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April 26, 2023

Justice Charles Johnson, Chair,
Washington State Supreme Court Rules Committee,
& the Chief Justice and Associate Justices of the
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: COMMENT ON "GR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY"

Dear Justice Johnson, Chief Justice Gonzales, and Associate Justices:

The WSBA spent over ten years trying to find ways to reduce the costs of civil litigation in Washington. *See* Memorandum to Board of Governors from Ken Masters, Chair of the Civil Litigation Rules Drafting Task Force ("Memo"), dated July 11, 2018, and submitted to the BOG at its September 28, 2018 Meeting (attached and incorporated by this reference).[1] After years of effort, the Escalating Costs of Civil Litigation Task Force made quite a few recommendations, the most significant of which was that the principle of cooperation stood the best chance of achieving the laudable goal of making civil litigation less expensive in Washington. The BOG agreed, adopting that principle.

The Rules Drafting Task Force therefore drafted that rule into CR 1:[2]

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

As the original Task Force, the Rules Drafting Task force, and BOG all agreed, this rule is the lynchpin of any real hope of lowering the costs of civil litigation in Washington.

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[1] The Memo attached hundreds of pages of proposed rules changes. Those thoroughly vetted drafts are available on the WSBA's website for the Sept. 28, 2018 BOG Meeting.

[2] Copy attached to Memo as Enclosure 1.

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Unfortunately, a subsequent BOG rejected its own proposal. We believe this Court should embrace it by adopting proposed CR 1, together with the many other places in the discovery rules where we incorporated the spirit of cooperation, perhaps most importantly in CR 26. *See* Memo & Enclosures.

This Court has frequently recognized the spirit of cooperation embodied in our court rules, perhaps most importantly in ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993): "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials."[3] This Court recently reiterated the need for good faith cooperation:

> Our civil rules require parties to engage in discovery in good faith. . . . CR 26, 37. Parties "must *fully* answer all interrogatories and all requests for production, unless a specific and clear objection is made." ***Fisons***, 122 Wn.2d at 354 (citing CR 33(a), 34(b)). Our liberal discovery rules aim to make civil trials "'a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Id.* at 342 (internal quotation marks omitted) (quoting ***Gammon v. Clark Equip. Co.***, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984)). "'This system obviously cannot succeed without the **full cooperation** of the parties'" .... [Bold emphasis added.]

Henderson v. Thompson, 200 Wn.2d 417, 440-41, 518 P.3d 1011 (2022).

Although the need for full cooperation is "obvious" to this Court, as that last sentence goes on to discuss, our courts nonetheless frequently issue sanctions for discovery abuse. How many appellate decisions have addressed the sad spectacle of sanctions, only to see them spiral ever upward? A search for ***Fisons*** within the same sentence as "sanctions" pulls up 197 decisions just since 1993. Obviously, the "spirit of cooperation" has not entered into the Washington State Bar. *Cf.* Ezek. 2:2.[4]

The Task Forces whose job it was to find ways to lower the costs of civil litigation for the roughly 85% of Washingtonians who cannot afford a lawyer – or at least don't think they can – believed that the best way to instill cooperation in the Bar was to adopt a rule telling lawyers that they *must* cooperate. Indeed, to tell them that one does not *litigate* discovery, so much as *produce* discovery in a spirit of *cooperation*. Many trial lawyers still believe that the antediluvian "duty of zealous representation" *forbids* them from cooperating with opposing counsel. Even 35 decisions echoing the spirit of cooperation have not disabused them of this destructive myth. Nor have 197 sanctions decisions.

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[3] The phrase "spirit of cooperation" appears in no fewer than 35 Washington appellate decisions.

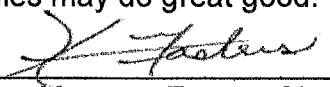
[4] "The Spirit came into me as he spoke, and he set me on my feet. I listened carefully to his words."

Litigating discovery is very expensive. Indeed, it seems fair to say that a significant percentage of the escalating cost of civil litigation is the wildly escalating cost of litigating discovery. There has to be a better way.

