



Task Force *on the*  
Escalating Costs of Civil Litigation

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

February 11, 2015

Send comments to: [ECCL@wsba.org](mailto:ECCL@wsba.org)

Introduction	1
Executive Summary	3
Material Considered	6
Recommendations	16
Conclusion	48

Per Section IX(B)(3)(d) of the Bylaws of the Washington State Bar Association, this draft report does not represent a view or action of the Bar unless approved by a vote of the Board of Governors.

## Task Force Membership

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

## Subcommittees

### **Alternative Dispute Resolution Subcommittee**

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

### **Discovery Subcommittee**

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

### **District Court Subcommittee**

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

## **Pleadings and Motion Practice Subcommittee**

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

## **Survey Subcommittee**

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

## **Trial Procedure Subcommittee**

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

<b>Introduction</b>	<b>1</b>
<b>Executive Summary</b>	<b>3</b>
1. Initial case schedule and judicial assignment	3
2. Two-tier litigation	3
3. Mandatory disclosures and early discovery conference	3
4. Proportionality and cooperation	4
5. E-discovery	4
6. Motions practice	4
7. Pretrial conference	4
8. District court	4
9. Alternative dispute resolution	5
<b>Material Considered by the Task Force</b>	<b>6</b>
1. Subcommittee material	6
2. Literature	6
a. Court material	6
b. Reports, studies, and surveys	8
c. Articles and periodical material	9
d. Other material	11
3. Survey	12
a. Demographics and practice	12
b. Costs of litigation	13
c. Discovery	13
d. Electronically stored information	14
<b>Recommendations</b>	<b>16</b>
1. Initial case schedules	16
2. Judicial assignment	18
3. Two-tier litigation	19
4. Mandatory discovery conference	22
5. Mandatory disclosures	25
6. Proportionality and cooperation	29
7. Discovery limits	32
8. E-discovery	36
9. Motions practice	37
10. Pretrial conference	38
11. District court	40
12. Alternative dispute resolution	42
<b>Conclusion</b>	<b>48</b>

## Introduction

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

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

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

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

The Task Force has held regular meetings since July 2011, three times requesting that its initial charter be extended. It organized itself into six subcommittees, which also

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

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

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

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

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

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

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

## Executive Summary

The Task Force initially organized itself into four subcommittees to explore different aspects of civil litigation. These four—the Alternative Dispute Resolution Subcommittee, the Discovery Subcommittee, the Pleadings and Motion Practice Subcommittee, and the Trial Procedure Committee—worked independently, and each generated a final report. The Task Force also created two additional subcommittees: the Survey Subcommittee, which developed and implemented the Task Force Survey of WSBA members; and the District Court Subcommittee, which considered the applicability and impact of proposed recommendations on the district courts. With input from the Survey and District Court Subcommittees, the Task Force as a whole considered the recommendations in these subcommittee reports in making its final recommendations.

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

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

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

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

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

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

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

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



counterbalance to the new discovery limits and shorter case schedules also being recommended.

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

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

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

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

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

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

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

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

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

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

Most civil litigation occurs in superior court, but district court offers a potentially quicker and less expensive alternative for some cases. Many of the Task Force's recommendations apply to district court as well as superior court. In addition, the Task Force recommends increasing the district court jurisdictional limit from \$75,000 to \$100,000, extending jurisdiction to unlawful detainer proceedings, and issuing a case schedule in civil cases upon filing. District court cases would follow a 6-month schedule from filing to trial.

## **9. Alternative dispute resolution**

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

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

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

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

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

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

## Material Considered by the Task Force

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

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

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

### **1. Subcommittee material**

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

### **2. Literature**

#### ***a. Court material***

1. Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice, Nos. ADM10-8051, ADM09-8009, ADM04-8001 (Minn. May 8, 2013)
2. Model Agreement Regarding Discovery of Electronically Stored Information and Proposed Order (W.D. Wash. Dec. 13, 2012)

3. Standing Order, In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, No. M10-468 (S.D.N.Y. Nov. 1, 2011)
4. Order Establishing the Managing Panel of the Oregon Complex Litigation Court and Appointing Members to the Panel, Chief Justice Order No. 10-067 (Or. Dec. 2, 2010)
5. Order Establishing the Oregon Complex Litigation Court and Adopting New UTCR 23.010, 23.020, 23.030, 23.050, and 23.060 Out-of-Cycle, Chief Justice Order No. 10-066 (Or. Dec. 2, 2010)
6. Order of Out-of-Cycle Adoption of New UTCR 5.150, UTCR Form 5.150.1a, and UTCR Form 5.150.1b, Chief Justice Order No. 10-025 (Or. May 6, 2010)
7. Model Civil Case Schedule Order (Spokane Cty. Sup. Ct. 2002)
8. Federal Rules of Civil Procedure 16 (2007)
9. Federal Rules of Civil Procedure 26 (2010)
10. Federal Rules of Civil Procedure 26 (1993)
11. Federal Rules of Civil Procedure 33 (2007)
12. Local Rules, Eastern District of Washington LCR 7 (2013)
13. Local Rules, Western District of Washington LCR 7 (2014)
14. Washington Rule of Professional Conduct RPC 1.3 (2006)
15. Washington Rule of Professional Conduct RPC 3.1 (2006)
16. Washington Rule of Professional Conduct RPC 3.2 (2006)
17. King County Local Rules CR 4 (2013)
18. King County Local Rules CR 7 (2013)
19. Pierce County Local Rules PCLR 3 (2014)
20. Spokane County Local Rules LAR 0.4.1 (2000)
21. Oregon Uniform Trial Court Rule UTCR 5.150 (2014)
22. Oregon Uniform Trial Court Rule UTCR 23.010 (2014)
23. Oregon Uniform Trial Court Rule UTCR 23.020 (2014)
24. Oregon Uniform Trial Court Rule UTCR 23.030 (2014)
25. Oregon Uniform Trial Court Rule UTCR 23.050 (2014)
26. Oregon Uniform Trial Court Rule UTCR 23.060 (2014)
27. Oregon Court Fee Schedule (2011)

