Scheduling and Discovery Practice in Judge Shaffer's Court

This document is intended to provide guidance to litigants about scheduling and discovery practice in Judge Shaffer's court.

1. Scheduling

1.1. Trial Continuances and Case Schedule Changes

In general, Judge Shaffer allows only a short trial date adjustment, as permitted by CR 40(d), on condition the request is made before the deadline for trial date changes set forth in the case schedule.

Trial continuance requests are normally denied, absent a showing of good cause, such as unanticipated prejudice to a party, and even then, a continuance will be granted only for the shortest feasible period of time. *See* CR 40(d). For example, continuances to conduct further discovery or to discuss settlement will generally not be granted. Continuances because of trial date conflict are normally granted only if the trial date is very close and none of the cases set for the trial date have resolved. If a continuance is granted, it will normally be the last the parties should expect.

Other dates in the case schedule may be adjusted without my signature by written stipulation of the attorneys. Reasonable accommodation of other attorneys' schedules is greatly appreciated.

1.2. Motions Shortening Time

Any request that the court decide a motion on shortened time must comply with the requirements of King County LR 7(b)(10). **As soon as** a moving party decides to seek an order shortening time, that party must contact the opposing party in a matter that is likely to result in actual notice of the pending motion to shorten time. The declaration in support of the motion must indicate what efforts have been undertaken to notify opposing parties.

In general, absent good cause and unavoidable circumstances, motions to shorten time will not be granted.

1.3. General Scheduling Principles

Whenever possible, consult with opposing counsel before scheduling hearings and motions. Opposing counsel should assert a conflict only if one actually exists. If opposing counsel does not promptly respond or is otherwise uncooperative, the requirement to consult is waived.

Please provide notice to opposing counsel at the earliest possible time when canceling or striking a motion or hearing.

Every effort should be made to serve opposing counsel at a time and place calculated to provide actual notice. For example, delivering important documents after 4:30 p.m. is not well calculated to permit a meaningful review that day.

2. DISCOVERY

2.1. General Standards

Both parties are expected to resolve discovery disputes in a timely fashion. Court intervention should be an unusual occurrence.

2.2 Discovery Conference Call

If the parties cannot resolve a discovery dispute, the parties are still welcome to file a motion. However, the parties **may also schedule a conference call with Judge Shaffer before bringing such a motion**. She will be available to counsel on both sides via phone within 1-3 court days of being contacted by the parties. Feel free to take advantage of this new policy if it will streamline discovery issues.

2.3. Motions to Compel

Judge Shaffer will resolve a dispute over a single interrogatory or request for production, or a dispute arising as to a line of questioning in a deposition on an emergency basis over the telephone. A written motion is unnecessary.

A written motion generally does not provide sufficient information to rule intelligently on complex discovery issues. Judge Shaffer will often require the parties to appear on a Friday morning to confer in the jury room, with Judge Shaffer's assistance, as she has time to provide it. It is debatable whether it is helpful to have Judge Shaffer ask whether requested information is likely to lead to discovery of admissible information, and if so, direct a response, but she will provide this service if you wish to come to court and wait through a morning of other motions.

Do not set a discovery motion or schedule a Friday meeting in my court unless you have really **met and conferred** pursuant to the requirements of CR 26(i).

Please do not attach stacks of self-serving discovery letters for motions to compel. Judge Shaffer will ask two simple questions: First, what does the requesting party want that they do not have? Second, why can't they have it? Please focus on these questions before coming to my courtroom for a Friday morning discussion regarding discovery.

2.4. Production of Discovery

Parties are expected to produce any information that is not otherwise privileged.

Be familiar with CRs 26-37 and King County LRs 26-37. Discoverable information includes anything reasonably calculated to "lead to" the discovery of admissible evidence. CR 26(b)(1). In general, failure to provide discovery may *not* be excused on the ground that what is sought is objectionable **unless the party failing to act has applied for a CR 26(c) protective order**. LR 37(d). For information on the court's policies regarding protective orders, please see Section 2.4 of this memorandum.

