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## Changes Suggested in Washington Practice and Procedure: Comparative Analysis of State Rules and Statutes with New Federal Rules Points to Desirable Amendments

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# Changes Suggested in Washington Practice and Procedure

## Comparative Analysis of State Rules and Statutes With New Federal Rules Points to Desirable Amendments

*In accordance with action taken at the July Convention of the Washington State Bar Association, the Board of Governors appointed a committee (Paul P. Ashley of Seattle, chairman) on Judicial Administration to concern itself with the matters considered and reported upon by the section on Judicial Administration of the American Bar Association. This committee divided itself into sections, and to each was assigned one of the subjects under consideration, including Pre-trial Procedure, Improvement in the Law of Evidence, Trial Practice and Administrative Agencies and Tribunals.*

*Among other things the American Bar Association recommended that the State Bar Associations undertake to bring state practice into close conformity with the Rules of Civil Procedure for the District Courts of the United States, as recently adopted. The section on this subject consists of Honorable George Donworth, formerly District Judge for the Western District of Washington and member of the advisory committee appointed by the United States Supreme Court for the drafting of the new federal rules; the Honorable John S. Robinson, Justice of the Supreme Court of the State of Washington; Mr. Elwood Hutchinson, member of the Yakima Bar and winner of the Ross A. B. A. award in 1937, and Mr. L. B. Hamblen of Spokane, chairman.*

*Already noted for their leadership in matters of judicial reform, the Bench and Bar of the state of Washington now have at their disposal the specific proposals formulated after careful study by these able men. Suggestions and criticisms from the Bar are invited and, in light of those received, further study will be given to this material before it is presented to the annual convention in July.*

Charged with the task, "to study and report back on the advisability of adopting, in whole or in part, the new federal court rules as part of the trial practice in the State of Washington," the Committee on Trial Practice has given very careful consideration to the problem, approaching it in the broad sense, covering the entire field of pleading, procedure and practice in the civil courts. While Washington, with excellent rules of practice now in force, is in the vanguard of the states with reference to judicial procedure, this committee believes that there are numerous excellent suggestions in the new federal rules which should be adopted as rules of procedure in our state courts.

Not only is there an obvious advantage in conformity (within reasonable limitations) as to practices in the federal and state courts, to lighten the task of the practicing lawyer, but—which we consider more important—the changes hereafter recommended, in our opinion, would constitute actual and substantial improvements in the administration of justice in our state courts.

The new federal rules<sup>1</sup> approach the goal stated by Chief Justice Hughes: "a simplified practice which will strip procedure of unnecessary forms, technicalities, and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."<sup>2</sup>

1. The new federal rules permit service upon attorneys by mail (Rule 5b) even though within the same city; provided three days' additional time is allowed (Rule 6e). If this modern, practical convenience to lighten the burden of the bar is permissible in federal courts, (presumably courts of greater dignity) the same would likewise seem appropriate in state courts. We, therefore, recommend adoption of a new state rule based upon these two portions of the federal rules and reading substantially as follows:

*Service by Mail.* Whenever service is required or permitted to be made upon a party represented by an attorney, except as to summons and complaint or other process, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. In addition to other methods provided by law, service of a document, other than process, upon an attorney, or upon a party not represented by an attorney, may be made by mailing to him at his last known address. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon his attorney or upon himself, if not represented by an attorney, by mail, 3 days shall be added to the prescribed period.

2. Believing that the same general method of pleading a cause of action should be followed in state as in federal courts, we recommend elimination of the distinction between statements of fact and conclusions of law in the pleading of plaintiffs' claims and defendants' counterclaims and cross-claims. Federal rule 8a, instead of requiring "a plain and concise statement of facts constituting the cause of action" as under our state code,<sup>3</sup> provides for "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>4</sup>

The obvious purpose of this rule is to eliminate motions to strike and technical objections to pleadings as containing allegations by way of conclusions rather than pure statements of ultimate facts. It is considered that allegations of conclusions within reasonable

<sup>1</sup>Adopted by the Supreme Court of the United States and effective in all federal district courts September 16, 1938.

<sup>2</sup>79 L. ed. 1920; 19 JOUR. AM. JUR. SOC. 7 (June, 1935).

<sup>3</sup>REM. REV. STAT. § 258.

