BOARD FOR JUDICIAL ADMINISTRATION

MEETING PACKET

FRIDAY, MARCH 20, 2015
9:00 A.M.

AOC SEATAC OFFICE
18000 INTERNATIONAL BOULEVARD, SUITE 1106
SEATAC, WASHINGTON

Board for Judicial Administration Membership

VOTING MEMBERS:

Chief Justice Barbara Madsen, Chair
Supreme Court

Judge Kevin Ringus, Member Chair
District and Municipal Court Judges' Association
Fife Municipal Court

Judge Thomas Bjorgen
Court of Appeals, Division II

Judge Bryan Chushcoff
Superior Court Judges' Association
Pierce County Superior Court

Judge Janet Garrow
District and Municipal Court Judges' Association
King County District Court

Judge Judy Rae Jasprica
District and Municipal Court Judges' Association
Pierce County District Court

Judge Michael Lambo
District and Municipal Court Judges' Association
Kirkland Municipal Court

Judge John Meyer
Superior Court Judges' Association
Skagit County Superior Court

Judge Sean Patrick O'Donnell
Superior Court Judges' Association
King County Superior Court

Justice Susan Owens
Supreme Court

Judge Jeffrey Ramsdell, President
Superior Court Judges' Association
King County Superior Court

Judge Ann Schindler
Court of Appeals, Division I

Judge Laurel Siddoway
Court of Appeals, Division III

Judge Scott Sparks
Superior Court Judges' Association
Kittitas County Superior Court

Judge David Steiner, Acting President
District and Municipal Court Judges' Association
King County District Court East Division - Bellevue

NON-VOTING MEMBERS:

Judge Harold Clarke III, President-Elect
Superior Court Judges' Association
Spokane County Superior Court

Ms. Callie Dietz
State Court Administrator

Mr. Anthony Gipe, President
Washington State Bar Association

Mr. William Hyslop, President-Elect
Washington State Bar Association

Judge Kevin Korsmo
Presiding Chief Judge
Court of Appeals, Division III

Ms. Paula Littlewood, Executive Director
Washington State Bar Association

Judge G. Scott Marinella, President-Elect
District and Municipal Court Judges' Association
Columbia County District Court

Board for Judicial Administration (BJA) Meeting

Friday, March 20, 2015 (9:00 a.m. – Noon)

AOC SeaTac Office, 18000 International Blvd., Suite 1106, SeaTac

AGENDA

1. Call to Order	Judge Kevin Ringus	9:00 a.m.
2. Welcome and Introductions	Judge Kevin Ringus	9:00 a.m.
3. Perceptions of Justice	Mr. Greg Taylor	9:05 a.m.
Action Items		
4. February 20, 2015 Meeting Minutes Action: Motion to approve the minutes of the February 20, 2015 meeting	Judge Kevin Ringus	9:50 a.m. Tab 1
5. GR 31.1 Suggested Rule Changes Action: Motion to approve the suggested GR 31.1 rule change	Mr. John Bell	9:55 a.m. Tab 2
6. BJA Court Education Committee Charter Revision Action: Motion to approve the revised BJA Court Education Committee Charter	Judge John Meyer	10:15 a.m. Tab 3
7. Suggested Rule GR 35 Judicial Performance Evaluations Action: Motion to support suggested rule GR 35 Action: Motion to support the idea of judicial evaluations	Judge Kevin Ringus	10:25 a.m. Tab 4
Break		10:40 a.m.
8. WSBA Task Force on the Escalating Costs of Civil Litigation Report Action: Motion to comment on the WSBA Task Force on the Escalation Costs of Civil Litigation Report	Judge Kevin Ringus	10:55 a.m. Tab 5
Reports and Information		
9. Legislative Report	Ms. Mellani McAleenan	11:15 a.m. Tab 6
10. State Budget Update	Mr. Ramsey Radwan	11:25 a.m. Tab 7
11. BJA Administrative Manager Position	Judge Kevin Ringus	11:35 a.m.

12. Standing Committee Reports Budget and Funding Committee Court Education Committee Legislative Committee Policy and Planning Committee	 Judge Ann Schindler Judge John Meyer Judge Sean O'Donnell Judge Scott Sparks	11:40 a.m. Tab 8
13. Other Business Next meeting: May 15 AOC SeaTac Office	Judge Kevin Ringus	11:55 a.m.
14. Adjourn		Noon
Persons with a disability, who require accommodation, should notify Beth Flynn at 360-357-2121 or beth.flynn@courts.wa.gov to request or discuss accommodations. While notice five days prior to the event is preferred, every effort will be made to provide accommodations, when requested.		

Tab 1

Board for Judicial Administration (BJA) Meeting

Friday, February 20, 2015 (9 a.m. – Noon)
AOC Olympia Office, 1112 Quince Street SE, Olympia

MEETING MINUTES

BJA Members Present:
Chief Justice Barbara Madsen, Chair
Judge Kevin Ringus, Member Chair
Judge Thomas Bjorgen
Judge Bryan Chushcoff
Judge Harold Clarke III
Ms. Callie Dietz
Mr. Anthony Gipe (by phone)
Judge G. Scott Marinella
Judge John Meyer
Judge Jeffrey Ramsdell
Judge Ann Schindler
Judge Laurel Siddoway (by phone)
Judge Scott Sparks
Judge David Steiner

Guests Present:
Mr. Jim Bamberger
Ms. Ishbel Dickens
Justice Mary Fairhurst
Ms. Ruth Gordon
Mr. Eric Johnson
Ms. Sophia Byrd McSherry
Ms. Joanne Moore

Public Present:
Dr. Page Carter
Mr. Tom Goldsmith

AOC Staff Present:
Mr. John Bell
Ms. Beth Flynn
Mr. Steve Henley
Ms. Mellani McAleenan

January 16, 2015 Meeting Minutes

It was moved by Judge Sparks and seconded by Judge Chuschcoff to approve the January 16, 2015 BJA meeting minutes. The motion carried.

Washington State Association of Counties Legislative Agenda

Mr. Johnson presented information regarding the Washington State Association of Counties' (WSAC) 2015 legislative agenda. The WSAC is trying to make sure they have the resources to fund county services. They are looking at new sources of revenue, flexible ways to use existing revenue, and ways to control costs.

The WSAC identified several areas of new or flexible revenue sources. They cannot guarantee the increased revenue will go directly to the criminal justice system but it will go into the general government account and that funds the criminal justice system. They have several initiatives both big and small to try to generate or redirect revenue. Some of their revenue ideas are listed below.

- Create a shared system for marijuana taxes. They want the increased revenue to fund state services relating to the marijuana initiative which are currently funded by the counties.
- Propose a public utility tax for unincorporated areas.

- Use a portion of building permit fees to pay for the Growth Management Act. The counties are looking for some flexibility in the ways they can use building permit fees.
- Propose a new cap that utilizes inflation plus population growth for property tax.
- The Office of Public Defense (OPD) is requesting that the statewide infraction penalty be increased to pay for indigent defense. Counties are expending about $120 million on indigent defense and receiving about $5 million from the state. OPD is joining with the cities and the counties to increase the traffic infraction penalties.

Mr. Johnson stated that the WSAC will keep the judicial associations in the loop regarding their tax packages. They will provide information regarding their proposed revenue solutions for county government and how the tax packages make the county funding healthier. They are hoping the judicial associations will embrace their solutions even though there is no guarantee that the funding is going directly to the courts.

BJA Public Trust and Confidence Committee Report

Justice Fairhurst reported that the BJA Public Trust and Confidence Committee completed six projects last year and two of those six projects are ongoing.

The Committee completed the Myths and Misperceptions of Washington Courts video which had financial support from the Gender and Justice Commission, the Minority and Justice Commission and TVW. The video included comments from people on the street about how the legal process works and experts from the legal community provided the actual explanation for how things work. The video was nominated for a regional Emmy. In addition, posters were created for use in courthouses.

A subcommittee chaired by Judge Siddoway looked into rural courts' public trust and confidence issues. The results of the rural court survey were included in the meeting materials. The Committee decided the information should go to the BJA Policy and Planning Committee and the BJA to determine what should be done with the survey results.

Also included in the meeting materials was the Washington State Guide for Civic Observances: Law Day and Constitution Day. The Law and Constitution Day Subcommittee distributed a survey to Washington State Bar Association (WSBA) members asking about activities regarding Law Day. The results were just a snapshot of the activities taking place in Washington State but the report provides useful information for anyone wishing to celebrate Law Day and Constitution Day.

Judge Bill Bowman chaired a subcommittee to develop Judicial Remarks to Prospective Jurors which was included in the meeting materials. One change was made to the Judicial Remarks.

The Legislative Scholars Program is a weeklong program that is held each year. The Committee developed a half-day program on courts to include in the Legislative Scholars Program.

The Committee continues to catalogue the collection of law-related education materials that Ms. Margaret Fisher has accumulated over 40 years in the field. Once catalogued, the materials will be transferred to an electronic format and made available for use statewide.

The Committee asked for the BJA's approval for all of the projects prior to publishing the information and posting it online.

By consensus, the BJA approved the publishing of all the information that was brought forward by Justice Fairhurst, with one change to the Juror Remarks

Listed below are the 2015 projects of the Committee.

1. Create and disseminate a public service announcement video for special audiences; the Pattern Jury Instructions Committee funded this.
2. Review and repackage all past products of the Committee so that everything is current.
3. Collaborate with the Access to Justice Board and the Office of Civil Legal Aid to communicate why access to justice is important.
4. Provide supporting materials for the Children's Activity Book.
5. Legislative Scholars.
6. Continue cataloging the law-related education materials.

<u>Suggested Rule GR 35 Judicial Performance Evaluations</u>

Judge Steiner reported that the District and Municipal Court Judges' Association (DMCJA) had a mixed reaction the GR 35 proposal. The DMCJA asked to have a presentation regarding GR 35 at an upcoming Board meeting.

The Superior Court Judges' Association (SCJA) is in the same situation and will also have a presentation regarding the proposed rule.

Judge Schindler reported that the Court of Appeals (COA) expressed a lot of concerns and there were mixed reactions. There are concerns about confidentially of this along with other concerns such as is this an inappropriate use of state funds to endorse candidates? It is not like a voter's pamphlet—it is a state funded group that would endorse candidates. The consensus from COA judges is that criteria in the proposed rule was worked on and validated over the course of a number of years and is specific to trial court judges. There are different roles for trial court judges and appellate judges and they were acknowledged in the National Conference on Evaluating Appellate Judges report on pages 75 and 76 of the meeting materials. If the BJA goes forward with the rule there would need to be a group convened to determine criteria and then the group would need to validate the criteria.

Chief Justice Madsen stated that the Supreme Court had mixed reactions. It really is going to have to be a project of the BJA if that is what the BJA decides to do. No one in the Supreme Court was willing to sign off on the rule as presented.

Ms. Dietz reported that she did not have a final estimate on the costs for the Administrative Office of the Courts (AOC) to run the program but possible costs would be very employee and administrative intense. She looked at Alaska and they have seven employees and have less work than Washington would have.

This will be on the March BJA meeting agenda for action. It was requested that there be two votes on this issue: 1) to support the proposal, and 2) to support the idea of a judicial evaluation.

Legislative Report

Ms. McAleenan reported that there were 27 legislators, 30 legislative staff, 20 judges and 30 others who attended the legislative reception last night. It was a really nice turnout and they received a lot of good feedback. They had the Superior Court Case Management System (SC-CMS) software set up during the reception and quite a few people asked questions and played with the software.

Today marks the 40th day of the legislative session and bills have to move out of policy committees by today to remain alive. Next week is the fiscal committee cutoff and they have to be out of those committees by the 47th day of the session. Next week will be devoted to appropriations hearings.

In terms of BJA bills, the court transcriptionist bill passed out of the House unanimously and is in the Senate. The Skagit County District Court bill is on both the House and Senate floor calendars. The juvenile records bill is moving but is being revised as it is going. The legal financial obligation bill is moving but continuing to be amended. The COA tax division creation bill passed out of the Senate Law and Justice Committee yesterday and was amended to include a small claims section and mediation component. Senator John Braun dropped his retirement bill and it currently does not include judges.

The February state revenue forecast is being released today. There will probably be cuts in the Senate budget but the House budget should be a little nicer to the judicial branch.

Standing Committee Reports

Budget and Funding Committee: Judge Schindler reported that the BJA Budget and Funding Committee is meeting after the BJA meeting today.

Court Education Committee: Judge Meyer stated that the Court Education Committee reached an agreement with Dean Clark from Seattle University to join their committee. He also submitted a written report which was included in the meeting materials.

Legislative Committee: No report.

Policy and Planning Committee: Judge Sparks submitted a written report. They have a long timeframe view. Everyone is really busy, especially this time of year, so they are communicating via e-mail to get some consensus.

BJA Account

Behind Tab 7 is the year end financial report for the BJA Business Account. The BJA Business Account is privately funded by judges and does not include state money. Dues assessments are only sent as needed and generally, there is a 50-60% compliance rate for the dues. The ongoing costs to the BJA Business Account are bookkeeping services, registration fees, mats

and frames for BJA members leaving the Board and the biggest cost is for the legislative reception.

Ms. Dietz stated that it is time to audit the BJA Business Account and she would like to have someone in AOC's Fiscal department perform the audit in their own time for a small fee (about $150).

It was moved by Judge Sparks and seconded Judge Bjorgen to go forward with the internal audit of the BJA Private Account. The motion carried.

Salary Commission Report

Ms. McAleenan reported that representatives from every court level attended the January Salary Commission meeting. The Commission proposed a 3% general wage increase in 2015 and a 1% general wage increase in 2016, and for the judicial branch they opted for an additional 1% increase in 2015 and an additional 1% in 2016 to maintain working toward the benchmark of federal court judges. They also recognized the additional responsibility of being the Chief Justice of the Supreme Court and proposed a 1.5% increase.

Judges will not be attending the other Salary Commission meetings.

The Commission will meet in May and determine a final recommendation.

GR 31.1 Suggested Rule Changes

Mr. Bell stated that there were several issues with GR 31.1 raised by different committees and outside groups. The meeting materials included the suggested revisions to GR 31.1.

The first suggested revision is with section (c)(1) and it is recommended that requesters identify themselves at the time of their requests.

The second is with section (h)(1) and it is recommended that language be added stating a fee may be charged for research or preparation of the records. The fee would be up to $30 an hour after the first hour and each court could set their own fee as long as the first hour of research was free and the subsequent hours did not exceed $30 per hour. During discussion about research fees, it was suggested that maybe this could be addressed in a comment as opposed to amending the substantive portion of the rule. Mr. Bell will draft additional wording for the comment section and present that language to the underlying internal work groups and committees for approval. If approved he will submit the language for the BJA to review at their March meeting.

The third is with section (k)(1). It is recommended that The Washington State Office of Civil Legal Aid and the Washington State Office of Public Defense be listed in this section and deleted from section (k)(2).

The fourth revision is with section (l)(5) and the recommendation is to add date of birth as an exemption.

The final revision is to section (m)(1) and it is recommended that "at chambers" be deleted from end of that paragraph.

If you have any thoughts on the recommended revisions to GR 31.1, please e-mail them to Mr. Bell between now and the March BJA meeting so there can be a full discussion during the meeting.

Mr. Bell also reviewed issues that were raised and rejected by the work groups.

GR 31.1 training will be held in April and May.

Other Business

Court Management Council 2014 Annual Report: Ms. Dietz asked the BJA members to review the Court Management Council 2014 Annual Report which was distributed in the meeting materials. She also presented a draft of the Court Management Council's juror scam poster which will be used in courts to alert the public about juror scams that are going on in Washington.

WSBA Task Force on the Escalating Costs of Civil Litigation: The BJA was asked to review this report and comment on it. This will be placed on the March BJA meeting agenda to determine if the BJA would like to submit a comment.

> **It was moved by Judge Steiner and seconded by Judge Schindler to adjourn the meeting. The motion carried.**

Recap of Motions from the February 20, 2015 meeting

Motion Summary	Status
Approve the January 16, 2015 BJA meeting minutes	Passed
Approve the internal audit of the BJA private account	Passed
Adjourn the meeting	Passed

Action Items from the February 20, 2015 meeting

Action Item	Status
January 16, 2015 BJA Meeting Minutes • Post the minutes online • Send minutes to the Supreme Court for inclusion in the En Banc meeting materials	 Done Done
BJA Public Trust and Confidence Committee • Have the BJA Policy and Planning Committee decide what to do with the results of the rural courts survey • The Committee will publish the information that was brought forward during the meeting	Information passed on to the staff of the BJA Policy and Planning Committee
GR 35 • Add to March agenda for action (two action items: one for the proposal and one to support the idea of judicial evaluations)	Done

Action Item	Status
BJA Account • Go forward with the internal audit of the BJA private account	Done
WSBA Task Force on the Escalating Costs of Civil Litigation • Add to March BJA meeting agenda for action	Done

Tab 2

March 13, 2015

TO: Chief Justice Barbara Madsen and Judge Kevin Ringus, Co-Chairs and BJA

FROM: John Bell

RE: Changes to GR 31.1

I am providing you with the current suggested modifications to GR 31.1 for your review and decision. Per request at the February 20, 2015 meeting, I distributed to the Core Work Committee and the Executive Oversight Committee suggested modifications to GR 31.1 (h) (Charging of Fees). Neither committee objected to adding clarifying language into the comment section of (h). I have included both versions of section (h) for you to compare. The first version, which was presented to the BJA last month, keeps the clarification of "research fees" in the substantive portion of the rule. The alternative version removes the clarification of "research fees" from the substantive portion of the rule and places it into the comment section.

I have also included two emails I received this past month regarding suggested changes or clarifications to GR 31.1. One email is from Judge Meyer and he discusses the designation of the Public Records Officer (PRO) for the Court and if the PRO can be an executive branch employee. Judge Meyer also suggests that court administrators be included in the definition of "chambers staff." The second email is from Judge Downes providing his thoughts about adding court administrators to "chambers staff."

Finally, I have included my memo from the last meeting. Thank you.

From: JohnMMeyer [mailto:johnmm@co.skagit.wa.us]
Sent: Monday, February 23, 2015 10:54 AM
To: Bell, John
Subject: GR 31 issues

Just two matters:

1. I can guarantee that our Commissioners will not fund a PRO position in the Judicial Branch. From my conversations with other "rural" courts, the same applies for them. I'm not really worried about the separation of powers issue. Our Executive Branch PRO knows that the Judiciary is a separate branch and will treat any requests for our records knowledgably and with great discretion and confidentiality.
2. Again speaking for "rural" courts, for many of us the Court Administrator IS chambers staff under certain circumstances. Might I suggest that the interpretation differentiate between when the Court Administrator is acting administratively, and when he/she is addressing chambers responsibilities?

Thank you.

John M. Meyer, Judge
Skagit County Superior Court

From: Downes, Michael [mailto:michael.downes@snoco.org]
Sent: Thursday, March 05, 2015 11:57 AM
To: Bell, John
Subject: GR31.1

I am the presiding Judge for Snohomish County Superior Court. I am writing to urge that GR31.1 include Court Administrators as chambers staff. There are many occasions when a judge is dependent on the Court Administrator to carry out or assist in carrying out some aspect of legitimate in chambers business. To not include the administrator undercuts a courts ability to operate well. The notion that this should be opposed because it wasn't originally included in the rule and it may public disclosure advocates something to complain about ignores the real need of the courts. On that theory nothing would ever be amended to make it better meet the needs of anyone.

February 13, 2015

TO: Board for Judicial Administration Members

FROM: John Bell and Jan Nutting

RE: **REQUESTED CHANGES TO GR 31.1**

The Supreme Court asked that the BJA review GR 31.1 (Access to Administrative Records) for suggested changes prior to GR 31.1 becoming effective. Three internal committees of the GR 31.1 Implementation Work Group have reviewed the suggestions presented for consideration. Those suggested changes to GR 31.1 which were approved by the committees are attached. Below are reasons members of the committees believed the suggested changes should (or should not) be recommended by the BJA to the Supreme Court for inclusion prior to the effective date of GR 31.1.

(c)(1) Requiring requesters to identify themselves at the time of their requests is neither contrary to case law nor does it hamper openness. Requiring identification is consistent with language in GR 31.1. GR 31.1(c)(7) states that a records request can be denied if the request involves potential "harassment, intimidation, threats to security, or criminal activity." It would be difficult, if not impossible, to make this determination if the identity of the requester is unknown. The same can be said if the court or judicial agency is requesting prepayment for a large request as is allowed under GR 31.1(h)(3) and (5). It would be difficult to request and substantiate prepayment if the requestor is unknown.

(h)(1) Preparation fees: If a requester only wants to view the records then no copying fees will be charged; however, obtaining, locating and preparing (reviewing and redacting) the records may take substantial time and effort. Several committee members believe the requester should be charged for the time and effort required to prepare the records. Please note that this suggested change has received "mixed reviews" from different committee members as some of this proposed language is contrary to the Public Records Act (PRA), RCW 42.56.120, which states, in part, "No fee shall be charged for the inspection of public records. No fee shall be charged for locating public documents and making them available for copying." (Emphasis added). Other committee members have pointed out that the judiciary is not bound by the PRA and it may set its own records policies as long as the policies are not contrary to case law. Charging preparation fees is not contrary to case law. Furthermore, charging "research and preparation fees" is consistent with the language of GR 31.1(h)(4), which

states a fee of $30 an hour may be charged for “research services required to fulfill a request.” (Emphasis added). Because of the difference of opinions this change is being brought to the BJA for final decision.

(h)(4) The addition of “**preparation”** further clarifies that research includes preparation of documents (i.e. reviewing and redacting).

Naming the Office of Civil Legal Aid and the Office of Public Defense. Both are judicial agencies and should fall under (k)(1).

(*l*)(5) The addition of **date of birth as an exemption** was requested at the 2014 Presiding Judges Conference in November and brought to each internal committee for review. All the committees agreed that date of birth is a personal identifier that should be exempt from disclosure.

(m)(1) Deletion of the words "at chambers" was recommended by the Executive Oversight Group because "at chambers" could be taken literally and direct support to a judicial officer can occur outside of a judicial officer's chambers. All three committees approved of this deletion.

OTHER ISSUES that were raised during the last year:

Courts appointing an executive branch Public Records Officer to review GR 31.1 administrative records requests – The Committees agreed that having a judicial branch employee designated as a public records officer (PRO) is a budgetary issue, especially for the smaller courts. However, there are other concerns that need to be considered. There are serious concerns regarding an executive branch employee making disclosure decisions regarding judicial administrative records. What might be viewed as publicly accessible to an executive branch employee may not be accessible under GR 31.1 (i.e. chambers records, ethics opinions, meeting minutes among judges, etc.). Also, the point was made that allowing an executive branch PRO make disclosure decisions regarding judicial administrative records defeats the overall purpose of the rule: recognizing there is a separation of powers with regard to control of judicial administrative records. This issue is being brought to the BJA for discussion and decision.

Non-disclosure of prior draft documents after final documents are completed – All committees agreed draft documents are public records, unless they fall under some exemption.

Adding court administrators to chambers staff with regard to communications between a judge and court administrator – Saved this for BJA discussion, but each committee agreed that it is not a good idea as it was not originally in GR 31.1 and to add another disclosure exception could result in resistance from public disclosure advocates and delay the final approval and implementation of GR 31.1.

Statewide Record Retention Schedule and Mandatory Forms issues were raised in an email from Presiding Judge Sam Cozza, of Spokane County Superior Court. Judge Cozza made the following observations:

1.) We really need to have a specific retention schedule in the rule. It makes no sense for 39 different counties and 100 + municipalities to have different retention schedules. It will make everybody's life easier if the Supreme Court just tells us what we need to do to be in compliance.
2.) It really would be a huge help for courts and public records officers if requesters have to use mandatory forms. If you look at requests from various members of the public, it is often difficult to decipher what they are asking for, and it makes the whole process lengthier than it needs to be. If the state forms are used, it just directs courts with a little more specificity what is being sought.

Each committee agreed that the above two issues are not rule-making issues and should not be addressed in GR 31.1. Retention schedules could be set by the Supreme Court, but that would not be accomplished in the form of a court rule. With regard to mandatory forms for administrative records requests, the forms that were prepared and approved by the BJA were only meant to be used as guides as each court may have different needs and may want to edit the forms so those needs are addressed. However, it was decided that Judge Cozza's suggestions should be presented to BJA for discussion.

One final point: **A number of Committee members emphasized that it was important to refrain from making too many changes to GR 31.1.** The concern that was unanimously expressed was: Too many changes will cause delay in final approval and implementation. When GR 31(Access to Court Records) was first adopted in 2004, the Supreme Court required a one year review period. After one year a report was presented to the Supreme Court regarding any issues that arose during the first year of implementation. A few changes were made to GR 31 based on this report. A similar report could be prepared a year after GR 31.1 becomes effective. At that point, the judiciary will have had a year to determine if any major issues emerge and, if so, to address those issues with suggested modifications to GR 31.1.

NEW RULE

GENERAL RULES (GR)

Rule 31.1 – Access to Administrative Records

GENERAL PRINCIPLES

(a) Policy and Purpose. Consistent with the principles of open administration of justice as provided in article I, section 10 of the Washington State Constitution, it is the policy of the judiciary to facilitate access to administrative records. A presumption of access applies to the judiciary's administrative records. Access to administrative records, however, is not absolute and shall be consistent with exemptions for personal privacy, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. Access shall not unduly burden the business of the judiciary.

(b) Overview of Public Access to Judicial Records. There are three categories of judicial records.

(1) Case records are records that relate to in-court proceedings, including case files, dockets, calendars, and the like. Public access to these records is governed by GR 31, which refers to these records as "court records," and not by this GR 31.1. Under GR 31, these records are presumptively open to public access, subject to stated exceptions.

(2) Administrative records are records that relate to the management, supervision, or administration of a court or judicial agency. A more specific definition of "administrative records" is in section (i) of this rule. Under section (j) of this rule, administrative records are presumptively open to public access, subject to exceptions found in sections (j) and (*l*) of this rule.

(3) Chambers records are records that are controlled and maintained by a judge's chambers. A more specific definition of this term is in section (m) of this rule. Under section (m), chambers records are not open to public access.

PROCEDURES FOR ADMINISTRATIVE RECORDS

(c) Procedures for Records Requests.

(1) COURTS AND JUDICIAL AGENCIES TO ADOPT PROCEDURES. Each court and judicial agency must adopt a policy implementing this rule and setting forth its procedures for accepting and responding to administrative records requests. The policy must include the designation of a public records officer and ~~must~~ shall require that requests from the identified individual or, if an entity, an identified entity representative, be submitted in writing to the designated public records officer. Best practices for handling administrative records requests shall be developed under the authority of the Board for Judicial Administration.

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COMMENT: When adopting policies and procedures, courts and judicial agencies will need to carefully consider many issues, including the extent to which judicial employees may use personally owned computers and other media devices to conduct official business and the extent to which the court or agency will rely on the individual employee to search his or her personally owned media devices for documents in response to a records request. For judicial officers and their chambers staff, documents on personal media devices may still qualify as chambers records, see section (m) of this rule.

(2) PUBLICATION OF PROCEDURES FOR REQUESTING ADMINISTRATIVE RECORDS. Each court and judicial agency must prominently publish the procedures for requesting access to its administrative records. If the court or judicial agency has a website, the procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, and e-mail address.

(3) INITIAL RESPONSE. Each court and judicial agency must initially respond to a written request for access to an administrative record within five working days of its receipt, but for courts that convene infrequently no more than 30 calendar days, from the date of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be later revised, if necessary. For purposes of this rule, "working days" mean days that the court or judicial agency, including a part-time municipal court, is open.

(4) COMMUNICATION WITH REQUESTER. Each court and judicial agency must communicate with the requester as necessary to clarify the records being requested. The court or judicial agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.

(5) SUBSTANTIVE RESPONSE. Each court and judicial agency must respond to the substance of the records request within the timeframe specified in the

court~~'s~~ or judicial agency's initial response to the request. If the court or judicial agency is unable to fully comply in this timeframe, then the court or judicial agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the court or judicial agency does not fully satisfy the records request in the manner requested, the court or judicial agency must justify in writing any deviation from the terms of the request.

(6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the court or judicial agency cannot fully comply within a reasonable time due to constraints on the court~~'s~~ or judicial agency's time, resources, and personnel, the court or judicial agency shall communicate this information to the requester. The court or judicial agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the court~~'s~~ or judicial agency's response, which may include a schedule of installment responses. If the court or judicial agency and requester are unable to reach agreement, then the court or judicial agency shall respond to the extent practicable and inform the requester that the court or judicial agency has completed its response.

(7) RECORDS REQUESTS THAT INVOLVE HARASSMENT, INTIMIDATION, THREATS TO SECURITY, OR CRIMINAL ACTIVITY. A court or judicial agency may deny a records request if it determines that: the request was made to harass or intimidate the court or judicial agency or its employees; fulfilling the request would likely threaten the security of the court or judicial agency; fulfilling the request would likely threaten the safety or security of judicial officers, staff, family members of judicial officers or staff, or any other person; or fulfilling the request may assist criminal activity.

