



Justice... Professionalism... Service... Since 1886

January 13, 2016

VIA EMAIL: eccl@wsba.org

Board of Governors
Washington State Bar Association

Dear Governors:

The King County Bar Association Judiciary and Litigation Committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We have previously reviewed the draft report of the ECCL Task Force and offered a number of suggestions designed to meet the Task Force's charge while preserving the ability of litigants of all means to obtain a just result. We are pleased that the Task Force has made several of the changes that we proposed, but believe that the present report requires some modifications before being presented to the Supreme Court. To that end, we are providing this letter and plan to attend your deliberations and, with your permission, provide additional input.

Before addressing the suggested changes to the ECCL draft report, we would like to commend the effort and good work by the Task Force on the draft report. We greatly appreciate the time that has been devoted to the Task Force proposals and the commitment the members have made to attempt to reduce the cost of civil litigation. This is a very important topic and one that must be addressed by the Bar Association and the Supreme Court to reduce the escalating costs of civil litigation.

We do agree with many of the proposals by the Task Force. We have tried to address each proposal that will be addressed in the January 28-29, 2016 meeting in the following responses and to indicate which proposals are supported and which proposals are not supported. We understand that you will be addressing the following topics during the January meeting: (1) Initial Case Assignment; (2) Judicial Assignment; (3) Two-Tier Litigation; (4) Mandatory Discovery Conference; (5) Mandatory Disclosures; and (6) Proportionality and Cooperation. We will be submitting additional written materials to address the Task Force's other proposals prior to the March and April meetings of the Board of Governors.

INITIAL CASE SCHEDULE AND JUDICIAL ASSIGNMENT

We support the Task Force's recommendations for an initial case schedule being issued in all courts. The initial case schedule requirement has been in place in King County for many years and we believe making it a statewide requirement will provide greater structure and accountability in the litigation process.

We also support the Task Force's recommendation to have a judge assigned at the initiation of the litigation to supervise and eventually preside over each case. This has also been a King County requirement for many years and it makes it easier to monitor the progress of cases as they move through the system and provides a consistent decision maker for discovery and motion practice.

TWO-TIER LITIGATION

We also support the Task Force's recommendation for a two-tier litigation schedule. Our committee recently made a similar proposal to the King County Superior Court that was modeled after the Pierce County Superior Court two-tier litigation schedule. Our proposal was not accepted by the King County Superior Court but we remain hopeful that this change will be implemented at a later date.

MANDATORY DISCLOSURES

Our Committee is not opposed to mandatory disclosures being made or required by litigants as this may create certain efficiencies. However, the Committee is convinced that the use of mandatory disclosures should not justify the limitation or curtailment of other discovery tools. Mandatory disclosures are no substitute for those tools and should not be viewed as a replacement for them.

The Task Force proposals are premised on the notion that so called "lay down discovery" at the start of a case will obviate the need for much of the discovery that is presently conducted. We suggest that this is a false premise. The problem is rooted in the deceptive title of "lay down" discovery. The required mandatory disclosures require a party to disclose "all evidence known to that party that is relevant to the alleged claims or defenses of any party". Although the Mandatory Disclosure proposal is changed from the draft recommendations of the Task Force, the provisions of the proposal do not address the unilateral determination of relevancy as pronounced in *Johnson v. Jones*, 91 Wn. App. 127, 134, 955 P.2d 826 (1998): "A defendant or his counsel cannot unilaterally determine the relevancy of evidence during discovery." The determination of relevancy will always be subject to the producing party.¹

The proposed mandatory disclosures do not obviate the need for further discovery and lawyers operating under the Task Force proposals would still have to serve the same interrogatories required today to ferret out the names of all potential witnesses and serve requests for production for potentially critical documents. To say that the mandatory disclosures will shorten the process is to ignore realities of litigation. Each side owes a duty to protect its own client and not a duty to prepare the opponent's case.

