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Amendments to CR 26 and 30 Will Change Discovery and Deposition Practice

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On Sept. 5, 2024, the Washington Supreme Court entered an order adopting revised proposed amendments to Civil Rule (CR) 26—General Provisions Governing Discovery—and further ordered that "pursuant to the emergency provisions of GR 9(j)(1), the revised proposed amendments will be expeditiously published in the Washington Reports and will become effective upon publication."[1] The amendments to CR 26 affect objections, supplementation, and disclosure of experts. They will require a material change in the way many attorneys practice discovery.

Amendments to CR 30 adopted effective Oct. 1, 2024, codify procedure for depositions by remote means.

This article will explain the changes effected by the rule amendments and, with respect to CR 26, provide context considered by the Civil Litigation Rules Revision Work Group in drafting the proposed amendments to illustrate their impact.

HISTORY

Following task forces and work groups going back to 2011, in 2019 the WSBA Board of Governors created the Civil Litigation Rules Revision Work Group (Work Group), which the author was privileged to chair.[2] We assembled a group of litigation stakeholders, considered work of past groups, and proposed a small number of laser-focused amendments based on a pragmatic approach: What are a few recurring problems and how can they be fixed? In 2020 the Board approved our proposed amendments, forwarding them to the Washington Supreme Court for consideration. The revised proposed

amendments to CR 26 as adopted by the court are summarized first, followed by discussion of the amendments to CR 30.

EXPERT WITNESS DISCLOSURE

It was the Work Group's impression that many litigants tactically withhold discovery of testifying expert witnesses on the ground that no disclosure is required until a case schedule deadline. The amendments to CR 26(b)(5)(A)(i) and (ii) prohibit that practice and make clear what must be disclosed where a case schedule is used:

> *(5)* Trial Preparation: Experts.
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> * * *
>
> *(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. Except for special proceedings, a case schedule deadline to disclose experts does not excuse a party from timely responding to expert discovery to the extent responsive information is available. (ii) Unless these rules impose an earlier deadline, and in no event later than the deadline for primary or rebuttal expert witness disclosures imposed by a case schedule or court order, each*

> *party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.*

SUPPLEMENTATION OF RESPONSES

Civil Rule 26(e) only required supplementation in limited circumstances. CR 26(e), as amended, now imposes a self-executing duty to supplement and/or correct all discovery responses.

> ***(e) Supplementation of Responses.*** *A party who has responded to a request for discovery with a response has a duty to seasonably supplement or correct that response with information thereafter acquired. Supplementation or correction shall clearly set forth the information being supplemented or corrected. ~~that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~*
>
> *~~(1) A party is under a duty seasonably to supplement their response with respect to any question directly addressed to:~~*
>
> *~~(A) the identity and location of persons having knowledge of discoverable matters, and~~*
>
> *~~(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected~~*

> ~~*to testify, and the substance of the expert witness's testimony.*~~
>
> ~~*(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:*~~
>
> ~~*(A) the party knows that the response was incorrect when made, or*~~
>
> ~~*(B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.*~~
>
> ~~*(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.*~~
>
> ~~*(4)*~~ *Failure to seasonably supplement or correct in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.*

The new language that "[s]upplementation or correction shall clearly set forth the information being supplemented or corrected" represents two material changes.

First, previously the rule only required supplementation in a few circumstances or if expressly requested. Now there is an ongoing, self-executing duty to do so. A party must "seasonably supplement" with information "thereafter acquired."

CR 26(e). In response to the objection this might increase costs and introduce ambiguity, the Work Group determined most parties already ask for supplementation, so there is no net increase in work. As to ambiguity, although what constitutes "seasonably" is undefined, many rules are governed by reasonableness. This is no different.

Second, on the form of the supplementation, it was the Work Group's impression some litigants make supplementation a "needle-in-a-haystack" game, embedding (hiding) new information within their unchanged responses. Nothing is served by placing supplementary responses within unchanged responses unless it is to conceal or make the new information less obvious. The amended rule requires that the supplemented or corrected responses "shall clearly set forth the information being supplemented or corrected" so the reader can readily identify it for what it is. The best practice is to supplement or correct responses with *only* the supplemental or corrected information.