<sup>4</sup>This change in language was intentional. See Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447, 450 (July, 1936).

limits do no harm, but on the contrary are frequently helpful in elucidating the pleader's theory. We therefore recommend the following rule, which is a combination of the present statute and the federal rule:

*Claims for Relief.* A complaint or other pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) the title of the cause, specifying the name of the court, the name of the county in which the action is brought and the names of the parties to the action, plaintiff and defendant; (2) a short and plain statement of the claim, showing that the pleader is entitled to relief, without unnecessary repetition; and (3) a demand for judgment for the relief to which he deems himself entitled; if the recovery of money or damages be demanded, the amount thereof shall be stated. Subject to the rules as to joinder of claims or causes of action, relief in the alternative or of several different types may be demanded.

In addition to other grounds of demurrer as provided by law, an opposing party may demur to such pleadings upon the ground that the same fails to state a claim upon which relief can be granted.

The purpose of the last sentence of the foregoing proposed rule is to change the ground of general demurrer,<sup>5</sup> so as to correspond with federal rule 12b.

3. The committee recommends adoption of the following rule, based upon federal rule 8e, authorizing alternative, hypothetical and inconsistent pleadings:

ALTERNATIVE, HYPOTHETICAL AND INCONSISTENT PLEADINGS.

(a) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.

(b) A party may set forth two or more statements of a cause of action, claim or defense alternatively or hypothetically, either in one cause of action, count or defense, or in separate causes of action, counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate causes of action, claims or defenses as he has, regardless of consistency, and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligation imposed by the verification of pleadings.

4. In *State v. Vinther*, 183 Wash. 350, 186 Wash. 691, 48 P.

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<sup>5</sup>REM. REV. STAT. § 259, subd. 6.

(2d) 915, 58 P. (2d) 357, the majority of the court *en banc* held that where a party makes an unsuccessful motion for judgment on the pleadings, the other party is thereupon entitled to judgment in his favor on the pleadings without a trial, even though there are other issues of fact raised by the pleadings. It is the view of this committee that this rule is wholly unjust and creates a trap for the unwary. To remedy this situation a rule should be adopted in accord with the dissenting opinion therein and in accord with the federal rules. (Rule 12b, d and h.) The committee therefore recommends the adoption of a rule substantially as follows:

*Motion for Judgment on the Pleadings.* After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment in his favor or on the pleadings. Denial of such a motion shall not entitle the opposing party to judgment on the pleadings in his favor if there is any material issue or issues presented by the pleadings.

5. In Washington a bill of particulars is not part of the pleadings.<sup>6</sup> The new federal rules are to the contrary (Rule 12e). The committee recommends adoption of the federal rule, both because conformity in this respect is desirable and also because the federal rule is considered superior. It is believed that this rule will substantially promote the convenience of counsel and will, in many cases, obviate the necessity of filing an entire amended pleading. The following rule is therefore recommended:

*Motion for More Definite Statement or for Bill of Particulars.* Before responding to a pleading or, if no responsive pleading is permitted, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements.

6. The committee believes that a rule should be adopted based upon federal rule 13 (a, c, g, h and i) relative to compulsory and permissive counterclaims and cross-claims against co-parties. This is in accord with the commendable modern tendency to avoid a multiplicity of suits and to facilitate the adjudication of the

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<sup>6</sup>Dudley v. Duvall, 29 Wash. 528, 70 Pac. 68 (1902); Nilson v. Ebey Land Co., 90 Wash. 295, 155 Pac. 1036 (1916).

entire controversy and all controversies between the parties. The following proposed rule (except subdivision [b]) is literally the same as the said portions of the new federal rule:

#### COUNTERCLAIMS.

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim, not the subject of a pending action, which, at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party which would be a proper counterclaim under existing statutes and rules.

(c) *Counterclaim Exceeding Opposing Claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Cross-Claim Against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(e) *Additional Parties May Be Brought In.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(f) *Separate Trials; Separate Judgments.* If the court orders separate trials, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

7. For like reasons, namely, an avoidance of multiplicity of suits and the adjudication of the entire controversy in a single action, the committee favors the adoption of a rule as to third-party practice based on federal rule 14 as follows:

#### THIRD-PARTY PRACTICE.

(a) *When Defendant May Bring in Third Party.* Before the service of his answer a defendant may move

*ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses and his counter-claims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided by law and these rules. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which, under this rule, would entitle a defendant to do so.

8. For like reasons the committee favors adoption of the following rule which is literally the same as federal rule 18b:

*Joinder of Remedies: Fraudulent Conveyances.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Referring to the last sentence thereof as to fraudulent conveyances, the committee believes that this is a substantial improvement over our present state practice which is to the contrary.<sup>7</sup> This rule conforms to the provisions of the Uniform Fraudulent Conveyance Act, Sections 9 and 10.

