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April 27, 2022

Sent via Electronic Mail

Erin L. Lennon, Clerk
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Email: supreme@courts.wa.gov

RE: Proposed Amendments to the Civil Rules, CR 3.1, CR 16, CR 26, and CR 77

Dear Ms. Lennon:

Thank you for the opportunity to comment on the amendments to the Civil Rules originally proposed by the Escalating Cost of Civil Litigation (ECCL) Task Force. I write on behalf of the Attorney General's Office.

Because of the statewide practice of the Attorney General's Office, and our presence in every superior court in the State of Washington, our attorneys are aware of the variation in civil rules across the state and how those differences impact the cases we litigate. We also litigate in federal court and understand the benefits that uniform rules like the Federal Rules of Civil Procedure can provide. Finally, because our litigation is on behalf of the government, it is funded by the people of the State of Washington; as such, we support the general objectives of managing the costs of civil litigation for the benefit of the public at large and of minimizing barriers to access to justice that escalating costs so often impose.

Informed by this perspective, we write below in support of the proposed amendments to the Civil Rules that we believe will bring needed structure and consistency to the Superior Courts across the state and will ensure equal access to justice, regardless of location. We also identify those proposed amendments that we support, but believe require additional revisions or modifications, and some that we oppose.

1. Proposed New Rule CR 3.1 – Initial Case Schedules: Support with Modifications

The new proposed CR 3.1 would adopt the issuance of initial case schedules statewide, based in part on those used in King and Pierce Counties. The initial case schedules would include and establish a trial commencement date and pre-trial deadlines calculated a certain number of weeks before trial, including expert witness disclosure, discovery cutoff, dispositive motion filing deadline, and pretrial reports. The proposed rule allows for modification of these deadlines based on the complexity of the case or where a party otherwise establishes good cause or impracticability. Initial case schedules would create a predictable structure and internally consistent case flow, enhancing judicial management of each case, and increasing the ability of parties to self-regulate because of shared expectations about known case deadlines.

We seek two slight modifications to the proposed amendments: A) to add additional categories of cases that would be exempt from initial case schedule requirements because of the unique nature of those cases; and B) to add a date to the case schedule for the hearing of dispositive motions.

A. Modify proposed CR 3.1(e) to categorically exempt Public Records Act and cases filed by *pro se* individuals from initial case schedule requirements

Proposed CR 3.1 includes a list of types of cases that are exempt from the initial case schedule requirements. There are additional categories of cases relevant to the practice of the Attorney General's Office that we believe also should be exempted: Public Records Act (PRA) cases under RCW 42.56.001 et seq. and cases brought by individuals who are representing themselves *pro se*. This second category of cases would mirror one category of cases that is exempt from typical case scheduling requirements in federal courts. *Cf.* Fed. R. Civ. P. 26(a)(1)(B)(iv) (exempting from certain disclosure and case planning requirements actions brought without an attorney by a person in the custody of the United States, a state, or a state subdivision).

Public Records Act cases

PRA cases are meant to be expedited. *Kilduff v. San Juan Cnty.*, 194 Wn.2d 859, 871, 453 P.3d 719 (2019). "The purpose of the quick judicial procedure is to allow requesters to expeditiously find out if they are entitled to obtain public records." *Id.* The typical procedure involves resolving PRA claims through a show-cause hearing. *Wood v. Thurston Cnty*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003). At these hearings, courts can resolve factual disputes based on written submissions. RCW 42.56.550(4). This process allows courts to ensure that the litigation of PRA cases does not become "so expensive that citizens could not use the [PRA] for its intended purpose." *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 153, 240 P.2d 1149 (2010). In this respect, PRA cases are similar to Administrative Procedure Act (APA) cases, which are exempt from proposed CR 3.1. In recognition of these unique concerns, some superior courts have also

adopted special case management and scheduling processes for PRA cases. Imposing a standard case schedule for PRA cases under proposed CR 3.1 likely would interfere with the expeditious resolution of such cases and create an unnecessary impediment to access to public records.