(d) Review of Records Decision.

(1) NOTICE OF REVIEW PROCEDURES. The public records officer's response to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) DEADLINE FOR SEEKING INTERNAL REVIEW. A record requester's petition under section (d)(3) seeking internal review of a public records officer's decision must be submitted within 90 days of the public records officer's decision.

(3) INTERNAL REVIEW WITHIN COURT OR AGENCY. Each court and judicial agency shall provide a method for review by the judicial agency's director,

presiding judge, or judge designated by the presiding judge. For a judicial agency, the presiding judge shall be the presiding judge of the court that oversees the agency. The court or judicial agency may also establish intermediate levels of review. The court or judicial agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days, but for courts that convene infrequently no more than 30 calendar days, from the date the court or agency receives the request for review. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

(4) EXTERNAL REVIEW. Upon the exhaustion of remedies under section (d)(3), a record requester aggrieved by a court or agency decision may obtain further review by choosing between the two alternatives set forth in subsections (i) and (ii) of this section (d)(4).

(i) REVIEW VIA CIVIL ACTION IN COURT. The requesting person may use a judicial writ of mandamus, prohibition, or certiorari to file a civil action in superior court challenging the records decision.

COMMENT: Subsection (i) does not create any new judicial remedies, but merely recognizes existing procedures for initiating a civil action in court.

(ii) INFORMAL REVIEW BY VISITING JUDGE OR OTHER OUTSIDE DECISION MAKER. The requesting person may seek informal review by a person outside the court or judicial agency. If the requesting person seeks review of a decision made by a court or made by a judicial agency that is directly reportable to a court, the outside review shall be by a visiting judicial officer. If the requesting person seeks review of a decision made by a judicial agency that is not directly reportable to a court, the outside review shall be by a person agreed upon by the requesting person and the judicial agency. In the event the requesting person and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. The decision resulting from the informal review proceeding may be further reviewed in superior court pursuant to a writ of mandamus, prohibition, or certiorari. Decisions made by a judge under this subsection (ii) are part of the judicial function.

(iii) DEADLINE FOR SEEKING EXTERNAL REVIEW. A request for external review must be submitted within 30 days of the issuance of the court or judicial agency's final decision under section (d)(3).

(e) Monetary Awards Not Allowed. Attorney fees, costs, civil penalties, or fines may not be awarded under this rule.

(f) Persons Who Are Subjects of Records.

(1) Unless otherwise required or prohibited by law, a court or judicial agency has the option of notifying a person named in a record or to whom a record specifically pertains, that access to the record has been requested.

(2) A person who is named in a record, or to whom a record specifically pertains, may present information opposing the disclosure to the applicable decision maker under sections (c) and (d).

(3) If a court or judicial agency decides to allow access to a requested record, a person who is named in that record, or to whom the record specifically pertains, has a right to initiate review under subsections (d)(3)-(4) or to participate as a party to any review initiated by a requester under subsections (d)(3)-(4). If either the record subject or the record requester objects to informal review under subsection (d)(4)(ii), such alternative shall not be available. The deadlines that apply to a requester apply as well to a person who is a subject of a record.

(g) Court and Judicial Agency Rules. Each court may from time to time make and amend local rules governing access to administrative records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its administrative records not inconsistent with this rule.

[First Version]

(h) Charging of Fees.

(1) A fee may not be charged to view administrative records, except the requester may be charged for research required to locate ~~or~~, obtain, or prepare the records at the rate set forth in section (h)(4).

(2) A fee may be charged for the photocopying or scanning of administrative records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, ~~Chapter~~ chapter 42.56 RCW.

Commented [A1]: Per Code Revisor, see preface "Citation to the Revised Code of Washington."

(3) The court or judicial agency may require a deposit in an amount not to exceed the estimated cost of providing copies for a request. If a court or judicial agency makes a request available on a partial or installment basis, the court or judicial agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the court or judicial agency is not obligated to fulfill the balance of the request.

(4) A fee not to exceed $30 per hour may be charged for research and preparation services required to fulfill a request taking longer than one hour. The fee shall be assessed from the second hour onward.

COMMENT: The authority to charge for research services is discretionary, allowing courts to balance the competing interests between recovering the costs of their response and ensuring the open administration of justice. The fee should not exceed the actual costs of response.

(5) A court or judicial agency may require prepayment of fees.

[Alternative version]

(h) Charging of Fees.

(1) A fee may not be charged to view administrative records.

(2) A fee may be charged for the photocopying or scanning of administrative records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, chapter 42.56 RCW.

(3) The court or judicial agency may require a deposit in an amount not to exceed the estimated cost of providing copies for a request. If a court or judicial agency makes a request available on a partial or installment basis, the court or judicial agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the court or judicial agency is not obligated to fulfill the balance of the request.

(4) A fee not to exceed $30 per hour may be charged for research services required to fulfill a request taking longer than one hour. The fee shall be assessed from the second hour onward.

COMMENT: The authority to charge for research services such as locating, reviewing, redacting, and preparing the requested records for public viewing or consumption is discretionary. ~~, allowing c~~Courts should ~~to~~ balance the competing interests between recovering the costs of their response and ensuring the open administration of justice. The fee should not exceed the actual costs of response.

Commented [A2]: Additional language requested by EOW to clarify that that preparing the records (i.e. redactions, copying, etc.) can be charged.

Commented [A3]: Requested at the last BJA meeting in that research is clarified in the comment section and not the substantive portion of the rule

(5) A court or judicial agency may require prepayment of fees.

APPLICATION OF RULE FOR ADMINISTRATIVE RECORDS

This rule applies to all administrative records, regardless of the physical form of the record, the method of recording the record, or the method of storage of the record.

(i) Definitions.

(1) "Access" means the ability to view or obtain a copy of an administrative record.

(2) "Administrative record" means a public record created by or maintained by a court or judicial agency and related to the management, supervision, or administration of the court or judicial agency.

COMMENT: The term "administrative record" does not include any of the following: (1) "court records" as defined in GR 31; (2) chambers records as set forth later in this rule; or (3) an attorney's client files that would otherwise be covered by the attorney-client privilege or the attorney work product privilege.

(3) "Court record" is defined in GR 31.

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(4) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

(5) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(6) "Public record" includes any writing, except chambers records and court records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any court or judicial agency regardless of physical form or characteristics. "Public record" also includes metadata for electronic administrative records.

COMMENT: See O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010) (defining "metadata").

(7) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

COMMENT: E-mails and telephone records are included in this broad definition of "writing."

(j) Administrative Records—General Right of Access. Court and judicial agency administrative records are open to public access unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes, court orders, or case law. To the extent that records access would be exempt or prohibited if the Public Records Act applied to the judiciary's administrative records, access is also exempt or prohibited under this rule. To the extent that an ambiguity exists as to whether records access would be exempt or prohibited under this rule or other enumerated sources, responders and reviewing authorities shall be guided by the Public Records Act, ~~Chapter~~ chapter 42.56 RCW, in making interpretations under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety interests, a court or judicial agency shall delete identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

(k) Entities Subject to Rule.

(1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the district and municipal courts, and the following judicial ~~branch~~ agencies:

(i) All judicial organizations that are overseen by a court, including entities that are designated as agencies, departments, committees, boards, commissions, task forces, and similar groups;

(ii) The Superior Court Judges' Association, the District and Municipal Court Judges' Association, and similar associations of judicial officers and employees; ~~and~~

Commented [A4]: "judicial agencies" is used throughout so "branch" deleted to remain consistent

~~(ii)~~(iii) The Washington State Office of Civil Legal Aid and the Washington State Office of Public Defense.

~~(iii)~~(iv) All subgroups of the entities listed in this section (k)(1).

COMMENT: The elected court clerks and their staff are not included in this rule because (1) they are covered by the Public Records Act and (2) they do not generally maintain the judiciary's administrative records that are covered by this rule.

~~(2) This rule applies to the Washington State Office of Civil Legal Aid and the Washington State Office of Public Defense.~~

(~~3~~2) This rule does not apply to the Washington State Bar Association. Public access to the Bar Association's records is governed by [a proposed General Rule 12.4, pending before the Supreme Court].

(~~4~~3) A judicial officer is not a court or judicial agency.

COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.

(~~5~~4) An attorney or entity appointed by a court or judicial agency to provide legal representation to a litigant in a judicial or administrative proceeding does not become a judicial agency by virtue of that appointment.

(~~6~~5) A person or entity entrusted by a judicial officer, court, or judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or agency may not respond to a request for access to administrative records, absent express written authority from the court or judicial agency or separate authority in court rule to grant access to the documents.

COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of a court or judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court or judicial agency puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the court or judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the court~~'s~~ or judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if a court or judicial agency archives its records with the state

Commented [A5]: Requested by CWG

archivist, relinquishing by contract its own authority as to disposition of the records, the archivist would have separate authority to disclose the records.

Because of this rule's broad definition of "public record", this paragraph (6) would apply to electronic records, such as e-mails (and their metadata) and telephone records, among a wide range of other records.

(*l*) Exemptions. In addition to exemptions referred to in section (j), the following categories of administrative records are exempt from public access:

(1) Requests for judicial ethics opinions;

(2) Minutes of meetings held exclusively among judges, along with any staff;

COMMENT: Meeting minutes do not always contain information that needs to be withheld from public access. Courts have discretion whether to release meeting minutes, because an exemption from this rule merely means that a document is not required to be disclosed. Disclosure would be appropriate if the document does not contain information of a confidential, sensitive, or protected nature. Courts and judicial agencies are encouraged to carefully consider whether some, or all, of their meeting minutes should be open to public access. Adopting a local rule on this issue would assist the public in knowing which types of minutes are accessible and which are not.

(3) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this rule, except that a specific record is not exempt when publicly cited by a court or agency in connection with any court or agency action. This exemption applies to a record only while a final decision is pending on the issue that is being addressed in that record; once the final decision has been made, the record is no longer covered by this exemption. For purposes of documents related to budget negotiations with a budgetary authority, the "final decision" is the decision by the budgetary authority to adopt the budget for that year or biennium.

(4) Evaluations and recommendations concerning candidates seeking appointment or employment within a court or judicial agency;

COMMENT: Paragraph (4) is intended to encompass documents such as those of the Supreme Court's Capital Counsel Committee, which evaluates attorneys for potential inclusion on a list of attorneys who are specially qualified to represent clients in capital cases.

(5) Personal identifying information, including individuals' home contact information, Social Security numbers, date of birth, driver's license numbers, and identification/security photographs;

Commented [A6]: Request made at Presiding Judges Association…this was previously in the rule, but was removed before it was adopted

(6) Documents related to an attorney's request for a trial or appellate court defense expert, investigator, or other services, any report or findings submitted to the attorney or court or judicial agency by the expert, investigator, or other service provider, and the invoicing of the expert, investigator or other service provider during the pendency of the case in any court. Payment records are not exempt, provided that they do not include medical records, attorney work product, information protected by attorney-client privilege, information sealed by a court, or otherwise exempt information;

(7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a court~~'s~~ or judicial agency's internal investigation of a complaint against the court or judicial agency or its contractors during the course of the investigation. The outcome of the court~~'s~~ or judicial agency's investigation is not exempt;

(8) [Reserved];

(9) Family court mediation files; and

(10) Juvenile court probation social files.

(11) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans, the disclosure of which would have a substantial likelihood of threatening the security of a judicial facility or any individual's safety.

(12) The following records of the Certified Professional Guardian Board:

(i) Investigative records compiled by the Board as a result of an investigation conducted by the Board as part of the application process, while a disciplinary investigation is in process under the Board's rules and regulations, or as a result of any other investigation conducted by the Board while an investigation is in process. Investigative records related to a grievance become open to public inspection once the investigation is completed.

(ii) Deliberative records compiled by the Board or a panel or committee of the Board as part of a disciplinary process.

(iii) A grievance shall be open to public access, along with any response to the grievance submitted by the professional guardian or agency, once the investigation into the grievance has been completed or once a decision has been made that no investigation will be conducted. The name of the professional guardian or agency shall not be redacted from the grievance.

CHAMBERS RECORDS

(m) Chambers Records. Chambers records are not administrative records and are not subject to disclosure.

COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision-making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions.

(1) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, whether directly related to an official judicial proceeding, the management of the court, or other chambers activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer ~~at chambers~~.

Commented [A7]: Deletion of "at chambers"is recommended by the Executive Oversight Group because "at chambers" could be taken literally and direct support to a judicial officer can occur outside of a judicial officer's chambers.

COMMENT: Some judicial employees, particularly in small jurisdictions, split their time between performing chambers duties and performing other court duties. An employee may be "chambers staff" as to certain functions, but not as to others. Whether certain records are subject to disclosure may depend on whether the employee was acting in a chambers staff function or an administrative staff function with respect to that record.

Records may remain under chambers control even though they are stored elsewhere. For example, records relating to chambers activities that are stored on a judge's personally owned or workplace-assigned computer, laptop computer, cell phone, and similar electronic devices would still be chambers records. As a further example, records that are stored for a judicial chambers on external servers would still be under chambers control to the same extent as if the records were stored directly within the chambers. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.

(2) Court records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer or chambers staff.

COMMENT: Chambers records do not change in character by virtue of being accessible to another chambers. For example, a data base that is shared by multiple judges and their chambers staff is a "chambers record" for purposes of this rule, as long as the data base is only being used by judges and their chambers staff.

IMPLEMENTATION AND EFFECTIVE DATE

(n) Best Practices. Best practice guidelines adopted by the Supreme Court may be relied upon in acting upon public requests for documents.

(o) Effective Date of Rule.

(1) This rule will go into effect on a future date to be determined by the Supreme Court based on a recommendation from the Board for Judicial Administration. The rule will apply to records that are created on or after that date.

COMMENT: A delayed effective date is being used to allow time for development of best practices, training, and implementation. The effective date will be added to the rule once it has been determined.

(2) Public access to records that are created before that date are to be analyzed according to other court rules, applicable statutes, and the common law balancing test. The Public Records Act, c~~C~~hapter 42.56 RCW, does not apply to judicial records, but it may be used for non-binding guidance.

Tab 3

Board for Judicial Administration (BJA)

COURT EDUCATION STANDING COMMITTEE CHARTER

I. Committee Title
Court Education Committee (CEC)

II. Authority
Board for Judicial Administrative Rules (BJAR 3)

III. Charge or Purpose
The CEC will improve the quality of justice in Washington by fostering excellence in the courts through effective education. The CEC will promote sound adult education policy, develop education and curriculum standards for judicial officers and court personnel, and promote coordination in education programs for all court levels and associations.

IV. Policy
The CEC will establish policy and standards regarding curriculum development, instructional design, and adult education processes for statewide judicial education, using the National Association of State Judicial Educator's *Principles and Standards of Judicial Branch Education* goals:

The goal of judicial branch education is to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial branch functions.

1) Help judicial branch personnel acquire the knowledge and skills required to perform their judicial branch responsibilities fairly, correctly, and efficiently.
2) Help judicial branch personnel adhere to the highest standards of personal and official conduct.
3) Help judicial branch personnel become leaders in service to their communities.
4) Preserve the judicial system's fairness, integrity, and impartiality by eliminating bias and prejudice.
5) Promote effective court practices and procedures.
6) Improve the administration of justice.
7) Ensure access to the justice system.
8) Enhance public trust and confidence in the judicial branch.

V. Expected Deliverables or Recommendations

The CEC shall have the following powers and duties:

1. To plan, implement, coordinate, or approve BJA funded education and training for courts throughout the state.
2. Assure adequate funding for education to meet the needs of courts throughout the state and all levels of the court.
3. Collect and preserve curricula, and establish policy and standards for periodic review and update of curricula.
4. Develop and promote instructional standards for education programs.
5. Establish educational priorities.
6. Implement and update Mandatory Continuing Judicial Education polices and standards.
7. Develop working relationships with the other BJA standing committees (Policy and Planning, Legislative, and Budget and Finance).
8. Develop and implement standard curriculum for the Judicial College.
9. Provide education for judges and administrators that focuses on the development of leadership skills and provide tools to be used in the daily management and administration of their courts.

VI. Membership

Voting Members:

- Three BJA members with representation from each court level
- Education committee chair or a designee from the following:
  - Superior Court Judges' Association (SCJA)
  - District and Municipal Court Judges' Association (DMCJA)
  - Appellate courts
- ~~o~~ Annual Conference Education Committee Chair or designee
- Education committee chair or a designee from each of the following:
  - Washington State Association of County Clerks (WSACC)
  - District and Municipal Court Management Association (DMCMA)
  - Association of Washington Superior Court Administrators (AWSCA)
  - Washington Association of Juvenile Court Administrators (WAJCA)
- Washington State Law School Dean

Appointments:

- BJA Members: Appointed by the BJA co-chairs
- Judicial Members: Trial court members appointed by their respective associations and appellate member appointed by the Chief Justice
- Annual Conference Chair: Annual Conference member appointed by Chief Justice
- Court Administrators and County Clerk Members: Administrative and County Clerk members appointed by their respective associations
- Washington State Law School Dean: CEC recruit and appoint

Chair of CEC:

CEC members will elect a chair from among the three BJA representatives. The chair shall serve for a term of two years.

Co-chair of the CEC:

CEC members will elect a co-chair from among the non-BJA representatives. The co-chair shall serve for a term of two years.

VII. Term Limits

Staggered terms recommended (suggestion: staggered three year terms for all members),

Representing		Term/Duration
BJA Member, Appellate Courts	Judge Laurel Siddoway	***First population of members will be staggered (3 year term)**
BJA Member, SCJA	**Judge John Meyer - Chair**	*
BJA Member, DMCJA	Judge Judy Rae Jasprica	*
Appellate Court Education Chair or Designee (1)	Justice Debra Stephens	Term determined by Chief Justice
Superior Court Judges' Association Education Committee Chair or Designee (1)	Judge T.W. Small	Term determined by their association
District and Municipal Court Judges' Association Education Committee Chair or Designee (1)	Judge Douglas Fair	Term determined by their association
Annual Conference Chair or Designee (1)	Justice Susan Owens	Term determined by Chief Justice
Association of Washington Superior Court Administrators Education Committee Chair or Designee (1)	Ms. Andra Motyka (Ms. Fona Sugg is alternate)	Term determined by their association
District and Municipal Court Management Association Education Committee Chair or Designee (1)	Ms. Margaret Yetter	Term determined by their association
Washington Association of Juvenile Court Administrators Education Committee Chair or Designee (1)	Ms. Paula Holter-Mehren	Term determined by their association
Washington State Association of County Clerks Education Committee Chair or Designee (1)	Ms. Kimberly Allen	Term determined by their association
Washington State Law School Dean (1)	Dean Ann Clark	3 year term

VIII. Other Branch Committees Addressing the Same Topic

The CEC identified the following organizations involved in education:

- Association education committees
- Annual Conference Committee
- Gender and Justice Commission
- Minority and Justice Commission
- Court Interpreter Commission
- Certified Professional Guardian Board
- Court Improvement Training Academy
- Commission on Children in Foster Care
- AOC's Judicial Information System Education

The CEC will establish or continue relationships with the above named entities.

IX. Other Branch Committees to Partner With

Foster continual relationships with the BJA Legislative, Budget and Funding and Policy and Planning Committees. The CEC will be in close contact with the other BJA standing committees in order to develop long-term strategies for the funding of education and the creation of policies and procedures that are aligned with the BJA strategies and mission statement.

X. Reporting Requirements

The CEC will report at each regularly scheduled BJA meeting.

XI. Budget

XII. AOC Staff Support Until December 2015

- Mr. Dirk Marler, Director, Judicial Services Division (AOC Representative)
- Ms. Judith Anderson, Court Education Coordinator, Office of Trial Court Services and Judicial Education (Committee Staff)

XIII. Recommended Review Date

Every two years from adoption of charter.

Adopted: July 18, 2014
Attached Memorandum of Understanding with BCE signed
Amended: March 20, 2015
September 19, 2014

Tab 4

Summary Regarding
Proposed General Rule for a
Judicial Performance Evaluation Program

The attached proposed General Rule would establish a comprehensive and informative judicial performance evaluation program for Washington State. The proposal has been in development for the past two decades and represents the best thinking of many outstanding legal minds. This short chronology summarizes this lengthy process.

Why adopt a comprehensive program of judicial performance evaluations?

- The voters are crying out for better information.
- Judges can improve their performance through reliable feedback.
- Ratings on the specific dimensions of judging will educate voters on the qualities that should inform their votes.
- Evaluations by those who know the judge's work will promote judicial independence.
- Comprehensive ratings will help to insulate judges from well-funded single-issue attacks.

Who supports this?

- The Walsh Commission concluded that "[a] process for collecting and publishing information about judicial performance shall be created under the authority of the Supreme Court."
- A subcommittee of the American Judicature Society developed the proposal and successfully pilot-tested the evaluation methodology with both trial and appellate judges.
- The King County Bar Association scrapped its bar poll in favor of AJS-proposed evaluations. One result is elimination of bias in the resulting ratings.

Why should this be a statewide program?

- It's worked well everywhere that it has been tried, but very few local bar organizations have the resources of KCBA.
- Applying consistent criteria across the state will promote a better-qualified judiciary and public confidence in the courts as a whole.

Why do it by rule?

- It's vital that everyone participate and that everyone is treated the same way.
- Judicial challengers will be required to be evaluated as well, which will promote a level playing field in judicial elections.

Brief History of Proposed General Rule

1996: Initial Proposal by Walsh Commission

In March 1996, the Walsh Commission, appointed by Gov. Mike Lowry, Supreme Court Chief Justice Barbara Durham, and legislative officials, issued its final report, entitled, "*The People Shall Judge - Restoring Citizen Control to Judicial Selection.*"[1]

The Walsh Commission's report includes nine proposals that are "intended to give voters more information about judicial candidates increase judicial accountability, and insulate judicial candidates from political pressures."[2]

Proposal No. 5 of the Walsh Commission Report recommended that the Supreme Court create a judicial performance evaluation system:

> Voters testified [at state-wide hearings conducted by the Walsh Commission] that they wanted more information about the performance of judges. The Commission recommends creating an objective, uniform, comprehensive method for providing voter information about judicial performance.
>
> End-of-term reports will be used to provide information in the judicial voter pamphlet; judges may respond to the review prior to its release. Confidential mid-term reviews will provide the judges feedback for the purpose of self-improvement.[3]

1999-2006: American Judicature Society's Proposal

In 1999, following up on the Walsh Commission's recommendation, the Washington Chapter of the American Judicature Society[4] appointed a Judicial Evaluation Committee[5] to survey other states' judicial performance evaluation programs and draft a proposal for a similar program in Washington.

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[1] *See* http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/walshreport

[2] *See* http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/walshCommissionFinalReport

[3] *See* http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/walshCommissionFinalReport

[4] The AJS Washington Chapter Board at that time included Justice Mary Fairhurst, Justice Faith Ireland, Judge William Baker, Judge Ronald Cox, Judge John Schultheis, U.S. Magistrate Judge Mary Alice Theiler, Charles Wiggins, Mary Wechsler and Lish Whitson.

[5] Members of the AJS Judicial Evaluation Committee included several judges, including Judge Sharon Armstrong, Judge William Baker, Judge Roseanne Buckner, Administrative Law Judge Robert Kingsley, Judge Terry Lukens, Judge Jean Rietschel, Judge John Schultheis, Justice Charles Z. Smith, Judge Mariane Spearman; other members included Seattle University Law School Prof. John Strait, Washington State University Prof. Nicholas Lovrich, Washington State University Prof. David Brody, Henry Lippek, Greg Miller, Richard Morry, Kristin Olson, Karen Place, John Ruhl, Leonard W. Schroeter, Gary Straus, Rowland Thompson and Mary Wechsler.

On June 8, 2005, the AJS Washington Chapter Board submitted a white paper to the Washington Supreme Court recommending that the Supreme Court should adopt, by court rule, a formal state-wide judicial performance evaluation program, which would provide information that could improve individual judges' performance, and which also would provide voters or appointing authorities information on which to make decisions about judicial candidates. A copy of the white paper is attached.

During 2005 and 2006, the Judicial Selection Coalition ("JSC") a group of bar associations, citizen organizations, judges and citizens,[6] through its Judicial Evaluation Committee[7] continued to refine the AJS's draft proposal for a state-wide judicial performance evaluation program.

2006: WSTLA Survey Recommends Judicial Performance Evaluation Process

In March 2006, the Washington State Trial Lawyers Association conducted a state-wide "Judicial Elections/Selection Survey of its membership. The survey included the question: "Do you believe there is a need for a statewide, independent judicial evaluation process?" To that question 106 (68%) of the 166 respondents answered "yes."

2006-2008: WSBA Judicial Selection Task Force Proposal

The WSBA formed a Task Force, chaired by former WSBA Board of Governors member Doug Lawrence, to examine and recommend whether our system of judicial selection should be modified.

A subcommittee of the Task Force was appointed to draft a judicial performance evaluation program to provide the public with judicial performance evaluations both mid-term and prior to elections. The subcommittee took the 2006 AJS draft proposal and reframed it as a proposed new court rule.

On June 6, 2008, the Task Force presented to the WSBA Board of Governors its majority and minority reports. Among other things, the majority report recommended adoption of a formal judicial performance evaluation process that was very similar to the AJS's proposal.

2007: KCBA Adopts and Implements AJS Proposal

In the spring of 2007, the KCBA Board of Trustees adopted and implemented a judicial performance evaluation program for King County Superior Court judges and District Court judges, which is based upon and operates basically according to the AJS's judicial evaluation performance proposal.[8]

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[6] Members of the Judicial Selection Coalition included judges from the Washington Court of Appeals and the King County Superior Court; as well as representatives from KCBA, the WSBA, the Washington State Trial Lawyers Association, the Washington Defense Trial Lawyers, the AJS Washington Chapter, the League Women Voters of Washington; the Municipal League of King County, the University of Washington Law School, the Seattle University Law School, Gonzaga University Law School and Washington State University.

[7] The JSC's Judicial Evaluation Committee was chaired by Rob Mitchell (who had chaired the AJS Judicial Evaluation Committee), and participating members included W.S.U. Prof. David Brody, S.U. Law School Professor Janet Chung, Carl Forsberg, Snohomish County Bar Association President Geoffrey G. Gibbs, Judge Judith Hightower, former KCBA President Thomas E. Kelly, Jr., Pat Lessard, Henry Lippek, Gonzaga Law School Professor Rosanna Peterson, Rebecca Roe, Gonzaga Law School Professor Jennifer Sweigert and Mary Wechlser.

2014: AJS Presents Proposed Rule to Supreme Court

During 2008-2013, the AJS Washington Chapter Board's Judicial Evaluation Committee[9] reframed the judicial performance evaluation proposal into a proposed general court rule that could be presented to the Washington Supreme Court, as had been recommended originally by the Walsh Commission.

On February 5, 2014, AJS Washington Chapter's officers formally presented the proposed general court rule to the Supreme Court.

On October 20, 2014, following consideration by the Rules Committee, the Supreme Court *en banc* referred proposed general rule to the Board for Judicial Administration (BJA) for consideration.

Consisting of representatives from all levels of court, the BJA is in the best position to evaluate the proposal and recommend its adoption. The BJA is also in the best position to propose legislation to implement the rule.

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[8] *See* Ruhl, "Judicial Evaluation Program May Replace Bar Polls," *King County Bar Bulletin,* February 2007 (https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=02&Year=2007&AID=prespage.htm).

[9] The AJS Judicial Evaluation Committee members included: Judge Sharon Armstrong, Judge William Baker, Judge John Bridges, Administrative Law Judge Robert Kingsley, Judge Terry Lukens, Judge Catherine Shaffer, Judge Michael Trickey and Judge Mary Yu; other members included Washington State University Prof. David Brody, Dr. Ruth Walsh McIntyre, Brian Dano, Thomas Culbertson, Joni Kerr, Henry Lippek, Richard Morry, Kristin Olson, Karen Place and John Ruhl.

Final Draft of Proposed General Rule for Judicial Performance Evaluations

American Judicature Society
Washington State Chapter

Presented to Washington Supreme Court
February 5, 2014

FINAL D R A F T
As Approved by AJS Board on September 9, 2013

GENERAL RULE 35. JUDICIAL PERFORMANCE EVALUATIONS

(a) SCOPE AND PURPOSE

(1) Scope. This Rule governs the procedure for evaluating the performance of judicial officers and individuals seeking election or appointment to the bench.

(2) Purposes. This Rule is intended to:

(a) Facilitate self-improvement of judges and promote efforts to improve judicial performance;

(b) Provide reliable and relevant information to assist Washington voters in evaluating candidates for judicial office;

(c) Provide information to improve the design and content of continuing judicial education programs; and

(d) Protect the independence of judges in the performance of their duties.