9. Federal rule 20 contains a desirable provision as to per-

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<sup>7</sup>O'Day v. Ambaum, 47 Wash. 684, 92 Pac. 421 (1907); Allen v. Kane, 79 Wash. 248, 140 Pac. 534 (1914).

missive joinder of plaintiffs and joinder of defendants. Rule II of our state rules of practice<sup>8</sup> contains a similar provision as to joinder of plaintiffs but no provision as to joinder of defendants except "where the plaintiff is in doubt as to the person from whom he is entitled to redress." The committee believes that a like provision as to joinder of defendants should be adopted and therefore recommends the amendment of Rule II by adding thereto the following:

PERMISSIVE JOINDER OF DEFENDANTS.

(a) All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs, according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

10. The committee believes that a rule should be adopted similar to federal rule 22 which broadens and improves the remedy of interpleader. For example, at present a plaintiff cannot bring an interpleader action if he denies liability in whole or in part to any or all of the claimants. Under the new federal rules, however, this does not prevent his bringing such a proceeding. An insurance company may, for example, deny liability for breach of some condition of the policy, but, at the same time, in the event it is held liable, may desire to have its liability determined as between contesting claimants. Certainly it is desirable that this may all be done in one single proceeding. We therefore recommend the following rule:

INTERPLEADER.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several

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<sup>8</sup>193 Wash. 40-a; REM. REV. STAT. SUPP. § 308-2.



claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted under other rules and statutes.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by REM. REV. STAT. Sec. 198 to 201, both inclusive. Actions under that statute shall be conducted in accordance with these rules.

11. Likewise, federal rule 24 broadens and improves the right of intervention. The court is thereby given discretion to permit intervention when an applicant's claim or defense and the main action have a question of law or fact in common. The committee recommends the following rule:

INTERVENTION.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the State of Washington confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the State of Washington confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the State of Washington gives a right to intervene.

12. In view of the liberal rules as to joinder of parties, it seems desirable to include also federal rule 25 (a) (2) providing

for continuance of the action as to surviving parties in the event of death:

*Proceedings as to Surviving Parties.* In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

13. With reference to depositions and oral examinations before trial, our present state rule VII<sup>9</sup> is an excellent one. The committee believes, however, that the new federal rules contain excellent suggestions for broadening and improving the same, especially (1) in permitting the taking of the deposition of any witness before trial, even though not in the position of an adverse party and irrespective of residence or personal disability, and (2) in substituting the simple practice by notice for the old cumbersome procedure by commission and previous order of court as to all depositions, in the absence of stipulation, whether taken within or without the state, and (3) in its provisions authorizing the court to issue orders for the protection of rights of parties and deponents. As is well known, this feature is one of the outstanding innovations of the new federal rules. (Rules 26, 30, 31.)

The committee therefore recommends (1) that the said rule VII of our Washington rules of practice be amended by eliminating therefrom subdivision (a) as to depositions but retaining subdivision (b), and changing the title or heading thereof to read: "Oral examination of adverse witnesses before trial"; and (2) that a new rule or rules modeled after the said federal rules be adopted as follows:

#### DEPOSITIONS.

(a) *When Depositions May Be Taken.* By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by these rules, the deponent

may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who, at the time of taking the deposition, was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 20 miles from the place of trial or hearing, or is out of the county, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court in the United States or of any state has been dis-

missed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefore.

(d) *Objections to Admissibility.* Subject to the provisions of these rules relative to waiver, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(e) *Effect of Taking or Using Depositions.* A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (c) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(f) *Stipulations Regarding the Taking of Depositions.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

(g) *Notice of Taking Depositions Upon Oral Examination.* A party desiring to take the deposition of any person upon oral examination within or without this state shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may, for cause shown, enlarge or shorten the time. Issuance of a commission or an order of court for the taking of a deposition upon oral examination or upon written interrogatories shall not be necessary.

(h) *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some desig-

nated place other than that stated in the notice, or that it may be taken only on written interrogatories; or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that, after being sealed, the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witnesses from annoyance, embarrassment, or oppression.

