WASHINGTON STATE BAR ASSOCIATION

CIVIL LITIGATION RULES DRAFTING TASK FORCE

AGENDA

May 31, 2018
9:30 a.m. – 1:00 p.m.

Conference Call: 1-866-577-9294, Code: 52824#

Approval of April 26, 2018 Minutes **(pp. 1-3)**

Subcommittee Reports/Draft Rules (Redline & Comments)

1. **Mediation** **(pp. 4-53)**
   - Subcommittee Chair Averil Rothrock
     i. New Rule: Early Mandatory Mediation Requirement
     ii. Recommended ADR Practices
2. **Initial Case Schedule** **(pp. 54-84)**
   - Subcommittee Chair Roger Wynne
     i. New Rule: CR 3.1
     ii. CR 26
     iii. CRLJ 26
     iv. CRLJ 40
     v. New CRLJ 3.1
3. **Early Discovery Conferences** **(pp. 85-103)**
   - Subcommittee Chair Judge John Ruhl
     i. CR 26(f)
     ii. CR 37(e)
     iii. New Rule: CRLJ 26(h)
4. **Individual Judicial Assignment and Pretrial Conferences** **(pp. 104-135)**
   - Subcommittee Chair Hillary Evans Graber
     i. CR 16
     ii. CR 77
5. **Initial Disclosures** **(pp. 136-156)**
   - Subcommittee Chair Rebecca Glasgow
     i. CR 26
     ii. CRLJ 26
6. **Cooperation** **(pp. 157-167)**
   - Subcommittee Chair Jane Morrow
     i. CR 1
     ii. CR 11
     iii. CR 26
     iv. CR 37
     v. CRLJ 1
     vi. CRLJ 11
     vii. CRLJ 26

WASHINGTON STATE
BAR ASSOCIATION

CIVIL LTIGATION RULES DRAFTING TASK FORCE

Meeting Minutes
April 26, 2018

Members Present:
Chair Ken Masters, Roger Wynne, Jeffrey Damasiewicz (by phone), Nick Gellert, Rebecca Glasgow (by phone), Ruth Gordon (by phone), Hillary Evans Graber (by phone), Caryn Jorgensen (by phone), Shannon Kilpatrick, Jane Morrow, Roger Wynne, Averil Rothrock, Judge John Ruhl, Judge Paula McCandlis (by phone) and Judge Brad Maxa (by phone).

Members Excused or Not Attending:
Brad Smith, Stephanie Bloomfield, Hozaifa Cassubhai, Kim Gunning, Michael Subit, Judge Rebecca Robertson, Judge Aimee Maurer.

Also Attending:
Kevin Bank (WSBA Assistant General Counsel), Shannon Hinchcliffe (AOC Liaison), and Sherry Lindner (WSBA Paralegal).

Chair Ken Masters called the meeting to order at 9:30 a.m.

Minutes

The March 29, 2018 minutes were approved by consensus.

Subcommittee Reports

Initial Case Schedules

Chair Wynne asked whether subcommittee chairs should be responding to comments received from stakeholders. Ms. Lindner noted that she acknowledges receipt of comments when they come in, so there is no need for the Chairs to do that. Task Force Chair Masters stated that subcommittee chairs have discretion to respond to commenters in more detail if they wish.

Chair Wynne requested input on the extent to which the new CRLJ 3.1 (which is still being drafted) should mirror new proposed CR 3.1. There was consensus that uniformity between CRs and CRLJs is always a desirable goal, but given the differences between Superior and District Courts, it is unlikely that the rules will be identical.

Initial Discovery Conferences

The Task Force discussed the subcommittee's proposal in CRLJ 26 that the parties must file a "Joint Status Report" after the initial discovery conference. The subcommittee's proposal included a proposed "Joint Status Report" form. Discussion ensued as to how the form would be provided to the parties. AOC liaison Shannon Hinchcliffe noted that the Court's website has a long list of suggested forms covering a wide range of rules and pleadings. If the form is attached to the rule, it is considered mandatory, and it can only be amended through the rule making process. However, the forms on the website are "pattern forms" that are recommended but not required.

Chair Masters noted that a recommended form would be helpful for both the CRs and CRLJs. Some members expressed the view that because most mandatory forms are very specific and precise (i.e., a summons), requiring a particular form in the rule could be too limiting. The subcommittee will discuss the issue further.

Mr. Wynne noted that many of the Task Force's proposed amendments reference the initial case schedule, and that uniform language will be needed. He suggested using a placeholder for now, and will work on a uniform term.

Individual Judicial Assignments and Pretrial Conferences

Chair Hillary Evans Graber reported on comments already received regarding CR 77. Some comments mentioned that the term "judicial officer" would be preferable to "judge." This would encompass Court Commissioners as well as Judges. Judge Ruhl commented that Commissioners handle significant loads and can do almost everything a Judge can do. The subcommittee will consider the input.

The subcommittee has sent out the proposed amendments to CR 16 (pre-trial conferences) for comment.

Initial Disclosures

The subcommittee's proposed amendments have been sent out for comment. There was no further discussion, other than suggestions for grammatical changes.

Cooperation

Chair Jane Morrow stated that the subcommittee's proposed rule amendments have been distributed for comment. No comments have been received but she expects they will receive some later. There was no further discussion, other than suggestions for grammatical changes.

Mediation

The Task Force discussed various provisions in the current proposal. There was discussion as to whether the local county courts should set a fee schedule or fee range for mediators. Kevin Bank and Shannon Kilpatrick noted that the WSBA Court Rules and Procedures Committee had studied the way arbitrators are compensated, and offered to provide that information to the subcommittee.

There was further discussion as to whether a mediator should be allowed to act as an arbitrator in the same matter. Task members noted that there are differing views on this topic. The subcommittee will try to obtain more feedback on this issue.

Judge Ruhl raised the issue of the interplay between the sanctions provision in the proposed rule and the RCW requirement that mediation remain completely confidential. The subcommittee will look into this issue further as well.

General Matters

The Task Force discussed combining the amendments proposed by the different subcommittees to CR 26 into one version. Ms. Lindner will distribute a "combined" CR 26 draft shortly. Mr. Bank and Chair Masters also reminded the Task Force that forwarding memoranda and finalized versions of the rule amendments are due in early July.

The meeting adjourned at 12:30 p.m.

Feedback on Draft Mediation Rule
May 24, 2018

	FEEDBACK/COMMENT	RESPONSE
1.	"I see that it is not mandatory unless the parties to a litigation want it."	Unclear on what basis this comment is made. It is mandatory.
2.	Not appropriate for local governments, for example land use arena.	LUPA is excluded.
3.	"Unnecessary because most torts, particularly in PI in cases, already have mandatory arbitration, at least I think they do.	No, they do not consistently. Some ADR requirements are in place by local rule, although most lack an "early" requirement.
4.	Why have a list of "qualified mediators" if is also possible for two litigants to choose someone not on the list?	To be able to assign a mediator if and when the parties do not agree on one.
5.	How will a judge impose sanctions on a litigant who doesn't comply with these "early mandatory mediation" rules?	Per subpart (h), judges have discretion and the procedure and substance would be similar to any other sanction such as a discovery sanction. If the comment questions whether there is enough guidance for what is sanctionable nonparticipation in mediation, the subcommittee declines to be more specific because the judge should have discretion. It is the intent of the Subcommittee that sanctionable conduct would be obstruction and noncooperation on process, such as scheduling and attendance issues. Sanctions are not available based on the substantive content of the mediation. The Subcommittee has trimmed the rule to better reflect this intent. See #14, below.
6.	Concern mediators will not agree to court-imposed fee schedule. How will courts set a fee schedule?	Mediators who do not intend to charge fees similar to, or defensible in comparison to, their county's schedule will likely not participate as qualified mediators for appointment because their fees may not be considered reasonable and might be rejected by the Court. See (b)(4) and (f). The court

		fee schedule, while not binding on mediators, is intended to set standards for what is reasonable and provide some basis for uniformity. The fee schedule should reflect average market rates. Mediators are not volunteers or pro bono workers. Review of the July 24, 2017 Memorandum from the WSBA Court Rules and Procedures Committee entitled "Final Report and Referral of Arbitrator CAP issues to BOG" demonstrates the conclusion that the fees set by RCW 7.06.040 for arbitrators participating in MAR RCW 7.06 mediations are on average very low (below market), and also are not regularly capped. The memo reported widespread inconsistency around the state, and recommended that limits on arbitrator pay be referred back to the BOG for determination whether a legislative solution should be pursued. While the memo focused on a reportedly high rate inconsistent with average fees, the memo drew to our attention the reality that most arbitrator rates for MAR are below market. It is not the intent of this rule that mediators would work at below market rates.
7.	Might create more expense.	Policy comment.
8.	"Not broken, don't fix it."	Policy comment.
9.	Prohibiting a mediator from serving as an arbitrator is unnecessarily restrictive. I would suggest that parties can do so if they want. Can lead to efficiencies. This comment was reiterated by mediators who typically agree to arbitrate reduction of CR 2A agreement to a more complete contract, and by family law practitioners who report it is common for a mediator to later become the	The genesis of the prohibition was that ethical issues may arise if third party neutrals change hats from one in which parties may share confidential information (mediation) to one in which a third party neutral decides the case (arbitration). The prohibition does appear to undermine common practices. After looking closer at this issue, the Subcommittee recommends deleting the prohibition to allow the parties and the third

	arbitrator and it "saves time, money and effort."	party neutral to voluntarily contract concerning this subject.
10.	Rule may create flurry of busy work; parties who don't feel ready will have to justify why; may create delay because have to do mediation rather than move case forward. Could it be optional, so mediation is more accessible, but still not mandatory?	Policy comment. The BOG could consider an optional program, but the Subcommittee suggests that an optional program is unlikely to drive change.
11.	Applaud concept and support rule as written except for (d)(2) Mediation Procedure Attendance as applied to government party because bringing "all persons necessary to settle the matter and who have the necessary settlement authority." Usually government lawyer can go to mediation with a sense of what the board/decision-makers will look favorably upon but without final settlement authority. Settlements reached this way do not usually fall through for lack of final government authority. Should craft some different language for entities subject to the Open Meetings Act.	Interesting point. The Subcommittee considered if additional language for this special situation is necessary/advisable, such as "all persons necessary to settle the matter and who have the necessary settlement authority, unless the party is a governmental entity that requires a separate governing body to ratify or otherwise authorize all settlements before they become final." But this gets wordy and creates exceptions. The Subcommittee instead recommends, to create flexibility for the situation identified and any other situations not identified, the deletion of "all other" as a modifier on attendance issues that the mediator can decide, so that the mediator is authorized to decide *all* issues of attendance that would include the ability to take into account governmental party circumstances. This change has been made to the draft. Note that many mediators dislike creating this authority in the mediator. We have modified the language so as not to emphasize the mediator's authority, and to give the mediator discretion to determine the procedure if the mediator chooses to in order to resolve conflict about the mediation procedure. Also, we have modified the attendance requirement from "must attend" to "should attend" to guide the parties in what is desired, but leave some flexibility. Parties should COOPERATE with the mediator and each other to arrive at a consensus on how to proceed. Mediators might choose to conduct

		a minimal session if the parties do not reach agreement on procedure or attendance issues.
12.	Domestic relations cases should be excluded. "For example, mediators will often arbitrate domestic case and that proves VERY helpful and cost effective given the unique application to family law."	Policy comment. Domestic relations cases are not currently excluded from the requirement (see Initial Case Schedule rule).
13.	Should there be a means test associated with (c)(3) regarding pro bono mediators?	The Subcommittee decided not to prescribe tests but allow the courts to work this out analogizing to other situations and relying where appropriate on the substantive law involved, such as the ability in family law cases to require payment from the party with the ability to pay. Cross reference to (f) ("*Unless otherwise ordered by the court or agreed by the parties*, each party is responsible for his, her or its proportional share of the reasonable mediation fee."). Since this comment was received, the Subcommittee has modified the rule to include additional "Fee Relief" and options for the Court.
14.	A representative of the ADR community stressed that mediators are always concerned with neutrality and confidentiality. Mediators do not want to be reporting parties' conduct to the courts or be involved in enforcement of the rule. Where the language gives "authority" to mediators, consider softening.	The Subcommittee agrees that mediators should not be compelled to report to the courts or testify concerning the mediation. Uniform Mediation Act, Chapter 7.07 RCW. Mediators and specifically RCW 7.07.060 contains protections for mediators and allows them to refuse to disclose. The rule is not intended to abrogate any mediator protections. Party protections may be abrogated in a limited way by the rule. The statute assures confidentiality concerning a "mediation communication," unless the parties otherwise agree in a record. See RCW 7.07.020(3). "Mediation communication" is broadly described and could include communications focused on process, such as to set up, schedule, and agree to procedures for the mediation. This conflicts with the rule if the statute is interpreted to prevent a party from

	establishing another party's refusal to mediate or comply with the rule. To the extent there is such a conflict, the rule abrogates the statute. The Subcommittee intends that the rule will allow courts to consider evidence presented by parties in support of motions for sanctions under (h).
15. A representative of the ADR community approved the encouragement in the rule to consult with the parties and get input. Mediators should draw on different formats and ideas, counties will probably see different practices develop, and this is beneficial to help make the mediation useful.	Yes, this comment aligns with the goals of the Subcommittee.
16. A representative of the ADR community stated agreement that some minimal amount of information must be exchanged between the parties, so the initial disclosures are a key piece to scheduling the mediation. Based on different subject areas, mediators may need to verify that certain information is in hand before the mediation starts (for example, paychecks of divorcing spouses to set alimony and child support).	Yes, this is how the mediation rule works in concert with the initial disclosures rule. And, if some specific information has not been obtained but is considered important to the success of the mediation, an extension could be sought, such as per (g). The Subcommittee expects that an extension would be the exception and not the rule; in other words, the majority of cases should comply with the mediation requirement without obtaining an extension.
17. Recommendation for ADR recommended practices that mediator engage the parties directly themselves, not just rely on the lawyers.	This will be added to the recommended practices.
18. Rule likely to increase costs of litigation "as parties who are not ready or willing to voluntarily mediate a case are compelled to do so at their costs. 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." Also, a motion for relief from the requirement will	Policy comment. The Subcommittee cautions that the rule, if adopted, is not satisfied by participation merely to "check the box" if the comment implies that a party would participate in bad faith.