28. Rules of the Superior Court of New Hampshire Applicable in Civil Actions Rule 26, Depositions (2013)
29. Utah Rules of Civil Procedure URCP 26 (2012)
30. 2011 Oregon Court Fee Schedule

***b. Reports, studies, and surveys***

31. ABA Section of Litigation, Special Committee, Civil Procedure in the 21st Century: Some Proposals (2010)
32. ABA Section of Litigation, Member Survey on Civil Practice: Detailed Report (2009)
33. Paula L. Hannaford-Agor, NCSC, Estimating the Cost of Civil Litigation (2013)
34. Paula L. Hannaford-Agor, NCSC, Short, Summary & Expedited: The Evolution of Civil Jury Trials (2012)
35. IAALS & ACTL Task Force on Discovery and Civil Justice, A Return To Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs (2012)
36. Marc Galanter & Angela Frozena, Pound Civil Justice Inst.: 2011 Forum for State Appellate Court Judges, The Continuing Decline Of Civil Trials In American Courts (2011)
37. IAALS, Civil Case Processing in the Oregon Courts: An Analysis of Multnomah County (2010)
38. IAALS, Civil Case Processing in the Federal District Courts (2009)
39. IAALS, Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel (2010)
40. IAALS & ACTL Task Force on Discovery and Civil Justice, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (2009)
41. IAALS & ACTL Task Force on Discovery and Civil Justice, 21st Century Civil Justice System: A Roadmap for Reform: Pilot Project Rules (2009)
42. IAALS & ACTL Task Force on Discovery and Civil Justice, 21st Century Civil Justice System: A Roadmap for Reform: Civil Caseflow Management Guidelines (2009)
43. Reforming the Iowa Civil Justice System , Report of the Iowa Civil Justice Reform Task Force (2012)

44. Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (September 2014)
45. Judicial Council of California, Administrative Office of the Courts, Evaluation of the Early Mediation Pilot Programs (2004)
46. NCSC, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013)
47. Stacey Keare, Public Law Research Inst. (PLRI), Reducing the Cost of Civil Litigation: Alternative Dispute Resolution (1995)
48. Than N. Luu, PLRI, Reducing the Cost of Civil Litigation: What Are the Costs of Litigation? (1995)
49. Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force, Final Report (2011)
50. Javad Mostofizadeh, PLRI, Reducing the Cost of Civil Litigation: Using New Technology (1995)
51. Seventh Circuit Electronic Discovery Pilot Program, Final Report on Phase Two (2012)
52. Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association (June 23, 2012)
53. Donna Stienstra, Molly Johnson & Patricia Lombard, Federal Judicial Center, Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 (1997)
54. WSBA, Pulse of the Washington State Legal Profession (2009)

***c. Articles and periodical material***

55. Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 Rich. J.L. & Tech. 8 (2013)
56. Sharon S. Armstrong & Barbara Miner, *New KCSC Civil Case Schedule Will Reduce Time to Trial*, King Cnty. Bar Ass'n Bar Bulletin, June 2012
57. Shelly M. Damore, *The Fast Track: Oregon's Expedited Civil Jury Trial Program*, Or. Ass'n of Def. Counsel, Summer 2010, at 8
58. Phillip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933 (2012)
59. Joseph Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 Rutgers L. Rev. 337 (1985)

60. Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441 (2011)
61. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 494 (2013)
62. James S. Kakalik, *Analyzing Discovery Management Policies: Rand Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 No. 2 Judge's J. 22, 25 (1998)
63. Rebecca L. Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. Kan. L. Rev. 877, 891 (2013)
64. Rebecca L. Kourlis, Jordan M. Singer & Paul Saunders, *Survey of Experienced Litigators Finds Serious Cracks in U.S. Civil Justice System*, *Judicature*, Sept.–Oct. 2008, at 78 (2008)
65. John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolutions*, 24 Ohio St. J. on Disp. Resol. 81 (2008)
66. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765 (2010)
67. Emery G. Lee & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 Sedona Conf. J. 201 (2010)
68. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219 (1984)
69. Amy Luria & John E. Clabby, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 Chap. L. Rev. 29 (2005)
70. Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889 (2009)
71. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985)
72. Douglas C. Rennie, *The End of Interrogatories: Why Twombly and Iqbal Should Finally Stop Rule 33 Abuse*, 15 Lewis & Clark L. Rev. 191 (2011)
73. *The Sedona Conference Cooperation Proclamation: Resource for the Judiciary* (2014) (Public Comment Version)

74. *The Sedona Conference Cooperation Proclamation*, 10 Sedona Conf. J. 331 (2009 Supp.)
75. Charles Silver, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Does Civil Justice Cost Too Much?*, 80 Tex. L. Rev. 2073 (2002)
76. John V. Tunney, Foreword, *Financing the Cost of Enforcing Legal Rights*, 122 U. Pa. L. Rev. 632 (1973–1974)
77. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998)
78. Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 Okla. L. Rev. 115 (2006)

