Washington State Bar Association Solo & Small Practice Section

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SOLO & SMALL PRACTICE SECTION

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Via Email: ECCL@wsba.org

Russell M. Aoki
Chair
WSBA Task Force on
Escalating Cost of Civil Litigation

Re: Comments to the ECCL Task Force Report from the Executive Committee of the Solo & Small Practice Section

Chair Aoki:

Thank you for forwarding the ECCL Task Force's Report to the WSBA Section Chairs, and requesting section feedback. We would like to thank you and the Task Force members for the thoughtful and comprehensive review of the status of civil litigation in Washington.

Since our section is comprised of small and solo practitioners, we are uniquely qualified to look at cases from the viewpoint of most litigants who find themselves in the court system, be they plaintiffs or defendants. Typically, our clients do not have the financial wherewithal to take themselves out of the judicial system and access private arbitration on a large scale. While from a systems point of view a $100,000 case may not seem much, it is a large case for most parties and they deserve full access to judicial relief just like the "big cases."

We agree there is a tension between adjusting to the needs of the judicial system and speed, between the desire of litigants for full services, and the realities of the costs of the judicial system to those litigants. Bearing these principles in mind, the Executive Committee of the Solo & Small Practice Section provides the following feedback on the specific points of the Report. The comments are organized parallel to the organization of the recommendations in the Report.

1 and 2. Initial Case Schedule and Judicial Assignment: Initial Case Schedules and Judicial Assignment issued upon case filing is a procedure already in place in King, Pierce and Spokane Counties; to the extent the Task Force recommends implementing such structures statewide, that part of the recommendation is supported, with the caveat that the recommendation for imposing a six (6) month trial schedule in District Court, raises concerns among some members of the Executive Committee (*see* comments to Recommendation No. 11).

3. Two-tier Litigation: The Task Force recommends creation of two litigation tiers in Superior Court. The main concern raised is regarding the proposed tight case schedules, particularly for Tier 1 cases (those with up to $300,000 at issue).

The Task Force recommendations would have a case with as much as $299,000 at issue go to trial in 12 months, with discovery to be concluded within seven (7) weeks before trial (roughly eight months from filing). Depending on the nature and extent of discovery (e.g. obtaining medical records, scheduling CR 35 exam(s), deposing parties, fact witnesses and doctors, etc.), it can take longer than eight months to complete discovery even when the parties are cooperating. Accordingly, we believe it is important that, at minimum, a two-tier system explicitly allow flexibility for trial continuances and discovery deadlines.

4 and 5. Mandatory Disclosures and Early Discovery Conference: The primary recommendation in these sections of the Report was on initial disclosures, and modeling the disclosure and conference rules on those used in federal court; to that extent we support the proposed recommendation.

6. Proportionality and Cooperation: Proportionality and cooperation are worthy goals. However, it is unclear from the ECCL Task Force report as to specifically how proportionality and cooperation would be encouraged via the Rules and how this would be enforced to reduce costs while preserving the parties' rights to conduct appropriate discovery and sufficient time to prepare for trial.

7. Discovery Limits: Some of our Executive Committee members support the proposed discovery limits, others have grave concerns about such limits. We expect the Section membership has similar diversity of opinion.

Concerns noted by some Executive Committee members relate to the recommendation for specific limits on the length of depositions. For example, the Report calls for capping each expert witness deposition at four hours **even in a Tier 2 (higher value) case**. This is highly problematic, as many expert (and party and witness depositions) can easily exceed four hours, particularly when more than one party is involved. Indeed, certain types of cases, such as construction matters, routinely involve multiple parties and highly technical issues; expert depositions (and others) of necessity often take significantly longer than four hours.

In short, blanket limitations on depositions raise serious concerns among some of our members, particularly when combined with the Task Force's recommendations for limits on written discovery. The Task Force Report noted the central importance of depositions ("Asked to rate the effectiveness of discovery tools, respondents identified depositions as the most useful by far…" Task Force Report, at p. 13, section "c"), so the proposed limitations appear overly restrictive.

Moreover, if motions to the Court would be required for taking any additional discovery, that would defeat the purpose of reducing litigation costs, and such motions would become commonplace with the proposed restrictions.

Therefore, the Executive Committee members who have concerns respectfully suggest that while some discovery limits might work as guidelines for various litigation tiers, they should not be formally adopted as mandatory limits.

8. E-Discovery: Washington has already incorporated parts of the federal rules regarding e-discovery into CR 26 and CR 34. It appears the Task Force is recommending state courts implement most of the remaining federal e-discovery rules, and recommends a statewide e-discovery protocol for Superior and District courts. These recommendations seem appropriate.