	increase costs.	
19.	Allocates party resources to mediation instead of "other matters that are more substantively productive such as discovery." A second comment reiterated that money spent on good discovery will get cases to settle rather than an uninvited mediation.	Policy comment.
20.	Inadequate parameters on what type of mediation to hold "has the potential for abuse by overzealous mediators." "What are the guidelines as to any minimum or maximum lengths for mediation?"	The Subcommittee disagrees that more parameters are needed. The rule contemplates input from the parties to the mediator on the format of the mediation. The Subcommittee does not view the specter of overzealous mediators who disregard party input as a significant threat to the success of this rule, nor does the Subcommittee want to prescribe a mediation format. The flexibility is deliberate.
21.	With fee schedules set by counties, could "lead to widely disparate mediation costs between counties."	The mediation costs will reflect the market, so the Subcommittee agrees that the costs will be different by county and does not view this as a problem but as appropriate.
22.	Can a party terminate the mediation "at any time if they believe they are not getting anywhere?" What would be "reasonable cooperation" regarding termination of the mediation? This ambiguity is likely to increase costs.	The rule does not prescribe a minimum time, nor does it by its terms force parties to continue mediating beyond a point of reasonable productivity.
23.	Concern that early mediation imposes "gateway costs" on litigants who won't qualify for a *pro bono* mediator but for whom the cost is still prohibitive or problematic.	The Subcommittee added more flexibility for fee relief, including directly addressing a sliding scale. See (c)(3).
24.	Subsection (g) allows for an extension, but still seems to impose a threshhold for an extension that must be met by a motion, adding cost, and an evidentiary showing of some type.	Correct. The default requirement under the rule is to hold the early mediation as scheduled and required. Parties who comply will face no additional expense. To seek an extension, yes, the parties will need to incur the motion practice cost and articulate and establish the basis. If the other party does not oppose the extension, this should reduce the

	cost because a stipulated motion could filed.
25. Timeline: too early. Consider whether early mediation should be optional.	Policy comment. The BOG could consider an optional program, but the Subcommittee suggests that an optional program is unlikely to drive change.
26. Requiring mediation before the completion of discovery puts the parties at a disadvantage.	Policy comment. The BoG requested a rule for "early mandatory mediation." This is what the Subcommittee has drafted.
27. Experienced mediators are often booked months in advance. If the parties can't find a mediator, they would need to seek relief from the court, inefficiently using judicial resources.	The BoG requested a rule for "early mandatory mediation." This is what the Subcommittee has drafted. Based on supply and demand, the Subcommittee expects mediators will fill the demand. Parties may not be able to book and use the most popular mediators to comply with this rule.
28. Objection to the appointment of a mediator because one party might avoid joint selection (stall) in order to have the court appoint one that another party might not have chosen or think is a good fit.	The Subcommittee suggests no changes as a result of this concern.
29. Dislike giving the mediator discretion to hold a mediation the mediator considers appropriate after input from the parties. Note that the mediator has a financial interest in the mediation format.	As noted previously, the rule provides latitude and gives the parties the opportunity to shape the mediation. The Subcommittee assumes that if the parties agree on a process, the mediator will schedule that process. It is only if the parties do not agree that the mediator necessarily can determine the process based on reconciling the input. The Subcommittee believes the mediators will not abuse their authority or act out of self-interest. The Subcommittee rejects the alternative, which is to proscribe a process in a one-size fits all approach. The Subcommittee has drafted the rule to avoid that. The flexibility is deliberate.
30. Parties should be able to jointly opt out, or address the timeline as part of	The Subcommittee rejects a joint opt-out. This would undermine the rule and prevent

	their early discovery conference.	change. The parties, in fact, must address the mediation requirement at their early discovery conference, per the rule requiring an early discovery conference. After that conference is held and the topic addressed, a party may seek an extension under (g).
31.	Exempt pro se cases. "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 the court could accommodate the volume of requests."	Policy comment. The Subcommittee suggests no changes, but acknowledges that how the pro bono appointment would function cannot be completely foreseen.
32.	Would a change to one deadline in the case schedule automatically change others, such as an extension of the deadline of the initial disclosures automatically changing the mediation deadline, "[o]r would the parties be require to seek [more] relief?"	Parties would be well-advised to address all extension issues at the time they seek a first extension. For example, a party seeking an extension of the initial disclosures deadline should raise what additional deadlines it wishes extended, such as the mediation deadline. Changes to other deadlines would not necessarily be automatic.
33.	Concern that rule may impede access to justice for unrepresented litigants and those of limited means. Such litigants "are more likely than defendants to have a reasonable and good-faith reluctance to mediate before discovery." They face "an information and leverage imbalance prior to discovery."	Primarily a policy comment. The Subcommittee notes that the Court may qualify parties for pro bono mediation or apportion fees appropriately. Some changes regarding fee relief have been made in (c)(3). Affording the mediation itself, however, is not the main point of the comment, which focuses on the "early" nature of the required mediation and a perceived "information imbalance." The Subcommittee suggest no changes as a result of this comment.
34.	Mandatory mediation is inconsistent with voluntary nature of mediation. Like the part of the rule directing the mediator to consult with the parties on the mediation process, but concerned "that imposing the potentially significant costs … prior to discovery will inure most often to the benefit of defendants that start the case with greater resources and better access to relevant information"	Policy comment.

35.	Blanket rules like this are not well suited to family law cases.	Policy comment.
36.	In 2010-2013, the WSBA studied developing statewide family law rules. The effort was abandoned with the conclusion that more rules for family law was not necessarily better.	Policy comment.
37.	Consider optional rule providing court assistance in pursuing mediation. "Free settlement conferences by judges and commissioners are still offered in King County."	Policy comment.
38.	Existing assistance in King County for family law includes ERCM (early resolution case managers hired by the county for pro se litigants), status conferences, pre-trial conferences, and low-fee, courthouse –hired family law facilitators (nonlawyers), family law information centers, and Simple Dissolution Programs. "*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	Policy comment. Domestic relations cases are not currently excluded from the requirement (see Initial Case Schedule rule). See #12 above.

	3 times per year. These sessions start at a 3-hour expectation but often exceed that time." Parties in family law are often still emotional in the beginning of the case; may be blind-sided by the filing.	
39.	Begs question whether mediators must be attorneys.	Not required by the rule.
40.	Fees should not necessarily be hourly but might be flat fee or have a sliding scale. Relates to (b)(2)-(3). Retain flexibility.	The Subcommittee agrees that this flexibility is desired. (b)(3)(D) and (b)(4) are flexible enough to include this concept, because a fee schedule can include a variety of fee arrangements.
41.	Perhaps move pro bono terms currently in (b)(2) to (f) relating to mediator compensation. Might fit better there.	The Subcommittee has moved the language to a new subsection in (b) for better organization.
42.	Should (c) mention that the mediator jointly selected should have consented to serve?	The Subcommittee agrees and makes this change to improve clarity that the parties must know that mediator will serve before reporting a joint selection.
43.	Suggest changing "has authority to" to "may" in (d)(1) and changing "best" mediation practices to "recommended."	Accepted changes.
44.	Regarding attendance, suggest changing "must attend" to "should attend" so in cases where it is not practical or the mediator allows anything different, a violation of the rule is not implicit.	Accepted changes. The Subcommittee leans toward flexibility over rigid requirements.
45.	The extension in (g) is beneficial to allow parties some flexibility based on circumstances in the case. Consider deleting "in good faith" as superfluous or meaningless.	Accepted change.
46.	Regarding (h), confine sanctionable conduct to refusal to participate or	Accepted change.

	comply with rule. Eliminate "willful delay" or "participation in bad faith" as difficult to police and likely to encourage challenges that the rule does not want to encourage, such as complaints about the substance of the mediation rather than compliance with the goal to hold a mediation earlier in the life of a litigation.	
47.	Section (e) reflects a good approach that mediation must be commenced but the parties do not have to report on the status or reach an end to have complied with the rule requirement.	Thank you.
48.	Only trigger mandatory mediation if one party requests it, and make the requesting party responsible for the cost of mediation, in which case the remaining content of the rule is generally acceptable.	Policy Comment. The BoG could consider this if, as a matter of policy, it wishes to soften the mandatory nature of the early mandatory mediation rule.
49.	Current rule will not be effective in resolving cases early and will increase costs for plaintiffs in civil cases because 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."	Policy Comment.
50.	"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 a fair value to settle the case." Therefore, formal discovery must be complete, deps finished of key witnesses, significant legal issues resolved by the court, and expert opinions disclosed before mediation can be successful.	Policy Comment. The rule as drafted deliberately requires mediation in advance of expert disclosures, to save the time and fees necessary to prepare the expert disclosures until after mediation has proven unsuccessful. The Task Force identified in the drafting of this rule and the initial case schedule rule that one place to see significant savings when early mediation is conducted and successful is by avoiding the expert costs. The comment suggests a very different approach that expressly endorses the expenditure of these costs before mediation occurs.

	Additionally, no commenters opposed to the policy of early mediation address the potential for greater success reaching settlement later in the case if an early mediation fails. After the parties exchange more information and incur the expense of expert disclosures, the parties could promptly take up a second mediation effort and might be in a better position for success having already mediated together. In other words, the allocation of resources to a mediation earlier are not "wasted." The rule does not restrict later settlement or mediation efforts if the posture of the parties changes later in the case. The BoG's policy choice encourages a cultural shift in how lawyers approach settlement, including how early they start expressly working toward it.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES

New Rule: Early Mandatory Mediation Requirement

(a) Scope. This rule applies if a case schedule or court order requires mediation. On a party's motion for good cause or on its own initiative, the court may order any parties to mediate pursuant to this rule even where not otherwise required.

(b) Qualified Mediators.
(1) Judges shall be considered qualified mediators. They may serve as a mediator by agreement.
(2) The court shall maintain a list of other qualified mediators and has discretion to modify the list. ~~A person seeking to be on the list of qualified mediators agrees to follow the procedures of this rule if appointed and to accept appointment to one mediation per calendar year on a pro bono basis. Refusal to accept a pro bono appointment may result in removal from the list.~~ A qualified mediator shall demonstrate:
(A) Completion of mediation training; or
(B) Experience mediating at least five matters as a mediator.
(3) The list of qualified mediators must include the following for each mediator:
(A) Name;
(B) Physical and electronic mail addresses;
(C) Telephone number;
(D) Fee schedule;
(E) Whether the mediator is qualified by training, experience or both; and
(F) Preferred legal subject matters, if any.
(4) Each court ~~by county~~ shall establish a recommended fee schedule for assigned mediators and update it annually.
~~(5) No person who has provided mediation services for an action shall serve as an arbitrator of that action. No person who has been engaged as an arbitrator in an action shall serve as a mediator for that action.~~
(5) A person on the list of qualified mediators agrees to follow the procedures of this rule if appointed and to accept appointment to one mediation each calendar year on a pro bono basis. Refusal to accept a pro bono appointment may result in removal from the list.

(c) Selection of Mediator.
(1) Joint Selection of Mediator. Parties may by agreement select any person as mediator, even ~~if~~ one not on the court's list of qualified mediators. If the parties jointly select a mediator who consents, the plaintiff shall file a notice of joint selection of mediator that includes the name and contact information of the mediator ~~jointly selected~~, and serve a copy upon the mediator.
(2) Assignment of Mediator. If the plaintiff fails to file the notice of joint selection of mediator by a deadline provided by a case schedule or court order, the court shall promptly assign a mediator from the approved list and notify the mediator

Comment [AAR1]: Moved to (b)(5) for better organization.

Comment [AAR2]: Because there is no consensus in the ADR community that this is ethically necessary, and many feel the parties should be free to contract, this is deleted.

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and the parties of the assignment. If the mediator is unable to serve, the mediator shall ~~so~~ notify the court within five days of assignment and the court shall appoint a new mediator.

(3) Fee Relief or Pro Bono Mediator. A party who believes that any party is unable to afford mediation may ~~file a motion by a deadline provided by a case schedule or court order requesting~~request relief for that party from responsibility for the mediator's fee. The Court may deny relief or provide relief such as apportioning the fee among the remaining parties, requiring payment on a sliding scale, and assigning~~ment of~~ a *pro bono* mediator, or any combination thereof. If the court approves the request for a *pro bono* mediator, the court shall promptly assign a mediator on a *pro bono* basis.

(d) Mediation Procedure, Attendance.

(1) Mediation Procedure. The mediator ~~has authority to~~may determine based on the circumstances and input from the parties the procedure of the mediation, ~~for example~~including its form, length, and content. The mediator shall ~~consult the suggested best mediation practices and~~ confer with the parties to learn their needs, preferences, and recommendations. ~~for a successful process. The mediator shall hold a mediation the mediator considers appropriate in light of the circumstances and input from the parties.~~

(2) Attendance. All persons necessary to settle the matter and who have the necessary settlement authority ~~must~~ should attend. The mediator ~~has the authority to~~may determine ~~all other~~ issues of attendance after consulting the parties, including whether any individual may attend by other than personal attendance~~telephone~~.

(e) Notice of Compliance. No later than five~~5~~ days after commencement of mediation, the plaintiff shall file with the court a notice of compliance with this rule indicating that the parties held or commenced a mediation. The parties may continue mediation ~~efforts~~ after an initial session and need not represent that mediation efforts are completed. The notice of compliance shall be in the following or a substantially similar form:

IN THE SUPERIOR COURT OF ~~THE~~
~~STATE OF~~ WASHINGTON ~~IN AND~~ FOR ~~THE~~_____
COUNTY ~~OF~~ . . . . . .

(Plaintiff Name). . . . . ~~Cause~~ No. . . . . .
. . . . . .,

Plaintiff.
vs.

NOTICE OF COMPLIANCE WITH EARLY MANDATORY MEDIATION REQUIREMENT ~~(CR __)~~

Comment [AAR3]: Added provisions to broaden the court's authority to avoid access to justice/barrier issues.

Comment [AAR4]: We deleted this reference intended to be to the proposed Recommended ADR Practices because it is awkward to refer to them, but expect that qualified meditiators will know of recommended practices and be aware if the Supreme Court adopts any.

Comment [AAR5]: Incorporated into first sentence so deleted here; tightened.

Comment [AAR6]: Changed to provide guidance and intent but eliminate a strict requirement that would make failure to attend an automatic violation of the rule.

Comment [AAR7]: Changed to not exclude internet or video attendance.

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES

New Rule: Early Mandatory Mediation Requirement

(Defendant Name). . . CR __
.. . .,

Defendant.

. . . .

Plaintiff hereby notifies the Court that on (Date/Dates), all parties met for mediation in compliance with CR (#__[this rule])..