**d. Other material**

79. *How Much Will My Business Case Cost? Analyzing Discovery in Civil Litigation*, The Castlman Law Firm, P.C., [www.castlelaw.com/cost.htm](http://www.castlelaw.com/cost.htm) (accessed May 3, 2011)
80. Vincent DiCarlo, *How to Reduce to High Cost of Litigation*, Former Law Office of Vincent DiCarlo, [www.dicarlolaw.com/NetscapeHTRHCL.html](http://www.dicarlolaw.com/NetscapeHTRHCL.html) (accessed May 3, 2011)
81. Ann G. Fort, *Rising Costs of E-Discovery Requirements Impacting Litigants*, Depo.Com, [www.depo.com/resources/aa\\_theDiscoveryupdate/rising\\_costs\\_ediscovery.html](http://www.depo.com/resources/aa_theDiscoveryupdate/rising_costs_ediscovery.html) (accessed Apr. 29, 2011)
82. Rees Morrison, *The Four Killer B's that Drive Litigation Costs, According to a Fifth B, Baer*, Law Dep't Mgmt. (Dec. 21, 2010), [www.lawdepartmentmanagementblog.com/law\\_department\\_management/2010/12/the-four-killer-bs-that-drive-litigation-costs-according-to-a-fifth-b-baer.html](http://www.lawdepartmentmanagementblog.com/law_department_management/2010/12/the-four-killer-bs-that-drive-litigation-costs-according-to-a-fifth-b-baer.html) (accessed May 3, 2011)
83. Joseph F. Speelman, *Avoid Quick Fixes and Control the True Cost of Litigation*, Law.Com (Jun. 5, 2008), [www.law.com/jsp/cc/PubArticleCC.jsp?id=1202421924909](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202421924909) (accessed May 3, 2011)
84. Vice President Joseph Biden, Remarks at the Conference of Chief Justices (Jan. 30, 2012)
85. Letter from Rebecca L. Kourlis, Exec. Dir., IAALS, & Paul C. Saunders, Chairman, ACTL, to Paula Littlewood, Exec. Dir. WSBA (Nov. 3, 2009)
86. Lord Peter Goldsmith QC, Remarks at Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011) Theodore N. Mirvis, Slide Presentation at the Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011)



87. William T. Robinson III, Pres. ABA, Remarks at the Midyear Meeting of the Conference of Chief Justices (Jan. 29, 2011)

### **3. Survey**

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

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

#### ***a. Demographics and practice***

The overwhelming majority of survey respondents are experienced attorneys and dedicated litigators. The largest block of respondents, 25.9 percent, have practiced in Washington State for more than 30 years. Practitioners of between 21 and 30 years comprise another 19.6 percent of respondents.

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

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

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

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

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

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

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

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

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

### ***c. Discovery***

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

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

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

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

Respondents strongly agreed with the statement that parties are willing to invest more into litigating a case if the stakes are high by assigning the statement an average 4.29 on a scale of 1 to 5, with 1 indicating a strong disagreement and 5 indicating strong agreement. Any values over 3 would indicate agreement. They also agreed that parties “dig in” and litigate every little thing when a lot of money is involved (3.79 average), that existing discovery rules are not being enforced (3.68), and that discovery costs induce settlements (3.44). When cases settle due to discovery costs, 70.0 percent of survey respondents think that justice is not served.

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

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

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

ESI does not dominate the litigation practices of survey respondents. Though most respondents (72.7 percent) deal with ESI in their practice, a majority of those (54.3 percent) do so without the assistance of third-party vendors for services such as

creating databases or making ESI searchable.<sup>4</sup> A clear majority (77.8 percent) report that managing and reviewing ESI comprises one-fifth or less of their litigation costs; in total 96.8 percent reported ESI as one-half or less of their litigation costs.

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

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

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

# Recommendations

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

## 1. Initial case schedules

### *a. Current practice*

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

### *b. Recommendation*

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

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

Beyond the total time allowed, the courts of individual counties will have discretion to craft their own case schedules. Counties may also exempt certain categories of civil actions from schedules entirely, for example:

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

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

**c. *Reasons***

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

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

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

<sup>7</sup> James S. Kakalik, *Analyzing Discovery Management Policies: Rand Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 No. 2 Judge’s J. 22, 25 (1998) (“In the main evaluation report, we found that early case management predicted significantly reduced time to disposition;

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

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

## **2. Judicial assignment**

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

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

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

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

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

coupling early management with setting a trial schedule early predicted significant further time reductions."); IAALS, *Civil Case Processing in the Federal District Courts* 84 (2009) ("[F]aster disposition times tend to be strongly correlated with setting a trial date early in the litigation, filing motion for leave to conduct additional discovery as soon as possible after the Rule 16 conference ..., and filing motion on disputed discovery, motions to dismiss and motions for summary judgment as soon as practicable in the life of the litigation.").

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

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

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

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

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

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

Statewide, Washington makes few categorical distinctions between cases based on size or complexity. Mandatory arbitration, applicable to claims under \$50,000, is one such distinction. Another is the district court system, open only to claims under \$75,000. Pierce County assigns different case schedules based on a case's subject matter or likely complexity.

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

The Task Force recommends adopting a two-tier litigation system (sometimes referred to as multi-track litigation) in superior court cases, which would determine a case's

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

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



presumptive case schedule and discovery limits based on the tier to which a case is assigned.

*Initial assignment to Tier 1*

All cases default to Tier 1 on filing, and the Task Force anticipates most cases will remain in that tier. Cases involving large monetary claims, important non-monetary stakes, or complex factual or legal issues may be reassigned to Tier 2.

*Reassignment to Tier 2*

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine whether the case presents complex or important issues such that Tier 2's more expansive schedule, discovery, and trial procedures are warranted, looking to the following factors:

- Monetary claims by any party exceeding \$300,000;
- Evidence of likely factual complexity, such as more than 12 likely witnesses, or the need to conduct substantial investigation outside the State of Washington;
- Complex or novel legal issues;
- Claims involving important rights, or issues of widespread significance;
- Commonly complex case types such as medical or professional malpractice, product liability, or class action cases; and
- Other indicia of likely complexity as determined by the court.

The case schedule will set out a deadline to seek reassignment, shortly after the early discovery conference.<sup>11</sup> After this deadline, a party may only move for tier reassignment if there is good cause for the delay.

The following model case schedule sets out example deadlines for a Tier 1 case:

<i>Event/deadline</i>	<i>Date (weeks from trial)</i>
Filing	52
Early discovery conference	48
Initial disclosures	46
Application for reassignment to Tier 2	46
Joinder of parties	30

<sup>11</sup> Another Task Force recommendation, discussed below.

