-9194  
Fax: (425) 259-6240  
Website: [www.tuohyminorkruse.com](http://www.tuohyminorkruse.com)

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# KING COUNTY PROSECUTING ATTORNEY'S OFFICE



DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY

JUSTICE  
COMPASSION  
PROFESSIONALISM  
INTEGRITY  
LEADERSHIP

May 18, 2018

Rebecca Glasgow  
Civil Litigation Rules Drafting Task Force  
Washington State Bar Association  
1325 Fourth Ave., Suite 600  
Seattle, WA 98101-2539

Re: Draft Proposal to Amend Civil Rule 26

Dear Ms. Glasgow:

This letter is being submitted in response to your request for comments about the above-referenced rules proposal and represents the position of the Civil Division of the King County Prosecutor's Office. Because we appear primarily in superior court, our comments are limited to the CR 26 proposal.

We support the concept of initial disclosures and cooperation in discovery, but there are some concerns with this proposal that we wish to highlight.

1. The proposal would benefit from a specific reference to electronically stored information (ESI). *See e.g.* Fed.R.Civ.P. 26(a)(1)(A)(ii) ("...all documents, electronically stored information, and tangible things..."). First, the inclusion of a specific reference to ESI would appropriately recognize that what used to be documentary evidence is increasingly becoming ESI, as more and more entities eschew storing information in hard-copy format. Second, adding a reference to ESI would make the proposal more consistent with CR 34, which includes a specific reference to ESI, as distinct from documents. Finally, noting the option to produce ESI would prevent this rule from being misconstrued as a right to receive hard-copy documents, instead of ESI. Converting ESI to hard-copies is both expensive and not a best practice with respect to the environmental impact.
2. The proposal would also be improved by allowing for a party to simply describe documents relevant to a claim or defense. In some cases, a party will not have had an opportunity to review all potentially relevant documents or ESI early in a case, so a description may be more appropriate. In addition, the opposing party may not always want copies of every category listed. The proposed addition

CIVIL DIVISION • KING COUNTY ADMINISTRATION BUILDING 900  
500 FOURTH AVENUE • SEATTLE, WASHINGTON 98104  
Tel: (206) 296-0430 • Fax (206) 296-8819 • [www.kingcounty.gov/prosecutor](http://www.kingcounty.gov/prosecutor)

- would increase flexibility and allow parties to decide whether to produce documents that neither side may want on a potentially front-loaded basis. The parties should have the option of describing categories of documents.
3. We do not understand the part of the proposal allowing for inspection of evidence that is not easy-to-copy and this could be clarified. For example, is this meant to create a right of inspection for ESI stored on an organizations servers, which may be difficult to search? What about evidence such as a physical location, which is not only hard-to-copy, but probably impossible to copy? Is there some other situation this is meant to address?
  4. The proposal carves out an exception for noneconomic damages, in that it would exempt such damages from having to be calculated. All parties should have to explain what damages they are seeking in a lawsuit and the rules should not be tilted to allow some to keep their options open until closing argument at trial. Making the disclosure requirement uniform would also comport with RCW 4.28.360, which requires special and general damages to be specified, if requested. The current proposal would arguably amend that statute by court rule.
  5. The creation of a new duty to cooperate in discovery could be helpful. The concept of cooperation in discovery, especially in eDiscovery, is forward-thinking and has been prevalent among many eDiscovery practitioners for some time. See <https://thesedonaconference.org/cooperation-proclamation>. However, the concept of cooperation is typically seen as a guiding principle that is coupled with the principle of proportionality. See Fed.R.Civ.P. 1, Committee Notes on Rules – 2015 Amendment (“Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure. This amendment does not create a new or independent source of sanctions.”), <https://www.federalrulesofcivilprocedure.org/frcp/title-i/rule-1/>. In fact, there is no enforceable duty to cooperate in the Federal Rules of Civil Procedure. The proposal should provide more context around the duty to cooperate so it is clear when the obligation applies, how it is enforceable, and what it means in practice.
  6. Although proportionality is contained in the standard for granting a protective order, the scope of discovery in our state rules is more broadly defined than in the federal rules, as amended. If this proposal is adopted, it will be particularly important for courts to apply the duty in an even-handed manner, expecting cooperation from both requesting and producing parties. Given the imbalance in our state rules, creating such a duty could result in cross-motions for a protective order on the one hand and motions for sanctions for failure to cooperate on the other. For cooperation to work, it has to be a two-way street.

