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Joan E. Fairbanks
 Access to Justice Manager
 (206) 727-8282
 joanf@wsba.org



THE ALLIANCE
 for Equal Justice
 SUPPORTER

April 29, 2013

Rules Committee
 Supreme Court of Washington
 P.O. Box 40929
 Olympia, WA 98504-0929
 ATTN: Denise Foster

Dear Members of the Rules Committee:

Attached please find the Access to Justice Board's Comments on the proposed Family Law Civil Rules.

Thank you for your consideration.

Sincerely,

Kirsten Barron, Chair
 Access to Justice Board

Attachment

Cc: Access to Justice Board

RECEIVED
 SUPREME COURT
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 BY RONALD R. CARPENTER
 CLERK

**Access to Justice Board
Comments to the
Proposed Family Law Civil Rules
April 29, 2013**

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BY RONALD R. CARPENTER
LRTF

On July 26, 2011, members of the Washington State Bar Association Local Rules Task Force (LRTF) presented the Proposed Family Law Civil Rules (FLCR) to the Access to Justice (ATJ) Board's Justice Without Barriers Committee (JWOB) for review and comment. The ATJ Board subsequently approved those comments and forwarded them to the LRTF on August 31, 2011.

The ATJ Board's response applauded the efforts of the Local Rules Task Force as a positive step forward, but also put forth a number of detailed comments about the content of the proposed rules. These comments focused primarily on the impact of the proposed rules on pro se litigants who constitute the majority of family law litigants. The Board also looked at the potential impact of the rules on attorneys and other individuals who may advise and/or assist pro se litigants in person by telephone or through self-help publications, videos or other statewide resources.

In reviewing the Family Law Civil Rules currently posted for comment by the Supreme Court, the ATJ Board notes that none of its August 24, 2011 comments were incorporated by the LRTF, nor was there any response by the LRTF to the ATJ Board relative to the content of the ATJ Board submission. Thus, the ATJ Board respectfully submits to the Court's Rules Committee both its earlier comments and some significant complementary and additional insights, all of which are set forth below.

The Supreme Court established the ATJ Board to work to achieve equal access to justice for those facing economic and other significant barriers, including specifically to "address existing and proposed laws, rules and regulations that may adversely affect meaningful access to the civil justice system." (Supreme Court Order Establishing the ATJ Board).

From an access to justice perspective, variations in local rules can pose significant barriers to the justice system for pro se individuals. Variations also pose challenges for attorneys and other individuals who advise and/or assist pro se family law litigants in person, by telephone or through developing self-help publications, videos or other statewide resources. Justice is best served when all counties have

the same or similar rules and when those rules do not impose burdensome and costly requirements on those for whom our current system of justice can be overwhelming and confusing.

While there is no easy solution for addressing the current lack of uniformity of local rules in our state, the ATJ Board recommends that the Court consider the following short and long-term options for creating a more accessible, navigable and usable justice system for those appearing pro se. These suggestions will facilitate the statewide efforts currently underway by the Washington State Bar Association, civil legal aid providers, the Administrative Office of the Courts, and other stakeholders to provide resources and assistance:

- Adopt the ATJ Board's proposed changes to the Family Law Civil Rules
- Direct the counties to move toward the elimination of unnecessary local rules and toward the adoption of more uniform rules
- Issue and enforce a ban on the creation of new local rules
- Reduce the number of variations in the local rules from 39 to a much smaller number (i.e., three or five)

LACK OF UNIFORMITY

The rules as written do not create uniformity for all counties. Instead they encourage counties to adopt or maintain differing rules in a number of significant areas, including page limits, motion timeframes, extrajudicial services, automatic exchange of information and automatic restraining orders. The rules regarding page limits and motion timeframes are particularly troublesome for prose litigants because these rules generally must be applied at the beginning of a case, when time is often tight and the litigant has many tasks that s/he needs to complete in order to file or respond to a motion. Even if not required to be uniform, differing local rules with respect to page limits and motion timeframes should be discouraged rather than encouraged.

There are other family law provisions in rules 100 through 114 that do not inform a litigant of what the actual rule is. Instead, these proposed rules serve the function of informing local courts of the parameters within which they may or must develop their local rules. Incorporating these rules within the Family Law Civil Rules will be confusing to litigants and attorneys. Either another means or method of performing this function should be used, or these rules should be separately and clearly directed to the local courts and further require that any proposed local rules must be reviewed and approved, modified or rejected by the Supreme Court Rules

Committee, and not until there is full approval can the proposed local rules become effective.

