April 25, 2022

Sent via Email and U.S. Mail

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Comments from Washington State Association for Justice on Proposed Amendments to CR 3.1, CR 16 and CR 26

Dear Honorable Members of the Washington State Supreme Court Rules Committee:

The Washington State Association for Justice (WSAJ) on behalf of its 2,400 members and the thousands of Washington citizens we represent in civil injury matters respectfully make the following submission to the Washington Supreme Court regarding the Washington State Bar Association's proposed amendments to CR 3.1, CR 16, and CR 26.

WSAJ recognizes that these proposed amendments are the ultimate result of a years-long process first begun by the Escalating Costs of Civil Litigation ("ECCL") Task Force. After years of study, analysis, and issuance of a final report that included proposed civil rule amendments drafted over 16 months by the ECCL Civil Rules Drafting Taskforce, the WSBA Board of Governors elected not to send the ECCL Task Force's recommendations to the Court. Instead, the WSBA determined it wanted to request further input from stakeholders and to create a work group chaired by attorney Dan'l Bridges.

WSAJ supports and applauds efforts to find consensus on means for improving the rules and procedures for civil litigation in this state; enhancing courts' ability to effectively manage cases on their docket; and, most importantly, improving access to justice for Washingtonians. Significant concerns raised by WSAJ and other stakeholders regarding some of the original ECCL proposals, such as mandatory early mediation and mandatory initial disclosures in discovery, have been addressed through this process. However, the record must be made clear with regard to the rules now proposed for comment.

WSAJ notes that the GR 9 cover sheet for the current proposed amendments states that "the proposed amendments were endorsed by all stakeholders." WSAJ wishes to clarify that, like many stakeholders, it sent members in a purely observational capacity to Mr. Bridges' work group. Those members clearly announced they were attending only in an observational capacity; that they were not authorized to offer comments representative of WSAJ in those meetings; that the work group's processes and timelines were incompatible with soliciting meaningful stakeholder input on a representative, organizational basis; and that any comments they offered were made in a purely representative capacity. Those members clarified when, during the process, support was misattributed to WSAJ. And those members were told the record would correctly reflect WSAJ's support (or lack thereof) for the proposed amendments—a representation in apparent conflict with the blanket

statement that these proposals were "endorsed by all stakeholders." WSAJ offers these observations both to clarify any misperception of unanimous, unconditional stakeholder support for these proposed amendments as well as to provide necessary context for WSAJ's comments.

WSAJ supports the general goal of reducing the costs of civil litigation. To that end, although it appreciates the general principles underlying the proposed amendments, it continues to have serious concerns that as drafted they are counterproductive to that goal.

I. CR 3.1 – Initial Case Schedules

WSAJ generally supports specific case schedules in counties whose Superior Courts are adequately funded and staffed to perform their inherent administrative tasks, such as issuing the case schedule itself; monitoring compliance with its deadlines, reviewing reports and other administrative tasks associated with deadlines, such as scheduling and conducting conferences and hearings required by a case schedule; and other tasks, such as setting and coordinating mandatory trial dates.

WSAJ also strongly supports proposed CR 3.1's establishment of mandatory trial dates where possible. Mandatory trial dates drive efficient and effective litigation and resolution of cases and well-serve the proposed amendments' overarching goal of reducing the costs of civil litigation.

However, the proposed CR 3.1's case schedule deadlines do not accurately reflect the realities of litigation given the unrealistically short periods established by the deadlines. For example, the proposed amendments include a default discovery cutoff of 13 weeks—approximately three months or 91 days—before trial. However, essential discovery often and unavoidably occurs within that critical 90-day pretrial period. This reality is reflected by both the King County Superior Court and Pierce County Superior Court general discovery cutoffs for cases at seven weeks before trial. KCLCR 4(e)(2); PCLCR 3(h)(2). As a practical matter, the proposed amendments' much more restrictive deadlines likely will increase motions to modify the case schedule and disregard for unrealistic initial case schedule deadlines. This result is the antithesis of the goals of the proposed amendments—reducing the escalating costs of civil litigation through promoting the timely, efficient litigation of civil cases. On this basis WSAJ respectfully requests that the Court only adopt specific case schedule deadlines after careful, deliberate study of the realistic lifespan of civil cases in Superior Courts throughout the state and adopt only case schedule deadlines better reflecting those realities, such as those utilized by King County Superior Court and the local federal courts.

