

CIVIL LITIGATION RULES REVISION WORK GROUP

To : Board of Governors
From : Dan Bridges, Chair
Date : September 2, 2020
Re : Final Report

I. OVERVIEW

The work group has fulfilled its charter.

We took direct stakeholder input from the key litigation stakeholders.

In retrospect, much of the prior workgroup's proposed amendments have been left in tact.

Before I provide my formal report, I am going to take a point of personal privilege. As a litigator for over 25 years, it is been my honor and privilege to serve the board and the members by chairing this workgroup. I believe what the work group is providing you should be adopted. I would gladly implement in my practice, all these proposed changes. I believe they will streamline the process and result in more fair trial outcomes.

I suggest there is more work that could be done. For instance, King County has adopted a set of form discovery for personal injury cases. One of the issues this workgroup discussed was a prior recommendation to have mandatory laydown disclosures. As they exist in the federal court, we do not see those as a time or cost saving measure for reasons that are discussed below.

However, and I am only expressing my personal opinion, very specific subject area laydown disclosures could result in an enormous discovery cost savings. There are all manner of subject specific discovery issues that arise in every case that could be easily dispensed with by a mandatory laydown disclosure. The challenge in creating a one-size-fits-all approach however, is that one size does not fit all. But, a tailored approach could realize substantial time and thus cost savings. I will not detail those here but for example, in motor vehicle accident cases there are all manner of issues both sides ask in essentially every case that could simply be mandated provided. The same goes for contract cases, family law cases, etc.



II. HISTORY AND CONTEXT

Several years ago the board created a workgroup to study ways to decrease what it perceived to be an escalating cost of civil litigation. That workgroup returned a variety of suggestions. That board voted up or down on those suggestions, one by one. The suggestions that were affirmed, were handed off to a workgroup to draft rules consistent with both the report of the original workgroup and the charter issued by the board.

When the prior rules drafting workgroup formed, it viewed its charter to be to strictly draft rules as directed by the board. It took some stakeholder input but at most it only took input on how a given rule was worded. It did not take input on whether a rule should be adopted. This was raised several times in those meetings, of which I was the liaison to as a governor, and it was stated quite clearly by the chair of that workgroup that their charge was to draft rules as directed and to not consider stakeholder input as to whether in practice there should be a given rule. That is likely the correct way to read their charter. I will note anecdotally, that the prior workgroup indicated various stakeholders were consulted who later indicated they were not consulted. I rely that was a good faith miscommunication as I experienced that one time myself in this workgroup.

The intention of the original workgroup, and its charter required, that the amended rules would be returned to the board for its direct consideration with at least four months for the board to take comment and stakeholder input. As our process provides, the board creates workgroups and gives instructions via charters. Workgroups provide work product back to the board. Then, the board takes input directly from members and stakeholders on whether the work product should be adopted.

The board has both the discretion and explicit duty to weight others' work product and determine whether it should be adopted. Creating a workgroup and asking it to do something is not a commitment to actually implement what the workgroup drafted. That is clear both by our bylaws and anecdotally. Last year the board rejected a proposed rule requiring attorney liability insurance despite having voted it wanted to explore it and creating a workgroup to draft a rule.

That is the function of the board. To gather information, take additional input from stakeholders, and then make a decision based on its own discretion. In this specific instance, it may be that a given rule, as drafted, did not fully capture the board's intention. Or, it may be that having drafted a rule, the board appreciates the policy value being sought could not be furthered by a rule or lead to unintended consequences.

When the original civil rule proposed amendments were brought back to this board for a vote last year, litigation stakeholders strongly indicated opposition to several aspects of the proposed amendments that expressed opposition *both* to how certain rules were drafted (worded) and that what was attempted could not be achieved by a rule (they objected to a given rule change being made at all).

However, over the course of the previous workgroup's efforts, they asked for two continuances of the due date to deliver their final work product. This board granted those continuances. Having done so, there was no time to take stakeholder input by the board and meet the Supreme Court's rulemaking deadline that

fall. Also, there was essentially no time to comment, even as among the board much less stakeholders, before the vote was to be called. As the agenda proceeded that day, this was one of the last items, on the last day, of the Board's meeting.

Given that, and given the strong stakeholder response, last year's board voted to pause the process and create this workgroup to take stakeholder input directly and to both weigh it on its merits and to determine if their concerns could be addressed in the proposed rule changes.

In that regard, what we are providing you as redlines are not the civil rules as they currently exist. Instead, so you can see the changes made by this workgroup, we are providing you the redline offered by the previous workgroup, and our workgroup's work is a redline of that redline.

I realize that may sound like a tautology. However, I think it is important you are able to see where this workgroup amended the prior workgroup's suggestions.

The actual sitting members of this workgroup are all active litigators. We also had a retired trial judge. All of our stakeholders were active litigators, appointed by their respective organizations.

III. PROPOSED AMENDMENTS

Our work focused on five primary areas.

A. Mandated "Cooperation"

The largest stakeholder concern, both last year and now, were amendments that gave the trial courts the ability to issue sanctions even if a party followed all the rules and did *not* violate CR 11, but the court found the party was not "cooperating" sufficiently. The amended rule provided no definition of cooperation. Arguably, that would be left to each judge's subjective interpretation.

The workgroup and stakeholders discussed at length how a cooperation value could be implemented into the Civil Rules but could not find a way without encountering all manner of problems. We considered putting it into GR 1 but stakeholders expressed that would be a redundant addition given what GR 1 already says.

This workgroup concluded that the problem, if there is one, lays in the failure to enforce the rules we already have. Mandating "cooperation" in following the rules is not necessary because the rules need to be followed regardless. Further, one person's lack of cooperation is simply another person's zealous advocacy *within* the rules. As a policy value it fails to account for the fact that litigation is inherently adversarial. Finally, as originally proposed, allowing a sanction for conduct that is allowed under the Rules creates uncertainty. What is permissible in front of one judge would likely not be permissible in front of another. We already benefit from a well-developed body of law under CR 11 and CR 37. In the end, an undefined cooperation requirement would lead to more motions and more costs. Thus, this was removed.

B. “Early” Forced Mediation

By my reading of the rule provided by the prior workgroup, although I believe it is borne out by the records of the Board’s original vote on the ECCL, the suggested rule change did *not* create the rule the board asked for. Instead, it imposed a mediation requirement materially earlier.

Litigation stakeholders were unanimous and steadfast that while the policy value of early mediation is laudable, the reality is that cases are not amenable to settlement until the parties have sufficient information. Pushing mediation before that will not get cases settled; it will have the opposite effect. Insurance carriers (the drivers of most civil settlements) will not settle until they have for their claim file, certain information. No court rule will change that. Worse, of the cases that might settle earlier, there is the material risk they will be settled on incomplete information and leave injured persons with insufficient compensation.

Given the parties already have a high motivation to settle as soon as possible for a variety of reasons that can be explained but it is suggested should be self-apparent, a mandate for mediation by an “early” time arbitrarily fixed by a court rule will not result in more cases being settled.

Additionally, the previously suggested rule allowed parties an ability to avoid the rule imposed early mediation deadline but that would require a motion. Requiring parties to file a motion, which stakeholders indicated would essentially be done in every case, that would require a judge to take time to consider in order to rule on, does not further the goal of reducing the cost of civil litigation which was the purpose of the original task force.

In the end, this workgroup reports that while the attempt to create a pathway for more cases to settle earlier was reasonable, in application this is not something that can be reduced to a rule and an attempt to do so would have the opposite effect; it would increase the cost of litigation as cases forced to mediation before the parties are fully informed would actually lead to more cases going to trial and the increased cost that would create.

C. Case Schedule Requirements

A correction was made to the case schedule requirement. Previously, the rule as proposed left a large number of domestic and family law cases subject to the mandatory case schedule when they are either unworkable under a case schedule or a case schedule is in fact not necessary. We added language at the suggestion of DRAW to fix that.

D. Discovery Supplementation Requirement

Mr. Robert Wayne, of the King County Bar Association, made the excellent suggestion that if we want to decrease the cost of discovery, imposing a mandatory obligation to supplement discovery answers would facilitate that. The stakeholders either unanimously agreed or otherwise did not see a problem with that suggestion. Under the current rule, there is an obligation to supplement prior answers only under certain

narrow situations. As a matter of practice, given there is not a continuing duty to supplement, any competent attorney is put to either send letters to adverse counsel asking for a supplementation or having to send an entirely new set of discovery asking for a supplementation.

An automatic duty to supplement makes all of that work unnecessary thus decreasing the cost of litigation. It might be said it would require more work on the disclosing party to supplement and thus increase cost. It is suggested that is without merit. First, parties are asking for supplementation. The issue is not whether supplementation is done, it is only what work is required to bring it about. This is a net decrease. Second, even if this results in supplementation being done in the cases where the attorney might not have otherwise asked, it remains a benefit because they should have asked. Finally third, the duty would only be triggered if there was new information requiring supplementation. If there is not, there is no need to supplement.

This change should result in a net decrease work in discovery and more fair trials because it requires disclosure of relevant information. As context, the proposal offered here is similar (although not precisely the same) as the duty to supplement under the Federal Rules of Civil Procedure. See Rule 26(e)(1).

E. Mandatory Laydown Disclosures

With due and full respect to our learned federal bench, the litigation stakeholders were unanimous that the federal mandatory laydown disclosure requirement, in application, does not result in reducing the cost of, or time to conduct, discovery. Universally, those who participated in our meetings indicated the full extent of laydown disclosure requirements are replicated in every set of basic discovery requests. Thus, far from streamlining discovery, it actually duplicates it. Further, very little information is actually provided particularly given that fact it leaves it to the subjective impression of the party making the disclosure whether the information is relevant and thus needs to be identified.

The entire exercise in application is a “check the box” requirement that serves no purpose other than as a vehicle to exclude witnesses and evidence not disclosed in the laydown requirement. However, given our state law is dramatically different in the exclusion of evidence and witnesses for the failure to disclose them in discovery as compared to federal law, see, Burnet v. Spokane Ambulance, 131 Wn.2d 484 (1997) and Jones v. Seattle, 179 Wn.2d 322 (2013), a state imposed, one size fits all laydown disclosure requirement in our Civil Rules, does not do even that.

Meaningful decreases in the cost of discovery by a mandatory disclosure can only be achieved by case area specific laydown disclosures tailored to the needs of any one specific case area.

IV. NEXT STEPS

The Supreme Court has set forth what is essentially a form that must be completed with any proposed rule change. That must be done. Also, it is customary to send proposed rule changes with a report to the court explaining both the process and the reason for the changes. My understanding is historically, the chair has drafted that material and I would like to continue to volunteer for that duty. I think it is important that the

report be created by someone who has seen the process for more or less beginning to end and can provide the full context both for the original changes, and these changes to those changes.

