



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.”¹ 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.

¹ 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.