Additionally, WSAJ strongly objects to proposed CR 3.1(d)(1) regarding modification of case schedules. That proposed provision would establish both "good cause" and "the action's complexity" as standalone reasons for case schedule modifications. However, it would require a showing of "due diligence" only under the "good cause" standard. And it would allow case schedule modifications solely based on an undefined standard of "complexity," without demonstrating "due diligence" or any further showing.

As motions in support of or in opposition to remote trials during the pandemic have demonstrated, however, "complexity" is an inherently subjective standard. A personal injury case viewed as "simple" in the eyes of one attorney or judge may be "complex" in the eyes of others, contingent on

how they view the number and nature of witnesses, the number of exhibits, the nature of the evidence, and any number of known and unknowable factors. Untethered to any more objective standard, such as due diligence—which may be measured by how much discovery the requesting party has propounded, and when—this proposed provision is an open invitation for a party to simply try their luck with arguing "complexity" when case schedule modifications, such as trial continuances, may be advantageous. And by enshrining "complexity" as a standalone reason for case schedule modifications, the proposed provision implicitly encourages courts' reliance on it. The likely result will be an increased number of such motions and modifications, including trial continuances—again, antithetical to the proposed amendments' stated goals.

Further, WSAJ absolutely objects to proposed CR 3.1(d)(1) specifying that as part of any case schedule modification, "the court may require the plaintiff to serve its expert witness disclosures before the defendant if the issues in the case warrant staggered disclosures." As reflected by proposed CR 3.1(a)(1), Washington's Civil Rules, unlike the Federal Rules of Procedure, establish simultaneous expert disclosures as a default. And Washington's civil rules establish by default that discovery may be conducted in any sequence. CR 26(d). Despite these defaults, however, the reality of civil litigation—and part of the very escalating costs these proposed rules seek to reduce—is frequent demands by and disputes between parties that the opposing party should "go first" in producing discovery and being deposed, for no other reason that the objecting party finds it advantageous to tailor their responses and testimony by "going last."

The proposed amendments' proponents offer no rationale for encouraging courts to deviate from this standard on modification of a case schedule, regardless of the party requesting the modification. Nor do the proponents offer any rationale for specifically subjecting civil plaintiffs to such staggered disclosures. Encouraging such relief within the rule undoubtedly will result in motions in most if not all cases requesting such relief, contrary to reducing the costs of civil litigation. WSAJ respectfully requests the Court reject any such language in any rule adopted.

Finally, as discussed more fully below, WSAJ has significant concerns regarding the proposed amendments' repeated statements that parties must "timely respond" to discovery and may not rely on case schedule deadlines in doing so.

II. CR 16 – Pretrial Report

WSAJ supports most of the requirements for pretrial reports in the proposed revisions to CR 16. An exchange of witness and exhibit lists will no doubt serve all parties in preparing for trial. But requiring the parties to provide statements of "agreed material facts" and "material issues in dispute" will rarely, if ever, serve the parties in their pretrial preparations. Such a requirement increases the workload of attorneys before trial because they must sift through what is often an enormous number of documents and deposition transcripts, make determinations of what facts are material, reduce those facts to digestible paragraphs, and then submit them to opposing counsel for approval. Almost invariably, opposing counsel will not agree to the specific characterization of the facts, thus prompting another round of rewriting. This back-and-forth between counsel unnecessarily drains the time that could be spent on trial preparation. In practice, the agreed facts in pretrial reports are reduced to mundane matters like the plaintiff's date of hire or the date of the accident giving rise to

an injury—facts that would inevitably come out at trial anyway. Put differently, this requirement promotes inefficiency and increases the costs of litigation for a benefit that is marginal at best.

Although articulating what material issues are in dispute may be easier than agreeing on material facts (simply because agreement of the parties is not required), it is still unnecessarily burdensome to the parties. The only potential beneficiary of such a requirement is the trial court. But if the trial court wants to know what material issues are in dispute, it need only read the complaint and the answer. *Chen v. State*, 86 Wn. App. 183, 193 (1997) ("pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted"). And given the time constraints imposed by pretrial preparation, parties ordinarily will not devote much time or effort to make these pretrial statements anything more than what is set forth in the pleadings. It is fair to say that any perceived benefit of such a requirement can only be described as negligible, and certainly not compelling enough to impose busywork on the parties.