Pro se cases

Cases filed by *pro se* individuals should also be exempt from initial case schedule requirements and the corresponding pretrial report in proposed CR 16. These cases represent a significant percentage of lawsuits filed in state court, and they present their own unique case management concerns. The initial complaint can be difficult to understand, making it unclear if the lawsuit would otherwise fit within proposed CR 3.1's case scheduling requirements. *Pro se* plaintiffs can have challenges abiding by case scheduling orders and court rules, and it can be difficult for courts to effectively enforce such rules in light of the individual's *pro se* status. Additionally, requiring a pretrial management report in the small number of such cases that proceed to trial is unlikely to help narrow issues and reduce the cost of litigating such cases. It has been our experience that it can be particularly difficult to reach agreements with individuals who are acting *pro se*. The completion of a pre-trial management report would be particularly challenging as a result.

In recognition of those unique concerns, the Legislature and state courts have often adopted special rules applicable to cases brought by *pro se* individuals, particularly those who are incarcerated. *See, e.g.*, RCW 4.24.430 (precluding the waiver of a filing fee in certain cases for incarcerated individuals who file three frivolous or malicious actions); GR 3.1 (adopting a mailbox rule for *pro se* incarcerated individuals). Under the Federal Rules of Civil Procedure, cases brought by incarcerated individuals are exempt from the processes applicable to other cases. Fed. R. Civ. P. 26(a)(1)(B)(iv); *see also In re Arizona*, 528 F.3d 652 (9th Cir. 2008) ("While the scope of the district court's authority over pretrial proceedings is broad, it is tempered in *pro se* prisoner civil rights cases."). The exemption means that such cases are generally managed differently in federal courts in Washington. Exempting *pro se* cases from the statewide case schedule orders would not prevent judges from imposing a scheduling order in an appropriate case involving a *pro se* individual.

With our requested amendments, CR 3.1(e) would read in relevant part:

> **(e) Exemptions by Action Type.** The following types of actions are exempt from this rule, although nothing in this rule precludes a court from issuing an alternative case schedule for the following types of actions:
>
> [. . .]
>
> Ch. 36.70C RCW, Land Use Petition Act;

> Ch. 42.56 RCW, Public Records Act;
> Ch. 51.52 RCW, appeal from the board of industrial insurance appeals;
> [. . .]
> An action brought by a person who is unrepresented by an attorney.

B. Modify proposed CR 3.1(a)(3) to add a hearing deadline for dispositive motions

We have a serious concern regarding the efficiencies and costs of civil litigation that may not be ameliorated by the current proposed amendments to CR 3.1: the scheduling of summary judgment hearings *after* the trial date or on the eve of trial. We have encountered situations in certain courts where the earliest available date on which the Court could hear a motion for summary judgment was several weeks out and, at least in one instance, *after* the scheduled trial date. In another recent trial, the summary judgment hearing was held the afternoon before trial, such that the resulting grant of the State's summary judgment motion came too late to prevent the parties from incurring the full-blown expense of trial preparation.

To address these concerns, we suggest a further modification to proposed CR 3.1 to add a dispositive motion hearing deadline five weeks before trial. We propose five weeks so there is consistency with the timing of the dispositive motion filing deadline of the new proposed CR 3.1(a)(3) and the operation of CR 56. Proposed CR 3.1(a)(3) would require that dispositive motions be filed no later than nine weeks before the trial date. CR 56(c) requires that summary judgment motions be filed and served "not later than 28 calendar days before the hearing." Operationally, the latest date upon which a dispositive motion could be heard under these rules is five weeks before trial. To avoid summary judgment hearings being scheduled later than that, on the eve of trial, or *after* the scheduled trial date, we propose a further modification to proposed CR 3.1(a)(3) to include a "latest hearing" deadline that is also five weeks before trial and consistent with the other rules. This timing would also allow for the possibility that the parties will have an opportunity to receive a summary judgment ruling in advance of filing their pretrial report, which would be due four weeks before trial and requires the parties to identify the "material issues in dispute." *See* proposed CR 16(a)(3). With our proposed modification, the amended CR 3.1(a)(3) would read as follows:

> (3) *Dispositive Motions*. The parties shall file dispositive motions no later than 9 weeks before the trial commencement date. Dispositive motions shall be heard no later than 5 weeks before the trial commencement date.