Fact witness disclosures	22
Expert witness disclosures	13
Rebuttal expert witness disclosures	9
Mandatory mediation	8
Discovery cutoff	7
Pretrial disclosures	4
Trial	0

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

*Tier assignment does not limit award*

If monetary value is the basis for assigning a case to Tier 1 or Tier 2, it does not limit a party's potential recovery. Even in a Tier 1 case a jury could award more than \$300,000.

*Arbitration and district court*

Parties with claims of \$50,000 or less are still subject to mandatory arbitration; those with claims of \$75,000 or less can continue to file in district court.

**c. Reasons**

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

Multi-tier litigation applies a measure of proportionality from a case's outset. The IAALS recommends moving away from "one size fits all" litigation rules. Courts in the Southern District of New York,<sup>12</sup> Minnesota,<sup>13</sup> Oregon,<sup>14</sup> Utah,<sup>15</sup> and Washington's Pierce County<sup>16</sup>

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

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

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

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

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

have experimented with, or adopted, multi-tier litigation. Respondents to the Task Force's survey generally supported the idea, with 53.8 percent agreeing or strongly agreeing that a multi-track litigation system would be effective in lowering litigation costs without substantially limiting the ability to justly resolve disputes.

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

The Task Force considered basing tier assignment on pleadings. Instead, it decided to have Tier 1 be the initial default for all cases to ensure parties would not simply claim the stakes qualified for the more expansive Tier 2 in most cases. The lesson of Oregon's expedited civil trial system, an underused option that allows parties to opt into a shortened litigation track by agreement, suggests at least one party will favor a longer case track in almost all cases.<sup>17</sup>

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

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

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

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

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

***b. Recommendation***

The Task Force recommends requiring a mandatory early discovery conference with a list of topics to be discussed in both superior court and district court cases. The parties to meet as soon as practicable to discuss the following subjects:

- Whether (if in superior court) the case should be assigned to Tier 2 instead of the default Tier 1;
- Whether the case is suitable for mediation or arbitration, and when early mediation might occur;
- What changes should be made in the timing, form, or requirement for initial disclosures, including when they will be made;
- Subjects on which discovery may be needed, when completed, and whether conducted in phases or focused on particular issues;
- Any issues about disclosure or discovery of electronically stored information, including the form of production;
- Any issues about claims of privilege or work product, whether there is any agreement for the procedure for raising these issues, and whether the court should enter an order under ER 502;
- What changes should be made in the limitation on discovery, and what other limitations should be imposed. For cases seeking reassignment to Tier 2, the parties are encouraged to submit an agreed discovery plan setting out discovery limits appropriate for the case, or submit proposals for the court to decide if no agreement is reached;
- Whether time limits are appropriate for the conduct of trial, including potential time limits on voir dire, opening and closing statements, and each party's presentation of its case, including rebuttal evidence but excluding pretrial motions; and
- Any other order that the court should issue under CR 26(c) or other rule, including whether a special master should be appointed to deal with any aspects of discovery, including electronic discovery.

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

### *c. Reasons*

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

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

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

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

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

## 5. Mandatory disclosures

### *a. Current practice*

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

### *b. Recommendation*

The Task Force recommends requiring initial disclosures, expert-witness disclosures, and pretrial disclosures in both superior court and district court cases. These disclosures are patterned on those found in Federal Rule of Civil Procedure 26(a). The timing and subject matter of disclosures may be varied by party stipulation or court order.

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

#### *Initial disclosures*

Initial disclosures, or “laydown” discovery, will be required in advance of formal discovery. Parties will be required to make these disclosures as soon as practicable, in advance of receiving any discovery requests, but in any case no later the deadline set out in the case schedule. The following information must be disclosed:

- The name and contact information for each individual likely to have discoverable information, and the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- A copy, or a description by category, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- A computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under CR 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based;
- For inspection and copying as under CR 34 or CRLJ 26(b)(3)(A), any insurance agreement under which an insurance business may be liable to satisfy all or part

<sup>20</sup> See *supra* page 18.

of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

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

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

#### *Expert witness disclosures*

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

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

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

#### *Pretrial disclosures*

Pretrial disclosures should be required, by the deadline set out in the case schedule.

Disclosures must include:

- The name and, if not previously provided, contact information of each witness, separately identifying those the party expects to present and those it may call if the need arises;
- The designation of those witnesses whose testimony the party expect to present by deposition and a transcript of the pertinent parts of the deposition; and

- An identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises.

**c. Reasons**

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

*Initial disclosures*

Requiring parties to automatically provide certain basic information will mean less discovery has to be conducted and therefore lower costs. Mandatory disclosures are combined with limitations on other methods of discovery to lower costs. The Task Force believes that the requirement of mandatory disclosures will offset the limitation on interrogatories and requests for production that are proposed.<sup>21</sup> It should be noted that there is mixed evidence and opinion regarding the efficacy of mandatory disclosures as a means of lowering litigation costs.<sup>22</sup> But it should be further noted that disclosures are

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

<sup>22</sup> Compare Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 26 (“Our data and analyses do not strongly support the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours, and thereby reducing the costs of litigation, or as a means of reducing time to disposition Special Comm. of the ABA Section of Litigation, Civil Procedure in the 21st Century: Some Proposals 9–10 (2010) (proposing eliminating “the current requirement that the parties’ disclosures include documents” stating that only 33 percent of ABA Section of Litigation members surveyed believed that initial disclosures reduce discovery and only 26 believe that they save client money, and that “[t]he Committee members, like the ABA Survey respondents, believe that most initial disclosure is not useful”); Report of the Special Committee



criticized for doing too little as well as too much, and while there are critics that propose eliminating disclosure, there are also critics that propose expanding disclosure (for example by making document production mandatory rather than just document identification).<sup>23</sup> Ultimately, the Federal Advisory Committee on Civil Rules heard all of the evidence, criticism, and proposals regarding modifications to the initial disclosure rules but left initial disclosures unchanged in its fairly significant recent changes to the Federal Rules of Civil Procedure,<sup>24</sup> and the federal, or similar, approach to initial disclosure has been endorsed and adopted by state task forces and pilot projects.<sup>25</sup>