(b) JUDICIAL PERFORMANCE PROGRAM COMMITTEE

(1) Creation and Membership. The Judicial Performance Evaluation Program will be overseen by a Judicial Performance Program Committee ("Committee") having eleven voting members. In addition, the Administrator of the Courts or his/her designee will serve as a non-voting member of the Committee. The Board of Judicial Administration will appoint two voting members of the Committee, one of whom must be a retired appellate judge and one of whom must be a retired trial level judge. Three voting members of the Committee will be appointed by the Board of Governors of the Washington State Bar Association, at least one of which must be from Eastern Washington. One of the appointees by the Board of Governors must be a law professor who has prior trial experience. Six voting members of the Committee will be appointed by the Governor. No more than three of the gubernatorial appointees may be from the same political party. If the Governor declines or fails to make appointments within 60 days after the effective date of this rule or after a vacancy occurs, the remaining members of the Committee may, by majority vote, fill the position(s). A majority of the Committee must be non-attorneys. The Committee should reflect the ethnic, economic, geographic and political diversity of this state and the members should have a demonstrated interest in civic affairs. The chair of the Committee will be chosen from its membership and will serve a one year term. The chair may be reelected to a subsequent term or terms.

(2) **Terms.** Members of the Commission will serve four year staggered terms. One of the initial appointees of the Board of Judicial Administration, one of the initial appointees of the Board of Governors and three of the initial appointees of the Governor will serve an initial two year term. No member of the Commission may

serve more than two consecutive terms. All terms shall start as of June 1 of the year of appointment.

(3) Powers and Duties of the Committee. The Committee will have the following powers and duties:

(a) To develop and refine surveys for lawyers, judges, jurors, and pro se litigants, as provided for in this Rule;

(b) To ensure that data collection and analysis processes are methodologically sound;

(c) To contract with a qualified person or entity to prepare the survey forms, to process responses, and to compile statistical reports of the survey results in a manner designed to ensure the confidentiality and accuracy of the process;

(d) To conduct a confidential evaluation midway through a judge's term of office for the purpose of improving the judge's performance;

(e) To give each judge complete statistics from surveys and copies of written comments written on survey questionnaires as part of his/her evaluation;

(f) To identify key areas where improvement is needed and work with the Committee on Judicial Education and Training to prioritize areas and offer required courses to meet educational needs; and

(g) To conduct an evaluation of each judge whose term is ending, as well as each candidate for judicial office, and to disseminate the results of those evaluations to the public.

(4) Staff. The Administrative Office of the Courts will staff the Committee, which will include monitoring and administering the appointment process and such other duties as may be determined jointly by the Committee and the Administrative Office of the Courts.

(5) Feedback. After the program begins, the Committee will survey judges and judicial candidates to gather feedback about the evaluation process and how it can be improved. In addition, the Committee will compare the results of its evaluations of non-judge candidates with the results of evaluations of those candidates, if elected, and modify the survey instruments, procedures, or both used for non-judge candidates as appropriate to improve their predictive value.

(6) Reporting. At least annually, the Committee will submit a report to the Board of Judicial Administration summarizing its work and the feedback it has received. The report will identify any problems or limitations that have been encountered, describe

the Committee's plans to address those problems or limitations, and suggest any changes in applicable rules that the Committee believes are necessary or appropriate.

(7) **Implementation; Phasing.** This Rule will be implemented as follows:

(a) Superior Court judges and candidates for positions on the Superior Court will be subject to the provisions of this Rule immediately upon its effective date.

(b) Justices of the Supreme Court and judges of the Court of Appeals and candidates for positions on the appellate courts will be subject to the provisions of this Rule two years after its effective date.

(c) Judges of the courts of limited jurisdiction and candidates for positions on the courts of limited jurisdiction will be subject to the provisions of this Rule four years after its effective date.

(c) CRITERIA FOR EVALUATION

Judges should possess and demonstrate integrity, impartiality, professionalism, judicial temperament, and legal ability, as well as communication and administrative skills. To measure these qualities, the Committee will evaluate judges based on the following specific criteria:

(1) Integrity and Impartiality. Evaluations will determine the extent to which each judge:

(a) Treats all persons fairly, equally, and without discrimination based on race, creed, color, national origin, income, gender, marital status, sexual orientation, age, or the presence of any sensory, mental, or physical disability;

(b) Conducts proceedings fairly, impartially, and with an open mind;
(c) Displays a neutral presence on the bench; and

(d) Makes decisions without considering the possibility of public criticism.

(2) Professionalism and Judicial Temperament. Evaluations will determine the extent to which each judge:

(a) Treats persons with whom the judge has professional contact (staff, attorneys, and, in the case of trial judges, parties, witnesses, and jurors) with courtesy and respect;

(b) Demonstrates emotional maturity and multicultural awareness;

(c) Acts with patience and self-control;

(d) Avoids impropriety and the appearance of impropriety; and

(e) Acts in a manner that instills public confidence in the judiciary.

(3) Knowledge and Understanding of the Law. Evaluations will determine the extent to which each judge:

(a) Understands and applies the relevant law and the rules of evidence and procedure;

(b) When exercising discretion appreciates the importance of flexibility and common sense in ensuring just results; and

(c) Exercises sound legal reasoning.

(4) Communication Skills. Evaluations will determine the extent to which each judge:

(a) Prepares well thought out, clearly presented rulings;

(b) Communicates effectively in a clear and logical manner while on the bench;

(c) Is appropriately sensitive to the impact of nonverbal communications; and

(d) In the case of trial judges, communicates with jurors regarding court procedures, their duties, and delays in the proceedings as they occur.

(5) Administration. Evaluations will determine the extent to which each judge:

(a) Appropriately enforces court rules, orders, and deadlines;

(b) Makes decisions in a prompt, timely manner;

(c) Is punctual and prepared for court and, in the case of trial judges, maintains control over the courtroom; and

(d) Manages his or her caseload efficiently and in a manner which meets the needs of each case.

(d) SOURCES OF INFORMATION

(1) Data Collection. Survey questionnaires approved by the Committee will be used to collect information from the following persons who have appeared before or had professional contact with the judge being evaluated:

(a) Attorneys. All attorneys who have appeared before the judge during the six to eighteen months preceding the evaluation;

(b) Judges. All judges who, during the twelve months preceding the evaluation, have reviewed the record in a case presided over by the judge being evaluated or have had a decision reviewed by the judge being evaluated (excluding, however, colleagues on the same bench);

(c) Jurors. In the case of trial judges, all jurors who have rendered a verdict in a case during the three to twelve months preceding the evaluation; and

(d) Pro se litigants. In the case of trial judges, all litigants who have appeared pro se in a matter before the judge during the three to twelve months preceding the evaluation.

(2) Local Conditions. Where a range of time is set forth in this Rule, the Committee should choose an evaluation period that will likely generate a statistically valid number of responses. This evaluation period will vary depending upon local conditions. Before choosing the period of exposure for soliciting evaluations of the judges of any court, the Committee should consult with local bench and bar associations.

(3) Nature of Questions. Surveys distributed to non-lawyers should focus on the judge's impartiality, professionalism, and other observable behaviors and traits. Respondents who are not lawyers should not be asked about the judge's knowledge and understanding of the law.

(4) Avoidance of Bias. Surveys should ask respondents whether there is any reason why they cannot give a fair and impartial evaluation of the judge. If a person answers this question with anything other than an unqualified "no," that person's answers to other survey questions about the judge will not be counted.

(e) EVALUATION PROCEDURE

(1) Attorneys.

(a) Court personnel will provide the Committee with a list of attorneys who have appeared before the judge during the relevant time period, or information from which such a list can be reasonably derived, on or before February 15th of the evaluation year.

(b) The Committee or its designee will deliver to each eligible attorney a separate survey and (for mailed surveys) a postage prepaid return envelope for each judge the attorney is eligible to evaluate no later than April 15th of the evaluation year.

(c) Attorneys will return surveys directly to a designated data evaluation center.

(d) Surveys will be confidential and anonymous except for coding used for tracking and validation.

(2) Judges.

(a) The Committee or its designee will ask judges to identify other judges whom they are eligible to evaluate.

(b) The Committee or its designee will deliver to each eligible judge a separate survey and (for mailed surveys) a postage prepaid return envelope for each judge that judge is eligible to evaluate no later than April 15th of the evaluation year.

(c) Judges will return surveys directly to a designated data evaluation center or other location.

(d) Surveys will be confidential and anonymous except for coding used for tracking and validation.

(3) Jurors.

Jurors rendering a verdict in a case will be given a survey questionnaire. As soon as possible after the jury has been discharged, the bailiff or clerk in charge of the jury will give each juror an evaluation questionnaire and a return envelope. Jurors may complete the survey in the jury deliberation room or at a later time.

(4) Pro Se Litigants.

(a) Pro se litigants appearing before the judge will be given an evaluation questionnaire and a return envelope.

(b) The litigants may complete the survey while they are in the courthouse or at a later time.

(f) SELF-IMPROVEMENT PROCESS

(1) A central component of the judicial performance evaluation program is to promote efforts to improve the performance of individual judges.

(2) To further judicial self-improvement, in addition to the average scores received in each evaluation category, the Committee will give each judge being evaluated the results for each question in the survey.

(3) The narrative comments contained in the survey forms, which will be anonymous, will be extracted and provided to the judge for the purpose of self-improvement.

(4) All documents, tables, data, and narrative comments provided to individual judges for purposes of self-improvement will be confidential.

(5) A voluntary judicial conferencing system is encouraged. This system, which could be managed by the local bar association, would include interviews with attorneys who have appeared before the judge, as well as the preparation of a confidential written report for the judge to provide feedback on the judge's performance, including strong points and areas of needed improvement.

(6) In even-numbered years, the Committee will collaborate with the committee planning the Spring Conference of each judicial association to prepare and present a plenary session, lasting at least one hour, that addresses areas for improvement in judicial performance. This session will focus upon any weaknesses identified in the judicial performance evaluations conducted during the preceding two-year period.

(g) EVALUATION OF NON-JUDGE CANDIDATES FOR JUDICIAL OFFICE

(1) Application of Rule. If a candidate for judicial office is not currently a judge, the Committee will conduct an evaluation of that candidate as promptly as possible and publicize the results in the same manner used to publicize the results of evaluations of sitting judges who are candidates for election or reelection. If a candidate was previously a judge, and an evaluation of the candidate's performance in that role is available, the Committee may publicize the results of the previous evaluation in lieu of following the approach described in the remainder of this Part (g).

(2) Criteria. Non-judge candidates will be evaluated on the criteria identified in Part (c) of this rule. To the extent that these criteria require evaluation of performance while presiding in the courtroom, the Committee will, if feasible, examine the candidate's performance in analogous settings (e.g., pro tem service, service as a mediator or arbitrator), or ask evaluators to draw inferences from the settings in which they have observed the candidate.

(3) Sources of Information. The Committee will collect information from the following persons who have had professional contact with the candidate: judges before whom the candidate has appeared during the past three calendar years (other than the judge against whom the candidate is running); attorneys who have appeared before the candidate or have been co-counsel or opposing counsel during the past three calendar years; and other professional references supplied by the candidate, but no more than the total number of judges and attorneys from whom information is collected under the preceding provisions of this Part (g)(3).

(4) Procedure. If time permits, survey questionnaires will be distributed to the persons identified above. As needed, the Committee will conduct telephonic or in-

person interviews to accelerate assembly of the information called for by the survey instruments. Names of persons to be surveyed or interviewed will be drawn from the disclosure statement prepared by the candidate for appointing authorities, updated by the candidate, as well as those persons identified pursuant to Part (g)(3). If the candidate has not already prepared such a statement, he or she will submit one to the Committee within one week after filing (or, if earlier, announcing) for judicial office.

(5) Alternative. If it is not feasible to use the sources of information and the procedure set forth above, the Committee may conduct a bar poll of respondents who certify that they have personal knowledge of the candidate and can fairly assess the qualities that they are evaluating.

(h) CONFIDENTIALITY

(1) Necessity of Confidentiality, Generally. Judicial performance evaluations must be conducted in strict confidence to ensure that the results are valid and based on reliable information. Disclosure of evaluation information other than in the manner permitted by this Rule would undermine the goals of the program and would reduce the free flow of information. For this reason, all records and information obtained and maintained by the Committee concerning the performance of individual judges are strictly confidential and may not be disclosed except as provided in this Rule. The Committee will take reasonable steps to safeguard the confidentiality of its records. Such records and information shall be neither admissible nor discoverable in any action of any kind in any court or before any tribunal, board, or agency.

(2) Mid-term Evaluations. Records and information assembled by the Committee during mid-term evaluations will constitute personal information in files maintained for elected officials.

(3) Public Disclosure of Evaluation Results. In election years, the Committee will release to the public the results of all evaluations of judges and judicial candidates. The Committee will determine the most appropriate format to present such information, but at a minimum will disclose to the public the average score received on each of the five criteria listed in Part (c) from each group of respondents listed in Part (d).

(4) Completed Questionnaires. To ensure confidentiality of respondents' answers, the Committee's agent will remove any information from the questionnaires that may identify the respondent, and retype any handwritten comments or notes, before submitting the results of the completed questionnaires to the Committee.

(5) Disclosure of Confidential Information. Upon a majority vote of the Committee, with the approval of the Supreme Court, the Committee may release confidential information concerning a judge in the following circumstances:

(a) An inquiry is initiated that becomes the subject of widespread concern, the

release of information would benefit the public, and the judge signs a waiver for this purpose; or

(b) A government agency or nominating committee requests information concerning the potential appointment of a judge or former judge to another position, and the judge signs a waiver for this purpose.

(6) Waiver by Selective Disclosure. A judge waives confidentiality of information by disclosing confidential information relating to the judge to persons other than members of the Committee, its staff, or the judge's staff, attorneys, or advisors.

(7) Identity of Respondents Not Subject to Exception or Waiver. Under no circumstance may the Committee or any member of its staff release information that may identify or lead to the identification of a person providing information or making comments regarding a judge.

(8) Written comments. Any written comments received by the Committee are not public and will be made available only to Committee members and the judge being evaluated, except that anonymous narrative comments contained in the survey forms, with the name of the judge redacted, may be provided to the Administrative Office of the Courts for use in development of judicial education programs. Comments are solicited in an effort to provide feedback to the judge and to assist the judge in a self-evaluation process. Committee members may not reveal the contents of any comment concerning a judge being evaluated to anyone other than other Committee members and the judge.

COMPANION RULE CHANGES (proposed new language underscored)

RPC 8.2(b): A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct and of General Rule 35, concerning Judicial Performance Evaluations.

CJC Canon 1, Comment: Add the following new paragraph at end of first paragraph: Consistent with their duty to participate in establishing, maintaining, and enforcing high standards of judicial conduct, judges shall participate fully in judicial performance evaluations conducted under the authority of GR 35.

White Paper on Judicial Performance Evaluations

American Judicature Society
Washington State Chapter

June 8, 2005

Judicial Performance Evaluations

American Judicature Society
Washington State Chapter
June 8, 2005

I. Introduction

Over the past six years, the Washington State Chapter of the American Judicature Society ("AJS") has been working to develop an effective program of performance evaluations for Washington state judges. The AJS has examined programs used elsewhere, developed and pilot-tested evaluation instruments for both trial and appellate judges, and wrestled with practical issues of implementation. This report summarizes these efforts and asks the Supreme Court to adopt a formal evaluation program by court rule.

II. The Challenge

Few things are more central to the dual task of doing justice and building public faith in the institutions of representative government than assuring that judges perform their duties with both integrity and skill. Washington has been very fortunate in the quality of its judges. But even good judges can improve their performance, and voters could benefit from having more and better information about judicial candidates.

At present, there are few tools broadly available that judges can use to evaluate and improve specific aspects of their own performance. Informal feedback mechanisms are notoriously unreliable. Voters, too, have a hard time distinguishing among judicial candidates, making them reluctant to participate in electing judges and potentially subjecting judges to single-issue attacks. Bar polls and ratings, even where available, offer only the perspective of practicing attorneys. Judicial independence, integrity, and excellence are too important for us to be satisfied with this state of affairs.

The time has come for reform. Thirty years have passed since Alaska established the first state-sponsored program to evaluate judicial performance. Twenty years ago the ABA published a set of proposed guidelines for such programs. A task force led by then-Justice Robert F. Utter undertook to develop a program for Washington, but it was never implemented. The Walsh Commission recommended in 1996 that "[a] process for collecting and publishing information about judicial performance shall be created under the authority of the Supreme Court." The Legislature has been considering bills that would require evaluations and recommendations for judicial appointments. In at least one other state, an evaluation system was adopted by voter initiative. The Supreme Court should act before others seize the initiative.

III. Measuring What Matters

The first task that the AJS undertook was to articulate performance standards for judges. AJS believes that a judge should possess high levels of integrity and impartiality, professionalism, and legal ability, as well as excellent communication and administrative skills. Under those headings, a trial judge should strive to do the following:

Integrity and Impartiality	• Treat all persons fairly, equally, and without discrimination based on race, gender, income, or any other bias • Conduct proceedings fairly, impartially, and with an open mind • Make decisions without consideration of public criticism
Professionalism	• Treat parties, witnesses, jurors, staff, and attorneys with courtesy and respect • Demonstrate emotional maturity and multicultural awareness • Act with patience and self-control • Act in a manner that instills public confidence in the judiciary
Legal Ability	• Understand and apply the relevant rules of law, evidence, and procedure • Appreciate the importance of flexibility and common sense in ensuring just results • Exercise sound legal reasoning
Administration	• Be punctual and prepared for court • Maintain control over the courtroom • Demonstrate a commitment to the improvement of the judicial system • Appropriately enforce court rules, orders, and deadlines • Make decisions and rulings in a prompt, timely manner
Communication	• Communicate in a clear and logical manner while on the bench • Prepare well thought out, clearly presented rulings • Communicate with jurors regarding court procedures, their duties, and delays in the proceedings as they occur

On the appellate level, these same qualities are manifest when a judge undertakes to do the following:

Integrity and Impartiality	• Treat all person fairly, equally, and without discrimination based on race, gender, income, or any other bias • Conduct proceedings and make decisions fairly, impartially, with an open mind and without consideration of public criticism
Professionalism	• Treat staff and attorneys with courtesy and respect • Demonstrate emotional maturity and multicultural awareness • Act with patience and self-control

	• Act in a manner that instills public confidence in the judiciary
Legal Ability	• Understand and apply the relevant law • Appreciate the importance of flexibility and common sense in ensuring just results • Exercise sound legal reasoning
Administration	• Demonstrate a commitment to the improvement of the judicial system • Appropriately enforce court rules, orders, and deadlines • Make decisions in a prompt, timely manner
Communication	• Prepare well thought out, clearly presented written rulings

Under the guidance of Professor David C. Brody, and utilizing the ABA guidelines, the AJS developed questionnaires to measure these qualities. Pilot tests were conducted among both trial and appellate judges. In the former case, questionnaires were distributed to attorneys, witnesses, and jurors who appeared in the trial judges' courtrooms. In the case of appellate judges, questionnaires went to attorneys appearing before the appellate court and to superior court judges in the same jurisdiction. The judges who were evaluated found the results very useful; the feedback they received would not otherwise have been available to them.

Professor Brody's article summarizing his findings was the cover story in the January-February 2004 issue of Judicature. A copy of this article is attached.

IV. Implementation

Pilot testing not only validated the AJS's questionnaire-based evaluation process; it also established that a well-designed evaluation program can be carried out at reasonable cost. Nevertheless, a reliable source of on-going funding is essential: grants and volunteer labor are not sufficient to carry out an on-going, state-wide program of judicial performance evaluations.

Discussions on this topic and other practical questions of implementation yielded the following tentative conclusions:

A. Administration

AJS believes that a panel of citizens should oversee the evaluation process, and that its members should be appointed by the Supreme Court. The panel should represent the diversity of the state's peoples. It should include both attorney and non-attorney members. AJS favors including retired judges, a substantial number of well-informed lay representatives, and members of good-government groups such as AJS and the League of Women Voters. To assure continuity, members should serve staggered terms. Each participant must be committed to hard work and to achieving results. The Administrative Office of the Courts should provide staff support and oversight.

B. Respondents

Attorneys should be asked to evaluate trial court judges before whom they have recently appeared. Because broad bar polling raises questions of familiarity and fairness, the names of attorneys to be surveyed should be collected from the clerks' records. AJS believes that jurors and appellate judges should also be contacted for evaluations of trial judges.

At the appellate level, evaluations should be solicited from attorneys who have recently appeared before the Court of Appeals and the Supreme Court. Trial judges should also be invited to evaluate appellate judges with whose work they are familiar. Court of Appeals judges should have the opportunity to evaluate Supreme Court justices, and vice versa. In each case, an evaluating judge should confirm that he or she meets the standard of familiarity required to make an informed evaluation. Asking judges on the same court to provide evaluations of one another could create collegiality issues, and therefore it seems advisable to limit judicial respondents to judges sitting on different courts.

AJS believes that, for a variety of reasons, it would not be worthwhile to solicit evaluations from witnesses, court staff, or academic commentators.

C. Confidentiality

Respondents must be assured that their views will not be traceable to assure candid evaluations. The methods used in AJS's pilot project to collect and assemble survey responses provide such assurance. For additional protection, responses should reflect ratings on specific criteria and not include narrative comments.

A similar process of evaluation, conducted mid-term, could be a very valuable tool for judicial self-improvement. But the confidentiality required for this kind of evaluation process is likely to require legislation, given the clear public policy in this state favoring release of public records absent specific exemption. AJS believes that the citizen panel created to oversee judicial evaluations should be charged with developing a proposal for mid-term evaluations, with any necessary legislative amendments. It will be essential to work with public access proponents to craft such a proposal.

D. Public education

A key goal of the judicial evaluation program envisioned by AJS is to provide information to the public for its consideration in judicial elections. AJS believes that evaluations for this purpose should be conducted in the first quarter of the election year, and the results should be published in the Judicial Voter Pamphlet as well as electronically. The results should list the number of responses and provide the judge's response, if offered. AJS does not favor having the evaluation panel recommend either for or against any judge. Rather, bar associations and editorial writers may interpret the results and offer recommendations if they wish.

E. Non-judicial candidates for judicial office

AJS believes that all candidates for election to the bench should be evaluated and the results of those evaluations publicly disseminated. To that end, the judicial evaluation panel should be empowered to evaluate not only judges but also candidates for judicial office who lack judicial experience. The same qualities are relevant for all candidates. In evaluating non-judge candidates, the panel should focus on the candidate's arbitration, mediation, and pro tem experience, seeking evaluations from attorneys who have appeared before or opposite the candidate and judges who have had the candidate in their courtroom.

Although candidates who are not currently part of the court system cannot be compelled to cooperate, and current filing deadlines create practical difficulties in conducting evaluations and publicizing the results, these challenges are not insurmountable. AJS believes that publicizing the evaluation process and disclosing any lack of cooperation will discourage stealth candidates. In addition, the evaluation panel can elicit and publicize information from sources not disclosed by the candidates. The end result will be an evaluation process that is fair to all participants and that promotes voter knowledge.

Respectfully submitted,

American Judicature Society, Washington State Chapter
Mary Wechsler, President; Charles Wiggins, President-Elect
Board Members: Judge William Baker, Judge Ronald Cox, Justice Mary Fairhurst, Justice Faith Ireland (Ret.), Robert Mitchell, Judge John Schultheis, Magistrate Judge Mary Alice Theiler, and Lish Whitson

AJS Judicial Evaluation Committee
Robert Mitchell, Chair
Members: Judge Sharon Armstrong, Judge William Baker, Professor David Brody, Judge Roseanne Buckner, Administrative Law Judge Robert Kingsley, Judge Terry Lukens (Ret.), Greg Miller, Richard Morry, Professor Nicholas Lovrich, Kristin Olson, Karen Place, Judge Jean Rietschel, John Ruhl, Judge John Schultheis, Justice Charles Z. Smith (Ret.), Judge Mariane Spearman, Gary Strauss, Professor John Strait, Rowland Thompson, and Mary Wechsler

Board of Judicial Administration
December 12, 2014
Proposal for Judicial Performance Evaluation Program

Judicial performance evaluation programs exist in 16 states and the District of Columbia: [1]

In 6 states, performance evaluation results are provided to voters for use in retention elections.

- Alaska
- Arizona
- Colorado
- Missouri
- New Mexico
- Utah

In 3 states and the District of Columbia, performance evaluation results are provided to those responsible for reappointing judges.

- Connecticut
- District of Columbia
- New Jersey
- Vermont

In 2 states, summary performance evaluation results (i.e., individual judges are not identified) are provided to the public to enhance confidence in the courts.

- Hawaii
- New Hampshire

In 5 states, performance evaluations are provided only to individual judges for the purpose of self-improvement.

- Florida
- Idaho
- Illinois
- Massachusetts
- Rhode Island

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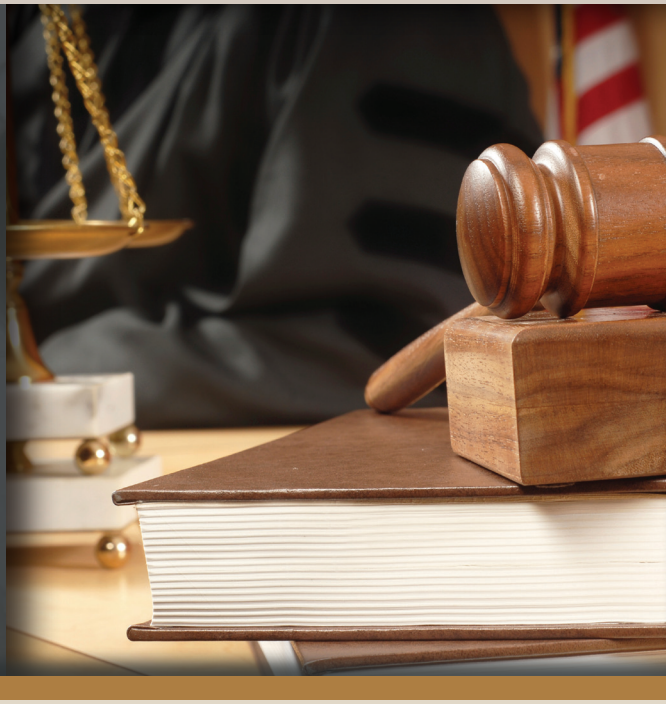
[1] Source: http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation (December 11, 2012)

National Conference on Evaluating Appellate Judges:

Preserving Integrity, Maintaining Accountability

POST-CONFERENCE REPORT



IAALS
Empowering Improvement. Advancing Excellence.
Institute for the Advancement of the American Legal System
University of Denver

Quality Judges Initiative

Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability
Post-Conference Report

I. Overview

The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver has worked in the area of judicial performance evaluation (JPE) from IAALS' inception in January 2006. In August 2008, IAALS convened its first conference on JPE—*Judicial Performance Evaluation: Strategies for Success*—which focused on the development, structure, and improvement of JPE programs across the nation. On August 11 and 12, 2011, IAALS convened its second national conference, this time focusing on appellate JPE, in response to the heightened profile of appellate judicial retention elections and the need for more tailored means of evaluating appellate judges and justices.

Over 70 state court judges, practitioners, academics, state JPE program coordinators from across the nation, and other leaders in the field attended the conference. The two-day discussion engaged panelists and participants on the roles and responsibilities of an appellate judge, appropriate measures and methods for evaluation, challenges and obstacles encountered in establishing and implementing JPE programs, strategies for improving existing performance evaluation programs, and the role of JPE in the growing contentiousness and politicization of appellate judicial retention elections. Conference participants engaged in an open and honest dialogue that was focused on the overarching importance of appellate JPE and the identification of concrete and meaningful improvements that can be made to the evaluation process.

In advance of the conference, IAALS administered a survey of appellate judges and justices in eight of the eleven states that have official appellate JPE processes.[1] The results of this survey helped to both shape the agenda for the conference and shed light on potential areas for improvement in the process. Drawing from these survey results, conference materials, and participant dialogue, this post-conference report discusses the various approaches currently in place for evaluating appellate judges and justices, and identifies themes, recommendations, and areas for future work in appellate JPE.

II. Judicial Performance Evaluation for Appellate Judges

Judicial performance evaluation (JPE) for appellate judges and justices appears in a variety of contexts. In states where appellate judges are retained by voters (e.g., Alaska, Arizona, and Colorado) or reappointed by decision makers (e.g., Hawaii and Vermont), JPE programs provide relevant information to those making retention or reappointment decisions. JPE is also used for purposes other than retention or reappointment. In New Hampshire and Massachusetts, where state court

[1] The survey is appended to the Post-Conference Report. Sixty-four appellate judges responded to the survey, from the following states: Alaska (6), Arizona (10), Colorado (10), Massachusetts (3), Missouri (10), New Mexico (6), Tennessee (4), and Utah (6), along with 9 judges who did not identify their state.

judges have life tenure (until age 70), JPE is used for the purposes of enhancing public confidence in the courts and self-improvement, respectively.