Volume alone is normally not sufficient to make the requested discovery burdensome. Inspection is often a reasonable option to deal with broadly phrased discovery requests that entail production of a very large volume of information.

2.5. Protective Orders and Stipulations

Judge Shaffer encourages parties to stipulate amongst themselves regarding protective orders excluding materials from discovery.

If counsel concludes that a motion to seal documents in the court record is necessary, they must bring a motion that adheres to the requirements of CR 26 and GR 15 for motions to seal documents in the court record. A motion for a protective order must also be consistent with the Washington Supreme Court's interpretation of the court rules, which requires, in part, that the parties make a specific showing that "the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest." Please review *State v. Waldon*, 148 Wn. App. 952, 962 (2009) (sealing orders that rely exclusively on GR15 do not satisfy the Constitutional benchmark articulated in *Seattle Times v. Ishikawa*), *Indigo Real Estate Serv. v. Rousey*, 151 Wn. App. 941 (2009), *Seattle Times v. Ishikawa*, 97 Wn. 2d 30, 37-39 (1982) (establishing five factors trial courts must consider to decide whether a motion to restrict access meets constitutional requirements), and *Bennett v. Smith Bundy*, 176 Wn. 2d 303, 314 (2013) (each request to seal should be accompanied by a document log including a statement as to why redaction or other less restrictive measures than sealing will not protect the interests at issue).

Motions and stipulations for entry of a protective order that fail to meet the requirements of CR 26 and GR 15 will be denied, even if the parties have stipulated to the motion. Parties may stipulate among themselves as to the production of materials in discovery.

A motion to seal cannot be made as part of a protective order. Such a motion must state with specificity why the court would have grounds to grant the motion. Judge Shaffer will only grant a motion to seal documents in the record only upon demonstration of good cause to do so and will restrict the scope of the documents that are to be sealed as narrowly as possible.

2.6. Sanctions

The court will impose sanctions for discovery violations. Under the commentary to the King County Local Rules 26-37, this is a mandatory duty for a court hearing a civil case.

Court Rule 26(i) provides that CR 37 sanctions may be appropriate for a willful refusal or failure to confer in good faith regarding discovery. Sanctions under this rule include dismissal, default, exclusion of witnesses or evidence, admission of facts, striking pleadings, allowing additional discovery, imposition of costs, continuance of the case; and monetary sanctions.

A sanction of dismissal or default may be imposed only if a record exists demonstrating that: (1) the party's refusal to obey the discovery order was willful or deliberate; (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial; and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *See Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn. 2d 674 (2002).

It is an abuse of the court's discretion to impose the severe sanction of limiting discovery and excluding expert witness testimony without first having considered, on the record, a less-severe sanc-

tion. *See Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494 (1997). In addition, the court must also find that the disobedient party's refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. *Ia.* Thus, before imposing a sanction of excluding witnesses, the record must demonstrate both that court first considered lesser sanctions and that the failure to comply was willful.

Monetary sanctions will be tailored to the specific situation and no greater sanction will be imposed than what is required for the particular case. *See Gammon v. Clark Equip. Co.*, 104 Wn. 2d 613 (1985). My minimum monetary sanction for other discovery violations is generally $500. Judge Shaffer will, however, consider imposing much higher sanctions, including attorneys' fees, where warranted.

Attorneys' fees will be awarded as a discovery sanction only if the request demonstrates that the fee is reasonable. The court will use the lodestar method for determining an award of attorneys' fees. The party seeking fees must demonstrate the reasonableness of the fees. Determinations of reasonableness are guided by RPC 1.5(a). *See Allard v. First Interstate Bank of Wash.*, 112 Wn. 2d 145 (1989).

Under RPC 1.5(a), the factors that are considered when determining whether a fee is reasonable are: (1) the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, and the terms of the fee agreement; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the area for similar legal services; (4) the amount at issue in the matter; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the attorney(s) performing the services; and (8) whether the fee is fixed or contingent.

Please do not cause unnecessary time and expense to the opposing party so that the court does not need to entertain a sanctions request.