In jurisdictions requiring "agreed material facts" and "material issues in dispute" in pretrial statements, courts have effectively created a second pleading requirement. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997) ("[a]n order entered pursuant to Rule 16(e) supersedes the pleadings and controls the subsequent course of litigation"). Indeed, the failure to include material facts in pretrial statements may be grounds to exclude their admission before trial. *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1444 n.3 (7th Cir. 1995) ("all the circuits that have reached this issue agree that a trial court may properly exclude evidence or theories not raised in a pretrial order absent an abuse of discretion"). Fearing a pleading penalty, counsel will invariably err on the side of over-inclusivity in their pretrial statements, attempting to marshal every fact learned through litigation into what is essentially a super-pleading, all because they have no idea what the court will consider a "material" fact and whether vital evidence will be excluded. This *de facto* heightened pleading standard is wholly inconsistent with Washington's liberal notice pleading standard. *Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) ("the complaint, and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis for recovery . . ."). Perhaps more importantly, such a requirement creates needless work and anxiety, increasing the costs of litigation and decreasing the quality of trials by reducing the amount of time that could be spent preparing for trial. In short, such an approach tends to foster trial by paper, rather than by jury.

Finally, WSAJ notes that the proposed amendments eliminate a party's ability, on their own initiative, to move the trial court to hold a pretrial conference earlier than the date

III. CR 26 – Discovery

Regarding the proposed amendments to CR 26(b)(5), WSAJ appreciates all efforts to ensure prompt disclosure of expert opinions. However, the current civil rules, in our view, already do not allow for delayed disclosure of expert discovery based on the disclosure deadlines. Because the proposed rule states "delayed disclosure" is a per se CR 37 violation, the proposed rule may result in increased motion practice and litigation costs. Moreover, the proposed rule purports to preclude reliance on experts or expert opinions disclosed beyond the disclosure deadlines, which is problematic. First, it is not always feasible to disclose all experts and expert opinions prior to the disclosure deadlines since additional discovery, including expert depositions, typically occurs after the disclosure deadlines and

may provide the basis for an expert's opinions or reveal the need for new experts. Second, such a rule would conflict with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997) and *Jones v. City of Seattle*, 179 Wn.2d 322 (2013), which control exclusion of expert witnesses at trial. In short, the proposed rule appears unlikely to reduce the cost of litigation.

The proposed amendments to the expert discovery rules in CR 26(b)(5) are also ambiguous. It is unclear whether they apply to witnesses qualified to offer expert opinions under ER 702 but not specially retained, such as a treating health care provider. *See, e.g.*, *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 175, 947 P.2d 1275 (1997) (holding that a treating doctor who developed opinions after reviewing plaintiff's medical records and conducting a physical examination was not an "expert" within the meaning of CR 26(b)(5) but was still permitted to offer such opinions, as they were not developed specifically in anticipation of litigation); *Peters v. Ballard*, 58 Wn. App. 921, 927-930, 795 P.2d 1158 (1990) (holding that a treating healthcare provider whose opinions derived from his treatment of plaintiff was not an expert witness within the meaning of CR 26(b)(4), which has since been recodified at CR 26(b)(5)); *see also* 3A Karl B. Tegland, Washington Practice: Rules Practice CR 26, at 643 (6th ed. 2013) (noting treating physicians are often termed "a fact expert or an occurrence expert" and treated as ordinary witnesses since their testimony is based on personal involvement). If plaintiffs had to produce discovery for every witness who might have an expert opinion under ER 702, discovery would become more expensive and more costly. Given these considerations, the Court should clarify, whether by textual amendment or by an official comment to the rule, that these requirements set out in CR 26(b)(5) apply only to specially retained expert witnesses whose opinions are developed in anticipation of litigation.

WSAJ does not oppose the proposed amendment to CR 26(e); however, it remains unclear at what point the duty to seasonably supplement terminates, *e.g.*, the discovery deadline or continues up until the time of trial. The latter is likely to impose undue burden, though there may be a need for a party to obtain supplements after the discovery cutoff under certain circumstances, which should be permitted.

WSAJ opposes the proposed amendment to CR 26(g) to require a privilege log, at least in its current form. This Court has noted "[t]he best practice is for the trial court to require a document log requiring grounds stated with specificity as to each document." *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 695–96, 295 P.3d 239 (2013). WSAJ agrees with this practice when there is genuine dispute over the validity of a claim of privilege or work product, but not in all circumstances, especially when it is clear to both parties that a discovery request targets confidential information. Requiring privilege logs in every case, no matter the case size or circumstances, is time consuming and therefore likely to increase litigation costs, not reduce them. In many instances, the cost associated with preparing a privilege log does not justify the potential benefits of increasing transparency around objections based on privilege or the work product doctrine.

