

LEXISNEXIS PRACTICE GUIDE

# Washington Civil Discovery

2016 Edition

PARIS K. KALLAS  
KATHLEEN M. O'SULLIVAN



LexisNexis

# LexisNexis® Practice Guide: WASHINGTON CIVIL DISCOVERY

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2016 Edition

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# *Publication Table of Contents*

## ***LexisNexis® Practice Guide: WASHINGTON CIVIL DISCOVERY***

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### VOLUME 1

Chapter 1	Discovery Planning
Chapter 2	Scope of Discovery, Privileges, and Work Product Protection
Chapter 3	Requests for Production and Inspection
Chapter 4	Interrogatories
Chapter 5	Requests for Admission
Chapter 6	Depositions
Chapter 7	Perpetuation of Testimony
Chapter 8	Physical and Mental Examinations
Chapter 9	Discovery of Experts
Chapter 10	Nonparty Discovery—Subpoenas
Chapter 11	Protective Orders
Chapter 12	Motions to Compel
Chapter 13	Discovery Sanctions
Table of Cases	
Table of Statutes	
Index	

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Judge Kallas frequently speaks at Continuing Legal Education Seminars on topics including best practices in mediation and arbitration and civil trial practice. She also sits on the WSBA ADR Executive Committee and serves on the Board of the Dispute Resolution Center of King County. She graduated from University of Puget Sound School of Law (now Seattle University School of Law) in 1981. While practicing law, she specialized in appellate practice, criminal defense, and general tort litigation.

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# Abbreviations

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## *Washington Sources*

<b>Wash. Const.</b>	Washington Constitution
<b>RCW</b>	Revised Code of Washington
<b>CR</b>	Washington Superior Court Civil Rules
<b>GR</b>	Washington General Rules
<b>ER</b>	Washington Rules of Evidence
<b>MAR</b>	Washington Mandatory Arbitration Rules
<b>RAP</b>	Washington Rules of Appellate Procedure
<b>RPC</b>	Washington Rules of Professional Conduct
<b>CJC</b>	Washington Code of Judicial Conduct
<b>CRLJ</b>	Washington Civil Rules for Courts of Limited Jurisdiction
<b>WAC</b>	Washington Administrative Code
<b>Ops. Wash. Atty. Gen.</b>	Opinions of the Washington Attorney General
<b>Wash.</b>	Washington Reports
<b>Wn.2d</b>	Washington Reports, Second Series
<b>Wn. App.</b>	Washington Appellate Reports
<b>P., P.2d, P.3d</b>	Pacific Reporter

## *Federal Sources*

<b>U.S. Const.</b>	United States Constitution
<b>U.S.C.</b>	United States Code
<b>I.R.C.</b>	Internal Revenue Code
<b>Fed. R. Civ. P.</b>	Federal Rules of Civil Procedure
<b>Fed. R. Evid.</b>	Federal Rules of Evidence
<b>Fed. R. App. P.</b>	Federal Rules of Appellate Procedure
<b>Fed. R. Bankr. P.</b>	Federal Rules of Bankruptcy Procedure
<b>C.F.R.</b>	Code of Federal Regulations
<b>Fed. Reg.</b>	Federal Register
<b>U.S.</b>	United States Reporter
<b>S. Ct.</b>	Supreme Court Reporter
<b>L. Ed. 2d</b>	Lawyer's Edition, Second
<b>F., F.2d, F.3d</b>	Federal Reporter
<b>F.R.D.</b>	Federal Rules Decisions
<b>F. Supp., F. Supp. 2d</b>	Federal Supplement