In addition, legal aid and pro bono attorneys from programs around the state generally attempt to convey a great deal of substantive legal information when they assist pro se litigants. Variation in these crucial local rules prevents uniformity in different counties and forces litigants and the people advising or assisting them to learn about how to use different content and procedures in different counties required by the local rules, as well as the statewide rules. Researching and explaining local rules to pro se litigants consumes time that could otherwise be spent giving them advice about the merits of their cases and the evidence and arguments they should make. For litigants who are represented, these complexities also require additional attorney time and increase fees and expenses.

PROMULGATION AND PROLIFERATION OF LOCAL RULES

The proposed FLCR 83, Local Rules of Court, as written provides direction to the local courts on how to number local rules and allows adoption of new local rules so long as they are adopted in accordance with GR 7. GR 7, which requires the courts to obtain approval from the Supreme Court before promulgating non-emergency local rules, has not effectively prevented the proliferation of local rules in the past. The ATJ Board suggests that the proposed rules would be far more helpful if they explicitly limit the local courts' ability to do the following:

1. Develop new local rules;
2. Alter the language in the Family Law Civil Rules; and
3. Maintain existing local rules that differ from or are not contemplated by the Proposed Family Law Civil Rules, further provided that any such existing local rules are reviewed and approved by the Supreme Court Rules Committee on or before ninety days of the adoption of these Family Law Civil Rules by the Supreme Court.

Without explicit direction that limits the counties' ability to adopt or adapt new or different local rules, and without an effective enforcement mechanism, the proliferation of local rules is likely to continue, to the detriment of access to justice, fair process and outcome for all people served by the courts, whether pro se or represented by an attorney.

Local rules should reflect clear and meritorious necessity and consistency with Supreme Court Rules and Supreme Court-approved local rules. In order to be adopted and given effect, proposed local rules should be submitted in advance to

the Supreme Court Rules Committee for its review, approval, modification or rejection, and unless and until approved shall not be adopted or become effective. The purpose is to assure that any and all local rules are necessary, fully consistent with access to justice, fair process and outcome for all, and fully consistent with Supreme Court Rules and other approved local rules.

DETRIMENTAL EFFECTS ON ACCESS TO JUSTICE

Some proposed rules may well have detrimental effects on access to justice and could be modified to promote better, more affordable and more meaningful access to justice. The ATJ Board finds that mandatory participation in extra-judicial services is often very burdensome to pro se and low income litigants and urges the LRTF to limit the opportunity for counties to impose additional extra-judicial requirements and fees and surcharges to meet those requirements.

Proposed FLCR's 100 Alternative Dispute Resolution, 101 Courthouse Facilitators and 102 Parenting Seminars, all contain helpful provisions that require the counties to waive the requirements for these extra-judicial services when "either of the parties is indigent or such referral would pose a significant financial hardship on either party" unless the county pays for the services. This language is crucial from an ATJ perspective because the various fees and surcharges imposed by the counties have presented an increasing barrier to access to justice for low income people. Further, very often the availability of fee waiver is not readily apparent in local rules and procedures, is difficult to find, learn about or understand, and difficult and burdensome to apply for and obtain.

The ATJ Board suggests broadening the language in FLCR 100, 101 and 102 to read:

1. *In cases where either party demonstrates good cause such as significant financial hardship, significant geographic distance between the litigant's residence and the location where the services are offered, scheduling conflicts created by work or other ongoing obligations that make participation impractical or impossible, limited English proficiency where the services are not offered in the litigant's primary language, disability or other reasons constituting good cause, the court shall not require participation in such services. In the case of financial hardship, the court may require the services only if:*
 - a. *the court waives the fee or provides funding to pay for the service and*

- b. *travel, missed work and other costs associated with the requirement do not present an undue burden on the litigant.*

The availability of the foregoing relief and what is required shall be provided to all litigants, along with information as to how to apply for such relief and provide such information to the court, including an online capability. Such information and process shall be accessible, reasonably understandable, and usable.

The ATJ Board also recommends that the language in proposed FLCR 101 (Courthouse Facilitator) be amended to state that in no case may proceedings be delayed, or entry of orders denied, because a party has not met with the family law facilitator before presenting the paperwork to the court. In many counties, the facilitators are all too few, have only limited hours of availability and are booked out weeks in advance. Pro se litigants should be given the same opportunity as represented litigants to promptly seek relief from the court.