V. ATTACHMENTS

We are providing:

1. Meeting memos for the work group;
2. The original stakeholder objection matrix presented to the board when this workgroup was created;
3. All rules in redline as discussed above;
4. Rules proposed by the original drafting task force that the workgroup did not revise.

ATTACHMENT 1

WASHINGTON STATE BAR ASSOCIATION

January 23, 2020

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Mr. Isham Reavis
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Domestic Relations Attorneys of Washington
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Seattle, WA 98104-7088

Re: Washington State Bar Association Civil Rules Workgroup

Dear Colleagues:

I am writing you because we either discussed the pending amendments to the Civil Rules last year, or you are the successor to an office of someone I did speak with last year.

I am honored to be the chairperson of the WSBA's Board of Governors Civil Rules Workgroup following up on work of a different workgroup that, last year, drafted sweeping amendments to the Civil Rules. You or your group provided input on those proposed amendments. The Board of Governors took your additional input seriously and created this new workgroup to ensure that you, as our critical litigation stakeholders, are fully heard in this process.

Having obtained the Board of Governors' agreement to pause this process *specifically to take your input*, I hope you will participate at our upcoming meeting where we will concretely discuss the proposed Civil Rule amendments you expressed concerns over. It is fair to say the Board having taken this pause specifically to obtain additional stakeholder input, can be reasonably relied upon to act quickly once the current workgroup returns its report. To borrow an auction phrase: this is last call. Of course, the Supreme



Dan Bridges, Workgroup Chair
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Litigation Stakeholders
January 17, 2020
Page 2

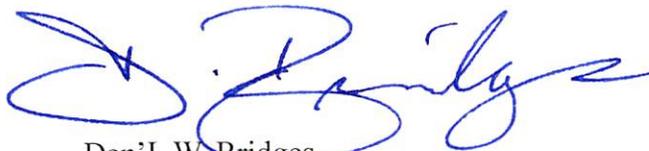
Court will take additional public comment as a component of its rule making process but this point in time provides a unique opportunity for you to have direct input. I do not believe an opportunity such as this to have an impact on our Civil Rules will happen again in our collective practice lifetimes.

In terms of how this process will proceed, I am attaching the agenda for our next meeting and a decision matrix. My current thought is that before we give consideration to specific language, we need to determine if the key stakeholders can come to a consensus as to how to best achieve cost savings in civil litigation. The decision matrix is only a guide. I have identified the broader issues identified by stakeholders but as noted in the last item, the workgroup welcomes and solicits your additional suggestions regarding how we can decrease the cost of civil litigation while not impairing the rights of parties in it.

In the next few days you will receive a communication geared toward determining your availability. Regretfully, I understand we may not obtain 100 percent participation. There will be an option to appear by phone but I urge you, if you are not available, to please appoint someone to appear in your stead. Without question we will give full consideration and weight to the written input you already provided. However, I can say without reservation there is no substitute for a personal appearance and we want to go beyond and build on your input to determine the best outcome. Please give us the benefit of your wisdom and experience while undertaking this important task.

My direct phone number is 425-462-4000. My email is dan@mcbdlaw.com. I welcome and invite any feedback you may have.

Sincerely,



Dan L W. Bridges
Workgroup Chairperson
Past WSBA Treasurer and Governor, District 9

Attachments: Agenda, Decision Matrix
cc: WSBA President Rajeev Majumdar
WSBA President-Elect Kyle Sciuchetti
WSBA Governors, Kang, Higginson, Tollefson
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CIVIL LITIGATION RULES REVISION WORK GROUP

To : Workgroup, Stakeholders, and Board of Governors
From : Dan Bridges, chair
Date : June 25, 2020

Attached is a matrix of civil rule amendments based on our in-person meetings and stakeholder input. As you will recall, the board created this workgroup to take stakeholder input that may not have been completely addressed when the civil rule amendments were originally proposed.

I suggest the matrix and redline rules speak for themselves. This is only a work in progress.

To our stakeholders, given the current restrictions on meeting in person, these are being provided electronically. I strongly urge and respectfully request that you please provide your input by email as soon as possible. Depending on the scope of comments, we may hold an additional zoom meeting to address ongoing concerns. If your input indicates this draft is at least close, it may be possible to address any further concerns based on the written input alone.

As to the specific members of the workgroup, this is only my attempt to facilitate our workflow. We will need to hold an additional meeting before these are presented to the board for formal consideration.

There are a variety of civil rules implicated by the original workgroup's and amendments that I have not addressed here because they only arise because of internal citations issues. For instance, the workgroup may have added a section to CR 26 that changed the numbering or lettering of that rule. That would require changing other rules that referenced those subsection numbers that changed. To streamline the process I have not included any of those rules in either the matrix or the redline at this time. I am working on conforming those issues now. Also, there may likely be the same issues present in the redlines attached. I am aware of those and I am also working to conform those. However, as none of that impacts the substance I wanted to get these to you as soon as possible.

Please feel free to either respond directly to this email as you receive it from WSBA, or email me at dan@mcbdlaw.com or call me 425-462-4000 I look forward to your responses.





July 20, 2020

Re: Governor Bridges' June 25, 2020 Memorandum on the Civil Litigation Rules Revision Work Group

Dear Committee Members:

The King County Bar Association Judiciary and Litigation Committee respectfully submits these comments regarding Governor Bridges' June 25, 2020, memorandum seeking input on certain proposed civil rule amendments. Our Committee has consistently taken an active role in evaluating and providing substantive feedback on proposed changes to the civil rules for years, including those referenced in Gov. Bridges' memorandum.¹ The document at issue is framed as "[Governor Bridges'] attempt to facilitate [the WSBA Civil Litigation Rules Revision Work Group's] workflow." The memorandum further provides, "[d]epending on the scope of comments, we *may* hold an additional zoom meeting to address ongoing concerns." (emphasis added). Following review of Gov. Bridges memorandum and discussion during an emergency Committee meeting convened on June 16, 2020, we are compelled to respond to certain procedural concerns.

The first issue we wish to highlight is the unilateral timeline to provide substantive feedback. We believe that the abbreviated timeline left our committee and other similarly situated stakeholders with insufficient time to fully respond to the proposals contained within the memorandum. With additional time we would have discussed how the proposals differed from, or were consistent with, the positions advanced by our committee in the past.² Our Committee is committed to providing substantive feedback on many proposed changes to the civil rules and look forward for the opportunity to do so in an open and structured manner that affords all stakeholders a genuine opportunity to provide substantive feedback on any proposed rule revisions.

The second area of concern is the extent to which the proposals in memorandum purport to reflect the position of the workgroup as a whole in light of the fact they are presented in summary fashion by the workgroup chairman. The memorandum provides limited information about the extent of any discussions or disagreements the committee members may have had about the proposed changes, and in fact, there is no identification whatsoever of the stakeholders that were involved in the work of your Task Force. Public disclosure and transparency into the nature and scope of stakeholder involvement with the workgroup is paramount to this process.

Finally, given the substance of the proposed changes and the potential impact on civil litigation in this State, we believe it is critical for all interested stakeholders to have the opportunity to substantively raise any issues they identify with any of the proposed changes. More specifically, we ask

¹ See, e.g., Memorandum to WSBA Task Force Regarding Initial Disclosures, Apr. 30, 2018 (attached for reference).

² See, e.g., *id.*

that our Committee be afforded adequate opportunity to attend an open meeting of the drafting Work Group and provide comments on any final product produced by the Civil Litigation Rules Revision Work Group that the Work Group intends on presenting to the WSBA Board of Governors.

We hope that these comments are useful in the Civil Litigation Rules Revision Work Group's continued efforts and look forward to providing feedback on your committee's future work. Please contact our Committee co-chairs Jane Morrow (jm@medilaw.com) or Isham Reavis (Isham@aokilaw.com) if you have any questions or concerns about our comments.

Sincerely,

KCBA Judiciary and Litigation Committee

cc: Jane Morrow, Co-Chair
Isham Reavis, - Co-Chair

CIVIL LITIGATION RULES REVISION WORK GROUP

To : King County Bar Association, Judiciary and Litigation Committee

From : Dan Bridges, chair

Date : July 23, 2020

First, thank you very much for your July 20, 2020 letter. You raise some important issues and I will respond in order.

Allow me to say at the top, however, that we will be holding an additional meeting via Zoom shortly to discuss this proposed amendment. I assure you that every person on the contacts you provided will be included in that scheduling. Please be on the lookout for that email which will come from WSBA directly. I hope you attend. We want your input.

Finally, **I would be grateful and I specifically ask that you please share this response with your full committee.** To save time, I would have cc'ed your members but they are not listed on your website.

To address your letter more specifically.

1. You expressed concern over a “unilateral time to provide substantive feedback.” We provided a deadline for a response but the workgroup has no intention on cutting off feedback. Considering stakeholder feedback was the reason this workgroup was created.

However, it has been our experience that without stating a deadline, responses are delayed to the point none are provided. The deadline was only intended as a nudge to receive feedback because we want to hear from you.

In terms of your organization’s specific input, as a gentle reminder please bear in mind we solicited input on the proposed amendments to the civil rules last year and your group provided incredibly helpful input that we implemented in this most recent redline. Additionally, you and I had a number of emails about your attendance at our last meeting and you in fact had a member of your group in attendance at that meeting. (Those emails were February 18 and 20, if you would like to review them). You told me via email on February 18 that Mr. Robert Wayne would attend for KCBA. He did. He was a very active and helpful participant.



That said, and I apologize if I cause offense, I confess I am a smidge confused by the overall gist of your letter as it implies we have not provided an opportunity for feedback and we have not involved you in the process. We provided all stakeholders, including you folks, notice of our meeting, and *your group attended the meeting and provided your input* – which we implemented. Yet, as I read your letter, the gist of it is we have not communicated with you at all.

2. In regard to the substance of my June 25 memo and your “concern (over) the extent to which the proposals in (the) memorandum purport to reflect the position of the work group as a whole in light of the fact they were presented in summary fashion by the workgroup chairman,” my memorandum was submitted to entire workgroup before being pushed out to stakeholders without disagreement as to its content.

Also, your representative attended that meeting. We provided you the memo, along with the other stake holders. I have not heard from Mr. Wayne that the memo provided did not reflect the consensus of comments at the meeting he attended. Given that, and again while intending no offense, I remain a smidge confused. Are you (or Mr. Wayne) saying the memo summary of the meeting is not accurate? He was there. If so, may I ask that you help me by identifying where. I would be grateful for any help you can provide.

I agree completely over the need for transparency. I feel we have done so but always welcome input.

