April 28, 2023

Paul M. Crisalli
2523 Warren Ave. N.
Seattle, WA 98109

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504

Re: Comments on Proposed Changes to CrR 4.12, CrRLJ 4.12, and CR 26

Dear Justices of the Supreme Court,

We are individual lawyers a judge who regularly review and discuss proposed rule changes. This letter provides comments on the proposed changes to CrR 4.12, CrRLJ 4.12, and CR 26.

CrR 4.12 and CrRLJ 4.12

We have a concern about the proposed new CrR 4.12 and CrRLJ 4.12. We do not think that these changes are necessary. The Court recently promulgated CrR 3.3 and CrRLJ 3.3, which became effective January 1, 2023 and which allow defense counsel to sign agreements to continue trial. We are concerned that the proposed new CrR 4.12 and CrRLJ 4.12 will cause unnecessary confusion and create an ambiguity because they are differently worded than CrR 3.3 and CrRLJ 3.3 rules. We do not think that the proposed new CrR 4.12 and CrRLJ 4.12 in light of the recent changes.

CR 26

There are many proposed changes to CR 26, some of which we take no position. We wish to highlight a few concerns.

CR 26(b)(5) – Expert Discovery Supplementation

We are concerned that the proposed addition of the sentence "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." We believe that this provision will likely create situations where a party complies with all disclosure deadlines yet is either subject to a CR 37 sanction motion or is sanctioned for a disclosure of an expert. To be sure, parties should be encouraged to meet schedule deadlines while avoiding unwarranted delays, but this new provision would punish parties for a timely disclosure. Further, the proposed language will be unclear to parties as to ascertain when they would be subject to CR 37 sanctions for failing to disclose an expert, even if it is before the deadline.

CR 26(e) – Requirement to Supplement Discovery

We are concerned with the proposed amendment to CR 26(e) that imposes a continuing duty to supplement all discovery responses by providing that the only way to supplement is to provide "only the information being supplemented or corrected." There are many ways to supplement discovery, and in some instances, simply providing the correction can cause confusion, particularly when there are multiple supplementations. There are instances when a supplemental response that comprehensively demonstrates all prior responses and supplementations will be best for showing the progression of information provided in discovery. We respectfully advise that the word "only" be removed and that another word, like "clearly" be substituted, as this would ensure that a supplementing party has an obligation to make clear what information is being substituted or corrected. The proposed rule would read:

> 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 clearly the information being supplemented or corrected.

CR 26(g) – Required Privilege Logs

While we recognize that privilege logs are necessary in litigation and often utilized, we are concerned that the rule requires privilege logs for any asserted privilege in discovery in any matter subject to the civil rules. As these cases run the gamut in size, scope, and substance, we are concerned that this proposed rule is not well-suited for all cases for which it would be applicable. For example, there may be instances when propounded discovery would lead to thousands (or millions) of obviously privileged documents that fit into easily identifiable categories but only a few limited documents responsive to the request and most relevant to the claims at issue. It makes better sense for the responding party at least some ability to identify the categories not produced by reason of the privilege, and thus go through the unnecessary time and expense of identifying each of the documents, and the information prescribed by the proposed rule.

Second, and relatedly, we are concerned that the proposed rule is out-of-step with current and future discovery software. In complex, heavy document cases, parties use document databases that can be trained to review and produce documents responsive to discovery requests. Often, the coding can be used to exclude documents containing certain things, like attorney-client communications, work product, and personal sensitive information, by using specific search terms or search algorithms. Under this rule, it appears that a party would still need to produce a privilege log, which would need to be produced and reviewed by the lawyers, for any documents subject to those terms or algorithms. We are concerned that the rule would shortcut efficiencies that exist and will be improved by technology.

Thank you for your time and consideration. We appreciate the opportunity to provide these comments.

Sincerely,

/s Paul M. Crisalli
Paul Crisalli

/s Blaine Gibson
Judge Blaine Gibson

/s James E. Horn
James E. Horn

/s Andrew Van Winkle
Andrew Van Winkle

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment Letter
Date: Friday, April 28, 2023 4:15:01 PM
Attachments: Comment Letter.pdf

From: Paul Crisalli <paul.crisalli@gmail.com>
Sent: Friday, April 28, 2023 4:11 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: blaine.gibson@co.yakima.wa.us; jhorne@forum.aw; Van Winkle, Andrew <Andrew.VanWinkle@courts.wa.gov>
Subject: Fwd: Comment Letter

Hello,

Please find attached a comment letter regarding proposed rules changes. Please let me know if you have any questions or have difficulty opening the attachment.

Thank you,
Paul Crisalli