Bar associations in a number of states—for example, Florida, Iowa, and Wyoming— have established unofficial JPE programs in which judges are rated by attorneys and results are made public. In some states, independent organizations undertake evaluations that rate or evaluate judges in accordance with the organization's mission—be it political, religious, or some other perspective. These independent evaluation efforts can co-exist with official programs. For example, the Massachusetts Judicial Branch undertakes performance evaluations of judges while the Massachusetts Bar Association conducts an independent evaluation. In Iowa, the Iowa State Bar Association conducts a statewide judicial plebiscite prior to retention elections and makes results public, while an independent organization known as Iowa Judicial Watch issues evaluations in which "ideology makes up a substantial portion of the grade."[2] Similar organizations are active in Colorado and Florida. Clear the Bench Colorado identifies justices who "demonstrate a consistent pattern of deciding cases in contravention of the Colorado Constitution, established statutory law, legal precedent, & 'rule of law' principles," while Florida Judicial Review "provides common sense, citizen analysis of judges [sic] decisions and promotes an independent, originalist judiciary." [3]

There are also national websites that invite attorneys and other court users to rate both federal and state appellate judges.[4] RatetheCourts.com invites site visitors to anonymously evaluate any state or federal judge, according to survey criteria recommended in the American Bar Association's Guidelines for the Evaluation of Judicial Performance and used by the Colorado Commission on Judicial Performance.[5] Its sister site, CourthouseForum.com, encourages the public "to freely and candidly post and discuss information and opinions about the nation's courts, judiciary and cases."[6] RobeProbe.com allows both lawyers and litigants to rate the performance of judges and bankruptcy trustees and identifies the "best" and "worst" judges based on those ratings.[7]

These examples illustrate that a variety of approaches are taken to evaluating appellate judicial performance. However, certain characteristics are common to many programs, particularly those that are state-sponsored. Surveys are usually distributed to attorneys who have appeared before the judge, as well as to court staff, clerks, and/or other judges, both at the trial or appellate level. Judges may fill out self-evaluation questionnaires and/or be interviewed by the evaluating body. In some states, a predetermined number of appellate opinions authored by the judge are reviewed, and evaluators may take into account reversals on appeal and caseload statistics.

Official JPE programs employ similar criteria in the evaluation as well. Although survey questions and evaluation guidelines differ by state, the following criteria are commonly used: legal ability, integrity and impartiality, communication skills, temperament and demeanor, and administrative performance and skills.

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[2] IOWA JUDICIAL WATCH, http://www.iowajudicialwatch.org (last visited Nov. 7, 2011).
[3] CLEAR THE BENCH COLO., http://www.clearthebenchcolorado.org (last visited Nov. 7, 2011); FLA. JUDICIAL REVIEW, http://www.floridajudicialreview.com (last visited Nov. 7, 2011).
[4] One national site, The Robing Room, is limited to attorney evaluations of federal district court judges and magistrate judges. THE ROBING ROOM, http://www.therobingroom.com (last visited Nov. 7, 2011).
[5] RATE THE COURTS, http://www.ratethecourts.com (last visited Nov. 7, 2011).
[6] COURTHOUSE FORUM, http://www.courthouseforum.com (last visited Nov. 7, 2011).
[7] ROBEPROBE.COM, http://www.robeprobe.com (last visited Nov. 7, 2011).

The extent to which evaluation results are distributed and with what level of detail depends largely on the purpose and goals of the program. In states where JPE programs are designed to provide information to voters or other decision makers, the evaluation results are generally made available in substantial detail, although they may be initially presented in summary form with full survey results and additional information available for those interested. In New Hampshire, only summary JPE results for the evaluated court are provided to the public, and in Massachusetts, where JPE is solely for self-improvement purposes, evaluation results are provided only to the evaluated judge.

III. Broad Conference Themes

A. Importance of Judicial Performance Evaluation

Conference panelists and participants affirmed the importance of JPE. As a vital component for ensuring public trust and confidence in the judiciary, JPE programs demonstrate a willingness on behalf of individual judicial officers and the judiciary as a whole to be accountable for their performance. The value of the JPE process, according to John Broderick, Jr., Dean of the University of New Hampshire School of Law, "is to make sure that the public [that judges] serve … has confidence in the service they are giving." Clear the Bench Colorado Director Matt Arnold echoed this sentiment: "Providing substantive information is not only important for the judges…It is absolutely critical to cementing respect for the process and respect for the rule of law."

JPE may have an additional role in states interested in moving from contested elections to a commission-based appointment and retention election system. Sarah Walker, President of the Minnesota Coalition for Impartial Justice, described public performance evaluation as the "most critical tool in passing a comprehensive reform package." Without this component, according to Walker, the progress made to date by the Coalition—which is working toward performance evaluation with merit selection and retention elections for all Minnesota judges—would not have been possible.

Well-designed and well-implemented evaluation programs bring transparency to the judiciary by measuring those aspects of the appellate process that are observable. After all, public trust and confidence should ultimately turn on the appearance of *how* the result was achieved, not *what* particular result was achieved. At the conference, Professor Jordan Singer of New England Law|Boston presented his research on the mind of the judicial voter, which suggests that voters are motivated primarily by procedural fairness considerations, rather than by policy preferences or case outcomes. Kansas Court of Appeals Judge Steve Leben echoed Professor Singer's comments, telling conference participants that procedural fairness drives both litigants and citizens generally in how they think about their court system. Conference participants also agreed that performance evaluation does not pose a threat to judges' decisional independence simply because it holds judges accountable for their work. According to the IAALS pre-conference survey, appellate judges agree, with 73 percent of respondents indicating that the evaluation process has no impact on their independence as a judge/justice. In fact, 16 percent reported that the process "enhances independence."

Judicial performance evaluation also serves a critical educational component, by providing voters and decision makers with an essential tool for assessing judges. Of the appellate judges surveyed by IAALS, 71 percent viewed evaluation results (and recommendations, if made) as having "some influence" on voters' decisions in retention elections and 17 percent describing them as having "a lot of influence." Conference panelists agreed that in states where judges stand for

retention, it is vital that voters receive objective information about a judge's performance. Just as the judiciary has an obligation to the public to strive for the highest levels of quality, the public—when given the opportunity through retention elections—in turn has an obligation to promote quality by casting an educated vote. Judicial performance evaluation, according to Colorado Court of Appeals Judge Russell Carparelli, raises for the public the "expectation that they are part of the process and that they should be informed and they should seek to be informed."

But JPE accomplishes more than simply educating voters, other decision makers, and/or the general public on the performance of individual judges and justices. It can also provide broader education on the proper role of judges and the role of the courts. This component is of growing importance, as appellate judges and justices are increasingly coming under fire for decisions in particular cases. In this respect, JPE can focus the public on the right indices of quality judicial performance, as opposed to inappropriate or non-objective standards—i.e., individual case outcomes or political ideology. According to Rebecca Love Kourlis, IAALS Executive Director, JPE "suggests to voters that they should be making decisions about judges on the basis of how well they do their job, not on the basis of one hot-button opinion."[8]

Furthermore, these programs benefit the judges and justices subject to evaluation by identifying areas in which their performance is deficient. Because of ethical and professional rules that limit communication and other interaction with individuals who appear in their courtrooms, judges are often unable to get candid feedback on their performance. At the conference, Judge Leben highlighted a disconnect between how judges view their performance and how the public views judges' performance:[9] "We are out of touch with how we are doing in anybody else's eyes and … the longer we are on the bench, the more we tend to grow out of touch with what regular people are thinking." When asked about the extent to which the evaluation process had been beneficial or detrimental to their professional development, 53 percent of appellate judge respondents to the IAALS survey believed it was "somewhat beneficial" and 10 percent found JPE "significantly beneficial," while only three percent described the evaluation process as "somewhat detrimental." Although one out of three respondents felt that it had no effect on their professional development, JPE programs have the potential to promote subconscious improvement in judges' performance, based on the simple awareness that they are being evaluated. An analysis of the IAALS survey comments shows that the primary benefit respondents see in JPE is self-improvement, provided that the evaluations give constructive feedback on potential areas of improvement. The comments also suggest that more frequent evaluations—i.e., not just during election years—would be especially helpful for self-improvement purposes.

B. Need to Tailor Performance Evaluations for Appellate Judges/Courts

Conference participants recognized that the role and responsibilities of trial and appellate judges differ in marked ways and that such differences have important implications for JPE processes.

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[8] *How Should Appellate Court Judges Be Evaluated?*, KUVO THE TAKE AWAY (Aug. 10, 2011), http://soundcloud.com/nheffel/kuvos-nathan-heffel-and.

[9] Citing a 2001 Justice at Stake survey of state court judges nationwide and a national population sample which found that 40 percent of the general public described courts in their state as "poor" or "fair" while none of the judges surveyed described courts as "poor" and only four percent described them as "fair."

The essential function of both trial and appellate court judges, said Judge Russell Carparelli, is to ensure fair and impartial application of the rule of law. Where the public misperception begins, however, is with the distinction between the trial court's role of fact finding and the appellate court's function of reviewing the trial court findings and application of law to those facts. The difference in purpose and manner in which trial and appellate court judges carry out these roles also creates difficulties in the evaluation process, as judges encounter different responsibilities and expectations. For instance, the trial judge initially knows very little about a case when it comes before her, as opposed to the appellate judge who has access to the full trial record and appellate briefs. There is, therefore, a different expectation of how prepared a trial judge can and must be, as opposed to the preparation expected of an appellate judge. There is also a significant difference in a trial judge's versus an appellate judge's exposure to the parties and counsel. Over the course of the pretrial and trial process, the trial judge may have substantial interactions with parties and counsel. At the appellate level, this interaction is generally confined to an oral argument that is strictly limited in length and in which only counsel participate. This difference in exposure potentially handicaps those responsible for evaluating the demeanor and preparation of appellate judges.

Fundamentally, the work product of the trial judge and the appellate judge is different. The trial judge oversees trial proceedings, including ruling on motions, conducting hearings, settling evidentiary issues, and in the case of a bench trial, rendering a judgment. The trial judge may also have conducted case conferences, issued pretrial orders, and resolved interparty disputes, depending on the point at which the judge became involved with the case. These pretrial and trial activities comprise the trial judge's work product. The appellate judge, on the other hand, reviews the trial record and party briefs, might participate in an oral argument, and then produces a written opinion—which may or may not be published. The primary work product generated by an appellate judge or justice, therefore, is the written opinion. Although a few programs review opinions as part of a broader evaluation process, there is no general agreement as to how this review should be conducted, as will be covered in detail below. As the principle work product of appellate judges, and the primary—if not only—way in which appellate judges communicate the legitimacy of their decisions, conference participants were unanimous in expressing a need for some sort of opinion review, based upon appropriate criteria, as part of the JPE process.

There is another important institutional difference between trial and appellate judges that further complicates any review of appellate opinions. Unlike trial court judges who operate individually, appellate judges work in panels. While the written opinion issued by the court may list a primary author, the opinion itself is often a collective effort. Whereas the trial court judge acts unilaterally, thus making it appropriate to evaluate his individual performance, the line becomes more blurred with respect to the appellate judge, whose performance has both a collaborative and individual component. In this interactive working environment, court culture can play an important role in an appellate judge's performance, and understanding that culture can be a factor in the evaluation. To wit, one respondent to the IAALS survey of appellate judges commented that the evaluating body should solicit more "input from the judges as to how their opinions are formulated and the environment they are in."

IV. Recommendations for Improving Appellate Performance Evaluation

In the IAALS survey of appellate judges and justices, a total of 62 percent of respondents described themselves as "very satisfied" (29 percent) or "somewhat satisfied" (33 percent) with the process for evaluating their performance. However, 24 percent said that they were neither satisfied nor dissatisfied, and a total of 14 percent reported being "somewhat" or "very" dissatisfied—thus

indicating that there is room for improvement in appellate judicial performance evaluation programs. With regard to specific aspects of the performance evaluation process that could be improved upon, the second most frequently given answer (by 44 percent of respondents) was "additional bases for evaluation—for example, opinion review, workload statistics, self-evaluation, etc." IAALS drilled down on this topic both in the survey and in conference panel discussions.

A. Additional Bases for Evaluation

Courtroom Observation

More than three-fourths (76 percent) of respondents to the IAALS survey agreed that courtroom observation should be part of the evaluation process for appellate judges. As one respondent noted, "[i]t is not only that litigants are entitled to a fair and impartial hearing, they are also entitled to the appearance of a fair and impartial hearing. The demeanor and conduct of the judges during oral arguments is the most direct evidence of the latter." Another respondent replied that "[b]eing part of a multi-judge appellate bench is so much different than sitting on the bench as a solo trial judge, and I think we are much less sensitive to how we are being perceived and experienced individually when part of an appellate bench." In this sense, ongoing observation from someone without a stake in the outcome of the case could provide valuable feedback to appellate judges. On the other hand, survey respondents expressed concern that courtroom observers would mistake a lack of questions from a justice or judge during oral arguments as a lack of preparation, which has the potential to lead judges to ask questions purely for the sake of showcasing their knowledge of the case.

During the conference, Utah Judicial Performance Evaluation Commission member and retired district court judge Anthony Schofield discussed Utah's developing program for courtroom observation. Although Utah has not yet addressed appellate courtroom observation, Judge Schofield told conference participants that it was clear to him that citizens want procedural fairness, and a courtroom observation program is well suited to spotting, understanding, evaluating, and reporting on this issue.

Appellate Opinion Review

As previously mentioned, conference participants agreed that review of written opinions is an essential component of the evaluation process. Similarly, nearly nine out of ten respondents (89 percent) to the IAALS survey believed that opinion review should be part of the evaluation process. As one respondent explained, "Written opinions provide the explanation for a particular outcome and the rationale for that outcome. If a judge cannot explain the reasons for the decision, public support for the judiciary and for its impartiality tends to erode." This point, which resonated throughout the conference, has become even more relevant in light of the rising number of self-represented parties.[10] Dean Broderick told conference participants, "[i]f there was ever a need to be more explanatory, more transparent—it's now." Judge Leben agreed that appellate opinions have to be understandable by lay readers, noting that the judiciary is a branch of government and citizens should be able to know what the courts are doing and to evaluate whether they are fair.

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[10] For a discussion of the substantial increase in self-represented litigants in appellate courts, see Thomas H. Boyd, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. APP. PRAC. & PROCESS 295 (2004).

The precise metrics for evaluating opinions and the process through which such an evaluation should occur was the topic of much debate during the course of the conference. Conference participants generally agreed upon certain criteria—e.g., whether an opinion uses simple and declarative language, is easily understood, and sets forth the reasoning and rationale for the particular outcome. Some participants proposed additional criteria, such as the approach offered by Professor Muti Gulati of Duke University School of Law. Professor Gulati and the co-authors of his article, *"Not that Smart": Sonia Sotomayor and the Construction of Merit*,[11] use citation rates to appellate opinions by other courts and in law journals (along with other measures, such as authorship and publication rates) as a measure of relative performance. A possible downside to this measure, particularly among state court judges, is the fact that it depends to some extent on whether the case is on the cutting edge of the law, or simply requires the application of existing principles—which would make it less likely to achieve prominence.

Another point of discussion related to who is best suited to review opinions—e.g., non-attorneys, attorneys, law professors, and/or other judges. Considering each in turn, many participants favored review by non-attorneys, as these individuals—having no legal background or familiarity with legal terms—could provide an honest analysis of the clarity of the opinion. However, a number of the comments in the IAALS survey of appellate judges expressed concern that non-attorney evaluators would lack the requisite legal knowledge and skills to review an opinion. Attorney reviewers are better suited to assess the adequacy of the reasoning given in the opinion for the outcome; however, conference participants and judges surveyed by IAALS expressed concern with having their opinions reviewed by individuals who may have a stake in the outcome (attorneys and non-attorneys alike). One respondent to the IAALS survey suggested that it would be more helpful to have a broad-based group of attorneys review opinions, rather than only those who have appeared before the court. Conference participants agreed that law professors would be able to assess the sufficiency of the analysis and clarity, even if they were not familiar with the substantive area of law addressed in the opinion. In fact, unfamiliarity with the area of law might be preferable in order to lessen the danger that a law professor would review an opinion based on its substantive outcome. Identifying and defining the line between reviewing an opinion for clarity, structure, and adequate explanation versus reviewing an opinion on the merits—the latter of which is solely the province of a higher court—was a shared concern, regardless of who the reviewers were.

The IAALS survey of appellate judges and justices suggested another category of individuals who might be well-suited to reviewing appellate opinions—other judges, both peer and trial court judges. One IAALS survey respondent suggested that "the work of the intermediate appellate judges should be reviewed by the state supreme court, which of necessity reads all opinions and deals with the quality of the court's analysis when considering petitions for review." Rafael Gomez, counsel for RobeProbe.com, suggested using retired judges. Some states already tap other judges for evaluation of their peers.

No clear direction emerged from the conference as to the approaches that should be taken in evaluating appellate opinions. Accordingly, IAALS established a task force to study this issue in detail and formulate recommendations for states interested in changing an existing, or incorporating a new, system for appellate opinion review as part of the judicial performance evaluation process.

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[11] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907724.

Appropriate Judicial Role

Villanova University School of Law Professor Penelope Pether spoke to conference participants about areas in which appellate judges and justices are not held appropriately accountable, and should be.[12] For example, inadequate screening in some courts—particularly intermediate appellate courts that grant appeal as a matter of right—may result in a certain subset of cases (e.g., cases in which the government is a defendant) being decided by court staff with little or no judicial supervision. A related practice that, in Professor Pether's view, should be examined in evaluating appellate courts and judges is whether judges sign opinions without being familiar with the record. Pether also expressed concern about the failure of some appellate courts to adhere to jurisdictional rules for non-publication of opinions and non-precedential status. She suggested that these are largely structural issues and that courts can, and should, take on their own auditing and evaluation processes for ensuring accountability and greater transparency in these areas.

NCSC Appellate CourTools

Dan Hall, Vice President of Court Consulting Services at the National Center for State Courts (NCSC), spoke to conference participants about court performance, which is one component of accountability that is particularly applicable to the appellate court context where it is more difficult to assign individual responsibility for caseflow outcomes. The NCSC *Appellate CourTools* are performance indicators for measuring how appellate courts handle cases, treat those that come before them, and interact with court employees.[13] Hall suggested that these indicators could be applied to measure performance for individual appellate judges and justices: 1) time from case filing to disposition, 2) clearance rates of cases, 3) age of active pending caseload, 4) employee satisfaction, 5) constituent satisfaction, and 6) reliability and integrity of case files. Although surveys of 'constituents' and employees are already undertaken in most official JPE programs, fewer programs consider clearance rates or age of pending caseload.

B. Evaluation Surveys

Survey Respondents

Forty-one percent of respondents to the IAALS survey of appellate judges indicated that survey respondent groups were an aspect of the performance evaluation process that could be improved upon and should be revisited. The issue of surveying attorneys who appear before appellate judges—the most commonly surveyed respondent group in the appellate evaluation process—came up in several contexts during the conference. Participants questioned whether this respondent group was in a position to evaluate the performance of a judge objectively, given their stake in the outcome. One survey respondent noted that "[r]espondents, by definition, are usually those with strong feelings either for or against." Echoing this concern, another IAALS survey respondent opined that "because survey respondents self-select, the data collected … is often skewed in favor of the disgruntled people who are more likely to respond than others." This observation may be as applicable to JPE for trial court judges as it is to appellate JPE.

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[12] For an example of Professor Pether's scholarship on this topic, see *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law,* 39 ARIZONA STATE LAW JOURNAL 1 (2007).

[13] Available at http://www.ncsconline.org/D_Research/CourTools/index.html#.

Conference participants expressed conflicting opinions about whether attorneys appearing before appellate judges on a regular basis are a positive or negative component of performance evaluation. On the one hand, repeat players have increased exposure to appellate judges, which provides more opportunity to observe levels of preparation and demeanor. On the other hand, this increased exposure has the potential to strengthen any existing biases for or against a particular appellate judge. According to one IAALS survey respondent:

> Many attorneys surveyed have appeared multiple times before a judge who is being evaluated. Their comments (either in favor of retention or against it) tend to skew the responses. Perhaps ensuring that only one response from each attorney is taken into account would help this concern.

Another IAALS survey respondent suggested that the attorney respondent pool be expanded to include all attorneys who rely on appellate opinions, rather than only those who appear before the judge.

The surveying of other judges on appellate judge performance was also raised by IAALS survey respondents. A number of respondents indicated that this group might be able to provide a valuable perspective, particularly with respect to appellate opinions. As noted, this theme arose in other parts of the conference discussion as well.

Survey Response Rates

The statistical validity of evaluation surveys was a significant concern shared by evaluated judges and JPE program coordinators alike. Just over half (52 percent) of IAALS survey respondents indicated that survey response rates were an aspect of the process that could be improved upon. Appellate judges are concerned with both low response rates to evaluation surveys and self-selection of respondents, as both issues may skew the results. Several IAALS survey respondents suggested providing evaluation survey respondents with some type of an incentive to fill out the survey, to increase the sample size and reduce the effect of potential respondent bias.

In response to this concern, Nancy Norelli, Vice President of the North Carolina Bar Association Judicial Performance Evaluation Committee, explained to conference participants that her program sought to maximize response rates by mobilizing the bar to spread the word about forthcoming JPE surveys. State Bar Counselors serving as "JPE ambassadors" emailed colleagues and local bar associations, describing the program and urging all attorneys to complete the surveys. Specialty and local bars also urged their members to complete surveys by making announcements at bar and section meetings. According to Norelli, it was critical that local attorneys, rather than JPE Committee members, conveyed this message. (It is important to note that all members of the bar are surveyed in North Carolina, whereas JPE programs in other states identify a pool of potential survey respondents based on recent interaction with the evaluated judge. IAALS is examining this issue and potential modifications.)

C. Dissemination of Evaluation Results

Almost one-third (32 percent) of IAALS survey respondents felt there was room for improvement with respect to the dissemination of evaluation information to the public. Two themes emerged from the IAALS survey on this point—one relating to the format and content of the

narratives prepared by the evaluating body, and the other relating to the manner and extent to which these narratives are disseminated to the public. Some of the criticisms—sometimes conflicting—offered by survey respondents on these issues included the following:

- [T]he narrative reports seem to be somewhat formulaic (short bio, say something good, say something bad), and reading the reports in the blue book only emphasizes how formulaic they are. I think this tends to undermine their credibility.

- The narrative is so general that it fails to provide the voter with anything meaningful.

- As to report format, while the evaluation panel was plainly concerned to be even-handed in providing evaluations, the danger is that their reports became too similar across judges, and therefore appeared "boilerplate," unpersuasive, and superficial.

- All [the narrative report] does basically is parrot the unreliable data returned by the attorneys, and throw in some subjective comments on quality of opinions which may or may not be accurate.

- [T]he narrative report places too much emphasis on raw data and scores or grades, and these … are continually misused.

These issues were discussed in some detail during the conference. The importance of evaluation results (and recommendations, where made) is not lost on appellate judges. Over two-thirds (71 percent) of those surveyed by IAALS prior to the conference described the evaluation results as having "some influence" on voters' decisions in retention elections while 17 percent believed they have "a lot of influence." Based on his analysis of social science data, Professor Singer argued that what citizens (voters) want when they go to the polls is simple, straightforward information about judges, much like the information provided in JPE narratives in many states. This suggests that too much detail in these narratives might put off voters. On the other hand, it is clear that short, formulaic narratives are also not particularly useful.

With respect to disseminating JPE results widely, Jane Howell, Executive Director of the Colorado Office of Judicial Performance Evaluation, shared Colorado's "Know Your Judge" website with conference participants. The site was designed in 2010 as an easy-to-use online tool through which voters could quickly locate the judges on their ballot and the JPE results for those judges. A public service announcement (PSA) accompanied the website and, according to Howell, "gave voters, for the first time—who might not read their Bluebook but watch TV or listen to the radio—information about judges and where to go." Between August and October of 2010, the PSA ran 14,000 times on 35 television stations and 270 radio stations.

Availability of objective and informative judicial performance evaluation results is becoming more and more important, as retention battles are heating up around the country and tending to focus on one or a few opinions that address hot-button issues. The 2010 election cycle in both Iowa and Alaska, among other states, saw organized opposition campaigns against the retention of one or more supreme court justices based on the outcome of particular cases. Chief Justice Mark Cady, three of whose colleagues on the Iowa Supreme Court were voted out in 2010 based on a single, unanimous decision, delivered the keynote address at the conference, in which he warned that "no state should think they are immune to what occurred in Iowa." Alaska Supreme Court Justice Dana

Fabe, who was successful in countering a retention challenge during the 2010 election cycle, told conference participants that she relied on her JPE results in defending her performance on the bench, leaving the opposition campaign to contend with the pro-retention recommendation issued by the Alaska Judicial Council. Thus, it is clear that accurate, thoughtful performance evaluation of appellate judges can, in fact, be a buffer against ideological attacks.

V. Conclusion

Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability was a unique gathering of individuals dedicated to improving processes for evaluating the performance of appellate courts and judges. There were two clear areas of consensus, which guide IAALS in its future work. First, conference participants (and IAALS survey respondents) firmly believe that performance evaluation of appellate judges can be a key component in achieving appropriate accountability while protecting impartiality. Second, the evaluation process for appellate judges needs improvement, particularly with respect to opinion review.

Thanks to the unique perspectives of judges, academics, interested citizens, and JPE program coordinators, IAALS has identified areas of opportunity in the appellate JPE process and is working toward concrete recommendations for improving the processes used by states across the nation. Two projects stemming from the August 2011 conference are underway:

1) Recommendations for Appellate Opinion Review

   In the wake of the conference, IAALS formed a task force to consider recommended practices for evaluating appellate opinions. The task force consists of two appellate judges, two representatives from state JPE commissions, and a law professor. The principal charge to the task force is to develop a model for opinion evaluation, in terms of how the evaluated opinions should be selected, who should evaluate the opinions, and what the evaluation criteria should be. The task force will also address ways in which opinion quality should be factored into other aspects of the evaluation process, including survey items, survey respondents, and the self-evaluation. Finally, the task force will consider how institutional differences between courts of last resort and intermediate appellate courts should be taken into account in evaluating the work of appellate judges.

2) Pilot Appellate JPE Projects

   IAALS is working with two other national organizations to introduce pilot appellate JPE programs in a few states. Our intention is to work with bar associations and/or court administrative offices, and with the support of appellate court judges, in these states to implement our recommended practices for evaluating appellate judicial performance and providing information to retention election voters.

IAALS hopes to build on the relationships formed and the collaborations initiated at the conference in carrying out this work.

APPENDIX
Survey of Appellate Judges on Judicial Performance Evaluation

1. **Overall, how satisfied are you with the process for evaluating your performance?**
   - Very satisfied
   - Somewhat satisfied
   - Neither satisfied or dissatisfied
   - Somewhat dissatisfied
   - Very dissatisfied

2. **In your opinion, which of the following aspects of the performance evaluation process could be improved upon? (will be asked to explain)**
   - Evaluation criteria (e.g., legal knowledge, integrity, communication skills, etc.)
   - Survey respondent groups
   - Survey response rates
   - Survey instruments/questionnaires
   - Additional bases for evaluation (e.g., opinion review, workload statistics, self-evaluation, etc.)
   - Format of narrative report
   - Dissemination of evaluation information to the public

3. **Is courtroom observation part of the evaluation process for appellate judges in your state?**
   - Yes
   - No

4. **In your view, should courtroom observation be part of the evaluation process for appellate judges?**
   - Yes
   - No (will be asked to explain)

5. **Is opinion review part of the evaluation process for appellate judges in your state?**
   - Yes
   - No

6. **In your view, should opinion review be part of the evaluation process for appellate judges?**
   - Yes
   - No (will be asked to explain)

7. **To what extent has the evaluation process been beneficial or detrimental to your professional development?**
   - Significantly beneficial (will be asked to explain)
   - Somewhat beneficial (will be asked to explain)
   - No effect
   - Somewhat detrimental (will be asked to explain)
   - Significantly detrimental (will be asked to explain)

8. **What impact, if any, does the evaluation process have on your independence as a judge/justice?**
   - Enhances my independence as a judge/justice
   - Has no impact on my independence as a judge/justice
   - Undermines my independence as a judge/justice

9. **Are appellate judges in your state subject to retention elections?**
   - Yes
   - No

If yes, survey continues. If no, survey ends here.

