

# MEMORANDUM

**TO:** WSBA Board of Governors

**FROM:** Russ Aoki, Chair, ECCL Task Force

**RE:** WSBA Escalating Cost of Civil Litigation Task Force Interim Report  
(Information Only – No Action Requested)

**DATE:** October 30, 2012

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**NO ACTION REQUESTED: INTERIM REPORT**

This is to provide a status report from the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. According to its charter, the Task Force's objective is to "assess the current cost of civil litigation in Washington state courts and make recommendations on controlling those costs". Since our last report, the Task Force has met on April 25, 2012, May 23, 2012, July 25, 2012, and September 26, 2012. The next scheduled meeting is November 28, 2012.

Within the last year, the Task Force has heard presentations from:

- WSBA Executive Director Paula Littlewood on the state of our legal profession;
- King County Superior Court Presiding Judge Richard McDermott on proposals to change the civil judicial system in King County;
- Jeff Hall, State Court Administrator, Administrative Office of the Courts, on statistics and trends examined by the AOC;
- Task Force member Don Jacobs, a former president of the Oregon Trial Lawyers Association, on the expedited civil trial system in Oregon;
- U.S. District Court Judge James Robart on changes to the federal civil system to address the cost of litigation; and
- WSBA Court Rules and Procedures Committee Chair Ken Masters on proposed changes to CR 34 pertaining to electronically stored information (ESI)

During its discussions, the Task Force considered a number of civil litigation expenses such as discovery costs, experts, filing fees, and other out of pocket expenses. Specific areas of focus were identified by the Task Force, leading to the creation of four subcommittees: Pleadings and Motion Practice, Discovery, Alternative Dispute Resolution, and Trial Procedure. The subcommittees have recruited a number of bar members to assist with their work. The total number assisting, including Task Force members, now totals 46. The subcommittees are expected to submit their recommendations to the Task Force by early 2013.

The following are brief reports from the subcommittees on their progress thus far.

### **Trial Procedure Subcommittee**

Honorable Richard McDermott (Co-Chair)

Gail Nunn (Co-Chair)

Amit Ranade

Non-Task Force members: Thomas Fain, Jeffrey Tilden, Kathleen Garvin, Lish Whitson, Simeon Osborn

The Trial Procedures Subcommittee has met five times. During the meetings they explored the various stages of trial, including pre-trial motions, *voir dire*, opening, exhibits, witnesses, and summation. The subcommittee found that isolating which aspects of the trial itself lead to increased costs for the parties is difficult because trial is the culmination of a process that starts many months prior. The subcommittee is, however, cognizant of its limited scope and is determined to focus on the “main event.” The subcommittee is also aware that bench trials are often chosen by parties and are the only trial format for family law civil cases. They also will consider recommendations for judges to streamline and assist in the reduction of costs for the parties in their individual courtrooms.

The goal of the subcommittee is to recommend ways to minimize the escalating cost of civil litigation, while maintaining the integrity of the adversarial system. A variety of methods will be studied to accomplish this, including but not limited to, investigating regulating cases based upon criteria such as the amount in controversy, the type of case, and the complexity of the issues to be tried. Recognizing that a more efficient system benefits not only the parties, the bench and the bar, but jurors as well, attention will also be paid to recommendations geared toward reinvigorating the role of the jury trial in our system of civil justice.

### **Discovery Subcommittee**

Todd Nunn (Chair)

Don Jacobs

Honorable Debra Stephens

Honorable Marcine Anderson

William Hyslop

Non-Task Force members: Tom McBride, Thomas Breen, Milton Rowland, Kinnon Williams, Miquette Karnan, Breean Beggs, Luke LaRiviere, Gregory Lucas, Leslie S. Johnson, J.M. Bouffard, M. Edward Taylor, Adam Rosenberg

After firming up the membership of the Discovery Subcommittee, the subcommittee held its first meeting on September 26, 2012. The next meeting will be held October 24, 2012. At its initial meeting, the subcommittee discussed the task of investigating the causes of increased discovery costs and the approach of the subcommittee. The approach will consist of two phases. Phase One involves gathering evidence on the current costs of discovery in Washington, the factors behind increased costs in discovery, and the solutions recommended or tried by Washington counties, federal

courts, and other states. Phase Two will analyze and discuss the evidence gathered in Phase One, and generate a preliminary report of the subcommittee's recommendations.