on Discovery and Case Management in Federal Litigation of the New York State Bar Association 73 (June 23, 2012) (collecting evidence that initial disclosures do not increase efficiency and recommending that the federal rules be amended to remove the document disclosure provisions); *with* Thomas E. Willging, Donna Stienstra, John Shapard & Deab Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 527 (1998) (“In general, initial disclosure appears to be having its intended effects ... [w]e found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure [and] [h]olding all variables constant, those with disclosure terminated more quickly.”). *See also* Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441, 1464–68 (2011) (contrasting proponents’ arguments that initial disclosures “foster exchange of discoverable information early,” “serve as tools to compel information sharing,” “advances litigation efficiency objectives,” in contrast to critics arguments that they do “not foster efficient discovery,” “foster over discovery,” and “do not fit comfortably in an adversarial system.”).

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

<sup>24</sup> Report of the Advisory Committee on Civil Rules (May 8, 2013).

<sup>25</sup> Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 31 (“Many recommendations for case management and discovery limitations presume discovery reforms requiring basic information disclosure in all cases at the outset of litigation without the necessity of discovery requests from a party.”); Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force, Final Report 18 (2011) (“Rule 26(a) of the Federal Rules of Civil Procedure provides for three categories of automatic disclosure: initial disclosures[], expert disclosures[], and trial disclosures[ and] [t]he task force reviewed all three categories of changes, and believes there is now enough experience with the operation of automatic disclosure in the federal courts to warrant the adoption of these federal court automatic disclosure requirements in Minnesota.”); NCSC, *New Hampshire Pilot Rules*, *supra* note 41, at 3 (“[A]utomatic disclosures[] are expected to [(1)] reduce the time from filing to disposition ... through a reduction in the amount of time expended on ... discovery” and (2) “reduce the number of discovery disputes ... by making most of the previously discoverable information ... routinely available to the parties without need for court intervention.”).

The Task Force considered the broader initial disclosures provided for in the 1993 amendments to the federal Rule 26. However, concerns were raised over interpreting the scope of disclosure under this earlier version. The Task Force decided in favor of the initial disclosures in the current federal Rule 26 so Washington courts could take advantage of federal case law interpreting it.

#### *Expert disclosures*

Requiring the party offering the expert testimony to disclose certain basic information reduces the amount of discovery the responding party has to conduct, lowering costs.<sup>26</sup> Based on the Task Force member's experience, specifying which party needs to disclose expert material first should also head off discovery disputes over that issue.

#### *Pretrial disclosures*

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

## **6. Proportionality and cooperation**

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

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

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

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

#### *Proportionality*

- The scope of discovery will be amended to read that parties may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense ...."

<sup>26</sup> Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 527 ("Like initial disclosure, expert disclosure appears to be having its intended effect, albeit with an increase in litigation expenses for 27% of the attorneys who used expert disclosure ... [but] slightly more attorneys (31%) reported decreased litigation expenses.").

- The scope of discovery will also be amended to include proportionality as a limit: "... and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

#### *Cooperation*

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

#### *c. Reasons*

Narrowing the very broad scope of discovery and explicitly requiring the court to impose proportionality and cooperation should reduce the amount of discovery, or at least tie it closely to the amounts and issues at stake in each case, thereby lowering costs overall.<sup>27</sup> It should also reduce the number and severity of discovery disputes, which will lower costs. Proportionality has been effective in federal court,<sup>28</sup> and is a central proposal of

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

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

most academic studies and state and federal pilot projects.<sup>29</sup> Several states have also endorsed and implemented an explicit proportionality requirement.<sup>30</sup> The Task Force's recommended language is based on similar language recommended by the Judicial Conference Committee on Rules of Practice and Procedure.<sup>31</sup> Like other rule changes, however, an explicit proportionality provision in the rules will only be effective if courts enforce them in a thoughtful way.<sup>32</sup>

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

<sup>30</sup> Favro & Pullan, *New Utah Rule 26*, *supra* note 21, at 970 ("To remedy this problem, Utah redefined the scope of permissible discovery. Today, Utah litigants "may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality." This simple yet profound change has effectively brought proportionality to the forefront of discovery practice."); Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 30 ("Discovery should be proportional to the size and nature of the case. Overly broad and irrelevant discovery requests should not be countenanced."); Minnesota Supreme Court Civil Justice Reform Task Force, *Recommendations*, *supra* note 25, at 17 (the task force recommended adopting proportionality rule which "would create a presumption of narrower discovery and require consideration of proportionality in all discovery matters, limiting discovery to the reasonable needs of the case," noting "[t]his recommendation is probably one of the most important recommendations the task force advances.").

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

<sup>32</sup> Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889, 908 (2009) ("[P]roportionality

Similarly, an express cooperation requirement has been tested in federal and state pilot programs (and found to be effective) and implemented by some states.<sup>33</sup> The Task Force's cooperation recommendations both make cooperation an underlying principle of the civil rules, and make cooperation an enforceable requirement during discovery. The Task Force noted that the most recent proposed federal amendments declined to adopt an enforceable cooperation duty, citing to the potential for collateral litigation of conflict with a duty of effective representation. However, Washington's Rules of Professional Conduct require *diligent* rather than *zealous* representation,<sup>34</sup> and in fact explicitly prohibit abuse of legal process<sup>35</sup> or tactical delays.<sup>36</sup> The Task Force considers these requirements entirely consistent with a duty of cooperation.

## 7. Discovery limits

### a. Current practice

Most counties do not limit discovery requests by category.

rules can be criticized equally for allowing opposite errors, both false negatives (failing to detect and halt discovery abuse) and false positives (finding disproportionate some costly discovery that actually is justified by high evidentiary value and case merit). Erroneous pro-plaintiff rulings unjustifiably increase litigation costs and pressure defendants to settle unmeritorious cases; conversely, erroneous pro-defendant rulings deny plaintiffs the ability to press meritorious claims successfully.”).