Finally, we want to propose that the task force consider providing a model stipulation and release of medical information. This issue comes up in most personal-injury cases, as well as many employment cases. Having a model stipulation could reduce conflicts and foster the principle of cooperation.

Thank you for giving us the opportunity to comment on this rules proposal.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Endel Kolde', with a long horizontal stroke extending to the left.

Endel Kolde  
Senior Deputy Prosecuting Attorney  
King Co. Prosecutor's Office  
Civil Division - Litigation Section



*Justice... Professionalism... Service... Since 1886*

May 23, 2018

VIA EMAIL: CLTF@wsba.org

Civil Litigation Rules Drafting Task Force  
Washington State Bar Association

Dear Task Force Members:

The King County Bar Association Judiciary and Litigation Committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We are writing to provide our input regarding the draft Civil Rules that you have prepared in response to the WSBA Board of Governors recommendations from the Task Force on the Escalating Costs of Civil Litigation.

Before addressing the suggested changes to the Civil Rules, we would like to commend the effort and good work by the Civil Litigation Rules Drafting Task Force. We greatly appreciate the time that has been devoted by the Task Force members to attempt to reduce the cost of civil litigation. This is a very important topic and one that must be addressed by the Bar Association and the Supreme Court to reduce the escalating costs of civil litigation.

Our Committee's comments on the Civil Rules are limited to the following topics: (1) Cooperation; (2) Initial Disclosures; (3) Mediation; and (4) Initial Case Schedules. The comments regarding Cooperation, Initial Disclosures and Mediation are included in the enclosed memorandums. Subcommittees were formed to develop and draft the enclosed memorandums that were then reviewed and approved by our Committee.

As to the Initial Case Schedules, we have only one comment regarding the need for a separate complex case track assignment. The original final report of the ECCL Task Force included a recommendation for assignment of cases to a "Tier 2" case schedule for cases that were designated as complex. The ECCL Task Force's language on this topic is as follows:

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine in its discretion whether the case is sufficiently complex for Tier 2. In making this determination, the court may consider the number of parties, claims, witnesses, issues, the necessity of substantial investigation outside the State of Washington, and likely discovery needs; novel legal issues or substantial public interest; substantial monetary value of the stakes (for example, stakes over \$300,000); and other indicia of complexity.

ECCL Final Report, p. 19.

We believe that a separate case schedule for Tier 2 complex cases is still appropriate for the reasons identified by the ECCL in its Final Report. A separate Tier 2 complex case schedule is also appropriate given the Civil Litigation Rules Drafting Task Force's draft rules regarding Early Mandatory Mediation. We believe that complex cases often require additional time before a productive mediation can occur. Thus, a separate case schedule along with a later mediation date is appropriate for these types of cases. If the Task Force does not believe that a separate Tier 2 complex case schedule is appropriate, the Task Force should consider a later early mediation date for complex cases for the reasons stated above.

Our Committee previously reviewed and provided input to the Escalating Costs of Civil Litigation Task Force and to the WSBA Board of Governors regarding the proposed recommendations of the ECCL Task Force. Many of our Committee's recommendations were incorporated by the ECCL Task Force and eventually adopted by the WSBA Board of Governors. We are hopeful that our recommendations regarding Cooperation, Initial Disclosures, Mediation, and Initial Case Schedules will assist you in drafting the proposed rule changes recommended to the Board of Governors.

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We feel strongly that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. To that end, we request that the Civil Litigation Rules Drafting Task Force make revisions to the proposed rule changes as provided within.

