Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

April 21, 2023

Via Electronic Mail

Ms. Erin L. Lennon
Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
E-mail: supreme@courts.wa.gov

RE: Proposed Amendments to CR 26 and RAP 18.7

Dear Ms. Lennon:

Thank you for the opportunity to comment on the Proposed Rules Published for Comment in November 2022 and July 2022. I write on behalf of the Attorney General's Office to submit comments on the proposed amendments to CR 26 and RAP 18.7.

The Attorney General's Office previously submitted comments in April 2022 on the proposed amendments to CR 26 that were published for comment at that time, and which were republished for comment in November 2022. We renew and expand upon those previously submitted comments, and we also submit a comment supporting the proposed changes to RAP 18.7.

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 CR 26 and RAP 18.7 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 to CR 26 that we support, but believe require additional revisions or modifications, and one proposed amendment that we oppose.

1. **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.

2. 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 Escalating Cost of Civil Litigation (ECCL) Task Force proposed 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.

3. Proposed Amendment to CR 26(g) – One-Size-Fits-All Privilege Logs: Oppose

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 complex litigation and civil actions litigated by the government.

The proposed amendment to CR 26(g) would require a linear 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. The proposed amendment 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."

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 (especially one finding its support in the unique context of a case involving a Public Records Act request) 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 law-enforcement cases handled by our office.

a. PRA considerations do not generally apply to other litigation

The proponents' rationale for the proposed amendment to CR 26(g) is based on considerations that are unique to the Public Records Act context, and that do not generally apply to other types of litigation. Specifically, the proponents state that the language "for the suggested amendment to CR 26(g) is taken almost verbatim from *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009)," a case involving the production of an itemized log in response to a request under the Public Records Act (PRA), chapter 42.56 RCW. *Rental Housing Association* held the agency's response in that case did not trigger the PRA's statute of limitations until the agency provided an exemption log. 165 Wn.2d at 538–40. The Court concluded that in order to make a valid claim of exemption under the PRA, an agency should include the information that a privilege log provides. *Id.* at 539. That case provides an "illustration of compliance" by quoting PRA model rules recommending a PRA withholding log that, for each record withheld, "identifies the type of record, its date and number of pages, and the author or recipient of the record

(unless their identity is exempt)." *Id.* at 539 (quoting former WAC 44-14-04004(4)(b)(ii), currently codified as WAC 44-14-04004(5)(b)). The Supreme Court then noted that this requirement was designed to ensure compliance with the statute and to provide an adequate record for a reviewing court to review any exemption claims. *Id.* at 537–38.

Rental Housing Association, however, did not address whether a document-by-document log is required when thousands of documents are being withheld for similar reasons. In that hypothetical, the withholding party would have a good claim that a linear log would *thwart* the purposes of the PRA by making a review of each privilege claim impractical. In fact, even within the current PRA framework, Washington courts have shown some flexibility in permitting documents to be grouped categorically when categorization sufficiently identifies the subject records and the claimed exemption. *See, e.g.*, *Klinkert v. Washington State Criminal Justice Training Comm'n*, 185 Wn. App. 832, 837, 342 P.3d 1198 (2015) (holding that Criminal Justice Training Commission log listing entire 713-page investigative file as one document that was being withheld as exempt under confidentiality provision of RCW 43.101.400(1) contained "enough information to enable [the requester] to evaluate, and a court to review, the Commission's decision to withhold the entire file" under the Public Records Act).

While *Rental Housing Association* provides a rule to help effectuate the important purposes of the PRA, it does not require (or even suggest) a one-size-fits-all approach under CR 26(g). As discussed below, rules in civil discovery should remain flexible by design so that trial courts and parties can shape the discovery process to fit the needs of each case, which can vary greatly.

b. Linear privilege logs are often unduly burdensome and unnecessary

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 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. *ACLU 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.

c. Other authorities endorse categorical privilege logs where appropriate

Federal Rule of Civil Procedure 26 permits courts to take a practical and flexible approach in assessing a privilege log's sufficiency:

> [Fed. R. Civ. P. 26(b)(5)] does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, **particularly if the items can be described by categories**.

Fed. R. Civ. P. 26 advisory committee's note to 1993 amendments (emphasis added); *see also In re Imperial Corp. of Am.*, 174 F.R.D. 475, 477 (S.D. Cal. 1997) (relying on commentary to permit categorical logs). 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.'"); *see also* New York City Bar Committee on State Courts of Superior Jurisdiction's Guidance and a Model for Categorical Privilege Logs available at: https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf ("NY Guidance").

Moreover, use of a categorical privilege log in large-scale and/or complex litigation has been endorsed by leading jurists in The Sedona Conference's[1] Commentary on Protection of Privileged ESI, 17 Sedona Conf. J. 95, 103 (2016) (SCC), available at: https://thesedonaconference.org/sites/default/files/publications/TSC%20Commentary%20on%20Protection%20of%20Privileged%20ESI%202015%20%281%29_0.pdf. The article explains that traditional logs "rarely 'enable the other parties to assess the claim'" of privilege in complex litigation. In fact, the Sedona jurists went so far as to label "the procedure and process for protecting privileged ESI from production" in complex litigation with traditional logs as "broken." *Id*.