OBJECTIONS/PRIVILEGE LOG

General objections are now *expressly* prohibited under the amendment to CR 26(g). A privilege log is required for *every* assertion of privilege.

> ***(g) Signing of Discovery Requests, Responses, and Objections***. *Every request for discovery or response or objection thereto made by a ~~party~~ represented party ~~by an attorney~~ shall be signed by at least one attorney of record in the attorney's ~~individual~~ name. ~~whose address shall be stated.~~ A ~~party who is not represented by an~~*

> *~~attorney shall sign the~~ request, response, or objection by a nonrepresented party shall be signed by that party. ~~and state the party's address.~~ Objections shall be in response to the specific request objected to. General objections shall not be made. A party making an objection based on privilege shall describe the grounds for the objection and, where consistent with subsection (b)(1), shall identify all matters the objecting party contends are subject to the privilege including sufficient information to allow other parties to evaluate the claim of privilege without disclosing protected content. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:*
> [remainder of rule unchanged]

Every objection must be individually stated in response to each request. That was always the rule if CR 33 (interrogatories) and CR 34 (requests for production) were read. Despite that, the Work Group found that some parties persisted in using general objections, claiming they were permissible because no rule expressly prohibited them. That was erroneous and the amended rule makes that clear.

The amended rule now also expressly requires that every assertion of privilege "shall describe the grounds for the objection" and "shall identify all matters the objecting party contends are subject to the privilege including sufficient information to allow other parties to evaluate the claim of privilege

without disclosing protected content." In other words: a privilege log. That was already required[3] but, as with general objections, many claimed it was not because no rule expressly required it. That was erroneous and the amended rule makes that clear.

There is a critical interplay between prohibiting general objections and requiring a privilege log. It was the Work Group's strong impression that repetitive, boilerplate, and privilege objections to discovery had spiraled out of control, wasting untold time in responding to them. They are a tool of obstruction forcing the responding party to engage in a cat-and-mouse exercise to sleuth out whether anything is actually being withheld before being able to determine if the objection is proper—needlessly increasing costs and blocking full discovery.

These amendments to the rule flip that script.

Putting these changes together, *either* a party has a privileged or protected item and shall make an objection to the *specific* question asking for it and provide a privilege log identifying it, *or they cannot and should not make the objection in the first place*. It cannot be both: because now every privilege objection must include a description of what is being withheld via a privilege log, if a party has nothing to identify in a log there is no basis to assert the objection in the first place.

It was the Work Group's impression that many litigants have a fundamental misunderstanding of how to use privilege objections. Some believe they must make a privilege objection *even when nothing privileged exists*, lest a later objection is waived on

the chance that *in the future* something privileged comes into existence. No case or civil rule requires that.

To illustrate the proper use of a privilege objection, a request for witness statements *might* call for work product. But if a party does not have any, the correct response is to say they have none. That does not waive an objection if a witness statement *later* comes into being. That later circumstance would simply require a seasonable supplement under CR 26(e) and *then* an objection coupled with a privilege log.

DEPOSITIONS BY REMOTE MEANS

Amendments to CR 30, addressing depositions by remote means, were proposed by the BJA Remote Proceedings Work Group and adopted effective Oct. 1, 2024.[4] The amended rule allows a party to unilaterally issue a notice of remote deposition and identifies criteria for a trial court to consider in deciding to require one if it is opposed. See CR 30(b)(7). The rule provides an unprecedented short period to object, requiring filing a "motion" to object "within three days of receipt of notice[.]"[5]

If a deposition is taken by remote means, the amended rule specifies who may be in the room with the deponent and requires that each person "in the room with the deponent … shall remain audible and visible for the duration of the deposition." CR 30(h)(7)(B). The amended rule requires that "[n]o one shall attempt to influence the deponent's response to an examiner's question in any manner, including visually, verbally, and in writing, such as notes, text

message, e-mail, and electronic chat functions." CR 30(h)(7)(D).

Amended Rule 30 does not address exhibits. Exhibits at remote depositions have been persistently problematic with many parties not providing them during deposition, showing all manner of items on screens, and wanting to send "exhibits" to the reporter later. That violates basic reporting requirements: The reporter is unable to concurrently mark and therefore *personally* certify that what accompanies the transcript was in fact what was used in the deposition. The author has seen items sent after a remote deposition as exhibits that were *not* what was used. This may have been an innocent mistake but the effect is the same. Although the rule is silent, parties should adhere to the longstanding requirement that the reporter must have and mark exhibits *during* the deposition. That is not a burden; all commonly used platforms allow exhibits to be uploaded on the fly during the deposition.