3. You indicate “given the substance of the proposed changes and the potential impact on civil litigation in the state, we believe it is critical for all interested stakeholders to have the opportunity to simply raise any issues they identify with any of the proposed changes. More specifically, we ask that our committee be afforded adequate opportunity to attend an open meeting of the drafting workgroup and provide comments on a final product.”

I agree with that sentiment one-thousand percent. I and the workgroup unreservedly welcome any and all input your organization, any stake-holder, or any person has.

We have held two public meetings. I personally wrote an extended letter before our second meeting that was sent to WDTL, WSAJ, WSBA litigation section, Draw, and Ms. Jane Morrow and Mr. Isham Reavis of the KCBA Judiciary/Litigation committee. That letter concluded:

In the next few days you will receive a communication geared toward determining your availability. Regretfully, I understand we may not obtain 100 percent participation. There will be an option to appear by phone but I urge you, if you are not available, to please appoint someone to appear in your stead. Without question we will give full consideration and weight to the written input you already provided. However, I can say without reservation there is no substitute for a personal appearance and we want to go beyond and build on your input to determine the best outcome. Please give us the benefit of your wisdom and experience while undertaking this important task.

Your group attended that meeting. Thank you!

In conclusion, I want to thank you and your entire committee for your July 20 letter. *It is greatly appreciated!*

Please feel free to either respond directly to this email at dan@mcbdlaw.com or call me 425-462-4000. I look forward to your responses.

PS: Your letter indicates there are attachments. There were no attachments to my copy. That is fine. I have the original document identified.



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VIA EMAIL

July 23, 2020

Dan Bridges (dan@mcbdlaw.com)

Chair, Civil Litigation Rules Revision Work Group

Washington State Bar Association

1325 4th Avenue, Suite 600

Seattle, WA 98101-2539

Re: WDTL Comments On June 25, 2020 Matrix of Civil Rule Amendments

Mr. Bridges:

The Washington Defense Trial Lawyers (“WDTL”) has served as a voice for the civil defense bar since 1962. WDTL members defend small and large businesses, individuals, and other entities in supporting balance and fairness for all in civil trials. WDTL submits these initial comments to the proposed changes outlined in your June 25, 2020 Matrix of Civil Rule Amendments.

While WDTL supports the work group’s decision to drop the “stand-alone” cooperation violations in the proposed amendments to CR 11 and CR 37, it still has concerns about some of the remaining proposals.

First, while WDTL and its members believe that civility and cooperation in litigation must be a central tenet of modern practice, WDTL is concerned that the addition of an undefined “lack of cooperation” standard to CR 11 and CR 37 adds nothing meaningful to the inherent authority already available to address lack of cooperation under the rules, while adding an additional layer of ambiguity and confusion. We fear that in spite of removing the “standalone” violations in the rules, the inclusion of the undefined term will still invite uncertainty and/or abuse.

Second, the proposed amendments to CR 26(b)(5)(A)(1) is also likely to cause undue confusion and seems inconsistent with existing practice and the state of the law regarding consultants and putative experts. *See* CR 26(b)(5)(B). As in Federal Court, the time for expert discovery should come after the final decision to name an expert has taken place (typically, the deadline for disclosing experts). Prior to the disclosure of an expert, the potential expert is usually working in a consulting / preliminary role, subject to CR 26(b)(5)(B). A party typically will not have made the definitive decision as to whether that putative expert will be a testifying expert until so designated. Allowing discovery into the exact subjects required by the expert disclosure rule, prior to the expert disclosure, makes little sense. Moreover, language creating a presumption of a CR 37 violation for failure to respond to such discovery makes little sense



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where, in most cases, it will not yet be clear whether the discovery will be subject to CR 26(b)(5)(A) or CR 26(b)(5)(B).

Finally, we are concerned that the language of CR 26(g) regarding privilege logs, as proposed, is too rigid. Requiring “individual identification,” without any exceptions, appears even more stringent than the federal rules. For instance, under a strict reading of the proposed language, each written communication with your client in the ordinary course of representation would each need to be individually listed on a privilege log. Obviously, this would be exceptionally burdensome, and presumably far outside the intent of the rule. To the extent that clarification of privilege log rules is required, we believe tracking the language of the Fed. R. Civ. Proc. 26(b)(5)(A) makes more sense.

We sincerely appreciate the opportunity to submit these preliminary comments and look forward to continued involvement with honing these amendments to ensure that our Court Rules reflect a fair and pragmatic litigation process for all in our state.

Sincerely,

Michael Chait
Chair, WDTL Rules Committee

CIVIL LITIGATION RULES REVISION WORK GROUP

To : Work Group and Stake Holders

From : Dan Bridges, chair

Date : August 7, 2020

Thank you to everyone who provided written input or attended our most recent meeting on August 5. As we are narrowing the issues to a spear point, I will confine this memo to new issues and actions taken as opposed to reiterating past conversations.

I am attaching redlined versions of CR 1, 3.1, 11, 26, 37, and CRLJ 1 and 11 based on the input at our August 5 meeting. Those are the only rules that elicited negative input or request for changes from the preceding version.

Before outlining the changes, in terms of our process going forward, we will have an additional meeting to review these changes and take additional input. My sense given our last meeting is our next meeting should likely be our last meeting. I believe the changes identified below address essentially all of the stakeholder input with one possible exception that is identified.

1. **Cooperation.** At the unanimous request of all stakeholders and workgroup members in attendance, I have stricken all reference to a “cooperation” requirement. That language was found in CR 1, 11, 26, and 37. We had an extended discussion on retaining that language, even if only in CR 1, to articulate that attorneys should cooperate.

However, without providing a definition of cooperation, concern was discussed regarding subjective interpretation. One person’s definition of cooperation may simply be another person’s zealous use of the rules as written. We had a very long discussion on this issue and addressed a variety of ways to salvage retaining that term but ultimately the unanimous consensus was the rules already require parties to follow the rules and to not engage in dilatory behavior. If there is a need to obtain greater compliance with the rules, the answer is requiring greater compliance with the current rules. Mandating an undefined duty of “cooperation” was believed to be an attempt to legislate pleasant behavior which although of course desired, is perhaps not possible through written rules.

2. **Abuse of case schedules to delay disclosure.** WSAJ expressed concern over making a delayed disclosure of expert witnesses a discovery violation. More specifically, that a party may not know until well after retention whether an expert is going to be a testifying expert versus a consulting expert. WSAJ expressed concern over exclusion of such a witness.



It was pointed out the proposed amendment would not make a good faith later disclosure a violation because nothing in the proposed amendment would make it a violation to disclose a consulting expert. However, there was unanimous agreement, and certainly no dissent, that case schedule deadlines in regard to expert witnesses are persistently improperly used as a shield to delay responding to expert witness discovery with the oft stated response that experts will be disclosed by the case schedule deadline even when the expert is clearly (and well before the deadline) going to be a testifying expert. The case schedule deadline was never intended to be safe harbor to refuse to respond to discovery yet that has become a wide spread practice.

But, to address the concern, the language it would constitute a “per se” violation was deleted.

3. **Exclusion of family law matters from case schedule.** DRAW pointed out that the case schedule exclusions under CR 3.1 omitted several important family law issues (change of name, paternity, nonparent custody, etc.) under RCW Title 26 that should not (and really cannot) be subject to a case schedule. DRAW pointed out that as the previous workgroup exempted the entirety of RCW Title 11 from the case schedule requirement, CR 3.1 should similarly exempt RCW Title 26 in total as opposed to attempting to list the sections individually. That change was made.
4. **Privilege Log:** WSAJ indicated the proposed language regarding a privilege log was overbroad. It should be noted no stakeholder expressed opposition to a privilege log requirement when a party asserts a privilege to not produce discovery – it is clearly required by case law. I deleted the language proposed and inserted language essentially verbatim (I had to change the tense slightly) from Rental Housing Ass’n of Puget Sound v. City of Des Moines, 165, Wn.2d 525, 538 (2009).
5. **Supplementation.** Mr. Robert Wayne (in attendance on behalf of KCBA but making it clear he was not specifically authorized to speak for KCBA beyond the scope of its written input) raised the issue of a need to make the duty to supplement responses broader. The rule as presently understood requires a supplementation if the prior answer, if left to stand, would be misleading. There was general agreement that a more proactive supplementation requirement would be desirable and certainly no dissent on that.

In reviewing the rule as it exists, I have difficulty identifying language that could be added to enhance the duty of supplementation. Truly, if you consider the full scope of the rule, my impression is the rule does require supplementation greater than simply if the prior answer if left to stand would be misleading. Given I cannot identify language to add to create some type of ongoing duty to supplement greater than what is already stated, I did not draft additional language.

That said, I believe the litigation stakeholders expressed agreement with the sentiment expressed by Mr. Wayne. I invite Mr. Wayne or any stakeholder to propose language to accomplish the policy value he identified.

4. **CRLJ issues.** The only change in the CRLJs was cooperation. I deleted those provisions consistent with the foregoing.

CIVIL LITIGATION RULES REVISION WORK GROUP

To : Work Group and Stakeholders

From : Dan Bridges, chair

Date : August 28, 2020

Re : Overview of upcoming September 1, 2020 meeting

Before addressing the September 1 meeting I must note a correction to my last memo. I attributed comments to WSAJ and Mr. Chris Love regarding expert disclosures that were in fact made by Michael Chait who is WDTL's delegate. I apologize for that. Please take this as a correction of our 'record' on this issue.

The only change raised at our last meeting was the suggestion we amend CR 26 to create an automatic, continuing duty to supplement discovery. There was no objection to doing so albeit we were unable to land on language. Happily, Mr. Robert Wayne, who is KCBA's delegate, provided a simplistic and excellent suggestion. The amended CR 26 includes that suggestion.

In short, with an automatic continuing duty to supplement, it streamlines the entire rule because as it exists, CR 26 has all manner of specific situations where a duty to supplement arises the rule spells out. Imposing an automatic duty to seasonably supplement allows the rule to be greatly streamlined, removing all of those circumstances, and simply imposes a duty to seasonably supplement.

The current rule uses the term "seasonally" supplement on the topics that currently require automatic supplementation. I make mention of that in the event anyone feels the phrase is vague. It may be. But, that is how the current rule reads and it is logical to maintain that consistency.

If you have any concerns or further suggestions about this CR 26 change or any other rules, I would be grateful if you could provide them before our September 1 meeting. Saying that, I not trying to impose an arbitrary deadline or close off input. I suspect it would be helpful for people to have your information in advance of the meeting so they may consider it. But, we will welcome information and points raised for the first time at the meeting itself.

