KCBA KING COUNTY BAR ASSOCIATION

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Mr. Endel R. Kolde
WSBA Rules Committee
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Dear Mr. Aoki and Mr. Kolde:

Thank you for your presentation to the King County Bar Association Judiciary and Litigation Committee. Our committee is charged with reviewing the impact of proposed rule changes on the practice of law and the administration of civil justice. We greatly appreciate the time that has been devoted to the Task Force proposals and the commitment you have made to attempting to reduce the cost of civil litigation. The local rules for King County implemented a mandatory case schedule many years ago. We believe that the ECCL Task Force proposal making that a statewide requirement will provide greater structure and accountability to the litigation process. Similarly, the assignment of a given case to an individual judge will make it easier to monitor the progress of cases as they move through the system.

There are several areas, however, where we do not agree on proposed changes. We proceed from the basic tenet that a just result can only be reached if both sides are able to discover the truth and bring evidence before the courts. We are concerned that some of the proposals of the Task Force may obtain a reduction in cost in a manner that may frustrate the justness of the result.

PROPORTIONALITY

Proportionality is the linchpin of the ECCL Task Force proposals. While the KCBA Judiciary and Litigation Committee is concerned about the high costs of litigation, it is just as concerned about the potential impact of the proposed proportionality standard. We are mindful that the rules as they exist today already provide a means to limit excessive discovery where the amount in controversy is less substantial.

The proposals do not address how the existing Civil Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.[1]" Moreover, 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 there is too great an inconsistency amongst trial courts in enforcing the existing rules.

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 all of the concerns raised by the ECCL with respect to proportionality and cooperation.

MANDATORY DISCLOSURES

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 Task Force proposal does not require either party to provide discovery that is harmful to its position regardless of how relevant it may be to a just determination. Rather, the required mandatory disclosures require a party to turn over information that "the disclosing party may use to support its claims or defenses." Thus, if a corporate defendant was aware of

witnesses or evidence that would adversely affect its claims or defenses there would be no obligation to provide it to the opposition. This will result in a greater harm to plaintiffs who are attempting to prove wrongdoing within a defendant corporation. Much of the evidence needed to prove the case would have to come from discovery of the operations, actions and individuals who allegedly contributed to the wrong that is the subject of the litigation. Likewise, a defendant might need to prove its defense out of information known to the plaintiff, yet not subject to lay down discovery.

A plaintiff's lawyer operating under the Task Force proposals would still have to serve the same interrogatories required today to ferret out the names of potential witnesses, an explanation of the functioning of the operations of the defendant entities and a description of potentially useful 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 prop up 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 not be limited to witnesses or information that a disclosing party may use to "support its claims or defenses." This limitation allows a party to not disclose witnesses or information that may be relevant to the lawsuit in an effort to prevent the adverse party from discovering witnesses/information that will aid the adverse party's case, i.e. to withhold a witness with "smoking gun" testimony on the basis that the witness will not be used by the disclosing party to "support its claims or defenses". Put differently, this limitation encourages a result that favors a "crafty" lawyer, rather than prioritizing the truth finding function of litigation.

An alternative standard might be to require disclosure of all evidence known to a party that pertains to either the alleged claims or defenses and the names of all witnesses who have knowledge of either. Such a standard would be a major change in the way lawsuits are conducted. It would require that all information be placed on the table. The countervailing cost might be deliberate ignorance; a failure to investigate so as to avoid the risk of finding evidence that would be harmful to the party's position. On balance, the KCBA Judiciary & Litigation Committee would support mandatory disclosure of all relevant facts known to a party and would suggest that the disclosure include a requirement of timely supplementation. C.F. CR 26(e)(3).

The Task Force has looked to federal practice in suggesting this form of mandatory disclosure. But, in the federal practice permitted discovery is far broader than that which is envisioned under the Task Force proposals. Laydown discovery in Federal Court is accompanied by a mandatory scheduling conference (FRCP 26 (f)(1)(2)) and a discovery plan must be completed by the parties and approved by the Court (FRCP 26 (f)(3)).

