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April 10, 2023

Honorable Charles W. Johnson, Co-Chair

Honorable Mary I. Yu, Co-Chair

Supreme Court Rules Committee

Temple of Justice

P.O. Box 40929

Olympia, WA 98504-0929

Dear Justice Johnson and Justice Yu:

Re: Proposed Changes to CR 26

The Civil Law and Rules Committee (CLRC) of the Superior Court Judges' Association (SCJA) reviewed the proposed changes to CR 26 submitted by the Washington State Bar Association (WSBA). When the SCJA reviewed the proposed changes to CR 26 in 2022, they were part of a larger package aiming to reduce the escalating costs of civil litigation. At that time, we expressed our opposition on the basis that many of the changes would have generated significant and unnecessary administrative burdens for superior courts, limited courts' ability to manage their own calendars, and contained impractical requirements that ultimately would have led to increased court costs, especially for smaller courts or those experiencing staffing shortages.

Following our latest review of CR 26, the SCJA respectfully requests that the Supreme Court Rules Committee consider the following comments.

CR 26(b)(5)(A)(i).

The CLRC supports most of the proposed amendments to this section. The supported amendments will clarify parties' obligations during discovery, thereby increasing the efficiency of case processing and decreasing the cost of litigation. The CLRC proposes one grammatical change to add a missing word to the proposed changes in Section (b)(5)(A)(i): "A case schedule deadline to disclose experts does not excuse a party from timely responding to expert discovery."

The CLRC does not support the amendment to the subsequent sentence in Section (b)(5)(A)(i): "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."

April 10, 2023

Page 2

That provision is believed to run contrary to *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 491-98 (1997). In that case, the Washington Supreme Court **rejected** the Court of Appeals' conclusion that a trial court's decision to limit discovery and subsequently preclude testimony based on a "**compliance problem with a scheduling order**" was appropriate (emphasis added). The Washington Supreme Court overruled the Court of appeals and enunciated the three-pronged *Burnet* analysis which trial courts must now discuss in detail on the record before exclusion of any late-disclosed testimony can be ordered as a discovery sanction. *Id.* The CLRC believes that to remain consistent with *Burnet*, this sentence must be stricken.

CR 26(e)

With respect to the proposed amendments to CR 26(e), there were differences of opinion between CLRC members. Some members favored the proposed amendments, as they felt the broadened duty to supplement will expedite the discovery process. However, a concern was raised that because the duty to supplement will be broadened without specific limitations, the unintended effect of the amendments could be a decrease in case processing efficiency and a corresponding increase in discovery costs. As the CLRC could not come to consensus, it takes no position on the proposed amendments to this portion of the rule.

CR 26(g)

The CLRC fully supports the proposed amendments to CR 26(g). The CLRC believes that they will clarify parties' obligations during discovery, thereby increasing efficiency of case processing and decreasing the cost of litigation.

The SCJA welcomes any opportunities to comment on proposed rule changes that impact Superior Courts. Thank you for consideration of our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jennifer Forbes".

Judge Jennifer Forbes, President
Superior Court Judges' Association

cc: SCJA Board of Trustees
Ms. Allison Lee Muller

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: SCJA Public Comment Letters
Date: Monday, April 17, 2023 2:21:38 PM
Attachments: [SCJA Public Comment CR 4.11 and 4.12.pdf](#)
[SCJA Public Comment CR 26.pdf](#)
[SCJA Public Comment CR 65.pdf](#)
[SCJA Public Comment GR 43.pdf](#)
[SCJA Public Comment RAP 18.7.pdf](#)
[image001.png](#)

From: Green, Heidi <Heidi.Green@courts.wa.gov>
Sent: Monday, April 10, 2023 11:05 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Benway, Jennifer <Jamanda.Benway@courts.wa.gov>
Cc: Lee Muller, Allison <Allison.LeeMuller@courts.wa.gov>; Valdez, Andrea <Andrea.Valdez@courts.wa.gov>; 'Jennifer Forbes' <jforbes@kitsap.gov>
Subject: SCJA Public Comment Letters

Good morning,

Please see the attached comment letters from the Superior Court Judges' Association regarding proposed changes to CR 4.11 and CR 4.12, CR 26, CR 65, GR 43, and RAP 18.7.

Thank you,

Heidi Green

Senior Policy Analyst | Office of Judicial & Legislative Relations

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