A new, more direct approach is now available. If this Court *tells* lawyers – in the Court Rules – that they *must* **cooperate** in all matters (including discovery) there is some hope that the scales will fall from their eyes. Lawyers are pretty good at following rules. They are not so good at researching case law about what they *should not* do – what they may do, yes, but not what they *mayn't* do. "Thou shall" is more direct than "thou shalt not."

The newer BOG's major complaint with the cooperation rule was that the word "cooperation" was undefined. This, even though (1) at least *35* decisions *require* cooperation in discovery (apparently, our courts know what cooperation means); (2) the rule's actual language is *reasonably cooperate*; and (3) the Memo made a detailed effort – as *the Drafter's Comments* – to flesh out the term. *See* Memo at 4-6. Reasonable cooperation is no mystery: Washington courts have echoed the spirit of cooperation many times, and existing rules governing lawyers' conduct require them to act reasonably. *See, e.g.*, RPC 3.2 ("reasonable efforts to expedite litigation"); RPC 1.01(h) ("'reasonably' . . . denotes the conduct of a reasonably prudent and competent lawyer").

We ask this Court to adopt our proposed CR 1, together with the many other places in the discovery rules where we incorporated the spirit of cooperation, perhaps most importantly in CR 26. *See* Memo & Enclosures. While one never knows until one tries, it seems unlikely that any harm will arise from adopting a rule telling lawyers what this Court has told them many times: treat one another as you would wish to be treated. The Tasks Forces – including their undersigned former participants – believe that the cooperation rules may do great good.



Ken Masters, Former Chair
ECCL Rules Drafting Task Force (RDTF)

/s/
Jane Morrow, Former Chair
ECCL RDTF Cooperation

/s/
Roger Wynne, Former Chair
ECCL RDTF Initial Case Schedules

/s/
Hillary Evans Graber, Former Chair
ECCL RDTF Individual Case Assignments & Pretrial Conferences

/s/
Isham Reavis, Assisting Non-member
ECCL Task Force

WASHINGTON STATE
BAR ASSOCIATION

MEMORANDUM

To: The President, President-Elect, Immediate-Past President, and Board of Governors

From: Ken Masters, Chair, Civil Litigation Rules Drafting Task Force

Date: July 11, 2018

Re: Suggested Amendments to CR 1; New CR 3.1; Amendments to CR 11; Amendments to CR 26; Amendments to CR 37; New CR 53.5; Amendments to CR 77

FIRST READING:

THE HISTORY OF THESE SUGGESTED RULES

Escalating Cost of Civil Litigation Task Force

Beginning in 2001, our Supreme Court began to develop a Civil Legal Needs Study. By 2003, the Study had established that 88% of low income people did not obtain the assistance of a lawyer for their legal problems.

A 2009 survey of the ABA's Litigation Section that received 3,300 responses showed 81% believed litigation was too expensive, and 89% believed litigation costs are disproportionate for small cases. The same year, a WSBA member survey that received 2,309 responses showed that 75% *agreed* (39%) or *strongly agreed* (36%) that litigation has grown too expensive.

In response, this Board of Governors chartered its Task Force on the Escalating Costs of Civil Litigation (ECCL) in 2011. The Task Force contained a veritable who's who of litigators (12), judges (4), and other access-to-justice champions (33). The ECCL was chartered 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.

The initial 18-month charter was extended three times. In 2015, the ECCL submitted its **final report** to the Board of Governors, with numerous recommendations.

Also in 2015, the Civil Legal Needs Study was updated. It showed little improvement in most areas, and a worsening in some.

The BOG's Adopted Recommendations

Accepting the ECCL Report, the Board of Governors determined to study its recommendations, one by one, over the course of an entire year. After extensive study and discussion, including feedback from a wide variety of stakeholders, of the dozen major areas in which the ECCL made recommendations, the BOG wholly adopted six, and partially adopted two, in **July 2016**:

Wholly adopted ECCL recommendations:

Initial Case Schedules
Judicial Assignment
Mandatory Discovery Conferences
Mandatory Initial Disclosures
Pretrial Conferences
Early Alternative Dispute Resolution

Partially adopted ECCL recommendations:

Proportionality (rejected) & Cooperation (adopted)
District Court (adopting some, but not all recommendations)

The BOG shared all of the above information with the Supreme Court, which indicated an interest in seeing suggested rules to implement these recommendations.