# *Table of Contents*

Chapter 1            Discovery Planning

---

Chapter 2            Scope of Discovery, Privileges, and Work Product Protection

---

Chapter 3            Requests for Production and Inspection

---

Chapter 4            Interrogatories

---

Chapter 5            Requests for Admission

---

Chapter 6            Depositions

---

Chapter 7            Perpetuation of Testimony

---

Chapter 8            Physical and Mental Examinations

---

Chapter 9            Discovery of Experts

---

Chapter 10           Nonparty Discovery—Subpoenas

---

Chapter 11           Protective Orders

---

Chapter 12           Motions to Compel

---

Chapter 13           Discovery Sanctions

---

Table of Cases

---

Table of Statutes

---

Index

---

# Chapter 1

## Discovery Planning\*

### I. Rule Locator

- § 1.01      **Statewide Rules and Statutes**
  - [1]   Superior Courts
  - [2]   District Courts
- § 1.02      **Superior Court Local Rules**
  - [1]   Importance of Local Rules Generally
  - [2]   List of Rules

### II. Practical Guidance

- § 1.03      **Developing a Discovery Plan**
  - [1]   Purpose and Importance of Discovery Planning
  - [2]   Suggested Timing and Approach to Planning
    - [a]   Plaintiff
    - [b]   Defendant
  - [3]   Cost Considerations
  - [4]   Impact of Client's Litigation Objectives
- § 1.04      **Conducting Preliminary Case Investigation ("Informal Discovery")**
  - [1]   Overview
  - [2]   Client Interviews
    - [a]   Arranging the Interview
    - [b]   Topics to Cover
    - [c]   Conducting the Interview
  - [3]   Preliminary Legal Research
  - [4]   Review of Client's Documents and Electronic Data
  - [5]   Internet Research
    - [a]   Objectives

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- [b] Potential Sources
- [6] Obtaining Public Records
  - [a] Government Agency Records
  - [b] Court Records
- [7] Site Inspections
- [8] Witness Interviews
  - [a] Importance of Conducting Early Witness Interviews
  - [b] Finding Witnesses
  - [c] Contacting Witnesses and Scheduling Interviews
  - [d] Recording Interviews; Obtaining Witness Statements
- [9] Using Investigators
- [10] Protecting Results of Preliminary Investigation Through Privilege and Work Product Protection

**§ 1.05 Preservation of Evidence**

**§ 1.06 Overview of Formal Discovery Tools**

**§ 1.07 Timing and Sequence of Discovery**

- [1] General Considerations
- [2] Discovery Cut-off Dates

**§ 1.08 Discovery / Status Conferences**

**§ 1.09 Signing and Certification of Discovery Requests and Responses**

**§ 1.10 Discovery Materials Generally Not Filed**

**§ 1.11 Obligation to Supplement Discovery Responses**

**§ 1.12 Modifying Usual Discovery Procedures by Stipulation**

**§ 1.13 Appointment of Special Master**

**III. Checklists**

**§ 1.14 Checklist: Discovery Planning**

## I. Rule Locator

### § 1.01 Statewide Rules and Statutes.

#### § 1.01[1] Superior Courts.

- CR 26–37 govern discovery in Washington superior court civil actions.
- CR 45 governs subpoenas, which are the principal means of obtaining discovery from non-parties.
- CR 53.3 governs the appointment of special masters to preside at depositions and hear discovery disputes.
- CR 5(i) limits the filing of discovery requests and responses in superior court.
- Evidentiary privileges, which provide limits on the scope of otherwise permissible discovery, are governed by ER 501 and 502, and by various statutory provisions, many of which are referenced in ER 501 [*see* Ch. 2, *Scope of Discovery, Privileges, and Work Product Protection* for list of statutory privileges]. The Washington evidence rules regarding privilege apply in all Washington state court proceedings [*see* ER 101, 1101(a), (b)].
- MAR 4.2 governs and severely limits the breadth of discovery tools available in a superior court action that has been assigned to mandatory arbitration pursuant to RCW 7.06.010 et seq.