The duty to disclose stems from the use of the existing discovery tools. A lawyer who relies upon the mandatory disclosures fails to serve his client's interest in developing affirmative evidence in the adversary's possession. In order to facilitate thorough discovery, mandatory disclosures should require timely supplementation. *Cf.* CR 26(e)(3). Providing parties the protection of a "safe harbor" in failure to disclose only serves to further allow parties to circumvent the process of mandatory disclosure and gives the parties a legal basis to do so.

The Task Force has looked to federal practice in suggesting this form of mandatory disclosure. But, in the federal practice laydown discovery is accompanied by a mandatory scheduling conference (FRCP 26 (f)(1)(2)) and a discovery plan that must be completed by the parties and approved by the Court (FRCP 26 (f)(3)). The Task Force considered requiring a judicial conference after submissions of the parties' joint status report as is required in Federal Court under 16(b), but declined to follow the lead of the federal courts. It is believed that having the oversight and enforcement power of the federal court is one of the reasons the mandatory disclosures work in the federal courts and is likely to fail as recommended by the Task Force.

EXPERT WITNESS DISCLOSURES

The Committee feels that the ECCL's recommendation on expert witness disclosures does not give adequate specificity regarding expert reports. The recommendations also provide unrealistic timelines that may delay discovery and cause difficulties in practice. Finally, the Committee is opposed to four-hour limitations on expert depositions.

A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials. Rule 37 is the enforcement section for the discovery process. It authorizes sanctions to be imposed on a party or its attorney for (1) failure to comply with a discovery order or (2) failure to respond to a discovery request or to appear for a deposition. Sanctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating, and educating a party or its attorney for engaging in discovery abuses

Under the Federal Rules, a party is required to submit a report from his or her expert that has been “prepared and signed by the witness.” FRCP 26(a)(2)(B). The report serves two interests that reduce the cost of litigation. First, it provides “a complete statement of all opinions the witness will express” together with the basis of the opinion. A party receiving such a report from his adversary may well decide to skip taking the expert’s deposition since he already has the report in hand. Second, by virtue of the expert’s signature on the report, the party receiving it has a means for impeachment. The proposal by the ECCL Task Force fails to provide for reports. Instead, the proposal states that information from experts should be provided “whether in a report or otherwise.”

FRCP 26(a)(2) does not automatically stagger the expert disclosures of the party, as proposed by the ECCL Task Force. The ECCL proposal would permit the initial disclosure of experts by the defense to be just six weeks before the discovery cutoff. The rebuttal expert disclosure deadline would permit a party to delay disclosure of expert witnesses until just two weeks before the discovery cutoff date. That is simply not enough time to schedule the deposition of the late disclosed expert and prepare for a deposition.

We also do not see a need to limit expert witness depositions to four hours. The practice in Washington is that the party noting and taking the adversary’s expert’s deposition pays for the expert’s time. That is sufficient incentive to be succinct. The federal rules do not contain a four hour limitation and our rules should not limit the expert beyond the seven hour limitation for all witnesses currently followed in King County.

PROPORTIONALITY

The Committee is opposed to introducing the concept of proportionality along the lines proposed by the ECCL recommendations. This change seems unnecessary as the existing rules already allow for these factors to be taken into account. Further, adding “proportionality” as an excuse for nondisclosure may increase litigation costs by generating motion practice and case law about how this principle applies.

The concept of proportionality is central to many of the ECCL Task Force proposals. Proportionality as presented by the Task Force rests on the untested assumption that the supposed increase in efficiency will increase the overall access to justice. As presented in the ECCL Task Force report, proportionality necessarily requires a court to balance the scope of proposed discovery against the assumed value of the claim asserted to perform a cost-benefit analysis. The flaw in that paradigm is that the ultimate value of the claim may not be apparent until late in the litigation process. Consider the impact of class action litigation which may start

with a single plaintiff with a limited complaint, but blossoms into broad if not deep harm to many. Such a claim would wither before it could see light, because the harm was not seen as being that great to the single plaintiff. A claim may also have important potential precedential value that can only be discerned upon deeper inquiry that proportionality would cut off at the start. It is apparent that a rule of proportionality will tend to favor defendants; particularly large corporate defendants. While superficially appealing, limits on discovery may unreasonably hinder discovery of meritorious claims. As a result, decisions made in the name of proportionality may, in effect, limit access to justice by making it more difficult for a party to engage in effective discovery.