2. Proposed Amendment to CR 16 – Pretrial Procedures: Support with Modifications

We support the proposed amendments to CR 16, which would adopt statewide pretrial procedures, reports, and conferences modeled on the rules applicable in the King and Pierce County Superior Courts and the federal district courts. The proposed amendments would create

structure to improve preparations for trial as well as the efficiency and quality of the trial proceedings themselves.

In our experience, the required conferences and reports increase cooperation and coordination between the parties' attorneys, resulting in the resolution of many conflicts without resort to the Court. These pretrial procedures help to frame and highlight areas of disagreement such that the Court can efficiently address them. Such preparations also enhance the professionalism and transparency of the proceedings, the efficient handling of exhibits, and respect for the time of all of the participants in a trial, including jurors and testifying witnesses.

We recommend modifications to: A) retain subsection (a); B) explicitly apply the categorical exemptions of proposed CR 3.1 to the provisions of proposed CR 16, including the exemptions we propose above related to Public Records Act cases and cases brought by *pro se* individuals.

A. Modify proposed amendments to CR 16 to retain subsection (a)

The proposed amendments to CR 16 include the elimination of subsection (a), which currently allows parties to move for a pretrial conference at any time to address issues that may provide streamlining opportunities. We understand that the elimination of this provision may have been proposed because the rule is now making pretrial conferences mandatory. However, we believe retaining subsection (a), in addition to the other changes proposed, would promote efficiency and flexibility, especially in complex cases, by enabling parties to request a conference with the Court at any time (not just during the immediate run-up to a trial).

Many of the lawyers at the Attorney General's Office have used CR 16(a) to make motions early in their cases to engage the Court and counsel in efforts to create potential efficiencies and streamlining opportunities. We are concerned that eliminating current subsection (a) would make it less clear that the parties may move for a conference at earlier stages of the case, prior to the filing of the pretrial report. While proposed subsection (b) may be understood to permit parties to move for a conference to address earlier-stage issues because it refers to "any" scheduled pretrial conference, proposed subsection (c) refers to a single order ("[t]he pretrial order") that follows "the conference." Additionally, the sequential order of proposed subsections (a) through (c) suggests that they establish a set of related procedures that will occur within the month preceding trial (and not before).

For these reasons, we recommend that current subsection (a) be retained along with the proposed new sections. With our proposed modification, CR 16 would read in relevant part:

> (a) **Hearing Matters Considered**. By order, or on the motion of any party, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) Such other matters as may aid in the disposition of the action.

(b) **Pretrial Report**. All parties shall participate in completing a joint pretrial report filed no later than the date provided in the case schedule or court order. The pretrial report shall contain the following: . . . .

B. Add a comment to proposed CR 16 to make it clear that it exempts the same categories of cases exempted from proposed CR 3.1, including Public Records Act and *pro se* cases

While proposed CR 3.1(e) exempts certain categories of cases from the case schedule requirement, proposed CR 16 contains no such list of exemptions. The proceedings that are exempt from proposed CR 3.1 are often unusual or more expeditious cases, such as a petition for a name change or dependency and termination proceedings under Title 13 RCW. In such cases, it does not make sense to require a joint pretrial report, either. We recognize that the language proposed to amend CR 16 includes a reference to "completing a joint pretrial report filed no later than the date provided in the case schedule or court order," which implicitly excludes cases without case schedules. That said, we believe it would be clearer if a comment to CR 16 explicitly stated that the same categorical exemptions that apply to the case schedule requirements (CR 3.1) also apply to the pretrial report (CR 16).

As above regarding the case schedule, we also propose adding new exemptions to proposed CR 3.1 and proposed CR 16 to exclude PRA cases and cases filed by individuals who are unrepresented by an attorney. The rationales for these two exemptions are discussed above.