§ 1.01[2] **District Courts.** CRLJ 26 governs discovery in civil actions in Washington district courts. CRLJ 26 strictly limits the type and quantity of discovery permitted in district court actions, absent court order [*see* CRLJ 26(a)–(e)], and provides a cut-off date for completion of discovery [*see* CRLJ 26(g)]. To the extent that discovery is permitted in district court actions, the manner of conducting discovery is governed by CR 26–37 [CRLJ 26(f)]. (In addition, many district courts have local rules that may address discovery practice.) This publication focuses on superior court practice.

### § 1.02 Superior Court Local Rules.

§ 1.02[1] **Importance of Local Rules Generally.** Additional details and requirements of discovery practice are frequently set forth in the local rules of the individual superior courts. The superior courts are permitted to adopt such local rules, provided that the local rules are “not inconsistent” with the statewide civil rules [CR 83(a)]. Local rules become effective when they are filed with the State Court Administrator in accordance with GR 7 [CR 83(b)].

The breadth and subject matter of local discovery rules varies considerably from county to county. Some of the types of requirements found in the local superior court rules include the following:

- Default “cut-off” dates for completion of discovery, which apply in the absence of a court order or stipulation of the parties.
- Case scheduling orders, which establish a discovery cut-off date and other

case deadlines. In some counties, these orders are issued automatically in all or most civil cases; in other counties, they are the result of an early status or scheduling conference, which may occur either at the request of the parties or on the court's own motion.

- Limits on certain types of discovery (e.g., number of interrogatories or depositions) in the absence of a court order.
- Filing requirements or limitations relating to deposition transcripts, interrogatories, and other discovery materials.
- General requirements regarding motion practice and in some cases specific requirements relating to discovery motions.
- Additional details or requirements pertaining to discovery sanctions.

✎ **Attorney's Tip:** Although a few counties do not have any local discovery rules, the majority of superior courts have at least one or two local rules pertaining to discovery. It is imperative for counsel to check the local superior court rules at the outset of the case and take into account any local requirements in formulating a discovery plan. A list of discovery-related superior court local rules is set forth below in § 1.02[2]; however, local rules can change frequently and with little notice, so counsel should check with the clerk of the court for the latest rules. The local rules are also generally available on the local superior court websites, on the Washington Courts website, and on some paid legal research websites such as LexisNexis, although the frequency with which the rules are updated on these websites may vary.

#### § 1.02[2] List of Rules.

- Benton & Franklin Super. Ct.:
  - Benton/Franklin Super. Ct. LCR 4 governs civil case scheduling orders, including dates for disclosure of witnesses and completion of discovery.
  - Benton/Franklin Super. Ct. LCR 7(b)(7)(L) contains specific meet and confer requirements with respect to discovery motions.
- Chelan County Superior Court:
  - Chelan Super. Ct. LR 32 governs filing of a written transcript of a deposition in conjunction with use of video depositions in court proceedings.
  - Chelan Super. Ct. LR 37(f) provides for a cut-off date for completion of discovery.
- Clark Super. Ct. LCR 45(a) contains restrictions on use of subpoenas duces tecum.
- Cowlitz Super. Ct. LCR 45(a) governs subpoenas issued by pro se litigants.
- Douglas County Superior Court:

- Douglas Super. Ct. LR 32(a)(6) governs filing of a written transcript of a deposition in conjunction with use of video depositions in court proceedings.
- Douglas Super. Ct. LR 37(f) provides for a cut-off date for completion of discovery.
- Grant Super. Ct. LR 26F provides for a status conference in all civil cases and issuance of a scheduling order setting forth deadlines including a discovery cut-off date.
- Grays Harbor Super. Ct. LCR 16(b)(3) governs issuance of scheduling orders, including deadlines for disclosure of witnesses.
- Island County Superior Court:
  - Island Super. Ct. LCR 16(c)(3) provides for a cut-off date for completion of discovery.
  - Island Super. Ct. LCR 33(a) governs filing of interrogatories.
- Jefferson County Superior Court:
  - Jefferson Super. Ct. LCR 16.1 provides for scheduling/status conferences on motion or stipulation of parties to address issues including discovery.
  - Jefferson Super. Ct. LCR 32 governs filing of a written transcript of a deposition in conjunction with use of video depositions in court proceedings.
- King County Superior Court:
  - King Super. Ct. LCR 4 provides for issuance of a case scheduling order in most civil cases, including deadlines for disclosure of witnesses and completion of discovery.
  - King Super. Ct. LCR 26(b) limits the number of interrogatories, depositions, and requests for admission in civil cases subject to a case scheduling order in absence of court order or stipulation of the parties modifying those limits.
  - King Super. Ct. LCR 26(c) governs motions to seal documents.
  - King Super. Ct. LCR 26(k) governs disclosure of witnesses in cases subject to LCR 4.
  - King Super. Ct. LCR 33 governs use of approved pattern interrogatories.
  - King Super. Ct. LCR 37(g) provides a cut-off date for completion of discovery in cases subject to LCR 4.
- Kitsap County Superior Court:
  - Kitsap Super. Ct. LCR 5(i)(1) provides that the originals of discovery materials must be maintained by the party who requested them.
  - Kitsap Super. Ct. LCR 5(i)(2) and 26(g) govern the form of

objections to discovery requests or responses.

- Mason Super. Ct. LCR 40(b)(1), (3) provides for an initial status conference at which the court may establish deadlines, including a discovery cut-off date.
- Pierce County Superior Court:
  - Pierce Super. Ct. PCLR 3 provides for issuance by the clerk of an Order Setting Case Schedule at the beginning of most civil cases, setting forth deadlines including a discovery cut-off date, and limits the number of depositions and interrogatories in certain types of cases.
  - Pierce Super. Ct. PCLR 26 governs disclosure of trial witnesses.
- San Juan County Superior Court:
  - San Juan Super. Ct. LCR 16(c)(3) provides that discovery must generally be concluded by the pretrial readiness hearing.
- Snohomish County Superior Court:
  - Snohomish Super. Ct. LGR 15 governs motions to seal or redact court records.
  - Snohomish Super. Ct. LCR 26(k) provides for a cut-off date for completion of discovery.
- Spokane County Superior Court:
  - Spokane Super. Ct. LAR 0.4.1 provides for issuance of a Case Schedule Order, which sets forth various deadlines including a cut-off date for completion of discovery, following an initial status conference in most civil cases.
  - Spokane Super. Ct. LCR 5(d)(6) prohibits filing of certain discovery documents.
  - Spokane Super. Ct. LCR 37(a) governs procedure for motions to compel discovery and imposes a requirement that parties confer and attempt to resolve discovery disputes before a motion may be heard.
- Whatcom Super. Ct. WCCR 26 sets forth limits on filing of discovery materials.
- Yakima County Superior Court:
  - Yakima Super. Ct. LCR 26(h) limits filing of discovery materials.
  - Yakima Super. Ct. LCR 33(a) sets forth requirements regarding form and service of interrogatories and answers to interrogatories.
  - Yakima Super. Ct. LCR 40(a) provides for issuance of a case scheduling order in many civil cases, which includes a deadline for completion of discovery, among other deadlines.
  - Yakima Super. Ct. LCR 40(c) provides for pretrial disclosure of witnesses.

## II. Practical Guidance

### § 1.03 Developing a Discovery Plan.

§ 1.03[1] **Purpose and Importance of Discovery Planning.** Discovery is a formal process by which the parties develop their cases through gathering information from the other party or from third parties by means of the specific tools authorized by CR 26–37 [see § 1.06 (overview of available discovery tools)]. Discovery is an essential part of any litigation and can have a marked impact in understanding, shaping, litigating, and resolving a case. Discovery sets the road map for the entire case. It reveals the facts, evidence, and issues on which the case will turn, and the knowledge, delivery, and demeanor of potential witnesses and experts. Discovery will help inform whether or not the case can or should settle or will proceed to trial or other judicial resolution.