The ECCL Rules Drafting Task Force

The Board of Governors therefore chartered this Rules Drafting Task Force in November 2016, to suggest rules to implement the BOG's eight categories of recommendations. Specifically, the RDTF was chartered to

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

- prepare draft amendments to the Superior Court Civil Rules and/or the Civil Rules for Courts of Limited Jurisdiction (together with necessary and appropriate conforming amendments to other rules);

- solicit and receive input from lawyers, judges, and other interested persons and entities, on the suggested amendments;

- after consideration of the input, present a set of suggested rule amendments to the Board of Governors.

The roster – an outstanding array of genuine Rules Geeks, including four former Chairs of the WSBA Rules Committee, judges from the district, superior, and appellate courts, and numerous experienced litigators – is attached.

The RTDF divided itself into the following subcommittees:

Initial Case Schedules, chaired by Roger Wynne

Individual Judicial Assignments and Pretrial Conferences, chaired by Hillary Evans Graber

Early Discovery Conferences, chaired by Hon. John Ruhl

Initial Disclosures, chaired by Hon. Rebecca Glasgow

Cooperation, chaired by Jane Morrow

Mediation, chaired by Averil Rothrock

These groups studied the original ECCL Report, the Board of Governor's Report, numerous other studies and original sources, numerous other state and federal court rules, and our own civil rules. They gradually developed draft rules, which were then further studied/scrubbed by the RDTF as a whole.

Once acceptable drafts were developed, the suggested rules were vetted to a wide array of stakeholders. *See attached* **Stakeholders List**. These included a wide array of WSBA Sections, judicial organizations, and minority and specialty bars. RDTF proceedings, drafts, etc. were posted on the WSBA website, and input was widely solicited. All input was gratefully accepted, and carefully reviewed.

Based on the comments received, further redrafting/editing/scrubbing occurred. Eventually, the RDTF voted on each suggested rule, making additional amendments, edits, and other necessary changes, in response to stakeholder feedback.

The Culmination of Roughly a Decade of Volunteer Dedication

This long, careful, and painstaking process has produced the proposals discussed below. The WSBA has invested essentially a decade of effort – literally thousands, or perhaps even tens-of-thousands of hours of volunteer dedication – into producing these suggestions.

The RDTF firmly believes these suggestions have a real potential to reduce the cost of civil litigation for all Washington citizens, for the reasons specified in the original ECCL Report, in the Board's Report, and below. We highly commend them to you.

THE SUGGESTED RULES:

CR 1: Cooperation

The RDTF focused on a 15-month endeavor to draft civil rule proposals recognizing the principle of cooperation adopted by the Board of Governors. Although there appears to be a general consensus that cooperation is an essential element to just, speedy, and inexpensive civil litigation (just as it so commonly is in criminal litigation) there currently is no provision expressly requiring cooperation in the Civil Rules.

The consensus on the RDTF was to embody the general principle, and then to draft specific rules. To this end, the RDTF focused on the cooperation principle stated on page 28 of the ECCL's Final Report:

> [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.

This ECCL recommended rule amendment came directly from CR 1 – SCOPE OF RULES of the Washington State Rules for Superior Court.

The RDTF further investigated where the duty to cooperate arises in the law. All court rules must be read in light of attorneys' duties and principles embodied in the Rules of Professional Conduct. Among other things, the RPCs require that

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RPC 3.2. The term "reasonable" is defined as follows in RPC 1.0A(h):

> "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

The RTDF ultimately concluded that lawyers have a duty of "reasonable cooperation" to secure the just, speedy, ***and inexpensive*** determination of every action.

In light of the above RPCs, and others, "reasonable cooperation" suggests efforts to expedite litigation consistent with the prudence and competence required of all lawyers in pursuing the interests of their clients, including treating everyone with courtesy and respect in all phases of the litigation. *See, e.g.*, RPC 1.1 ("A lawyer shall provide competent representation to a client"); RPC 1.3 ("A lawyer shall act with reasonable . . . diligence in representing a client") & Comment [1] ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect"); RPC 3.4 ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence . . .; (d) in pretrial procedure, make a frivolous discovery

request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party").