(i) *Record of Examination; Oath; Objections.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(j) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending, or if within this state, the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as hereinabove provided. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(k) *Failure to Attend or to Serve Subpoena; Expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness, because of such failure, does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(1) *Depositions of Witnesses Upon Written Interrogatories.* A party desiring to take the deposition of any person upon written interrogatories within or without this state, shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(m) *Orders for Protection Where Deposition Upon Written Interrogatories.* When a deposition is to be taken upon written interrogatories, after the service of said interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order hereinabove specified which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

We also recommend the following, based on rule 32, as to waiver of irregularity:

## EFFECTS OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.

(a) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to Taking of Deposition*

(1) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under these rules for the taking of a deposition are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

14. Under our state statute the court may order either party to give to the other an inspection and permission to take a copy of documentary evidence.<sup>10</sup> Rule 34 contains a desirable extension thereof in that the court is also empowered to order either party

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<sup>10</sup>REM. REV. STAT. § 1262.

to permit inspection of any real or personal property. The committee therefore recommends the following rule, which is a literal copy thereof:

*Discovery and Production of Documents and Things for Inspection, Copying or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

15. Our state statute permits physical examination in personal injury cases by a physician.<sup>11</sup> Rule 35 contains a desirable extension thereof in permitting a medical examination in any action in which the mental or physical condition of a party is in controversy. It also permits the person examined, upon request, to obtain a copy of the physician's report, subject to certain conditions as to exchange of medical reports. The committee, therefore, recommends adoption of the following rule, which is an exact copy thereof:

PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) *Order for Examination.* In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and

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<sup>11</sup>REM. REV. STAT. § 12301-1.



conclusions. After such request and delivery the party causing the examination to be made shall be entitled, upon request, to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court, on motion and notice, may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

16. Rule 36 likewise contains a desirable extension of our state statute relative to request for admission of genuineness of documents.<sup>12</sup> Under this rule a party may likewise serve upon another party a request for the admission of the truth of any relevant matters of fact. This should substantially expedite the trial of cases by avoiding the necessity of taking time to prove factual matters which are not actually the subject of bona fide dispute. The committee therefore recommends the following rule which is a substantial copy of rules 36 and 37 (c):

#### ADMISSIONS OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) *Request for Admission.* At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in said request. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

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<sup>12</sup>REM. REV. STAT. § 1263.

(b) *Effect of Admission.* Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

(c) *Expenses on Refusal to Admit.* If a party, after being served with such request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

17. In view of the liberality of these rules as to joinder of parties and claims, rule 42 should be adopted authorizing consolidation of actions for trial and especially authorizing separate trials of different claims or issues in the discretion of the court where necessary in furtherance of convenience or to avoid prejudice:

#### CONSOLIDATION; SEPARATE TRIALS.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate Trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

18. While probably not so important, the committee recommends the adoption of rule 43(e) authorizing the court to hear motions on oral testimony or depositions, as well as affidavits:

*Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

19. Conformity is desirable as to methods of proof of official

records; and rule 44 contains an excellent provision with reference thereto. The same also provides for the admissibility of evidence of a certificate of an officer that the records in his office contain no record or entry of a specified tenor. At present we have no statute or rule authorizing this, but it is desirable and convenient that there should be. The committee therefore recommends adoption of the following rule which is a literal copy thereof:

PROOF OF OFFICIAL RECORD.

(a) *Authentication of Copy.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of Lack of Record.* A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other Proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

20. Under repeated decisions of our state supreme court, when all parties have moved for a directed verdict, and none of the parties withdraws his motion before the court rules, trial by jury is waived and it is the duty of the court to discharge the jury and decide the case, at least unless the submission of certain ques-

tions to the jury is specially requested.<sup>13</sup> In the very recent case of *Hardinger v. Till* the court recognized this rule, but qualified the same by applying an exception in the case where one party, before the court rules on either of the motions, withdraws his motion and requests that all issues of fact be submitted to the jury.<sup>14</sup> Federal rule 50(a) is to the contrary; and the committee recommends that the following statement therein should be adopted, both for the sake of conformity and also because the latter is considered preferable in eliminating an illogical and unjust technicality:

*Motion for a Directed Verdict.* A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

21. We recommend that the following statement based on rule 52(a) should be added to the first paragraph of rule XI of our state rules of practice:<sup>15</sup>

Requests for findings of fact or conclusions of law are not necessary for purposes of appellate review, except where error is assigned upon the failure of the court to make any findings at all.

