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Subject: FW: Opposition to Proposed changes
Date: Tuesday, April 2, 2024 11:34:56 AM
Attachments: [WA State OPD 71.09 Program objection to proposed amendments to Civil Rules 26\(b\)\(5\)\(a\)\(1\), CR 30 \(b\)\(7\), CR 43 \(a\)\(1\).pdf](#)

From: Kelly Canary <Kelly.Canary@opd.wa.gov>
Sent: Tuesday, April 2, 2024 11:02 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Opposition to Proposed changes

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Dear Clerk of the Court,

Please find our attached objections to the proposed amendments to CR 26(b)(5)(a)(1); CR 30(b)(7) and CR 43 (a)(1).

Regards,

Kelly

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(she/her)
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**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**

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March 26, 2024

Sent via Electronic Mail

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

**RE: Objection to proposed amendments to Civil Rules 26(b)(5)(a)(1), CR 30 (b)(7),
CR 43 (a)(1)**

Dear Clerk of the Supreme Court,

Thank you for the opportunity to comment on the proposed amendments below. I write on behalf of Washington State Office of Public Defense's RCW 71.09 program.

Objection to proposed CR 26(b)(5)(A)(I) amendment.

We object to the CR 26 (b)(5)(A)(I) proposed amendments. They would apply to all civil proceedings with no exception for special proceedings under CR 81.

Because cases filed pursuant to RCW 71.09 special proceedings under CR 81 and not subject to the same abuses as other civil cases, we respectfully request that proceedings under RCW 71.09 be exempted from the proposed CR 26(b)(5)(A)(1) amendments.

Because involuntary civil commitment under RCW 71.09 involves a massive deprivation of liberty, the State bears the entire burden at trial, must prove their case beyond a doubt and the jury must be unanimous. Additionally, unlike other civil cases where a harm has occurred in the past, RCW 71.09 cases are dynamic and ongoing and based on *current evidence*. Because of the dynamic nature of these proceedings, the Respondents' expert opinions are also dynamic and may change as additional evidence becomes available. Requiring the Respondent, who has absolutely no burden to produce any evidence, to disclose experts and expert opinions prior to the case scheduling deadline is unworkable and unnecessary.

Unlike other civil proceedings, summary judgment is not available in pre-commitment cases because the Respondent has no burden to produce any evidence at all. Requiring expert disclosure in the early stages of other types of civil case may facilitate negotiations, settlements or summary judgment thereby saving the parties and the Court time and expense. This is not the case with RCW 71.09 civil commitment proceedings. Because civil commitment under RCW

71.09 is indefinite, the Respondent must be given adequate time to prepare their case for trial and not be required to disclose an opinion or witness that is subject to change.

Requiring the Respondent to respond to interrogatories prior to a case scheduling deadline creates significant hardship on the Respondent. Because interrogatories may be served at any time after the summons and complaint are filed, if the Plaintiff/Prosecuting Attorney requests expert information prior to case scheduling deadline, many Respondents will have to disclose experts who may never be called at trial because they may reach an opinion contrary to their interests. Because the entire burden is on the Plaintiff/Prosecuting Attorney and the Respondent is under no obligation to present any witness, it is often in the Respondent's interest to decide not to call an expert witness because their opinion may be unhelpful or subject to the change.

In RCW 71.09 proceedings, like other civil proceedings, the parties work together and present a case scheduling order for the Court to sign. The case scheduling deadline should remain the appropriate time to disclose the expert witnesses and the substance of their testimony.

Further, the proposed amendments misunderstand the nature of RCW 71.09 proceedings. In RCW 71.09 proceedings, the Petitioner's expert *must* always write a report, even when exculpatory. The Respondent is under no such obligation.

Should the Court adopt these amendments, we request that proceedings that fall under CR 81 be exempted from these provisions.

Objection to proposed CR 30 (b)(7) amendment.

We object to the CR 30(b)(7) amendments requiring a party to file an objection to the notice regarding whether a deposition will be conducted in person or by remote means. The party conducting the deposition is usually in the best position to understand the nature and scope of the deposition. In RCW 71.09 proceedings, discovery can be voluminous and often times extensive impeachment or refreshing recollection may need to occur with hundreds or thousands of pages of documents. While most witnesses are able to be deposed remotely, some witnesses require in person depositions.

Requiring court intervention when opposing counsel does not agree to the mode and manner of the deposition would be unworkable. It is the experiences of RCW 71.09 practitioners that scheduling immediate or even timely hearings is often not possible due to court congestion. When a 71.09 petition is filed, the case is preassigned. The judge typically retains the case for years and through different rotations. A preassigned judge on a civil calendar may have time for an immediate hearing, however if that judge is doing a criminal rotation, they may not. Continuing a deposition when the Respondent has a right to a trial within 45 days, RCW 71.09.050 (1), is neither workable nor feasible. Further, allowing for objections to be filed 3 days before the deposition could create a situation where a Respondent facing civil commitment will be required to waive their right to a trial within 45 days in order to accommodate an objection to the manner in which a deposition may be conducted.

Objection to proposed CR 43 (a)(1) Amendment.

We object, in part, to the proposed CR 43(a)(1) amendments. Most, if not many, expert witnesses in RCW 71.09 cases will be subject to extensive cross examination. It is the experience of many RCW 71.09 practitioners that cross examination of the opposing party's expert witness is the most important part of a Respondent's case. Because of the massive deprivation of liberty inherent in these proceedings, being able to effectively cross examine an expert witness is not always possible over zoom. Impeachment material is not always part of discovery and sending and receiving documents via email to the witness during the middle of trial would be overly burdensome and cost prohibitive. Contracted public defense attorneys, unlike Attorney Generals, do not have the resources to have support staff with them during the duration of the trial, making this amendment overly burdensome on the part of contracted public defenders under RCW 71.09.

If the Court adopts the amendments, we respectfully request that special proceedings under CR 81 be exempted from this provision.

Sincerely,

/s/Kelly Canary WSBA #39217
Kelly Canary, RCW 71.09 Program Manager
Washington State Office of Public Defense