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

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

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

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

***b. Recommendation***

The Task Force recommends presumptively limiting discovery, with superior court case limits depending on whether a case is assigned to Tier 1 or Tier 2:

<i>Discovery</i>	<i>Tier 1 limit</i>	<i>Tier 2 limit</i>
Interrogatories, including all discrete subparts	15	25
Requests for production	20	40
Requests for admission	15	25
Total fact deposition hours	20	40
Expert deposition hours per expert	4	4

Parties could vary these limits by stipulation or on a showing of good cause. Agreed changes to discovery limits do not require court approval unless they would affect deadlines in the case schedule. However, courts should not automatically give the presumptive limits greater weight than case-specific party proposals. In Tier 2 cases, the parties are encouraged to submit agreed discovery plans (or individual proposals for the court to decide if there is disagreement) following the Rule 26(f) conference.

In district courts, the number of interrogatories permitted without prior court permission of the court will be the same as in Tier 1—15, including all discrete subparts. District court discovery limits will remain otherwise unchanged.

***c. Reasons***

Discovery limits tied to case size are a direct, if inexact, means of imposing proportionality. Limits will force parties to be efficient with their use of the available discovery. Less discovery also means fewer discovery disputes and fewer opportunities for discovery abuse. On the Task Force’s survey, respondents to practicing in other jurisdictions also noted that those with discovery limits generally involve less litigation cost.

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

*Interrogatories*

“Restrictions on the number of interrogatories with option to obtain more by court leave” were supported by a majority of respondents to the Task Force’s survey. Limiting the number of interrogatories should mean less discovery activity. Additionally, there should

be no prejudice to parties' ability to conduct discovery since interrogatories are generally of limited value in discovery,<sup>37</sup> and mandatory initial disclosures will allow parties to be more targeted in their use of interrogatories.<sup>38</sup> There is general support for the proposition that limits on interrogatories will reduce discovery costs and abuse, and empirical evidence that reduction in interrogatories reduces attorney work hours.<sup>39</sup> There are those who argue that interrogatories, or certain types of interrogatories, should be eliminated entirely.<sup>40</sup>

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

### *Requests for production*

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

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

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

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

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

<sup>41</sup> NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 (limitation of interrogatories to 25 "were put in place in light of the amount for information that parties are now entitled to under [rule changes including initial disclosures], which are expected to greatly reduce the amount of discovery needed to prepare for trial.").

### *Requests for admission*

In general, less discovery activity should mean lower costs. Limiting the number of requests for admission should mean less discovery activity, and will force parties to be more efficient with the admission requests they have available.<sup>42</sup> As noted, respondents to the Task Force's survey considered requests for admission (along with interrogatories) one of the least effective forms of discovery, as well as one susceptible to abuse.

### *Depositions of fact witnesses*

"Restrictions on the number of or length of depositions with option to obtain more by court leave" were supported by a majority of respondents to the Task Force's survey. The Task Force also noted that while respondents overwhelmingly considered depositions *extremely effective* or *very effective* tools for justly resolving disputes, depositions are also the most expensive method of discovery.<sup>43</sup> In general, less discovery activity should mean lower costs. Limiting the number of hours of depositions should mean less discovery activity, and will force parties to be more efficient with the deposition hours they have available.<sup>44</sup> An hour-based limitation (instead of limiting the number of depositions) will provide parties with greater flexibility to take more, shorter depositions or fewer, longer depositions depending on the needs of the case.<sup>45</sup> The number of hours allowed at each tier should be sufficient for most cases. The goal is for parties to be thoughtful and efficient in how they conduct discovery.

<sup>42</sup> Special Comm. of the ABA Section of Litigation, *Civil Procedure in the 21st Century*, *supra* note 22, at 13 ("A party may serve no more than 35 requests for admission, including subparts, under Rule 36 unless all parties agree or by court order.").

<sup>43</sup> Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 576 (finding that "depositions accounted for about twice as much expense as any other discovery activity").

<sup>44</sup> IAALS & ACTL, *Final Report*, *supra* note 6, at 10 (suggesting numerical limits such as "only 50 hours of deposition time"); NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 ("PR 4 restricts ... the number of hours of depositions to 20 hours).

<sup>45</sup> The hours limitation is modeled after the Utah Rules of Civil Procedure. The comments to Utah Rule 26(c) state "[d]eposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes"; *see also* R. of Superior Ct. of N.H. Applicable in Civ. Actions, Rule 26, Depositions ("[A] party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed 20 unless otherwise stipulated by counselor ordered by the court for good cause shown.").



### *Depositions of experts*

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

## **8. E-discovery**

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

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

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

#### *Rule changes*

The federal rule amendments should be incorporated into the Washington Court Rules: amendments to CR 26 (discussing discovery of inaccessible data) and amendments to CR 37 (regarding sanctions for the deletion of electronically stored information (using the form of the new proposed amendments to the federal rules)). Because the Task Force decided against requiring an early judicial conference as in Federal Rule of Civil Procedure 16(b), language in that rule relating to electronically stored information will not be added to CR 16. CRLJ 26 will be amended to follow the changes made to CR 26.