If things go according to plan, the September 1, 2020 meeting should be the last meeting of this workgroup. I am hopeful the Board of Governors will take these proposals up at its September, 2020 meeting and approve submitting them to the Supreme Court. If so, I anticipate the Board will ask that an explanation



and history of the proposed amendments be provided. Historically, that is typically done by the workgroup chair in combination with staff. Assuming we proceed in that regard, I will ensure you receive a copy.

I want to thank every person who has contributed. Your input has been invaluable not only now, but last year when proposed amendments were brought to the Board for passage originally. Your timely and articulate written input persuaded the Board that additional work was needed. Never underestimate the power of focused determination on a specific issue.

If any of you have questions or comments leading up to the final meeting or after it, I would be very pleased to take any person's call at any time. Please feel free to either respond directly to this email at dan@mcbdlaw.com or call me 425-462-4000.

ATTACHMENT 2

COOPERATION REQUIREMENT

SUMMARY	King County Litigation and Judicial Committee	WSBA Litigation Section	Washington Defense Trial Lawyers	Washington State Association for Justice	DRAW – Domestic Relations Attorneys of Washington
<p>Imposes a “cooperation” requirement the runs across all Civil Rules subject to sanctions if found to not cooperate.</p> <p>No definition.</p> <p>Can be found to not cooperate even if does not violate rule.</p>	<p>Should be addressed by changes to current rules; CR 26(e) should more explicitly adopt CR 37 language</p>	<p>Flawed concept. Rules already impose.</p> <p>If intention is to decrease costs, needs specific definition so “it can be implemented in a consistent manner throughout the State.”</p> <p>Written to impose a subjective standard based on judge’s own opinion. No definition will lead to more motion practice, uncertainty over what constitutes cooperation, and post-hoc judgments. Will not decrease cost of litigation</p>	<p>Needs definition. Ambiguity in what is required will lead to inconsistent results. Imposing an additional sanction rule, in addition to already existing CR 11 and CR 37 sanctions and rules will not result in more cooperation and will lead to more motion practice.</p>	<p>Without a definition there will be inconsistent, subjective results. Ambiguity will lead to more motions.</p> <p>greater “critical issue” is the lack of “enforcement” of current rules. The data in the ECCL justifying this was only “unscientific, anecdotal surveys conducted between 2007 and 2009 by the ABA and WSBA.” The ECCL gave no weight to the same surveys finding the “prevailing common belief... is that judicial enforcement of the Civil Rules” that already exist will “solve the perceived problem.”</p>	<p>No comment made.</p>

MANDATORY EARLY MEDIATION

SUMMARY	King County Litigation and Judicial Committee	WSBA Litigation Section	Washington Defense Trial Lawyers	Washington State Association for Justice	DRAW – Domestic Relations Attorneys of Washington
<p>Hard deadline 6 months before trial.</p> <p>Departs from Board direction to not hold before party depositions.</p> <p>KCLR 4 deadline is 4 weeks pretrial.</p> <p>Can opt out with cause by requires a motion.</p>	<p>No comment.</p>	<p>“Will not have any marked effect on reducing the cost of litigation.” Will become a “check the box” act.</p> <p>In other jurisdictions with this early it has not led to more settlements and leads to fewer as will not mediation a second time.</p> <p>Many ambiguities more specifically addressed in feedback.</p>	<p>Need to be more specific to identify types of cases where may by of assistance versus applying to all.</p> <p>Will possibly lead to settlement in only small cases with undisputed facts. In most cases will deny parties ability to develop facts necessary to properly mediate and “does not support fair resolution of cases” where full facts are known.</p>	<p>Does not oppose general concept of early mediation but the rule as drafted will not be effective and increase overall costs.</p> <p>Whether cases settle “depends almost entirely on whether the adjuster has enough information” and too early of mediation will foreclose that.</p> <p>Changes in pre-litigation assessments “almost never occur” until not only party depositions but also key witnesses and experts.</p> <p>Possible changes are requiring a party to request it and pay for it.</p>	<p>“Opposed to this rule.”</p> <p>A required fee schedule will limit the pool of possible mediators and eliminate pro bono. Is an unfunded mandate on Courts to administer.</p>

CASE SCHEDULE/MANDATORY DISCLOSURES

SUMMARY	King County Litigation and Judicial Committee	WSBA Litigation Section	Washington Defense Trial Lawyers	Washington State Association for Justice	DRAW – Domestic Relations Attorneys of Washington
<p>Requires mandatory disclosures of all evidence, loosely modeled on FRCPs.</p> <p>No supplement duty, includes expert opinions, no language to protect against abuse.</p>	<p>Will increase cost of litigation, is only a box to check. Does not produce “adverse information held by opponent.” Will be a burden on Washington Courts to administer process.</p> <p>Deadline far too early or late depending on serviced date. FRCP works very well and should be mirrored if implemented.</p> <p>A subterfuge to not respond to other discovery. Already abuse with current case schedule with refusal to disclose certain information until deadline. Need language that deadlines are not safe harbors.</p> <p>Scope too large, other problems,</p>	<p>No comment made</p>	<p>No comment made</p>	<p>Does not generally oppose but rule is too broad. Should be limited to substantive evidence and made more clear does not interfere other discovery methods. Proposed deadline too soon. Expert opinions should not be included as not prepared yet. Is primarily a burden on injured plaintiffs, both in cost and ability as experts need discovery.</p> <p>Other problems exist regarding the disclosure on insurance, it is more limited than existing rule.</p>	<p>Needs more clear distinction for family cases. While the proposed rules ostensibly exclude family law, there are some areas that would be within the proposed case schedule which is not workable.</p>

ATTACHMENT 3

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 1 – SCOPE AND PURPOSE OF RULES

1
2 These rules govern the procedure in the superior court in all suits of a civil nature,
3 whether cognizable as cases at law or in equity, with the exceptions stated in rule 81. All parties
4 and attorneys shall reasonably cooperate with each other and the court in all matters. ~~They~~ These
5 rules shall be construed and administered consistently with this principle to secure the just,
6 speedy, and inexpensive determination of every action.
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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
New CR 3.1

1 (a) Initial Case Schedule. When a summons and complaint are filed, and unless
2 exempted pursuant to this rule, the court shall, in addition to any Local Rule case schedule
3 requirements, issue an initial case schedule with at least the following deadlines:

- 4 ~~1. Initial Discovery Conference. The parties shall hold an initial discovery~~
5 ~~conference no later than 45 weeks before the trial commencement date.~~
- 6 ~~2. Discovery Plan and Status Report. The parties shall file a discovery plan and~~
7 ~~status report no later than 43 weeks before the trial commencement date.~~
- 8 ~~3. Initial Disclosures. The parties shall serve initial disclosures no later than 39~~
9 ~~weeks before the trial commencement date.~~
- 10 ~~4. Joint Selection of Mediator, if Any. If the parties intend to jointly select a~~
11 ~~mediator, the plaintiff shall file a joint selection of mediator no later than 37~~
12 ~~weeks before the trial commencement date.~~
- 13 ~~5. Appointment of Mediator if Parties Do Not Jointly Select. If the plaintiff does not~~
14 ~~timely file a joint selection of mediator, the court shall appoint a mediator and~~
15 ~~notify the parties and the mediator no later than 36 weeks before the trial~~
16 ~~commencement date.~~
- 17 ~~6. Notice of Compliance with the Early Mandatory Mediation Requirement. The~~
18 ~~plaintiff shall file a notice of compliance with the early mandatory mediation~~
19 ~~requirement no later than 32 weeks before the trial commencement date.~~

20 17. Expert Witness Disclosures.

- 21 A. Each party shall serve its primary expert witness disclosures no later than
22 26 weeks before the trial commencement date.
- 23 B. Each party shall serve its rebuttal expert witness disclosures no later than
24 20 weeks before the trial commencement date.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

New CR 3.1

1 8. Discovery Cutoff. The parties shall complete discovery no later than 13 weeks
2 before the trial commencement date.

3 9. Dispositive Motions. The parties shall file dispositive motions no later than nine
4 weeks before the trial commencement date.

5 10. Pretrial Report. The parties shall file a pretrial report no later than four weeks
6 before the trial commencement date.

7 ~~11. Pretrial Conference. The court shall conduct a pretrial conference no later than~~
8 ~~three weeks before the trial commencement date.~~

9 12. Trial Commencement Date. The court shall commence trial no later than 52
10 weeks after the summons and complaint are filed.

11 (b) If application of subsection (a) would result in a deadline falling on a Saturday,
12 Sunday, or legal holiday, the deadline shall be the next day in the future that is not a Saturday,
13 Sunday, or legal holiday.

14 (c) The party instituting the action shall serve a copy of the initial case schedule on
15 all other parties no later than ten days after the court issues it.

16 (d) Permissive and Mandatory Case Schedule Modifications.

17 1. The court may modify the case schedule on its own initiative or on a motion
18 demonstrating (a) good cause; (b) the action's complexity; or (c) the
19 impracticability of complying with this rule. At a minimum, good cause requires
20 the moving party to demonstrate due diligence in meeting the case schedule
21 requirements. As part of any modification, the court may revise expert witness
22 disclosure deadlines, including to require the plaintiff to serve its expert witness
23 disclosures before the defendant if the issues in the case warrant staggered
24 disclosures.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

New CR 3.1

1 2. No case schedule may require a party to violate the terms of a protection, no-
2 contact, or other order preventing direct interaction between persons. To adhere to
3 such orders, the court shall modify the case schedule on its own initiative or on a
4 motion.

