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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 are pleased that the Task Force on the Escalating Costs of Civil Litigation (“Task Force”) has made several changes we have proposed in the past, but we believe that the present report requires 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.

We have strong objections to two of the proposals that will be addressed during the March 10, 2016 meeting in Olympia: the Task Force’s suggested (7) Presumptive Discovery Limits and (8) Electronic Discovery proposal.¹

We include in our discussion of Presumptive Discovery Limits a proposal for a ban on the use of blanket objections in response to interrogatories. We have no objection to the Task Force’s proposal regarding (9) Motions Practice (limiting oral argument on non-dispositive motions).

We will be submitting additional written materials to address the Task Force’s other proposals prior to the April meeting of the Board of Governors.

1. The numbers (7), (8), and (9) identify the proposals as numbered in the June 15, 2015 Task Force report.

(7) PRESUMPTIVE DISCOVERY LIMITS

OVERVIEW

Presumptive discovery limits are an inherently incorrect tool for reducing the costs of civil litigation. They may well increase the costs of litigation, which limits access to justice, and they take a one-sized-fits-all approach that ignores the needs of particular kinds of litigation. Accordingly, we believe the proposed limitations threaten to increase the costs of litigation, decrease access to justice, and undo years of work toward controlling costs of litigation.

Specifically, presumptive discovery limits will increase motion practice over the limitations on discovery while reducing the amount of material actually discovered. This will increase the burden on the courts and will have a substantial one-sided effect in the many asymmetric litigations where one party holds the mass of discoverable materials or has more to gain by delay. Accordingly, we recommend more party-neutral solutions to limiting the cost of litigation, such as prohibiting general objections to interrogatories and increasing the enforcement of existing rules.

The KCBA's Judiciary and Litigation Committee includes members who represent both plaintiffs and defendants in litigation reaching from simple automobile torts to complex commercial litigation. The Committee strives to promote the speedy, just, and fair resolution of legal disputes. Accordingly, we are concerned about rule changes which may significantly favor one party to litigation, especially when it is unclear that the proposals will accomplish the Task Force's goal—here, reducing the cost of civil litigation.

As a starting point, it is important to carefully read The Task Force report and note that it has offered no concrete evidence that the proposed limitations will reduce the costs of civil litigation. Indeed, the Task Force's own survey results show that ninety-five percent of litigants already limit the costs of discovery without a rule-based incentive.²

Furthermore, even in simple cases, the appropriate use of individual discovery tools may vary widely and frequently exceeds the proposed presumptive discovery limits for Tier One and District Court litigation.

2. Task Force Final Report, at 13 (noting that 95% of litigants strive to keep discovery costs proportional to the value at stake in litigation). Litigants voluntarily limit the number of depositions they take, limit the means used in discovery, and enter into informal discovery arrangements with opposing counsel. *Id.*

Before the Board of Governors recommends that the Supreme Court adopt a rule change, it should insist on solid evidence that the rule change will accomplish the goal of reducing the cost of litigation in Washington State. It should also ensure access to justice issues are addressed so that the change is fair to all litigants. Here the proposed rule changes would asymmetrically alter the burden in discovery disputes on every litigant in the state and would require thousands of attorneys to engage in motion practice over simple discovery requests.

The Task Force has not met the heavy burden of showing that presumptive discovery limits will reduce the cost of litigation or that they will not compromise the access to justice and truth-seeking functions of our court system.

NUMBER OF INTERROGATORIES

The proposed approach to interrogatory reform would undo years of progress at the local level at containing the costs of litigation. For example, in King County, many attorney-hours have been devoted to creating form interrogatories for specific types of cases. While we appreciate the Task Force's effort, its proposal would prohibit the type of form interrogatories that have proven to be effective here in King County.

If interrogatory reform is nevertheless approved, it should at a minimum explicitly allow local civil rules to vary the interrogatory limit in cases where pattern interrogatories have been promulgated.

The Task Force is proposing significant limitations on the number of interrogatories that can be propounded by a party. Only fifteen interrogatories would be allowed in District Court and twenty-five would be permitted in Tier One (twelve-month schedule Superior Court) cases. King County litigators have significant experience working with restrictions on the number of interrogatories. Since 2005, King County Superior Court has imposed discovery limits on civil litigants as identified under LCR 26(b). Specifically, in all cases governed by a Case Schedule under King County LCR 4, interrogatories are limited as follows:

(2) Interrogatories.

(A) Cases With Court-Approved Pattern Interrogatories. In cases where a party has propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 15 interrogatories,

including all discrete subparts, in addition to the pattern interrogatories.

(B) Cases Without Court-Approved Pattern Interrogatories. In cases where a party has not propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 40 interrogatories, including all discrete subparts.