Date: . . . . . .

~~Attorney for Plaintiff . . . . . .~~
~~. . . . .,~~

_____
(Signature)
WSBA #
Attorney for Plaintiff(s)

(f) Mediator Compensation. The parties shall pay the mediator's reasonable fee~~s~~ unless a court order provides otherwise. Unless otherwise ordered by the court or agreed by the parties, each party is responsible for his, her or its proportional share of the reasonable mediation fee. The court has authority to resolve in its discretion any fee dispute upon motion of any party, including the reasonableness of the mediation fee.

(g) Extension of Applicable Deadline for Specific Objectives. If any party ~~in good faith~~ believes that completion of specific discovery or exchange of specific information is necessary before mediation, and if that specific discovery or exchange of specific information is not likely to be completed within applicable deadlines imposed by an initial case schedule, then that party may seek after the initial discovery conference to extend the mediation deadline~~, by aising the issue at the Initial Discovery Conference and incorporating the same into the Discovery Plan and Status Report.~~ The court may extend an applicable deadline for mediation imposed by an initial case schedule by a maximum of 60 days in such circumstances and incorporate any such extension into the c~~C~~ase s~~S~~chedule. The availability of this extension is without prejudice to any extension ~~of, or exemption from, any case schedule~~ otherwise available.

(h) Sanctions for Failure to Comply. The court, upon motion or upon its own initiative, may impose an appropriate sanction on any party or attorney for

Comment [AAR8]: Considered unnecessary.

Comment [AAR9]: Requires parties to first confer at the Initial Discovery Conference on the topic of the mediation before seeking an extension.

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refusal to participate in mediation or comply with any of the requirements of this rule~~., for willful delay in completing mediation or for participation in bad faith~~. For purposes of this rule, a party may submit evidence to substantiate a claim for sanctions but may not reveal substantive communications concerning any mediation. ~~The sanction may include, but is not limited to, an order to pay a fee sufficient to deter the conduct and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the sanctionable conduct.~~ The court shall not entertain any motion with respect to this subsection unless the parties have conferred with respect to the motion. The moving party shall arrange for a mutually convenient conference in person or by telephone. The court may apply sanctions if the court finds that any party or its counsel, upon whom a motion with respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith. Any motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.

Comment [AAR10]: Tightened to focus grounds for sanctions on the procedure of setting up and holding the mediation, rather than the content or success of the mediation.

Comment [AAR11]: Added to clarify that any protections of a party under RCW 7.07 are abrogated on a limited basis to allow a party to substantiate its claim for sanctions under this rule.

Comment [AAR12]: Eliminated as unnecessary.

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES

New Rule: Early Mandatory Mediation Requirement

(a) Scope. This rule applies if a case schedule or court order requires mediation. On a party's motion for good cause or on its own initiative, the court may order any parties to mediate pursuant to this rule even where not otherwise required.

(b) Qualified Mediators.

(1) Judges shall be considered qualified mediators. They may serve as a mediator by agreement.

(2) The court shall maintain a list of other qualified mediators and has discretion to modify the list. A qualified mediator shall demonstrate:

(A) Completion of mediation training; or

(B) Experience mediating at least five matters as a mediator.

(3) The list of qualified mediators must include the following for each mediator:

(A) Name;

(B) Physical and electronic mail addresses;

(C) Telephone number;

(D) Fee schedule;

(E) Whether the mediator is qualified by training, experience or both; and

(F) Preferred legal subject matters, if any.

(4) Each court shall establish a recommended fee schedule for assigned mediators and update it annually.

(5) A person on the list of qualified mediators agrees to follow the procedures of this rule if appointed and to accept appointment to one mediation each calendar year on a pro bono basis. Refusal to accept a pro bono appointment may result in removal from the list.

(c) Selection of Mediator.

(1) Joint Selection of Mediator. Parties may by agreement select any person as mediator, even one not on the court's list of qualified mediators. If the parties jointly select a mediator who consents, the plaintiff shall file a notice of joint selection of mediator that includes the name and contact information of the mediator, and serve a copy upon the mediator.

(2) Assignment of Mediator. If the plaintiff fails to file the notice of joint selection of mediator by a deadline provided by a case schedule or court order, the court shall promptly assign a mediator from the approved list and notify the mediator and the parties of the assignment. If the mediator is unable to serve, the mediator shall notify the court within five days of assignment and the court shall appoint a new mediator.

(3) Fee Relief or Pro Bono Mediator. A party who believes that any party is unable to afford mediation may request relief for that party from responsibility for the mediator's fee. The Court may deny relief or provide relief such as apportioning the fee among the remaining parties, requiring payment on a

sliding scale, and assigning a *pro bono* mediator, or any combination thereof. If the court approves the request for a *pro bono* mediator, the court shall promptly assign a mediator on a *pro bono* basis.

(d) Mediation Procedure, Attendance.
(1) Mediation Procedure. The mediator may determine based on the circumstances and input from the parties the procedure of the mediation, including its form, length, and content. The mediator shall confer with the parties to learn their needs, preferences, and recommendations.
(2) Attendance. All persons necessary to settle the matter and who have the necessary settlement authority should attend. The mediator may determine issues of attendance after consulting the parties, including whether any individual may attend by other than personal attendance.

(e) Notice of Compliance. No later than five days after commencement of mediation, the plaintiff shall file with the court a notice of compliance with this rule indicating that the parties held or commenced a mediation. The parties may continue mediation after an initial session and need not represent that mediation efforts are completed. The notice of compliance shall be in the following or a substantially similar form:

IN THE SUPERIOR COURT OF
WASHINGTON FOR _____
COUNTY . . . . . .

(Plaintiff Name). . . . . No. . . . . .
. . . . . .,

Plaintiff. NOTICE OF COMPLIANCE WITH EARLY
vs. MANDATORY MEDIATION REQUIREMENT

(Defendant Name). . . CR __
.. . .,

Defendant.

. . . .

Plaintiff hereby notifies the Court that on (Date/Dates), all parties met for mediation in compliance with CR (#__[this rule])..

Date: . . . . . .

_____

(Signature)
WSBA #
Attorney for Plaintiff(s)

(f) Mediator Compensation. The parties shall pay the mediator's reasonable fee unless a court order provides otherwise. Unless otherwise ordered by the court or agreed by the parties, each party is responsible for his, her or its proportional share of the reasonable mediation fee. The court has authority to resolve in its discretion any fee dispute upon motion of any party, including the reasonableness of the mediation fee.

(g) Extension of Applicable Deadline for Specific Objectives. If any party believes that completion of specific discovery or exchange of specific information is necessary before mediation, and if that specific discovery or exchange of specific information is not likely to be completed within applicable deadlines imposed by an initial case schedule, then that party may seek after the initial discovery conference to extend the mediation deadline. The court may extend an applicable deadline for mediation imposed by an initial case schedule by a maximum of 60 days in such circumstances and incorporate any such extension into the case schedule. The availability of this extension is without prejudice to any extension otherwise available.

(h) Sanctions for Failure to Comply. The court, upon motion or upon its own initiative, may impose an appropriate sanction on any party or attorney for refusal to participate in mediation or comply with any of the requirements of this rule. For purposes of this rule, a party may submit evidence to substantiate a claim for sanctions but may not reveal substantive communications concerning any mediation. The court shall not entertain any motion with respect to this subsection unless the parties have conferred with respect to the motion. The moving party shall arrange for a mutually convenient conference in person or by telephone. The court may apply sanctions if the court finds that any party or its counsel, upon whom a motion with respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith. Any motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.

RECOMMENDED ADR PRACTICES

1. MEDIATION

(a) 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.

(b) Parties should consider engaging in limited-scope mediation focused on specific issues:

i. 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.

ii. In cases where discovery is likely to be extensive or contentious, the parties should consider mediating the scope and conduct of discovery.

(c) Parties and mediators should consider varying the format of mediation, depending on the needs of the case and disposition of the parties:

i. Conducting mediation as a series of sessions rather than a one-day event; or

ii. 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.

(d) Mediators should consider pre-session meetings, in person or by phone:

i. With counsel; or

ii. With counsel and client.

(e) Mediators should attempt to engage the parties directly, not rely exclusively on their lawyers.

2. PRIVATE ARBITRATION

(a) The arbitrator should identify the scope of arbitration with input from the parties.

(b) Parties should consider limiting or eliminating the length and number of depositions and the extent of expert discovery.

(c) 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.

(d) 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.

(e) An arbitration contract should address the following topics; if they are not, the arbitrator or panel should address them in early rulings:

i. Whether there is a challenge to arbitration;

ii. Whether arbitration should be global, addressing and resolving all issues, or whether its scope should be limited to one or more specific issues;

iii. What procedural rules will govern conduct and location of proceedings (for example, AAA, JAMS, JDR, or some other protocol);

iv. What limits will be placed on discovery, for example, lay-down discovery or e-discovery rules. Without some discovery limits, arbitration comes to resemble full-scale litigation;

v. The body of substantive law that will govern resolution of the dispute;

vi. Whether mediation is required either before arbitration or early in arbitration, and, if so, on what schedule;

vii. What interim relief, if any, will be available, whether injunctive or otherwise;

viii. Whether to allow expedited electronic exchange of briefs, submittals, and other documents;

ix. Whether to allow pre-hearing motions for summary judgment or partial summary judgment;

x. 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

xi. Details concerning a 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.

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

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. 4th 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

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
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Website: www.tuohyminorkruse.com

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

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 in 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
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Port Orchard, WA 98366
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Email: Igeorge@co.kitsap.wa.us

>>> Sherry Lindner <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 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
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

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

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

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

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
PURCELL LAW
A FAMILY LAW OFFICE
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
Maria Diaz: MD@PurcellFamilyLaw.com
Mark Von Weber: 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.

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

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

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

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 litems, 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.

MCBA
Mason County
BAR ASSOCIATION

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

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,

JULIE NICHOLS, WSBA No. 37685
MCBA President

Email: julie@whitehousenichols.com • Phone: (360) 426-5885

Mason County Superior Court

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]

Click here to view in a PDF.

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

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

Email: patti@davidgateslaw.com • Phone: (360) 275-9505

Civil Litigation
Rules Drafting Task Force
Initial Case Schedules Subcommittee Report
May 2018

Members: Judge Rebecca Robertson, Caryn Jorgensen, and Roger Wynne.

What's new since April:

CR package. Attached are our proposals to amend the CR to implement an initial case schedule requirement. Specifically:

> New CR 3.1(e), redlined to show and sometimes explain what we changed in the exemptions list since the draft we sent to stakeholders;
>
> New CR 3.1, clean; and
>
> Amended CR 26, redlined to show proposed edits to existing CR 26 (unchanged from the stakeholder version).

We received some policy-level concerns about the concept and this late-arriving suggestion from the three-judge bench of the Mason County Superior Court:

> [W]e 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.

We did not have the capacity to consider this proposal, which might run counter to the BOG's direction and would require serious rethinking of our approach. We also received requests to add certain exemptions and scrubbed the exemptions list as best we could.

Please recall that we do not propose amending CR 56(c), as someone on our Task Force recommended. To facilitate a motion one of you might want to make, here is language to amend the first sentence of CR 56(c) to resolve any potential confusion with CR 3.1:

> The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing, and not later than any deadline for dispositive motions provided by a case schedule or court order.

CRLJ package. Also attached are our proposals to amend the CRLJ:

New CRJL 3.1;

Amended CRLJ 26; and

Amended CRLJ 40.

The CRLJ package tracks the CR package with some differences:

The mediation deadlines are not part of the CRLJ proposal because our Task Force is not recommending early mediation for the CRLJ. *See* attached illustration of the timeline.

Proposed CRLJ 3.1 contains no list of exemptions. We do not know enough to know what to exempt as a matter of course. The blanket exemption remains, so each court could exempt types of actions for which an initial case schedule is not appropriate.

CRLJ 40 is the current rule on setting trials in courts of limited jurisdiction. Our proposed amendments add cross-references to new CRLJ 3.1

This package lagged behind the CR package. We are soliciting stakeholder feedback by June 6. Thus far we have heard only policy-level concerns more suitable for the BOG and Supreme Court.

Guidance:

We seek feedback from the Task Force on anything they spot, especially regarding errors and omissions in the CR 3.1 exemption list and whether to further consider the suggestion from the Mason County Superior Court.

Recommendation:

We recommend the Task Force vote on our CR package and provide input on our CRJL package.

Illustration of the Initial Case Schedule Rule

EVENT	*Weeks before TRIAL*	*EXAMPLE WITH DATES*
Filing	**52**	Tuesday, January 2, 2018
Initial discovery conference	**45**	Tuesday, February 20, 2018
Discovery plan and status report:	**43**	Tuesday, March 6, 2018
Initial disclosures	**39**	Tuesday, April 3, 2018
Joint selection of mediator, if any*	**37**	Tuesday, April 17, 2018
Appointment of mediator if parties do not jointly select*	**36**	Tuesday, April 24, 2018
Notice of compliance with early mediation*	**32**	Tuesday, May 22, 2018
Expert disclosures, primary	**26**	Tuesday, July 3, 2018
Expert disclosures, rebuttal	**20**	Tuesday, August 14, 2018
Discovery cutoff	**13**	Tuesday, October 2, 2018
Dispositive motions, filing deadline	**9**	Tuesday, October 30, 2018
Pretrial report	**4**	Tuesday, December 4, 2018
Pretrial conference	**3**	Tuesday, December 11, 2018
Trial	**0**	Tuesday, January 1, 2019

**Included only in proposed CR 3.1. Not part of proposed CRLJ 3.1.*

New CR 3.1(e); changes to the exemption list since stakeholder draft

. . . .

(e) The following types of actions are exempt from this rule, although nothing in this rule precludes a court from issuing an alternative case schedule for the following types of actions:

RALJ Title 7, appeal from a court of limited jurisdiction;

RCW ch. 4.24.130, change of name;

RCW ch. 4.48, proceeding ~~referred to~~ before a referee;

RCW ch. 5.51, Uniform Interstate Depositions and Discovery Act;

~~RCW 4.64.090, abstract of transcript of judgment;~~[. . . This does not appear to be an action of any sort.]

RCW ch. 6.36, Uniform Enforcement of ~~f~~Foreign ~~j~~Judgments Act;

RCW ch. 7.06, mandatory arbitration appeal;

RCW ch. 7.16, writs;[. . . This is the catch-all. Broken out from the reference to 7.36.]

RCW ch. 7.24, Uniform Declaratory Judgments Act;[. . . These are facial challenges usually resovled on cross motions for summary judgment.]