It is worth observing the court's adoption of an amendment to CR 30 codifying requirements for when and how remote depositions may be noted *sub silentio* vacates its emergency order that depositions "shall be performed remotely." Codifying a permanent rule obviates the court's emergency, temporary rule. Further, the language of the emergency order and the amended CR 30 cannot exist in the same space.

THE NEXT FRONTIER: LOCAL RULE CONSISTENCY?

The Work Group proposed additional amendments aimed at continuity on a few common, statewide practice issues. Local flexibility should be retained but, as just one example, there is no compelling reason for there to be differing nine-day, seven-day, and six-day notice requirements for a basic motion depending on whether it is filed in King, Pierce, or Snohomish County. Local rules have become such a patchwork that many of the differences serve little purpose other than to pose traps for the unwary. We could achieve meaningful efficiency by returning to some degree of consistency on common procedural issues. Given the current rule structure, it will require the Supreme Court through rule-making to unify those issues.

Practitioners should be grateful for the clarity provided by the amendments to CR 26 and CR 30 adopted by the court, but many additional opportunities for increasing efficiencies in our discovery rules remain—and more can be done.

ABOUT THE AUTHOR

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representing injured persons. He has tried over 50 jury trials in state and U.S. District Court and has argued in the Washington Supreme Court, every Division of the Court of Appeals, and the Ninth Circuit Court of Appeals. He is a past treasurer of the Washington State Bar Association and was a governor on its Board of Governors.

NOTES

1. Order No. 25700-A-1592, In re Proposed Amendments to CR 26, 2024 Wash. LEXIS 449 (Wash. Sup. Ct. Sept. 5, 2024), available at www.courts.wa.gov/courtrules/rulesrelatedCourtOrder.cfm.

2. Special thanks must be given to Ken Masters who chaired a different, previous drafting task force. Not all work makes it to the final product, but no work is wasted. Ken's task force's drafts informed the Board in creating my Work Group and were needed steps to this final product.

3. Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 538, 199 P.3d 393 (2009).

4. *See* Order No. 25700-A-1602, In re Proposed Amendments to CR 30, 2024 Wash. LEXIS 447 (Wash. Sup. Ct. Sept. 5, 2024), available at https://www.courts.wa.gov/courtrules/rulesrelatedCourtOrde

5. In the author's opinion, providing the ability to unilaterally force an internet deposition and

requiring a motion be filed in only three days to oppose it is inconsistent with notice and timing embodied in the Civil Rules, conflicts with CR 26(i) requiring a conference of counsel before moving for relief on discovery, and is such a departure from procedural norms as to express an overt hostility to in-person (real) depositions. We should adopt efficiencies in technology but we jeopardize the truth-finding process provided by the human interaction that litigation requires by walling the witness behind the shield of a safety-blanket video screen. A practical, neutral rule would be to permit, unilaterally, remote appearances at live (real) depositions by attorneys if they wish and if they arrange the technology for it. And as to witnesses, to allow remote appearance by agreement and provide a framework to move to compel that if there is a compelling need. Further, as a rule it has unintended and bad outcomes. Noted above, it is silent on the proper taking of exhibits which undermines the reliability of the transcript. Further, a three-day motion requirement will encourage canned, rushed motions which are to no one's benefit and are contrary to the findings of litigation-cost-reduction task forces that universally tried to avoid anything creating more motion practice. Additionally, it can work a very real prejudice to parties in multiparty litigation by allowing one party to disadvantage another by racing to note a remote deposition first when an in-person one is needed or even a party noting their own deposition to try to force it remotely. Remote appearances have a limited place but are no substitute for an in-person deposition on contentious issues or where lengthy, or many, exhibits are involved. Finally, the rule is King County-

centric in its assumption every witness has sufficient technology to comply and says nothing about who bears the burden of providing it. CR 45 compels physical attendance. It does not compel a high-speed internet connection, computer, and web camera.

CR 26 AND 30 FEATURE

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