Very respectfully yours,

**KCBA Judiciary & Litigation Committee**

Brett M. Hill, Co-Chair

cc: Andrew Prazuch

Attachments: Memos regarding (1) Cooperation; (2) Initial Disclosures; and (3) Mediation

# Memorandum

May 10, 2018

**To** WSBA Civil Litigation Rules Drafting Task Force  
**From** King County Bar Association Judiciary & Litigation Committee  
**Re** WSBA Civil Litigation Rules Drafting Task Force, draft proposals on “cooperation” amendments

This memo represents the comments of the King County Bar Association’s Judiciary and Litigation Committee to the WSBA Civil Litigation Rules Drafting Task Force, regarding that Task Force’s draft proposals implementing the “cooperation” requirement recommended by the WSBA Task Force on the Escalating Costs of Civil Litigation and approved by the WSBA Board of Governors.

The Committee generally approved of the goals of the draft proposals, which would amend CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26, and CR 37 to require reasonable cooperation between parties, and making available sanctions for a failure to cooperate. Reasonable cooperation between opposing parties during litigation is of course a laudable goal, which the WSBA Board of Governors have embraced. The Task Force’s draft proposed amendments would be a step towards moving litigants towards that goal.

The Committee has comments on four aspects of the draft proposals:

*First*, what constitutes “cooperation” in the context of an adversarial process—or, conversely, a failure to reasonably cooperate—is left open to interpretation in the draft proposals. The Committee is concerned that without guidance, reasonable minds may differ as to where the line between effective advocacy and noncooperation lies. This could produce additional litigation regarding (lack of) cooperation, underenforcement of the new rules, or both.

To avoid confusion, the Committee recommends the Task Force look to two sources. The first is the Guidelines of Professional Courtesy, developed by the King County Bar Association and adopted in 1999. The second is the WSBA’s Creed of Professionalism, adopted by the Board of Governors in 2001. Both these sources address the issue of civil, professional, and cooperative attorney conduct. The principles they contain may help guide attorneys in abiding by the new cooperation requirements. Copies of both the Guidelines of Professional Courtesy and the Creed of Professionalism are included as attachments.

*Second*, the Committee is concerned the amendments as drafted may be prone to underenforcement, because they would allow a court to impose no sanction even if it finds that a litigant unreasonably failed to cooperate with the court or opposing counsel. When the WSBA was in the process of considering the ECCL Task Force’s report in the

course of making its recommendations, multiple commenters identified lack of judicial enforcement as a significant problem, and a driver of the escalating litigation costs these amendments are meant to address. This was consistent with our group's experiences. With these proposed amendments, judges might be hesitant to impose any sanctions, even when there has been a clear and unreasonable failure by one party to cooperate.

Without *consistent* sanctions, there is little incentive to bring a failure to cooperate to the court's attention. Without consistent sanctions, there is likewise little deterrent to prevent strategic failures to cooperate. These failures unreasonably drive up litigation costs, consume court resources and are highly prejudicial to the administration of justice.

Compare a failure-to-cooperate motion to a motion to compel discovery. With the discovery motion, even without monetary sanctions, there remains an incentive to bring the motion—the possibility of obtaining of an order compelling production. But for a failure to cooperate, it is unclear what remedy beyond monetary sanctions would be appropriate.

The Task Force should go further in making cooperation an enforceable requirement. One way would be requiring at least some sanctions whenever a court finds that a party's conduct amounted to a failure to reasonably cooperate. We acknowledge this would be taking a step further than the original ECCL Task Force recommendation, which left the decision to impose sanctions for failures to cooperate discretionary. But in our opinion, requiring some sanction for a party's violation of the cooperation rule—even a small sanction—would be a significant step towards achieving the change in litigation culture the cooperation amendment was intended to achieve.

*Third*, there is a potential discrepancy between the remedies available in the proposed amendments to CR 37 and CR 11. The CR 11 amendment allows sanctions that include, but are not limited to, an award of costs and attorney's fees. But the CR 37 amendment only provides for costs and attorney's fees.

The proposed CR 37 amendment is in line with CR 37's existing award of attorney's fees to the prevailing party in a discovery motion. But it creates a mismatch between the two rules providing remedies for a failure to cooperate, which may lead to confusion. Additionally, attorney's fees for bringing a motion to find another party in violation of the cooperation requirement may be substantial. This may lead some judges to hesitate to find a violation for conduct that may constitute a failure to cooperate, but which the judge believes is not egregious enough to warrant a large monetary penalty. This also could lead to an issue of under-enforcement.