RCW ch. 7.36, ~~petition for writ of~~ habeas corpus~~, mandamus, restitution, or review, or any other writ~~;[. . . This chapter is about habeus only.]

RCW ch. 7.60, appointment of receiver if not combined with, or ancillary to, an action seeking a money judgment or other relief ~~receivership proceeding (when filed as an independent action and not under an existing proceeding)~~;[. . . Borrows language from RCW 7.60.025(1)(a).]

RCW ch. 7.90, sexual assault protection order;

RCW ch. 7.94, extreme risk protection order;

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New CR 3.1(e); changes to the exemption list since stakeholder draft

RCW ~~ch. 8.12,~~ Title 8, eminent domain ~~condemnation [*Note: Citations to sources of condemnation authority may need to be expanded in a subsequent draft.*]~~;[. . . Title 8 covers all manner of public entities. Chapter 8.12 is just cities.]

RCW ch. 10.14, anti-harassment protection order;

RCW ch. 10.77, criminally insane procedures;[. . . That's the title of the chapter.]

RCW Title 11, probate and trust law;

RCW ch. 12.36, small claims appeal;

RCW Title 13, juvenile courts, juvenile offenders, etc. ~~emancipation of a minor~~;[. . . The Title covers more than courts, offenders, and minors. The title is named "Juvenile Courts and Juvenile Offenders," so use that with "etc." The idea is for everything in Title 13 to be exempt.]

RCW ~~ch.~~ 26.04.010, marriage age waiver petition;

RCW ch. 26.21A, Uniform Interstate Family Support Act;

RCW ch. 26.33, adoption;

RCW ch. 26.09, dissolution proceedings and legal separation;[. . . Based on comments.]

RCW ch. 26.50, ~~d~~Domestic ~~v~~Violence Protection Act;

RCW 29A.72.080, appeal of ballot title or summary for a state initiative or referendum;

RCW ch. 34.05, ~~administrative appeal~~Administrative Procedure Act petition;

RCW ch. 35.50, local improvement assessment foreclosure;[. . . Based on comments.]

RCW ch. 36.70C, land use petition;

~~RCW ch. 49.12, work permit;~~[. . . Work permits show up only in terms of waivers, which are granted administratively, not judicially. The rest of the chapter seems to govern serious employment litigation that this rule should cover.]

RCW ch. 51.52, appeal from the board of industrial insurance appeals;

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New CR 3.1(e); changes to the exemption list since stakeholder draft

RCW ch. 59.12~~8~~, unlawful detainer;

RCW ch. 59.18, Residential Landlord-Tenant Act;[. . . We had the wrong cite for unlawful detainer, and RLTA has the writ of restitution proceding, which we had intended to exempt above.]

RCW ch. 70.09, sexually violent predator commitment;[. . . We had the wrong cite below; moved up here to be in numerical order.]

RCW ch. 70.96A, ~~chemical dependency~~ treatment for alcoholism, intoxication, and drug addiction;[. . . That's the title of the chapter.]

~~RCW ch. 70.109 (sexually violent predator commitment);~~

RCW ch. 71.05, ~~civil commitment~~ mental illness;[. . . That's the title, and it appears to cover more than commitments.]

RCW ch. 74.20, support of dependent children~~Uniform Reciprocal Enforcement of Support Act~~;[Reviser's note to RCW 74.20.210: "The "Uniform Reciprocal Enforcement of Support Act" was redesignated the "Uniform Interstate Family Support Act" by 1993 c 318." That Uniform Act is what we cite above as RCW ch. 26.21A. We should continue to exempt 74.20 because is provides for petitions for specific things.]

RCW ch. 74.34, abuse of vulnerable adults;

RCW ch. 84.64, lien foreclosure; [. . . Based on comments.]

SPR 98.08W, settlement of claims by guardian, receiver, or personal representative;

SPR 98.16W, settlement of claims of minors and incapacitated persons; and

WAC 246-100, isolation and quarantine.

. . . .

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
New CR 3.1 – INITIAL CASE SCHEDULE

(a) When a summons and complaint are filed, and unless exempted pursuant to this rule, the court shall issue an initial case schedule with at least the following deadlines:

1. Initial Discovery Conference. The parties shall hold an initial discovery conference no later than 45 weeks before the trial commencement date.

2. Discovery Plan and Status Report. The parties shall file a discovery plan and status report no later than 43 weeks before the trial commencement date.

3. Initial Disclosures. The parties shall serve initial disclosures no later than 39 weeks before the trial commencement date.

4. Joint Selection of Mediator, if Any. If the parties intend to jointly select a mediator, the plaintiff shall file a joint selection of mediator no later than 37 weeks before the trial commencement date.

5. Appointment of Mediator if Parties Do Not Jointly Select. If the plaintiff does not timely file a joint selection of mediator, the court shall appoint a mediator and notify the parties and the mediator no later than 36 weeks before the trial commencement date.

6. Notice of Compliance with the Early Mandatory Mediation Requirement. The plaintiff shall file a notice of compliance with the early mandatory mediation requirement no later than 32 weeks before the trial commencement date.

7. Expert Witness Disclosures.

   A. Each party shall serve its primary expert witness disclosures no later than 26 weeks before the trial commencement date.

B. Each party shall serve its rebuttal expert witness disclosures no later than 20 weeks before the trial commencement date.

8. Discovery Cutoff. The parties shall complete discovery no later than 13 weeks before the trial commencement date.

9. Dispositive Motions. The parties shall file dispositive motions no later than nine weeks before the trial commencement date.

10. Pretrial Report. The parties shall file a pretrial report no later than four weeks before the trial commencement date.

11. Pretrial Conference. The court shall conduct a pretrial conference no later than three weeks before the trial commencement date.

12. Trial Commencement Date. The court shall commence the trial no later than 52 weeks after the filing of the summons and complaint.

(b) If application of subsection (a) would result in a deadline falling on a Saturday, Sunday, or legal holiday, the deadline shall be the next day in the future that is neither a Saturday, Sunday, nor legal holiday.

(c) The party instituting the action shall serve a copy of the initial case schedule on all other parties no later than ten days after the court issues it.

(d) Permissive and mandatory case schedule modifications.

1. The court may modify the case schedule on its own initiative or a motion demonstrating: good cause; the action's complexity; or the impracticality of complying with this rule because of the nature of the action. At a minimum, good cause requires the moving party to demonstrate due diligence in meeting the

requirements of the case schedule. As part of any modification, the court may revise expert witness disclosure deadlines, including to require the plaintiff to serve its expert witness disclosures before the defendant if the issues in the case warrant staggered disclosures.

2. No case schedule shall require a party to violate the terms of a protection, no-contact, or other order preventing direct interaction between persons. The court shall modify the case schedule on its own initiative or a motion to enable the parties to respect the terms of such an order.

(e) The following types of actions are exempt from this rule, although nothing in this rule precludes a court from issuing an alternative case schedule for the following types of actions:

RALJ Title 7, appeal from a court of limited jurisdiction;

RCW ch. 4.24.130, change of name;

RCW ch. 4.48, proceeding before a referee;

RCW ch. 5.51, Uniform Interstate Depositions and Discovery Act;

RCW ch. 6.36, Uniform Enforcement of Foreign Judgments Act;

RCW ch. 7.06, mandatory arbitration appeal;

RCW ch. 7.16, writs;

RCW ch. 7.24, Uniform Declaratory Judgments Act;

RCW ch. 7.36, habeas corpus;

RCW ch. 7.60, appointment of receiver if not combined with, or ancillary to, an action seeking a money judgment or other relief;

RCW ch. 7.90, sexual assault protection order;

RCW ch. 7.94, extreme risk protection order;

RCW Title 8, eminent domain;

RCW ch. 10.14, anti-harassment protection order;

RCW ch. 10.77, criminally insane procedures;

RCW Title 11, probate and trust law;

RCW ch. 12.36, small claims appeal;

RCW Title 13, juvenile courts, juvenile offenders, etc.;

RCW 26.04.010, marriage age waiver petition;

RCW ch. 26.21A, Uniform Interstate Family Support Act;

RCW ch. 26.33, adoption;

RCW ch. 26.09, dissolution proceedings and legal separation;

RCW ch. 26.50, Domestic Violence Protection Act;

RCW 29A.72.080, appeal of ballot title or summary for a state initiative or referendum;

RCW ch. 34.05,Administrative Procedure Act petition;

RCW ch. 35.50, local improvement assessment foreclosure;

RCW ch. 36.70C, land use petition;

RCW ch. 51.52, appeal from the board of industrial insurance appeals;

RCW ch. 59.12, unlawful detainer;

RCW ch. 59.18, Residential Landlord-Tenant Act;

RCW ch. 70.09, sexually violent predator commitment;

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RCW ch. 70.96A, treatment for alcoholism, intoxication, and drug addiction;

RCW ch. 71.05, mental illness;

RCW ch. 74.20, support of dependent children;

RCW ch. 74.34, abuse of vulnerable adults;

RCW ch. 84.64, lien foreclosure;

SPR 98.08W, settlement of claims by guardian, receiver, or personal representative;

SPR 98.16W, settlement of claims of minors and incapacitated persons; and

WAC 246-100, isolation and quarantine.

(f) In addition to the types of actions identified in subsection (e), the court, on a motion or its own initiative, may exempt any action or type of action for which compliance with this rule is impractical.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

[(a) unchanged.]

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

[(b)(1) – (b)(4) unchanged.]

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) Unless earlier required by these rules, and in no event later than the deadline for primary or rebuttal expert witness disclosures provided by a case schedule or court order, each party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and state such other information about the expert as may be discoverable under these rules.

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(B) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(~~B~~C) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(~~C~~D) Unless manifest injustice would result:~~,~~ (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(B)~~(A)(ii)~~ and (b)(5)(C~~B~~) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(B)~~(A)(ii)~~ of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(C~~B~~) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

[(b)(6) – (b)(8) unchanged.]

[(c) – (j) unchanged.]

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

New CRLJ 3.1 – INITIAL CASE SCHEDULE

(a) When a summons and complaint are filed, and unless exempted pursuant to this rule, the court shall issue an initial case schedule with at least the following deadlines:

1. Initial Discovery Conference. The parties shall hold an initial discovery conference no later than 45 weeks before the trial commencement date.

2. Discovery Plan and Status Report. The parties shall file a discovery plan and status report no later than 43 weeks before the trial commencement date.

3. Initial Disclosures. The parties shall serve initial disclosures no later than 39 weeks before the trial commencement date.

4. Expert Witness Disclosures.

   A. Each party shall serve its primary expert witness disclosures no later than 26 weeks before the trial commencement date.

   B. Each party shall serve its rebuttal expert witness disclosures no later than 20 weeks before the trial commencement date.

5. Discovery Cutoff. The parties shall complete discovery no later than 13 weeks before the trial commencement date.

6. Dispositive Motions. The parties shall file dispositive motions no later than nine weeks before the trial commencement date.

7. Pretrial Report. The parties shall file a pretrial report no later than four weeks before the trial commencement date.

8. Pretrial Conference. The court shall conduct a pretrial conference no later than three weeks before the trial commencement date.

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

New CRLJ 3.1 – INITIAL CASE SCHEDULE

9. Trial Commencement Date. The court shall commence the trial no later than 52 weeks after the filing of the complaint.

(b) If application of subsection (a) would result in a deadline falling on a Saturday, Sunday, or legal holiday, the deadline shall be the next day in the future that is neither a Saturday, Sunday, nor legal holiday.

(c) The party instituting the action shall serve a copy of the initial case schedule on all other parties no later than ten days after the court issues it.

(d) Permissive and mandatory case schedule modifications.

1. The court may modify the case schedule on its own initiative or a motion demonstrating: good cause; the action's complexity; or the impracticality of complying with this rule because of the nature of the action. At a minimum, good cause requires the moving party to demonstrate due diligence in meeting the requirements of the case schedule. As part of any modification, the court may revise expert witness disclosure deadlines, including to require the plaintiff to serve its expert witness disclosures before the defendant if the issues in the case warrant staggered disclosures.

2. No case schedule shall require a party to violate the terms of a protection, no-contact, or other order preventing direct interaction between persons. The court shall modify the case schedule on its own initiative or a motion to enable the parties to respect the terms of such an order.

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

New CRLJ 3.1 – INITIAL CASE SCHEDULE

(e) The court, on a motion or its own initiative, may exempt any action or type of action for which compliance with this rule is impractical.

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

CRLJ 26 – DISCOVERY

Discovery in courts of limited jurisdiction shall be permitted as follows:

(a) Specification of Damages. A party may demand a specification of damages under RCW 4.28.360.

(b) Interrogatories and Requests for Production.

(1) The following interrogatories may be submitted by any party:

(A) State the amount of general damages being claimed.

(B) State each item of special damages being claimed and the amount thereof.

(C) List the name, address, and telephone number of each person having any knowledge of facts regarding liability.

(D) List the name, address, and telephone number of each person having any knowledge of facts regarding the damages claimed.

(E) List the name, address and telephone number of each expert you intend to call as a witness at trial. For each expert, state the subject matter on which the expert is expected to testify~~. State~~, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

(2) In addition to section (b)(1), any party may serve upon any other party not more than two sets of written interrogatories containing not more than 20 questions per set without prior permission of the court. Separate sections, paragraphs or categories contained within one interrogatory shall be considered separate questions for the purpose of this rule. The interrogatories shall conform to the provisions of CR 33.

(3) The following requests for production may be submitted by any party:

(A) Produce a copy of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of any judgment which may be entered in this action, or to indemnify or reimburse the payments made to satisfy the judgment.

(B) Produce a copy of any agreement, contract or other document upon which this claim is being made.

(C) Produce a copy of any bill or estimate for items for which special damage is being claimed.

(4) In addition to section (b)(3), any party may submit to any other party a request for production of up to five separate sets of groups of documents or things without prior permission of the court. The requests for production shall conform to the provisions of CR 34.

(c) Depositions.

(1) A party may take the deposition of any other party, unless the court orders otherwise.

(2) Each party may take the deposition of two additional persons without prior permission of the court. The deposition shall conform to the provisions of CR 30.

(d) Requests for Admission.

(1) A party may serve upon any other party up to 15 written requests for admission without prior permission of the court. Separate sections, paragraphs or categories contained within one request for admission shall be considered separate requests for purposes of this rule.

(2) The requests for admission shall conform to the provisions of CR 36.