Proposed FLCR 16(c) information exchange-automatic discovery requires the parties to exchange certain information in a case. The ATJ Board is concerned that proposed FLCR 16 (c) does not contain any provisions to allow domestic violence survivors or others for whom disclosure of certain information would be dangerous or otherwise inappropriate to redact or omit such information. By contrast, a litigant served with a formal discovery request would have the opportunity to seek a protective order before providing the requested information. If proposed FLCR 16(c) is amended to allow parties to redact certain information subject to later court ruling, the ATJ Board would support this rule. If that amendment is not adopted, the ATJ Board suggests that FLCR 16 be deleted, allowing the ordinary discovery rules to govern the exchange of information.

The ATJ Board also suggests that the information exchange should happen earlier in the case, with the exchange date linked to the date the case and response are filed, rather than the date of the settlement conference or trial.

Finally, in proposed FLCR 16(d)(5), the ATJ Board strongly suggests deletion of “legal records” from the automatic temporary orders. The current language requires access to “all tax, financial, legal and household records.” The terms “tax, financial and household” are broad, but have some definition, relevancy and capability of reasonable interpretation. The term “legal records” is disastrously vague, broad and undefined. It is essentially limitless in scope and relevancy, and limitless and unpredictable in potential interpretation – by parties, lawyers and courts. There is no concept of relevancy, and would include records dating back to

a person's childhood, include family, relatives, friends, colleagues and associates, and regarding issues completely unrelated to the family law litigation. Some legal records are also legally privileged or otherwise protected in whole or in part by other court rules, and state and federal statutes and regulations. Think about all the unnecessary effort and expense these words would impose on the parties, the lawyers and the courts, and the unnecessary motions, briefs, lawyer conferences and court hearings – plus in the family law context, would add another opportunity for unhappy and resentful people to harass each other. And, of course, if there are relevant and/or specific legal records appropriate for access and production which are not already covered by “tax, financial and household” records, they will very likely be reasonably identifiable and voluntarily produced, or a specific request will in almost all instances be quickly and properly handled.

READABILITY/PLAIN LANGUAGE

The ATJ Board/Administrative Office of the Courts Pro Se Project has been hard at work converting mandatory family law court forms into plain language format, and is very familiar with the issue of plain language with respect to how well the justice system serves pro se litigants. The FLCR rules as currently drafted are not in plain language and maintain the legalese that has been the standard in our state.

Because of our familiarity with developing plain language documents, we recognize that to re-write the proposed Family Law Civil Rules in plain language would be a very large task that would add considerable time and cost to the creation of the new rules. We believe, however, that in the long run the FLCRs could be written in plain English, and in doing so will make these rules accessible to the vast majority of pro se family law litigants.

We suggest three palliative measures that can be taken immediately:

1. Add a glossary to the front of the rules to define in plain language the legal jargon terms found within the rules themselves. We suggest the glossary be quite extensive, built on the assumption that any word or words that have specific legal meaning, as opposed to common meaning, need to be defined. ATJ Board/AOC Pro Se Project Committee members would be willing to help in this effort.
2. When convenient, words should routinely be substituted by a common word equivalent that is better understood. For example, the word “must” is a good substitute for the word “shall” employed in a legal sense, since the common use of “shall” implies more leeway than the rules actually allow. (There are court cases that approve of this substitution.)

3. Footnotes or some other means of reference should be added that note which mandatory family law forms would meet the requirement of the particular document noted in a civil rule. For example, when the word “order” appears, the forms that can be used for that type of order should be noted in the footnote.

To conclude, the ATJ Board thanks the Local Rule Task Force for all the time and effort that have gone into the proposed Family Law Civil Rules. We believe all of us understand that the current inconsistent local rules present significant barriers to accessing the justice system for pro se litigants, and unnecessary difficulty and expense for attorneys and represented litigants as well. However, the ATJ Board believes the proposed FLCRs as currently written will not reduce those barriers for the reasons discussed above, and in some instances will add to or intensify them. We very much applaud the attempt of the LRTF to make family law rules more uniform and consistent statewide but that goal is not met through the proposed FLCRs in their current form and language. We strongly suggest that adopting the ATJ Board’s recommendations to the proposed FLCRs will go a long way toward avoiding or minimizing the problems and constructively address our common goals.

We appreciate your careful consideration.

Kirsten Barron

A handwritten signature in black ink, appearing to read "Kirsten Barron". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chair, Access to Justice Board

Approved by the Access to Justice Board

April 26, 2013