April 28, 2023

Hon. Chief Justice Steven Gonzalez
Ms. Erin L. Lennon, Clerk of the Court
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

By US Mail and email to supreme@courts.wa.gov

Re: Public Comment On Proposed Discovery Civil Rule Amendments

Dear Chief Gonzalez and Ms. Lennon:

I write in reply to letters by Attorney General's Office, the "Washington State Association for Justice," and the Superior Court Judges Association for the State of Washington. These comments are offered globally as to all proposed Civil Rule amendments on the topic of discovery.

Given the pace and process of our wonderful State Bar Association, I rely you are familiar it takes substantial time for the Board of Governors to authorize a formal response by the WSBA. Therefore, I want to make clear that I am writing in my personal capacity.

However, that personal capacity includes serving as the WSBA treasurer, a Governor on the Board of Governors for three years, the Board's liaison to the original workgroup tasked with formulating proposed Civil Rule amendments, and the chair of the second workgroup tasked by the WSBA to propose *the pending* proposed amendments. Also, I have been an active litigator in the State of Washington for nearly 30 years with over 50 jury trials having tried cases in every major county in the state as well as over 50 appellate appearances in all three Divisions of the Court of Appeals and multiple appearances before this Court.

Not in order of importance but simply in the order in which items are stated, I will provide a response.

A. ATTORNEY GENERAL LETTER DATED APRIL 21, 2023

Notably, despite its length the AG's letter does not disagree with much of the proposed amendments. I understand the AG's comments on requests for modifications. I suggest they are better illustration of the fact that no one, singular rule can address every peculiar situation and that when the AG's office finds itself confronted with one of the outlier situations described in its letter that only highlights the need for it to be proactive and timely with a CR 26(i) discovery conference. There is not a single example it raises involving complex or similar litigation that cannot be addressed by a discovery conference.

Rules are at their best when they address the greatest number and most frequent of situations and allow exceptions for outliers. Rather than attempt to shoehorn the outlier examples cited by the AG's office (which I agree exist) as reasons for modification I submit the better course is to adopt the rules as proposed and allow the discretion that already exists in the rules to address the outlier situations cited by the AG.

That said, I will provide brief comment to some of the points raised by the AG's letter.

1. Disclosure of expert witness information

The proposed amendment makes it clear expert witness information must be timely produced in response to discovery and case schedule drop-dead deadlines are not safe harbor. It does that by, for the first time, providing a clear enforcement mechanism in the event a party tactically delays disclosure based on a case schedule deadline. Of course, a trial court must still exercise discretion to find a tactical non-disclosure happened. But if it does, the amendment's invocation of CR 37 as enforcement provides the trial court a clear remedy thus the proposed amendment provides deterrence against this long standing, and it appears undisputed, discovery abuse. The reason and need for that are stated in the workgroup's original submission.

The AG's office indicates it supports the proposed amendment. But then, it asks the court delete the language offered by the amendment providing enforcement. It says the proposed amendment "fails to address late disclosures" and "invite(s) litigation regarding timely disclosures."

That comment misapprehends both that section of CR 26 and the proposed amendment by mistakenly believing CR 26 at that part of the rule, and the proposed amendment, are concerned with *case schedule* late disclosures. Neither are. But, mistaking that as the point of the rule and proposed amendment the AG's office argues the proposed amendment does not adequately address late *case schedule* disclosures.

The purpose of that section of CR 26 and the proposed amendment have nothing to do with timely or late case schedule disclosures; both only address untimely *discovery responses* by wrongly withholding expert witness information with the excuse a party need not produce anything until a case schedule deadline. Thus, the criticism the AG's office offers has nothing to do with the proposed amendment. The proposed amendment addresses the problem identified.

Moving past that, the AG's office offers a new paragraph creating a state wide rule of expert disclosure much like King and Pierce County have by Local Rule. It does not appear to be appropriately before the court as it seeks to create a new rule with no public comment.

2. Mandatory Discovery Supplementation

The AG supports mandatory discovery supplementation but objects to a supplement being what it is: a supplement. Instead, the AG desires to allow parties to continue to couch a supplement of a singular item – it could be only one sentence – in the entire set of discovery responses having nothing to do with what is being supplemented.