All of this is consistent with an attorney's duties as an advocate, as the RPC Preamble makes clear:

> (1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.
>
> (2) . . . As advocate, a lawyer conscientiously and ardently asserts the client's position under the rules of the adversary system. . . .
>
> . . .
>
> (5) . . . A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.
>
> . . .
>
> (9) . . . These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Beyond reading "reasonable cooperation" in light of attorney ethical duties – always a must with any court rule[1] – the RDTF did not believe it was necessary or advisable to define "reasonable cooperation" in the rule itself. As a practical matter, court rules generally do not define their own terms (that is far more common in statutes).

Rather, courts interpret the language of court rules, preferring plain language over technical interpretations. Common English definitions of "cooperation" include, the "actions of someone who is being helpful by doing what is wanted or asked for: common effort"; the "act of working together to come up with the most efficient and cost-effective solution to a problem or issue"; and "people working toward a common end." While an attorney's advocacy duties within our adversary system may sometimes preclude a fully "common end" approach, making a "common effort" to resolve the parties' dispute with "the most efficient and cost-effective solution to a problem or issue" is fully consistent with those duties. That is the spirit of this new rule: working together to secure the just, speedy, and inexpensive determination of every action, consistent with the best interests of each client.

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[1] Although *pro se* litigants will also have to follow these rules, they are held to the standard of care of a lawyer, so are expected to meet the ethical standards as well.

Suggested CR 1 is a broad statement of purpose whose point is to increase awareness of its overarching principles. Ultimately, cooperation will be case and fact specific and will be developed not only on a case-by-case basis, but more so on an issue-by-issue basis. Some objected that this would encourage more litigation. Perhaps. But the RDTF's objective was not to reduce necessary litigation. Rather, it was to reduce *the costs* of that litigation. Requiring reasonable cooperation among all those concerned is highly likely to achieve that end.

New CR 3.1: Initial Case Schedules

The RTDF recommends a new Civil Rule 3.1, and an amended Civil Rule 26(b)(5), to require initial case schedules where appropriate. New CR 3.1(a) would set the default requirement for a Superior Court to issue an initial case schedule with deadlines stated in terms of weeks before the trial date, which would be set for 52 weeks after the action is commenced. Below is a helpful chart illustrating how those deadlines would fall on a calendar for an action commenced January 2.

Illustration of a Proposed Initial Case Schedule

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

Pretrial report	**4**	Tuesday, December 4, 2018
Pretrial conference	**3**	Tuesday, December 11, 2018
Trial	**0**	Tuesday, January 1, 2019

Several of the events on the schedule (such as for a discovery plan, initial disclosures, and early mediation) do not currently exist in the Civil Rules – but are proposed herewith.

To add substance to the deadline for expert witness disclosures, the proposal to amend CR 26(b)(5) requires each disclosure to include the type of information required in response to an expert interrogatory.

New CR 3.1(b) clarifies how to set a deadline falling outside a business day, and subsection (c) requires timely service of the schedule.

Subsection (d) authorizes the court to modify an initial case schedule on its own initiative or a motion. Complexity or impracticability are stated grounds for a motion to modify, as is "good cause," backed by a demonstration of due diligence. The court is also required to modify the schedule to respect an order preventing direct interaction between persons.

Subsection (e) lists many specific types of actions exempt from the rule.

Subsection (f) authorizes each court to exempt any individual action or type of action for which the court deems compliance with the rule to be impracticable.

The BOG wisely recommended a case schedule. We think this will reduce the costs of civil litigation across Washington.

CR 11 & 37: Requiring Cooperation

Because the Board of Governors voted to support "requiring cooperation as a guiding principle," the RDTF reviewed how it could "require cooperation," or alternatively, allow for sanctions for failing to cooperate. The proposed CR 11 and CR 37 permit sanctions for failing to cooperate in pleadings, motions, and legal memoranda that go beyond discovery sanctions currently available.

Proposed CR 11 is designed to be a more specific statement of this purpose. Its goal is to increase attorney awareness of CR 1 and its overarching principles in the process of litigation, and to provide a sanction provision for failures to reasonably cooperate.

