



WSBA

ESCALATING COST OF CIVIL LITIGATION TASK FORCE

MEETING MINUTES

May 7, 2014

The Escalating Cost of Civil Litigation Task Force met at 2:00 p.m. on May 7, 2014 at the WSBA Offices.

Present were Russ Aoki (Chair), Hon. Ron Cox (phone), Eric de los Santos, Bill Hyslop, Don Jacobs (phone), Jerry McNaul, Gail Nunn, Todd Nunn, and Hon. Debra Stephens. Excused were Breean Beggs, Ken Masters (BOG Liaison), and Hon. Richard McDermott. Absent were Hon. Marcine Anderson, Lincoln Beauregard, Cynthia Buhr, Jessica Goldman, Amit Ranade, and Kevin Stock.

Also in attendance were Jeanne Marie Clavere (Staff Liaison), Isham Reavis, Aoki Law, Hon. Robert Alsdorf (ret.), Alan Alhadeff, and Darlene Neumann, paralegal.

I. Minutes

The minutes of April 9, 2014 were approved as amended.

II. Subcommittee Reports

ADR Subcommittee

Subcommittee Chair Jerry McNaul introduced two members of his subcommittee, retired judge Robert Alsdorf and Alan Alhadeff.

a. Arbitration

Judge Alsdorf presented a report recommending a model of best practices to improve efficiency and cost savings in arbitration proceedings. The report recommended limits on discovery, narrowing the structure of arbitration or scope of the dispute, and a list of other determinative issues. In developing their recommendations, the subcommittee interviewed arbitrators and lawyers involved in arbitration. Judge Alsdorf noted because arbitration is primarily a private process governed by the parties' contract there are limitations on what can be done. The subcommittee's efforts therefore focused on a best practices

model identifying areas impacting the process rather than looking at changes to court rules. Judge Alsdorf commented that arbitrations, particularly in certain types of cases, can resemble full blown civil litigation especially in discovery. To manage the proceedings more effectively, the subcommittee suggested structuring the arbitration contract at the outset. If the underlying contract contained inadequate provisions, the arbitrator can still affect the process by holding planning meetings with both sides to obtain agreement on the procedures, governing rules, and other substantive details, thereby saving time and costs for the parties.

In response to a question on what steps the Bar might take towards arbitration, the subcommittee suggested the Bar could recommend changes to court rules requiring disclosures of anticipated costs of discovery, settlement offers, pre-trial settlement demands, etc., as supportive measures.

Regarding institutional controls, Judge Alsdorf noted there are several civil and commercial arbitration rules. Best practices are also outlined in the American Arbitration Association (AAA) Rules and Procedures. Private ADR service providers like JAMS and AAA apply those rules and procedures in administering arbitration cases. The Task Force discussed the problem of arbitration agreements with clauses often not well defined. Similarly, the state's arbitration statute, which did not adopt the Uniform Arbitration Act, was perceived as having little structure. The Task Force discussed the possibility of a dual approach to promote the best practices model combined with efforts by the WSBA ADR Section to push for statutory changes in the state's arbitration rule.

Discussion followed on mandatory arbitration (MAR) in Superior Court and whether to recommend increasing the monetary limit which currently stands at \$50,000. The Task Force and Judge Alsdorf also discussed addressing the RCWs on arbitration. Since the report did not focus on those areas, the subcommittee will gather information on MAR cases first and take a further look at the RCWs. The subcommittee will report back to the Task Force.

b. Mediation

Alan Alhadeff presented a report recommending early mediation to reduce the costs of litigation. Research by the subcommittee conducted in partnership with the WSBA ADR Section and KCBA identified three current practices of mediation: 1) mediation towards the end of a case, described as the "summit conference" approach which is the predominant practice, 2) early mediation before significant discovery has taken place and, 3) pre-session mediation contact where counsel for the parties have informal contact or conversations with the mediator prior to discovery. The research suggested early mediation or pre-session contact with the mediator resulted in significant cost savings and made the mediation process more efficient. Mr. Alhadeff noted the project with KCBA

produced several useful field notes of lawyers who practiced early mediation. The notes will be published on the WSBA ADR Section's website as a resource.

Discussion followed on how the Bar can promote the recommendations as useful practices. Mr. Alhadeff suggested the Task Force put on programs around the state with the ADR Section and invite lawyers, particularly newer lawyers, and judges to discuss mediation practices.

The Task Force discussed recommending proposing a rule for a standing order for mandatory mediation prior to trial. Mr. Alhadeff indicated mandatory mediation in civil litigation may be problematic since there must be buy-in from both sides. Pro se and MAR cases, however, may benefit from mandatory mediation. Rather than coming from the state bar, Mr. Alhadeff suggested local bars are better suited to promote mandatory mediation for local practice. As far as structural changes, the courts could adopt a rule authorizing pre-trial mediation and set a specific number of days and hours, for example. The Task Force suggested the ADR subcommittee work with the Pleadings and Practice Subcommittee to explore the possibility of including mediation in the scheduling order.

Trial Procedures Subcommittee

Subcommittee Co-Chair Gail Nunn presented the subcommittee's report recommending a two-tier litigation track for cases up to \$300,000. Cases of less than \$300,000 would be fast tracked. Ms. Nunn discussed the literature reviewed by the subcommittee in preparing their recommendations. The Task Force inquired whether any recommendations can be made in family law. Ms. Nunn commented family law practitioners largely self-regulate on the trial issue because of the fee structure (pay as you go) which limits the process. However, the Task Force could recommend limits on discovery in the case schedule or require mandatory party disclosures. Discussion followed on the recommendation for a six person jury and unanimous jury decisions. Ms. Nunn commented the smaller jury selection should save time to seat a jury. Members discussed the size of juries, the impact of group dynamics on decisions, and the public preference for a 12 person jury. There was uncertainty over whether a unanimous decision represented the current standard for a six person jury. Other recommendations included limits on the number of witnesses and a maximum four days at trial. Ms. Nunn clarified the limit on witnesses also applies to experts and that modifications to limits can be made at the case scheduling stage. Members noted the limits would most likely depend on the case type and practice area. The subcommittee will meet again to consider the points raised by today's discussion.

Discovery Subcommittee

Subcommittee Chair Todd Nunn reported he is working on a second draft of the subcommittee's report presented at the last meeting.

Pleadings and Practice Subcommittee

Subcommittee Chair Eric de los Santos commented the subcommittee's report presented at the last meeting will also address diversity in their final draft. The subcommittee agreed to work with the ADR Subcommittee on incorporating early mediation.

III. Follow up Work

The Task Force discussed creating an outline of common points, and any variances, for a future meeting to discuss which recommendations should be in the final report. Further discussion followed on the schedule of the Board of Governors meetings and submitting the Task Force report for a first reading before the end of the current fiscal year.

The Chair announced a subcommittee on District Court has been formed and Task Force member Judge Marcine Anderson's agreement to serve as chair is dependent on whether she has an opponent in her judicial race; she will confirm shortly. Judge Anderson will bring in other District Court judges and several practitioners to the subcommittee.

The meeting adjourned at 3:48 p.m.

The next meeting of the ECCL Task Force will be June 4, 2014.