In support of that, the AG's office argues it would be easier to use a supplement at trial as an exhibit that contains everything as opposed to only the supplement.

Notably, the AG's office does not explain why that is. As a litigator myself with a material amount of trial experience I see nothing difficult about doing that. Indeed, it could streamline trial by allowing a litigant to focus only on what the supplement was.

Also, even if we assume the AG's point about a trial exhibit has merit, it is an outlier situation that does not support the change it requests. In every single case where there is discovery and a supplement this problem is an issue. In every case.

Balance that against how many cases actually go to trial, and within that how many trials involve a discovery response being marked as an exhibit. No doubt it happens but in my nearly 30 years of practice I am hard pressed to remember it happening more than once.

Furthermore, when discovery answers are used as an exhibit no trial judge would allow an entire set of discovery to go to the jury for all manner of reasons I rely need not be stated here. Instead, at most a discovery response might be marked and shown to a witness with the witness reading only the pertinent part. Thus, the example the AG's office identifies as basis for its objection actually supports a supplement as being only a supplement because then a litigant could use and offer that one item apart from voluminous and unrelated matters.

Requiring a supplement to be only a supplement and not an obfuscation of a single line hidden within 20 pages of responses and objections is an enormous time and therefore cost saving measure in discovery that will be realized in every case. Losing that efficiency to address the seldom incurred situation identified by the AG's office does not outweigh that benefit.

What is more, the language offered by the AG will not work.

The AG's office proposes the court strike the amendment's language requiring a supplement be only that, a supplement, and instead say a supplement must be "clear." That is no solution to the problem.

The AG's proposed language would not even require the supplemented information be called out or identified as to what is being supplemented. Under the AG's proposal, as long as what was said as a supplement was said "clearly" (as opposed to confusingly said), it meets the rule. Only saying a

supplement must be "clear" still puts the receiving party to a needle in a haystack search for what was supplemented.

3. Privilege Log

The AG's office agrees there should be an amendment making this mandatory but argues the court should only require a privilege log "by category" as opposed to by document.

The core of the AG's position is its argument that in complex litigation it needs more time to gather documents to understand what is privileged in the first place. And, so its argument goes, a privilege log by "category" is more appropriate because it needs more time to identify the documents in, what it calls, a "linear" fashion – what case law simply calls a privilege log.

It is novel the AG's office saying that, fails to appreciate it is admitting its internal practice (not all the time, but at times) is the very incorrect use of blanket privilege objections the proposed amendment is trying to fix.

Parties without knowing if anything is covered by privilege make long, boilerplate objections of privilege 'just in case' they later find a document they might want to object to. That is the AG's argument of what it wants to do: to make privilege objections before even identifying the documents purportedly subject to it.

The solution to needing more time to determine what documents are privileged is not to make a blanket privilege objection (what the AG's office calls an objection by "category") and certify the objection before the attorney even identifies privileged documents.

The solution to needing more time is to timely use the rules that already exist to request more time to respond. CR 26(i) is an already existing mechanism for that. If the requesting party is unreasonable and will not agree, the rules already provide a remedy for that as well.

Additionally, as with its objection regarding discovery supplements, the AG's argument is based on unusual, outlier cases of enormous complex discovery. Those are the rare exception; not the norm. Anecdotally the vast majority of cases are small. Most privilege issues, if Court of Appeals opinions are any indication – and they are – arise out of singular insurance bad faith matters, employment discrimination claims, and the like. Those are precisely the situations where what the AG's office calls a "linear" privilege log (a privilege log) will result in a meaningful time savings in discovery.

Cases involving, as the AG cites at page 9 of its letter, "150,000 privileged documents" are as rare in civil litigation as compared to the day-to-day work of the court as to not be necessary to account for. Instead, while they certainly do exist, those exceptions actually prove the rule and the amendment as they illustrate why parties such as the AG's office should be timely and proactive with a discovery conference, and if need be, obtain a protective order as opposed to making blanket objections.

Indeed, what it asks this court to do at page 12 of its letter, that in "complex or other litigation involving voluminous discovery... the parties may use category-based privilege logs" *is precisely what can and should be discussed in a CR 26(i) conference*. The amendment does not bar the AG's office from using a log by "category" when it has a unique situation where that would be a better outcome. It need only demonstrate the need to do so. Not satisfied with that, the AG's office wants that to be the default. If an outlier situation exists the AG can, and should, seek relief unique to that situation as opposed to saddling all cases with an inadequate outcome.