Various questions were raised during vetting and scrubbing whether sanctions would be best placed in CR 37. But CR 37 applies to discovery. The RTDF recommends a broader scope for cooperation, consistent with the Board's direction.

Stakeholders recognized that the RPCs already require a certain level of professional conduct including that required under RPC 3.1, 3.4, and 8.4. But as discussed above with proposed CR 1, this does not render the duty to reasonably cooperate redundant. An attorney's failure to cooperate under the RPCs may result in a complaint and disciplinary processes, but it is highly unlikely that an opposing counsel encountering an uncooperative attorney would file a bar complaint about the conduct, unless it was frequent, persistent, or particularly egregious. Also, using the disciplinary process to deal with uncooperative behavior has a less direct effect, if any, on the costs of civil litigation. Finally, the RPCs would not be a useful precedent when proceeding with a sanctions motion addressing cooperation. The RPCs give no basis in motions practice for the imposition of sanctions.

We also recognize the risk of inviting new CR 11 motions with any proposed amendment. But again, our task Is not to decrease litigation, but to decrease the costs of litigation. Permitting sanctions for failures to reasonably cooperate serves that mission.

We are also aware of independent policies and guidelines such as the King County Bar Association Guidelines of Professional Courtesy, the WSBA's Creed of Professionalism, and judges' individual guidelines of practice within their courts. But we remain committed to the term "reasonably cooperate." The addition of the word "reasonably" is intended to allow for a judge's discretion based on the specific circumstances in each case brought before the court.

FRCP 11 provides for notice and a reasonable opportunity to respond. The subcommittee agreed to add a similar cooperation obligation under CR 11 with the requirement that notice be provided to the alleged offending party before going to the Court. The Task Force also included the cooperation element in a proposal for CR 26 and CR 37. These additions would encompass general discovery.

Adoption of proposed CR 11 will stand as a precedent in this nation for changing the culture of civil litigation. We believe that the proposed rules will effectively reduce the cost of civil litigation.

CR 16: Pretrial Procedure

This proposal would amend CR 16 by mandating that the parties confer about and submit a pretrial report to the court. The pretrial report would cover a certain list of subjects, including material issues in dispute, agreed material facts, a list of lay and expert witnesses, exhibit index, and most importantly, ways to shorten the trial. The proposal would also modify and add to the topics the trial judge should consider at any pretrial conference.

The ECCL believed that requiring the parties to consider these issues and then meet to discuss them with the trial judge before trial would encourage the parties to prepare for trial earlier and would result in shorter, less costly trials. The ECCL Report, which provides detailed reasoning, is attached. The RDTF researched pretrial conference rules in Washington local court rules, other state's court rules, and the federal rules. This rule incorporates the list identified by the ECCL Task Force with a few additions based primarily on Washington state court local rules.

Proposed CR 16 requires counsel to meet and confer to hammer out issues in advance of trial. The proposed language will engage litigants to control trial costs, while preserving judicial discretion and authority to manage the courtroom. We believe that the rule as proposed will effectively reduce the cost of civil litigation.

CR 26: Cooperation in Discovery.

There are several proposed revisions to CR 26 to effectuate the Board of Governors' Report. In keeping with the plan of this memo, we will walk through them in order.

CR 26(a) – Cooperation

The Task Force reviewed potential language addressing cooperation that would fall under CR 26. Local Federal Rule of Civil Procedure 26(f) of the Western District of Washington provides, in part:

> Counsel are expected to cooperate with each other to reasonably limit discovery requests, to facilitate the exchange of discoverable information, and to reduce the costs of discovery.

From this, the Task Force looked at alternate proposed provisions adding similar language into either CR 26(a) or CR 26(b). Because discovery abuses are often seen in the scheduling of inspections and depositions, it was determined that the most logical place to add this proposal would under CR 26(a).

The Task Force discussed the problem with attempting to "reasonably" limit discovery requests. This went beyond our assigned task. There is, of course, a tension between accepting the ECCL Task Force cooperation recommendation, but not placing limits on discovery, as they also recommended. But the BOG resolved to do one without the other, which is certainly plausible. As a result, references to discovery limitations came out, and the final proposed CR 26 tracked the order and language of CR 26(a).