Retention election states only:

10. **How much impact do you believe the evaluation results (and recommendations, if made) have on voters' decisions in retention elections?**
    - A lot of influence
    - Some influence
    - No influence

11. **Does the evaluation report provide information that has enabled you, or would enable you if necessary, to defend yourself against attacks by special interests?**
    - Yes
    - No (will be asked to explain)

12. **Could the evaluation report be modified to better enable you to defend yourself, if necessary, against attacks by special interests?**
    - Yes (will be asked to explain)
    - No

13. **May we share your responses with your state JPE commission?**
    - Yes *(will be asked what state)*
    - No

November 7, 2014

TO: Board for Judicial Administration Members

FROM: Shannon Hinchcliffe, BJA Administrative Manager

RE: TIMELINE FOR BJA'S INPUT ON PROPOSED SUGGESTED GR 35 – JUDICIAL PERFORMANCE EVALUATION

I. Procedural History

Suggested General Rule 35 was submitted by Judge Michael J. Trickey as President of the Washington State Chapter of the American Judicature Society (AJS) in January 3, 2014. Judge Trickey was invited to discuss the item at the February 2014 administrative *en banc* meeting. The Supreme Court Rules Committee met in October 2014 to consider the rule. At that meeting, the committee voted to request the BJA to consider the new suggested rule and provide feedback to the committee about the proposal.

II. Suggested Timeline Considerations

The following suggested timeline has been created to 1) allow time for vetting the proposal through separate court levels while targeting an outcome in time for the 2015 Supreme Court Rules cycle, 2) allow for the most robust discussion and compilation of input for the policy issues related to judicial performance evaluations.

The timeline takes several variables into consideration and attempts to outline a procedural roadmap which can assist in accomplishing the above objectives. Association boards generally meet monthly and follow a one month discussion, next month action format. They also generally refer rules and substantive matters to either their corresponding rules committee or an *ad hoc* workgroup for further review. After review, there is likely a report back to the board as a discussion item and then it can be moved to action the next meeting.

Other considerations include the timeline which is respective to the Supreme Court Rules Committee cycle which starts again in October. This timeline also attempts to accommodate an end result before the board membership turns over on July 1, 2015.

Organization	Suggested Schedule	Possible Action
BJA	**December 12 – Discussion item or reports and information item and presentation by rule proponents** • Define area of focus for "feedback/input" and anticipate form of the feedback (e.g. recommendations on the policy aspects vs. red-lined version of the suggested rule). The form of feedback will likely impact the timeline. • Define BJA outreach vs. court level outreach to judicial officers for input.	• *Request members to review the proposal with general memberships and/or association governing bodies.* • *Implement outreach steps based on decisions made in meeting.* • *Request AOC to do an impact analysis on the rule* • *Set tentative return date to BJA for May discussion, possibly June discussion and then August action.* • **Latest possible action date is September 2015 to make Supreme Court Rules schedule for feedback for the 2015-2016 rules cycle.*
	May 15 – Discussion item • Facilitate a discussion about all comments and recommendations from associations and judicial members, any branch partners and AOC impact statement. • Review any recently created governance philosophies or strategic goals including Principal Policy Goals and BJA resolutions. • Review staff briefing paper about the topic which includes information related to national treatment of the topic.	• *Discussion can continue for more than one month if necessary.* • *BJA members will turn over for the July meeting.*
	June 19, August 21 or September 18 – Action (can be taken as late as September 18)	*Memorialize input/recommendation, send to Supreme Court Rules Committee.*
DMCJA Board	**January – Discussion/ information item at board meeting**	*Refer for further review.*
	April – Board discussion item	
	May– deadline for final comments from the board	*Memorialize input for distribution in May 15 BJA materials (May 8).*
SCJA Board	**January – Discussion/ information item at board meeting**	*Refer for further review.*
	April – Board discussion item	
	May – deadline for final comments from the board	*Memorialize input for distribution in May 15 BJA materials (May 8).*

Organization	Suggested Schedule	Possible Action
COA	**January – Discuss at monthly meeting**	*Outreach or further review.*
	May - deadline for final comments from the COA	*Memorialize input for distribution in May BJA materials (May 8).*
Supreme Court – En Banc?		

Tab 5

WSBA

Task Force *on the* Escalating Costs of Civil Litigation

Final Report *to the* Board of Governors

February 11, 2015

Send comments to: ECCL@wsba.org

Per Section IX(B)(3)(d) of the Bylaws of the Washington State Bar Association, this draft report does not represent a view or action of the Bar unless approved by a vote of the Board of Governors.

Task Force Membership

Chair	Russell M. Aoki	
WSBA Members	Lincoln C. Beauregard	Don L. Jacobs
	Breean L. Beggs	Jerry R. McNaul
	Cynthia F. Buhr	Gail B. Nunn
	Eric C. de los Santos	Todd L. Nunn
	Jessica L. Goldman	Amit D. Ranade
	William D. Hyslop	
Judiciary Members	The Hon. Marcine Anderson	
	The Hon. Ronald E. Cox	
	The Hon. Richard F. McDermott, Jr.	
	The Hon. Debra L. Stephens	
Clerk's Association	Kevin Stock	
Assisting Non-Member	Isham M. Reavis	
Research Student	Martina Wong	
BOG Liaisons	Marc L. Silverman	
	Ken Masters	
WSBA Staff Liaison	Jeanne Marie Clavere	
WSBA Staff Support	Darlene Neumann	

Subcommittees

Alternative Dispute Resolution Subcommittee

Chair	Jerry R. McNaul	
Task Force Members	Lincoln C. Beauregard	Cynthia F. Buhr
Other Members	Alan Alhadeff	Rina M. Goodman
	The Hon. Robert H. Alsdorf (retired)	
	Gregg L. Bertram	David J. Lenci
Assisting Non-Member	Andre Chevalier	

Discovery Subcommittee

Chair	Todd L. Nunn	
Task Force Members	The Hon. Marcine Anderson	
	Russell M. Aoki	William D. Hyslop
	Breean L. Beggs	Don Jacobs
	The Hon. Debra L. Stephens	
Other Members	J.M. Bouffard	Endel Kolde
	Thomas Breen	Luke LaRiviere
	Michael R. Caryl	Gregory D. Lucas
	Jean Cotton	Adam Rosenberg
	Larry G. Johnson	Milton G. Rowland
	Leslie S. Johnson	M. Edward Taylor
	Miquette Karnan	Kinnon W. Williams

District Court Subcommittee

Chair	The Hon. Marcine Anderson	
Other Members	The Hon. Alicia H. Nakata	The Hon. Donna Wilson
	Linda M. Gallagher	Vonda M. Sargent

Pleadings and Motion Practice Subcommittee

Chair	Eric C. de los Santos	
Task Force Members	The Hon. Ronald E. Cox	Jessica L. Goldman
Non-Task Force Members	Melissa Anderson	Andrea Smith
	David Black, Jr.	Chrystina Solum
	Katherine Cameron	Steven Winterbauer
	Leslie Hagin	

Survey Subcommittee

Chair	Eric C. de los Santos	
Members	Russell M. Aoki	Milton G. Rowland
	Breean L. Beggs	

Trial Procedure Subcommittee

Co-Chairs	The Hon. Richard F. McDermott, Jr.	
	Gail B. Nunn	
Task Force Members	Amit D. Ranade	Kevin Stock
Non-Task Force Members	Thomas Fain	Jeffrey Tilden
	Kathleen Garvin	Lish Whitson
	Simeon Osborn	

Introduction

The price of a lawsuit is high and growing higher. How costly, and the history and rate of growth, are difficult to measure directly, but lawyers—the individuals best positioned to witness the trend and effect of civil litigation costs—overwhelmingly report a problem. In a nationwide survey of 800 lawyers, the American Bar Association found 80 percent reported that civil litigation costs have become prohibitive.[1] Focusing only on members of its litigation section, a second ABA survey found that 81 percent of approximately 3,300 respondents believe that litigation is too expensive, and 89 percent believe litigation costs are disproportional for small cases.[2] The WSBA surveyed its members in 2009, receiving 2,309 responses. Seventy-five percent of those responding *agreed* (39 percent) or *strongly agreed* (36 percent) that the cost of litigation has grown prohibitive.

In response, in April 2011 the WSBA Board of Governors chartered this Task Force on the Escalating Costs of Civil Litigation. The charter instructed the Task Force to:

- Assess the current cost of civil litigation in Washington State Courts and make recommendations on controlling those costs. "Costs" shall include attorney time as well as out-of-pocket expenses advanced for the purpose of litigation. The Task Force will focus on the types of litigation that are typically filed in the Superior and District Courts of Washington.
- In determining its recommendation, the Task Force shall survey neighboring and similarly situated states to compare the cost of litigation in Washington and review reports and recommendations from other organizations such as the Institute for the Advancement of the American Legal System, the American College of Trial Lawyers, the Public Law Research Institute.

Confronting escalating civil litigation costs also addresses access to justice. If litigation costs grow increasingly prohibitive, more individuals with meritorious claims will be unable to pay the price necessary to vindicate their rights, and more defendants will be forced to abandon valid defenses because of the costs for asserting them. Reining in civil litigation costs means increasing access to the civil justice system for all.

The Task Force has held regular meetings since July 2011, three times requesting that its initial charter be extended. It organized itself into six subcommittees, which also

[1] Stephanie Francis Ward, *Pulse of the Legal Profession*, 93 A.B.A. J. 30, 31 (Oct. 2007).

[2] ABA Section of Litigation Member Survey on Civil Practice: Full Report 2 (2009).

worked separately to address specific aspects of civil litigation. It heard presentations from WSBA Executive Director Paula Littlewood on the state of the legal profession; then-King County Superior Court Presiding Judge Richard McDermott on proposals to change the civil judicial system in King County; Jeff Hall, then-State Court Administrator, Administrative Office of the Courts, on statistics and trends examined by the AOC; U.S. District Court Judge James Robart on civil litigation and rules in the federal courts; and Task Force member Don Jacobs, a former president of the Oregon Trial Lawyers Association, on the expedited civil trial system in Oregon. Individual subcommittees sought extensive input from members of the bar and bench.

The Task Force reviewed literature from around the country, including other states' and federal courts' responses to rising civil litigation costs; case studies by the Institute for the Advancement of the American Legal System (IAALS) and the American College of Trial Lawyers (ACTL); and a nationwide litigation cost survey conducted by the National Center for State Courts (NCSC).

In accordance with its charge to seek input from affected lawyers, judges, and other entities, the Task Force also conducted its own survey of WSBA members involved in, or affected by, civil litigation. Over 500 bar members participated, most who reported themselves as experienced litigators. The respondents echoed the concerns found by previous surveys, identified specific factors contributing to runaway litigation costs, and expressed support for proposals aimed at curbing those costs. Preliminary versions of this report were circulated to litigation-related WSBA sections, minority bar associations and civil litigation associations the Washington State Association for Justice (WSAJ) and Washington Defense Trial Lawyers (WDTL) for comment, and the input received is reflected in the final report.

Based on this data and the work of the individual subcommittees, the Task Force has developed a set of recommendations. These recommendations seek to speed case resolutions—inside or out of the courtroom—while preserving the legal system's ability to reach just results. The centerpiece of the Task Force's recommendations is a system of early case schedules and discovery limits, assigned based on a case's size or complexity, counterbalanced by mandatory initial disclosures. Other recommendations address e-discovery, alternative dispute resolution, and judicial case management.

These recommendations come with a significant caveat: they do not specifically take up family law issues. During its fact-finding, the Task Force came to the conclusion that family law and its distinct constellation of concerns were beyond the Task Force's ability to fully consider without unreasonably extending its charter. Therefore, the Task Force's recommendations only reach family law to the extent they affect all other areas of civil litigation.

Executive Summary

The Task Force initially organized itself into four subcommittees to explore different aspects of civil litigation. These four—the Alternative Dispute Resolution Subcommittee, the Discovery Subcommittee, the Pleadings and Motion Practice Subcommittee, and the Trial Procedure Committee—worked independently, and each generated a final report. The Task Force also created two additional subcommittees: the Survey Subcommittee, which developed and implemented the Task Force Survey of WSBA members; and the District Court Subcommittee, which considered the applicability and impact of proposed recommendations on the district courts. With input from the Survey and District Court Subcommittees, the Task Force as a whole considered the recommendations in these subcommittee reports in making its final recommendations.

1. Initial case schedule and judicial assignment

The best way to control the length of litigation is setting a schedule at the outset. Upon filing, all cases will be issued a schedule setting out a trial date and other litigation deadlines.

The Task Force concluded that active judicial case management—including a willingness to enforce discovery rules—is indispensable in controlling litigation costs. Ideally, at the outset a single judge should be assigned to handle all discovery disputes and pretrial issues in a case. Recognizing this may not prove practical in the superior courts of some counties, the Task Force recommends amending the rules to describe such judicial assignment as a preferred practice.

2. Two-tier litigation

Litigation is not one-size-fits-all. A case's length, the breadth of discovery, and the scope of trial should be proportional to its needs. Two litigation tiers would be created in superior court: cases in Tier 1 would proceed along a 12-month case schedule and be subject to presumptive limits on discovery, and Tier 2 cases would have 18 months to trial and more extensive discovery than permitted in Tier 1.

Tier 2 would be reserved for cases presenting complex legal or factual issues, involving significant stakes, or marked by other factors indicating likely complexity. Upon filing, all cases would default to Tier 1, with option to move to Tier 2 for good cause shown.

3. Mandatory disclosures and early discovery conference

In both superior court litigation tiers and in district court, case schedules would require an early discovery conference among the parties. Parties would be also required to make initial disclosures, expert witness material disclosures, and pretrial disclosures patterned on the federal rules of civil litigation. These recommendations are designed to promptly engage all parties in the discovery process and provide early access to necessary information. The Task Force considers these recommendations a necessary

counterbalance to the new discovery limits and shorter case schedules also being recommended.

4. Proportionality and cooperation

Lowering litigation costs depends on keeping the costs of cases proportional to their needs, and on ensuring cooperation between attorneys as much as possible within our adversarial legal system. Proportionality and cooperation principles will be explicitly reflected in the rules.

5. E-discovery

Washington has already incorporated parts of the federal rules regarding e-discovery into CR 26 and CR 34. CR 26 and CR 37 will be amended to incorporate most of the remaining federal e-discovery rules. CRLJ 26 will be amended to follow the changes in CR 26.

Additionally, the Task Force recommends a state-wide e-discovery protocol for both superior and district courts. This will take the form of a model agreement and proposed order on e-discovery to be used on a case-by-case basis.

6. Motions practice

The Task Force recommends non-dispositive motions in superior and district court cases be decided on their pleadings, without oral argument. The court may permit oral argument on party request.

7. Pretrial conference

The current civil rules permit, but do not require, a pretrial conference aimed at focusing issues and laying out a framework for managing trial. In both superior and district court, the Task Force recommends requiring a pretrial meeting between the parties to reach agreement on trial management issues. The parties would then submit a joint report to the court, which would issue a pretrial order. For cases where a pretrial meeting does not occur or would be inappropriate, the current discretionary hearing will remain available.

8. District court

Most civil litigation occurs in superior court, but district court offers a potentially quicker and less expensive alternative for some cases. Many of the Task Force's recommendations apply to district court as well as superior court. In addition, the Task Force recommends increasing the district court jurisdictional limit from $75,000 to $100,000, extending jurisdiction to unlawful detainer proceedings, and issuing a case schedule in civil cases upon filing. District court cases would follow a 6-month schedule from filing to trial.

9. Alternative dispute resolution

The Task Force considered mediation, settlement conferences, private arbitration, and mandatory arbitration.

Mediation or settlement conferences often occur on the eve of trial, after the parties have incurred the bulk of litigation costs. The Task Force recommends mediation in the early stages of a case, well before completing discovery. Because different litigation types have different issues and timelines, the WSBA Sections should develop guidelines for what early mediation means in their respective practice areas.

The Task Force also recommends mandatory mediation in superior court cases no later than 60 days after party depositions (or 60 days before trial, if sooner). If one or more party wishes to forego mediation, the party or parties would have to file a statement following the early discovery conference that the case is not suited to mediation. The court could waive the mediation requirement for good cause based on such statements.

The Task Force also recommends promulgating a set of suggested mediation practices for parties to consider, including conducting mediation as a series of short meetings and pre-session contact between mediator, counsel, and client.

Most arbitration takes the form of a private contractual process. Though the Task Force makes no recommendation that would directly affect private arbitration, it recommends promulgating a series of best practices for parties and arbitrators.

The Task Force makes no recommendation regarding the rules for mandatory arbitration in superior court.

Material Considered by the Task Force

The Task Force gathered information from two main sources: literature, including reports from other states and the federal courts, studies, and law review articles; and the Task Force's survey of WSBA members involved in, or affected by, civil litigation.

The Task Force also considered final reports created by its ADR, Discovery, Pleadings and Motion Practice, and Trial Procedure Subcommittees. Beyond the information considered by the Task Force as a whole, the subcommittees researched and considered other literature. Two subcommittees conducted a series of in-person interviews: the Pleadings and Motion Practice Subcommittee spoke with judges from across the state, and the ADR Subcommittee with spoke attorneys and mediators. The subcommittees summarize these additional information sources in their separate reports.

Finally, the Task Force considered feedback from the stakeholders whose input was sought in the survey—litigation-related WSBA sections, the minority bar associations, the WSAJ, and the WDTL. The Task Force provided these stakeholders with a preliminary version of this report, and asked for comments. This final report reflects the sections' input.

1. Subcommittee material

1. ADR Subcommittee Report: Mediation, July 2014
2. ADR Subcommittee Report: Arbitration, July 2014
3. Discovery Subcommittee Report, August 27, 2014
4. District Court Subcommittee Report, December 31, 2014
5. Pleadings and Motion Practice Subcommittee Report, January 17, 2014
6. Trial Procedure Subcommittee, Escalating Cost of Civil Litigation Task Force Subcommittee Report, August 2014
7. Alan Alhadeff, Revised Memorandum re Proposed Rules for Mandatory Mediation, December 23, 2014

2. Literature

a. Court material

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2. Model Agreement Regarding Discovery of Electronically Stored Information and Proposed Order (W.D. Wash. Dec. 13, 2012)

3. Standing Order, In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, No. M10-468 (S.D.N.Y. Nov. 1, 2011)
4. Order Establishing the Managing Panel of the Oregon Complex Litigation Court and Appointing Members to the Panel, Chief Justice Order No. 10-067 (Or. Dec. 2, 2010)
5. Order Establishing the Oregon Complex Litigation Court and Adopting New UTCR 23.010, 23.020, 23.030, 23.050, and 23.060 Out-of-Cycle, Chief Justice Order No. 10-066 (Or. Dec. 2, 2010)
6. Order of Out-of-Cycle Adoption of New UTCR 5.150, UTCR Form 5.150.1a, and UTCR Form 5.150.1b, Chief Justice Order No. 10-025 (Or. May 6, 2010)
7. Model Civil Case Schedule Order (Spokane Cty. Sup. Ct. 2002)
8. Federal Rules of Civil Procedure 16 (2007)
9. Federal Rules of Civil Procedure 26 (2010)
10. Federal Rules of Civil Procedure 26 (1993)
11. Federal Rules of Civil Procedure 33 (2007)
12. Local Rules, Eastern District of Washington LCR 7 (2013)
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14. Washington Rule of Professional Conduct RPC 1.3 (2006)
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16. Washington Rule of Professional Conduct RPC 3.2 (2006)
17. King County Local Rules CR 4 (2013)
18. King County Local Rules CR 7 (2013)
19. Pierce County Local Rules PCLR 3 (2014)
20. Spokane County Local Rules LAR 0.4.1 (2000)
21. Oregon Uniform Trial Court Rule UTCR 5.150 (2014)
22. Oregon Uniform Trial Court Rule UTCR 23.010 (2014)
23. Oregon Uniform Trial Court Rule UTCR 23.020 (2014)
24. Oregon Uniform Trial Court Rule UTCR 23.030 (2014)
25. Oregon Uniform Trial Court Rule UTCR 23.050 (2014)
26. Oregon Uniform Trial Court Rule UTCR 23.060 (2014)
27. Oregon Court Fee Schedule (2011)

28. Rules of the Superior Court of New Hampshire Applicable in Civil Actions Rule 26, Depositions (2013)
29. Utah Rules of Civil Procedure URCP 26 (2012)
30. 2011 Oregon Court Fee Schedule

b. Reports, studies, and surveys

31. ABA Section of Litigation, Special Committee, Civil Procedure in the 21st Century: Some Proposals (2010)
32. ABA Section of Litigation, Member Survey on Civil Practice: Detailed Report (2009)
33. Paula L. Hannaford-Agor, NCSC, Estimating the Cost of Civil Litigation (2013)
34. Paula L. Hannaford-Agor, NCSC, Short, Summary & Expedited: The Evolution of Civil Jury Trials (2012)
35. IAALS & ACTL Task Force on Discovery and Civil Justice, A Return To Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs (2012)
36. Marc Galanter & Angela Frozena, Pound Civil Justice Inst.: 2011 Forum for State Appellate Court Judges, The Continuing Decline Of Civil Trials In American Courts (2011)
37. IAALS, Civil Case Processing in the Oregon Courts: An Analysis of Multnomah County (2010)
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42. IAALS & ACTL Task Force on Discovery and Civil Justice, 21st Century Civil Justice System: A Roadmap for Reform: Civil Caseflow Management Guidelines (2009)
43. Reforming the Iowa Civil Justice System , Report of the Iowa Civil Justice Reform Task Force (2012)

44. Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (September 2014)

45. Judicial Council of California, Administrative Office of the Courts, Evaluation of the Early Mediation Pilot Programs (2004)

46. NCSC, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013)

47. Stacey Keare, Public Law Research Inst. (PLRI), Reducing the Cost of Civil Litigation: Alternative Dispute Resolution (1995)

48. Than N. Luu, PLRI, Reducing the Cost of Civil Litigation: What Are the Costs of Litigation? (1995)

49. Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force, Final Report (2011)

50. Javad Mostofizadeh, PLRI, Reducing the Cost of Civil Litigation: Using New Technology (1995)

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c. Articles and periodical material

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57. Shelly M. Damore, *The Fast Track: Oregon's Expedited Civil Jury Trial Program*, Or. Ass'n of Def. Counsel, Summer 2010, at 8

58. Phillip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933 (2012)

59. Joseph Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 Rutgers L. Rev. 337 (1985)

60. Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441 (2011)

61. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 494 (2013)

62. James S. Kakalik, *Analyzing Discovery Management Policies: Rand Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 No. 2 Judge's J. 22, 25 (1998)

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76. John V. Tunney, Foreword, *Financing the Cost of Enforcing Legal Rights*, 122 U. Pa. L. Rev. 632 (1973–1974)

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85. Letter from Rebecca L. Kourlis, Exec. Dir., IAALS, & Paul C. Saunders, Chairman, ACTL, to Paula Littlewood, Exec. Dir. WSBA (Nov. 3, 2009)

86. Lord Peter Goldsmith QC, Remarks at Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011) Theodore N. Mirvis, Slide Presentation at the Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011)

87. William T. Robinson III, Pres. ABA, Remarks at the Midyear Meeting of the Conference of Chief Justices (Jan. 29, 2011)

3. Survey

The Task Force also conducted a survey of WSBA members most likely to be involved in civil litigation, or affected by its rising costs. The ECCL survey was sent to members of the WSBA's Litigation, Family Law, Business Law, Corporate Counsel, Labor & Employment, Solo & Small Practice, Indian Law, Administrative Law, Civil Rights, Creditor Debtor Rights, and Health Law Sections; to members of the State Minority Bar Associations; and to members of the WSAJ and the WDTL.

Five hundred and twenty-one attorneys took the survey. Not all survey-takers responded to each question. As such, percentages in this summary are relative to the number of responses to a particular question instead of total respondents.

a. Demographics and practice

The overwhelming majority of survey respondents are experienced attorneys and dedicated litigators. The largest block of respondents, 25.9 percent, have practiced in Washington State for more than 30 years. Practitioners of between 21 and 30 years comprise another 19.6 percent of respondents.

Nearly all (94.0 percent) include litigation as part of their practice,[3] with litigation comprising seven-tenths or more of the practice of a majority (54.3 percent), and comprising more than nine-tenths the practice of a full third (33.5 percent) of respondents. A majority (58.3 percent) has practiced litigation for 16 years or more, and 26.8 percent are veteran litigators of more than 30 years.

Most (89.6 percent) respondents litigate in Washington. Of those also practicing in other jurisdictions, Oregon practitioners ranked the highest with 23 responses, followed by California (14 responses), and Idaho (10 responses). State superior court is the most common forum with most respondents (79.9 percent) reporting over half of their litigation occurred there. Over half of them (55.7 percent) conduct more than three-quarters of their litigation in superior court. Only 13.8 percent conduct the majority of their litigation in federal court, and 5.1 percent in state district court. Survey responses were made in 24 of Washington's 39 counties. Most respondents (56.6 percent) practice in King County; the next most-reported seats of practice are Pierce County (9.2 percent) and Clark County (5.4 percent).

[3] For purposes of the survey, "litigation" meant all stages of civil litigation from filing of a complaint to trial or settlement.

A slight majority of respondents (51.2 percent) reported that they represent plaintiffs or petitioners a majority of the time. For 33.6 percent of respondents, plaintiffs and petitioners comprised three-quarters or more of their clientele. On the defense side, 1 in 4 respondents (24.8 percent) reported that defendants represented three-quarters or more of their clientele. Most respondents (55.9 percent) have never represented indigent clients.

Nearly half (42.2 percent) of respondents' practices were at least one-quarter personal injury, wrongful death, or medical malpractice. The other top responses were family law (25.2 percent), business law (19.0 percent), and labor and employment (16.0 percent).

b. Costs of litigation

Survey respondents agreed that there are several solutions for lowering the costs of civil litigation without limiting the ability to effectively and justly resolve disputes. Of the proposed ideas, mandating good-faith mediation within 60 days of party depositions garnered the highest degree of support—its weighted average was 3.62 on a scale of 1 to 5. An average over 3 indicates agreement. The next-highest rated proposals were a standard list of discovery questions that must be answered by each party early in the litigation (3.55) and restrictions on the number or length of depositions with option to obtain more by court leave (3.48). All the specific proposals presented in the survey garnered general approval, with each averaging a 3.32 or higher.

One hundred and fifty-eight respondents commented individually and provided additional ideas. Common suggestions were higher sanctions or better enforcement of existing rules (23 responses), and limiting expert witness fees or medical costs (17 responses). Interestingly, 17 respondents preferred no additional or even fewer restrictions.

The survey also asked respondents to identify the primary forces driving litigation costs. Attorney fees were identified most often, by over half (54.0 percent) of respondents. Other top factors identified were representation by larger firms (45.0 percent), overly broad discovery requests (43.5 percent), expert witness fees (43.5 percent), and unequal bargaining positions of the parties (42.8 percent). Additional factors identified in narrative responses include the insurance industry and defense lawyers (19 responses each), attorneys drawing out cases for their own compensation (19 responses), and discovery abuse (10 responses).

c. Discovery

Asked to rate the effectiveness of discovery tools, respondents identified depositions as the most useful by far, and requests for admissions the least. On a scale of 1 to 5, with 1 being the least effective and 5 being the most, respondents on average assigned depositions a 3.92 rating, requests to produce a 3.49, and subpoenas duces tecum a 3.28. The remaining discovery tools were rated between *effective* and *slightly effective*.

Almost all respondents (95.0 percent) reported that they strive to keep discovery costs proportionate to the stakes in litigation. The most common methods include: limiting the number of depositions or records custodians (41 responses), limiting the scope of discovery to the most effective means (37 responses), and cooperating with opposing counsel or entering into informal discovery arrangements (35 responses).

Over half of the survey respondents (56.0 percent) reported no difference between jurisdictions regarding the costs or effectiveness of discovery practices. Thirty-seven respondents find discovery more effective in jurisdictions with case schedules and discovery limits. Twenty-four respondents called out federal courts as being less costly because of discovery limits and attentiveness to discovery abuse. Thirteen praised Oregon courts as less costly on account of their limited discovery and lack of expert depositions.

Of note is that most survey respondents (57.4 percent) would decline certain cases because of discovery-related costs. Of these respondents, 32 would turn down medical malpractice or negligence cases due to discovery costs; 23 would turn down cases with too many witnesses or experts; and 22 would turn down cases based on the ratio of discovery costs to recovery potential.

Respondents strongly agreed with the statement that parties are willing to invest more into litigating a case if the stakes are high by assigning the statement an average 4.29 on a scale of 1 to 5, with 1 indicating a strong disagreement and 5 indicating strong agreement. Any values over 3 would indicate agreement. They also agreed that parties "dig in" and litigate every little thing when a lot of money is involved (3.79 average), that existing discovery rules are not being enforced (3.68), and that discovery costs induce settlements (3.44). When cases settle due to discovery costs, 70.0 percent of survey respondents think that justice is not served.

Two-hundred and fifty-five respondents provided narrative responses and volunteered ideas for curbing discovery abuse. The most common ideas underline the perceived need for court involvement. In fact, 138 responses called for more sanctions or greater enforcement of existing rules.

