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The Honorable Chief Justice Steven C. Gonzalez
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

RE: Proposed Amendments to Civil Rule 26

Dear Chief Justice Gonzalez:

I am writing in regard to the proposed amendments to CR 26. By way of background, I have been involved in the deliberations concerning the Escalating Costs of Civil Litigation (ECCL) before the WSBA Board of Governors as the representative of the King County Bar Association Judiciary and Litigation Committee (KCBA Judiciary). I also represented KCBA Judiciary in the WSBA Workgroup that was chaired by Dan Bridges. In that capacity, I drafted the section of the proposal on supplementation of interrogatories, and voiced the position of KCBA Judiciary on eliminating general objections and not permitting delay in answering interrogatories requesting information on experts until the deadline under case schedule guidelines. I also served as the KCBA representative to the King County Superior Court Judge's Local Rules Committee for eight years. In that capacity I proposed and assisted in drafting comment 6 to Local Rule 4, prohibiting such delay in answering interrogatories requesting expert information. That comment is set forth below in this letter.

I am currently the Co-Chair of KCBA Judiciary and am a past trustee and officer of KCBA. I taught trial advocacy at the University of Washington Law School for 30 years. I am a team leader in the deposition program for NITA in Arizona and Nevada and have served in the following capacities with that organization for 43 years; faculty member, team leader, program director and national lecturer via Zoom. Next year will mark 50 years as being a member of the bar.

<u>The comments that follow are my own and are not necessarily the position of any of the above organizations or committees</u>. This letter responds to the opposition submitted by WSAJ and the comments submitted earlier by the Superior Court Judges' Association

1 & 2. Expert Disclosure and Discovery.[1]

The proposed amendment largely tracks the procedures for witness disclosure that have been followed in King County for many years. The major change is that the amendment to CR 26 prohibits sidestepping direct responses to propounded interrogatory requests for expert information by means of delaying to the absolute deadline imposed by a case schedule. Instead, the amended rule would require disclosure when the witness is in place. Lawyers rarely wait until the court imposed deadline to actually engage their trial experts and they should not use that deadline as a means to delay the discovery process.

The Judges of the King County Superior Court clarified that point several years ago (at the request of KCBA Judiciary) by promulgating comment 6 to KCLCR 4, the King County rule establishing case schedule deadlines. The comment provides:

> 6. The deadlines in the Case Schedule do not supplant the duty of parties to timely answer interrogatories requesting the names of individuals with knowledge of the facts or with expert opinions. Disclosure of such witnesses known to a party should not be delayed to the deadlines established by this rule.

King County has lived under this edict for several years and has found it to be workable and beneficial. The arguments about whether to apply the rule to treating doctors raised by the WSAJ has been worked out in practice and is not an issue that has led to the exclusion of opinions of treating doctors. Rather, counsel in this county do their best to provide such opinions in discovery. The rule is quite workable and time has proven its worth. The codification contained in the proposed CR 26 amendments is consistent with the King County comment above and only goes beyond it by making an express reference to CR 37 to encourage compliance. Since all the civil discovery rules create CR 37 compliance enforcement, it is difficult to see how the express reference creates problems that should cause the amendments not to be implemented.

3. Supplementation of Discovery

CR 26 currently requires supplementation only in regard to the identity of witnesses and in circumstances in which prior answers were either untrue when

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[1] The numbered paragraphs correspond to the numbering in the WSAJ letter of March 24, 2023. In addition I address the comments of the SCJA.

made or have become inaccurate and "a failure to amend the response is in substance a knowing concealment." As time passes and the trial date approaches, the only way to make sure that the answers previously given remain complete and accurate is to prepare and serve "new requests for supplementation of prior responses." CR 26(e)(3). This has led to the additional expense of having to prepare new interrogatories containing a request for supplementation, an additional burden that has a price to litigants. The failure of a party to make such a request creates a hidden trap for a potential malpractice claim if undiscovered information is sprung against the lawyer's client at trial. Since the adverse party would be under a duty to respond to a CR 26(e)(3) demand for supplementation, if one were properly and timely made, it is hard to understand WSAJ's assertion that "the proposed amendment as drafted is also unlikely to reduce litigation costs." That would only be true under the current rules if a party failed to request supplementation, meaning that there would be no update and trial by ambush could ensue.

WSAJ also asserts that the proposed amendments would create an ambiguity as to whether new information learned after the discovery cutoff would be subject to supplementation. I must agree in part with WSAJ on that point. The current language in CR 26(e)(3), using the deadline of "any time prior to trial," should be inserted into the current proposed amendment to CR 26. The following modification would clarify the timing issue.

> (e) Supplementation of Responses. A party who has responded to a request for discovery has a duty, which continues until the time of trial, to seasonably supplement or correct that response with information thereafter acquired.

I submit that required supplementation of discovery responses is in the spirit of CR 1, which calls for the application of the rules "to secure the just, speedy and inexpensive administration of every action."

Superior Court Judge's Association

The SCJA asserts that "the proposed changes to GR (sic) 26 either [are] covered by existing local rules, or such a significant change from the procedures of smaller counties that implementation would result in disruptions to existing work load." That does not seem correct. First, the judges of King County had to enact a specific comment to the case scheduling rule to prevent the tactical practice of delayed disclosure of experts discussed above. The SCJA has submitted no proof of even a review of the local rules of the 39 counties to demonstrate that similar rules or comments exist in their local rules, or even that those smaller counties utilize case

schedules mandating expert witness disclosures. In any regard, uniformity of the requirement via a statewide civil rule would be preferable and would facilitate multi-county practice by lawyers.

The requirement of supplementation of discovery should have zero impact on the existing workloads of the courts in smaller counties as it is an obligation imposed on counsel. There would be no disruption of existing work load for those courts.

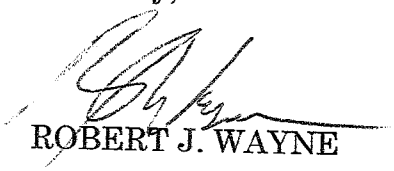
It is understandable that other proposals of the ECCL Committee and the April 7, 2021 promulgation of other proposals might have some impact on how smaller counties process their cases. However, the CR 26 amendments are not in that category.

Support for Proposed Amendments to CR 26

Neither the SCJA nor the WSAJ have offered an argument against the elimination of general objections. It is time to end that improper practice and enforce the requirement that objections to discovery be specific and not interposed to delay or defeat an obligation of disclosure.

Years of work and thousands of hours of volunteer participation have gone into the project to reduce the costs of litigation. The practical changes embodied in the Court's proposed amendments to CR 26 will benefit the public and the lawyers who daily labor to achieve just results. The amendments should be adopted, with the minor modification proposed above.

Sincerely,



ROBERT J. WAYNE

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