The proposed text as drafted also is concerning, for three reasons. First, the text draws on an inapposite case, *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009), which concerned the Public Records Act (PRA), chapter 42.56 RCW. When this Court described privilege logs, it was quoting from another decision based on the PRA, *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). We

do not see an equivalence between government's duties under the PRA and litigants' duties to identify claims of privilege and work product. Second, the proposed language for CR 26(g) (because it is based on the broad duties under the PRA) appears to go further than the federal analogue, which provides:

> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> (i) expressly make the claim; and
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

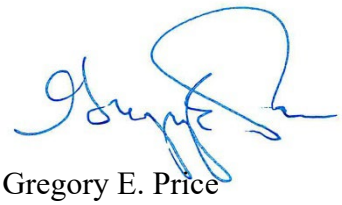
Fed. R. Civ. Proc. 26(b)(5)(A). Third, the proposed text specifically identifies "the author and recipient" of items withheld under claims of privilege as information that may be "otherwise protected." Despite Washington law providing no support for such information being privileged information in most cases, discovery disputes often arise regarding the improper withholding of that information in privilege logs. Generally embodying within the rule that such information may be protected likely would encourage such baseless claims of privilege. WSAJ thinks the federal rule better addresses the necessary components of a privilege log. For these reasons, we urge the Court to reject this amendment to CR 26(g).

WSAJ supports the amendment to CR 26(g) to ban general objections. General objections increase litigation costs and decrease transparency. Because general objections often make it unclear whether the objecting party is withholding information based on the objection, they can lead to expensive discovery disputes. And they can be tool for unvirtuous parties or their counsel to conceal discoverable information. The proposed amendment would eradicate these problems, and it would be consistent with precedent and persuasive authorities. *See, e.g.*, *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) ("[O]bjections should be plain enough and specific enough so that the court can understand in what way the interrogatories are alleged to be objectionable."); *Walker v. Lakewood Condominium Owners Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) ("Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."); *cf. also Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 675, 374 P.2d 939, 942 (1962) ("A general objection which does not specify the particular ground on which it is based is insufficient to preserve a question for appellate review."); *Hendrickson v. King Cty.*, 101 Wn. App. 258, 269, 2 P.3d 1006, 1012 (2000) (holding that general objections are insufficient to prevent admission of documents under ER 904).

***

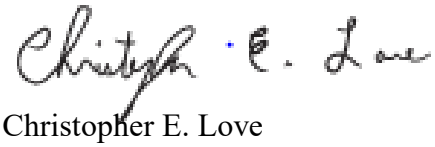
Thank you for all the hard work, time and consideration that has been dedicated to reviewing our court rules. WSAJ shares in the desire to ensure that the Civil Rules best operate to promote efficiency and access to justice, while limiting the cost of litigation. We greatly appreciate the opportunity to share our evaluation of and response to the proposed amendments to CR 3.1, CR 16 and CR 26. Please do not hesitate to contact us with any questions you may have.

Sincerely,



Gregory E. Price
WSAJ President

Nathan P. Roberts
WSAJ President-Elect



Christopher E. Love
WSAJ Court Rules Committee, Chair

Michael W. Montgomery, WSAJ Court Rules Committee, Vice Chair

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Subject:	FW: WSAJ comments on proposed amendments to CR 3.1, CR 16 and CR 26
Date:	Monday, April 25, 2022 9:24:30 AM
Attachments:	2022.4.25 - WSAJ Cmts. re Prop. Amendments to CR 3.1, CR 16 and CR 26.pdf

From: Kelli Carson [mailto:kelli@washingtonjustice.org]
Sent: Monday, April 25, 2022 9:17 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Chris Love <chris@pcvalaw.com>; michael@haroldcarrattorney.com
Subject: WSAJ comments on proposed amendments to CR 3.1, CR 16 and CR 26

Dear Honorable Members of the Washington State Supreme Court's Court Rules Committee:

Please find attached comments from the Washington State Association for Justice regrading proposed amendments to CR 3.1, CR 16 and CR 26. A hard copy will follow. Please do not hesitate to contact us with any questions.

Best regards,

Kelli Carson
Government Affairs Deputy Director
Washington State Association for Justice
1809 7th Avenue, Suite 1500
Seattle, WA 98101
425.351.7113
kelli@washingtonjustice.org
www.washingtonjustice.org