LCR 26(b)(2)(A) & (B) (2015).³ State local rules are not uniform and we are not saying our rules should be imposed on other counties. Rather, the counties should be free to experiment with limitations that make sense in their communities. Such an approach encourages innovations such as the pattern interrogatories now being used in King County.

King County's interrogatory limitations were developed after extensive vetting through members of the King County civil bar and bench, and they were implemented with consideration for the ability of a party to obtain evidence in a case. Great care was taken to assure that a party's access to justice was not impeded. Protections were ensured for parties in exceptional cases by the provision for modification of the limitations by stipulation or by court order under LCR 26(b)(5).

Though the KCBA Judiciary and Litigation Committee does not conceptually object to a restriction on the number of interrogatories, the restrictions recommended by the Task Force go too far in what seems like an arbitrary manner. In King County, before limitations were imposed, a task force developed pattern interrogatories that got to the heart of common issues in motor vehicle litigation. A very distinguished group of lawyers and judges participated in the process.

Most of the cases that are litigated using pattern interrogatories would fall into proposed Tier One cases and be subject to the twenty-five interrogatory limitation. Compare that with the product of the automobile litigation pattern interrogatory developed by the bar and bench. Those pattern interrogatories numbered thirty-seven pattern interrogatories from defendant to plaintiff (seventy-five if subparts are included) and twenty-nine pattern interrogatories (fifty-eight if subparts are included) from plaintiff to defendant. This excludes the allowance for an additional fifteen case-specific interrogatories under LCR 33. These pattern interrogatories were developed for motor vehicle tort cases, which, at the time of their

3. "LCR" throughout this document refers to the 2015 King County Local Civil Rules.

development, comprised sixty-six percent of the King County civil court tort cases that were filed.⁴

The King County pattern interrogatories, which are far less restrictive than the Task Force proposal, were developed after at least sixteen months of research and multiple drafts. The process included the participation of a wide cross-section of our local and state bar, and was followed by input stemming from a comment period. The Task Force's proposed restrictions of interrogatories to fifteen in District Court and to twenty-five in Tier One cases do not approach the number of interrogatories in the King County cases with pattern interrogatories that would likely fall under the Tier One restriction.

The proposed interrogatory limits fail to take into account the extensive expertise that went into developing these automobile-related pattern interrogatories. These interrogatories expedite the majority of civil court tort cases in King County. We do not believe that a rule change should invalidate this work or should prevent other counties from adopting or modifying these interrogatories as their bar finds appropriate. Likewise, a rule change should not prevent experts in other substantive areas of law throughout the state from developing their own local case-specific pattern interrogatories to reduce the costs of litigation. If the Board nevertheless supports the proposal, it should provide litigators the alternative of allowing a number of case specific interrogatories in addition to any pattern interrogatories approved by local rule.

The Task Force has supported its recommendation to limit interrogatories partly on the basis of its conclusion that "Respondents to the task force's survey rated interrogatories, along with requests for admission, as *sometimes* ineffective and susceptible to abuse" (emphasis added).⁵ The Task Force added that "Limiting the number of interrogatories should mean less discovery activity."⁶ To recommend the imposition of severe restrictions on interrogatories on a statewide basis because of vague suppositions⁷ and nonrepresentative survey results is misplaced and does not properly or adequately serve the bar membership, our profession, or our clients.

4. **Error! Main Document Only.**A Word From Former KCBA President John Ruhl on the Interrogatories, <http://www.kcba.org/4lawyers/pattern.aspx>.

The standardized questions allow plaintiffs' and defendants' counsel to propound written discovery requests more quickly and easily. They give both sides' counsel less reason to engage in costly discovery disputes that otherwise might eat up an inordinate portion of pretrial expense and waste judicial resources.

5. Task Force Final Report, FN 37.

6. *Id.*, at 32

7. For example, the Task Force applies sources discussing interrogatories in federal litigation to Washington State litigation. But the Task Force's proposal limits interrogatories in state court, where the

REQUESTS FOR PRODUCTION

The KCBA Judiciary and Litigation Committee opposes in its entirety the Task Force's proposal for the restriction of requests for production.

One reason King County Superior Court's restrictions on interrogatories is successful is that there is no such restriction on requests for production. Severely restricting a party to twenty to forty requests for production will not advance justice but rather impede it. Parties rightfully seeking documents and tangible things under CR 34 will be forced to file motions to access evidence that would otherwise be readily available. The current rules allow a party to determine, by using requests for production, what an opposing party does and does not possess. This ability would be unduly restricted by the proposed presumptive limitations.

Consider the likely reaction of counsel to the Task Force modifications. The documents being sought will remain just as vital to a case, but the tools used to discover them will be less effective. For example, rather than making three or four narrow requests for production which are easily understood and answered, counsel will be forced to make one broad request, hoping to encapsulate the formerly available multiple easy-to-answer requests. Thus, the same number of documents will have to be retrieved, but usually only after time and resources are wasted with objections and motions over the unduly broad single request. If a party needs to assure itself that it has all the relevant documents, the standard will be increased motion practice over the limits of discovery, not reduced cost of litigation.