#### *Protocol*

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

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

The federal amendments have been relatively successful in lowering litigation costs associated with electronic discovery in federal court.<sup>46</sup> Other jurisdictions (federal and state) implementing protocols similar to the one recommended by the Task Force have reported beneficial results.<sup>47</sup> Other recommendations of the Task Force—case schedules;

<sup>46</sup> Lee & Withers, *Survey of United States Magistrate Judges*, *supra* note 18, at 202 (“The responses [to a survey of magistrate judges] indicate that, by and large, the [e-discovery] rules are working to achieve the ‘just, speedy, and inexpensive determination of every action’ as dictated by Rule 1 of the Federal [Civil Rules]”).

increased judicial management; the Rule 26(f) conference; proportionality—should also improve the course of e-discovery.<sup>48</sup>

## **9. Motions practice**

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

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

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

The Task Force recommends that non-dispositive motions in superior or district court be decided without oral argument. Oral argument will only be permitted in the following instances:

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

<sup>47</sup> Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 46 ("The Task Force recommends that the bar, through the Iowa State Bar Association, develop a best practices manual for electronic discovery in civil litigation. This could address the issues of identification, scope, and preservation of electronically stored information likely to be involved in specific types of civil cases."); Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 Rich. J.L. & Tech. 8, 38 (2013) ("At least thirty-two districts, however, have acknowledged the discovery of electronically stored information in civil litigation. Of these districts, seven merely make passing reference to e-Discovery in their local rules. Another twelve districts emphasize e-Discovery topics deemed most worthy of attention at Rule 26(f) conferences. Nine districts, as well as others using model orders, have adopted pragmatic solutions that address gaps in the Amendments more aggressively. At least five additional districts have released non-binding guidance for parties on the topic of e-Discovery.").

<sup>48</sup> See The Sedona Conference Cooperation Proclamation: Resources for the Judiciary 9 (2014) (Public Comment Version) (making similar recommendations).

***c. Reasons***

Even brief oral arguments require an attorney to prepare, travel, wait in the court, present argument, and then return back to their office. Oral arguments also consume limited court time that could be dedicated to trial work. These costs can be avoided by allowing some motions to be decided on the pleadings alone. King County Superior Court and the U.S. District Courts of both of Washington's federal districts resolve most non-dispositive motions without requiring oral argument for non-dispositive motions.<sup>49</sup> Not requiring oral argument for all motions will also help make district court a more attractive forum for civil cases.

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

**10. Pretrial conference**

***a. Current practice***

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

***b. Recommendation***

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

- The nature and a brief, non-argumentative summary of the case;
- A list of issues which are not in dispute;
- A list of issues that are in dispute;
- Suggestion by either party for shortening the trial, including time limits for presenting each party's case at trial, and limits on the number of expert witnesses per part or per issue;
- An index of exhibits (excluding rebuttal or impeachment exhibits);
- A list of jury instructions requested by each party; and

<sup>49</sup> See King County LCR 7(b)(3); Local Rules W.D. Wash. LCR 7(b)(4); Local Rules E.D. Wash. LCR 7(h)(3)(C).

- A list of names of all lay and expert witnesses excluding rebuttal witnesses.

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

### *c. Reasons*

Trial may be the single most expensive and time consuming aspect of litigation.<sup>50</sup> Perhaps for this reason, the number of civil jury trials is decreasing.<sup>51</sup> But because having a jury of your peers make a determination of the facts of a case has long been the backbone of the American civil justice system,<sup>52</sup> there will be a loss to our society if this method of resolving disputes between people is lost due to the sheer expense to the parties.<sup>53</sup> It is also an access-to-justice issue—if the common man or woman cannot afford entry to the courtroom, they are denied access to the core of our justice system.

<sup>50</sup> See Paula Hannaford-Agor & Nicole L. Waters, NCSC, *Estimating the Cost of Civil Litigation* 7 (2013) (“For all case types, a trial is the single most time-intensive stage of litigation, encompassing between one-third and one-half of total litigation time in cases that progress all the way through trial.”).

<sup>51</sup> “According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009.” IAALS & ACTL, *A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs* 1 n.1. (2012); see also Marc Galanter & Angela Frozena, *Pound Civil Justice Inst.: 2011 Forum for State Appellate Court Judges, The Continuing Decline of Civil Trials in American Courts* 2 (2011) (“The recent data on civil trials can be summed up in two stories: no news and big news. The no news story is that the trend lines regarding the decline of trials are unchanged. The big news story is that the civil trial seems to be approaching extinction.”).

<sup>52</sup> The federal constitution directs that the right to a jury trial shall be preserved, U.S. Const. amend. VII, and our state constitution declares that right “inviolable,” Const. art. 1, § 21. See also *Parsons v. Bedford*, 28 U.S. 433, 466 (1830) (“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union .... As soon as the [U.S. C]onstitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.”).

<sup>53</sup> “The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try

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

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

## **11. District court**

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

District courts' civil jurisdiction includes damages for injury to individuals or personal property and contract disputes in amounts up to \$75,000. CrRLJ 3.3(a)(2) gives precedence to scheduling criminal trials over civil trials, and many district courts also hear criminal motions before civil motions. Aside from criminal cases, many of the cases filed in district court are infractions, collection actions, or domestic violence or anti-harassment protection orders.

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

Many recommendations already discussed affect district court:

- Initial case schedule issued on filing, with a 6-month period from filing to trial, except in categories of cases as determined by individual county<sup>54</sup>;
- Mandatory early discovery conference<sup>55</sup>;
- Mandatory initial, expert witness, and pretrial disclosures except for categories of cases exempt from initial case schedules<sup>56</sup>;

jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials." IAALS & ACTLA, *A Return To Trials*, *supra* note 51, at 1.

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

<sup>55</sup> See *supra* pages 22–25.

- Principles of proportionality and cooperation incorporated into discovery rules<sup>57</sup>;
- Number of interrogatories allowed without prior court permission of the changed to 15, including discrete subparts<sup>58</sup>;
- Remainder of federal e-discovery rules incorporated into state rules<sup>59</sup>; and
- Non-dispositive motions decided on the pleadings, unless the court permits oral argument.<sup>60</sup>

The Task Force additionally recommends extending the district court's jurisdiction to include claims up to \$100,000. District court jurisdiction should also expand to include unlawful detainer proceedings under Chapter 59.12 RCW and anti-harassment protection orders involving real property, so long as the disputes remain within the proposed \$100,000 jurisdictional limit.