Finally on this point, this court must reject the AG's office request for special and preferential treatment. It asks this court at page 12 of its letter that the State be given preferential treatment and that it only ever be required to use "category-based privilege logs." It is relied this court requires no discussion on why preferential treatment should not be granted. While we all appreciate and respect the work of the Attorney General's Office on behalf of the citizens of the State of Washington, neither it or the State are entitled to preferential treatment.

B. WSAJ LETTER DATED MARCH 24, 2023

1. Claim Of Lack of Stakeholder Input

WSAJ first says it did not give input to the proposed amendments. Its representatives did in fact speak and give input on the proposed amendments consistent with what was proposed to this court.

When the most recent task force was formed, we took extraordinary steps to invite every major stakeholder to be a voting member on the committee – including WSAJ. At our first meeting the WSAJ representatives did indeed make the disclaimer they were only there to observe.

I will concede that was met with a certain level of exasperation by other committee members and me as the Chair with the responsive of:

> Why. We are here to discuss proposed rules, you are a stakeholder, and now is a time to be heard. Why send a representative to represent WSAJ at every meeting only to say it is not participating when it in fact is here participating.

I say none of that to in any way be derogatory toward WSAJ. As Chair I was extremely grateful WSAJ attended every meeting and spoke. WSAJ may have any process it desires and if it wants to say that the representative it sent to represent it was not representing it, it is what it is. I will not gainsay whether that is a procedural philosophy to preserve the ability to say later (as it does now) WSAJ was not involved so it can have a second bite at the apple; because in the end, it does not matter. Our original report accurately reported what each stake holder's representative said: including WSAJ. If WSAJ wants to distance itself from what its appointed person it sent to represent it at our meetings by saying that person was not really its representative, I rely the court will make of that what it will.

2. Argument of procedure leading to these proposed amendments

WSAJ at page 2 takes issue with the long process these proposed amendments took. It asserts that during that process "SCJA, WSBA, and other stakeholders have expressed serious concerns." It does not identify what those concerns were, when they were voiced (were they in response to first workgroup which is now moot or the second), and feels difficult reconcile with its prior statement it did not say anything.

But in any event, the long history of this process demonstrates the opposite of WSAJ's criticism. This was a thoughtful process that took account of all stakeholder input.

When the original "ECCL" task force made its final report to the Board of Governors it provided a slate of issues/values that could be addressed to, in its view, decrease the cost of civil litigation. The Board voted on what issues/values it wanted to pursue and then created a workgroup to draft rules to implement those values.

I was on the Board of Governors the entire time the first workgroup did its work and for a very long time was the Board's liaison to that workgroup including when it finished its work.

That workgroup, while exercising total and complete good faith, asked repetitively for continuances of the deadline to submit its proposed rules to the Board of Governors. The Board for over a year had a hard stop deadline in order to submit proposed rules to this court that corresponded with the Court's rule making deadline.

Ultimately, the workgroup did not provide its work product to the Board for consideration until only days before the deadline. The Board was asked to consider the final work product of a three-year process in one day and what was worse, those proposed amendments were the last item on the agenda for that meeting and the Board was given all of five minutes to deliberate three years of work. That is said without any exaggeration. In essence, the Board was given no time to discuss those proposed amendments or take any stakeholder input which is the role of the Board before using its discretion to vote up or down on a proposal.

While the Board was discussing the time left to decide how to vote was insufficient, it was either then Justice Gonzalez if not Chief Fairhurst (*I think it more likely it was Chief Fairhurst*) who raised their hand and told the Board that it should not be overly concerned with a rule submission deadline; that the Board could present those rules when they were ready and the Court would consider them in due course. Given that, the Board voted to form a second workgroup (the one I chaired) to take stakeholder input and present the rules back in a less rushed fashion so it could actually deliberate and make an informed vote.

The rule amendments ultimately proposed are the result of that process.