The Task Force should consider aligning the remedies for a failure to cooperate under CR 11 and CR 37, or alternatively making remedies available under only CR 11. If CR 37 is amended to include sanctions for failures to cooperate, the Task Force may want to consider making monetary sanctions other than attorney's fees available under that rule.

*Fourth*, there is a technical problem with the proposed amendments as drafted. Under the proposed rules, the parties must cooperate in bringing the motion for sanctions for failure to cooperate against one party. Specifically, proposed rule CR 11(c) provides that “[t]he moving party shall arrange for a mutually convenient conference in person or by telephone” and that “[a]ny motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.” It is thus impossible for a litigant who is the victim of noncooperation to bring a motion for sanctions for noncooperation without arranging for a mutually convenient conference, which in turn cannot be accomplished without the cooperation of the noncooperating non-movant.

As a solution to this, it may be appropriate to adopt the language of Federal Civil Rule 37(a)(1), allowing a certification that a movant “has in good faith [met] or attempted to [meet the conference requirements of this rule] with the person or party failing to [cooperate].”

# MEMORANDUM

**To:** WSBA Task Force  
**From:** King County Bar Association Judiciary & Litigation Committee  
**Date:** April 30, 2018  
**Subject:** Initial Disclosures

The KCBA Judiciary & Litigation Committee has reviewed the proposal on Initial Disclosures from the WSBA Task Force and offers the following comments.

## 1. Timing of Initial Disclosures

Under the Task Force proposed case schedule, Initial Disclosures would occur 13 weeks after filing. The KCBA Judiciary & Litigation Committee felt that this may prove to be unworkable for several reasons.

First, it is altogether possible that the complaint might not get served until the 13<sup>th</sup> week after filing. Under RCW 4.16.170 an action is deemed commenced on filing for purposes of the statute of limitations provided that it is served within 90 days. It is not uncommon for a plaintiff to file an action on the eve of the expiration of the statute of limitations and delay service while additional work is performed or the defendants are located. Since the date of commencement relates back to the date of filing, the Plaintiff is able to buy time in this manner. If Initial Disclosures are tied to the filing date, then there may well be insufficient time to meet the deadline in such circumstances. The KCBA Judiciary & Litigation Committee asks whether there might be a more practical way to schedule the disclosures? Under the FRCP the date for initial disclosures is determined by referencing the required discovery conference with the Court. ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order. . ."). Washington's Civil Rules makes a CR 26(f) conference optional as opposed to the federal mandatory procedure. In Washington CR 26(f) conferences are the exception and not the normal practice.

Second, Initial Disclosures may come too late. With the Task Force proposal creating a 52 week period from filing to trial, a 13 week deadline for

Initial Disclosures is 25% of the way through the process. That slow start to a case leaves everyone on their heels. Many lawyers serve discovery requests along with the summons and complaint and the Washington Civil Rules make express provision for such a practice by requiring responses within 40 days (as opposed to the normal 30 days) after service. See e.g. CR 33(a), CR 34(b)(3)(A), & CR 36(a). If Initial Disclosures are intended to be a less expensive substitute for traditional discovery,<sup>1</sup> then 91 days (13 weeks) may not satisfy the needs of lawyers who demand discovery within 40 days as a matter of course. Why wait twice as long to get started? The proposed rule encourages a dilatory practice.

One alternative approach would be to require Initial Disclosures to be made at the earlier of 13 weeks or filing or within 30 days of the service of a demand by any party for the making of Initial Disclosures, but not sooner than 40 days after service of the summons and complaint. That would at least reduce the late disclosure problem inherent in the existing draft.

Third, there is a danger that litigants may use the deadline for Initial Disclosures as an excuse for not providing timely responses to interrogatories and requests for production that are served during the first 13 weeks of filing. King County had just such an experience with its Local Civil Rule on case schedule requirements for identifying lay and expert witnesses. Litigants frequently responded to such interrogatory requests saying that the information would be provided on the date set in the case schedule and not a day sooner. The King County Superior Court Local Rules Committee took steps to counter this by adding the following comment to LCR 4.