(e) Unless earlier required by these rules, and in no event later than the deadline for primary or rebuttal expert witness disclosures provided by a case schedule or court order, each party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(fe) Other Discovery at Discretion of Court. No additional discovery shall be allowed, except as the court may order. The court shall have discretion to decide whether to permit any additional discovery. In exercising such discretion the court shall consider: (1) whether all parties are represented by counsel~~,~~; (2) whether undue expense or delay in bringing the case to trial will result; and (3) whether the interests of justice will be promoted.

(g~~f~~) How Discovery to Be Conducted. Any discovery authorized pursuant to this rule shall be conducted in accordance with Superior Court Civil Rules 26 through 37, as governed by CRLJ 26, and any case schedule or court order.

(h~~g~~) Time for Discovery. Unless otherwise provided by a case schedule or court order, ~~Twenty-one days after the service of~~ the party served with the summons and complaint, or with a counterclaim~~,~~ or cross complaint, ~~the served party~~ may demand the discovery set forth in sections (a)-(d) of this rule, or request additional discovery pursuant to section (e) of this rule, 21 days after service.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES
FOR COURTS OF LIMITED JURISDICTION (CRLJ)

CRLJ 40 – ASSIGNMENT OF CASES

(a) Notice of Trial~~—~~ and Note of Issue in the Absence of Case Schedule or Court Order.¶ Except as otherwise provided in a case schedule or court order, an action shall be brought on for trial as provided in this subsection (a).

(1) Of Fact. At any time after the issues of fact are completed in any case by the service of complaint and answer or reply when necessary, as herein provided, either party may cause the issues of fact to be brought on for trial, by serving upon the opposite party a notice of trial at least 3 days before any day provided by rules of court for setting causes for trial, which notice shall give the title of the cause as in the pleadings, and notify the opposite party that the issues in such action will be brought on for trial at the time set by the court; and the party giving such notice of trial shall, at least 5 days before the day of setting such causes for trial, file with the clerk of the court a note of issue containing the title of the action, the names of the attorneys and the date when the last pleading was served; and the clerk shall thereupon enter the cause upon the trial docket according to the date of the issue.

(2) Of Law. In case an issue of law raised upon the pleadings is desired to be brought on for argument, either party shall, at least 5 days before the day set apart by the court under its rules for hearing issues of law, serve upon the opposite party a like notice of trial and furnish the clerk of the court with a note of issue as above provided, which note of issue shall specify that the issue to be tried is an issue of law; and the clerk of the court shall thereupon enter such action upon the motion docket of the court.

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(3) Adjournments. When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to law day until final disposition or stricken off by the court.

(4) Filing Note by Opposite Party. The party upon whom notice of trial is served may file the note of issue and cause the action to be placed upon the calendar without further notice on his part.

(5) Issue May Be Brought to Trial by Either Party. Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

(b) Methods. Except as otherwise provided by rule 3.1, ~~E~~each court of limited jurisdiction may provide by local rule for placing of actions upon the trial calendar: (1) without request of the parties; (2) upon request of a party and notice to the other parties; or (3) in such other manner as the court deems expedient.

(c) Preferences. In setting cases for trial, unless otherwise provided by statute or rule 3.1, preference shall be given to criminal over civil cases, and cases where the defendant or a witness is in confinement shall have preference over other cases.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES
FOR COURTS OF LIMITED JURISDICTION (CRLJ)
CRLJ 40 – ASSIGNMENT OF CASES

(d) Trials. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

(e) Continuances. A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

(f) Change of Judge. In any case pending in any court of limited jurisdiction, unless otherwise provided by law, the judge thereof shall be deemed disqualified to hear and try the case when he is in anywise interested or prejudiced. The judge, of his own initiative, may enter an order disqualifying himself; and he shall also disqualify himself under the provisions of this rule if, before the jury is sworn or the trial is commenced, a party files an affidavit that such party cannot have a fair and impartial trial by reason of the interest or prejudice of the judge or for other ground provided by law. Only one such affidavit shall be filed by the same party in the case and such affidavit shall be made as to only one of the judges of said court.

All right to an affidavit of prejudice will be considered waived where filed more than 10 days after the case is set for trial, unless the affidavit alleges a particular incident, conversation or

utterance by the judge, which was not known to the party or his attorney within the 10-day period. In multiple judge courts, or where a pro tempore or visiting judge is designated as the trial judge, the 10-day period shall commence on the date that the defendant or his attorney has actual notice of assignment or reassignment to a designated trial judge.

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

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; Greg Zempel; Christopher Horner
Subject: RE: Comment on New Civil Rule 3.1
Date: Monday, April 16, 2018 3:20:34 PM

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

From: Christopher Horner [mailto:christopher.horner@co.kittitas.wa.us]
Sent: Monday, April 16, 2018 1:41 PM
To: 'CLTF@wsba.org' <CLTF@wsba.org>
Cc: 'sherryl@wsba.org' <sherryl@wsba.org>; pamloginsky@waprosecutors.org; Greg Zempel <greg.zempel@co.kittitas.wa.us>; Alan L. Miles <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

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

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

From: bjohnsnlaw@aol.com
To: Civil Litigation Task Force
Subject: amending CR26 re: initial case schedules
Date: Saturday, May 05, 2018 6:40:08 PM

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

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

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(a) - (e) [Unchanged]

(f) Discovery Conference.

(1) Initial Discovery Conference

(A) *Timing of Initial Discovery Conference*. No later than a date provided by a case schedule or court order, the plaintiff shall schedule and all parties that have appeared in the case shall conduct an initial in-person or telephonic discovery conference. Each party or each party's attorney shall reasonably cooperate in scheduling and conducting the initial discovery conference.

(B) *Subjects to Be Discussed at Initial Discovery Conference*. At the initial discovery conference, the parties shall consider:

i. Joinder of additional parties and amendments to pleadings;

ii. Amendments to the case schedule, if any;

iii. Possibilities for promptly resolving the case;

iv. Scheduling early mediation;

v. Admissions and stipulations about facts;

vi. Agreements as to what discovery may be conducted and in what order, and any limitations to be placed on discovery;

vii. Preservation and production of discoverable information, including documents and electronically stored information;

viii. Agreements for asserting privilege regarding materials to be produced or protective orders regarding the same; and

ix. Other ways to facilitate the just, speedy, and inexpensive disposition of the action.

(C) *Joint Status Report*. Not later than 14 days after the initial discovery conference, the plaintiff shall file and serve a joint status report stating the parties'

positions and proposals on the subjects set forth in CR 26(f)(2). The joint status report shall be signed by all parties or their counsel and shall certify that the parties reasonably cooperated to reach agreement on the matters set forth in the joint status report.

(2) Discovery Conference With the Court

(A) *Discovery Conference With the Court*. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

i. A statement of the issues as they then appear;

ii. A proposed plan and schedule of discovery;

iii. Any limitations proposed to be placed on discovery;

iv. Any other proposed orders with respect to discovery; and

v. A statement showing that the attorney making the motion has cooperated reasonably to reach agreement with opposing parties or their attorneys on the matters set forth in the motion.

~~(B) *Duty to Reasonably Cooperate*. Each party and each party's attorney shall reasonably cooperate in the framing of a discovery plan if a plan is proposed by the attorney for any party.~~

(B) *Notice of Discovery Conference.* Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

(C) *Order on Discovery Conference*. Following any discovery conference with the court, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are

necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(D) *Pretrial Conference.* Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g)-(j) [Unchanged]

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(a) - (e) [Unchanged]

(f) Discovery Conference.

(1) Initial Discovery Conference

(A) *Timing of Initial Discovery Conference*. No later than a date provided by a case schedule or court order, the plaintiff shall schedule and all parties that have appeared in the case shall conduct an initial in-person or telephonic discovery conference. Each party or each party's attorney shall reasonably cooperate in scheduling and conducting the initial discovery conference.

(B) *Subjects to Be Discussed at Initial Discovery Conference*. At the initial discovery conference, the parties shall consider:

i. Joinder of additional parties and amendments to pleadings;

ii. Amendments to the case schedule, if any;

iii. Possibilities for promptly resolving the case;

iv. Scheduling early mediation;

v. Admissions and stipulations about facts;

vi. Agreements as to what discovery may be conducted and in what order, and any limitations to be placed on discovery;

vii. Preservation and production of discoverable information, including documents and electronically stored information;

viii. Agreements for asserting privilege regarding materials to be produced or protective orders regarding the same; and

ix. Other ways to facilitate the just, speedy, and inexpensive disposition of the action.

(C) *Joint Status Report*. Not later than 14 days after the initial discovery conference, the plaintiff shall file and serve a joint status report stating the parties'

positions and proposals on the subjects set forth in CR 26(f)(2). The joint status report shall be signed by all parties or their counsel and shall certify that the parties reasonably cooperated to reach agreement on the matters set forth in the joint status report.

(2) Discovery Conference With the Court

(A) *Discovery Conference With the Court*. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

i. A statement of the issues as they then appear;

ii. A proposed plan and schedule of discovery;

iii. Any limitations proposed to be placed on discovery;

iv. Any other proposed orders with respect to discovery; and

v. A statement showing that the attorney making the motion has cooperated reasonably to reach agreement with opposing parties or their attorneys on the matters set forth in the motion.

(B) *Notice of Discovery Conference.* Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

(C) *Order on Discovery Conference*. Following any discovery conference with the court, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(D) *Pretrial Conference.* Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g)-(j) [Unchanged]

SUGGESTED JOINT STATUS REPORT
FOR CR 26(f) INITIAL DISCOVERY CONFERENCES

IN THE _____ SUPERIOR COURT, IN AND FOR THE COUNTY OF _____
STATE OF WASHINGTON

Plaintiff(s),	)	No.
v.	)	JOINT STATUS REPORT (CR 26(f))
Defendant(s).	)	

The plaintiff must file and serve this Joint Status Report no later than 14 days after the initial discovery conference between the parties.

The parties jointly represent that on the _____ day of _____, 20__, pursuant to CR 26(f), they conducted an initial discovery conference and conferred regarding the subjects set forth in CR 26(f)(2). The parties submit this joint status report stating their positions and proposals on these subjects, as required by CR 26(f)(1)(C).

1. Joinder of Additional Parties.

[ ] At this time, the parties do not believe that any additional parties should be joined.

[ ] At this time, one or more parties plan to seek leave of court to join an additional party or parties. If this box is checked, describe any such proposed joinder of additional parties.

_____
_____
_____

2. Amendments to Pleadings.

[ ] At this time, the parties do not plan on amending the pleadings.

[ ] At this time, either or both parties plan to seek leave of court to amend their pleading. If this box is checked, describe any potential amendments.

SUGGESTED JOINT STATUS REPORT
FOR CR 26(f) INITIAL DISCOVERY CONFERENCES

_____
_____
_____

3. Amendments to the Case Schedule, If Any.

[ ] At this time, the parties do not plan to seek leave of court to amend the Initial Case Schedule.

[ ] At this time, one or more of the parties plan to seek leave of court to amend the Initial Case Schedule. If this box is checked, describe any such amendments.

_____
_____
_____

4. Possibilities for Promptly Resolving the Case.

The parties [ ] do [ ] do not agree that there are possibilities for promptly resolving the case. If the parties do agree, describe any such possibilities and the timing contemplated by the parties as to determining whether prompt resolution is possible.

_____
_____
_____

5. Scheduling of Early Mediation.

The parties [ ] do [ ] do not agree that early mediation is appropriate in this case. If the parties do agree, describe when the parties believe the mediation should be scheduled and any attempts the parties have made to schedule mediation.

_____
_____
_____

6. Admissions and Stipulations About Facts.

The parties [ ] do [ ] do not agree that there are facts which are either admitted or which can be addressed in a stipulation. If the parties do agree, list any such facts.

_____
_____
_____

7. Agreements as to What Discovery May Be Conducted, and In What Order, and Any Limitations on Discovery.

The parties [ ] have [ ] have not agreed on a discovery plan as to the scope of discovery, the order in which discovery will be conducted, and any limitations on discovery. If the parties do agree, describe the agreed discovery plan. If the parties do not agree, describe the points on which the parties agree and the points on which the parties disagree and when the parties intend to present this issue to the Court for resolution.

SUGGESTED JOINT STATUS REPORT
FOR CR 26(f) INITIAL DISCOVERY CONFERENCES

_____
_____
_____

8. Preservation and Production of Discoverable Information, Including Documents and Electronically Stored Information. Describe the parties' agreement, if any, as to preservation and production of discoverable information. If the parties do not agree, describe the scope of the disagreement to be resolved by the Court and when the parties intend to present this issue to the Court for resolution.

_____
_____
_____

9. Agreements for Asserting Privilege Regarding Materials to Be Produced.

[ ] The parties have agreed on a procedure for asserting privilege regarding materials to be produced in this case. If this box is checked, describe the agreed procedure.

[ ] The parties have not agreed on a procedure for asserting privilege regarding materials to be produced in this case. If this box is checked, describe the parties' disagreement and when the parties intend to present this issue to the Court for resolution.

_____
_____
_____

10. Agreements for Protective Orders Regarding Materials to Be Produced.

[ ] The parties agree that a protective order should be entered regarding certain information and documents to be produced. If this box is checked, describe when the parties intend to present a proposed protective order to the Court.

[ ] The parties do not agree that a protective order should be entered in this case. If this box is checked, describe the parties' disagreement and when the parties intend to present this issue to the Court for resolution.

_____
_____
_____

11. <u>Other.</u> Describe any proposals by one or more parties that would facilitate the just, speedy, and inexpensive disposition of this action. For each such proposal, indicate if the parties agree.

_____
_____
_____

The undersigned certify that the parties reasonably cooperated to reach agreement on the matters set forth in this Joint Status Report.

Date: _____

SUGGESTED JOINT STATUS REPORT
FOR CR 26(f) INITIAL DISCOVERY CONFERENCES

For the Plaintiff:

Signature: _____
Printed Name: _____
Title (and WSBA number if applicable): _____

For the Defendant:

Signature: _____
Printed Name: _____
Title (and WSBA number if applicable): _____

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULE 37

CR 37(e) FAILURE TO REASONABLY COOPERATE REGARDING A DISCOVERY PLAN

CR 37 Failure to Make Discovery: Sanctions

[CR 37(a)-(d) unchanged]

CR 37(e) Failure To ~~Participate in~~ Reasonably Cooperate Regarding a Discovery Plan. If a party or a party's attorney fails to ~~participate in good faith~~ reasonably cooperate in scheduling or conducting a discovery conference, or drafting a joint status report, or ~~the~~ framing a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

Washington State Bar Association
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Seattle, WA 98101-2539

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULE 37
CR 37(e) FAILURE TO PARTICIPATE IN THE FRAMING OF A DISCOVERY PLAN

CR 37 Failure to Make Discovery: Sanctions

[CR 37(a)-(d) unchanged]

CR 37(e) Failure To Reasonably Cooperate Regarding a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

SUGGESTED AMENDMENT TO
COURTS OF LIMITED JURISDICTION CIVIL RULE 26
CRLJ 26(h) Discovery Conference

Rule 26: Discovery

[CRLJ 26(a)-(g) no change]

CRLJ 26(h) Discovery Conference.