The proposed Comment would read:

Comment to CR 16: The same categorical exemptions that apply to CR 3.1 also apply to CR 16. If the case is categorically exempt from the CR 3.1 case schedule requirement, it is also exempt from the CR 16 pretrial report requirement, unless a court order provides otherwise.

3. Proposed Amendment to CR 26(b)(5) – Expert Discovery Supplementation: Support with Modifications

In general, we support the proposed amendment to CR 26(b)(5)**,** to address expert witness disclosures and prohibit parties from unnecessarily waiting until the case schedule deadline for

such disclosures to respond to expert witness discovery. We believe these general changes will ensure access to discovery into expert witness opinions formulated early in the case, enhance the quality of trial preparation, and potentially lead to earlier resolution in some cases.

That said, we have concerns that the amendments will invite unnecessary and unproductive litigation over when, other than the expert disclosure deadline, parties should have disclosed their experts. In complex cases, it can take a fair amount of initial factual discovery before expert opinions can be formulated and disclosed. The expert disclosure deadline later in the discovery period acknowledges and accommodates this, while also creating a framework for the parties' case management. Expert disclosure on or near the discovery deadline has not been an impediment to preparation of our cases for trial. The abuse of the expert discovery deadline that has been most problematic and prejudicial, and that we encounter most frequently in our litigation, is *late* expert disclosures, made after the established deadline, which often result in extended discovery periods and interference with trial preparations.

We respectfully request that the following sentence be stricken, because it fails to address *late* disclosures and invokes CR 37 to invite litigation regarding *timely* disclosures: "~~Delayed disclosure of an expert constitutes a violation of CR 37 if the trial court finds the responding party delayed based on a case schedule deadline~~." Instead, parties should be encouraged to meet case schedule deadlines while avoiding unwarranted delay. With our proposed modification, CR 26(b)(5) would read as follows:

> (5) *Trial Preparation: Experts*. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. A case schedule deadline to disclose experts does not excuse a party timely responding to expert discovery. ~~Delayed disclosure of an expert constitutes a violation of CR 37 if the trial court finds the responding party delayed based on a case schedule deadline.~~ (ii) Unless these rules impose an earlier deadline, and in no event later than the deadline for primary or rebuttal expert witness disclosures imposed by a case schedule or court order, each party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, and state the substance

of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

4. **Proposed Amendments to CR 26(e) – Requirement to Supplement Discovery Responses Only: Support in Part with Modification**

We support the part of the proposed amendment to CR 26(e) that imposes a general, continuing duty to supplement all discovery responses, which will promote full and transparent exchange of information as it is available to the parties, expedite the discovery process, and better ensure full disclosure well before trial.

We oppose the part of the proposed amendment to CR 26(e) that would require that supplemental responses to written discovery "only" include the information being supplemented or corrected, and not the prior, unchanged response.

The ECCL Task Force proposes the latter change because it believes that including prior, unchanged responses in a party's supplemental responses "places an unnecessary burden on the responding party to search out and find supplemental information, an expenditure of time that serves no useful purpose." We agree with the goal of promoting clarity and efficiency in discovery, but we disagree that the proposed amendment is likely to achieve that goal. Certainly, in some instances, efficiency is enhanced by providing only the updated answers. However, in many instances, greater efficiency can be achieved by having a single, comprehensive set of *all* discovery responses that clearly demarcates the most recent supplements (e.g., through blacklining). A supplemental response that comprehensively reflects all prior responses will make it easier for parties to see what information has been added in context without the need to cross-reference multiple documents. Additionally, the comprehensive supplement can be used as a single exhibit to a dispositive motion, for cross-examination at trial, or at a deposition. At a deposition, for example, a single comprehensive set of discovery responses can avoid evasion and the time-waste that occurs with testifying witnesses who must flip through a stack of documents to answer questions. Attorneys in our office have used both methods of discovery supplementation based on the specific needs of the case and the phase/needs of the litigation, and we believe it is important for litigants to continue to have the flexibility to decide what method is most clear and concise on a case-by-case basis.