6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

It is suggested that an expanded form of the comment be added as a part of the proposed Initial Disclosure rule so that it does not provide a means for subverting timely responses to traditional discovery. The expansion should extend to documents and other discovery covered by the new rule.

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<sup>1</sup> "the functional equivalent of court-ordered interrogatories. . ."

## 2. Scope of Required Disclosures

When the requirement of Initial Disclosures was first adopted by the federal courts in 1993, the scope of the disclosures was as follows:

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are **likely to have discoverable information relevant to the factual disputes between the parties**. All persons with such information should be disclosed, **whether or not their testimony will be supportive of the position of the disclosing party**. As officers of the court, **counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.**<sup>2</sup>

Emphasis added.

This broad scope of disclosures was narrowed in 2000. The Task Force proposal adopts the narrow standard of disclosure instead of using the standard of "relevance to the factual dispute." Rather, a party is only required to disclose that which "supports the disclosing party's claims or defenses," or which is referred to in the party's pleadings.

The differences between the old and new scope limitations is significant. A party can withhold from disclosure information harmful to its case since it only has to provide information and witnesses "supporting the disclosing party's claims or defenses." A party who relies upon the Initial Disclosures as an effective substitute for traditional discovery is walking into a trap and perhaps exposing him or herself to professional liability for errors and omissions because the Initial Disclosures will not provide the full vista of the case necessary to rebut the opponent.<sup>3</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> In *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 341, 858 P.2d 1054 (1993), the Washington Supreme Court interpreted the sanctions provisions of CR 26(g) by applying the report of the federal advisory committee, which in turn cited to the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "**Mutual knowledge of all the relevant**

The easy answer to this is to send an interrogatory that requests the “bad” stuff that hasn’t been supplied. But, if the intention of the proposed rules is to combat the escalating costs of civil litigation, then that purpose is defeated by making interrogatories just as necessary as before. What is saved by a rule so narrowly drafted?

Arizona has adopted the broader scope of initial disclosure in its Rule of Civil Procedure 26.1, which provides:

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

The KCBA Judiciary & Litigation Committee recommends that if an initial disclosure rule is adopted that either the 1993 version of the rule be adopted or the Arizona rule be utilized. Each has the broader scope of “relevance to the factual dispute” rather than the limited disclosure that proposed by the Task Force Draft.

Finally, there are some omissions in the Task Force Draft of language that appears in the FRCP. The FRCP exempts from initial disclosure information that would be used solely for impeachment. The Task Force Draft is silent on this and should be modified to expressly state the exception. Next, the FRCP specifically requires production of “electronically stored information (ESI) and tangible things.” The Task Force Draft omits that language and instead says “document and other relevant evidence.” While relevant evidence might be read to include ESI and tangible things, it would be better to make that express. A court might well see the deviation from the FRCP as expressing an intention to not cover such material or as a reason to reject federal authority in interpreting the new state rule. Another difference in the Task Force Draft is that while it mimics the requirement that a plaintiff provide a description and computation of each category of damages, it omits the FRCP requirement that the underlying documentation also be made available;<sup>4</sup> once again forcing the defending party

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**facts gathered by both parties is essential to proper litigation.”** *Hickman v. Taylor*.

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“who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each

to resort to a request for production and reducing the intended cost saving. Consistent with the goal of reducing the costs of litigation, the KCBA Judiciary & Litigation Committee recommends that the federal version be adopted rather than the modification contained in the Task Force Draft.

### 3. Supplementation

A party making Initial Disclosures “is under no duty to supplement the disclosure” except where new witnesses are located, a new expert is identified, or when the party knows that the disclosure was incorrect when it was made or knows that the Initial Disclosure is no longer true (and withholding that fact is in substance a knowing concealment.” Other than that, there is no requirement to supplement. The same is true for interrogatories and requests for production.

