March 24, 2023

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

RE: WSBA Proposed CR 26 Amendments

Dear Chief Justice:

The Washington State Association for Justice ("WSAJ") has 2,400 attorney members who represent thousands of Washington citizens in civil matters involving individual rights and injuries. WSAJ respectfully submits the following to the Washington Supreme Court regarding the Washington State Bar Association's ("WSBA") proposed amendments to CR 26.

WSAJ recognizes that these proposed amendments are the result of a years-long process first begun by the Escalating Costs of Civil Litigation ("ECCL") Task Force. The ECCL Task Force devoted several years to studying and analyzing issues relating to costs of civil litigation, culminating in a final report that included proposed civil rule amendments. Although the ECCL Civil Rules Drafting Taskforce spent 16 months formulating rule amendments, the WSBA Board of Governors elected not to send the ECCL Task Force's recommendations to the Court. Instead, WSBA determined it would request further input from stakeholders and create a work group chaired by attorney Dan'l Bridges.

WSAJ supports and applauds efforts to find consensus on means for improving the rules and procedures for civil litigation in this state; enhancing courts' ability to effectively manage cases on their docket; and, most importantly, improving access to justice for Washingtonians. Significant concerns raised by WSAJ and other stakeholders regarding some of the original ECCL Task Force's proposals, such as mandatory early mediation and mandatory initial disclosures in discovery, have been addressed through this process. However, there has been no consensus regarding the current proposed amendments to CR 26 and there is no supporting evidence that they will reduce or address the escalating costs of civil litigation. On that point, the record must be made clear about the rule now proposed for comment.

WSAJ notes that the GR 9 cover sheet for the current proposed amendments states that "the proposed amendments were endorsed by all stakeholders." WSAJ has in fact not endorsed the proposed amendments. WSAJ, like many stakeholders, sent members in a purely observational capacity to Mr. Bridges' work group. Those members announced they were attending only in an observational capacity; that they were not authorized to offer comments representative of WSAJ in those meetings; that the work group's processes and timelines were incompatible with soliciting meaningful stakeholder input on a representative, organizational basis; and that any comments they offered were made in a purely personal capacity. Those members clarified when, during the process, support was misattributed to WSAJ. And those members were told the record would correctly reflect WSAJ's support (or lack thereof) for the proposed amendments—a representation in apparent conflict with the blanket statement that these proposals were "endorsed by all stakeholders." WSAJ offers these observations both to clarify any misperception of unanimous, unconditional stakeholder support for these proposed amendments as well as to provide necessary context for WSAJ's comments.

WSAJ supports the general goal of reducing the costs of civil litigation. To that end, although it appreciates the general principles underlying the proposed amendments, it finds significant that the Superior Court Judges Association ("SCJA") previously has commented that the proposed amendments to CR 26 are "either covered by existing rules, or such a significant change from the procedures of smaller counties that implementation would result in major disruptions to existing work load."

WSAJ concurs with SCJA that the proposed amendments are unnecessary and potentially counterproductive to the stated goal of reducing the costs of civil litigation—a conclusion supported by the long, troubled process resulting in the current proposed amendments. The WSBA work group's original proposed amendments to CR 3.1, CR 16, and CR 26 were significantly reduced from and drastically different than the ECCL Task Force's recommendations. In turn, the Court did not approve any of the proposed amendments, definitively rejected the proposed amendments to CR 3.1 and CR 16, and republished only the proposed amendments to CR 26 for comment.

After years of this whittling-down process, the result is multiple proposed amendments to CR 26 regarding which SCJA, WSAJ, and other stakeholders have expressed serious concerns. In addition to SCJA's shared, general concerns regarding this proposed package of amendments, WSAJ continues to have serious concerns that as drafted they are counterproductive to the goal of reducing civil litigation costs. They are as follows:

1. Expert Disclosure

With respect to disclosure of expert opinions (CR 26(b)(5)), WSAJ has serious concerns and opposes the proposed amendment to the rule. The amendment is superfluous. The current civil rules already require timely disclosure of expert discovery based on the disclosure deadlines. In addition, because the proposed rule provides that "delayed disclosure" is a per se CR 37 violation, the proposed rule may result in increased motion practice and litigation costs. Moreover, the proposed rule purports to preclude reliance on experts or expert opinions disclosed beyond the disclosure deadlines, which is problematic. First, it is not always feasible to disclose all experts and expert opinions prior to the disclosure deadlines since additional discovery, including expert depositions, typically occurs after the disclosure deadlines and may provide the basis for an expert's opinions or reveal the need for new experts. Second, such a rule would conflict with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997), and *Jones v. City of Seattle*, 179 Wn.2d 322 (2013), which control exclusion of expert witnesses at trial. In short, the proposed rule appears unlikely to reduce the cost of litigation.