Although there could be potential benefits to laydown discovery, the Washington State Superior Court rules do not operate in the same manner or function as the Federal Rules of Civil Procedure. For example, there is no mandatory scheduling conference with the superior courts in Washington. Neither are parties required to develop and submit a discovery plan for court approval. Further, the courts' patterns of enforcement of the civil rules of discovery are variable and inconsistent. Sanctions are not uniformly ordered against non-complying parties.

Laydown discovery does not obviate the need for discovery. It is a provision for early disclosure, but there is no requirement for supplementation. Consistent and effective means of discovery through interrogatories, requests for production and requests for admissions must be available to the parties throughout the litigation process to enable the parties full access to evidence required for their cases.

The ECCL Task Force should look into the problem of lack of enforcement of existing civil rules. We have found that there is inconsistency in enforcement of the discovery rules among the judges of King County. State wide, it must be assumed that there is great variation in the degree to which enforcement of the rules can be expected. Indeed, it is the lack of expectation that often pushes lawyers to test the boundaries and thereby run up the costs of litigation. We ask whether the Task Force has considered steps toward additional training of judges in enforcement or the adoption of illustrative comments that might provide guidance to trial courts. Those steps should be explored before wholesale changes are made in the civil rules.

EXPERT WITNESSES

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 signature on the report, the party receiving it has a means for impeachment of the expert. 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 Final Report. 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.

LIMITATIONS ON NUMBER OF INTERROGATORIES

The ECCL Task Force is proposing significant limitations on the number of interrogatories that can be propounded by a party. Only 15 interrogatories would be allowed in Tier 1 and 25 would be permitted in Tier 2. 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 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)

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

Though the KCBA Judicial and Litigation Committee does not conceptually object to a restriction on the number of interrogatories, the restrictions recommended by the ECCL Task Force go too far in what seems like an arbitrary manner. In King County, before limitations were imposed, a task force developed form 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 the pattern interrogatories would now fall into Tier 1 and be subject to the 15 interrogatory limitation. Compare that with the product of the pattern interrogatory task force.

Those pattern interrogatories provided for 37 pattern interrogatories from defendant to plaintiff (75 interrogatories if subparts are included) and 29 pattern interrogatories (58 interrogatories if subparts are included) from plaintiff to defendant. This excludes the allowance for an additional 15 case specific interrogatories under LCR 33. The pattern interrogatories were developed for motor vehicle tort cases, which, at the time of their development, comprised 66% of the King County civil court tort cases that were filed.[3] The King County pattern interrogatories, which are far less restrictive than the ECCL proposal, came after 16 months of research and multiple drafts from a wide cross section of our local and state bar, along with a comment period. The EECL's proposed restrictions of interrogatories to 15 in Tier 1 cases and to 25 in Tier 2 cases don't come near the allowable interrogatories in the King County cases that would likely fall under the Tier 1 restriction. If the Task Force continues to seek a reduction in the number of interrogatories it

should consider an alternative of allowing a specific number of case specific interrogatories in addition to any court approved pattern interrogatories.

The ECCL Task Force has supported its recommendation to limit interrogatories partly on 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)[4]. To recommend the imposition of severe restriction of interrogatories on a statewide basis because of this vague and nonrepresentative survey result is misplaced and does not properly or adequately serve our bar membership.

The King County Bar Association Judiciary and Litigation Committee would strongly oppose the stringent and arbitrary limitations on interrogatories in all cases, whether the case is considered Tier 1 or Tier 2.

It should be noted that ever since the Superior Court has begun a reduction of the time to trial from 18 months to 12 months, the KCBA has sought the creation of a two tier system, providing counsel with the initial decision to opt into a complex case track in cases involving product liability, malpractice or numerous witnesses. We have not, and do not now, support a limitation on discovery based upon such tracking. Rather, the purpose of tracking should be to allow additional time to trial for these complex cases. The Pierce County local rules provide a model for that structure.