Restricting discovery in the way that the ECCL Task Force proposes may fail in its goal as parties are forced to engage in extended motions' practice to litigate whether a particular line of inquiry is relevant to a "claim or defense." The proposal to add language requiring the court to evaluate "whether the burden or expense of the proposed discovery outweighs its likely benefit" is similarly problematic due to the fact that it implicitly requires a court to prejudge the value of a pending case in the absence of meaningful evidentiary support.

Compare the proposed standard with the existing limitations. CR 26(b)(1) already includes an implicit proportionality component.² The limitations detailed in CR 26(b)(1) are mandatory and allow a Court to determine whether a particular request is objectionable. A party confronted with onerous discovery requests or abusive discovery practice is free to seek a protective order under CR 26(c) or move for sanctions under CR 11 or CR 37. Although these tools are readily available, the Task Force Report does not address why they are ineffective. It may be that the root of the problem is that rulings by trial courts on discovery lack the predictability that deters discovery abuses in the first place. Many practitioners report that judges do not readily and uniformly enforce the rules that are in place. This inconsistency

² The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

amongst trial courts leads to bogus objections and obstructionist tactics that multiply the cost of litigation. We need enforcement of existing rules rather than the wholesale adoption of new ones. When discovery rulings are foreseeable and sharp practices are subject to sanctions, there is less incentive to frustrate legitimate discovery.

Restricting discovery in the way that the ECCL Task Force proposes may fail in its goal as parties are forced to engage in extended motion practice to litigate whether a particular line of inquiry is relevant to a "claim or defense." The proposal to add language requiring the court to evaluate "whether the burden or expense of the proposed discovery outweighs its likely benefit" is similarly problematic due to the fact that it implicitly requires a court to prejudge the value of a pending case in the absence of meaningful evidentiary support. While superficially appealing, limits on discovery may unreasonably hinder discovery of meritorious claims. As a result, decisions made in the name of proportionality may, in effect, limit access to justice by making it more difficult for a party to engage in effective discovery.

Most telling are the unintended consequences of the proposals. The proposed rule changes will provide obstreperous counsel with a new tool to frustrate discovery. Objections will be made at deposition and in response to written discovery based upon one side's position that the other is seeking that which has little relevance. Undoubtedly, this will lead to more motions before the courts; one of the most expensive aspects of civil litigation. Thus, rather than making litigation cheaper, the opposite may be the case.

Most strikingly, however, the Report acknowledges that the proposed changes will "only be effective if courts enforce them in a thoughtful way." This statement, while true, is in conflict with the existing language of the rules as detailed above. The Report also does not address the fact that, as a self-governing profession, it is incumbent upon practitioners to adhere to the ethical obligations of practice. Attorneys are already bound by the Rules of Professional Conduct, notably RPC 3.1, 3.4, 8.4, which all implicitly speak to the issue of cooperation the ECCL Task Force finds lacking. Any alleged failure of practitioners to adhere to their ethical obligations or the existing rules will not be remedied by the proposal. If anything, a thoughtful application of the existing rules will address many of the concerns raised by the ECCL Task Force with respect to proportionality and cooperation.

Finally, the December, 2015 changes in the FRCP implement proportionality. It would be prudent to see how those changes play out in the course of the next two years before we initiate such a wholesale revision of our long standing guidelines under CR 26.

CONCLUSION

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We feel strongly that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. While we support several of the ECCL Task Force proposals as outlined above, we are concerned that some do not provide a sufficient level of confidence that the determinations made under the proposed rule changes will permit litigants to obtain justice. For the reasons we have set forth above we are not in support of those proposals.

Very respectfully yours,

KCBA Judiciary & Litigation Committee

Lafcadio H. Darling, Co-Chair

Brett M. Hill, Co-Chair

cc: Andrew Prazuch