9. Motions Practice: The Task Force recommends non-dispositive motions in Superior and District Court cases be decided on their pleadings, without oral argument. This has long been the practice in King County Superior Court, and is working very well. We agree with this recommendation.

10. Pretrial Conference: The Task Force recommends that in both Superior and District Court levels, a pretrial meeting be required between the parties to reach agreement on trial management issues; the parties would then submit a joint "Trial Management Report" report to the Court, which would issue a pretrial order.

We support the concept, but have some questions about the logistics of how this recommendation would work in practice. It would appear to duplicate current procedures and even some of the Task Force's own recommendations.

For example, to some extent the recommendation is duplicative of the current system, at least in King and Pierce Counties, where there are already deadlines for Joint Confirmation of trial readiness, exchange of exhibit and witness lists and Joint Statement of Evidence. King County Superior Court already provides for pretrial conferences.

In addition, the recommended case schedule described by the Task Force's Recommendation No. 3 includes a sample case schedule that calls for pretrial disclosures, and thus appears duplicative (unless the Task Force intends for the pretrial disclosures in Recommendation No. 3 to be the same as are described in Recommendation No. 10).

The Task Force's Recommendation No. 1 already calls for case schedules, which, if modeled on those of King, Pierce and Spokane Counties, would presumably include the same information and deadlines. Thus we see potential for redundancy.

In addition, if the proposed Joint Trial Management Report were submitted and the pretrial conference were held soon after the aforementioned required pretrial pleadings were filed, there would be much duplication of effort and cost, particularly of the process of filing motions in limine and the Joint Statement of Evidence.

We support the idea of pretrial conferences and Joint Trial Management Reports, but would prefer more clarity as to how the Recommendation would not conflict with the adoption of case schedules as described in Recommendation No. 1, or other existing procedures.

11. District Court: The Task Force recommends increasing jurisdictional limits of District Court from $75,000 to $100,000.

Increasing the jurisdictional limits of District Court is a controversial proposal, and the Executive Committee has not resolved its position on that part of the proposal.

Apart from the issue of jurisdictional limits, there are concerns that the recommendation of a mere six (6) month trial schedule for cases up to $100,000 could be unduly prejudicial to the parties' ability to conduct discovery and prepare for trial. While $100,000 may be less than the proposed Tier 1 limit for Superior Court cases, it is still a significant sum of money to be at stake in a lawsuit. Many personal injury cases, for example, would still require obtaining medical records, expert examinations, party and witness depositions. Currently, it can take months just to obtain medical records (even assuming no disputes regarding the scope of a records request), let alone time needed to schedule expert examinations per CR 35 and possibly expert depositions. In short, even relatively modest cases have surprising complexity and would require the flexibility of more time to prepare than just six (6) months.

Notably, the Task Force did not address raising the jurisdictional limits for the Mandatory Arbitration program, which is currently set at $50,000 maximum per claim. The Task Force recommendations would tend to make District Court more appealing for those cases that are valued in the $50,000 to $100,000 range. However, even MAR matters can stretch out longer than 6 months, and have the added

safeguard of filing for appeal by trial de novo. In other words, there are concerns that if the District Court jurisdictional limit is raised, trial should not be set for a mere six (6) months from filing the Complaint.

12. Alternative Dispute Resolution: It is unclear why the Task Force did not make any recommendations regarding arbitration per the MAR program beyond an apparent desire by the Task Force to promote District Court. This strikes some of our Executive Committee members as odd, given the very streamlined and cost-effective process of MAR. Many (perhaps the majority?) of cases in MAR arbitration are not appealed, but even appeals by trial *de novo* of MAR awards have shortened case schedules, with discovery not duplicative of that already conducted for the arbitration. It is an excellent cost-effective alternative and helps reduce the burden on the courts, including District Courts.

Regarding mediation, the suggestion of early mediation is welcome, though it is not always feasible early on. We suggest the timeline be based upon either 60 or 90 days prior to trial and not be correlated with depositions in the case, which can happen at any time.

The suggestion of limited-scope mediation is promising, and could help narrow issues for trial. The suggestion of conducting mediation in a series of sessions rather than a one-day event is intriguing, but we have concern the cost could end up being higher if the sessions are spread out (and thus a disincentive). But there may certainly be cases that would be good candidates for alternative mediation approaches. We support the suggestion of creative approaches to mediation.

The Executive Committee of the Solo & Small Practice Section would like to thank the Task Force for all its hard work. We also appreciate the opportunity to provide comments

Regards,

Greg McLawsen, Chair
WSBA Solo & Small Practice Section