The survey asked respondents to identify common discovery abuses they have experienced. Most respondents report having experienced blanket objections to discovery requests (72.7 percent), failures to produce responsive documents (67.6 percent), and excessive or burdensome interrogatories (64.5 percent). A slim majority (51.3 percent) report excessive or burdensome production requests. The other 11 forms of abuse were commonly experienced by less than a third of respondents.

d. Electronically stored information

ESI does not dominate the litigation practices of survey respondents. Though most respondents (72.7 percent) deal with ESI in their practice, a majority of those (54.3 percent) do so without the assistance of third-party vendors for services such as

creating databases or making ESI searchable.[4] A clear majority (77.8 percent) report that managing and reviewing ESI comprises one-fifth or less of their litigation costs; in total 96.8 percent reported ESI as one-half or less of their litigation costs.

As noted, respondents rated ESI an only slightly effective discovery tool, assigning it a rating of 2.70 out of 5. On the other hand, respondents report less discovery abuses involving ESI than other discovery abuses. Of the respondents, 20.9 percent had experienced excessive or burdensome ESI requests, and only 10.6 percent had experienced excessive ESI productions—the least and third-least frequent forms of discovery abuse reported, as discussed.

When asked about primary forces driving litigation costs, only 17.1 percent of respondents identified ESI discovery requests as one of the factors, and only 11.5 percent identified ESI discovery disputes.

[4] The survey did not query respondents on their understanding of, or familiarity with, ESI. Though a slight majority of respondents reported managing ESI in-house, the survey did not distinguish between those who operate in-house discovery databases from those who merely scan and save paper documents.

Recommendations

Many of the Task Force's recommendations will involve changes to the Civil Rules. Should the Board of Governors approve these recommendations, the Task Force contemplates the Court Rules and Procedures Committee would then review them for drafting and finalization. If approved by the Board of Governors, the proposed rules will be forwarded to the Supreme Court for consideration and public comment.

1. Initial case schedules

a. Current practice

The superior courts of King County, Pierce County, and Spokane County issue schedules in all civil cases; courts in some other counties do not.

b. Recommendation

The Task Force recommends a case schedule be issued upon filing a civil case in either superior court or district court. All superior court cases will initially be set on a 12-month schedule, but may seek to move to an 18-month schedule as described below in the recommendation regarding litigation tiers. Cases filed in district court will receive a 6-month schedule at filing.

Case schedules will include deadlines for initial disclosures, joinder of parties, fact witness disclosure, expert witness disclosure, mandatory mediation, discovery cutoff, pretrial disclosures, and a trial date. A deadline for moving the court to change the assigned tier or to make other adjustments to discovery limitations will also be stated in the case schedule.

Beyond the total time allowed, the courts of individual counties will have discretion to craft their own case schedules. Counties may also exempt certain categories of civil actions from schedules entirely, for example:

- Change of name;
- Adoption;
- Domestic violence protection order under Chapter 26.50 RCW;
- Anti-harassment protection order under Chapter 10.14 RCW;
- Unlawful detainer;
- Appeal from courts of limited jurisdiction;
- Foreign judgment;
- Abstract of transcript of judgment;
- Writ petition;
- Civil commitment;

- Proceedings under Title 11 RCW (probate and trust law);
- Proceedings under Title 13 RCW (juvenile courts and juvenile offenders);
- Proceedings under Chapter 10.77 RCW (criminally insane); and
- Proceedings under Chapter 70.96A RCW (chemical dependency).

c. Reasons

Case schedules are necessary to organize cases and keep parties moving toward resolution. A schedule is the backbone of case management, and is necessary to organize cases, impose a time frame on case resolution, impose deadlines to keep cases moving toward resolution, and implement cost-reduction methods.[5] Deadlines—including a certain trial date—prompt parties to efficiently evaluate and prepare cases, leading to resolution at trial or through negotiation.[6] There is empirical evidence that supports the use of early case management as a method of reducing litigation costs, especially when combined with setting a trial schedule early.[7] The automatic case schedule implements both of these methods.[8]

[5] IAALS & ACTL Task Force on Discovery, 21st Century Civil Justice System: A Roadmap for Reform: Pilot Project Rules 8 (2009) ("Early and ongoing control of case progress has been identified as one of the core features common to those courts that successfully manage the pace of litigation. Active court control, which includes scheduling, setting and adhering to deadlines, and imposing sanctions for failure to comply with deadlines, can ensure that each scheduled event causes the next scheduled event to occur, thereby ensuring that every case has no unreasonable interruption in its procedural progress."); Rebecca L. Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. Kan. L. Rev. 877, 891 (2013) ("[F]irm trial dates, enforced timelines, streamlined motions practice, and judicial availability are other tools that are being used to move the process along and reduce the time and cost burden on litigants.").

[6] *See* IAALS & ACTL Task Force on Discovery, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 20 (2009) ("There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates the settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.").

[7] James S. Kakalik, *Analyzing Discovery Management Policies: Rand Sheds New Light on the Civil Justice Reform Act Evaluation Data*, 37 No. 2 Judge's J. 22, 25 (1998) ("In the main evaluation report, we found that early case management predicted significantly reduced time to disposition;

In the Task Force's survey, respondents who practice in multiple jurisdictions found that jurisdictions issuing schedules in all cases, such as the federal courts, were less costly litigation forums. The Pleadings and Motions Practice Subcommittee also found support for universal case schedules from interviewing members of the state judiciary. Judges that the subcommittee interviewed viewed case schedules as an easy-to-implement and effective tool for controlling litigation cost.

The Task Force recommends allowing counties leeway to exempt certain cases from schedules because many civil actions fall outside the heartland of civil litigation to which the schedule recommendation is addressed. King, Pierce, and Spokane County, which issue civil case schedules, each make categorical exemptions for certain types of civil actions. The exemptions carved out by these counties represent practical experience that the Task Force believes should be preserved.

2. Judicial assignment

a. Current practice

In some counties, cases are assigned to a single judge at the outset of the case. In many counties, they are not.

b. Recommendation

The Task Force recommends adding the following language to the civil rules on judicial assignment:

A judge shall be assigned to each a case upon filing. The assigned judge shall conduct all proceedings in the case unless the court determines it is impracticable to do so.

coupling early management with setting a trial schedule early predicted significant further time reductions."); IAALS, Civil Case Processing in the Federal District Courts 84 (2009) ("[F]aster disposition times tend to be strongly correlated with setting a trial date early in the litigation, filing motion for leave to conduct additional discovery as soon as possible after the Rule 16 conference …, and filing motion on disputed discovery, motions to dismiss and motions for summary judgment as soon as practicable in the life of the litigation.").

[8] Implementation of mandatory discovery planning is necessary to get the full benefit of early case schedules and trial setting, and vice versa. Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 25 ("We estimate that early management with a mandatory discovery management planning policy is associated with a 104-day reduction when a trial schedule is set early, and with about an 85 day reduction for early management with a mandatory planning policy but without setting a trial schedule early. The estimated effect for early management with neither mandatory planning nor setting a trial schedule early is much smaller-only about twenty-nine days.").

c. Reasons

Court involvement in management during key stages of the case, including during the discovery phase, is necessary for any of the recommended cost reduction methods to be implemented (proportionality, litigation tiers, court conferences to determine variation from discovery limits).[9] Many respondents to the Task Force's survey complained that judges' failure to enforce existing rules contributed significantly to driving up those costs. A judge responsible for overseeing a case from start to finish would be more familiar with the parties and issues, more able to efficiently resolve discovery disputes, and more willing to curb discovery abuse. This method has been endorsed and adopted by other states after studies or pilot projects.[10]

The Task Force ultimately decided against requiring judicial assignment. Many counties have only a few judges handling civil cases; denying those counties the flexibility to share the work associated with those cases as needed would be an administrative burden. The proposed language preserves this flexibility while making clear that assignment to a single judge for the life of a case is the strongly preferred option.

3. Two-tier litigation

a. Current Practice

Statewide, Washington makes few categorical distinctions between cases based on size or complexity. Mandatory arbitration, applicable to claims under $50,000, is one such distinction. Another is the district court system, open only to claims under $75,000. Pierce County assigns different case schedules based on a case's subject matter or likely complexity.

b. Recommendation

The Task Force recommends adopting a two-tier litigation system (sometimes referred to as multi-track litigation) in superior court cases, which would determine a case's

[9] Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century*, *supra* note 5, at 891 ("Judicial caseflow management has been recognized as another essential element in moving a case fairly, efficiently, and economically through the process. Early judicial involvement in every case, by a single judge assigned to the case from start to finish, is more efficient."); IAALS & ACTL, *Final Report*, *supra* note 6, at 18 ("A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.").

[10] *E.g.* Reforming the Iowa Civil Justice System, Report of the Iowa Civil Justice Reform Task Force 30 (2012) ("One judge assigned to each case for the life of the matter will enhance judicial management, promote consistency and adherence to deadlines, and reduce discovery excesses.").

presumptive case schedule and discovery limits based on the tier to which a case is assigned.

Initial assignment to Tier 1

All cases default to Tier 1 on filing, and the Task Force anticipates most cases will remain in that tier. Cases involving large monetary claims, important non-monetary stakes, or complex factual or legal issues may be reassigned to Tier 2.

Reassignment to Tier 2

A court may reassign a Tier 1 case to Tier 2 for good cause, either on its own motion or at the request of one or more parties. The court will determine whether the case presents complex or important issues such that Tier 2's more expansive schedule, discovery, and trial procedures are warranted, looking to the following factors:

- Monetary claims by any party exceeding $300,000;
- Evidence of likely factual complexity, such as more than 12 likely witnesses, or the need to conduct substantial investigation outside the State of Washington;
- Complex or novel legal issues;
- Claims involving important rights, or issues of widespread significance;
- Commonly complex case types such as medical or professional malpractice, product liability, or class action cases; and
- Other indicia of likely complexity as determined by the court.

The case schedule will set out a deadline to seek reassignment, shortly after the early discovery conference.[11] After this deadline, a party may only move for tier reassignment if there is good cause for the delay.

The following model case schedule sets out example deadlines for a Tier 1 case:

Event/deadline	*Date (weeks from trial)*
Filing	52
Early discovery conference	48
Initial disclosures	46
Application for reassignment to Tier 2	46
Joinder of parties	30

[11] Another Task Force recommendation, discussed below.

Fact witness disclosures	22
Expert witness disclosures	13
Rebuttal expert witness disclosures	9
Mandatory mediation	8
Discovery cutoff	7
Pretrial disclosures	4
Trial	0

Any change to the case schedule in either tier must be approved by the court.

Tier assignment does not limit award

If monetary value is the basis for assigning a case to Tier 1 or Tier 2, it does not limit a party's potential recovery. Even in a Tier 1 case a jury could award more than $300,000.

Arbitration and district court

Parties with claims of $50,000 or less are still subject to mandatory arbitration; those with claims of $75,000 or less can continue to file in district court.

c. Reasons

Proportionality is an important tool in litigation costs. Many jurisdictions, including the federal courts, have or are adopting proportionality as an explicit limit on discovery. Ninety-five percent of the respondents to the Task Force's survey strive to keep discovery costs proportionate to litigation stakes. Litigating low-stakes cases, however valued, should cost less than litigating high-stakes cases.

Multi-tier litigation applies a measure of proportionality from a case's outset. The IAALS recommends moving away from "one size fits all" litigation rules. Courts in the Southern District of New York,[12] Minnesota,[13] Oregon,[14] Utah,[15] and Washington's Pierce County[16]

[12] Standing Order, In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, No. M10-468 (S.D.N.Y. Nov. 1, 2011).

[13] Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice, Nos. ADM10-8051, ADM09-8009, ADM04-8001 (Minn. May 8, 2013).

[14] Order Establishing the Oregon Complex Litigation Court and Adopting New UTCR 23.010, 23.020, 23.030, 23.050, and 23.060 Out-of-Cycle, No. 10-066 (Or. Dec. 2, 2010).

[15] Utah R. Civ. Pro. URCP 26(c)(5).

[16] Pierce Cnty. Local R. PCLR 3(h).

have experimented with, or adopted, multi-tier litigation. Respondents to the Task Force's survey generally supported the idea, with 53.8 percent agreeing or strongly agreeing that a multi-track litigation system would be effective in lowering litigation costs without substantially limiting the ability to justly resolve disputes.

The general format of the tier system is closely modeled on the amended Utah Rules of Civil Procedure Rule 26(c)(5). The specific discovery limits in each tier were decided by the Task Force based on the available evidence, study, and the Task Force members' own professional experience.

The Task Force considered basing tier assignment on pleadings. Instead, it decided to have Tier 1 be the initial default for all cases to ensure parties would not simply claim the stakes qualified for the more expansive Tier 2 in most cases. The lesson of Oregon's expedited civil trial system, an underused option that allows parties to opt into a shortened litigation track by agreement, suggests at least one party will favor a longer case track in almost all cases.[17]

The Task Force considered basing tier assignment on information supplied during initial disclosures, with no tier assignment until those disclosures had been made. It decided on presumptive Tier 1 assignment both because this establishes a default preference for the shorter (and therefore presumably less expensive) litigation track, and also because it would avoid the necessity of requiring a case-assignment hearing for parties comfortable with remaining in Tier 1. This will result in less administrative burden on the courts.

4. Mandatory discovery conference

a. Current practice

Under the current CR 26(f), one party may seek to frame a discovery plan with the other party, and if that party refuses to cooperate, the party seeking to frame the plan can make a motion to the court to hold a discovery conference.

[17] *See* Paula L. Hannaford-Agor, NCSC, Short, Summary & Expedited: The Evolution of Civil Jury Trials 60–61 (2012) ("The major disappointment expressed by the Multnomah County trial bench concerning the ECJT program was the unexpectedly slow start for an expedited designation. … Several of the attorneys mentioned that they had asked the opposing counsel in a number of cases about filing an expedited designation motion before they found one willing to go forward.").

b. Recommendation

The Task Force recommends requiring a mandatory early discovery conference with a list of topics to be discussed in both superior court and district court cases. The parties to meet as soon as practicable to discuss the following subjects:

- Whether (if in superior court) the case should be assigned to Tier 2 instead of the default Tier 1;
- Whether the case is suitable for mediation or arbitration, and when early mediation might occur;
- What changes should be made in the timing, form, or requirement for initial disclosures, including when they will be made;
- Subjects on which discovery may be needed, when completed, and whether conducted in phases or focused on particular issues;
- Any issues about disclosure or discovery of electronically stored information, including the form of production;
- Any issues about claims of privilege or work product, whether there is any agreement for the procedure for raising these issues, and whether the court should enter an order under ER 502;
- What changes should be made in the limitation on discovery, and what other limitations should be imposed. For cases seeking reassignment to Tier 2, the parties are encouraged to submit an agreed discovery plan setting out discovery limits appropriate for the case, or submit proposals for the court to decide if no agreement is reached;
- Whether time limits are appropriate for the conduct of trial, including potential time limits on voir dire, opening and closing statements, and each party's presentation of its case, including rebuttal evidence but excluding pretrial motions; and
- Any other order that the court should issue under CR 26(c) or other rule, including whether a special master should be appointed to deal with any aspects of discovery, including electronic discovery.

Following the conference, the parties will submit a joint status report to the court regarding those topics discussed.

c. Reasons

Rule 26(f) conferences have been successful in federal court in avoiding later discovery disputes and thereby lowering the cost of litigation.[18] The mandatory early conference benefits the parties by making them think about discovery issues early in the litigation and attempt to reach agreement about those issues. If the parties cannot agree, they at least flag them for the court in the early stages of the case. Other states are endorsing and adopting these conferences.[19]

The Task Force also believed requiring the parties to consider how trial might be conducted at the early stages would be valuable. Limits on the conduct of trial would make trials less expensive and therefore more available. If the parties can agree on a trial time schedule from the outset, it would keep attorneys and litigants focused on getting their evidence before the court, avoided repetition, and limiting the number of witnesses with repetitive testimony. This not only decreases the length and expense of trial itself, but should also streamline trial preparation. And even if the parties fail to reach an agreement, confronting the potential time and costs of trial early on may produce earlier resolutions in cases that would eventually settle anyway.

The Task Force considered requiring a judicial conference after submission of the parties' joint status report, similar to the scheduling conference required under Federal Rule of Civil Procedure 16(b). The Task Force decided against this practice because it would impose an additional burden on the courts and parties, and because the automatically issued case schedule would obviate the need for a scheduling conference in many Tier 1 cases.

[18] Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 25 ("We estimate that early management with a mandatory discovery management planning policy is associated with a 104-day reduction when a trial schedule is set early, and with about an 85 day reduction for early management with a mandatory planning policy but without setting a trial schedule early Emery G. Lee & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 Sedona Conf. J. 201, 202 (2010) ("It is safe to say that the amendments to Rules 26(f) and 16(b), which prompt the parties and the court to pay 'early attention' to potential e-discovery issues, are rated as the most effective amendments by the judges answering the survey."); IAALS & ACTL, *Final Report*, *supra* note 6, at 21 ("Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.").

[19] NCSC, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules 3 (2013) ("The requirement to meet and confer regarding case structuring[] is expected to reduce the number of in-court case structuring conferences.").

5. Mandatory disclosures

a. Current practice

There is currently no statewide provision for mandatory initial disclosures, expert-witness disclosures, or pretrial disclosures. Some county local rules provide for deadlines for certain fact witness disclosures.

b. Recommendation

The Task Force recommends requiring initial disclosures, expert-witness disclosures, and pretrial disclosures in both superior court and district court cases. These disclosures are patterned on those found in Federal Rule of Civil Procedure 26(a). The timing and subject matter of disclosures may be varied by party stipulation or court order.

Those categories of civil actions a county exempts from receiving an initial case schedule, as discussed above,[20] are also exempt from initial disclosure requirements.

Initial disclosures

Initial disclosures, or "laydown" discovery, will be required in advance of formal discovery. Parties will be required to make these disclosures as soon as practicable, in advance of receiving any discovery requests, but in any case no later the deadline set out in the case schedule. The following information must be disclosed:

- The name and contact information for each individual likely to have discoverable information, and the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- A copy, or a description by category, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- A computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under CR 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based;
- For inspection and copying as under CR 34 or CRLJ 26(b)(3)(A), any insurance agreement under which an insurance business may be liable to satisfy all or part

[20] *See supra* page 18.

of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Initial disclosures must be based on information reasonably available to a party. Delay based on the need to fully investigate, or another party's failure to disclose, is not excused. The rule should explicitly provide for sanctions for failing to make timely initial disclosures.

Later-appearing parties must make initial disclosures within 30 days of being served or joined.

Expert witness disclosures

Expert disclosures consistent with the federal rules should be required. The timing of the disclosures will be staggered. The party bearing the burden of proof on an issue discloses their expert and expert material first, by the deadline set out in the case schedule. The party or parties without the burden must disclose experts and expert material within 30 days of the first party's disclosure.

A party would disclose the following information (whether in a report or otherwise) if an expert witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony:

- A complete statement of all opinions the witness will express and the basis and reasons for them;
- The facts or data considered by the witness in forming them;
- Any exhibits that will be used to summarize or support them;
- The witness's qualifications, including a list of all publications authored in the previous 10 years;
- A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- A statement of the compensation to be paid for the study and testimony in the case.

Pretrial disclosures

Pretrial disclosures should be required, by the deadline set out in the case schedule. Disclosures must include:

- The name and, if not previously provided, contact information of each witness, separately identifying those the party expects to present and those it may call if the need arises;
- The designation of those witnesses whose testimony the party expect to present by deposition and a transcript of the pertinent parts of the deposition; and

- An identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises.

c. Reasons

Mandatory disclosures make available categories of information required to prepare almost every case without resort to discovery. This will allow parties to focus discovery on case-specific facts, and reduce discovery and trial preparation costs. Respondents to the Task Force's survey supported a standard list of questions that parties must answer in every case, with 34.0 percent agreeing and 25.8 percent strongly agreeing this approach would lower litigation cost without impairing just resolutions.

Initial disclosures

Requiring parties to automatically provide certain basic information will mean less discovery has to be conducted and therefore lower costs. Mandatory disclosures are combined with limitations on other methods of discovery to lower costs. The Task Force believes that the requirement of mandatory disclosures will offset the limitation on interrogatories and requests for production that are proposed.[21] It should be noted that there is mixed evidence and opinion regarding the efficacy of mandatory disclosures as a means of lowering litigation costs.[22] But it should be further noted that disclosures are

[21] Douglas C. Rennie, *The End of Interrogatories: Why* Twombly *and* Iqbal *Should Finally Stop Rule 33 Abuse*, 15 Lewis & Clark L. Rev. 191, 259 (2011) ("Mandatory disclosures have already taken over many of the functions of interrogatories."); Phillip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 972 (2012) (discussing Utah's expansion of initial disclosure obligations, stating "[t]his change was especially important to achieve proportionality, [as] [d]iscovery tends to be more focused and thus more cost effective when parties know more about the case earlier."); Amy Luria & John E. Clabby, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 Chap. L. Rev. 29, 44 (2005) ("[I]n contrast to interrogatories, mandatory initial disclosures increase the efficiency of litigation.").

[22] *Compare* Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 26 ("Our data and analyses do not strongly support the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours, and thereby reducing the costs of litigation, or as a means of reducing time to disposition Special Comm. of the ABA Section of Litigation, Civil Procedure in the 21st Century: Some Proposals 9–10 (2010) (proposing eliminating "the current requirement that the parties' disclosures include documents" stating that only 33 percent of ABA Section of Litigation members surveyed believed that initial disclosures reduce discovery and only 26 believe that they save client money, and that "[t]he Committee members, like the ABA Survey respondents, believe that most initial disclosure is not useful"); Report of the Special Committee

criticized for doing too little as well as too much, and while there are critics that propose eliminating disclosure, there are also critics that propose expanding disclosure (for example by making document production mandatory rather than just document identification).[23] Ultimately, the Federal Advisory Committee on Civil Rules heard all of the evidence, criticism, and proposals regarding modifications to the initial disclosure rules but left initial disclosures unchanged in its fairly significant recent changes to the Federal Rules of Civil Procedure,[24] and the federal, or similar, approach to initial disclosure has been endorsed and adopted by state task forces and pilot projects.[25]

on Discovery and Case Management in Federal Litigation of the New York State Bar Association 73 (June 23, 2012) (collecting evidence that initial disclosures do not increase efficiency and recommending that the federal rules be amended to remove the document disclosure provisions); *with* Thomas E. Willging, Donna Stienstra, John Shapard & Deab Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 527 (1998) ("In general, initial disclosure appears to be having its intended effects … [w]e found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure [and] [h]olding all variables constant, those with disclosure terminated more quickly."). *See also* Emily C. Gainor, Note, *Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards*, 52 B.C. L. Rev. 1441, 1464–68 (2011) (contrasting proponents' arguments that initial disclosures "foster exchange of discoverable information early," "serve as tools to compel information sharing," "advances litigation efficiency objectives," in contrast to critics arguments that they do "not foster efficient discovery," "foster over discovery," and "do not fit comfortably in an adversarial system.").

[23] IAALS & ACTL, *Final Report*, *supra* note 6, at 7 (proposing automatic production in initial disclosure, not just identification of documents that the party will use).

[24] Report of the Advisory Committee on Civil Rules (May 8, 2013).

[25] Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 31 ("Many recommendations for case management and discovery limitations presume discovery reforms requiring basic information disclosure in all cases at the outset of litigation without the necessity of discovery requests from a party."); Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force, Final Report 18 (2011) ("Rule 26(a) of the Federal Rules of Civil Procedure provides for three categories of automatic disclosure: initial disclosures[], expert disclosures[], and trial disclosures[and] [t]he task force reviewed all three categories of changes, and believes there is now enough experience with the operation of automatic disclosure in the federal courts to warrant the adoption of these federal court automatic disclosure requirements in Minnesota."); NCSC, *New Hampshire Pilot Rules*, *supra* note 41, at 3 ("[A]utomatic disclosures[] are expected to [(1)] reduce the time from filing to disposition … through a reduction in the amount of time expended on … discovery" and (2) "reduce the number of discovery disputes … by making most of the previously discoverable information … routinely available to the parties without need for court intervention.").

The Task Force considered the broader initial disclosures provided for in the 1993 amendments to the federal Rule 26. However, concerns were raised over interpreting the scope of disclosure under this earlier version. The Task Force decided in favor of the initial disclosures in the current federal Rule 26 so Washington courts could take advantage of federal case law interpreting it.

Expert disclosures

Requiring the party offering the expert testimony to disclose certain basic information reduces the amount of discovery the responding party has to conduct, lowering costs.[26] Based on the Task Force member's experience, specifying which party needs to disclose expert material first should also head off discovery disputes over that issue.

Pretrial disclosures

Mandatory pretrial disclosures allow attorneys to focus on the issues and evidence that will actually feature at trial, reducing discovery and trial preparation costs.

6. Proportionality and cooperation

a. Current practice

CR 26(b)(1) provides for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ...." Proportionality between the burden or expense of discovery and a case's needs, amount in controversy, the importance of the issues, and the parties' resources is listed in CR 26(b)(1)(C) as a potential limit on discovery. There is no provision expressly requiring the cooperation of parties in the Civil Rules.

b. Recommendation

The Task Force recommends amending the rules to narrow the scope of discovery, specifically incorporating proportionality as a limit, and to require cooperation among the parties as a guiding principle in employing the Civil Rules.

Proportionality

- The scope of discovery will be amended to read that parties may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense ...."

[26] Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 527 ("Like initial disclosure, expert disclosure appears to be having its intended effect, albeit with an increase in litigation expenses for 27% of the attorneys who used expert disclosure ... [but] slightly more attorneys (31%) reported decreased litigation expenses.").

- The scope of discovery will also be amended to include proportionality as a limit: "... and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Cooperation

- The scope of the Civil Rules will be amended to specify that the courts and all parties jointly share the responsibility of using the rules to achieve the aspirational ends of the civil justice system: "They [the Civil Rules] shall be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action."
- Discovery sanctions will be amended to include a failure to cooperate during the discovery process: "If the court finds that any party or counsel for any party has willfully impeded the just, speedy, and inexpensive determination of the case during the discovery process, the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the impediment.

c. Reasons

Narrowing the very broad scope of discovery and explicitly requiring the court to impose proportionality and cooperation should reduce the amount of discovery, or at least tie it closely to the amounts and issues at stake in each case, thereby lowering costs overall.[27] It should also reduce the number and severity of discovery disputes, which will lower costs. Proportionality has been effective in federal court,[28] and is a central proposal of

[27] Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495 (2013) ("[N]arrowing the scope of discovery to focus on information that is neither privileged nor protected work product and that is relevant to the actual claims and defenses raised by the pleadings could greatly improve things, at least as long as there is a consensus that the purpose of the discovery rules is to prepare for trial," and "institutionalizing the concept of cooperation during discovery into the rules of procedure—would work hand in glove with the other two recommendation to help trim unnecessary costs and burdens and focus on what facts truly are needed to resolve a particular dispute.").

[28] Lee & Withers, *Survey of United States Magistrate Judges*, *supra* note 18, at 202 ("[M]ore than 6 in 10 of the judges who responded to the survey reported that the proportionality provisions in Rules 26(2)(C) and 26(c) were being invoked and that, when invoked, were effective in limiting the cost and burden of e-discovery.").

most academic studies and state and federal pilot projects.[29] Several states have also endorsed and implemented an explicit proportionality requirement.[30] The Task Force's recommended language is based on similar language recommended by the Judicial Conference Committee on Rules of Practice and Procedure.[31] Like other rule changes, however, an explicit proportionality provision in the rules will only be effective if courts enforce them in a thoughtful way.[32]

[29] Final Report on the Joint Project of the IAALS & ACTL Task Force on Discovery, *supra* note 6, at 7 ("Proportionality should be the most important principle applied to all discovery."); Seventh Cir. Elec. Discovery Pilot Program, Final Report on Phase Two 73–74 (2012) (finding that "Principle 1.03 [proportionality] continues to be well received" and "should be subject to continued testing" based on positive Phase Two survey responses (including 63 percent of judge respondents who "reported that the proportionality standards … played a significant role in the development of discovery plans for their Pilot Program cases" while 48 percent of judge respondents "reported that the application of the Principles had decreased or greatly decreased the number of discovery disputes brought before the court")); Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century*, *supra* note 5, at 883–34 ("[P]ilot projects have adopted proportionality as a guiding star throughout the case so that litigation remains just, speedy, and inexpensive.").

[30] Favro & Pullan, *New Utah Rule 26*, *supra* note 21, at 970 ("To remedy this problem, Utah redefined the scope of permissible discovery. Today, Utah litigants "may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality." This simple yet profound change has effectively brought proportionality to the forefront of discovery practice."); Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 30 ("Discovery should be proportional to the size and nature of the case. Overly broad and irrelevant discovery requests should not be countenanced."); Minnesota Supreme Court Civil Justice Reform Task Force, *Recommendations*, *supra* note 25, at 17 (the task force recommended adopting proportionality rule which "would create a presumption of narrower discovery and require consideration of proportionality in all discovery matters, limiting discovery to the reasonable needs of the case," noting "[t]his recommendation is probably one of the most important recommendations the task force advances.").