The Task Force report does not provide any supporting data as to how or why limiting a party's ability to request the production of documents ultimately serves the ends of justice or reduces the costs of litigation. The blanket statement that "less discovery should mean lower costs" is counterintuitive when applied to discovery by means of requests for production. The Task Force did not, and cannot, even look to the Federal Rules for support, as they do not contain any such limitations.

Interrogatories and requests for production are necessary discovery tools that should not be restricted absent clear abuse on a case-by-case basis. Responses to interrogatories and requests for production are utilized to streamline the presentation of evidence in motion practice and in trial. For instance, WPI 6.10 provides, "The answers to interrogatories will be [read aloud] [presented] to you. Insofar as possible, give them the same consideration that you would give to answers of a witness testifying from the witness stand." Restricting discovery by

issues, the parties, and discovery practice in general is very different, and where interrogatories frequently play an important role.

means of limitations on interrogatories or requests for production denies a party the necessary procedural tools designed to streamline cases. These tools provide an avenue for the introduction of evidence rather than bringing additional witnesses to trial or having to conduct additional depositions to obtain the same evidence. The KCBA Judiciary and Litigation Committee opposes in its entirety the Task Force proposal for the restriction of requests for production.

LAY WITNESS DEPOSITION LIMITATIONS.

The KCBA Judiciary and Litigation Committee opposes the Task Force proposal to establish a system of allocated time spread over all depositions. Instead we note that we have no objection to a limitation on the number and overall length of each deposition in line with the standards already implemented, for example, in King County and under the federal rules.

The Task Force found that depositions top the list as the most effective discovery devices. Nevertheless, it has proposed a significant limitation on depositions to allow a total of forty hours of depositions. Existing practice in both federal courts and King County provides a greater opportunity to take depositions.

While Washington's Civil Rules do not address the matter of limitations in the number and length of depositions, both the FRCP and the King County Local Rules provide a limitation of ten depositions of no more than seven hours. King County expands that to permit one of the depositions to be a two day deposition, again subject to the limitation that a day of deposition cannot exceed seven hours. Thus, current practice allows a total of seventy-seven hours of deposition. See FRCP 30(d)(1) & 30(a)(2)(A), and LCR 26(b)(3). The Task Force recommendations represent a radical departure from current practice and compromise the single most effective tool of discovery.

The KCBA Judiciary and Litigation Committee opposes the Task Force proposal. First, experience has shown that the limitation to forty hours does not provide sufficient time to prepare a case. Under current practice, lawyers have found depositions to be the most useful form of discovery. If depositions produce the greatest return for the time invested, then why compromise this important tool and make it less effective?

Second, the use of total hours as the sole limitation on depositions does nothing to protect witnesses from excessively long depositions. While a party has many incentives to be efficient, a witness could conceivably be required to attend multiple days of deposition. The federal and King County rules limit the attendance of a

witness to a single day of seven hours (recognizing that a single witness may be subject to two days in King County). To the extent that the rules are intended to promote respect for the process, a limitation to a single day does more to protect a non-party witness from inconvenience and abuse.

Third, the Task Force proposal also creates logistical problems and generates opportunities for apparent mischief that will increase motion practice. As an example, how are speaking objections, time devoted to study of a proposed exhibit, and colloquies of counsel to be allocated? Will there be a “chess clock” at every deposition? Expensive fights over such minutia become more likely as the available deposition time decreases. It is not difficult to envision motions alleging that the other side strategically frustrated the efficient taking of a deposition.

The KCBA Judiciary and Litigation Committee strongly objects to the Task Force proposal on limitations on lay depositions in its current form, but would have no objection if it were modified to be not more restrictive than the standard used successfully under the Federal Rules and, for example, in King County: in all cases there would be a limitation to ten depositions of lay witnesses of no more than seven hours each with leave to conduct one deposition lasting two days. The court should retain discretion to permit additional depositions or provide greater length where appropriate

EXPERT DEPOSITIONS

We 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.

CURRENT AVAILABLE REDRESS FOR DISCOVERY ABUSES

The KCBA Judiciary and Litigation Committee respectfully suggests that a major driving force in litigation expense is the failure of courts to enforce existing rules. If rules are strictly enforced, litigants can anticipate the cost of obstructive discovery practices. Predictability discourages obstruction. Before we begin adopting new rules we should first test the benefits of enforcement of existing rules. Restricting discovery while doing nothing on the enforcement aspect of the rules only encourages noncompliant actions and forces the party seeking discovery to return time and again to seek redress from the court. This, in turn, defeats the goal of

reducing the costs of litigation and clogs already over-burdened judicial dockets. Likewise, the open-ended opportunity to apply to the court for broader discovery is no salve when the majority of cases (particularly in Tier One) will regularly require such an application. Going to court to solve discovery inefficiencies is one of the greatest costs of litigation.

