



**PRESIDENT**

Jon R. Morrone  
Holland America Group  
206.626.7070  
jmorrone@HollandAmericaGroup.com

**PRESIDENT-ELECT**

Michael K. Rhodes  
Mix Sanders Thompson, PLLC  
206.307.1965  
mrhodes@mixsanders.com

**TREASURER**

Erin Seeberger  
Johnson, Graffe, Keay, Moniz & Wick  
206.223.4770  
seebergere@jgkmmw.com

**SECRETARY**

Rory Cosgrove  
Carney Badley Spellman  
206.556-8156  
cosgrove@carneylaw.com

**TRUSTEES**

Derek Bishop, Seattle  
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Erin Fraser, Seattle  
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**VIA EMAIL**

April 24, 2023

Clerk of the Supreme Court  
P.O. Box 40929  
Olympia WA 98504-0929  
supreme@courts.wa.gov

**Re: WDTL Comments On Proposed Amendments To CR 3.1, 16, 26 and 77**

To the Clerk of the Washington State Supreme Court:

I write on behalf of the Board of Trustees of the Washington Defense Trial Lawyers (“WDTL”). As you know, the WDTL is a membership of more than 700 defense attorneys who practice from Vancouver to Bellingham, and from Sequim to Spokane.

We hereby submit comments regarding proposed amendments to Superior Court Civil Rules 3.1, 16, 26, and 77. While the goal of reducing costs and counsel cooperation are laudable, and are of substantial interest to our membership, we have several remaining concerns about the implementation of a number of the proposed amendments.

**A. Expert Disclosure Requirements – Rule 26(b)(5)**

The WDTL appreciates the committee’s work in attempting to address gamesmanship in expert disclosures and discovery and agrees that all parties could benefit from further clarification in the rules on this issue. The amendment purports to require expert disclosure at the earliest possible time to avoid intentionally delayed disclosures and provides for a remedy for the failure to do so. The WDTL is concerned, however, that the proposed approach threatens to increase gamesmanship and punish parties who take steps to prepare their client’s cases well in advanced of trial. The proposed changes have the potential to incentivize delaying expert selection and providing the party who does delay their selection with an unfair advantage through a preview of the opposing party’s expert information.

Moreover, as drafted, it is unclear how the proposed rule would coexist with the Supreme Court’s existing precedent regarding witness exclusion in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997), and *Jones v. City of Seattle*, 179 Wn.2d 322 (2013).

**B. Supplementation of Discovery Responses – Rule 26(e)**

The WDTL generally supports providing a more robust duty to supplement discovery responses. The amendment replaces the existing categories mandating supplementation with a requirement that litigants “seasonably supplement”



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mrhodes@mixsanders.com

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Erin Seeburger  
Johnson, Graffe, Keay, Moniz & Wick  
206.223.4770  
seeburgere@jgkwmw.com

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discovery responses. However, as drafted, the proposed rule fails to adequately provide notice and guidance as to either the threshold or timing for such supplementation. Without specific definitions, the WDTL is concerned that the proposed amendments would result in uncertainty for litigants and the bench.

### **C. General Objections and Privilege Logs - Rule 26(g)**

The WDTL supports the technical changes to the first sentence of the proposed rule. It also supports the requirement to make objections specific to the discovery request at issue, and the corresponding prohibition of general objections.

As to the proposed amendment requiring logging of all privileged materials, the WDTL is concerned that the proposal, as drafted, would require extensive, detailed, and time-consuming logging of routine litigation file documents which are indisputably covered by privilege. The proposed language, as drafted, for instance, would require an attorney to list the details of each individual email sent to her client or which contains her work product. Such a requirement represents a poor use of attorney time and resources and ultimately constitutes an unacceptable cost to end-clients. While the WDTL believes additional guidance on the provision of privilege logs would be useful, the current proposed language creates unacceptable burdens with limited benefits.

We greatly appreciate the opportunity to have our members' voices heard as part of this process and thank you for your time and attention to this matter.

Sincerely,

Michael Chait  
Chair, WDTL Rules Committee

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Martinez, Jacquelynn](#)  
**Subject:** FW: Comments on Proposed Amendments to CR 3, 16, 26, and 77 from Washington Defense Trial Lawyers  
**Date:** Friday, April 28, 2023 9:30:54 AM  
**Attachments:** [image001.png](#)  
[WDTL Position Re Proposed Rule Changes 042823.pdf](#)

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**From:** Maggie Sweeney <maggie@wdtl.org>  
**Sent:** Friday, April 28, 2023 9:23 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** mchait@sbwillp.com; Jon Morrone <JMorrone@HollandAmericaGroup.com>  
**Subject:** Comments on Proposed Amendments to CR 3, 16, 26, and 77 from Washington Defense Trial Lawyers

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Dear Madame Clerk of the Supreme Court,

Please see the attached letter regarding the Washington Defense Trial Lawyer's comments to the proposed amendments to Superior Court Civil Rules 3.1, 16, 26, and 77.

Kind regards,

Maggie

**Maggie S. Sweeney**  
Executive Director



701 Pike Street, Suite 1025  
Seattle, WA 98101  
Phone: 206.749.0319  
wdtl.org  
Facebook, Twitter (wdtl) & LinkedIn