CR 26(b) – Initial Disclosures

The ECCL and the BOG recommended adopting initial disclosures in Washington.

All claims and defenses or only the disclosing party's claims and defenses? The RDTF concluded that requiring disclosure of people possessing any relevant information about any claim or defense, rather than only their own claims or defenses, would likely increase the cost of civil litigation. We came to the same conclusion regarding disclosure of documents and other relevant evidence. Requiring a party to initially disclose information related to claims or defenses raised in the opposing party's pleadings would likely require extensive searching for potential evidence even though the claims or defenses raised by the other side may not yet be clear. Traditional targeted discovery can still be conducted and would be a more efficient.

Computation of damages. We concluded that the rule should not require a computation for general and noneconomic damages. Initial disclosures would occur too early in the case to reasonably require this. A description of general and noneconomic damages is required.

Retained experts. In response to a stakeholder comments, we excluded retained experts from the required disclosure of individuals possessing relevant information. The case schedule requires expert disclosures later in the case.

Witnesses and evidence to be used solely for impeachment. After discussion, we adopted a proposal to exclude any witness and any relevant evidence that would be used solely for impeachment. This is standard litigation practice in Washington.

Insurance. We discussed feedback that some stakeholders would prefer to require initial disclosures of relevant insurance agreements in every case. We voted to require disclosing a copy of the insurance agreement only where insurance coverage is or may be contested, but to require disclosing the declarations page in every case. Requiring disclosing the full agreement in every case would lead to increased costs because it not likely necessary in the run of cases, and unnecessary motions practice for protective orders would be common. Because this rule does not limit traditional discovery, a party can request a copy of relevant insurance agreements at any time.

CR 26(c)(5)(A)(ii) – Expert Disclosures

This provision specifies the content of expert disclosures required under the initial case schedule. Being specific lowers uncertainty, increasing compliance and lowering costs.

In sum, The RTDF agrees with the BOG that initial disclosures will decrease the costs of civil litigation in Washington.

CR 30: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 32: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 33: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 34: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 36: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 37: Cooperation & Technical Revisions

Most of this rule is amended simply to reflect the renumbering of other rules. No substantive change is intended. The changes regarding reasonable cooperation are discussed *supra*.

CR 43: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

CR 53.3: Technical Revision

This rule is amended simply to reflect the renumbering of other rules. No substantive change is intended.

New CR 53.5: Early Mediation

This new proposed CR 53.5 governs required mediation in civil cases. A case schedule or court order may require mediation. For example, the proposed new CR 3.1 requires an initial case schedule that will include an early, mandatory mediation deadline. Proposed CR 3.1 excepts some civil cases from this requirement.

Additionally, proposed CR 53.5(a) allows the court to order any parties to mediate pursuant to this rule even where not otherwise required. In most cases, a mediation required by a civil case schedule must occur after the parties receive Initial Disclosures, but before expert disclosures must be prepared and served. *See* proposed CR 3.1(a) and proposed CR 26(b). This is approximately 32 weeks before trial in a case that is to be resolved on a one-year timetable.

Proposed CR 53.5 requires parties to begin working together on a negotiated resolution of their case earlier rather than later. The goal is that the rule will help litigants resolve or progress in their cases, and that cost savings may be achieved in those cases that resolve.

Proposed CR 53.5 works in concert with Uniform Mediation Act, Chapter 7.07 RCW, which applies to mediations. A potential for conflict exists regarding CR 53.5(h) and RCW 7.07.020(3). Both address confidentiality of communications involving mediation. In the event of a conflict, CR 53.5(h) would control a party's ability to present evidence to substantiate a claim for sanctions for failure to comply with the requirements of CR 53.5. If such evidence might fall within a privilege created by RCW 7.07.020(3), the statutory confidentiality privilege would be abrogated for purposes of allowing a party to seek sanctions under proposed CR 53.5(h).

No one-size-fits-all mediation is required by this rule. Rather, we sought to allow sufficient flexibility in the form of the mediation, so that the procedures can evolve as the mediation evolves and can be adapted to each case and the parties involved.
Proposed CR 53.5(d)(1)-(2) require the mediator to confer with the parties and establish a procedure suited to the circumstances and input of the parties.