[31] Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Sept. 2014), at 30–31. "After considering [2,300] public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some modifications as described below, will improve the rules governing discovery." *Id.* at 5–6. The Report goes on to discuss the reasons supporting the proposed proportionality language. *Id.* at 6–8.

[32] Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889, 908 (2009) ("[P]roportionality

Similarly, an express cooperation requirement has been tested in federal and state pilot programs (and found to be effective) and implemented by some states.[33] The Task Force's cooperation recommendations both make cooperation an underlying principle of the civil rules, and make cooperation an enforceable requirement during discovery. The Task Force noted that the most recent proposed federal amendments declined to adopt an enforceable cooperation duty, citing to the potential for collateral litigation of conflict with a duty of effective representation. However, Washington's Rules of Professional Conduct require *diligent* rather than *zealous* representation,[34] and in fact explicitly prohibit abuse of legal process[35] or tactical delays.[36] The Task Force considers these requirements entirely consistent with a duty of cooperation.

7. Discovery limits

a. Current practice

Most counties do not limit discovery requests by category.

rules can be criticized equally for allowing opposite errors, both false negatives (failing to detect and halt discovery abuse) and false positives (finding disproportionate some costly discovery that actually is justified by high evidentiary value and case merit). Erroneous pro-plaintiff rulings unjustifiably increase litigation costs and pressure defendants to settle unmeritorious cases; conversely, erroneous pro-defendant rulings deny plaintiffs the ability to press meritorious claims successfully.").

[33] Seventh Cir. Elec. Discovery Pilot Program, *Final Report*, *supra* note 29, at 71–72 (finding that "Principle 1.02 [cooperation] continues to be well received" and "should be subject to continued testing" based on positive Phase Two survey responses); Kourlis & Kauffman, *From Recommendations to Reform in the 21st Century, supra* note 5, at 883–84 ("The pilot projects are also a proving ground for the notion of cooperation among and between the parties. Attorneys who have put aside gamesmanship and embraced the concept of cooperation report that it has not undermined the zealous representation of their clients. In fact, it is becoming an essential component of appropriate representation—particularly in the area of electronic discovery—in order to achieve a just, speedy, and inexpensive determination for clients."); *see also* The Sedona Cooperation Proclamation, 10 Sedona Conf. J. 331 (2009 Supp.).

[34] "A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." Wash. R. Prof'l Conduct RPC 1.3 cmt. 1.

[35] "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Wash. R. Prof'l Conduct RPC 3.1 cmt. 1.

[36] "Dilatory practices bring the administration of justice into disrepute. ... Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." Wash. R. Prof'l Conduct RPC 3.2 cmt. 1.

b. Recommendation

The Task Force recommends presumptively limiting discovery, with superior court case limits depending on whether a case is assigned to Tier 1 or Tier 2:

Discovery	*Tier 1 limit*	*Tier 2 limit*
Interrogatories, including all discrete subparts	15	25
Requests for production	20	40
Requests for admission	15	25
Total fact deposition hours	20	40
Expert deposition hours per expert	4	4

Parties could vary these limits by stipulation or on a showing of good cause. Agreed changes to discovery limits do not require court approval unless they would affect deadlines in the case schedule. However, courts should not automatically give the presumptive limits greater weight than case-specific party proposals. In Tier 2 cases, the parties are encouraged to submit agreed discovery plans (or individual proposals for the court to decide if there is disagreement) following the Rule 26(f) conference.

In district courts, the number of interrogatories permitted without prior court permission of the court will be the same as in Tier 1—15, including all discrete subparts. District court discovery limits will remain otherwise unchanged.

c. Reasons

Discovery limits tied to case size are a direct, if inexact, means of imposing proportionality. Limits will force parties to be efficient with their use of the available discovery. Less discovery also means fewer discovery disputes and fewer opportunities for discovery abuse. On the Task Force's survey, respondents to practicing in other jurisdictions also noted that those with discovery limits generally involve less litigation cost.

Because limiting discovery may mean constricting litigants' access to information, the Task Force considers mandatory disclosures, discussed below, as a necessary accompaniment to this recommendation.

Interrogatories

"Restrictions on the number of interrogatories with option to obtain more by court leave" were supported by a majority of respondents to the Task Force's survey. Limiting the number of interrogatories should mean less discovery activity. Additionally, there should

be no prejudice to parties' ability to conduct discovery since interrogatories are generally of limited value in discovery,[37] and mandatory initial disclosures will allow parties to be more targeted in their use of interrogatories.[38] There is general support for the proposition that limits on interrogatories will reduce discovery costs and abuse, and empirical evidence that reduction in interrogatories reduces attorney work hours.[39] There are those who argue that interrogatories, or certain types of interrogatories, should be eliminated entirely.[40]

The specific numerical limits on interrogatories in each tier were derived from the federal rules. The current limit under Federal Rule of Civil Procedure 33 is 25 interrogatories, including discrete subparts, and other states are also implementing limitations.[41]

Requests for production

In general, less discovery activity should mean lower costs. Limiting the number of requests for production should mean less discovery activity, and will force parties to be more efficient with the production requests they have available. There should be no prejudice to parties' ability to conduct discovery because mandatory initial disclosures will allow parties to be more targeted in their use of requests for production.

[37] Respondents to the Task Force's survey rated interrogatories, along with requests for admission, as sometimes ineffective and susceptible to abuse.

[38] As discussed in the Advisory Committee Notes to the 1993 amendments to FRCP 33(a) ("Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)–(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable.").

[39] Kakalik, *Analyzing Discovery Management Policies*, *supra* note 7, at 27 ("Our analysis lends support to the policy of limiting interrogatories as a way to reduce lawyer work hours and thereby reduce litigation costs.").

[40] Special Comm. of the ABA Section of Litigation, *Civil Procedure in the 21st Century*, *supra* note 22, at 13 ("No party may propound any contention interrogatory unless all parties agree or by court order."); Rennie, *The End of Interrogatories* , *supra* note 21, at 263 ("Interrogatory practice does nothing to advance the goals of the Federal Rules of Civil Procedure, and instead, contributes to the popular dissatisfaction with the American justice system both in the legal community and the public at large").

[41] NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 (limitation of interrogatories to 25 "were put in place in light of the amount for information that parties are now entitled to under [rule changes including initial disclosures], which are expected to greatly reduce the amount of discovery needed to prepare for trial.").

Requests for admission

In general, less discovery activity should mean lower costs. Limiting the number of requests for admission should mean less discovery activity, and will force parties to be more efficient with the admission requests they have available.[42] As noted, respondents to the Task Force's survey considered requests for admission (along with interrogatories) one of the least effective forms of discovery, as well as one susceptible to abuse.

Depositions of fact witnesses

"Restrictions on the number of or length of depositions with option to obtain more by court leave" were supported by a majority of respondents to the Task Force's survey. The Task Force also noted that while respondents overwhelmingly considered depositions *extremely effective* or *very effective* tools for justly resolving disputes, depositions are also the most expensive method of discovery.[43] In general, less discovery activity should mean lower costs. Limiting the number of hours of depositions should mean less discovery activity, and will force parties to be more efficient with the deposition hours they have available.[44] An hour-based limitation (instead of limiting the number of depositions) will provide parties with greater flexibility to take more, shorter depositions or fewer, longer depositions depending on the needs of the case.[45] The number of hours allowed at each tier should be sufficient for most cases. The goal is for parties to be thoughtful and efficient in how they conduct discovery.

[42] Special Comm. of the ABA Section of Litigation, *Civil Procedure in the 21st Century*, *supra* note 22, at 13 ("A party may serve no more than 35 requests for admission, including subparts, under Rule 36 unless all parties agree or by court order.").

[43] Willging, *et al.*, *An Empirical Study of Discovery and Disclosure Practice*, *supra* note 22, at 576 (finding that "depositions accounted for about twice as much expense as any other discovery activity").

[44] IAALS & ACTL, *Final Report*, *supra* note 6, at 10 (suggesting numerical limits such as "only 50 hours of deposition time"); NCSC, *New Hampshire Pilot Rules*, *supra* note 19, at 2 ("PR 4 restricts … the number of hours of depositions to 20 hours).

[45] The hours limitation is modeled after the Utah Rules of Civil Procedure. The comments to Utah Rule 26(c) state "[d]eposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes"; *see also* R. of Superior Ct. of N.H. Applicable in Civ. Actions, Rule 26, Depositions ("[A] party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed 20 unless otherwise stipulated by counselor ordered by the court for good cause shown.").

Depositions of experts

In general, less discovery activity should mean lower costs. Limiting the number of depositions for experts, and their length, should mean less discovery activity, and force parties to be more efficient with the expert deposition hours they have available. Given the breadth of the expert disclosures, this number of hours for a deposition of the expert was thought to be sufficient.

8. E-discovery

a. Current practice

The current Washington Court Rules have incorporated federal e-discovery rules in CR 34, and parts of CR 26.

b. Recommendation

Rule changes

The federal rule amendments should be incorporated into the Washington Court Rules: amendments to CR 26 (discussing discovery of inaccessible data) and amendments to CR 37 (regarding sanctions for the deletion of electronically stored information (using the form of the new proposed amendments to the federal rules). Because the Task Force decided against requiring an early judicial conference as in Federal Rule of Civil Procedure 16(b), language in that rule relating to electronically stored information will not be added to CR 16. CRLJ 26 will be amended to follow the changes made to CR 26.

Protocol

The courts will promulgate a protocol and proposed order on electronically stored information, consistent with the Model Agreement re: Discovery of Electronically Stored Information used by the federal courts of the Western District of Washington.

c. Reasons

The federal amendments have been relatively successful in lowering litigation costs associated with electronic discovery in federal court.[46] Other jurisdictions (federal and state) implementing protocols similar to the one recommended by the Task Force have reported beneficial results.[47] Other recommendations of the Task Force—case schedules;

[46] Lee & Withers, *Survey of United States Magistrate Judges*, *supra* note 18, at 202 ("The responses [to a survey of magistrate judges] indicate that, by and large, the [e-discovery] rules are working to achieve the 'just, speedy, and inexpensive determination of every action' as dictated by Rule 1 of the Federal [Civil Rules]").

increased judicial management; the Rule 26(f) conference; proportionality—should also improve the course of e-discovery.[48]

9. Motions practice

a. Current practice

In most counties, even the simplest of motions require counsel to appear for oral argument. In King County Superior Court, most non-dispositive motions are decided without oral argument.

b. Recommendation

The Task Force recommends that non-dispositive motions in superior or district court be decided without oral argument. Oral argument will only be permitted in the following instances:

- Motions in superior court for revision of a commissioner's rulings, other than rulings regarding involuntary commitment and Title 13 proceedings (juvenile offenders);
- Motions for temporary restraining orders and preliminary injunctions;
- Family law motions;
- Ex parte and probate motions;
- Motions where court grants a party's request for oral argument.

[47] Iowa Civil Justice Reform Task Force, *Reforming the Iowa Civil Justice System*, *supra* note 10, at 46 ("The Task Force recommends that the bar, through the Iowa State Bar Association, develop a best practices manual for electronic discovery in civil litigation. This could address the issues of identification, scope, and preservation of electronically stored information likely to be involved in specific types of civil cases."); Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road,* 19 Rich. J.L. & Tech. 8, 38 (2013) ("At least thirty-two districts, however, have acknowledged the discovery of electronically stored information in civil litigation. Of these districts, seven merely make passing reference to e-Discovery in their local rules. Another twelve districts emphasize e-Discovery topics deemed most worthy of attention at Rule 26(f) conferences. Nine districts, as well as others using model orders, have adopted pragmatic solutions that address gaps in the Amendments more aggressively. At least five additional districts have released non-binding guidance for parties on the topic of e-Discovery.").

[48] *See* The Sedona Conference Cooperation Proclamation: Resources for the Judiciary 9 (2014) (Public Comment Version) (making similar recommendations).

c. Reasons

Even brief oral arguments require an attorney to prepare, travel, wait in the court, present argument, and then return back to their office. Oral arguments also consume limited court time that could be dedicated to trial work. These costs can be avoided by allowing some motions to be decided on the pleadings alone. King County Superior Court and the U.S. District Courts of both of Washington's federal districts resolve most non-dispositive motions without requiring oral argument for non-dispositive motions.[49] Not requiring oral argument for all motions will also help make district court a more attractive forum for civil cases.

The Task Force's recommendation is based on King County Superior Court's Local Rule LCR 7(b)(3).

10. Pretrial conference

a. Current practice

The current civil rules do not provide statewide standards for trial management. CR 16 provides that a superior court may, in its discretion, hold a hearing on the conduct of trial. Trial management tends to be on a case-by-case basis, either based on the general practices of the trial court judge, or prompted by party objection.

b. Recommendation

The Task Force recommends the parties in superior court civil cases be required to prepare a joint Trial Management Report, except in cases where a domestic violence protection order or a criminal no-contact order has been entered between parties. The report will include:

- The nature and a brief, non-argumentative summary of the case;
- A list of issues which are not in dispute;
- A list of issues that are in dispute;
- Suggestion by either party for shortening the trial, including time limits for presenting each party's case at trial, and limits on the number of expert witnesses per part or per issue;
- An index of exhibits (excluding rebuttal or impeachment exhibits);
- A list of jury instructions requested by each party; and

[49] *See* King County LCR 7(b)(3); Local Rules W.D. Wash. LCR 7(b)(4); Local Rules E.D. Wash. LCR 7(h)(3)(C).

- A list of names of all lay and expert witnesses excluding rebuttal witnesses.

The discretionary hearing currently available under CR 16 will remain available if the parties cannot reach an agreed report, if one of the parties refuses to cooperate, or if there is a domestic violence protection order or a criminal no-contact order entered between parties. After receiving a trial management report or holding a hearing, the court will enter a Pretrial Order as provided in CR 16.

c. Reasons

Trial may be the single most expensive and time consuming aspect of litigation.[50] Perhaps for this reason, the number of civil jury trials is decreasing.[51] But because having a jury of your peers make a determination of the facts of a case has long been the backbone of the American civil justice system,[52] there will be a loss to our society if this method of resolving disputes between people is lost due to the sheer expense to the parties.[53] It is also an access-to-justice issue—if the common man or woman cannot afford entry to the courtroom, they are denied access to the core of our justice system.

[50] *See* Paula Hannaford-Agor & Nicole L. Waters, NCSC, Estimating the Cost of Civil Litigation 7 (2013) ("For all case types, a trial is the single most time-intensive stage of litigation, encompassing between one-third and one-half of total litigation time in cases that progress all the way through trial.").

[51] "According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009." IAALS & ACTL, A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs 1 n.1. (2012); *see also* Marc Galanter & Angela Frozena, Pound Civil Justice Inst.: 2011 Forum for State Appellate Court Judges, The Continuing Decline of Civil Trials in American Courts 2 (2011) ("The recent data on civil trials can be summed up in two stories: no news and big news. The no news story is that the trend lines regarding the decline of trials are unchanged. The big news story is that the civil trial seems to be approaching extinction.").

[52] The federal constitution directs that the right to a jury trial shall be preserved, U.S. Const. amend. VII, and our state constitution declares that right "inviolate," Const. art. 1, § 21. *See also Parsons v. Bedford*, 28 U.S. 433, 466 (1830) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union …. As soon as the [U.S. C]onstitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.").

[53] "The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try

Requiring parties to consider limiting the length of trial, the number of witnesses, and focus on the issues actually in dispute, will encourage shorter, less costly, and therefore more available trials. Reducing the number of expert witnesses in particular should decrease costs, both in trial and preparation time. In the Task Force's survey, nearly half of the respondents considered expert witness expenses as a driving force of rising litigation costs, and limiting experts was one of the respondents' most-volunteered solutions.

The Task Force considered imposing presumptive limits on time available to the parties to present their case at trial and on the number of expert witnesses available to each party. However, the Task Force ultimately decided this would take too much away from the court's discretion. Presumptive limits would also not take into account a case's particular facts and needs. Instead, the Task Force decided to require the parties to consider adopting limits voluntarily, subject to the court's approval. This will engage the parties in the task of containing trial cost while preserving judicial discretion and authority to manage the courtroom.

11. District court

a. Current practice

District courts' civil jurisdiction includes damages for injury to individuals or personal property and contract disputes in amounts up to $75,000. CrRLJ 3.3(a)(2) gives precedence to scheduling criminal trials over civil trials, and many district courts also hear criminal motions before civil motions. Aside from criminal cases, many of the cases filed in district court are infractions, collection actions, or domestic violence or anti-harassment protection orders.

b. Recommendation

Many recommendations already discussed affect district court:

- Initial case schedule issued on filing, with a 6-month period from filing to trial, except in categories of cases as determined by individual county[54];
- Mandatory early discovery conference[55];
- Mandatory initial, expert witness, and pretrial disclosures except for categories of cases exempt from initial case schedules[56];

jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials." IAALS & ACTLA, *A Return To Trials*, *supra* note 51, at 1.

[54] *See supra* pages 16–18.

[55] *See supra* pages 22–25.

- Principles of proportionality and cooperation incorporated into discovery rules[57];
- Number of interrogatories allowed without prior court permission of the changed to 15, including discrete subparts[58];
- Remainder of federal e-discovery rules incorporated into state rules[59]; and
- Non-dispositive motions decided on the pleadings, unless the court permits oral argument.[60]

The Task Force additionally recommends extending the district court's jurisdiction to include claims up to $100,000. District court jurisdiction should also expand to include unlawful detainer proceedings under Chapter 59.12 RCW and anti-harassment protection orders involving real property, so long as the disputes remain within the proposed $100,000 jurisdictional limit.

c. Reasons

District court is sometimes perceived as inhospitable to civil litigation and is an underused civil litigation forum. According to responses to the Task Force's survey, though over half of respondents reported that over 20 percent of their civil litigation cases involved amounts under $50,000—within the district court jurisdictional limit—the overwhelming majority, 85 percent, conducted less than a fifth of their civil litigation in district court.

The Task Force believes district courts can offer an expedited and less costly alternative to superior courts for some cases. Its recommendations will make district court a more viable and affordable forum for civil litigation: case schedules will keep litigation moving and focus attorney efforts; early discovery conferences, mandatory disclosures, and discovery limits will streamline discovery and reduce discovery abuse; eliminating the need for oral argument will greatly reduce the costs of motions practice. Raising the jurisdictional limit will also make district court more attractive to categories of cases such as landlord–tenant disputes, or where defendants carry insurance policies of $100,000.

[56] *See supra* pages 25–29.

[57] *See supra* pages 29–32.

[58] *See supra* page 33.

[59] *See supra* pages 36–36.

[60] *See supra* pages 37–38.

12. Alternative dispute resolution

a. Current practice

Mediation

Litigants who engage in mediation mostly (but not invariably) do so in the form of a "summit conference"—late in the case, after discovery has been completed, sometimes on the eve of trial. To make mediation sessions more productive, mediators regularly engage in pre-session contact with attorneys or parties. District courts in Clallam, King, Pierce, Thurston, and Skagit County require pretrial settlement or mediation conferences.

Private arbitration

Private arbitration is entered into by contract between the parties. Arbitration has increasingly come to resemble full-scale litigation in terms of time and expense. As with civil litigation, much of the cost increase comes from expanding discovery practices.

Mandatory arbitration

The Mandatory Arbitration Act, Chapter 7.06 RCW, and the Mandatory Arbitration Rules make civil cases involving claims of $50,000 or less subject to arbitration.

b. Recommendation

Mediation

The Task Force recommends requiring mediation in superior court cases before completing discovery unless the parties stipulate that mediation would be inappropriate, or one or more parties show good cause. Parties seeking to avoid mediation, or delay mediation until after discovery, will need to file their stipulation or reasons for good cause after holding the Rule 26(f) discovery conference. Unless the court then waives the requirement, the parties will be required to mediate no later than 60 days of completing depositions of the respective parties, or 60 days before the start of trial, whichever is sooner.[61] Unless excused by the court, all parties attending mediation must have in attendance a person with full settlement authority.

The recommended mediation deadline falls earlier than eve-of-trial summit mediation, but even earlier mediation may be possible and beneficial in many cases. The Task Force supports approaching the various WSBA sections about developing standards for the timing of early mediation within their respective practice areas.

The Task Force also recommends promulgating a set of suggested mediation practices:

- Parties should consider engaging in mediation at an earlier stage than required by the rules. Certain types of cases typically require little discovery. Very early mediation can be fruitful in such cases.
- Parties should consider engaging in limited-scope mediation focused on specific issues:
    - Even when there is little possibility of settling all issues in a dispute, or of settling issues before conducting discovery, the parties should consider mediating particular issues that might be resolved.
    - In cases where discovery is likely to be extensive or contentious, the parties should consider mediating the scope and conduct of discovery.
- Parties and mediators should consider varying the format of mediation, depending on the needs of the case and disposition of the parties:
    - Conducting mediation as a series of sessions rather than a one-day event; or

[61] Settlement conferences will continue to be available in all cases, including after the deadline for mandatory mediation has passed.

    - Using shuttle-style mediation, in which the mediator meets with the parties individually, to identify areas of potential settlement before the parties' positions are entrenched.
- Mediators should consider pre-session meetings, in person or by phone:
    - With counsel; or
    - With counsel and client.

Private arbitration

The Task Force recommends promulgating a set of suggested arbitration practices:

- The arbitrator should identify the scope of arbitration with input from the parties.
- Parties should consider limiting or eliminating the length and number of depositions and the extent of expert discovery.
- Parties should consider voluntarily narrowing the scope of arbitration at outset. For example, selecting a single arbitrator; conducting focused single-issue arbitration; establishing specific limitations on relief.
- If not already contractually agreed among the parties, arbitrators should consider scheduling planning and coordinating meetings upon selection to set the terms and conditions of the arbitration process.
- The following topics should be addressed in the arbitration contract. If they are not, the arbitrator or panel should address them in early rulings:
    - Whether there is a challenge to arbitration;
    - Whether arbitration should be global, addressing and resolving all issues, or whether its scope should be limited to one or more specific issues;
    - What procedural rules will govern conduct and location of proceedings (for example, AAA, JAMS, JDR, or some other protocol);
    - What limits will be placed on discovery, for example, lay-down discovery or e-discovery rules. Without some discovery limits, there is little difference between arbitration and full-scale litigation;
    - What jurisdiction's substantive law will govern resolution of the dispute;
    - Whether mediation is required either before arbitration or early in arbitration, and if so on what schedule;
    - What interim relief, if any, will be available, whether injunctive or otherwise;
    - Whether to allow expedited electronic exchange of briefs, submittals, and other documents;

- Whether to allow pre-hearing motions for summary judgment or partial summary judgment;
- What timing should be required for the arbitration process: (1) mandate either to conduct or consider early mediation; (2) date(s) to commence and complete discovery; (3) date for final coordinating conference prior to hearing on the merits; (4) date to commence hearing on the merits; (5) duration of the hearing day, and possible imposition of time limits on presentation of evidence and argument; and
- Final award: (1) time limit on the arbitrator or panel between completion of hearing and issuance of award; (2) form of award (basic, reasoned, or detailed findings and conclusions), including a specific statement if the parties do not want a compromise or "split the baby" award; (3) what permanent relief may be granted (legal or equitable); (4) whether to allow award of costs and fees; and (5) whether to allow judicial review.

Mandatory arbitration

The Task Force makes no recommendation as to mandatory arbitration. Mandatory arbitration will continue to be available to parties in superior court civil cases involving claims of $50,000 or less.

c. Reasons

Mediation

Early mediation offers benefits both over litigation and late-stage mediation.[62] When the ADR Subcommittee surveyed Washington State mediators, it found that parties who

[62] Judicial Council of Calif., Admin. Office of the Courts, Evaluation of the Early Mediation Pilot Programs (2004) (finding that, in a 30-month study of five early mediation programs, each program decreased the trial rate, the time to disposition, the litigants' costs, and the courts' workload; while increasing the litigants' satisfaction with the dispute resolution process); Donna Stienstra, Molly Johnson & Patricia Lombard, Fed. Judicial Ctr., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 at 235–36 (1997) (finding that cases in a mandatory early assessment and mediation program reduced the average disposition time by two months and estimated litigation costs by $15,000 per party over cases participating in optional mediation); John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolutions*, 24 Ohio St. J. on Disp. Resol. 81, 101 (2008) ("Time and cost savings are presumably related to the time in the process when parties begin mediation because cases that start mediation late in litigation have less time and money to "save" compared to the normal litigation process.").

engaged in early mediation realized significant savings: costs associated with discovery, trial preparation, and expert witnesses could be largely avoided. Those parties also avoided other negative effects of undergoing litigation—often a stressful and disruptive process—by shortening the time between the emergence of a problem and finding a solution.

Respondents to the Task Force's survey rated depositions as the most effective form of discovery for resolving disputes: 22.1 percent rated it *extremely effective*, and the combined total for *effective*, *very effective*, and *extremely effective* was 92.1 percent. After party depositions, both sides should have enough information to mediate effectively.[63]

The Task Force recommends mediation after party depositions because such depositions can occur before the bulk of other discovery costs have accrued, yet are highly effective at clarifying and resolving factual issues. This should not be viewed as an authoritative definition of early mediation, but rather as a date on which some of the benefits of truly early mediation may still be realized. Because the time at which early mediation will be most fruitful will vary depending on the type of case, the individual WSBA sections will be best positioned to develop guidelines about what early mediation means to their respective members.

Pre-session contact is a growing trend among mediators. More than half the mediators interviewed by the ADR Subcommittee reported that they regularly engaged in such contact, which helps familiarize the mediator with the facts and disputes, focus the attorneys on key issues, and lower barriers to resolution. As a result, the pre-session contact made actual mediation likelier to bring resolution. Breaking mediation into a series of short meetings can likewise increase the effectiveness of mediation by allowing more time for both sides to consider the issues, instead of concentrating the mediation process into a single high-stakes event.

Private arbitration

Arbitration's traditional advantage over civil litigation, reduced time and expense, has been eroded by the expanding scope of discovery in arbitration. Streamlining the typical arbitration would make the practice more efficient and attractive. However, private arbitration is a contractual affair between the parties, into which the Bar has little

[63] Mediation need not wait until the parties have complete information. A vast majority (from 76–89 percent, depending on the jurisdiction) of attorneys in cases within federal ADR demonstration programs reported that the first ADR contact (mostly mediation) occurred "at about the right time"—despite the fact that the cases were referred to ADR at very different stages. Stienstra, *et al.*, *Study of the Five Demonstration Programs*, *supra* note 62, at 20.

authority to intrude. For that reason, the Task Force recommends creating a series of best practices to which arbitrators and arbitrating parties can refer. These practices are based on the professional experience of the members of the ADR Subcommittee, as well as input from experienced arbitrators and lawyers who frequently participate in arbitration.

Mandatory arbitration

The mandatory arbitration rules were intended to give parties in low-stakes cases access to a trial-like procedure. However, the Task Force's recommendations will increase parties' access to relatively quick and affordable trials, by making the district courts more attractive to litigants and by introducing Tier 1 in superior court. Parties may choose to forgo mandatory arbitration once these other options become available. Further, currently courts and parties incur significant expenses because of de novo appeals from mandatory arbitration. At this point the Task Force cannot predict to what extent parties will continue to access mandatory arbitration. The Task Force therefore makes no recommendation at this time.

Conclusion

Courts, litigants, and lawyers across the country are faced with escalating litigation costs. Litigants may lose access to the civil justice system if they cannot afford to vindicate or defend their rights in court.

Washington is not the first state to recognize the problem, nor the first jurisdiction that has decided to address it. The Task Force has benefited from the lessons learned, and the choices made, by similar task forces from outside Washington. Equally important, the Task Force has drawn on the experience and opinions of the judges, lawyers, and other knowledgeable parties whom it interviewed, surveyed, and met with—and of those who have agreed to serve as members. This report, and the recommendations it contains, rests on this broad base of practical knowledge.

The Task Force's recommendations aim to make our courts affordable and accessible while preserving the paramount goal of justly resolving disputes. Some of the recommendations are bold, some minor; none are made lightly. They are the result of four years of study and deliberation.

The ultimate success of these recommendations, should the Board of Governors approve, will depend on buy-in by the bench and bar. The Task Force urges the Board not only to adopt these recommendations, but to help educate the judges and lawyers who will be responsible for making the recommendations a reality. One of the recommendations relates to the principles of proportionality and cooperation, and these two principles infuse the entirety of the Task Force's work. Controlling litigation costs means making those costs proportional to the issues from which litigation arises. Achieving proportionality, or taking steps towards that goal, will take the cooperation of all of us who work in and use our state's courts. Only together can we ensure that justice is available for all.