***c. Reasons***

District court is sometimes perceived as inhospitable to civil litigation and is an underused civil litigation forum. According to responses to the Task Force's survey, though over half of respondents reported that over 20 percent of their civil litigation cases involved amounts under \$50,000—within the district court jurisdictional limit—the overwhelming majority, 85 percent, conducted less than a fifth of their civil litigation in district court.

The Task Force believes district courts can offer an expedited and less costly alternative to superior courts for some cases. Its recommendations will make district court a more viable and affordable forum for civil litigation: case schedules will keep litigation moving and focus attorney efforts; early discovery conferences, mandatory disclosures, and discovery limits will streamline discovery and reduce discovery abuse; eliminating the need for oral argument will greatly reduce the costs of motions practice. Raising the jurisdictional limit will also make district court more attractive to categories of cases such as landlord-tenant disputes, or where defendants carry insurance policies of \$100,000.

<sup>56</sup> See *supra* pages 25–29.

<sup>57</sup> See *supra* pages 29–32.

<sup>58</sup> See *supra* page 33.

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

<sup>60</sup> See *supra* pages 37–38.

## **12. Alternative dispute resolution**

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

#### *Mediation*

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

#### *Private arbitration*

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

#### *Mandatory arbitration*

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

## ***b. Recommendation***

### *Mediation*

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

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

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

- Parties should consider engaging in mediation at an earlier stage than required by the rules. Certain types of cases typically require little discovery. Very early mediation can be fruitful in such cases.
- Parties should consider engaging in limited-scope mediation focused on specific issues:
  - Even when there is little possibility of settling all issues in a dispute, or of settling issues before conducting discovery, the parties should consider mediating particular issues that might be resolved.
  - In cases where discovery is likely to be extensive or contentious, the parties should consider mediating the scope and conduct of discovery.
- Parties and mediators should consider varying the format of mediation, depending on the needs of the case and disposition of the parties:
  - Conducting mediation as a series of sessions rather than a one-day event; or

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



- Using shuttle-style mediation, in which the mediator meets with the parties individually, to identify areas of potential settlement before the parties' positions are entrenched.
- Mediators should consider pre-session meetings, in person or by phone:
  - With counsel; or
  - With counsel and client.

### *Private arbitration*

The Task Force recommends promulgating a set of suggested arbitration practices:

- The arbitrator should identify the scope of arbitration with input from the parties.
- Parties should consider limiting or eliminating the length and number of depositions and the extent of expert discovery.
- Parties should consider voluntarily narrowing the scope of arbitration at outset. For example, selecting a single arbitrator; conducting focused single-issue arbitration; establishing specific limitations on relief.
- If not already contractually agreed among the parties, arbitrators should consider scheduling planning and coordinating meetings upon selection to set the terms and conditions of the arbitration process.
- The following topics should be addressed in the arbitration contract. If they are not, the arbitrator or panel should address them in early rulings:
  - Whether there is a challenge to arbitration;
  - Whether arbitration should be global, addressing and resolving all issues, or whether its scope should be limited to one or more specific issues;
  - What procedural rules will govern conduct and location of proceedings (for example, AAA, JAMS, JDR, or some other protocol);
  - What limits will be placed on discovery, for example, lay-down discovery or e-discovery rules. Without some discovery limits, there is little difference between arbitration and full-scale litigation;
  - What jurisdiction's substantive law will govern resolution of the dispute;
  - Whether mediation is required either before arbitration or early in arbitration, and if so on what schedule;
  - What interim relief, if any, will be available, whether injunctive or otherwise;
  - Whether to allow expedited electronic exchange of briefs, submittals, and other documents;

- Whether to allow pre-hearing motions for summary judgment or partial summary judgment;
- What timing should be required for the arbitration process: (1) mandate either to conduct or consider early mediation; (2) date(s) to commence and complete discovery; (3) date for final coordinating conference prior to hearing on the merits; (4) date to commence hearing on the merits; (5) duration of the hearing day, and possible imposition of time limits on presentation of evidence and argument; and
- Final award: (1) time limit on the arbitrator or panel between completion of hearing and issuance of award; (2) form of award (basic, reasoned, or detailed findings and conclusions), including a specific statement if the parties do not want a compromise or “split the baby” award; (3) what permanent relief may be granted (legal or equitable); (4) whether to allow award of costs and fees; and (5) whether to allow judicial review.

#### *Mandatory arbitration*

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

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

##### *Mediation*

Early mediation offers benefits both over litigation and late-stage mediation.<sup>62</sup> When the ADR Subcommittee surveyed Washington State mediators, it found that parties who

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

engaged in early mediation realized significant savings: costs associated with discovery, trial preparation, and expert witnesses could be largely avoided. Those parties also avoided other negative effects of undergoing litigation—often a stressful and disruptive process—by shortening the time between the emergence of a problem and finding a solution.

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

The Task Force recommends mediation after party depositions because such depositions can occur before the bulk of other discovery costs have accrued, yet are highly effective at clarifying and resolving factual issues. This should not be viewed as an authoritative definition of early mediation, but rather as a date on which some of the benefits of truly early mediation may still be realized. Because the time at which early mediation will be most fruitful will vary depending on the type of case, the individual WSBA sections will be best positioned to develop guidelines about what early mediation means to their respective members.

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

#### *Private arbitration*

Arbitration's traditional advantage over civil litigation, reduced time and expense, has been eroded by the expanding scope of discovery in arbitration. Streamlining the typical arbitration would make the practice more efficient and attractive. However, private arbitration is a contractual affair between the parties, into which the Bar has little

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

authority to intrude. For that reason, the Task Force recommends creating a series of best practices to which arbitrators and arbitrating parties can refer. These practices are based on the professional experience of the members of the ADR Subcommittee, as well as input from experienced arbitrators and lawyers who frequently participate in arbitration.

*Mandatory arbitration*

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

## Conclusion

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

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

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

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