WASHINGTON STATE ASSOCIATION for JUSTICE™

April 4, 2024

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 over 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 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.

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 last year republished only the proposed amendments to CR 26 for comment. After years of this whittling-down process, the result was multiple proposed amendments to CR 26 regarding which SCJA, WSAJ, and other stakeholders expressed serious concerns.

This year, the Court has republished proposed amendments only to CR 26 that are further downsized, apparently in response to multiple stakeholders' concerns. WSAJ also appreciates that this year's proposed amendments addressed some of its concerns regarding last year's version. However, this year's proposed amendments continue to leave unaddressed many of WSAJ's most serious concerns from last year. Although WSAJ supports the general goal of reducing the costs of civil litigation, in addition to SCJA's past 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 notes that the proposed amendments removed language that would make "delayed disclosure" of expert discovery based on reliance on case scheduling deadlines a per se CR 37 violation. Although WSAJ appreciates this partially responsive deletion to last year's objection, this year's proposed amendment otherwise remain unchanged.

For the same reasons expressed last year, WSAJ continues to have 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. 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 continues to oppose the proposed amendment to CR 26(e) which remains unchanged from last year. 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. WSAJ appreciates that this year's proposed amendments deleted or altered proposed text to which WSAJ objected last year, such as the proposed text specifying the information regarding documents withheld claims of privilege that must be provided in 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.

For those reasons, this year's proposed text would require a privilege log for assertions of privilege "where consistent with subsection (b)(1)." Presumably, this proposed amendment refers to CR 26(b)(1)'s existing text: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ." Emphasis added. As a whole, practitioners may interpret the proposed amendments as directing them to identify in a privilege log withheld information or documents based on a determination that the information or documents are (1) relevant and (2) not privileged.

Without more, the proposed text does not resolve WSAJ's previous concerns of potentially requiring privilege logs in every case. Some practitioners may interpret the rule as requiring a court determination of whether "relevant" documents or information are "not privileged" and, erring on the side of caution, may believe they are required to produce a document-by-document privilege log identifying all information or documents withheld under privilege, including indisputably privileged attorney-client communications. A privilege log for such routine, ongoing communications "would have to be supplemented regularly up until the day of trial," "makes no logical sense," and "would become merely a 'make-work' requirement with no real justification." *Dawson v. Jantran, Inc.*, CIV.A.209CV60-P-A, 2010 WL 1956892, at *1 n. 2 (N.D. Miss. May 13, 2010); *see also Williams v. Dave Wright BGH, Inc.*, 419CV00300SMRSBJ, 2020 WL 12968369, at *4, *6 (S.D. Iowa Dec. 23, 2020) (privilege log not required where counsel's description of nature of documents to opposing counsel was sufficient to establish applicability of privilege); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 478 (S.D. Cal. 1997) (recognizing that "hundreds of thousands, if not millions, of documents" were "within the literal meaning and scope" of discovery requests but concluding "it would be foolish to believe that very many of those documents would be other than protected by the attorney-client privilege or work product" and document-by-document privilege log would be unduly burdensome). The proposed text appears to mandate some form of privilege log even for those communications reasonable counsel would otherwise agree are not

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privileged and not subject to production without this additional "make-work" and likely would invite increased motions practice over the form and content of such logs.

Moreover, the proposed text may create additional problems and reduce the transparency it intends to create. Some practitioners may interpret the proposed amendments as self-contradictory and self-defeating: by requiring identification in a privilege log only of documents or information "not privileged," they require identification of no documents withheld under a claim of privilege. Such an interpretation is particularly problematic in the context of withheld communications on which attorneys are copied in order to make blanket assertions of privilege or to whom the defendant has delegated ordinary business functions, such as investigations.

For example, courts have been forced to grapple with parties who institute systematic programs of copying attorneys on sensitive internal communications with generic "requests" for advice to support blanket assertions of privilege. Because Washington's attorney-client privilege applies to communications made for purposes of soliciting advice from any attorney, *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 777, 381 P.3d 1188 (2016), parties might plausibly determine that any communication containing even a passing request for legal advice is privileged, outside CR 26(b)(1)'s scope, and not required to be included in a privilege log. Such an interpretation would defeat opposing parties' efforts to learn that such communications exist and courts' efforts to probe the propriety of privilege claims.

Likewise, courts applying Washington law have had to confront the intersection between attorney-client privilege and a party's delegation of investigatory or other ordinary business functions to counsel. *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1242-1244 (D. Or. 2017). Generally embodying in the rule that parties need not identify documents if they believe doing so is not "consistent" with CR 26(b)(1)—such as their conclusion that such communications are "privileged" and outside that rule's scope—likely would encourage parties not to identify such communications in the first instance, even though privilege may not apply.

Again, WSAJ fully supports the practice of requiring privilege logs in appropriate cases and under appropriate circumstances. But as the above examples demonstrate, crafting a privilege log requirement of general application is fraught with potential pitfalls that likely would increase the costs of civil litigation.

WSAJ respectfully renews its request 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,

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Chair, WSAJ Court Rules Committee

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