5 (e) The following types of actions are exempt from this rule, although nothing in this
6 rule precludes a court from issuing an alternative case schedule for the following types of
7 actions:

8 RALJ Title 7, appeal from a court of limited jurisdiction;

9 RCW 4.24.130, change of name;

10 RCW ch. 4.48, proceeding before a referee;

11 RCW 4.64.090, abstract of transcript of judgment;

12 RCW ch. 5.51, Uniform Interstate Depositions and Discovery Act;

13 RCW ch. 6.36, Uniform Enforcement of Foreign Judgments Act;

14 RCW ch. 7.06, mandatory arbitration appeal;

15 RCW ch. 7.16, writs;

16 RCW ch. 7.24, Uniform Declaratory Judgments Act;

17 RCW ch. 7.36, habeas corpus;

18 RCW ch. 7.60, appointment of receiver if not combined with, or ancillary to, an
19 action seeking a money judgment or other relief;

20 RCW ch. 7.90, sexual assault protection order;

21 RCW ch. 7.94, extreme risk protection order;

22 RCW Title 8, eminent domain;

23 RCW ch. 10.14, anti-harassment protection order;

24 RCW ch. 10.77, criminally insane procedure;

25 RCW Title 11, probate and trust law;

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

New CR 3.1

1 RCW ch. 12.36, small claims appeal;

2 RCW Title 13, juvenile courts, juvenile offenders, etc.;

3 ~~RCW 26.04.010, marriage age waiver petition;~~

4 ~~RCW ch. 26.09, dissolution proceedings and legal separation;~~

5 ~~RCW ch. 26.21A, Uniform Interstate Family Support Act;~~

6 ~~RCW ch. 26.33, adoption;~~

7 ~~RCW ch. 26.50, Domestic Violence Prevention Act;~~

8 RCW Title 26, Domestic relations;

9 RCW 29A.72.080, appeal of ballot title or summary for a state initiative or

10 referendum;

11 RCW ch. 34.05, Administrative Procedure Act;

12 RCW ch. 35.50, local improvement assessment foreclosure;

13 RCW ch. 36.70C, Land Use Petition Act;

14 RCW ch. 51.52, appeal from the board of industrial insurance appeals;

15 RCW ch. 59.12, unlawful detainer;

16 RCW ch. 59.18, Residential Landlord-Tenant Act;

17 RCW ch. 70.09, sexually violent predator commitment;

18 RCW ch. 70.96A, treatment for alcoholism, intoxication, and drug addiction;

19 RCW ch. 71.05, mental illness;

20 RCW ch. 74.20, support of dependent children;

21 RCW ch. 74.34, abuse of vulnerable adults;

22 RCW ch. 84.64, lien foreclosure;

23 SPR 98.08W, settlement of claims by guardian, receiver, or personal

24 representative;

25 SPR 98.16W, settlement of claims of minors and incapacitated persons; and

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

New CR 3.1

1 WAC 246-100, isolation and quarantine.

2 (f) In addition to the types of actions identified in subsection (e), the court may, on a
3 party's motion or on its own initiative, exempt any action or type of action for which compliance
4 with this rule is impracticable.

5 (g) Imposition of a case schedule deadline does not excuse a party's obligation to
6 timely respond to discovery propounded under these Rules. Parties are obligated to timely
7 respond to discovery when propounded and shall not respond to discovery requests indicating a
8 response will be provided by the case schedule deadline.

1 **SUGGESTED AMENDMENT**
2 **SUPERIOR COURT CIVIL RULES (CR)**

3 **CR 11 - SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL**
4 **MEMORANDA; SANCTIONS**

5 (a) – (b) [Unchanged]

6 ~~(e) Consistent with the overall purpose of these rules as set forth in CR 1, the court, upon after~~
7 ~~finding a party or attorney violated CR 11 motion or its own initiative, may consider whether~~
8 ~~impose an appropriate sanction on any the party or attorney failed to reasonably cooperate as~~
9 ~~who violates the mandate of reasonable cooperation set forth in CR 1 and may include in any~~
10 ~~sanction order, which sanction may include an order to pay to the other party or parties the~~
11 ~~amount of the reasonable expenses incurred because of the lack of cooperation, including a~~
12 ~~reasonable attorney fee. The court will not entertain any motion for a sanction based on a lack of~~
13 ~~cooperation under this subsection unless the moving parties party certifies it have conferred with~~
14 ~~the adverse party regarding the motion lack of cooperation and the court finds the adverse party's~~
15 ~~lack of cooperation was without a good faith basis in law or fact. . The moving party shall~~
16 ~~arrange for a mutually convenient conference in person or by telephone. The court may impose~~
17 ~~sanctions if the court finds that any party or its counsel, upon whom a motion with respect to~~
18 ~~matters covered by such rules has been served, has willfully refused or failed to confer in good~~
19 ~~faith. Any motion seeking sanctions under this subsection shall include the moving party's~~
20 ~~certification that the conference requirements of this rule have been met, or that the moving party~~
21 ~~attempted in good faith to meet the conference requirements of this rule.~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 (a) Discovery Methods, ~~and Cooperation.~~

2 (1) Methods. Parties may obtain discovery by one or more of the following methods:
3 depositions upon oral examination or written questions; written interrogatories; production of
4 documents or things or permission to enter upon land or other property, for inspection and other
5 purposes; physical and mental examinations; and requests for admission.
6

7 ~~(2) Cooperation. Consistent with rule 1, parties and attorneys shall reasonably~~
8 ~~cooperate with each other in using discovery, including using discovery methods; exchanging~~
9 ~~discoverable information; scheduling depositions, inspections, and examinations; and reducing~~
10 ~~the costs of discovery.~~

11 (b) Initial Disclosures.

12 ~~(1) Content of Initial Disclosures. When the case schedule or a court order requires~~
13 ~~initial disclosures, a party shall, without awaiting a discovery request, provide to the other~~
14 ~~parties:~~

15 ~~(A) The name, address, and telephone number of each individual possessing relevant~~
16 ~~information supporting the disclosing party's claims or defenses, excluding retained experts or~~
17 ~~any witness to be used solely for impeachment;~~

18 ~~(B) A copy of each document and other relevant evidence supporting the disclosing~~
19 ~~party's claims or defenses, unless the use would be solely for impeachment; provided that if a~~
20 ~~document or other relevant evidence cannot easily be copied, the disclosing party shall make it~~
21 ~~reasonably available for inspection;~~

22 ~~(C) A copy of each document the disclosing party refers to in a pleading;~~
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Commented [DB1]: This paragraph is completely redundant of CR 1 which already says it applies to the entire rules. There is no need to restate it.

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 ~~(D) A description and computation of each category of damages the disclosing party~~
2 ~~claims; provided that, a description not a computation suffices for general and noneconomic~~
3 ~~damages;~~

4 ~~(E) The declarations page of any insurance agreement under which an insurance~~
5 ~~business may be liable to satisfy all or part of a judgment that may be entered in the action or to~~
6 ~~indemnify or reimburse for payments made to satisfy the judgment; and~~

7 ~~(F) In any action where insurance coverage is or may be contested, a copy of the~~
8 ~~insurance agreement, and all letters from the insurer regarding coverage.~~

9 ~~(2) Parties Later Joined or Served. A party joined or served after the other parties have~~
10 ~~made their initial disclosures shall comply with this rule within 60 days of being joined or~~
11 ~~served, unless the court orders otherwise.~~

12 ~~(3) Basis for Initial Disclosures; Unacceptable Excuses. A party shall make its initial~~
13 ~~disclosures based on information known or reasonably available to that party. A party is not~~
14 ~~excused from making its disclosures because it has failed to fully investigate the case, it~~
15 ~~challenges the sufficiency of another party's disclosures, or another party has failed to make~~
16 ~~required disclosures.~~

17 ~~(bc)~~ Discovery Scope and Limits. Unless otherwise limited by order of the court in
18 accordance with these rules, the scope of discovery is as follows:

19 [renumbered (c)(1) – (c)(4) unchanged.]
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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts,
2 otherwise discoverable under the provisions of subsection ~~(b)(c)~~(1) of this rule and acquired or
3 developed in anticipation of litigation or for trial, may be obtained only as follows:

4 (A)(i) A party may through interrogatories require any other party to identify each
5 person whom the other party expects to call as an expert witness at trial, to state the subject
6 matter on which the expert is expected to testify, to state the substance of the facts and opinions
7 to which the expert is expected to testify and a summary of the grounds for each opinion, and to
8 state such other information about the expert as may be discoverable under these rules. A case
9 schedule deadline to disclose experts does not excuse a party timely responding to expert
10 discovery. Delayed disclosure of an expert constitutes a per se violation of CR 37 if the trial
11 court finds the responding party delayed based on a case schedule deadline. (ii) Unless
12 these rules impose an earlier deadline, and in no event later than the deadline for primary or
13 rebuttal expert witness disclosures imposed in by a case schedule or court order, each party shall
14 identify each person whom that party expects to call as a primary or rebuttal expert witness at
15 trial, state the subject matter on which the expert is expected to testify, state the substance of the
16 facts and opinions to which the expert is expected to testify and a summary of the grounds for
17 each opinion, and state such other information about the expert as may be discoverable under
18 these rules.

19 (B) A party may, subject to the provisions of this rule and of rules 30 and 31, depose
20 each person whom any other party expects to call as an expert witness at trial.

21 (BC) A party may discover facts known or opinions held by an expert who is not
22 expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of
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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 exceptional circumstances under which it is impracticable for the party seeking discovery to
2 obtain facts or opinions on the same subject by other means.

3 ~~(e d)~~ Unless manifest injustice would result, (i) the court shall require that the party
4 seeking discovery pay the expert a reasonable fee for time spent in responding to discovery
5 under subsections ~~(b)(c)(5)(B)(A)(ii)~~ and ~~(b)(c)(5)(C)(B)~~ of this rule; and (ii) with respect to
6 discovery obtained under subsection ~~(b)(c)(5)(B)(A)(ii)~~ of this rule, the court may require, and
7 with respect to discovery obtained under subsection (b)(5)(~~C B~~) of this rule the court shall
8 require, the party seeking discovery to pay the other party a fair portion of the fees and expenses
9 reasonably incurred by the latter party in obtaining facts and opinions from the expert.

10 [renumbered ~~(b c)~~(6) – ~~(b c)~~(8) unchanged.]

11 ~~(e d)~~ [Unchanged]

12 ~~(d e)~~ [Unchanged]

13 ~~(e f)~~ **Supplementation of Responses.** A party who has provided initial disclosures or
14 responded to a request for discovery has a where the disclosure or response that was complete
15 when made is under no duty to seasonably supplement or correct supplement that response with
16 the disclosure or response to include information thereafter acquired, except as follows:

17 Supplementation shall set forth only the information being added or corrected.

18 —(1) A party is under a duty seasonably to supplement the disclosure or response with
19 respect to any question directly addressed to:

20 —(A) the identity and location of persons having knowledge of discoverable matters; and

21 —(B) the identity of each person expected to be called as an expert witness at trial, the
22 subject matter on which the expert witness is expected to testify, and the substance of the expert
23 witness's testimony.