The FRCP requirement is somewhat broader. It requires supplementation not just when the disclosure was incorrect, but also when it was “incomplete.” This seems to be a better approach because it picks up documents that would make the earlier disclosure more reliable. Here is the federal language.

#### (e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission— **must supplement or correct its disclosure or response:**

(A) **in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect**, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

The KCBA Judiciary & Litigation Committee recommends that this FRCP provision be adopted in place of the Task Force Draft. Alternatively, the Task

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computation is based, including materials bearing on the nature and extent of injuries suffered.”

FRCP 26(a)(1)(A)(iii).

Force may wish to consider the supplementation provision in Arizona Civil Rule 26.1(d)(2).<sup>5</sup>

#### 4. Sanctions

The Task Force Draft retains the present references to sanctions contained in CR 26(e)(4) [supplementation requirement] and CR 26(h) [signing of requests and responses]. The current provisions are vague in that they refer to “such terms and conditions as the trial court may deem appropriate,” and including “an order to pay the amount of the reasonable expenses incurred.” The KCBA Judiciary & Litigation Committee recommends that this language be stricken and a specific reference to CR 37 be substituted in order to make clear that the full panoply of allowable sanctions may be imposed.

The Arizona Initial Disclosure Rule discussed above is backed by stiff sanctions that don’t exist in Washington. Under Arizona Court Rule 37 the evidence or witness may be excluded if not timely disclosed and unfavorable information not timely disclosed can lead to extreme sanctions such as dismissal.<sup>6</sup>

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Arizona Civil Rule 26.1(d)(2) *Additional or Amended Disclosures*. The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order--or in the absence of such a deadline, later than 60 days before trial--must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

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Arizona Civil Rule 37(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) Failure to Timely Disclose. Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless such failure is

The disclosure rule works in Arizona because lawyers face serious, case destroying sanctions. Given the Washington Supreme Court's decision in *Jones v. Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) the Task Force cannot provide a means to enforce the requirements for Initial Disclosures with such sanctions.

## Should an Initial Disclosure Rule Be Adopted?

The Rules Drafting Task Force has been charged by the WSBA Board of Governors with multiple tasks. Principle among them is to:

Review the recommendations of the Board of Governors addressing the ECCL Task Force Report and determine whether amendments to Washington's Civil Rules are needed to implement the recommendations.

Consistent with that responsibility, the KCBA Judiciary & Litigation Committee offers the following comments.

Initial Disclosures require a new additional step to the discovery process, which necessarily adds the preparation time to the escalating costs of civil litigation. The rule should only be adopted if it would result in an overall reduction of costs. So the first question that must be answered is whether the rule

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harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) Inaccurate or Incomplete Disclosure. On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

Arizona Civil Rule 37(d) Failure to Timely Disclose Unfavorable Information. If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may impose serious sanctions, up to and including dismissal of the action--or rendering of a default judgment--in whole or in part.

modification as proposed saves money? The KCBA Judiciary & Litigation Committee submits that it does not.

The underlying failure in the rule is that it fails to produce the adverse information held by the opponent. Any competent litigator is therefore going to have to send out requests for production and interrogatories substantially similar to the ones currently being used. It is as if the parties are initially asked to answer a poorly drafted set of interrogatories and requests (the incomplete initial disclosure list) and then have to answer the discovery requests that would be expected under current practice. It is readily apparent that the initial disclosures saves nothing and adds to the burden and expense of litigation. Moreover, the late and perhaps uncertain deadline for initial disclosures discussed above, means that the diligent will have already drafted and served the inevitable discovery requests and that initial disclosures won't serve a useful function and, ironically, won't be "initial." Only those inclined toward procrastination will be served by the rule; often to their disadvantage due to the incomplete nature of that which would be required.

The lack of required supplementation also requires the diligent to follow up, just as they do today. There is no cost saving that can be found in this rule. A second cost increasing factor is that bulk delivery of documents at the start of a case requires the receiving party to dive through the material to figure out which documents apply to any given claim. Currently, carefully drafted requests for production require the responding party to identify the documents by request number, preventing the hiding of the needle in the haystack. There is an exception that allows documents to be produced in the form in which a business has maintained them. But that is an exception and the normal rule generally provides identified items. An initial disclosure rule as proposed would leave the recipient guessing and would add significantly to the costs of litigation.