PROPOSED LIMITATIONS ON REQUESTS FOR PRODUCTION

One reason the 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 20 – 40 requests for production, especially in complex cases involving product liability, medical malpractice or intellectual property, will not advance justice but rather impede it. Parities rightfully seeking documents and tangible things under CR 34 will be forced to file motions to open access to evidence that would otherwise be readily available. The current rules allow a party to definitively determine what a party does and does not possess. 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. Rather than making three or four narrow requests for production, which are easily understood and answered, counsel will begin making one significantly broader request, hoping to encapsulate the former multiple 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 rules will be bent in the quest.

The ECCL Task Force report does not provide any supporting bases 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 ECCL 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 severely restricted, or 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 means of the interrogatory or request for production denies a party the necessary procedural tools designed to streamline cases and 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 initially sought.

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

The KCBA Judicial and Litigation Committee opposes in its entirety the ECCL Task Force proposal for the restriction of Requests for Production.

GENERAL OBJECTIONS TO INTERROGATORIES.

The report of the WSBA ECCL 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 15-20 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 can be used in motion practice and trial.

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

LIMITATIONS ON REQUESTS FOR ADMISSIONS.

The WSBA ECCL Task Force is recommending a limitation on requests for admission (RFAs) that would permit only 15/ 25 depending on whether a case is in Tier one or Tier two. This recommendation is based on respondents' belief that RFAs along with interrogatories are one of the least effective forms of discovery. This belief may in part be due to a misconception about the function of requests for admission. To the extent that requests for admissions are viewed as a form of discovery, they are being either misunderstood or mis-used. As observed in *Coleman v. Altman*, 7 Wn.App. 80, 86, 497 P.2d 1338 (1972):

> The purpose of rule 36 is to eliminate from controversy matters which will not be disputed. **It was not designed to discover facts but to circumscribe contested factual issues** in a case so that issues which are disputed may be clearly and succinctly presented to the trier of facts.
>
> Emphasis added. See also, *Reid Sand & Gravel, Inc. v. Bellevue Properties*, 7 Wn. App. 701, 704 05, 502 P.2d 480, 482-83 (1972), *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc*., 174 F.R.D. 38, 42 (S.D.N.Y. 1997)("Rule 36 is not a discovery device."); Lakehead *Pipe Line Co. v. American Home Assur. Co.*, 177 F.R.D. 454, 458 (D. Minn. 1997)("Requests for Admission are not a discovery device"); *Morris v. Electrical Systems*, 1990 WL 258387, 4 (N.D. Ind. 1990)(finding that Requests for Admission were "technically" not governed by the court's discovery order).

Properly used requests for admission remove issues and simplify the trial of cases. Rather than severely limiting RFAs they should be encouraged. If they are not being used properly the solution is to increase CLE education on their proper use rather than limiting their availability. The federal rules do not limit the number of RFAs, although the rules recognize the power of trial courts to regulate the number by order or by local rules. FRCP 26(b)(2)(A). The Eastern District of Washington has adopted a limitation of 15 RFAs. LR 36.1. The Western District does not have such a limitation.

RFAs can also be used to authenticate documents, saving a party from having to bring in needless record custodians and increasing the speed of trials. To that end the King County Local Rules permit unlimited use of RFAs for authentication of documents. LCR 26(b)(4). That rule does have a limitation of 25 non-authentication RFAs. The Eastern District of Washington also permits authentication of an unlimited number of documents so long as the request is contained in a single RFA.

The KCBA Judiciary and Litigation Committee recommends that there either be no restriction on the number of RFAs or alternatively, the approach used by King County in LCR 26(b)(4) be utilized.

DEPOSITION LIMITATIONS.