Accordingly, we respectfully request that the proposed amendment be modified to substitute the word "clearly" in place of the word "only." As modified, it would read:

> **CR 26(e) Supplementation of Responses**. A party who has responded to a request for discovery with a response has a duty to seasonably supplement or correct that response with information thereafter acquired. Supplementation or correction shall set forth ~~only~~ clearly the information being supplemented or corrected.

We believe this simple change would address the ECCL Task Force's concerns without introducing excess rigidity into the civil rules.

5. <u>Proposed Amendment to CR 26(g) – One-Size-Fits-All Privilege Logs: Oppose</u>

We oppose the proposed amendment to CR 26(g) in its current form and without any allowance for the use of category-based privilege logs to address the unique needs inherent in civil actions litigated by the government. We believe modification of this proposed rule is needed to avoid unnecessary and unproductive litigation over discovery disputes, and because the one-size-fits-all privilege log requirement does not provide the flexibility and efficiency needed in complex litigation and child welfare proceedings under chapter 13.34 RCW, nor does it address the unique circumstances involved in affirmative law-enforcement cases handled by our office.

The proposed amendment to CR 26(g) would require a privilege log when any documents or information are withheld from discovery responses, and would additionally prescribe the particular fields and level of detail that must be included in that privilege log for each such document. It reads: "No objection based on privilege shall be made without identifying with specificity all matters the objecting party contends are subject to the privilege including the type of item, the number of pages, and, unless otherwise protected, the author and recipient, or if protected, other information sufficiently identifying the item without disclosing protected content."

Discovery response deadlines are relatively short, and parties often need to preserve privilege objections without having undertaken a comprehensive review of all responsive or potentially responsive materials. For example, in child welfare litigation, the Department of Children, Youth, and Families must provide records within 15 days after receiving a written request. RCW 13.34.090(5). Providing all records and a detailed privilege log within 15 days presents an unreasonable workload for the agency and its attorneys. Furthermore, preparation of a privilege log may be unduly burdensome where a discovery request seeks a large volume of information that is likely to be privileged (whether the requester intends to seek privileged information or not). As another example, in our affirmative consumer protection and civil rights cases, defendants frequently ask for our office's "investigation file" in discovery. Because these investigations are led and directed by attorneys, many of the communications in the file are privileged or contain work product. Specifically, much of the information we possess concerning the case, including our investigative sources and methods, frequently is protected by multiple privileges, including the government deliberative process privilege, attorney-client privilege, common interest privilege, and attorney work product protection. Recognition of these privileges is common in a wide range of government litigation.

With respect to the specific protections frequently applicable to our work, the work product doctrine is broadly recognized in Washington case law and the Civil Rules. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985); CR 26(b)(4). The work product doctrine protects the work of government lawyers who lead investigations done in anticipation of litigation, including attorney and staff interview notes taken during fact-finding investigations. *See, e.g.*, *Kittitas County v. Allphin*, 190 Wn.2d 691, 703, 706–07, 416 P.3d 1232 (2018), *as amended* (June 18, 2018) (emails between Kittitas County prosecutors and staff with the Department of Ecology were protected work product, as they contained "legal research and opinions, mental impressions, theories, or conclusions," as well as "written notes or memoranda of factual statements or investigation," created for use in environmental litigation); *Soter v. Cowles Publ'g Co*., 162 Wn.2d 716, 743, 174 P.3d 60 (2007) (classifying school district's "attorney or legal team's notes regarding witness interviews as highly protected opinion work product"). Importantly, the work product doctrine does not protect otherwise discoverable information simply because it is part of a government prosecutor's files. *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 479–80, 987 P.2d 620 (1999) (requiring record-by-record analysis of contents of closed police investigative file).