(1) *Timing of Initial Discovery Conference*. Upon the filing of each case governed by these rules, and unless exempted by these rules, the court shall issue an Initial Case Schedule requiring the parties to conduct an initial discovery conference within the earlier of 14 days of service of the last pleading responsive to the complaint or 45 days of service of the last notice of appearance. Each party or each party's attorney shall reasonably cooperate in scheduling and conducting the initial discovery conference.

(2) *Subjects To Be Discussed at Initial Discovery Conference*. At the initial discovery conference, the parties shall consider the following subjects:

(A) A statement of the issues as they then appear;

(B) A proposed discovery plan, including a schedule for discovery in accordance with these rules;

(C) Any proposed order with respect to limitations to be placed on discovery, in addition to those limits already contained within these rules;

(D) Any proposed order with respect to additional discovery in conformity with these rules;

(E) Any proposed order to amend the Initial Case Schedule

(F) Other ways to facilitate the just, speedy, and inexpensive disposition of the action

(3) *Joint Status Report*. Not later than 14 days after the initial discovery conference, the plaintiff shall file and serve a joint status report, stating the parties' positions and proposals on the subjects set forth in CRLJ 26(h)(2). The joint status report shall be signed by all parties or their counsel and shall certify that the parties reasonably cooperated to reach agreement on the matters set forth in the joint status report

(4) *Other Discovery Conference*. Any party proposing a discovery plan under this rule shall serve the proposed discovery plan on all parties within 90 days of service of the summons and complaint, or counterclaim, or cross complaint, whichever is longer. Any such proposed discovery plan shall be deemed approved by the Court if

no objection or counter proposal is served and filed within 14 days after the proposed discovery plan is filed and served. If an objection or other proposed discovery plan is filed and served within 14 days of the filing and service of a proposed discovery plan, the court shall schedule a discovery conference.

(5) *Duty to Cooperate*. Each party and each party's attorney shall reasonably cooperate at a discovery conference and in framing a discovery plan if a plan is proposed by an attorney for any party. If a party or a party's attorney fails to do so, the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(6) *Additional Discovery.* Nothing in this rule shall restrict a party from seeking or the court from ordering additional discovery pursuant to CRLJ 26(e).

(7) *No Ex Parte Fee*. No ex parte fee will be charged with respect to any joint status report or any discovery plan.

SUGGESTED AMENDMENT TO
COURTS OF LIMITED JURISDICTION CIVIL RULE 26
CRLJ 26(h) Discovery Conference

Rule 26: Discovery

[CRLJ 26(a)-(g) not changed]

CRLJ 26(h) Discovery Conference.

(1) *Timing of Initial Discovery Conference*. Upon the filing of each case governed by these rules, and unless exempted by these rules, the court shall issue an Initial Case Schedule requiring the parties to conduct an initial discovery conference within the earlier of 14 days of service of the last pleading responsive to the complaint or 45 days of service of the last notice of appearance. Each party or each party's attorney shall reasonably cooperate in scheduling and conducting the initial discovery conference.

(2) *Subjects To Be Discussed at Initial Discovery Conference.* At the initial discovery conference, the parties shall consider the following subjects:

(A) A statement of the issues as they then appear;

(B) A proposed discovery plan, including a schedule for discovery in accordance with these rules;

(C) Any proposed order with respect to limitations to be placed on discovery, in addition to those limits already contained within these rules;

(D) Any proposed order with respect to additional discovery in conformity with these rules;

(E) Any proposed order to amend the Initial Case Schedule

(F) Other ways to facilitate the just, speedy, and inexpensive disposition of the action

(3) *Joint Status Report*. Not later than 14 days after the initial discovery conference, the plaintiff shall file and serve a joint status report, stating the parties' positions and proposals on the subjects set forth in CRLJ 26(h)(2). The joint status report shall be signed by all parties or their counsel and shall certify that the parties reasonably cooperated to reach agreement on the matters set forth in the joint status report

(4) *Other Discovery Conference.* Any party proposing a discovery plan under this rule shall serve the proposed discovery plan on all parties within 90 days of service of the summons and complaint, or counterclaim, or cross complaint, whichever is longer. Any such proposed discovery plan shall be deemed approved by the Court if

no objection or counter proposal is served and filed within 14 days after the proposed discovery plan is filed and served. If an objection or other proposed discovery plan is filed and served within 14 days of the filing and service of a proposed discovery plan, the court shall schedule a discovery conference.

(5) *Duty to Cooperate*. Each party and each party's attorney shall reasonably cooperate at a discovery conference and in framing a discovery plan if a plan is proposed by an attorney for any party. If a party or a party's attorney fails to do so, the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(6) *Additional Discovery.* Nothing in this rule shall restrict a party from seeking or the court from ordering additional discovery pursuant to CRLJ 26(e).

(7) *No Ex Parte Fee*. No ex parte fee will be charged with respect to any joint status report or any discovery plan.

SUGGESTED JOINT STATUS REPORT
FOR CRLJ 26(h) INITIAL DISCOVERY CONRERENCES

IN THE _____ DISTRICT COURT, IN AND FOR THE COUNTY OF _____
STATE OF WASHINGTON

Plaintiff(s),	)	No.
v.	)	JOINT STATUS REPORT (CRLJ 26(h))
Defendant(s).	)	

The plaintiff must file and serve this Joint Status Report no later than 14 days after the initial discovery conference between the parties.

The parties jointly represent that on the _____ day of _____, 20__, pursuant to CRLJ 26(h), they conducted an initial discovery conference and conferred regarding the following subjects. The parties submit this joint status report, as required by CRLJ 26(h)(3).

1. Statement of the Issues

_____
_____
_____

2. Discovery Plan. Check each applicable box below. For each box checked, provide the information requested.

[ ] The parties intend to serve interrogatories and requests for production, as permitted by CRLJ 26(b). If this box is checked, state when each party intends to serve interrogatories and requests for production:
_____.

[ ] The parties intend to take depositions, as permitted by CRLJ 26(c). If this box is checked, state when the parties intend to take depositions, and which persons, besides the opposing party, each party intends to depose.
_____
_____
_____

[ ] The parties intend to serve requests for admission, as permitted by CRLJ 26(d). If this box is checked, state when the parties intend to serve requests for admission.
_____
_____
_____

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Seattle, WA 98101-2539

SUGGESTED JOINT STATUS REPORT
FOR CRLJ 26(h) INITIAL DISCOVERY CONRERENCES

3. Limitations on Discovery.

[ ] The parties agree that limitations should be placed on discovery, in addition to the limits set forth in the Rules for Courts of Limited Jurisdiction, including, but not limited to, the limits set forth in CRLJ 26. If this box is checked, describe all agreed limitations on discovery.

_____
_____
_____

[ ] Plaintiff proposes limitations on discovery to which defendant does not agree. If this box is checked, describe plaintiff's proposed limitations on discovery.

_____
_____
_____

[ ] Defendant proposes limitations on discovery to which plaintiff does not agree. If this box is checked, describe plaintiff's proposed limitations on discovery.

_____
_____
_____

4. Additional Discovery.

[ ] The parties agree to jointly seek leave of court to permit additional discovery, beyond the discovery permitted by CRLJ 26(a)-(d). If this box is checked, describe what additional discovery the parties agree is required.

_____
_____
_____

[ ] Plaintiff intends to seek leave of court to permit additional discovery, beyond the discovery permitted by CRLJ 26(a)-(d), which defendant opposes. If this box is checked, describe the additional discovery plaintiff believes is required.

_____
_____
_____

[ ] Defendant intends to seek leave of court to permit additional discovery, beyond the discovery permitted by CRLJ 26(a)-(d), which plaintiff opposes. If this box is checked, describe the additional discovery plaintiff believes is required.

_____
_____
_____

5. Amendments to Initial Case Schedule.

[ ] At this time, the parties do not plan to seek leave of court to amend the Initial Case Schedule.

SUGGESTED JOINT STATUS REPORT
FOR CRLJ 26(h) INITIAL DISCOVERY CONRERENCES

[ ] At this time, either or both parties plans to seek leave of court to amend the Initial Case Schedule. If this box is checked, describe any such amendments.

_____
_____
_____

6. Other. Describe any proposals by either or both parties that would facilitate the just, speedy, and inexpensive disposition of this action. For each such proposal, indicate if the parties agree.

_____
_____
_____

The undersigned certify that the parties reasonably cooperated to reach agreement on the matters set forth in this Joint Status Report.

Date:

For the Plaintiff:

Signature:
Printed Name:
Title (and WSBA number if applicable):

For the Defendant:

Signature:
Printed Name:
Title (and WSBA number if applicable):

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

Civil Litigation
Rules Drafting Task Force Subcommittee Report
May 29, 2018

CR 77; Judicial Assignment

We sent our email to stakeholders on February 23, 2018, seeking all responses by April 1. To date we have received the following:

- Five emails in favor of the rule;
- One email favoring local control;
- One email (from Judge Gibson) pointing out the rule doesn't mandate anything, therefore doesn't change anything, therefore isn't necessary;
- One voicemail asking whether this rule would change the practice of judges delegating responsibility to commissioners (Chelan County has all family law matters before commissioners); and
- One letter from Thurston County Superior Court, offering thoughts regarding whether (1) "reassignment" for various reasons is truly necessary (2) "all civil" cases are appropriate for preassignment (they exclude tax warrants, for instance) and (3) whether preassignment suits all courts (meaning larger or smaller courts may have different needs).

I have attached a spreadsheet addressing each comment. We discussed these comments in the full Task Force meeting on April 26, 2018. Our subcommittee discussed each suggestion.

A. We determined we would not change the first sentence to "The court shall assign…" changing it from passive to active. The subcommittee was split on this issue but ultimately decided to keep in active voice. The rationale behind keeping it passive voice was that we did not want to impact courts who use court administrators or clerks to assign cases. Our fear was that by altering the language to begin "the court should" assign the case, those courts may be restricted in ways not in line with our Task Force goals.
B. We determined there is a difference between the meanings of "impracticable" and "impractical" and decided to stick with "impracticable" (meaning "unworkable, unfeasible, unviable"), as opposed to "impractical" (meaning unrealistic, unsuitable, not sensible, inappropriate), because we believe it's closer to our intended meaning.
C. We decided to change the word "judge" to "judicial officer" as suggested, to include commissioners.

We have not received any requests to extend the deadline for responses. We hope to bring this rule to a vote at our May meeting.

CR 16; Pretrial Conference

Proposed CR 16 was sent to stakeholders on April 20, 2018 and the comment period closed May 28, 2018. Our proposal garnered four comments; one of which abstained from comment while the remaining three were critical of the changes. I have attached a spreadsheet addressing each comment.

The subcommittee met on May 29, 2018 and discussed the comments; we do not believe any of them (aside from one which/that witch-hunted a proper which/that, one which/that our Task Force had already found) will significantly impact the rule.

We have not received any requests to extend the deadline for responses. We hope to bring this rule to a vote at our May meeting.

Comments to proposed CR 16

Name	Organization (if any)	Comment	Response
Judge Frank Dacca	DMCJA Court Rules committee	"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.	
Rebecca Bernard of Grays Harbor County Prosecuting Attorney's Office		1. Will there be a pattern joint pre-trial report 2. What happens if parties decline to confer? 3. Can you provide the court with the other sides' anticipated witnesses? 4. Concern regarding exclusion of witnesses	1. Not from us 2. If a party fails to confer as required, the opposing party may seek court intervention. See also cooperation rule. 3. There's no prohibition for this. 4. This rule does not impact a judge's ability to exclude witnesses.
Tyler Hinckley		This amendment will increase cost of litigation by adding additional requirements on litigants and "should be left to the discretion of the various counties." "CR 16 also favors defense attorneys who can bill their clients for additional time… "	The ECCL Task Force disagreed with the statement that this would increase costs; thus, we drafted this rule accordingly. Similarly, we disagree the rule is biased.
G. Scott Marinella		"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."	We disagree this rule takes any discretion from the court; we similarly disagree the WSBA lacks authority to propose a rule change.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 16 – PRETRIAL PROCEDURE AND FORMULATING ISSUES

~~(a) **Hearing Matters Considered**. By order, or on the motion of any party, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:~~

~~(1) The simplification of the issues;~~

~~(2) The necessity or desirability of amendments to the pleadings;~~

~~(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;~~

~~(4) The limitation of the number of expert witnesses;~~

~~(5) Such other matters as may aid in the disposition of the action.~~

(a) Pretrial Report. All parties in the case shall confer in completing a joint pretrial report no later than the date provided in the case schedule or court order. The pretrial report shall contain:

(1) A brief non-argumentative summary of the case;

(2) The material issues in dispute;

(3) The agreed material facts;

(4) The names of all lay and expert witnesses, excluding rebuttal witnesses;

(5) An exhibit index (excluding rebuttal or impeachment exhibits);

(6) The estimated length of trial and suggestions for shortening the trial; and

(7) A statement whether additional alternative dispute resolution would be useful before trial.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 16 – PRETRIAL PROCEDURE AND FORMULATING ISSUES

(b) Pretrial Conference. Each attorney with principal responsibility for trying the case, or each unrepresented party, shall attend a pretrial conference, if scheduled. At the pretrial conference, the court may consider and take appropriate action on the following matters:

(1) Formulating and simplifying the issues and eliminating claims or defenses;

(2) Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof and addressing evidentiary issues;

(3) Adopting special procedures for managing complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(4) Establishing reasonable parameters on the time to present evidence;

(5) Establishing deadlines for trial briefs, motions in limine, deposition designations for unavailable witnesses, proposed jury instructions, or any other pretrial motions, briefs, or documents;

(6) Resolving any pretrial or trial scheduling issues; and

(7) Facilitating in other ways the just, speedy, and inexpensive disposition of the action.