Additionally, the parties are not required to finish mediation to comply with proposed CR 53.5. As stated in CR 53.5(e), the parties must certify that they "held or commenced a mediation." Their efforts with the mediator can continue so long as they commenced a mediation within the time required.

Proposed CR 53.5(g) responds to a concern that certain cases might not be ready for mediation within the deadline, even though the deadline occurs after Initial Disclosures are served. This provision allows for an extension of the mediation deadline of no more than 60 days when specific discovery objectives are identified. A longer extension would undermine the purpose and overall plan that mandatory mediations occur "early," *i.e.*, before completing discovery.

We also created several provisions within proposed CR 53.5(c) to assure access to justice. Parties may select any person as a mediator if they agree. This allows flexibility and control. Parties also may obtain fee relief from the Court, including apportionment of the mediator's fee among parties with ability to pay, payment on a sliding scale, and assignment of a *pro bono* mediator, or any combination thereof. Proposed CR 53.5(b)(5) requires a person on the list of qualified mediators to accept appointment to one mediation each calendar year on a *pro bono* basis.

The RDTF agrees with the ECCL and the BOG that early mediation can be a powerful tool for reducing the costs of civil litigation. We commend it to you.

Suggested Adoption of Recommended ADR Practices

The BOG requested recommended "alternative dispute resolution practices." *See* July 2016 Board of Governors Report at IV.12. We sought input from many sources.
We perceive no conflict with any rules or statutes, but recommend that adoption of these best practices be advisory only. The can be posted on the Courts' website.

New CR 77(i): Judicial Assignment

The ECCL and the BOG recognized that having one judge assigned to a civil case from start to finish can improve judicial efficiency and reduce the cost of litigation. A judge who is already familiar with the parties and issues can more effectively manage discovery disputes, pretrial motions, and trial.

On the other hand, counties vary significantly with respect to the number of judges that hear civil cases. The ECCL recognized the importance of adopting a rule that allowed smaller jurisdictions to manage civil cases in the most efficient manner possible. Proposed CR 77(i) uses the word "should" instead of the ECCL's "shall."

In counties where judicial pre-assignment is not favored, judges and court administrators value the ability to assign trials and hearings as they arise so as to run the court schedule more efficiently – this is especially true in smaller jurisdictions. They also value the ability to delegate work to other judges or commissioners on an as-needed basis. Most courts that do not require pre-assignment allow litigants or court administration to request pre-assignment for large or complex cases.

To encourage judicial pre-assignment of cases where practicable, this proposal encourages courts to assign cases to a specific ***judicial officer***, expanding the concept of judicial pre-assignment to include all judicial officers.

All of the comments we received on this proposal were positive. The RDTF commends judicial pre-assignment as a cost-saving measure.

CRLJs

The RDTF faithfully followed the BOG's direction to draft CRLJs regarding cooperation, initial case schedules, judicial pre-assignment, and early discovery. But when we vetted those proposals to the DMCJA, we received unusually strong feedback that our proposals – which largely mirrored the CR proposals – either would not decrease costs in the courts of limited jurisdiction, or conceivably might increase those costs. The DMCJA did not have immediate reservations about the reasonable cooperation provisions, so we are bringing those forward for the same reasons discussed *supra*. Nor did they object in principle to considering the other proposals. But they felt strongly that they needed further time to consider them.

The RDTF also felt that although we did have some practitioners and judges familiar with limited jurisdiction courts, we did not have sufficient expertise to fully appreciate the quite different litigation context presented in those courts. We therefore voted not to bring forward the remaining CRLJ proposals (other than the cooperation provisions) at this time. We understand from the DMCJA – whose current President sat on our Task Force – that they are open to working with a task force or work group on proposals to decrease the costs of civil litigation in their courts. We commend this idea to the BOG, along with our reasonable cooperation proposals, which we believe are the lynchpin for changing the culture of litigation in Washington.

ENCLOSURES

- Enclosure 1: Rule Proposals; redline and clean versions
- Enclosure 2: Final ECCL Report
- Enclosure 3: July 2016 BOG Report
- Enclosure 4: Charter
- Enclosure 5: Stakeholder's List
- Enclosure 6: Comments Received

ENCLOSURE 1

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

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

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