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 ~~(2) A party is under a duty seasonably to amend a prior disclosure or response if the party~~
2 ~~obtains information upon the basis of which:~~

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3 ~~(A) the party knows that the disclosure or response was incorrect when made; or~~

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4 ~~(B) the party knows that the disclosure or response though correct when made is no longer~~
5 ~~true and the circumstances are such that a failure to amend the disclosure or response is in~~
6 ~~substance a knowing concealment.~~

7
8 ~~(3) A duty to supplement disclosures or responses may be imposed by order of the court,~~
9 ~~agreement of the parties, or at any time prior to trial through new requests for supplementation of~~
10 ~~prior disclosures or responses.~~

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11 (4) ~~Failure to seasonably supplement in accordance with this rule will subject the~~
12 ~~party to such terms and conditions as the trial court may deem appropriate.~~

13 (~~g~~) ~~Discovery Conference.~~ **[UNCHANGED]**

14 (1) ~~Initial Discovery Conference.~~

15 (A) ~~Timing of Initial Discovery Conference. No later than a date provided by a case~~
16 ~~schedule or court order, the plaintiff shall schedule and all parties that have appeared in the case~~
17 ~~shall conduct an initial in-person or telephonic discovery conference. Each party and attorney~~
18 ~~shall reasonably cooperate in scheduling and conducting the initial discovery conference.~~

19 (B) ~~Subjects to Be Discussed at Initial Discovery Conference. At the initial discovery~~
20 ~~conference, the parties shall consider:~~

- 21 (i) ~~Joinder of additional parties and amendments to pleadings;~~
- 22 (ii) ~~Amendments to the case schedule, if any;~~
- 23 (iii) ~~Possibilities for promptly resolving the case;~~
- 24 (iv) ~~Admissions and stipulations about facts;~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 ~~(v) — Agreements as to what discovery may be conducted and in what order,~~
2 ~~and any limitations to be placed on discovery;~~

3 ~~(vi) — Preservation and production of discoverable information, including~~
4 ~~documents and electronically stored information;~~

5 ~~(vii) — Agreements for asserting privilege regarding materials to be produced or~~
6 ~~protective orders regarding the same; and~~

7 ~~(viii) — Other ways to facilitate the just, speedy, and inexpensive disposition of the~~
8 ~~action.~~

9 ~~(C) Joint Discovery Plan and Status Report. Not later than 14 days after the initial~~
10 ~~discovery conference, the plaintiff shall file and serve a joint discovery plan and status report~~
11 ~~stating the parties' positions and proposals on the subjects stated in rule 26(g)(1)(B). The joint~~
12 ~~discovery plan and status report shall substantially comply with any form the court prescribes.~~
13 ~~shall be signed by all parties or their counsel, and shall certify that the parties reasonably~~
14 ~~cooperated to reach agreement on the matters set forth.~~

15 ~~(D) Discovery Before Initial Discovery Conference. Nothing in this rule shall prevent~~
16 ~~any party from initiating discovery before the initial discovery conference; nor does this rule~~
17 ~~excuse any party from responding to another party's discovery requests or otherwise~~
18 ~~participating in discovery another party initiates before the initial discovery conference.~~

19 ~~(2) Discovery Conference With the Court.~~

20 ~~(A) Subjects to Be Discussed at Discovery Conference. At any time after~~
21 ~~commencement of an action the court may direct the attorneys for the parties to appear before it~~
22 ~~for a conference on the subject of discovery. The court shall do so upon motion by the attorney~~
23 ~~for any party if the motion includes:~~
24

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

- 1 ~~(1)(i) A statement of the issues as they then appear;~~
2 ~~(2)(ii) A proposed plan and schedule of discovery;~~
3 ~~(3)(iii) Any limitations proposed to be placed on discovery;~~
4 ~~(4)(iv) Any other proposed orders with respect to discovery; and~~
5 ~~(5)(v) A statement showing that the party or attorney making the motion has~~
6 ~~reasonably cooperated to reach agreement with opposing parties or their~~
7 ~~attorneys on the matters set forth in the motion.~~

8
9 ~~Each party and each party's attorney are under a duty to participate in good faith in the~~
10 ~~framing of a discovery plan if a plan is proposed by the attorney for any party.~~

11 ~~Notice of the motion shall be served on all parties. Objections or additions to matters~~
12 ~~set forth in the motion shall be served not later than 10 days after service of the motion.~~

13 ~~(B) Order on Discovery Conference. Following the any discovery conference~~
14 ~~with the court, the court shall enter an order tentatively identifying the~~
15 ~~issues for discovery purposes; establishing a plan and schedule for~~
16 ~~discovery; setting limitations on discovery, if any; and determining such~~
17 ~~other matters, including the allocation of expenses, as are necessary for the~~
18 ~~proper management of discovery in the action. An order may be altered or~~
19 ~~amended whenever justice so requires.~~

20 ~~(C) Pretrial Conference. Subject to a properly moving party's right to a~~
21 ~~prompt hearing, the court may combine the discovery conference with a rule 16~~
22 ~~pretrial conference.~~

23 ~~(e-h g) Signing Discovery Requests, Responses, and Objections.~~

24 ~~Every initial disclosure, request for discovery, or response or objection thereto made~~
25 ~~by a represented party party represented by an attorney shall be signed by at least one attorney of~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 record in the attorney's ~~own individual name, and state the signer's address whose address shall~~
2 ~~be stated.~~ A non-represented party ~~who is not represented by an attorney~~ shall sign the initial
3 disclosure, request, response, or objection, ~~and state the signer's party's address. These~~
4 ~~Objections shall be in response to the specific request objected to. General objections shall not~~
5 ~~be made. No objection based on privilege shall be made without identifying with specificity all~~
6 ~~the matters the objecting party contends are subject to the privilege including the type of item,~~
7 ~~the number of pages, and unless otherwise protected the author and recipient or if protected,~~
8 ~~other information sufficiently identifying the item without disclosing protected content.~~
9 ~~Documents or items an objecting party asserts a privilege to must be identified individually. The~~

10 ~~signatures of the attorney or party constitute~~ a certification ~~that~~ the attorney or party has read
11 the initial disclosure, request, response, or objection, and that to the best of their knowledge,
12 information, and belief formed after a reasonable inquiry, it is:

13
14 (1) Consistent with these rules and warranted by existing law or a good faith argument
15 for the extension, modification, or reversal of existing law;

16
17 (2) Not interposed for any improper purpose, such as to harass or to cause unnecessary
18 delay or needless increase in the cost of litigation; and

19 (3) Not unreasonable or unduly burdensome or expensive, given the needs of the case,
20 the discovery already had in the case, the amount in controversy, and the importance of the
21 issues at stake in the litigation. If ~~a~~ an initial disclosure a request, response, or objection is not
22 signed, it shall be stricken unless it is signed promptly after the omission is called to the attention
23 of the party making the initial disclosure request, response, or objection and a party shall not be
24 obligated to take any action with respect to it until it is signed.
25

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

1 If a certification is made in violation of the rule, the court, upon motion or upon its own
2 initiative, shall impose upon the person who made the certification, the party on whose behalf the
3 ~~initial disclosure~~ request, response, or objection is made, or both, an appropriate sanction, which
4 may include an order to pay the amount of the reasonable expenses incurred because of the
5 violation, including reasonable attorney fees.

6 [renumbered (i) – (j) unchanged.]
7

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9
10 **NOTE: Privilege log language was taken essentially verbatim from Rental Housing Ass'n of**
11 **Puget Sound v. City of Des Moines, 165 Wn.2d 525, 538 (2009).**

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**SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)**

JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

IN THE SUPERIOR COURT, IN AND FOR THE COUNTY OF _____
STATE OF WASHINGTON

_____) No.
_____)
_____)
_____) Plaintiff(s),
_____) **JOINT DISCOVERY PLAN AND**
_____) **STATUS REPORT**
_____) v. _____ **CR 26(f)**
_____)
_____) Defendant(s)
_____)
_____)

_____ ~~The plaintiff must file and serve this Joint Discovery Plan and Status report no later than 14 days after the initial discovery conference between the parties.~~

_____ ~~The parties jointly represent that on the _____ day of _____, 20____, pursuant to CR 26(f)(1), they conducted an initial discovery conference and conferred regarding the subjects set for in CR 26(f)(12)(B). The parties submit this joint discovery plan and status report stating their positions and proposals on these subjects, as required by CR 26(f)(1)(C).~~

1. Joinder of Additional Parties.

~~At this time, the parties do not believe that any additional parties should be joined.~~

~~At this time, one or more parties plan to seek leave of court to join an additional party or parties.~~

~~If this box is checked, describe any such proposed joinder of additional parties.~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

2. ~~Amendments to Pleadings.~~

~~At this time, the parties do not plan on amending the pleadings.~~

~~At this time, either or both parties plan to seek leave of court to amend their pleading. If this box is checked, describe any potential amendments.~~

3. ~~Amendments to the Case Schedule, If Any.~~

~~At this time, the parties do not plan to seek leave of court to amend the initial case schedule.~~

~~At this time, one or more of the parties plan to seek leave of court to amend the initial case schedule. If this box is checked, describe any such amendments.~~

4. ~~Possibilities for Promptly Resolving the Case.~~

~~The parties do do not agree that there are possibilities for promptly resolving the case. If the parties do agree, describe any such possibilities and the method and timing contemplated by the parties to determine whether prompt resolution is possible.~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

5. ~~Scheduling of Early Mediation.~~

~~The parties [] do [] do not agree that early mediation in accordance with case schedule or court order is appropriate in this case. If the parties do not agree, explain why describe when the parties believe mediation should be scheduled and any attempts the parties have made to schedule mediation.~~

6. ~~Admissions and Stipulations About Facts.~~

~~The parties [] do [] do not agree that there are facts which that are either admitted or which can be addressed in a stipulation. If the parties do agree, list any such facts.~~

7. ~~Agreements as to What Discovery May Be Conducted, and In What Order, and Any Limitations on Discovery.~~

~~The parties [] have [] have not agreed on a discovery plan as to the scope of discovery, the order in which discovery will be conducted, and any limitations on discovery. If the parties do agree, describe the agreed discovery plan. If the parties do not agree, describe the points on which the~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

1 ~~parties agree and the points on which the parties disagree and when the parties intend to present~~
2 ~~this issue to the Court for resolution.~~

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7 **~~8. Preservation and Production of Discoverable Information, Including Documents~~**
8 **~~and Electronically Stored Information.~~**

9
10 ~~Describe the parties' agreement, if any, as to preservation and production of discoverable~~
11 ~~information. If the parties do not agree, describe the scope of the disagreement to be resolved by~~
12 ~~the Court and when the parties intend to present this issue to the Court for resolution.~~

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17 **~~9. Agreements for Asserting Privilege Regarding Materials to Be Produced.~~**

18 ~~The parties have agreed on a procedure for asserting privilege regarding materials to be~~
19 ~~produced in this case. If this box is checked, describe the agreed procedure.~~

20 ~~The parties have not agreed on a procedure for asserting privilege regarding materials to be~~
21 ~~produced in this case. If box is checked, describe the parties' disagreement and when the parties~~
22 ~~intend to present this issue to the Court for resolution.~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

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~~**10. — Agreements for Protective Orders Regarding Materials to Be Produced.**~~

~~The parties agree that a protective order should be entered regarding certain information and documents to be produced. If this box is checked, describe when the parties intend to present a proposed protective order to the Court.~~

~~The parties do not agree that a protective order should be entered in this case. If this box is checked, describe the parties' disagreement and when the parties intend to present this issue to the Court for resolution.~~

~~**11. — Other.**~~

~~Describe any proposals by one or more parties that would facilitate the just, speedy, and inexpensive disposition of this action. For each such proposal, indicate if whether the parties agree.~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
JOINT DISCOVERY PLAN AND STATUS REPORT CR 26(f)

1 ~~The undersigned certify that the parties reasonably cooperated to reach agreement on the matters~~
2 ~~set forth in this Joint Discovery Plan and Status Report.~~

3
4 ~~Date: _____~~

5
6 ~~For the Plaintiff:~~

7 ~~Signature: _____~~

8 ~~Printed Name: _____~~

9 ~~Title (and WSBA number if applicable): _____~~

10
11 ~~For the Defendant:~~

12 ~~Signature: _____~~

13 ~~Printed Name: _____~~

14 ~~Title (and WSBA number if applicable): _____~~

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 37 – FAILURE TO MAKE DISCOVERY SANCTIONS

1 (a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other
2 parties and all persons affected thereby, and upon a showing of compliance with rule 26(j), may
3 apply to the court in the county where the deposition was taken, or in the county where the action
4 is pending, for an order compelling discovery as follows:

5 (1) Appropriate Court. An application for an order to a party may be made to the court in
6 which the action is pending, or on matters relating to a deposition, to the court in the county
7 where the deposition is being taken. An application for an order to a deponent who is not a party
8 shall be made to the court in the county where the deposition is being taken.