~~(b)~~ **(c) Pretrial Order.** The court shall ~~make~~ enter an order that recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and ~~which~~ limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 16 – PRETRIAL PROCEDURE AND FORMULATING ISSUES

(a) Pretrial Report. All parties in the case shall confer in completing a joint pretrial report no later than the date provided in the case schedule or court order. The pretrial report shall contain:

(1) A brief non-argumentative summary of the case;

(2) The material issues in dispute;

(3) The agreed material facts;

(4) The names of all lay and expert witnesses, excluding rebuttal witnesses;

(5) An exhibit index (excluding rebuttal or impeachment exhibits);

(6) The estimated length of trial and suggestions for shortening the trial; and

(7) A statement whether additional alternative dispute resolution would be useful before trial.

(b) Pretrial Conference. Each attorney with principal responsibility for trying the case, or each unrepresented party, shall attend a pretrial conference, if scheduled. At the pretrial conference, the court may consider and take appropriate action on the following matters:

(1) Formulating and simplifying the issues and eliminating claims or defenses;

(2) Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof and addressing evidentiary issues;

(3) Adopting special procedures for managing complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(4) Establishing reasonable parameters on the time to present evidence;

(5) Establishing deadlines for trial briefs, motions in limine, deposition designations for unavailable witnesses, proposed jury instructions, or any other pretrial motions, briefs, or documents;

(6) Resolving any pretrial or trial scheduling issues; and

(7) Facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(c) Pretrial Order. The court shall enter an order that recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

From: Scott Marinella
To: Civil Litigation Task Force
Subject: CR 16
Date: Friday, April 20, 2018 4:57:46 PM

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

From: Tyler Hinckley
To: Civil Litigation Task Force
Subject: Proposed Amendment to CR 16
Date: Tuesday, May 01, 2018 5:37:18 PM

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
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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

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

Please Note: Your email is important to us. Our email system uses an aggressive SPAM Filter. If you have not received a reply to your email, please call our office and we will add you to our SPAM Filter. Thank you.

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

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

Comments to proposed CR 77

Name	Organization (if any)	Comment	Response
Rani Sampson	Overcast Law in Wenatchee	In Chelan County, there's a commissioner who hears all family law motions, would this impact that?	The "should," as opposed to a "shall," should allow for this practice to continue.
Kerry Lawrence		"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."	
Judge Robert McSeveney	Chelan Co. Superior Court	"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."	GR 29(f)(2) provides the Presiding Judge shall: "Assign judicial officers to hear cases pursuant to statute or rule. The court may establish general policies governing the assignment of judges;" We don't see any inherent conflict.
Judge Blaine Gibson	Yakima Co. Superior Court	"A rule amendment that changes nothing is not necessary."	He's not wrong.
James Elliot		"fully support this idea"	
James Berg		"in support of the proposed change"	
George Steele		"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."	The "should," as opposed to a "shall," should allow for just this.
Duane Crandall	Member of CWBA	Is "agreeble" with the proposed change	
Craig Liebler		"It's about time."	

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 77 – Superior Courts and Judicial Officers

[(a)-(h) unchanged.]

(i) ~~**Sessions Where More than One Judge Sits – Effect of Decrees, Orders, etc.**~~ ~~[Reserved. See RCW 2.08.160.]~~ **Judicial Assignment.** A judge should be assigned to each case upon filing. The assigned judge shall conduct all proceedings in the case unless the case is reassigned to a different judicial officer on a temporary or permanent basis. In counties where local conditions make routine judicial assignment impracticable, the court may assign any case to a specific judicial officer upon written motion of any party or on the court's own motion.

[(j)-(n) unchanged.]

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 77 – Superior Courts and Judicial Officers

[(a)-(h) unchanged.]

(i) Judicial Assignment. A judge should be assigned to each case upon filing. The assigned judge shall conduct all proceedings in the case unless the case is reassigned to a different judicial officer on a temporary or permanent basis. In counties where local conditions make routine judicial assignment impracticable, the court may assign any case to a specific judicial officer upon written motion of any party or on the court's own motion.

[(j)-(n) unchanged.]

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

From: Craig Liebler
To: Civil Litigation Task Force
Cc: Ron St. Hilaire
Subject: CR77
Date: Sunday, February 25, 2018 1:45:45 PM

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+% or 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

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 by April 1, 2018.

Best,
Meredith

---------- Forwarded message ----------
From: **Sherry Lindner** <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" <steve@sackmannlaw.com>, "khawkins@clarkandfeeney.com" <khawkins@clarkandfeeney.com>, "diana.ruff@co.benton.wa.us" <diana.ruff@co.benton.wa.us>, "travis@brandtlaw.net" <travis@brandtlaw.net>, "stephaniehyatt@icloud.com" <stephaniehyatt@icloud.com>, "mark@sampath-law.com" <mark@sampath-law.com>, "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>, "tpcba1@aol.com" <tpcba1@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 by April 1, 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

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact julies@wsba.org.

From: George Steele
To: Civil Litigation Task Force
Subject: CR 77
Date: Thursday, March 01, 2018 10:14:56 AM

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

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

405 E. Lincoln Avenue, Yakima, WA 98901
halversonNW.com

From: Blaine Gibson
To: Civil Litigation Task Force
Subject: Proposed Amendment to CR 77(i)
Date: Tuesday, March 20, 2018 11:44:30 AM

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

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>
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>
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>
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>
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

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

Kerry C. Lawrence
Pillar Law PLLC
1420 Fifth Avenue, Suite 3369
Seattle, WA 98101
Phone: 425-941-6887
kerry@pillar-law.com

Superior Court of the State of Washington
For Thurston County

2000 Lakeridge Drive SW • Building Two • Olympia WA 98502
Telephone: (360) 786-5560 **Website:** www.co.thurston.wa.us/superior

March 22, 2018

To: Ms. Hillary Graber
Civil Litigation Rules Drafting Task Force
sent via email to 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 hurtle 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

(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 Comment Table

Stakeholder	Comment Summary	Subcommittee Response
Deane Minor	Agree- No changes to suggest.	
King County Prosecutors ¶1	Rule should include ESI or at least some reference to electronic copies so that attorneys don't think that hard copies are required.	An ESI discovery rule was rejected by the BOG, so we don't believe we have authority to add that. We also do not believe the current rule suggests hard copies are required.
King County Prosecutors ¶2	Rule should allow description of categories of documents relevant to a claim or defense, rather than requiring disclosure so early. Concerned there will not be time to gather and review all disclosable documents by the deadline.	The subcommittee and the larger committee discussed this concern at length and decided that allowing description without disclosure could lead to delay and disputes that would not fulfill the purpose of reducing the cost of civil litigation. In order to meet our case schedule target of trial within one year, actual initial disclosures (rather than descriptions) will be important.
King County Prosecutors ¶3	Confused about meaning of: "but if a document or other relevant evidence cannot easily be copied, the disclosing party shall make the item reasonably available for inspection by the other parties." Would this allow access to ESI in databases? Would this allow inspection of a physical location?	We are open to suggestions for clarification, but we don't believe clarification is necessary.
King County Prosecutors ¶4	Objection to the clause requiring a description, but not a calculation, of noneconomic, general damages. RCW 4.28.360 requires these damages to be specified if requested. Argues this rule conflicts with statute.	The subcommittee and the larger committee discussed this concern at length. We disagree that the rule would conflict with the statute. This rule governs initial disclosures. Additional discovery will still occur under the other civil rules and there can be requests to specify noneconomic, general damages.

King County Prosecutors ¶¶ 5-6	Rule should provide detail around the duty of "cooperation" and perhaps include proportionality. Cooperation will have to be a two-way street.	Proportionality was rejected by the BOG. If the concept of cooperation needs to be expanded or clarified, that should occur under Civil Rule 1 so that the clarification applies globally to all of the civil rules. We will be depending on judges to enforce the cooperation requirement even-handedly.
King County Prosecutors	Request for the committee to create a model stipulation and release of medical information.	This issue seems specific to a few types of civil cases.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(a) [Unchanged]

(b) Initial Disclosures.

(1) *Content of Initial Disclosures*. Where initial disclosures are required by case schedule or court order, a party shall provide to the other parties, without awaiting a discovery request:

(A) the name, address, and telephone number of each individual that possesses any relevant information that supports the disclosing party's claims or defenses;

(B) a copy of each document and other relevant evidence supporting the disclosing party's claims or defenses, but if a document or other relevant evidence cannot easily be copied, the disclosing party shall make the item reasonably available for inspection by the other parties;

(C) a copy of each document the disclosing party refers to in its pleadings;

(D) a description and computation of each category of damages claimed by the disclosing party, but only a description, not a computation, is required for general and noneconomic damages;

(E) the declarations page of any insurance agreement under which an insurance business may be liable to satisfy all or part of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(F) in any action where insurance coverage is or may be contested, a copy of the agreement and all letters from the insurer regarding coverage.

(2) Parties Later Joined or Served. A party joined or served after the other parties have made their initial disclosures shall comply with this rule within sixty days of being joined or served, unless the court orders otherwise.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(3) *Basis for Initial Disclosures; Unacceptable Excuses.* A party shall make its initial disclosures based on information known or reasonably available to that party. A party is not excused from making its disclosures because it has failed to fully investigate the case, it challenges the sufficiency of another party's disclosures, or another party has failed to make required disclosures.

(4) *Sanctions for Failure to Disclose.* The parties shall reasonably cooperate. A party that fails to cooperate or fails to timely make the disclosures required by this rule may be sanctioned as provided in these rules. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

(~~b~~ c) [Unchanged]

(~~c~~ d) [Unchanged]

(~~d~~ e) [Unchanged]

(~~e~~ f) Supplementation ~~of Responses~~. A party who has provided initial disclosures or responded to a request for discovery where the disclosure or response ~~that~~ was complete when made is under no duty to supplement the disclosure or response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the disclosure or response with respect to any question directly addressed to:

(A) the identity and location of persons having knowledge of discoverable matters; and

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(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.

(2) A party is under a duty seasonably to amend a prior disclosure or response if the party obtains information upon the basis of which:

(A) the party knows that the disclosure or response was incorrect when made; or

(B) the party knows that the disclosure or response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(~~f~~ g) [Unchanged]

(~~g~~ h) Signing of Discovery Requests, Responses, and Objections.

Every initial disclosure, request for discovery, or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the initial disclosure, request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the

initial disclosure, request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the initial disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

(a) [Unchanged]

(b) Initial Disclosures.

(1) *Content of Initial Disclosures*. Where initial disclosures are required by case schedule or court order, a party shall provide to the other parties, without awaiting a discovery request:

(A) the name, address, and telephone number of each individual that possesses any relevant information that supports the disclosing party's claims or defenses;

(B) a copy of each document and other relevant evidence supporting the disclosing party's claims or defenses, but if a document or other relevant evidence cannot easily be copied, the disclosing party shall make the item reasonably available for inspection by the other parties;

(C) a copy of each document the disclosing party refers to in its pleadings;

(D) a description and computation of each category of damages claimed by the disclosing party, but only a description, not a computation, is required for general and noneconomic damages;

(E) the declarations page of any insurance agreement under which an insurance business may be liable to satisfy all or part of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(F) in any action where insurance coverage is or may be contested, a copy of the agreement and all letters from the insurer regarding coverage.

(2) *Parties Later Joined or Served.* A party joined or served after the other parties have made their initial disclosures shall comply with this rule within sixty days of being joined or served, unless the court orders otherwise.

(3) *Basis for Initial Disclosures; Unacceptable Excuses.* A party shall make its initial disclosures based on information known or reasonably available to that party. A party is not excused from making its disclosures because it has failed to fully investigate the case, it challenges the sufficiency of another party's disclosures, or another party has failed to make required disclosures.

(4) *Sanctions for Failure to Disclose.* The parties shall reasonably cooperate. A party that fails to cooperate or fails to timely make the disclosures required by this rule may be sanctioned as provided in these rules. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

(c) [Unchanged]

(d) [Unchanged]

(e) [Unchanged]

(f) Supplementation. A party who has provided initial disclosures or responded to a request for discovery where the disclosure or response was complete when made is under no duty to supplement the disclosure or response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the disclosure or response with respect to any question directly addressed to:

(A) the identity and location of persons having knowledge of discoverable matters; and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.

(2) A party is under a duty seasonably to amend a prior disclosure or response if the party obtains information upon the basis of which:

(A) the party knows that the disclosure or response was incorrect when made; or

(B) the party knows that the disclosure or response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(g) [Unchanged]

(h) Signing of Discovery Requests, Responses, and Objections.

Every initial disclosure, request for discovery, or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the initial disclosure, request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the

initial disclosure, request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the initial disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

SUGGESTED AMENDMENT

CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

CRLJ 26 - DISCOVERY

Discovery in courts of limited jurisdiction shall be permitted as follows:

(a) ~~**Specification of Damages**~~ **Initial Disclosures.** A party shall provide to the other parties, without waiting a discovery request: ~~may demand a specification of damages under RCW4.28.360.~~

(1) the name, address, and telephone number of each individual that possess any relevant information that supports the disclosing party's claims or defenses;

(2) a copy of each document and other relevant evidence supporting the disclosing party's claims or defenses, but if a document or other relevant evidence cannot easily be copied, the disclosing party shall make the item reasonably available for inspection by the other parties;

(3) a copy of each document the disclosing party refers to in its pleadings;

(4) a description and computation of each category of damages claimed by the disclosing party, but only a description, not a computation, is required for general and noneconomic damages;

(5) the declarations page of any insurance agreement under which an insurance business may be liable to satisfy all or part of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(6) in any action where insurance coverage is or may be contested, a copy of the agreement and all letters from the insurer regarding coverage.

(7) Sanctions for Failure to Disclose. The parties shall reasonably cooperate. A party that fails to reasonably cooperate or fails to timely make the disclosures required by this rule may

be sanctioned as provided in these rules. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

(b) Interrogatories and Request for Production.

(1) ~~The following interrogatories may be submitted by any party:~~

~~(A) State the amount of general damages being claimed.~~

~~(B) State each item of special damages being claimed and the amount thereof.~~

~~(C) List the name, address, and telephone number of each person having any knowledge of facts regarding liability.~~

~~(D) List the name, address, and telephone number of each person having any knowledge of facts regarding the damages claimed.~~

~~(E) List the name, address and telephone number of each expert you intend to call as a witness at trial. For each expert, state the subject matter on which the expert is expected to testify. State the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

~~(2) In addition to the section (b)(1),~~ ~~a~~A~~n~~y party may serve upon any other party not more than two sets of written interrogatories containing not more than 20 questions per set without prior permission of the court. Separate sections, paragraphs or categories contained within one interrogatory shall be considered separate questions for the purpose of this rule. The interrogatories shall conform to the provisions of CR 33.