Planning is crucial for effective and efficient use of available discovery tools. This chapter discusses the process of formulating a discovery plan, the elements that should be included in the plan, and factors that should be considered in developing an effective discovery plan. It also discusses informal methods of fact gathering that can and should be employed prior to and in parallel with formal discovery.

### § 1.03[2] Suggested Timing and Approach to Planning.

§ 1.03[2][a] **Plaintiff.** Plaintiff's counsel should begin planning for discovery even before the case is filed. An attorney is ethically obligated to conduct a reasonable preliminary inquiry before filing a complaint to determine whether there is a reasonable legal and factual basis for bringing the action [see RPC 3.1 & comment 2] and can be subject to sanctions for filing a complaint without doing so [see CR 11(a)]. The standard for evaluating the scope of investigation required before filing a complaint is that the attorney's inquiry must be "reasonable under the circumstances" [see CR 11(a)]. Statute of limitations considerations may in some instances limit the extent of investigation that plaintiff's counsel can undertake before filing the complaint if counsel is not consulted until long after the dispute arises, but will not completely excuse the obligation to make reasonable inquiry [see, e.g., *Bryant v. Joseph Tree*, 119 Wn.2d 210, 220–221, 829 P.2d 1099 (1992) (whether counsel made reasonable inquiry is dependent on several factors including time that was available prior to signing pleading), *superseded by statute on other grounds*, 2008 Wash. App. LEXIS 2844 (Wash. Ct. App. Dec. 2, 2008)]. Thus, "informal discovery" should commence before the action is filed and should be part of the discovery process, concurrent with formal discovery [see § 1.04].

♦ **Cross Reference:** Discussion of sanctions for filing a pleading in violation of CR 11, see LEXISNEXIS PRACTICE GUIDE: WASHINGTON PRETRIAL CIVIL PROCEDURE, Ch. 29, *Sanctions*.

The characteristics and benefits of a good discovery plan include:



- Meeting discovery deadlines [*see* § 1.07[2]].
- Organizing information as it is gathered and correlating it with elements required to be proved or disproved, in preparation for:
  - Evaluating settlement opportunities.
  - Bringing or resisting a summary judgment or other dispositive motion.
  - Trying the case.
- Ensuring that counsel's client preserves relevant evidence, and notifying the opposing or third parties of the need to preserve evidence [*see* § 1.05].
- Selecting the most appropriate discovery tools for the circumstances of the case [*see* § 1.06].
- Maximizing the use of informal methods of discovery before and after filing the action [*see* § 1.04].
- Timing discovery to get the earliest possible outline of the opposition's case while concealing your own theories and strategies as long as possible [*see* § 1.07[1]].
- Avoiding mistakes, such as revealing privileged or other confidential information that cannot later be controlled or sealed [*see* § 1.04[10]; *see also* Ch. 2, *Scope of Discovery, Privileges, and Work Product Protection*].
- Using technology to provide more efficient organization and retrieval of evidence.
- Maintaining control of litigation costs [*see* § 1.03[3]].

To formulate an effective discovery plan, counsel must first gain an understanding of the factual and legal issues involved in the dispute. Counsel will typically begin by interviewing the client (and key employees or agents of the client, where applicable) to gather basic information about the potential parties and the facts in dispute [*see* § 1.04[2]], acquire copies of and review any key documents or other tangible evidence that the client has possession or control over [*see* § 1.04[4]], and if possible interview other potential key witnesses that the client or counsel's preliminary investigation has identified [*see* 1.04[8]]. Preliminary legal research may also be needed at this stage to determine potential bases for relief and potential defenses [*see* § 1.04[3]] prior to drafting and filing the pleadings and formulating the initial approach to formal discovery.

Based on the preliminary case investigation and legal research, counsel should be able to determine the elements he or she will need to prove and which defenses will need to be refuted, and begin to draft a discovery plan devised to acquire and develop the evidence needed to prove the plaintiff's case if the action proceeds to trial and to evaluate the strengths and weaknesses of the