The WSBA ECCL Task Force found that depositions top the list as the most effective discovery devices. Nevertheless, the Task Force has proposed a significant limitation on depositions in each of the two tiers. The limitations are expressed in terms of total hours for all depositions. For Tier One the limit is 20 hours and for Tier Two the limit is 40 hours.

Existing practice in federal courts and in King County provides a greater opportunity to take depositions. While the Washington State Civil Rules does 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. Under those rules a party is limited to 10 depositions of no more than seven hours. King County expands that to allow one deposition that can span two days with seven hours of deposition each day. Thus, current practice allows a total of 77 hours of deposition. See FRCP 30(d)(1) & 30(a)(2)(A), and LCR 26(b)(3). The ECCL 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 20/40 limitation provides insufficient 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, if there are multiple defendants and one notes the deposition of a witness for the plaintiff, whose time is counted when the non-noting defendant conducts an examination? How are speaking objections, time devoted to studying a proposed exhibit, and colloquies of counsel going to be allocated? Will there be a "chess clock" at every deposition? How will time on cross-examination be counted? It is not difficult to envision motions alleging that the other side strategically frustrated the efficient taking of a deposition. Cases in Tier One will be especially prone to tactical interference given the few hours that the Task Force seeks to allocate.

The KCBA Judiciary and Litigation Committee recommends that the Task Force proposal be modified to reflect that in all cases (without regard to tiers) there will be a limitation to 10 depositions of lay witnesses of no more than seven hours each with leave to conduct one deposition lasting two days. The limitation to 10 depositions should not include expert witness depositions. Those should not be limited at all given the weight that juries often give to the opinions of experts. The courts should retain discretion to permit additional depositions or provide greater length where appropriate.

CURRENT AVAILABLE REDRESS FOR DISCOVERY ABUSES

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, there has always been available to the parties in civil cases the implementation of motions to compel should any party not provide adequate disclosures under the current local or state civil rules of discovery.

State and local King County civil rules currently provide a party redress for discovery abuses under CR 37 and LCR 37. The true answer to impacting the escalating costs of litigation is not to have more rules, but rather to have consistent and stringent enforcement of the rules now existing.

ADR AND MEDIATION

The KCBA Judiciary and Litigation Committee agrees that mediation can be a useful dispute resolution mechanism that can reduce the overall cost of civil litigation. While the Committee believes that earlier mediation can be a net benefit, it is also cognizant of the fact that many lawyers are unwilling to engage in mediation until after significant discovery has taken place. Consequently, while we support the ECCL Task Force's push for early mediation we take no position as to the specific timing of any mediation schedule.

While the Committee generally supports the use of alternative dispute resolution mechanisms, such as private arbitration, it is unclear whether the WSBA—or any organ thereof—should devote resources to the development of a particular set of standards. Many of the extant providers of arbitration services (e.g., AAA or JAMS) already provide a clear set of standards and the Report sheds no light on the adequacy of those standards. Since there is no evidence indicating a need for a new set of standards, the KCBA Judiciary and Litigation Committee believes that the ECCL Task Force proposal on standards is unnecessary.

CONCLUSION

The KCBA Judiciary and Litigation Committee stands committed to the goal of reducing the cost of litigation. But, we feel strongly that modifications to the existing system ought not 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 a number of them simply 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.

Sincerely,

King County Bar Association
Judiciary & Litigation Committee

Lafcadio H. Darling, Co-Chair
Brett M. Hill, Co-Chair

cc: Andrew J. Prazuch, KCBA Executive Director
Gerhard Letzing, WA State Association for Justice Executive Director
Maggie Sweeney, WA Defense Trial Lawyers Executive Director
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ENDNOTES

[1] CR 1

[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).

CR 26 (b)(1).

[3] A word from former KCBA President John Ruhl on the interrogatories, 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.

[4] Task Force on the Escalating Costs of Litigation Final Report to the Board of Governors, February 11, 2015, FN 37.