Tab 6

Board for Judicial Administration
House of Origin Cutoff Report

Current as of Thursday, March 12, 2015

Today is the 60th day of the 105-day legislative session. Bills not necessary to implement the budget (NTIB) must have passed out of their house of origin by yesterday at 5 pm in order to continue in the legislative process. NTIB bills are not subject to cutoff rules. Bills still alive must now repeat the same cycle of policy committee hearing, fiscal hearing (if necessary), rules committee, and floor action but on a shorter timeline. The next cutoff is April 1st.

Here are the highlights regarding bills BJA is tracking and other legislation of interest:

BJA Request Legislation

~~HB 1061~~/SB 5174
SUMMARY: Changes the number of judges Skagit County District Court from two to three.
POSITION: BJA request
STATUS: SB 5174 passed Senate unanimously and was heard in House Judiciary on March 12.

HB 1111
SUMMARY: Updating the court transcriptionist statutes and implements the recommendations of the Court Management Council, in conjunction with pending court rule.
POSITION: BJA Request
STATUS: Passed the House unanimously and was heard in Senate Law & Justice on March 12.

DMCJA Request Legislation

SB 5125 /~~HB 1328~~
SUMMARY: Would increase district court civil jurisdiction from $75,000 to $100,000.
POSITION: DMCJA Request
STATUS: Passed the Senate unanimously and is scheduled for hearing in House Judiciary on March 18.

~~SB 5126 /HB 1327~~
SUMMARY: Employment Security Department Subpoenas
POSITION: DMCJA withdrew request for this bill due to a potential conflict with federal law.
STATUS: Dead

~~HB 2097~~
SUMMARY: Authorizing parity with superior courts in the setting of jury fees
POSITION: DMCJA request.
STATUS: Dead

SCJA Request Legislation

SHB 1617
SUMMARY: Would allow courts to consult the Judicial Information System and related databases to review criminal history and determine whether other proceedings involving the parties are pending prior to entering certain orders.
POSITION: SCJA Request
STATUS: Passed House 92-6 and is scheduled for hearing in Senate Law & Justice on March 16.

~~HB 1618~~
SUMMARY: Requires a person objecting to the relocation of a child to establish adequate cause for a hearing on the objection.
POSITION: SCJA Request
STATUS: Died in House Rules.

SB 5101
SUMMARY: Technical change to acknowledge that the Department of Corrections no longer files presentence reports and allows the court to a mental evaluation even in the absence of a presentence report.
POSITION: SCJA request
STATUS: Passed Senate unanimously and was heard in House Judiciary on March 12.

SB 5104
SUMMARY: Allows a court to order participation in rehabilitative programs if the court finds that any chemical dependency contributed to the offense.
POSITION: SCJA Request
STATUS: Passed Senate unanimously and is scheduled for hearing in House Public Safety on March 17.

DATA DISSEMINATION/ACCESS TO COURT RECORDS

~~HB 1481~~/E2SSB 5564
SUMMARY: Eliminates most juvenile offender legal financial obligations and allows for sealing when 80% of restitution is paid.
POSITION: Support but prefer SB.
STATUS: Passed Senate 48-1 and scheduled for hearing in House Early Learning & Human Services on March 18.

ESHB 1553
SUMMARY: Creates a process by which a person with a criminal record can be granted a certificate of restoration of opportunity, which removes any professional bar imposed solely as a result of the conviction.
POSITION: Support
STATUS: Passed House unanimously and referred to Senate Law & Justice.

BILLS AFFECTING AOC EMPLOYEES AND/OR JUDGES

~~HB 1028~~
SUMMARY: Requires cities and counties to provide court security.
POSITION: Support
STATUS: Dead

HB 1397/~~SB 5308~~
SUMMARY: Allows judges and certain others to provide only city and county to the Public Disclosure Commission rather than full address.
POSITION: Support
STATUS: Passed Hose 78-20 and referred to Senate Government Operations & Security.

SB 5980
SUMMARY: Creates a defined contribution plan for elected officials. Does not include judges.
POSITION: Not reviewed. AOC staff does not work on retirement bills.
STATUS: Referred to Ways and Means

SB 5982
SUMMARY: Increases the retirement age for persons hired after 12/31/15
POSITION: Not reviewed. AOC staff does not work on retirement bills.
STATUS: Referred to Ways & Means

SB 6005
SUMMARY: Changes the average final wage calculation for retirees hired after 7/1/15.
POSITION: Not reviewed. AOC staff does not work on retirement bills.
STATUS: Referred to Ways & Means

ELECTIONS

~~HB 1051~~
SUMMARY: Makes Supreme Court justice elections partisan.
POSITION: Oppose
STATUS: Dead

~~HB 1350~~
SUMMARY: Providing for the election of Supreme Court justices from three judicial districts.
POSITION: Watch
STATUS: Dead

~~HB 2030~~
SUMMARY: Establishing districts from which Supreme Court justices are elected.
POSITION: Watch
STATUS: Dead

~~HJR 4201~~
SUMMARY: Creating election districts for Supreme Court judicial positions.
POSITION: Watch
STATUS: Dead

~~HJR 4207~~
SUMMARY: Requires that all mandatory, regulatory, licensing, and disciplinary functions regarding the practice of law and administration of justice reside exclusively in the Supreme Court.
POSITION: Not reviewed
STATUS: Dead

~~HJR 4211~~
SUMMARY: Amending the Constitution to provide for Supreme Court districts.
POSITION: Watch
STATUS: Dead

~~SB 5685~~
SUMMARY: Concerning the election of Supreme Court justices by district.
POSITION: Watch
STATUS: Dead

~~SJR 8205~~
SUMMARY: Amending the state Constitution so that justices of the Supreme Court are elected by qualified electors of a Supreme Court judicial district.
POSITION: Watch
STATUS: Died in Senate Rules.

PROBLEM SOLVING COURTS

~~HB 1305~~/SB 5107
SUMMARY: Encourages the creation of therapeutic courts in Washington and consolidates current law into a single chapter.
POSITION: Support
STATUS: Passed Senate unanimously and was heard in House Judiciary on March 12.

LEGAL FINANCIAL OBLIGATIONS

~~HB 1016~~
SUMMARY: If offender is homeless or mentally ill, failure to pay legal financial obligations is not willful noncompliance.
POSITION: Not reviewed
STATUS: Dead

E2SHB 1390/~~SB 5713~~
SUMMARY: Eliminates interest accrual on the non-restitution portions of legal financial obligations and modifies standards to reduce or waive interest. Creates indigency exception. Establishes provisions governing payment plans and priority of payment of LFOs. Addresses sanctioning for noncompliance. Makes DNA fee a one-time payment. Has technology-related issues.
POSITION: Watch
STATUS: Bill passed House 94-4 and was referred to Senate Law & Justice.

JURY SERVICE

SHB 1610
SUMMARY: Reduces the term of service for jurors. Allows exception for smaller jury pools.
POSITION: Support
STATUS: Heard in House Judiciary on 2/10. Referred to Rules.

OTHER

~~HB 1772~~
SUMMARY: Repealing provisions concerning the Washington State Bar Association.
POSITION: Not reviewed
STATUS: Dead

~~HB 1885~~/2SSB 5755
SUMMARY: Implements recommendations of the Justice Reinvestment Initiative by addressing and mitigating the impacts of property crimes.
POSITION: Watch
STATUS: Senate bill passed 40-9 and was referred to House Public Safety.

HB 1943
SUMMARY: Creates standards for electronic monitoring/home detention. Requires AOC to develop forms.
POSITION: Watch
STATUS: Passed House 96-1 and is scheduled in Senate Law & Justice on March 16.

~~HB 2076/SSB 5752~~
SUMMARY: The Caseload Forecast Council (CFC) must make recommendations for producing racial impact statements on the effect proposed legislation will have on racial and ethnic minorities, including how legislation will impact the racial and ethnic composition of the criminal and juvenile justice systems.
POSITION: Support
STATUS: Bill died in Rules.

SHB 2085
SUMMARY: Authorizes community restitution/community service in lieu of payment for traffic infractions.
POSITION: Not reviewed. AOC offered a technical amendment.
STATUS: Passed House 83-15 and was referred to Senate Law & Justice.

SSB 5449/~~HB 2111~~
SUMMARY: Creates a tax division of the court of appeals.
POSITION: Concerns
STATUS: Bill is in Ways & Means and was designated NTIB.

SB 5647
SUMMARY: Allowing counties to create guardianship courthouse facilitator programs.
POSITION: No position
STATUS: Passed Senate 48-0 and is scheduled for hearing in House Judiciary on March 19.

SB 5658
SUMMARY: The requirement to process certain documents is moved from the county clerk to the petitioning party. Applies to seven statutes.
POSITION: Not reviewed.
STATUS: Passed Senate 47-1 and is scheduled for hearing in House Judiciary on March 18.

~~SB 5766~~
SUMMARY: Concerning monitoring agencies providing electronic monitoring.
POSITION: Watch
STATUS: Died in Senate Rules.

BUDGET

HB 1105/SB 5076
SUMMARY: Early supplemental operating budget, limited to wildfire and mental health needs.
POSITION: Not reviewed
STATUS: Signed by governor

HB 1106/SB 5077
SUMMARY: Making 2015-2017 operating appropriations.
POSITION: Pro on judicial branch section. (Governor's version includes Supreme Court budget)
STATUS: Heard in House and Senate on 1/14.

HB 1115/ SB 5097
SUMMARY: Capital budget includes funding for maintenance of Temple of Justice.
POSITION: Support judicial branch portions.
STATUS: Heard in House on 1/20 and Senate on 2/5.

SB 5064/ ~~HB 1477~~
SUMMARY: Requires a quarterly revenue forecast on February 20th during both a long and short legislative session year.
POSITION: Not reviewed
STATUS: Senate bill passed senate unanimously and referred to Appropriations. No hearing scheduled on House bill.

BOARD FOR JUDICIAL ADMINISTRATION

POSITIONS TAKEN As of
03/12/2015

Bill	Bill Title	Position/Comments	Date	Leg Status
HB 1022	**Bail bond agreements**			
		------	01/26/2015	S Law & Justice
		Support	01/26/2015	S Law & Justice
HB 1028	~~**Court security**~~			
		Support Mellani signed in Pro at hearing	01/20/2015	H Judiciary
		Under Review Bill is the same as that proposed by DMCJA previously but is not a DMCJA request bill this year. Mellani will research why superior courts to find out why they are not included and whether there are similar provisions. BJA Leg Com will review on 1/20.	01/12/2015	H Judiciary
~~HB 1061 (5174)~~	~~**District judges, Skagit Cnty**~~			
		Request Judge Svaren will testify at hearing.	01/12/2015	H Rules X
HB 1105 (5076)	**Operating sup budget 2015**			
		Support Mellani will sign in pro at hearing, being as specific to the BJA requests as possible. Likewise, 1106 and capital budget.	01/12/2015	H subst for
HB 1106 (5077)	**Operating budget 2015-2017**			
		Support Mellani will sign in pro at hearing, being as specific to the BJA requests as possible. Likewise, 1105 and capital budget.	01/12/2015	H Approps
HB 1111	**Court transcripts**			
		Request Mellani will testify if someone from the Court Management Council cannot.	01/12/2015	S Law & Justice
HB 1248	**Court proceedings**			
		No Position	01/20/2015	H subst for

Tab 7

WASHINGTON COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

March 20, 2015 BJA Update

State Revenue and Budget Update

- The current economic and revenue operating environment is much the same as it was in November 2014 (the previous forecast date).
    - As of the February 20, 2015 forecast, general fund revenue is expected to increase by 8.7% to about $36.5 billion for the biennium ending June 30, 2017 and revenue for the biennium ending June 30, 2019 is expected to increase 9.1% to $39.8 billion ($3.3 billion between biennia)
    - The increase in revenue for 2015-2017 is about $2.9 billion. The increase necessary to maintain and fund new and existing programs is $2.1 billion, leaving $800 million for policy additions. Almost 75% ($2.1 billion) of the new revenue will be used to fund programs and costs previously implemented by the state legislature.
    - There are definitional issues between what the Governor identifies as ongoing costs and what the Senate identifies as ongoing costs (about a $1.1 billion difference).
    - McCleary still needs to be funded at $1.5 billion - $2.0 billion.
    - Initiative 1351 is estimated to cost $2 billion during the 15-17 biennium unless amended by the legislature.
    - Even though revenue is projected to increase, costs are also increasing at an equal or greater pace.
- The February 20 revenue forecast will not cause the legislature to pass the supplemental budget sooner (previously I speculated that they might pass the supplemental sooner with an earlier forecast).
- Judicial branch agencies have not been asked to submit or describe impacts of budget reductions. This is both good news and not so good news. It may be an indicator that the legislature is not actively thinking about budget cuts to the judicial branch or it could mean that they don't care what the impacts would be.
- The House will release their version of the budget on March 23, 2015. We continue to meet with legislators, legislative staff and stakeholders regarding our budget submittal.

JIS Assessment Update

- On March 6, 2015 the Judicial Information System Committee (JISC) unanimously agreed to recommend to the Supreme Court that the Judicial Information System Assessment/penalty and the base traffic infraction penalty be increased by $6 each. The JIS assessment would increase from $17 to $23 and the base infraction penalty from $42 to $48. The new infraction amount would be $136.

- The increase, if approved, would generate additional revenue, estimated to be:

Biennium	Local General Fund	State General Fund	JIS Account
2015-2017	$3,840,000	$4,631,000	$8,471,000
2017-2019	$5,120,000	$6,174,000	$11,300,000
2019-2021	$5,120,000	$6,174,000	$11,300,000
2021-2023	$5,120,000	$6,174,000	$11,300,000

- The increase is necessary because the legislature has taken approximately $22 million from the JIS account and we have two large information technology projects and other increased costs. The increase will allow continuation of those projects.

Tab 8

March 10, 2015

TO: Board for Judicial Administration Members

FROM: Judge John M. Meyer, BJA Court Education Committee Chair

RE: Court Education Committee Report for March 20, 2015

I. Work in Progress

The Court Education Committee (CEC) met on March 2 from 9 a.m. – noon at SeaTac. The primary focus was to review different models of judicial education from other states and the Committee reviewed Arizona and Idaho court education including how they are funded. The CEC is interested in evolving the current Washington State model.

Judge Douglas Fair, Snohomish District Court, has been appointed the Co-chair of the CEC.

On March 2, the CEC was invited to attend the Board for Court Education's (BCE) meeting. The BCE and CEC discussed the future of judicial education and BCE members shared thoughts on what the Board did well and what challenges they faced. Very valuable discussion.

The next CEC meeting will be April 17 from 9 a.m. – noon at the AOC SeaTac Office.

II. Short-term Goals

Continue to research education models from around the country with a mixture of judicial education under the Administrative Office of the Courts and those under law schools or other organizations. Dean Annette Clark has already begun contacting the law school deans across the country and asking if they are responsible for the education of judges and if so, how it works.

Develop a report on current Washington State education models to compare information from other states including funding sources, number of personnel, and the scope of education provided.

Continue interviewing the various education committees to determine their actual educational needs and discuss ways to fund education in the future. Would like to find funding to reinstate the Judicial Education Leadership Institutes.

Review current policies, procedures and guidelines developed by the BCE and adopted by the CEC along with the advisory and special committees currently active under the BCE to determine if they need to remain active, sunsetted, or formatted in a different manner under the CEC.

Review how biennial and supplemental budget requests are developed and submitted. Explore how the Supreme Court budget process may help expand educational funding.

III. Long-term Goals

Develop a stable funding source for court education.

Tab 9

BOARD FOR JUDICIAL ADMINISTRATION RULES (BJAR)

TABLE OF RULES

BJAR
PREAMBLE

The power of the judiciary to make administrative policy governing its operations is an essential element of its constitutional status as an equal branch of government. The Board for Judicial Administration is established to adopt policies and provide strategic leadership for the courts at large, enabling the judiciary to speak with one voice.

[Adopted effective January 25, 2000.]

BJAR 1
BOARD FOR JUDICIAL ADMINISTRATION

The Board for Judicial Administration is created to provide effective leadership to the state courts and to develop policy to enhance the administration of the court system in Washington State. Judges serving on the Board for Judicial Administration shall pursue the best interests of the judiciary at large.

[Amended effective October 29, 1993; January 25, 2000.]

BJAR 2
COMPOSITION

(a) Membership. The Board for Judicial Administration shall consist of judges from all levels of court selected for their demonstrated interest in and commitment to judicial administration and court improvement. The Board shall consist of five members from the appellate courts (two from the Supreme Court, one of whom shall be the Chief Justice, and one from each division of the Court of Appeals), five members from the superior courts, one of whom shall be the President of the Superior Court Judges' Association, five members of the courts of limited jurisdiction, one of whom shall be the President of the District and Municipal Court Judges' Association, two members of the Washington State Bar Association (non-voting) and the Administrator for the Courts (non-voting).

(b) Selection. Members shall be selected based upon a process established by their respective associations or court level which considers demonstrated commitment to improving the courts, racial and gender diversity as well as geographic and caseload differences.

(c) Terms of Office.

(1) Of the members first appointed, one justice of the Supreme Court shall be appointed for a two-year term; one judge from each of the other levels of court for a four-year term; one judge from each of the other levels of court and one Washington State Bar Association member for a three-year term; one judge from the other levels of court and one Washington State Bar Association member for a two-year term; and one judge from each level of trial court for a one-year term. Provided that the terms of the District and Municipal Court Judges' Association members whose terms begin on July 1, 2010 and July 1, 2011 shall be for two years and the terms of the Superior Court Judges' Association members whose terms begin on July 1, 2010 and July 1, 2013 shall be for two years each. Thereafter, voting members shall serve four-year terms and the Washington State Bar Association members for three-year terms commencing annually on June 1. The Chief Justice, the President Judges and the Administrator for the Courts shall serve during tenure.

(2) Members serving on the BJA shall be granted equivalent pro tempore time.

[Amended effective October 29, 1993; February 16, 1995; January 25, 2000; June 30, 2010.]

BJAR RULE 3
OPERATION

(a) Leadership. The Board for Judicial Administration shall be chaired by the Chief Justice of the Washington Supreme Court in conjunction with a Member Chair who shall be elected by the Board. The duties of the Chief Justice Chair and the Member Chair shall be clearly articulated in the by-laws. Meetings of the Board may be convened by either chair and held at least bimonthly. Any Board member may submit issues for the meeting agenda.

(b) Committees. Ad hoc and standing committees may be appointed for the purpose of facilitating the work of the Board. Non-judicial committee members shall participate in non-voting advisory capacity only.

(1) The Board shall appoint at least four standing committees: Policy and Planning, Budget and Funding, Education, and Legislative. Other committees may be convened as determined by the Board.

(2) The Chief Justice and the Member Chair shall nominate for the Board's approval the chairs and members of the committees. Committee membership may include citizens, experts from the private sector, members of the legal community, legislators, clerks and court administrators.

(c) Voting. All decisions of the Board shall be made by majority vote of those present and voting provided there is one affirmative vote from each level of court. Eight voting members will constitute a quorum provided at least one judge from each level of court is present. Telephonic or electronic attendance shall be permitted but no member shall be allowed to cast a vote by proxy.

[Adopted effective January 25, 2000; amended effective September 1, 2014.]

BJAR 4
DUTIES

(a) The Board shall establish a long-range plan for the judiciary;
(b) The Board shall continually review the core missions and best practices of the courts;
(c) The Board shall develop a funding strategy for the judiciary consistent with the long-range plan and RCW 43.135.060;
(d) The Board shall assess the adequacy of resources necessary for the operation of an independent judiciary;
(e) The Board shall speak on behalf of the judicial branch of government and develop statewide policy to enhance the operation of the state court system; and
(f) The Board shall have the authority to conduct research or create study groups for the purpose of improving the courts.

[Adopted effective January 25, 2000.]

BJAR 5
STAFF

Staff for the Board for Judicial Administration shall be provided by the Administrator for the Courts.

[Adopted effective January 25, 2000.]

BOARD FOR JUDICIAL ADMINISTRATION
BYLAWS

ARTICLE I
Purpose

The Board for Judicial Administration shall adopt policies and provide leadership for the administration of justice in Washington courts. Included in, but not limited to, that responsibility is: 1) establishing a judicial position on legislation; 2) providing direction to the Administrative Office of the Courts on legislative and other administrative matters affecting the administration of justice; 3) fostering the local administration of justice by improving communication within the judicial branch; and 4) providing leadership for the courts at large, enabling the judiciary to speak with one voice.

ARTICLE II
Membership

Membership in the Board for Judicial Administration shall consist of the Chief Justice and one other member of the Supreme Court, one member from each division of the Court of Appeals, five members from the Superior Court Judges' Association, one of whom shall be the President; five members from the District and Municipal Court Judges' Association, one of whom shall be the President. It shall also include as non-voting members two members of the Washington State Bar Association appointed by the Board of Governors; the Administrator for the Courts; and the Presiding Chief Judge of the Court of Appeals, the President-elect judge of the Superior Court Judges' Association and the President-elect judge of the District and Municipal Court Judges' Association.

ARTICLE III
Officers and Representatives

The Chief Justice of the Supreme Court shall chair the Board for Judicial Administration in conjunction with a Member chair. The Member chair shall be elected by the Board and shall serve a two year term. The Member chair position shall be filled alternately between a voting Board member who is a superior court judge and a voting Board member who is either a district or municipal court judge.

ARTICLE IV
Duties of Officers

The Chief Justice Chair shall preside at all meetings of the Board, performing the duties usually incident to such office, and shall be the official spokesperson for the Board. The Chief Justice chair and the Member chair shall nominate for the Board's approval the chairs of all committees. The Member chair shall perform the duties of the Chief Justice chair in the absence or incapacity of the Chief Justice chair.

ARTICLE V
Vacancies

If a vacancy occurs in any representative position, the bylaws of the governing groups shall determine how the vacancy will be filled.

ARTICLE VI
Committees

Standing committees as well as ad hoc committees and task forces of the Board for Judicial Administration shall be established by majority vote.

Each committee shall have such authority as the Board deems appropriate.

The Board for Judicial Administration will designate the chair of all standing, ad hoc, and task force committees created by the Board. Membership on all committees and task forces will reflect representation from all court levels. Committees shall report in writing to the Board for Judicial Administration as appropriate to their charge. The Chair of each standing committee shall be asked to attend one BJA meeting per year, at a minimum, to report on the committee's work. The terms of standing committee members shall not exceed two years. The Board for Judicial Administration may reappoint members of standing committees to one additional term. The terms of ad hoc and task force committee members will have terms as determined by their charge.

ARTICLE VII
Executive Committee

There shall be an Executive Committee composed of Board for Judicial Administration members, and consisting of the co-chairs, a Judge from the Court of Appeals selected by and from the Court of Appeals members of the Board, the President Judge of the Superior Court Judges' Association, the President Judge of the District Municipal Court Judges' Association, and non-voting members to include one Washington State Bar Association representative selected by the Chief Justice, President-elect judge of the Superior Court Judges' Association, President-elect judge of the District and Municipal Court Judges' Association and the Administrator for the Courts.

It is the purpose of this committee to consider and take action on emergency matters arising between Board meetings, subject to ratification of the Board.

The Executive Committee shall serve as the Legislative Committee as established under BJAR 3(b)(1). During legislative sessions, the Executive Committee is authorized to conduct telephone conferences for the purpose of reviewing legislative positions.

ARTICLE VIII
Regular Meetings

There shall be regularly scheduled meetings of the Board for Judicial Administration at least bi-monthly. Reasonable notice of meetings shall be given each member.

ARTICLE IX
Special Meetings

Special meetings may be called by any member of the Board. Reasonable notice of special meetings shall be given each member.

ARTICLE X
Quorum

Eight voting members of the Board shall constitute a quorum provided each court level is represented.

ARTICLE XI
Voting

Each judicial member of the Board for Judicial Administration shall have one vote. All decisions of the Board shall be made by majority vote of those present and voting provided there is one affirmative vote from each level of court. Telephonic or electronic attendance shall be permitted but no member shall be allowed to cast a vote by proxy.

ARTICLE XII
Amendments and Repeal of Bylaws

These bylaws may be amended or modified at any regular or special meeting of the Board, at which a quorum is present, by majority vote. No motion or resolution for amendment may be considered at the meeting in which they are proposed.

Approved for Circulation--7/27/87
Amended 1/21/00
Amended 9/13/00
Amended 5/17/02
Amended 5/16/03
Amended 10/21/05
Amended 03/16/07

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BOARD FOR JUDICIAL ADMINISTRATION

PROCESS AND GUIDELINES FOR RESOLUTION REQUESTS

The Board for Judicial Administration (Board) was established to adopt policies and provide strategic leadership for the courts at large, enabling the Washington State judiciary to speak with one voice. To fulfill these objectives, the BJA may consider adopting resolutions on substantive topics relating to the administration of justice.

Resolutions may be aspirational in nature, support a particular position, or serve as a call to action. Resolutions may support funding requests, but do not stand alone as a statement of funding priorities or indicate an intent by the Board to proactively seek funding Resolutions are not long-term policy statements and their adoption does not establish the Board's work plan or priorities.
The absence of a Resolution on a particular subject does not indicate a lack of interest or concern by the Board in regard to a particular subject or issue.

In determining whether to adopt a proposed resolution, the Board shall give consideration to the following:

- Whether the Resolution advances the Principal Policy Objectives of the Judicial Branch.

- The relation of the Resolution to priorities delineated in existing strategic and long range plans.

- The availability of resources necessary to properly act upon the resolution.

- The need to ensure the importance of resolutions adopted by the Board is not diluted by the adoption of large numbers of resolutions.

In order to ensure timely and thorough consideration of proposed resolutions, the following guidelines regarding procedure, form and content are to be followed:

- Resolutions may be proposed by any Board member. The requestor shall submit the resolution, in writing, with a request form containing a brief statement of purpose and explanation, to the Associate Director of the Board for Judicial Administration.

- Resolutions should not be more than two pages in length. An appropriate balance must be struck between background information and a clear statement of action. Traditional resolution format should be followed. Resolutions should cover only a single subject unless there is a clear and specific reason to include more than one subject. Resolutions must be short-term and stated in precise language.

- Resolutions must include a specific expiration date or will automatically expire in five years. Resolutions will not be automatically reviewed upon expiration of their term, but may be reviewed upon request for reauthorization. Resolutions may be terminated prior to their expiration date as determined by the Board.

- The Associate Director shall refer properly submitted resolutions to appropriate staff, and/or to an appropriate standing committee (or committees) for review and recommendation, or directly to the Board's Executive Committee, as appropriate. Review by the Board's Executive Committee will precede review by the full Board membership. Such review may be done via e-mail communication rather than in-person discussion when practical. Resolutions may be reviewed for style and content. Suggestions and comments will be reported back to the initiating requestor as appropriate.

- The report and recommendation of the Executive Committee shall be presented to the BJA membership at the next reasonably available meeting, at which time the resolution may be considered. Action on the proposed resolution will be taken in accordance with the BJAR and bylaws. The Board may approve or reject proposed resolutions and may make substantive changes to the resolutions.

- Approved resolutions will be numbered, maintained on the Board for Judicial Administration section of the Washington Courts website, and disseminated as determined by the Board for Judicial Administration.

PRINCIPAL POLICY OBJECTIVES
OF THE WASHINGTON STATE JUDICIAL BRANCH

1. **Fair and Effective Administration of Justice in All Civil and Criminal Cases.** Washington courts will openly, fairly, efficiently and effectively administer justice in all criminal and civil cases, consistent with constitutional mandates and the judiciary's duty to maintain the highest level of public trust and confidence in the courts.

2. **Accessibility.** Washington courts, court facilities and court systems will be open and accessible to all participants regardless of cultural, linguistic, ability-based or other characteristics that serve as access barriers.

3. **Access to Necessary Representation.** Constitutional and statutory guarantees of the right to counsel shall be effectively implemented. Litigants with important interest at stake in civil judicial proceedings should have meaningful access to counsel.

4. **Commitment to Effective Court Management.** Washington courts will employ and maintain systems and practices that enhance effective court management.

5. **Appropriate Staffing and Support.** Washington courts will be appropriately staffed and effectively managed, and court personnel, court managers and court systems will be effectively supported.

BOARD FOR JUDICIAL ADMINISTRATION

RESOLUTION REQUEST COVER SHEET

(INSERT PROPOSED RESOLUTION TITLE HERE)

SUBMITTED BY: (INSERT NAME HERE)

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(1) Name(s) of Proponent(s):

(2) Spokesperson(s): (List who will address the BJA and their contact information.)

(3) Purpose: (State succinctly what the resolution seeks to accomplish.)

(4) Desired Result: (Please state what action(s) would be taken as a result of this resolution and which party/-ies would be taking action.)

(5) Expedited Consideration: (Please state whether expedited consideration is requested and, if so, please explain the need to expedite consideration.)

(6) Supporting Material: (Please list and attach all supporting documents.)