2. Discovery into experts and their opinions

The proposed amendment to CR 26(b)(5) as it relates to expert discovery is similarly problematic. It creates ambiguity regarding discovery. It is unclear whether the discovery rules formulated would apply both to specially retained expert witnesses as well as to witnesses qualified to offer expert opinions under ER 702 but not specially retained, such as a treating health care provider. *See, e.g.*, *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 175, 947 P.2d 1275 (1997) (holding that a treating doctor who developed opinions after reviewing plaintiff's medical records and conducting a physical examination was not an "expert" within the meaning of CR 26(b)(5) but was still permitted to offer such opinions, as they were not developed specifically in anticipation of litigation); *Peters v. Ballard*, 58 Wn. App. 921, 927-930, 795 P.2d 1158 (1990) (holding that a treating healthcare provider whose opinions derived from his treatment of plaintiff was not an expert witness

within the meaning of CR 26(b)(4), which has since been recodified at CR 26(b)(5)); *see also* 3A Karl B. Tegland, Washington Practice: Rules Practice CR 26, at 643 (6th ed. 2013) (noting treating physicians are often termed "a fact expert or an occurrence expert" and treated as ordinary witnesses since their testimony is based on personal involvement). If plaintiffs had to produce discovery for every witness who might offer opinion testimony under ER 702, discovery would be more expensive and more costly.

3. Supplementation of discovery

WSAJ also opposes the proposed amendment to CR 26(e). The proposed amendment introduces ambiguity into the timeline and duty to seasonably supplement discovery. It is unclear at what point the duty to seasonably supplement terminates, *e.g.*, the discovery deadline or continues up until the time of trial. The latter is likely to impose undue burden, though there may be a need for a party to obtain supplements after the discovery cutoff under certain circumstances, which should be permitted. This proposed amendment as drafted is also unlikely to reduce litigation costs.

4. Privilege logs

WSAJ opposes the proposed amendment to CR 26(g) to require a privilege log. This Court has noted "[t]he best practice is for the trial court to require a document log requiring grounds stated with specificity as to each document." *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 695–96, 295 P.3d 239 (2013). WSAJ agrees with this practice when there is genuine dispute over the validity of a claim of privilege or work product, but not in all circumstances, especially when it is clear to both parties that a discovery request targets confidential information. Requiring privilege logs in every case, no matter the case size or circumstances, is time consuming and therefore likely to increase litigation costs, not reduce them. In many instances, the cost associated with preparing a privilege log does not justify the potential benefits of increasing transparency around objections based on privilege or the work product doctrine.

The proposed text as drafted also is concerning, for three reasons. First, the text draws on an inapposite case, *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009), which concerned the Public Records Act (PRA), chapter 42.56 RCW. When this Court described privilege logs, it was quoting from another decision based on the PRA, *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). We do not see an equivalence between government's duties under the PRA and litigants' duties to identify claims of privilege and work product. Second, the proposed language for CR 26(g) (because it is based on the broad duties under the PRA) appears to go further than the federal analogue, which provides:

> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
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> (i) expressly make the claim; and
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> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. Proc. 26(b)(5)(A). Third, the proposed text specifically identifies "the author and recipient" of items withheld under claims of privilege as information that may be "otherwise protected." Despite Washington law

providing no support for such information being privileged information in most cases, discovery disputes often arise regarding the improper withholding of that information in privilege logs. Generally embodying within the rule that such information may be protected likely would encourage such baseless claims of privilege. WSAJ thinks the federal rule better addresses the necessary components of a privilege log. For these reasons, we urge the Court to reject this amendment to CR 26(g).

WSAJ respectfully requests that the Court reject the "omnibus" package of proposed amendments to CR 26. To the extent that any proposed amendments identify general principles that could reduce civil litigation costs, WSAJ believes the better approach to implementing them in the future is careful consideration of proposed amendments to discrete provisions of CR 26, rather than a singular attempt to overhaul the rule as a whole.

Sincerely,

Nathan P. Roberts
WSAJ President

Christopher E. Love
Chair, WSAJ Court Rules Committee