22. Rule 56 contains a desirable provision authorizing entry of summary judgment where it appears upon the pleadings and affidavits that there is no genuine issue. This practice has been found beneficial in relieving congested trial calendars in New York and other states. We therefore recommend the following, which is an exact copy of said rule, with a clause added to paragraph (d) similar to the provision in rule 16 as to pretrial procedure:

#### SUMMARY JUDGMENT.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall

<sup>13</sup>*Peoples Bank & Trust Co. v. Douglas*, 154 Wash. 450, 282 Pac. 838 (1929) and cases cited; *Hardinger v. Till*, 97 Wash. Dec. 117, 84 P. (2d) 668 (1938).

<sup>14</sup>The holding in the *Hardinger* case therefore establishes that the mere making of motions by both parties does not authorize the discharge of the jury, since either party may withdraw his motion at any time before the court rules on either of the motions.

<sup>15</sup>193 Wash. 48-a, REM. REV. STAT. SUPP. § 308-11.

be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly, unless such order is modified at the trial to prevent manifest injustice.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in

bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

23. Rule 57 contains the following desirable provision with reference to declaratory judgment proceedings, which further effectuates the salutary object of that statute:

*Declaratory Judgments.* The procedure for obtaining a declaratory judgment pursuant to statute shall be in accordance with these rules; and the right to trial by jury may be demanded under the circumstances and in the manner provided by law. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

We consider the last two sentences thereof as to existence of another adequate remedy and as to a speedy hearing especially desirable in connection with the declaratory judgment statute.

24. The modern tendency, which should certainly be fostered, is to refuse to disturb a judgment or grant a new trial for harmless error unless substantial justice requires. To this end the following provisions of rules 1 and 61 should be adopted:

*Harmless Error.*

(a) These rules shall be construed to secure the just, speedy and inexpensive determination of every action.

(b) No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

25. Rule 63 contains the following desirable provision as to death or disability of a judge:

*Disability of a Judge.* If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed

by the court after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

26. Rule 68 contains the following excellent novel provision as to offer of judgment. This facilitates compromise settlements and the speedy determination of litigation because without an actual tender or deposit with the clerk, as is necessary under our state statute (he may not have the money readily available), a defendant may serve an offer to submit to judgment in a stated amount which, if accepted, results in prompt entry of judgment therefor. Future costs as the plaintiff's reward or punishment are his incentive to be reasonable. We therefore recommend the following rule:

*Offer of Judgment.* At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the superior court from the time of the offer but shall pay costs from that time.

27. We recommend the following, based on rule 70:

*Judgment Vesting Title.* If real or personal property is within the county, the court in lieu of directing a conveyance thereof by a party or by a commissioner, may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

28. The committee recommends the adoption of rule 71 as follows:

*Process in Behalf of and Against Persons Not Parties.* When an order is made in favor of a person who is not a

party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

For example, this rule facilitates the enforcement of injunctions against employes of defendants or other persons legally bound thereby.

In passing, we call attention to the fact that our state supreme court has already adopted two very desirable rules as to the record on appeal, one based on rule 75 permitting an abbreviated record containing so much of the evidence as bears upon the questions sought to be reviewed, and filing a concise statement of the points upon which appellant intends to rely,<sup>16</sup> and the other based on rule 76 permitting an appeal upon a condensed agreed statement of the case approved by the trial court.<sup>17</sup>

At some future time it may be found desirable to adopt other federal rules as state rules of practice; but the committee believes that at the present time it would not be wise to adopt any rules other than those hereinabove referred to. For example, at the present time at least the committee does not recommend the adoption in this state of the federal rule as to commencement of actions requiring filing of summons and complaint before service thereof (rules 3 and 4); the requirement that pleadings be signed by an individual attorney in lieu of verification thereof (rule 11); unlimited joinder of claims in the same complaint or counterclaim (rules 13b and 18a); demand for jury trial as to certain issues only (rule 38); obtaining relief in contested actions different from that prayed for (rule 54c); partial new trial, that is, conferring power upon the court to grant a new trial as to certain issues only, such as the amount of damages (rule 59a).

Pre-trial procedure (rule 16) is assigned to another special committee and therefore is omitted herein.

A number of other federal rules are desirable, but are in substance found in our present statutes and rules of practice in this state; and for that reason we have not recommended any change therein.

Federal rule 41, for example, contains some excellent provisions as to voluntary and involuntary dismissal of actions. However, because of its substantial similarity to present practice in this state, we have not recommended any change in that respect at this time. Rule IV of our state rules of practice<sup>18</sup> became effective as recently as May 1, 1938. Under this rule a voluntary nonsuit may be taken before plaintiff rests at the conclusion of his opening case, but thereafter the same may be allowed only

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<sup>16</sup>Rule IX (2), 193 Wash. 10-a.