I have noted over my time volunteering with the bar that often, arguments of procedure derail needed action. We become mired in discussing process, which is of course important and should not be ignored, and forget to consider the rule or issue being decided. The end result is good ideas and needed

action are often left on the table. I am hopeful that after what is now a 5 or 6 year process that does not happen again. If this court deems these proposed amendments deficient, that is a proper use of its discretion. However, to give them less weight over an objection of a lack of process would not be a reasonable outcome.

3. Expert disclosure

First, WSAJ does not disagree with the comment of the WSBA workgroup that the current case schedule deadline is more often than not used as a weapon to tactically delay disclosure of experts as opposed to a shield against ambush. I submit as a litigator that no person who honestly speaks to that issue will deny that the typical response to expert witnesses discovery is experts will be "disclosed in accord with the case schedule" meaning on the deadline despite the fact the party has a retained, testifying witness with known opinions. I have simply lost track of how many cases I have had, once the expert's file was obtained, that it was not crystal clear the adverse party's expert was always a testifying expert with opinions disclosed and they were tactically withheld until the deadline. That subverts the rule. What was a good idea in terms of the case schedule for a drop dead deadline has become a weapon for delay. Hence, the need for the amendment.

Second, there is nothing in the proposed amendment that shuts down disclosure of expert witness opinions after the case schedule deadline as WSAJ argues. The rule does the opposite. The proposed amendment only requires opinions are not withheld tactically and are timely disclosed in response to discovery. The proposed amendment categorically does not preclude disclosing opinions after the case schedule deadline. If that is done Burnet v. Spokane Ambulance, 131 Wn.2d 484 (1997) comes into play.

4. Discovery into experts and their opinions

WSAJ argues the proposed amendment is "problematic" because it creates "ambiguity" over whether the rule applies to testifying experts or fact-experts such as treating health care providers. I respectfully suggest that criticism is not well taken.

When terms are used in the rules they necessarily bring with them the case law using those same terms. In this context, the rules already have requirements in regard to "experts" that case law has illuminated the meaning of in terms of testifying experts, consulting experts, and what the Washington Practice Manual calls "fact experts" such as treating providers. The proposed amendments simply use the same word, "expert," and that same word is as already understood under case law. There is no ambiguity. Where it says "expert" it clearly means a testifying expert because that is what case law already says. It does not mean a treating doctor. It does not mean a consulting expert. The latter two are not "experts" in that context as we all understand the current rule to be. There is no ambiguity.

5. Supplementation of discovery

WSAJ argues the rule creates ambiguity. But again, it says that only by giving no weight to the fact the rules already speak to those issues and we alerady have case law providing definitions of what

terms mean. The only thing the proposed rule does is to stop the duty of supplementation being contingent on receiving a reminder email or letter from opposing counsel.

WSAJ argues the proposal "is also unlikely to reduce litigation costs." It does not say why. An affirmative duty to supplement decreases litigation cost because it removes the need for counsel to constantly be sending reminder letters to supplement and it avoids the later argument that surprise evidence was not disclosed because there was no "supplement" request. Anything that can be done to make trials less of an ambush reduces the cost of litigation. This rule does that.

6. Privilege Logs

Case law is already clear a privilege log is required if a document is withheld because of privilege. The proposed amendment only codifies what the law already is, and if practice is any indication, most lawyers either are unaware of or ignore.

WSAJ argues requiring one in every case is a burden. It is precisely the opposite. Requiring a privilege log every time a privilege objection is no greater cost or burden because it is already required (it is only ignored) and when provided decreases the cost of litigation, decreases motion practice, and makes trial less of an ambush because either one of two things will happen: (1) instead of the typical practice of long, boilerplate privilege objections when there is not even anything the objecting attorney thinks is privileged, the objection will not be made at all because under this proposed amendment there will be nothing to put on a privilege log. Thus, this proposed amendment will shut down one of the greatest costs of litigation which is wading through long, baseless boilerplate objections to determine if something even exists. Or, (2) there may be documents legitimately subject to privilege, they will be properly identified upfront, and that will prevent the responding party from wasting substantial time trying to determine what is being objected to and allow the parties to meaningfully conference it. Or perhaps even better, the responding party will read the privilege log, see the objection is well taken, and nothing more need be done. That is the best reduction of the cost of civil litigation possible.