A document-by-document linear approach is only one of "a number of means of sufficiently establishing [a] privilege." *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Under Federal Rule of Civil Procedure 26, courts retain "discretion to permit less detailed disclosure in appropriate cases," including the discretion to allow privilege claims to be described and assessed categorically when "(a) document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be

[1] The Sedona Conference is "a nonprofit legal policy research and education organization, has a working group comprised of judges, attorneys, and electronic discovery experts dedicated to resolving electronic document production issues." *Aguilar v. Immigr. & Customs Enf't Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 355 (S.D.N.Y. 2008). "Since 2003, the Conference has published a number of documents concerning ESI, including the Sedona Principles." *Id.* "Courts have found the Sedona Principles instructive with respect to electronic discovery issues." *Id.* (citation omitted).

of no material benefit to the discovering party in assessing whether the privilege claim is well grounded." *S.E.C. v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. Mar. 20, 1996); *accord In re Imperial Corp. of Am*., 174 F.R.D. at 479 (holding a linear log is not required when it "would be unduly burdensome and inappropriate").

Although they take a different approach than linear logs, categorical logs still satisfy the fundamental principle that the proponent of a privilege assertion bears the burden of "provid[ing] information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege." *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013).

Categorical privilege logs are a particularly appropriate and efficient alternative in cases involving high volumes of discovery, as a number of courts have recognized. *See, e.g.*, *Wyndham Vacation Ownership, Inc. v. Totten Franqui Davis & Burk, LLC*, No. 18-81055-CIV, 2019 WL 7905017, at *1 (S.D. Fla. Feb. 19, 2019); *Auto. Club of New York*, 297 F.R.D. at 59-60; *United States v. Magnesium Corp. of Am.*, No. 2:01-CV-00040 DB, 2006 WL 1699608, at *5 (D. Utah June 14, 2006), *modified in part*, No. 2:01CV40 DB, 2006 WL 2350155 (D. Utah Aug. 11, 2006); *In re Imperial Corp. of Am.*, 174 F.R.D. at 479. Courts recognize that they can be a compelling alternative given "the exponential growth in the size of document productions that have resulted from the use of computers, emails and similar devices and applications that generate electronically stored information" and for the purpose of "reduc[ing] the burden of individually identifying a large volume of documents." *Auto. Club of New York*, 297 F.R.D. at 60; *see also Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (permitting a categorical log "[t]o lessen the burden posed by reviewing and recording a large quantity of protected communications."). Moreover, a categorical log avoids scenarios in which the log itself reveals confidential information—for example, document titles that identify an individual receiving treatment for a substance use disorder or describing potential actions contemplated by a board or commission as part of its litigation strategy. *See Magnesium Corp. of Am.*, 2006 WL 1699608, at *5 (holding that a categorical log for a voluminous set of documents was justified because document-by-document entries could themselves reveal privileged information about litigation strategy).

d. Categorical privilege logs promote the purposes of CR 1, especially in cases involving high volumes of data

The creation of categorical privilege logs in cases involving high volumes of discovery is consistent with CR 1's mandate to construe and administer the rules "to secure the just, speedy, and inexpensive determination of every action." Indeed, our courts have interpreted CR 1 to require practical solutions rather than rigid or formulaic procedural requirements. *See CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 395, 321 P.3d 1261 (2014) ("To the extent possible, then, 'the rules of civil procedure should be applied in such a way that

substance will prevail over form.'" (internal quotation and citation omitted)); *Kohl v. Zemiller*, 12 Wn. App. 370, 372, 529 P.2d 861 (1974) ("Pragmatic considerations govern in reaching the overall objective stated in CR 1 . . . Accordingly, a practical solution should be preferred to a technical one whose use might result in frustrating the purpose of the superior court rules." (citation omitted)). A categorical privilege log is a practical solution that honors the purpose of the discovery rules. *Auto. Club of New York*, 297 F.R.D. at 60 ("the justification for a categorical log of withheld documents is directly proportional to the number of documents withheld."); *accord Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc.*, No. 205CV01059KJDGWF, 2007 WL 1726558, at *8 (D. Nev. June 11, 2007) (ordering an affidavit describing categories of emails rather than a traditional privilege log where "such communications are in the hundreds of thousands" because "requiring Plaintiffs to provide a privilege log for each privileged email communication would be unduly burdensome and not serve the legitimate purposes of discovery").[2]

The vast, expanding volumes of electronic data make it more difficult (and expensive) to look at every document in a data set and explain privilege without disclosing content. A categorical log, by contrast, arranges similarly grouped documents by privilege basis, while providing enough information to permit the receiving party to request additional detail on a more granular/approachable/categorical basis, or even challenge the assertion of the categorical privilege at face value (such as waiver) depending on the document's recipient.