Initial Disclosures work in the federal courts because of a different structure for pretrial discovery. Federal judges push discovery management over to a staff of Magistrate Judges. Federal courts are more intimately involved in the pretrial process because they can financially afford it. Our superior and district courts are under-funded and don't even have the luxury of a law clerk let alone commissioners who would act like federal magistrate judges.

The KCBA Judiciary & Litigation Committee submits that the Draft Proposal will increase the costs of civil litigation, introduce uncertainty and create a trap for the unwary.

## MEMORANDUM

To: Washington State Bar Association Civil Litigation Rules Drafting Task Force  
From: KCBA Judiciary and Litigation Committee  
Date: May 12, 2018  
Subject: Early Mandatory Mediation

A subcommittee of the KCBA Judiciary and Litigation Committee consisting of Katie Comstock, Joseph Bringman, and Michael Wampold first met to review Washington State Bar Association Civil Litigation Rules Drafting Task Force's proposed Early Mediation Rule. The subcommittee then met with the KCBA Judiciary and Litigation Committee as a whole, and together we present the following comments and concerns.

We are in support of an early mandatory mediation rule. We agree that requiring mediation in superior court cases before completing discovery, could help reduce the cost of litigation and encourage early resolution. We feel that early mediation will only be successful if effective initial disclosures and case schedule rules are also adopted (see separate memorandums from regarding those topics from the KCBA Judiciary and Litigation Committee). In our opinion, for an early mediation to be successful all counsel should meet early to determine the discovery they need to conduct prior to discussing settlement, and if there are any motions that need to be filed prior to discussing settlement.

With regards to the language of the rule, we have the following comments:

- (b)(4) - We are concerned that this section of the rule, which requires that each court establish and maintain a recommended fee schedule, will create a higher burden on the court and may have little to no effect on early mediation. Mediation fees vary widely depending on the mediator, the subject-matter of the dispute, and the way in which the matter has ended up at mediation. Although we agree there can be a benefit to having the mediator's fee public (as set forth in (b)(3)(D)), we do not see a benefit to the court setting a recommended fee schedule.
- In section (c)(2), there does not seem to be an option for a party to file something with the court where the parties cannot come to an agreement on a mediator. We propose amending the rule to require the parties to file something regardless of whether they agree on a mediator. The document could be titled "notice of joint selection of mediator / notice of request for appointment of mediator." Placing the burden on the parties to file something, regardless of whether they agree on a mediator, makes it more likely that the deadline won't simply slip and that if the court does need to assign a mediator, you don't lose time while waiting for the court to realize that no "notice" has been filed.
- In section (d)(2), we would like to address the increasingly common scenario where when insurance is involved, a representative with meaningful settlement authority is not present at mediation, or if available by phone, becomes unavailable by 2:00 due to being in a different time zone. We propose that the rule is amended to reflect that to the extent insurance is implicated, a representative with settlement

authority of each participating insurance be required to attend. We propose that the representative attend in person, unless agreed to otherwise by the parties, or allowed by the court. Further, where a representative is allowed to attend by phone, they should be required to be available throughout the mediation.

- In section (d)(2), we do not believe that giving the mediator the authority to determine all issues related to attendance will have the desired result. The mediator does not have subpoena authority, or the ability to sanction conduct. Further, in this rule, the mediator is not required and may not even be allowed, to file pleadings with the court. We believe the court should retain the authority to determine all issues related to attendance.
- Section (d)(2) should refer to section (h) and emphasize that the failure to attend will result in sanctions.
- For section (f), mediator compensation, if the parties agree to a mediator, then it seems they have already agreed that the mediator's fee is reasonable. In that scenario, the rule should be clarified that the parties cannot challenge previously agreed mediator compensation.
- In section (h), the language about potential sanctions needs to be clarified. Is the referenced fee ("a fee sufficient to deter the conduct") a fee to be paid to the court, or to the other parties? Does it bear any relation to the other parties' attorney's fees? Also, what does the phrase "reasonable expenses" include – does it include attorney's fees?