In addition, Washington law recognizes the "deliberative process exemption—protecting the give and take of deliberations that are necessary to formulate agency policy," and exempting "predecisional opinions or recommendations" from disclosure. *Am. C.L. Union of Wash. v. City of Seattle*, 121 Wn. App. 544, 549, 89 P.3d 295 (2004). Similar federal law also protects against disclosure of pre-decisional and deliberative documents and materials, *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 356 (2d Cir. 2005), including those that are part of government law-enforcement investigations. *See, e.g.*, *Nat'l Wildlife Fed'n*, 861 F.2d 1114, 1119 (9th Cir. 1988) ("[W]henever the unveiling of factual materials would be tantamount to the 'publication of the evaluation and analysis of the multitudinous facts' conducted by the agency, the deliberative process privilege applies."); *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1120–21 (N.D. Cal. 2003) ("a government can withhold documents or prevent testimony that reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated"); *Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974) (withholding staff hearing summaries as shielded by deliberative process privilege).

To address these and other privileges during the discovery process, our office frequently produces category-based privilege logs consistent with CR 26 that describe the withheld documents with sufficient specificity as to allow defendants to evaluate the privileges or protections claimed, but without logging information as to every document in the group. Other jurisdictions have specifically recognized such an approach to logging privileges in voluminous cases. *See, e.g.*, *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013) ("Local Civil Rule 26.2 also authorizes the use of a categorical privilege log and provides that 'when asserting privilege on the same basis with respect to multiple

documents, it is presumptively proper to provide the information required by this rule by group or category.'").

Put simply, individually logging voluminous documents, such as communications between investigative team members, will be a significant waste of time and taxpayer resources, and will not result in additional documents being produced to requesting defendants. Thus, rather than achieve the ECCL Task Force's objective of *reducing* the cost of litigation, the prescriptive privilege log required by proposed CR 26(g) would *increase* the costs of discovery for government agencies and, ultimately, Washington taxpayers, given the volume of documents and communications that would need to be logged individually.

More importantly, compliance with the proposed rule could compromise the success of our law enforcement actions on behalf of the people of the State of Washington by forcing us to divulge information on privilege logs that may provide defendants—and potentially their business and industry partners—with a roadmap of our investigation. Thus, our office, like other government entities, simply could not comply with the highly specific proposed privilege log requirements without effectively revealing work product and information that could jeopardize the success of our investigation and litigation efforts. This risk would likely require us to litigate the privilege log in many or most cases to protect our work product and other privileged investigative and law enforcement information. This is so despite the qualifier in proposed CR 26(g) that allows a party to omit "otherwise protected" information from the privilege log. The proposed rule sets a baseline expectation that privilege logs ordinarily should contain—for each document—the document type, number of pages, author, and recipient. We anticipate that any deviation from this baseline will result in a discovery dispute, and that such disputes will often require court intervention.

For these reasons, we oppose the proposed amendment to CR 26(g) regarding one-size-fits-all privilege logs.

Alternatively, we suggest the following amendment (with **bold** depicting additional additions):

> **(g) Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a ~~party~~ represented party ~~by an attorney~~ shall be signed by at least one attorney of record in the attorney's ~~individual~~ name., ~~whose address shall be stated.~~ A ~~nonrepresented party who is not represented by an attorney shall sign the~~ request, response, or objection by a nonrepresented party shall be signed by that party ~~and state the party's address~~. Objections shall be in response to the specific request objected to. General objections shall not be made. **A party making an objection based on privilege shall describe the grounds for the objection and, where consistent with subsection (b)(1), shall identify** ~~No objection based on privilege shall be made~~

> ~~without identifying with specificity~~ all matters the objecting party contends are subject to the privilege including ~~the type of item, the number of pages, and, unless otherwise protected, the author and recipient, or if protected, other~~ **sufficient** information **to allow other parties to evaluate the claim of privilege** ~~sufficiently identifying the item~~ without disclosing protected content. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

As a second alternative, we request that if the proposed amendments to CR 26(g) are adopted, that the Court also include a comment that in litigation where claims or defenses are investigated and litigated by government entities, the government entities may use category-based privilege logs, where appropriate, to disclose the categories or groups of documents and files withheld without revealing privileged details about their individual contents. Proposed comment:

> **Comment to CR 26(g) amendments of 2022 regarding categorical privilege logs for government parties.** The privilege logs required by this rule may not apply to law-enforcement actions or investigations in anticipation of litigation handled by government entities, whose investigations are directed by attorneys. In such cases, detailed individual disclosures about the contents of government attorneys' communications and files may impair the litigation, as well as future investigations, by revealing information including, but not limited to, the investigative methods used, the priorities and order of investigation, investigation and litigation strategy, evidence and information obtained, the sources of evidence and information, witnesses selected for interviews, and documents selected for inclusion in the case file. In such cases, government parties must provide a privilege log that protects privileged or non-discoverable information while providing the opposing party and the court with sufficient information to assess the claim of privilege.

6. **Proposed Amendment to CR 26(g)(6) – End General Objections: Support**

We support the proposed amendment to CR 26(g)(6)**,** which prohibits "general objections" in written discovery responses consistent with federal rules, and reinforces the need for specific objections to specific interrogatories per CR 33(a) and requests for production per CR 34(b)(3)(B). This rule change would help eliminate time-waste, and increase the clarity and transparency of responses to discovery.

7. **Proposed Amendment to CR 77(i) – Provide Judicial Case Assignments: Support with Modifications**

We strongly support providing trial judge assignments for every case statewide, except in counties where "impractical," and then on a case-by-case basis by motion, as required by proposed CR 77(i).

Judicial assignments would improve efficiencies, particularly in complex cases. In our experience, judges assigned to cases for all purposes get to know the parties and the case, ensuring consistent rulings over the course of the litigation, reduced gamesmanship in discovery, and more effective case management. Assigned judges are in a better position to appropriately narrow issues in dispute on summary judgment, rule on motions *in limine*, and conduct a fair and efficient trial. The same efficiencies and opportunities are not present when different judges rule on every motion, the case is not managed by a judge throughout the litigation, and the case is tried before a judge who has no background or connection to the pretrial proceedings.

That said, we are concerned that the proposed amendment to CR 77(i) can be read as permitting a party to file a motion requesting that the court assign a particular named judicial officer to hear its case. Permitting parties to request a specific judicial officer runs afoul of litigants' rights to have their cases tried by a fair and impartial tribunal. The proposed amendment reads, in part: "In counties where local conditions make routine judicial assignment impracticable, *the court may assign any case to a specific judicial officer on a party's motion* or on its own initiative." (Emphasis added.) We believe it would be clearer if the proposed amendment to CR 77(i) allowed the court to reassign a case to an available, rather than a specific, judicial officer where local conditions make routine judicial assignment impracticable.

For these reasons, we respectfully request that the proposed amendment be modified to substitute the words "an available" in place of the words "a specific." It would read:

> **(i) Judicial Assignment.** The court should assign a judicial officer to each case upon filing. The assigned judicial officer shall conduct all proceedings in the case unless the court reassigns the case to a different judicial officer on a temporary or permanent basis. In counties where local conditions make routine judicial assignment impracticable, the court may assign any case to ~~a specific~~ an available judicial officer on a party's motion or on its own initiative.

* * *

We appreciate the opportunity to comment on these proposed rules and thank the Court for its ongoing efforts to improve the administration of justice across the state.

Sincerely,

KRISTIN BENESKI
First Assistant Attorney General

KB/kw

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: AGO Comments on Proposed Amendments
Date: Wednesday, April 27, 2022 4:13:30 PM
Attachments: Comment on Proposed Amendments to CR 3.1, CR 16, CR 26, CR 77.pdf
Comment on Proposed Amendments to GR 22.pdf

From: Warren, Kim A (ATG) [mailto:Kim.Warren@atg.wa.gov]
Sent: Wednesday, April 27, 2022 3:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: AGO Comments on Proposed Amendments

Good afternoon,

Please find attached comments from the Attorney General's Office on proposed amendments. Please let me know if you have any questions.

Best regards,

Kim Warren

Executive Assistant

Administration Division

Attorney General's Office