Here is an example of a categorical privilege log from the NY Guidance beginning at p.8 (in recent litigation, the State employed this format to categorize more than 150,000 privileged documents):

[2] While a software-generated metadata log might not be as time-consuming to generate as compared to a manual linear log, metadata logs often lack the substantive information to be able to contest or facilitate a constructive discussion relating to the privilege designation of particular documents. For example, the original file name used to identify a particular document will not necessarily describe its content, or grounds for privilege. By contrast, that document would be sorted in the categorical log based on its basis for privilege, with a general description of the basis for the privilege.

Model Categorical Privilege Log

Category No.	Date Range[1]	Document Type	Sender(s)/Recipient(s)/Copyee(s)	Category Description	Privilege Justification	Documents Withheld (Total Documents: 454)[2]	Documents Withheld, Including Families[3]
1	3/11/2012 - 6/30/2012	Email, PDF	**Attorneys**: K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client**: M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia **Qualified Third-Parties**: H. Smith (Accountants LLP), D. Jones (Consultant)	Communications with outside counsel providing, requesting or reflecting legal advice regarding easement and operating agreement negotiations with Heights Building Ltd.	Attorney-Client Privilege; Attorney Work Product	325	415
2	3/11/2012 - 5/31/2012	Email, Powerpoint, PDF	**Attorneys**: K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client**: M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia	Communications with in-house counsel providing, requesting or reflecting legal advice regarding third-party claims related to Montague construction.	Attorney-Client Privilege; Attorney Work Product	45	52
3	3/11/2012 - 6/30/2012	Email, PDF	J. Ginter; F. Treglia; K.; A. Adams.; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; M. Salem; A. Skar; A. Chen; B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen	Communications between non-lawyers containing information prepared by or on behalf of an attorney in preparation of litigation regarding Montague construction contracts.	Attorney Work Product	68	82
4	4/16/2012 - 6/30/2012	Email	**Attorneys**: K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client**: M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia	Communications with counsel containing information prepared in anticipation of litigation regarding pending litigation related to consumer complaints.	Attorney-Client Privilege; Attorney Work Product	52	152
5	6/01/2012 - 6/15/2012	Email	**Attorneys**: K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client**: M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia	Communications with counsel providing, reflecting or requesting legal advice regarding public disclosure and corporate governance issues related to pending litigation.	Attorney-Client Privilege; Attorney Work Product	15	15

1. Parties will agree on the relevant date range for discovery in the litigation. Date ranges in the log are a subset of this range and reflect the date of the earliest document and the date of the last document in the category.

2. Documents may appear in more than one category. Total Document represents the total document count.

3. Documents Withheld represents the number of documents to which privilege applies in each category; Documents Withheld, Including Families includes these documents with families, which may not be privileged.

We respectfully submit that the proposed amended rule does not keep pace with case law requiring, as a practical matter, technology-assisted review and predictive coding to capture and categorize documents withheld for privilege.

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 parties. 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.

e. The AGO's opposition and alternative proposals

For these reasons, we oppose the proposed amendment to CR 26(g) regarding one-size-fits-all privilege logs and request that this amendment not be adopted in any form.

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 complex or other litigation involving voluminous discovery, or where claims or defenses are investigated and litigated by government entities, the parties or 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 in complex or other litigation involving voluminous discovery, or 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 privileged materials including government attorneys' communications and files may impair the litigation, as well as future investigations, by revealing investigative and other privileged information. In such cases, 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 evaluate the claim of privilege, recognizing that in the case of categorical logs, this may be an iterative process that should be approached in good faith by counsel for all parties.

4. **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.

5. **Proposed Amendment to RAP 18.7 – Gender-Inclusive Options: Support**

We support the proposed amendments to RAP 18.7 and the RAP Forms. These proposed amendments align with the Attorney General's Office's policy of using individuals' preferred

pronouns, and would provide our staff and others with information that will facilitate the goal of minimizing misgendering, transphobia, trans-exclusion, and anti-LGBTQIA+ experiences in our courts and in litigation.

* * *

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: Martinez, Jacquelynn
Subject: FW: AGO Comments on Proposed Amendments to CR 26 and RAP 18.7
Date: Friday, April 21, 2023 1:01:19 PM
Attachments: AG Comment Civil Rules 4.21.23.pdf

From: Warren, Kim A (ATG) <Kim.Warren@atg.wa.gov>
Sent: Friday, April 21, 2023 12:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Beneski, Kristin (ATG) <kristin.beneski@atg.wa.gov>
Subject: AGO Comments on Proposed Amendments to CR 26 and RAP 18.7

Dear Ms. Lennon,

Please find attached a letter from First Assistant Attorney General, Kristin Beneski submitting comments on the proposed amendments to CR 26 and RAP 18.7. Please let me know if you have any questions.

Best regards,

Kim Warren

Executive Assistant to

Kristin Beneski

First Assistant Attorney General