**OTHER COMMENTS RECEIVED**



**Bob Ferguson**  
**ATTORNEY GENERAL OF WASHINGTON**  
Administration Division  
PO Box 40100 • Olympia, WA 98504-0100 • (360) 753-6200

July 11, 2018

Washington State Bar Association  
Board of Governors  
1325 Fourth Avenue, Suite 600  
Seattle, Washington 98101

**RE: Comments on Proposed Changes to Civil Rules**

Dear President Pickett and Governors:

I write on behalf of the Attorney General's Office (AGO) with comments on the proposed changes to the civil rules as put forth by the Civil Rules Drafting Taskforce. More than 500 Assistant Attorneys General represent state agencies and employees in state courts across Washington, litigating a broad range of cases. Our office therefore offers an important perspective on the impact of these proposals.

A key feature of the proposed changes is the addition of a mandatory case scheduling order based on a 52 week filing-to-trial schedule, along with initial discovery conference requirements. Those proposed changes appear in the proposed new rule, CR 3.1, and in amendments to CR 26(f). While CR 3.1 exempts some case types, the AGO recommends that four additional case types be added to CR 3.1(e) and exempted from the requirements:

- RCW 34.05, civil enforcement actions,
- RCW 42.56, Public Records Act cases,
- RCW 74.66.050, *qui tam* actions, and
- Actions brought without an attorney by a person in the custody of the United States, a state, or a state subdivision.

**Civil Enforcement Actions:** The Administrative Procedure Act, RCW 34.05, allows agencies to petition for civil enforcement of an agency's order. For example, lawyers may file a petition in superior court to enforce an agency cease and desist order against a carrier operating its business despite an agency order closing the business for non-compliance with safety rules. This is typically an expedited or summary proceeding that should be exempted similar to administrative appeals under RCW 34.05 or land use petition reviews under RCW 36.70c, as not being subject to additional discovery requirements that are associated with typical civil litigation.

ATTORNEY GENERAL OF WASHINGTON

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**Public Records Act cases:** Public Records Act cases under RCW 42.56.550 are often summary proceedings that can typically be resolved on the pleadings. Extending the time to conduct discovery by imposing a presumptive trial schedule delays resolution of these cases. Because penalties are assessed on a daily basis against the agency, delaying resolution creates a disincentive for plaintiffs to cooperate and imposes additional costs on publicly funded state and local agencies.

**Qui Tam Complaints:** Medicaid Fraud False Claims Act cases, which are a type of *qui tam* action, are filed under seal. The defendant is not served with the complaint until the seal is lifted. This occurs only when the AGO's Medicaid Fraud Control Division intervenes or formally declines the matter. Importantly, it is often weeks or months after filing that the seal is lifted and the defendant is served. Thus, it does not make sense to impose on these cases a rule that requires issuance of a case scheduling order at the time of filing.

**Pro se litigants in custody:** Lawyers from the AGO regularly defend cases brought by *pro se* litigants in the custody of the Department of Corrections or the Department of Social and Health Services. Based on our long experience handling these matters, we do not believe automatically requiring an initial discovery conference and plan in these cases will result in more efficient case management. Our experience demonstrates that many of these litigants are unfamiliar with the legal process. Imposing additional rules for them to comply with will lead to more confusion and attendant delay. In addition, a sizable number are uncooperative or actively abuse the process and will be resistant to efforts to organize the case as required by the rules.

It is for these reasons that these types of cases in the federal system are exempt from similar scheduling rules, FRCP 26(a)(1)(B)(iv). Federal courts have determined that cases involving *pro se* in-custody litigants can be most effectively managed – and the interests of all parties can be best protected – by exempting these cases from mandatory initial discovery conferences and plans. We urge the adoption of a similar exemption in the proposed Washington rules.

On behalf of the Washington Attorney General's Office, I appreciate the opportunity to provide these comments. Thank you for your consideration.

Sincerely,



SHANE ESQUIBEL  
Chief Deputy Attorney General

SE:kw