<sup>17</sup>Rule X, 193 Wash. 11-a.

<sup>18</sup>193 Wash. 41-a; REM. REV. STAT. SUPP. § 308-4.



in the discretion of the court. This is a stricter rule than prevailed under the former statute,<sup>19</sup> thereby expressly superseded, whereby a voluntary nonsuit might be taken before the court announced its decision. Under the federal rule this may be done as a matter of right only before service of the answer. We believe that no change should be made in our present state rule, at least until it has received a longer trial than it has thus far.

In this connection we also call attention to the provision in federal rule 41(b) that upon granting the defendant's motion for involuntary dismissal the court may in its discretion dismiss the action without prejudice. A similar provision is found in our state statute in the event that the court shall decide that the plaintiff's evidence "is insufficient merely for failure of proof of some material fact, or facts, and that there is reasonable ground to believe that such proof can be supplied in a subsequent action."<sup>20</sup> Since, therefore, the principal features of federal rule 41 are contained in our present statutes and rules of practice, we have recommended no change in this respect, at least at this time.

It may also be mentioned that at a recent conference of the Ohio Bar in Cincinnati the conferees, after careful consideration, voted by a very substantial majority in favor of a considerable number of the above recommendations for adoption of federal rules in state procedure.<sup>21</sup>

In closing we shall refer to two other matters which are emphasized in the 1938 report of the trial practice committee of the American Bar Association. Most of the proposals of that committee are already component parts of our Washington state practice. That committee strongly recommends, however, that in all state courts the trial judge have the authority to comment upon the weight and credibility of the evidence in instructing the jury, as in the federal courts. Much may be said in favor of this proposal, but in this state the same would require a constitutional amendment,<sup>22</sup> and it is the view of the committee that at this time there is not sufficient favorable sentiment of either the bar or the public to give such amendment any reasonable assurance of success. The committee therefore believes that that matter should be deferred for future consideration.

That committee in its report also deploras, as do we, the occasional delay of some judges in rendering decisions. Article 1, Section 10 of our State Constitution provides:

"Justice in all cases shall be administered openly and without unnecessary delay."

And Article 4, Section 20 thereof contains this provision:

"Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof."

<sup>19</sup>REM. REV. STAT. § 408.

<sup>20</sup>REM. REV. STAT. § 410-1.

<sup>21</sup>U. S. LAW WEEK, December 28, 1938, p. 4.

<sup>22</sup>WASH. CONST., Art. 4, § 16.

These constitutional provisions, however, are not self-executing and there is at present no machinery established for their enforcement. In most cases reasonably prompt decisions are rendered by the superior court judges of this state, but not always, and unfortunately "the law's delay", of which men have complained for centuries, is to a substantial extent still a serious problem. It would seem to the committee, however, that definite means for enforcement of these provisions should be adopted only as a matter of last resort, and it is hoped that a respect for the opinions of the bar and the public should render that unnecessary. The committee, therefore, makes no specific recommendation on this matter at the present time.

The recent 1938 annual report of Attorney-General Cummings contains this statement:

"It is not too much to say that the new rules have been greeted with enthusiasm by the bench, the bar and the press of the country. Their adoption constitutes an achievement of the first order. It is the most far-reaching improvement in procedural reform that has occurred in more than half a century."

In the respects hereinabove stated this committee strongly recommends that that improvement in the administration of justice be adopted as part of the rules of procedure of this state.

GEORGE DONWORTH,  
*of the Seattle Bar.*  
LAURENCE R. HAMBLIN,  
*of the Spokane Bar.*  
ELWOOD HUTCHESON,  
*Of the Yakima Bar.*  
JOHN S. ROBINSON,  
*Justice of the Washington Supreme Court.*

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## Governors Adopt Tenure Policy

Realizing that unless a limitation be fixed upon the tenure in office of the members of the Board of Governors there may arise a tendency for the board to perpetuate itself, the board, at its last meeting, unanimously adopted the following resolution:

"Be It Resolved, That it is the opinion of the Board of Governors that the tenure of office of members of the board should be limited to one elective term."

While it is recognized that this resolution is not binding upon any member of the board who desires to stand for re-election, yet the members of the board feel that it will accomplish the desired result.

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## Save These Dates

Washington State Bar Association Convention, July 21-22, 1939, Spokane, Washington. Headquarters: Davenport Hotel.

American Bar Association Convention, July 10-14, 1939, San Francisco, California. Headquarters: Palace Hotel.