CR 26 and LCR 26 guide the discovery process as it relates to interrogatories, depositions, requests for admission and the discovery of documents and tangible things. Moreover, parties in civil cases have always been permitted to bring motions to compel should any party not provide adequate disclosures.

State and, for example, local King County civil rules currently provide a party redress for discovery abuses under CR 37, LCR 26, and LCR 37. The true answer to impacting the escalating costs of litigation is not to have rules limiting discovery, but rather to have consistent and stringent enforcement of the rules that *already exist*.

GENERAL OBJECTIONS SHOULD BE EXPLICITLY PROHIBITED.

The proposed restrictions on discovery do nothing to address or deter the often-used practice of blanket objections to discovery requests.

The report of the Task Force states that 72.7% of respondents have identified “blanket objections” as a common discovery abuse. Indeed, such objections often fail to meet the test of CR 11 and do not satisfy the requirement of CR 33(a) (“[T]he reasons for objection shall be stated in lieu of an answer.”). Rather, one is left to guess which of the fifteen to twenty general objections contained at the start of the answering document apply to a given interrogatory. Such objections are more like an insurance policy against giving a direct answer and frustrate the legitimate goal of obtaining answers which are used in motion practice and trial.

Despite the overwhelming view of the respondents, the Task Force report does not address this problem. The Board of Governors should consider a rule modification prohibiting general objections.

(8) ESI: ELECTRONICALLY STORED INFORMATION

THE ESI RULE WOULD ADD EXPENSE AND BLOCK ACCESS TO JUSTICE

The task force's ESI (Electronically Stored Information) Rule is opposed by the KCBA Judiciary and Litigation Committee because it will increase litigation expense and block access to justice.⁸

The KCBA Judiciary and Litigation Committee recognizes that parties may differ on the desirability of ESI limitations, but strongly believes that any proposal for such limitations must thoroughly explore and address the access to justice questions it raises. The committee is deeply concerned that the proposed ESI rule—as a practical matter—would both increase litigation expense and decrease access to justice.

Instead of reducing litigation expense, the proposal, modeled on the federal rules, would engender significantly greater expense. Rather than providing compelling economic data supporting the need for this change, the Task Force proposes a solution in search of a problem. No evidence suggests our current discovery rules (or for that matter, our judges) are inadequate to address ESI.

The proposal adopts the two-tiered federal system under which the parties must engage in collateral discovery litigation when one party (typically an institutional, governmental or corporate defendant) "claims" that its ESI sources "are not reasonably accessible because of undue burden or costs." *See* Fed. R. Civ. P. 26(b)(2)(B). The proposed rule shifts the burden to the requesting party to show an overriding need ("good cause") for ESI, where historically the burden has always rested on the resisting party to justify withholding the information. The whole idea that litigants can initially refuse to produce the discovery on the basis of their unilateral claim that is "not reasonably accessible" sets the stage for additional litigation requiring the use of very expensive forensic computer experts to debate questions of data accessibility.

And the problem here is not limited to the discovery provisions in CR 26. These additional burdensome expenses will likewise apply in requests for production under CR 34 as parties' requests for email communication proliferates. This collateral litigation on discovery disputes over ESI invariably favors litigants with large resources while disadvantaging less wealthy litigants. In cases involving ESI,

8. Although a proposal based on the Federal ESI discovery scheme has been presented to the Board of Governors in the past, no rule substantially similar to FRCP 26(b)(2)(B) has been recommended by the Governors for adoption by the Washington Supreme Court.

we foresee fewer people getting access to justice. Increasingly meritorious claims may not be brought because of the uncertainty and the costs in litigating ESI discovery disputes and the ability of defendants to deploy discovery rules to withhold information.

(9) MOTIONS PRACTICE - ORAL ARGUMENT

The KCBA Judiciary and Litigation Committee has no objection to the Task Force's recommendation regarding oral argument.

CONCLUSION

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. We believe that modifications to the existing system ought not to decrease the likelihood that litigants can achieve a just result in our courts. While we have supported several Task Force proposals in the past, we are concerned that some of the proposals on the agenda at the March Board of Governors meeting do not provide a sufficient level of confidence that the proposed rule changes will permit litigants to obtain justice. We are also deeply concerned that the proposed rule changes may *increase* the costs of litigation, and believe that the Task Force has not met its burden of showing the proposed rule changes are necessary or will accomplish their goals. For the reasons we have set forth above we are not in support of those proposals.

Very respectfully yours,

KCBA Judiciary & Litigation Committee

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Brett M. Hill, Co-Chair

cc: Andrew J. Prazuch, KCBA Executive Director