(~~3~~2) ~~The following requests for production may be submitted by any party:~~

~~(A) Produce a copy of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of any judgment which may be entered in this action, or to indemnify or reimburse the payments made to satisfy the judgment.~~

~~(B) Produce a copy of any agreement, contract or other document upon which this claim is being made.~~

~~(C) Produce a copy of any bill or estimate for items for which special damage is being claimed.~~

~~(4) In addition to section (b)(3), a~~Any party may submit to any other party a request for production of up to five separate sets of groups of documents or things without prior permission of the court. The requests for production shall conform to the provisions of CR 34.

(c) Depositions.

(1) A party may take the deposition of any other party, unless the court orders otherwise.

(2) Each party may take the deposition of two additional persons without prior permission of the court. The deposition shall conform to the provisions of CR 30.

(d) Requests for Admission.

(1) A party may serve upon any other party up to 15 written requests for admission without prior permission of the court. Separate sections, paragraphs or categories contained within one request for admission shall be considered separate requests for purposes of this rule.

(2) The requests for admission shall conform to the provisions of CR 36.

SUGGESTED AMENDMENT

CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

CRLJ 26 - DISCOVERY

(e) Other Discovery at Discretion of Court. No additional discovery shall be allowed, except as the court may order. The court shall have discretion to decide whether to permit any additional discovery. In exercising such discretion the court shall consider (1) whether all parties are represented by counsel, (2) whether undue expense or delay in bringing the case to trial will result and (3) whether the interests of justice will be promoted.

(f) How Discovery to Be Conducted. Any discovery authorized pursuant to this rule shall be conducted in accordance with Superior Court Civil Rules 26 through 37, as governed by CRLJ 26.

(g) Time for Discovery. Twenty-one days after the service of the summons and complaint, or counterclaim, or cross complaint, the served party must produce the discovery set forth in section (a) of this rule and may demand the discovery set forth in sections (~~a~~b)-(d) of this rule, or request additional discovery pursuant to section (e) of this rule.

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SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)
CRLJ 26 - DISCOVERY

Discovery in courts of limited jurisdiction shall be permitted as follows:

(a) Initial Disclosures. A party shall provide to the other parties, without waiting a discovery request:

(1) the name, address, and telephone number of each individual that possess any relevant information that supports the disclosing party's claims or defenses;

(2) a copy of each document that other relevant evidence supporting the disclosing party's claims or defenses, but if a document or other relevant evidence cannot easily be copied, the disclosing party shall make the item reasonably available for inspection by the other parties;

(3) a copy of each document the disclosing party refers to in its pleadings;

(4) a description and computation of each category of damages claimed by the disclosing party, but only a description, not a computation, is required for general and noneconomic damages;

(5) the declarations page of any insurance agreement under which an insurance business may be liable to satisfy all or part of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(6) in any action where insurance coverage is or may be contested, a copy of the agreement and all letters from the insurer regarding coverage.

(7) Sanctions for Failure to Disclose. The parties shall reasonably cooperate. A party that fails to reasonably cooperate or fails to timely make the disclosures required by this rule may be sanctioned as provided in these rules. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)
CRLJ 26 - DISCOVERY

(b) Interrogatories and Request for Production.

(1) Any party may serve upon any other party not more than two sets of written interrogatories containing not more than 20 questions per set without prior permission of the court. Separate sections, paragraphs or categories contained within one interrogatory shall be considered separate questions for the purpose of this rule. The interrogatories shall conform to the provisions of CR 33.

(2) Any party may submit to any other party a request for production of up to five separate sets of groups of documents or things without prior permission of the court. The requests for production shall conform to the provisions of CR 34.

(c) Depositions.

(1) A party may take the deposition of any other party, unless the court orders otherwise.

(2) Each party may take the deposition of two additional persons without prior permission of the court. The deposition shall conform to the provisions of CR 30.

(d) Requests for Admission.

(1) A party may serve upon any other party up to 15 written requests for admission without prior permission of the court. Separate sections, paragraphs or categories contained within one request for admission shall be considered separate requests for purposes of this rule.

(2) The requests for admission shall conform to the provisions of CR 36.

(e) Other Discovery at Discretion of Court. No additional discovery shall be allowed, except as the court may order. The court shall have discretion to decide whether to

permit any additional discovery. In exercising such discretion the court shall consider (1) whether all parties are represented by counsel, (2) whether undue expense or delay in bringing the case to trial will result and (3) whether the interests of justice will be promoted.

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(g) Time for Discovery. Twenty-one days after the service of the summons and complaint, or counterclaim, or cross complaint, the served party must produce the discovery set forth in section (a) of this rule and may demand the discovery set forth in sections (b)-(d) of this rule, or request additional discovery pursuant to section (e) of this rule.

From: Deane Minor
To: Civil Litigation Task Force
Subject: suggested change to CR 26
Date: Monday, April 09, 2018 6:18:27 PM

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

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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

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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,

Endel Kolde
Senior Deputy Prosecuting Attorney
King Co. Prosecutor's Office
Civil Division – Litigation Section

Civil Litigation
Rules Drafting Task Force Subcommittee Report
COOPERATION SUBCOMMITTEE
May 31, 2018

Subcommittee:

The Cooperation Subcommittee comprises Judge Brad Maxa, Shannon Hinchcliffe, Nick Gellert and Jane Morrow. The Subcommittee's mission is to prepare and propose civil rule changes to effectuate the recommendations of the ECCL Task Force as accepted by the WSBA BOG regarding the principle of cooperation.

Overview of Current Practices:

Although there appears to be a general consensus that cooperation is an essential element to just, speedy and inexpensive civil litigation, there is no provision expressly requiring the cooperation of parties in the Civil Rules.

Research Conducted:

Following the submission of our cooperation rule proposals to stakeholders, the Task Force received comments from four stakeholder groups: The WSBA Litigation Section, the Washington State Association for Justice (WSAJ), the King County Bar Association Judiciary and Litigation Section, and the Kitsap County Bar Practice and Procedure Committee. After review of the comments, the cooperation subcommittee discussed and decided that the proposals as submitted to the stakeholders would not be altered (albeit with some minor grammatical edits) before submission to the Civil Litigation Rules Drafting Task Force for vote. The following is a brief synopsis of our analysis of the comments received and our decision to submit our original proposals for a vote.

ENFORCEMENT OF CURRENT RULES WILL SOLVE THE PERCEIVED PROBLEM OF NONCOOPERATION

There was a general current running through the comments that more rules regarding cooperation are unnecessary and that stronger and consistent judicial enforcement of the current civil rules will solve the perceived problem. Our Task Force members agreed that judicial enforcement of current discovery rules could assist in controlling litigation costs. However, the cooperation subcommittee was tasked with infusing the element of cooperation in the civil rules so a decision to eliminate a cooperation element in the rues is outside of the scope of the Civil Litigation Rules Drafting Task Force's work and is better left with the BOG to review.

The subcommittee declined to change the language to include mandatory or consistent sanctions for failure to reasonably cooperate. The sanction imposed upon a party under the proposed rule will likely be related to the facts and circumstances which are presented in the motion. Members believe that the judge's discretion to review the facts and

prescribe the penalty is preferable but this option can be considered by the Task Force when a vote is taken.

Our subcommittee considered including language in our proposals that would mandate sanctions when there is a finding of failure to cooperate. This could be accomplished by inserting the word "shall" in place of "may" when the proposals reference sanctions by the court. The subcommittee declined to change the language to include mandatory or consistent sanctions for failure to reasonably cooperate. The subcommittee believed that a sanction will likely be measured against the facts and circumstances in each case which are presented in the motion. Our subcommittee members believe that the judge's discretion to review the facts and impose the penalty is preferable but this option can be considered by the Task Force when a vote is taken.

GENERAL PRINCIPLE TO "REASONABLY COOPERATE" IS SUBJECTIVE AND THE INABILITY TO DEFINE IT WILL LEAD TO LITIGATION AND MOTIONS PRACTICE.

From the start of the cooperation subcommittee's work, we have been aware of the inherent inability to define cooperation in terms that would encompass all of the civil rules. Cooperation is a term that is not capable of being easily defined. It is a bit ironic that some of the stakeholders felt that a cooperation element in the civil rules was unnecessary because the concept of cooperation is implicit in the civil rules. However, these same stakeholders then opposed our proposals because we could not sufficiently define cooperation.

Stakeholders suggested that the Washington State Rules of Professional Conduct (RPC) require a certain level of professional conduct including that required under RPC 3.1, 3.4 and 8.4. The committee disagrees that adding the requirement to reasonably cooperate in the civil process is redundant. An attorney's failure to cooperate with the RPCs may result in a complaint and disciplinary process but it is highly unlikely that opposing counsel, when encountering an uncooperative attorney, would file a bar complaint about the conduct unless it was frequent, persistent or particularly egregious. Also, using the disciplinary process to deal with uncooperative behavior has a less direct effect, if any, on the costs of civil litigation. Further, the RPCs would not be a useful precedent when proceeding with a sanctions motion addressing cooperation. The RPCs give no basis in the motions practice for the imposition of sanctions.

The committee is aware of independent policies and guidelines such as the King County Bar Association Guidelines of Professional Courtesy, the WSBA's Creed of Professionalism and judges' individual guidelines of practice within their court. However, our subcommittee felt it best to leave our language inclusive of the term "reasonably cooperate." The addition of the word "reasonably" was intentional to be able to allow for judge's discretion as to what is reasonable based on the specific circumstances in each case brought before the court.

Because the BOG voted to support "**requiring cooperation as a guiding principle,**" the subcommittee reviewed how it could "require cooperation" or alternatively allow sanctions for failing to cooperate. Inclusion of the amendments to CR 11 and CRLJ 11

provides sanctions for failing to cooperate with pleadings, motions, and legal memoranda that go beyond discovery sanctions currently available. Discussions within the cooperation subcommittee led to the query as to whether the CR 11 proposals could be eliminated to address concerns that the addition of our proposals would lead to increased motions practices among civil litigators. Withholding the CR 11 proposals would reduce the number of rule provisions that would allow for a sanction relief.

CR 11 and CR 37

The King County Judiciary and Litigation Section brought up the following concern with regard to cooperation subcommittee proposals CR 11 and CR 37 as follows:

"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 that attorney's fees available under that rule."

While the cooperation subcommittee came to the unanimous decision to keep the proposal as presented, we look to the Task Force for direction on this comment.

CONFERENCE CERTIFICATION

Upon reflection of the cooperation subcommittee proposals, it would seem beneficial to revisit the language requirement that "the 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 would appear counter intuitive that the parties must cooperate in bringing the motion for sanctions for failure to cooperate against one party because of the unlikelihood that a litigant who is the victim of noncooperation could bring a motion for sanctions for noncooperation by arranging for a mutually convenient conference, which must be accomplished with the cooperation of the noncooperating party.

A solution to this, as recommended by the King County Judiciary and Litigation Section, would be 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]."

Guidance:

The subcommittee seeks guidance from the full Task Force on the above comments and recommendations of stakeholders.

Recommendation:

The subcommittee recommends the following civil rules proposals for a vote: CR 1, CRLJ 1, CR 11, CRLJ 11, CR 26, CRLJ 26, CR 37.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 1 – SCOPE AND PURPOSE OF RULES

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. All parties and their legal counsel shall reasonably cooperate with each other and the court in all matters. ~~They~~ These rules shall be construed and administered to be consistent with this principle and to secure the just, speedy, and inexpensive determination of every action.

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SUGGESTED AMENDMENT

SUPERIOR COURT CIVIL RULES (CR)

CR 11 - SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA; SANCTIONS

(a) – (b) [Unchanged]

(c) Consistent with the overall purpose of these rules as set forth in CR 1, the court, upon motion or its own initiative, may impose an appropriate sanction on any party or attorney who violates the mandate of reasonable cooperation set forth in CR 1, which sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the lack of cooperation, including a reasonable attorney fee. The court will not entertain any motion under this subsection unless the parties have conferred regarding the motion. The moving party shall arrange for a mutually convenient conference in person or by telephone. The court may impose sanctions if the court finds that any party or its counsel, upon whom a motion with respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith. Any motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.

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SUGGESTED AMENDMENT

Superior Court Civil Rules, CR 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods and Cooperation. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Consistent with the general obligation to cooperate set forth in CR 1, the court expects the parties and their counsel to reasonably cooperate with each other in: using discovery methods; exchanging discoverable information; scheduling depositions, inspections, and examinations; and reducing the costs of discovery.

(b) – (j) [Unchanged]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 37 - FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) – (e) [Unchanged]

(f) Failure to Reasonably Cooperate. If a party or a party's attorney fails to reasonably cooperate as required in CR 1 or CR 26(a) regarding any discovery matter, the court may, after opportunity for hearing, require the party or the party's attorney to pay the other party's reasonable expenses, including attorney fees, caused by the failure.

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SUGGESTED AMENDMENT

CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)

CRLJ 1 – SCOPE AND PURPOSE OF RULES

These rules govern the procedure in all trial courts of limited jurisdiction in all suits of a civil nature, with the exceptions stated in rule 81. All parties and their legal counsel shall reasonably cooperate with each other and the court in all matters. These~~y –~~ rules shall be construed and administered to be consistent with this principle and to secure the just, speedy, and inexpensive determination of every action.

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SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)
CRLJ 11 – SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) – (b) [Unchanged]

(c) Consistent with the overall purpose of these rules as set forth in CRLJ 1, the court, upon motion or its own initiative, may impose an appropriate sanction on any party or attorney who violates the mandate of reasonable cooperation set forth in CRLJ 1, which sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the lack of cooperation, including a reasonable attorney fee. The court will not entertain any motion under this subsection unless the parties have conferred regarding the motion. The moving party shall arrange for a mutually convenient conference in person or by telephone. The court may impose sanctions if the court finds that any party or its counsel, upon whom a motion with respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith. Any motion seeking sanctions under this subsection shall include a certification that the conference requirements of this rule have been met.

SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)
CRLJ 26 – DISCOVERY

Consistent with the general obligation to cooperate set forth in CRLJ 1, the court expects the parties and their counsel to reasonably cooperate with each other in: using discovery methods; exchanging discoverable information; scheduling depositions, inspections, and examinations; and reducing the costs of discovery. Discovery in courts of limited jurisdiction shall be permitted as follows:

(a) – (g) [Unchanged]

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