7. Omnibus Proposal

At its conclusion, WSAJ argues the court should reject an "Omnibus package of proposed amendments" and instead engage in "careful consideration of proposed amendments to discrete provisions of CR 26." I suggest WSAJ gives no weight to the full of this process, what was originally considered, and how narrow these proposed amendments are.

What was proposed by the first workgroup (never sent to this court) might well have been considered an overreaching, Omnibus package. Indeed, it is only slight hyperbole to say that there was hardly a single rule not touched by the first workgroup. What has been provided here is laser focused on only a few issues that the real world, experienced trial lawyers who made up this second workgroup recognized and saw as being meaningful opportunities to streamline discovery.

It is not my intention to say there cannot be additional improvements or that this workgroup was perfect. However, if at the end of this process, with this many people involved, and at the tip of the spear a workgroup consisting of seasoned litigators cannot proffer proposed amendments that will have a real-world, immediate impact at decreasing the cost of discovery, I submit no process can.

C. SUPERIOR COURT JUDGES' ASSOCIATION LETTER DATED SEPTEMBER 13, 2022

All of the Association's comments appear to center on the desire to maintain individuality for each county. Therefore, rather than addressing those concerns specifically I will address that underlying issue globally.

The proposed amendment has an escape clause that allows individual courts to chart their own course in terms of a case schedule and other issues to fit their unique needs. Given that, the proposed amendments provide a solution.

That said, and while we all greatly appreciate and respect the unique individuality of each County, at the end of the day we are one Superior Court. Given the ubiquity of technology, online filing, zoom technology which allows for greater accessibility to across state meetings, depositions, and at times even motions, at some point in our not so distant future we must come to the appreciation that we are one court and at a point need to be moving toward a uniform set of rules and expectations.

How cases are litigated determines the justice a litigant receives. The justice a litigant receives should not be contingent on which county a case is filed in.

The Association's letter raises the issue of cost and the need to monitor case schedules as impacting smaller courts. In the abstract that argument is not without merit but we should not fail to give weight to how case schedules work in reality. Even in the county with the most vigorous of case schedule enforcement, King County, there is no real day-to-day oversight as the Association expresses. Instead, the case schedule is self-policed. If a party feels aggrieved they bring it to the attention of the court and the case schedule provides the court a tool to ensure a timely resolution. In my practice I have never seen a court actively monitor much less enforce a case schedule other than perhaps counties with complex case schedules that involve certain affirmative statements (joinder, etc.) which this rule does not require.

D. CONCLUSION

As a litigator I urge the Court to implement the proposed amendments. I spend – nay, I waste – countless hours every week spinning wheels on long pointless boiler plate objections, I loose precious time in discovery while parties hide behind case schedules to make disclosures, and my practice is a constant game of whack-a-mole while I try to keep abreast of and not run afoul of the unique and at times conflicting Local Rules imposed by the many counties I practice in.

No rule will ever guarantee a result. At the end of the day, parties must follow the rules and when they do not the courts must enforce them. That is why in proposing amendments we did not draft rules of

behavior as such nor rules that say: they rule really means what it says. These amendments are needed adjuncts.

Also I suspect, I hope, that at some point in the future we appreciate the experiment of detailed Local Rules has itself been a source of increased cost of litigation. We are one Superior Court. The reasonable desire to allow courts to adopt local rules to administer justice unique to the needs of their particular infrastructure (number of judges, shared judges, etc.) has morphed into a multiplicity of differing and at time conflicting substantive rules of justice.

While I am very grateful for any entity or member who takes the time to give input as commenters have done, I respectfully suggest the issues raised are not ultimately persuasive. I urge the court to adopt the proposed amendments.

Sincerely,

Dan'L W. Bridges
Past WSBA Treasurer and Governor
Chair, WSBA Civil Rule Workgroup

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: Public Comment
Date:	Friday, April 28, 2023 3:32:17 PM
Attachments:	image001.png Bridges Public Comment Civil Rules.pdf

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From: Dan Bridges <dan@mcbdlaw.com>
Sent: Friday, April 28, 2023 2:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Public Comment

Greetings,

Attached are my public comments on the pending proposed amendments to the Civil Rules addressing discovery. I will follow this by US Mail.

If I am submitting this incorrectly I would be grateful for your correction.

Thank You!

Dan

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