The subcommittee organized into five sub-subcommittees:

- Empirical evidence collection – collecting actual evidence of discovery cost escalation in Washington, what cause issues, and potential solutions:
- Literature review – gather and review existing literature for discussion on discovery cost and recommended solutions:
- Federal court review – gather and review methods used in federal courts to reduce discovery costs:
- State court review – gather and review methods used by other states to reduce discovery costs:
- Practice review – gather and review methods used by particular practices to reduce discovery costs.

### **Alternative Dispute Resolution Subcommittee**

Jerry McNaul (Chair)

Lincoln Beauregard

Cynthia Buhr

Non-Task Force members: Honorable Robert H. Alsdorf (retired), Gregg Bertram, David Lenci, Rina Goodman, Alan Alhadeff

The Alternative Dispute Resolution (ADR) Subcommittee has met four times on the following dates: December 19, 2011, January 24, 2012, March 7, 2012, June 12, 2012.

The subcommittee has prepared two draft outlines on ways to improve the cost effectiveness of ADR. Subcommittee member Judge Alsdorf (retired) has written a draft outline on recommended best practices and member Alan Alhadeff has drafted an initial report. The report will discuss a survey project funded by the WSBA ADR Section, which is currently chaired by member Rina Goodman, and will include an update of the survey project based on numerous interviews with experienced mediators. The data will be analyzed by Mr. Alhadeff, other researchers, colleagues, and UW law professors to identify emerging themes, practices, and innovation.

The subcommittee will continue to refine the draft reports over the next several meetings before a final report is presented to the ECCL Task Force.

### **Pleadings and Motion Practice Subcommittee**

Eric de los Santos (Chair)

Honorable Ronald Cox

Jessica Goldman

Non-Task Force members: David Black, Jr., Leslie Hagin, Steve Winterbauer, Andrea Smith, Katherine Cameron, Melissa Anderson, Chrystina Solum

The Pleadings & Practice Subcommittee added 4 new members from the following minority bar associations: Northwest Indian Bar, Washington Women Lawyers, Asian Bar Association of Washington, and the Loren Miller Bar Association. To date, the

subcommittee is comprised of 10 attorneys with diverse practice backgrounds. The subcommittee continues to seek a family law attorney as this individual's experience and insight would be beneficial to the subcommittee's work.

Although the Pleadings & Practice Subcommittee got off to a good start last year, its progress slowed somewhat due to numerous scheduling conflicts. At their most recent meeting, however, the subcommittee refocused its efforts and resolved to meet the deadline to issue a report and recommendations by doing the following:

- a. Clearly defining basic assumptions about the subcommittee's work to ensure consistency in methodology and the drafting of the recommendations. For example, the group recognizes the need to agree on a working definition of the "costs of civil litigation" as it pertains to pleadings practice. By defining the "costs" the subcommittee can measure the effectiveness of any proposed recommendations more accurately.
- b. Assigning individual members specific proposals/recommendations for research and reporting back to the group for discussion and deliberation. In the past, members were asked to bring their ideas to the meetings for general discussion. While well intentioned, this activity did not render any tangible results or work product.
- c. Blocking out specific days and times (at least three 3-hour meetings in early spring) for face-to-face meetings to draft and finalize our recommendations; and
- d. Setting firm deadlines.

Most of the subcommittee's recommendations will come from an intensive review of the literature already available on the subject. In addition, there were several new ideas that were discussed at prior subcommittee meetings that will be followed up for further research and applicability. The subcommittee plans to submit their recommendations to the Task Force by February 2013.

### **ECCL Timeline**

The ECCL Task Force anticipates having all four subcommittee reports completed by early 2013. If so, then a final report could be available to the Board of Governors by the Spring of 2013.

Attachments:

ECCL Task Force Charter  
ECCL Task Force Roster  
Non-ECCL Member Roster