9 (2) Motion. If a deponent fails to answer a question propounded or submitted under rules
10 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a),
11 or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a
12 request for inspection submitted under rule 34, fails to respond that inspection will be permitted
13 as requested or fails to permit inspection as requested, any party may move for an order
14 compelling an answer or a designation, or an order compelling inspection in accordance with the
15 request. When taking a deposition on oral examination, the proponent of the question may
16 complete or adjourn the examination before the proponent applies for an order.

17 If the court denies the motion in whole or in part, it may make such protective order as it
18 would have been empowered to make on a motion made pursuant to rule 26(d).

19 [(a)(3) – (a)(4) Unchanged]

20 (d) Failure of Party To ~~Disclose~~, Attend at Own Deposition, ~~or o-oree or~~ Serve Answers
21 to Interrogatories, or Respond to Request for Production or Inspection. If a party or an officer,
22 director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to
23 testify on behalf of a party fails:

24 ~~(1) To make initial disclosures;~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 37 – FAILURE TO MAKE DISCOVERY SANCTIONS

1 ~~(21)~~ (1) ~~T~~o appear before the officer who is to take his or her deposition, after being
2 served with a proper notice; ~~or~~

3 ~~(32)~~ (2) ~~T~~o serve answers or objections to interrogatories submitted under rule 33, after
4 proper service of the interrogatories; or

5 ~~(43)~~ (3) ~~T~~o serve a written response to a request for production of documents or
6 inspection submitted under rule 34, after proper service of the request, the court in which the
7 action is pending on motion may make such orders in regard to the failure as are just, and among
8 others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of
9 this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act
10 or the attorney advising the party or both to pay the reasonable expenses, including attorney fees,
11 caused by the failure, unless the court finds that the failure was substantially justified or that
12 other circumstances make an award of expenses unjust.

13 The failure to act described in this subsection may not be excused on the ground that the
14 discovery sought is objectionable, unless the party failing to act has applied for a protective order
15 ~~as provided by~~ under rule 26(~~de~~). For purposes of this section, an evasive or misleading answer
16 is ~~to be~~ treated as a failure to answer.

17 ~~(e) Failure to Reasonably Cooperate. If a party or an attorney fails to reasonably~~
18 ~~cooperate regarding any discovery matter as rule 1 or 26 requires, the court may, after~~
19 ~~opportunity for hearing, require the party or attorney to pay the other party's reasonable~~
20 ~~expenses, including attorney fees, caused by the failure.~~

**SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)**

NEW RULE: CR 53.5

1 ~~(a) Scope. This rule applies when a case schedule or court order requires mediation.~~

2 ~~(b) Qualified Mediators.~~

3 ~~(1) A judicial officer shall be considered a qualified mediator who may serve as a~~
4 ~~mediator by agreement.~~

5 ~~(2) The court shall maintain a list of other qualified mediators and has discretion to~~
6 ~~modify the list. A qualified mediator shall demonstrate completion of mediation training or~~
7 ~~experience mediating at least five matters as a mediator.~~

8 ~~(3) The list of qualified mediators must include the following for each mediator:~~

9 ~~(A) Name;~~

10 ~~(B) Physical and electronic mail addresses;~~

11 ~~(C) Telephone number;~~

12 ~~(D) Fee schedule;~~

13 ~~(E) Whether the mediator is qualified by training, experience, or both; and~~

14 ~~(F) Preferred legal subject matters, if any.~~

15 ~~(4) Each court shall establish a recommended fee schedule for assigned mediators and~~
16 ~~update it annually.~~

17 ~~(5) A person on the list of qualified mediators agrees to follow the procedures of this~~
18 ~~rule if appointed and to accept appointment to one mediation each calendar year on a pro bono~~
19 ~~basis. Refusal to accept a pro bono appointment may result in removal from the list.~~

20 ~~(c) Selection of Mediator.~~

21 ~~(1) Joint Selection of Mediator. Parties may by agreement select any person as~~
22 ~~mediator, even one not on the court's list of qualified mediators. If the selected mediator agrees~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
NEW RULE: CR 53.5

~~to serve, the plaintiff shall file a notice of joint selection of mediator that includes the name and contact information of the mediator, and serve a copy upon the mediator.~~

~~(2) Assignment of Mediator. If the plaintiff fails to file the notice of joint selection of mediator by a deadline provided by a case schedule or court order, the court shall promptly assign a mediator from the approved list and notify the mediator and the parties of the assignment. If the mediator is unable to serve, the mediator shall notify the court within five days of assignment and the court shall appoint a new mediator.~~

~~(d) Mediation Procedure, Attendance.~~

~~(1) Mediation Procedure. The mediator shall confer with the parties to learn their needs, preferences, and recommendations. Based on the circumstances and input from the parties, the mediator will establish mediation procedures, including its form, length, and content.~~

~~(2) Attendance. All persons necessary to settle the matter and who have the necessary settlement authority should attend. The mediator may determine issues of attendance after consulting the parties, including whether any individual may attend by other than personal attendance.~~

~~(e) Notice of Compliance. No later than five days after commencement of mediation, the plaintiff shall file with the~~

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
NEW RULE: CR 53.5

~~court a notice of compliance with this rule indicating that the parties held or commenced a mediation. The parties may continue mediation after an initial session and need not represent that mediation efforts are completed. The notice of compliance shall contain the following or substantially similar form:~~

~~Plaintiff hereby notifies the Court that on (Date/Dates), all parties met for mediation in compliance with CR 53.5.~~

~~(f) Mediator Compensation and Pro Bono Mediator.~~

~~(i) The parties shall pay the mediator's reasonable fee unless a court order provides otherwise. Unless otherwise ordered by the court or agreed by the parties, each party is responsible for their proportional share of the reasonable mediation fee. Upon motion of any party, the court may resolve any disputes, including the reasonableness of the mediation fee.~~

~~(ii) A party who believes that any party is unable to afford mediation may request relief for that party from responsibility for the mediator's fee. The court may provide relief such as apportioning the fee among the remaining parties, requiring payment on a sliding scale, assigning a pro bono mediator, or any combination thereof. If the court approves the request for a pro bono mediator, the court shall promptly assign a mediator on a pro bono basis.~~

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
NEW RULE: CR 53.5

1 ~~(g) Extension for Specific Objectives. After the initial~~
2 ~~discovery conference, any party may seek to extend the mediation~~
3 ~~deadline for a maximum period of 60 days if, after the initial~~
4 ~~discovery conference, the party believes that specified~~
5 ~~discovery or specified information exchange is necessary but is~~
6 ~~unlikely to be completed within the time limits prescribed in a~~
7 ~~case schedule or court order. This extension is without~~
8 ~~prejudice to any schedule modification otherwise available.~~

9
10 ~~(h) Sanctions for Failure to Comply. Upon motion or on its own~~
11 ~~initiative, the court may impose an appropriate sanction on any~~
12 ~~party or attorney failing to comply with this rule. For~~
13 ~~purposes of this rule, a party may submit evidence to~~
14 ~~substantiate a claim for sanctions, but may not reveal~~
15 ~~substantive communications concerning any mediation. The court~~
16 ~~will not entertain any motion under this subsection unless the~~
17 ~~parties have first conferred regarding the motion. The moving~~
18 ~~party shall arrange for a mutually convenient conference in~~
19 ~~person or by telephone. Any motion seeking sanctions under this~~
20 ~~subsection shall include the moving party's certification that~~
21 ~~these conference requirements have been met or that the moving~~
22 ~~party has attempted in good faith to meet them. The court may~~

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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
NEW RULE: CR 53.5

1 ~~also impose sanctions if it finds that any party or attorney~~
2 ~~willfully refused or failed to confer in good faith.~~

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SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION
(CRLJ)

CRLJ 1 – SCOPE AND PURPOSE OF RULES

1 These rules govern the procedure in all trial courts of limited jurisdiction in all suits of a
2 civil nature, with the exceptions stated in rule 81. ~~All parties and attorneys shall reasonably~~
3 ~~cooperate with each other and the court in all matters. They~~ These rules shall be construed and
4 administered ~~consistently with this principle to~~ secure the just, speedy, and inexpensive
5 determination of every action.
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SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION
(CRLJ)

**CRLJ 11 – SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL
MEMORANDA: SANCTIONS**

1 (a) – (b) [Unchanged]

2 ~~(c) Upon motion or on its own initiative, the court may impose an appropriate sanction on~~
3 ~~any party or attorney who violates the reasonable cooperation mandate in rule 1. Sanctions may~~
4 ~~include an order to pay another party’s reasonable expenses due to the violation, including~~
5 ~~reasonable attorney fees. The court will not entertain any motion under this subsection unless the~~
6 ~~parties have first conferred. The moving party must arrange a mutually convenient in person or~~
7 ~~telephonic conference. Any motion seeking sanctions under this subsection must include the~~
8 ~~moving party’s certification that these conference requirements were met or that the moving~~
9 ~~party attempted in good faith to meet them. The court may also impose sanctions if it finds that~~
10 ~~any party or attorney willfully failed or refused to confer in good faith.~~

11 ~~(c) The court, after finding a party or attorney violated CR 11 may consider whether the~~
12 ~~party or attorney failed to reasonably cooperate as set forth in CR 1 and may include in any~~
13 ~~sanction order, an order to pay to the other party or parties the amount of the reasonable expenses~~
14 ~~incurred because of the lack of cooperation, including a reasonable attorney fee. The court will~~
15 ~~not entertain any motion for a sanction based on a lack of cooperation unless the moving party~~
16 ~~certifies it conferred with the adverse party regarding the lack of cooperation and the court finds~~
17 ~~the adverse party’s lack of cooperation was without a good faith basis in law or fact.~~

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SUGGESTED AMENDMENT
CIVIL RULES FOR COURTS OF LIMITED JURISDICTION
(CRLJ)

CRLJ 26 - DISCOVERY

1 ~~Consistent with rule 1, parties and attorneys shall reasonably cooperate with each other in using~~
2 ~~discovery methods; exchanging discoverable information; scheduling depositions, inspections,~~
3 ~~and examinations; and reducing the costs of discovery.~~ Discovery in courts of limited jurisdiction

4 shall be permitted as follows:

5 (a) – (g) [unchanged.]
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ATTACHMENT 4

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 16 – PRETRIAL PROCEDURE AND FORMULATING ISSUES

1 ~~(a) **Hearing Matters Considered.** By order, or on the motion of any party, the court may~~
2 ~~in its discretion direct the attorneys for the parties to appear before it for a conference to~~
3 ~~consider:~~

4 ~~(1) The simplification of the issues;~~

5 ~~(2) The necessity or desirability of amendments to the pleadings;~~

6 ~~(3) The possibility of obtaining admissions of fact and of documents which will avoid~~
7 ~~unnecessary proof;~~

8 ~~(4) The limitation of the number of expert witnesses;~~

9 ~~(5) Such other matters as may aid in the disposition of the action.~~

10 ~~(a) **Pretrial Report.** All parties shall participate in completing a joint pretrial report filed~~
11 ~~no later than the date provided in the case schedule or court order. The pretrial report shall~~
12 ~~contain the following:~~

13 ~~(1) A brief nonargumentative summary of the case;~~

14 ~~(2) The agreed material facts;~~

15 ~~(3) The material issues in dispute;~~

16 ~~(4) The names of all lay and expert witnesses, excluding rebuttal witnesses;~~

17 ~~(5) An exhibit index (excluding rebuttal or impeachment exhibits);~~

18 ~~(6) The estimated length of trial and suggestions for shortening the trial; and~~

19 ~~(7) A statement whether additional alternative dispute resolution would be useful before~~
20 ~~trial.~~

21 ~~(b) **Pretrial Conference.** Each attorney with principal responsibility for trying the case,~~
22 ~~and each unrepresented party, shall attend any scheduled pretrial conference. At a pretrial~~
23 ~~conference, the court may consider and take appropriate action on the following matters:~~

24 ~~(1) Formulating and simplifying the issues and eliminating claims or defenses;~~

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

CR 16 – PRETRIAL PROCEDURE AND FORMULATING ISSUES

1 (2) Obtaining admissions and stipulations about facts and documents to avoid
2 unnecessary proof, and addressing evidentiary issues;

3 (3) Adopting special procedures for managing complex issues, multiple parties, difficult
4 legal questions, or unusual proof problems;

5 (4) Establishing reasonable time limits for presenting evidence;

6 (5) Establishing deadlines for trial briefs, motions in limine, deposition designations,
7 proposed jury instructions, and any other pretrial motions, briefs, or documents;

8 (6) Resolving any pretrial or trial scheduling issues; and

9 (7) Facilitating in other ways the just, speedy, and inexpensive disposition of the action.

10 ~~(b)~~ (c) Pretrial Order. The court shall enter an order reciting the following:

11 (1) the action taken at the conference;

12 (2) the amendments allowed to the pleadings; and

13 (3) the parties' agreements on any matters considered.

14 The pretrial order limits the issues for trial to those not disposed of by admissions or
15 agreements of counsel and controls the subsequent course of the action, unless modified at trial
16 to prevent manifest injustice.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 30 – DEPOSITION UPON ORAL EXAMINATION

1 [(a) – (c) unchanged.]

2 (d) Motion To Terminate or Limit Examination. At any time during the taking of the
3 deposition, on motion of a party or of the deponent and upon a showing that the examination is
4 being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress
5 the deponent or party, the court in which the action is pending or the court in the county where
6 the deposition is being taken may order the officer conducting the examination to cease forthwith
7 from taking the deposition, or may limit the scope and manner of the taking of the deposition as
8 provided in rule 26(~~de~~). If the order made terminates the examination, it shall be resumed
9 thereafter only upon the order of the court in which the action is pending. Upon demand of the
10 objecting party or deponent, the taking of the deposition shall be suspended for the time
11 necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of
12 expenses incurred in relation to the motion.

13 [(e) – (h) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 32 – USE OF DEPOSITIONS IN COURT PROCEEDINGS

1 (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory
2 proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence
3 applied as though the witness were then present and testifying, may be used against any party
4 who was present or represented at the taking of the deposition or who had reasonable notice
5 thereof, in accordance with any of the following provisions:

6 [(a)(1) – (a)(4) unchanged.]

7 (5) The deposition of an expert witness may be used as follows:

8 (A) The discovery deposition of an opposing party’s rule 26(c**b**)(5) expert
9 witness, who resides outside the state of Washington, may be used if reasonable notice before the
10 trial date is provided to all parties and any party against whom the deposition is intended to be
11 used is given a reasonable opportunity to depose the expert again.

12 (B) The deposition of a health care professional, even though available to testify
13 at trial, taken with the expressly stated purpose of preserving the deponents testimony for trial,
14 may be used if, before the taking of the deposition, there has been compliance with discovery
15 requests made pursuant to rules 26(c**b**)(5)(A)(i), 33, 34, and 35 (as applicable) and if the
16 opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the
17 deponent or other means, for cross examination of the deponent.

18 Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously
19 taken; and, when an action has been brought in any court of the United States or of any state and
20 another action involving the same issues and subject matter is afterward brought between the
21 same parties or their representatives or successors in interest, all depositions lawfully taken and
22 duly filed in the former action may be used in the latter as if originally taken therefor. A
23 deposition previously taken may also be used as permitted by the Rules of Evidence.

24 [(b) – (d) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 33 – INTERROGATORIES TO PARTIES

1 [(a) unchanged.]

2 (b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired
3 into under rule 26(~~cb~~), and the answers may be used to the extent permitted by the Rules of
4 Evidence.

5 An interrogatory otherwise proper is not necessarily objectionable merely because an
6 answer to the interrogatory involves an opinion or contention that relates to fact or the
7 application of law to fact, but the court may order that such an interrogatory need not be
8 answered until after designated discovery has been completed or until a pretrial conference or
9 other later time.

10 An interrogatory otherwise proper is not objectionable merely because the propounding
11 party may have other access to the requested information or has the burden of proof on the
12 subject matter of the interrogatory at trial.

13 [(c) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)

**CR 34 – PRODUCING OF DOCUMENTS, ELECTRONICALLY STORED
INFORMATION, AND THINGS OR ENTRY ONTO LAND FOR INSPECTION AND
OTHER PURPOSES**

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2 (a) Scope. Any party may serve on any other party a request within the scope of Rule
3 26(c**b**):

4 (1) to produce and permit the requesting party or the party's representative, to inspect,
5 copy, test, photograph, record, measure, or sample the following items in the responding party's
6 possession, custody, or control: any designated documents, electronically stored information, or
7 things including writings, drawings, graphs, charts, photographs, sound recordings, images, and
8 other data or data compilations stored in any medium from which information can be obtained,
9 either directly or, if necessary, after translation or conversion by the responding party into a
10 reasonably usable form, or to inspect and copy, test, or sample any things which constitute or
11 contain matters within the scope of rule 26(c**b**) and which are in the possession, custody or
12 control of the responding party; or

13 (2) to permit entry onto designated land or other property possessed or controlled by the
14 responding party, so that the requesting party may inspect, measure, survey, photograph, test, or
15 sample the property or any designated object, process or operation on it.

16 [(b) – (c) unchanged.]
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SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 36 – REQUEST FOR ADMISSION

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(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(c**b**) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

[the remainder of (a) unchanged]

[(b) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 43 – TAKING OF TESTIMONY

1 [(a) – (e) unchanged]

2 (f) Adverse Party as Witness.

3 (1) Party or Managing Agent as Adverse Witness. A party, or anyone who at the time of
4 the notice is an officer, director, or other managing agent (herein collectively referred to as
5 “managing agent”) of a public or private corporation, partnership or association which is a party
6 to an action or proceeding may be examined at the instance of any adverse party. Attendance of
7 such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the
8 manner prescribed in rule 30(b)(1) to opposing counsel of record. Notices for the attendance of a
9 party or of a managing agent at the trial shall be given not less than 10 days before trial
10 (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown
11 in the manner prescribed in rule 26(de), the court may make orders for the protection of the party
12 or managing agent to be examined.

13 [(f)(2) – (f)(3) unchanged]

14 [(g) – (k) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 53.3 – APPOINTMENT OF MASTERS IN DISCOVERY MATTERS

1 [(a) – (c) unchanged]

2 (d) Powers. The order of reference to the master may specify the duties of the master. It
3 may direct that the master preside at depositions and make rulings on issues arising at the
4 depositions. It may direct the master to hear and report to the court on unresolved discovery
5 disputes and to make recommendations as to the resolution of such disputes, as to the imposition
6 of terms or sanctions to be assessed against any party, and as to which party or parties shall bear
7 the costs of the master. If directed by the court, the master shall prepare a report upon the matters
8 submitted to the master by the order of reference. A party may request that the report be sealed
9 pursuant to rule 26(~~de~~). The report with the rulings and recommendations of the master shall be
10 reviewed by the court and may be adopted or revised as the court deems just.

11 [(g) – (k) unchanged.]

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 77 – SUPERIOR COURTS AND JUDICIAL OFFICERS

1 [(a)-(h) unchanged.]

2 (i) ~~Sessions Where More than One Judge Sits—Effect of Decrees, Orders, etc.~~
3 ~~[Reserved. See RCW 2.08.160.]~~ Judicial Assignment. The court should assign a judicial officer
4 to each case upon filing. The assigned judicial officer shall conduct all proceedings in the case
5 unless the court reassigns the case to a different judicial officer on a temporary or permanent
6 basis. In counties where local conditions make routine judicial assignment impracticable, the
7 court may assign any case to a specific judicial officer on a party’s motion or on its own
8 initiative.

9 [(j)-(n) unchanged.]