WASHINGTON STATE
BAR ASSOCIATION

Board of Governors Meeting

Public Session
Late Late Materials

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The Hilton
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Washington State Bar Association
Board of Governors
1325 Fourth Avenue, Suite 600
Seattle, Washington 98101

RE: Comments on Proposed Changes to Civil Rules

Dear President Pickett and Governors:

I write on behalf of the Attorney General's Office (AGO) with comments on the proposed changes to the civil rules as put forth by the Civil Rules Drafting Taskforce. More than 500 Assistant Attorneys General represent state agencies and employees in state courts across Washington, litigating a broad range of cases. Our office therefore offers an important perspective on the impact of these proposals.

A key feature of the proposed changes is the addition of a mandatory case scheduling order based on a 52 week filing-to-trial schedule, along with initial discovery conference requirements. Those proposed changes appear in the proposed new rule, CR 3.1, and in amendments to CR 26(f). While CR 3.1 exempts some case types, the AGO recommends that four additional case types be added to CR 3.1(e) and exempted from the requirements:

- RCW 34.05, civil enforcement actions,
- RCW 42.56, Public Records Act cases,
- RCW 74.66.050, *qui tam* actions, and
- Actions brought without an attorney by a person in the custody of the United States, a state, or a state subdivision.

Civil Enforcement Actions: The Administrative Procedure Act, RCW 34.05, allows agencies to petition for civil enforcement of an agency's order. For example, lawyers may file a petition in superior court to enforce an agency cease and desist order against a carrier operating its business despite an agency order closing the business for non-compliance with safety rules. This is typically an expedited or summary proceeding that should be exempted similar to administrative appeals under RCW 34.05 or land use petition reviews under RCW 36.70c, as not being subject to additional discovery requirements that are associated with typical civil litigation.

Public Records Act cases: Public Records Act cases under RCW 42.56.550 are often summary proceedings that can typically be resolved on the pleadings. Extending the time to conduct discovery by imposing a presumptive trial schedule delays resolution of these cases. Because penalties are assessed on a daily basis against the agency, delaying resolution creates a disincentive for plaintiffs to cooperate and imposes additional costs on publicly funded state and local agencies.

***Qui Tam* Complaints:** Medicaid Fraud False Claims Act cases, which are a type of *qui tam* action, are filed under seal. The defendant is not served with the complaint until the seal is lifted. This occurs only when the AGO's Medicaid Fraud Control Division intervenes or formally declines the matter. Importantly, it is often weeks or months after filing that the seal is lifted and the defendant is served. Thus, it does not make sense to impose on these cases a rule that requires issuance of a case scheduling order at the time of filing.

***Pro se* litigants in custody:** Lawyers from the AGO regularly defend cases brought by *pro se* litigants in the custody of the Department of Corrections or the Department of Social and Health Services. Based on our long experience handling these matters, we do not believe automatically requiring an initial discovery conference and plan in these cases will result in more efficient case management. Our experience demonstrates that many of these litigants are unfamiliar with the legal process. Imposing additional rules for them to comply with will lead to more confusion and attendant delay. In addition, a sizable number are uncooperative or actively abuse the process and will be resistant to efforts to organize the case as required by the rules.

It is for these reasons that these types of cases in the federal system are exempt from similar scheduling rules. FRCP 26(a)(1)(B)(iv). Federal courts have determined that cases involving *pro se* in-custody litigants can be most effectively managed – and the interests of all parties can be best protected – by exempting these cases from mandatory initial discovery conferences and plans. We urge the adoption of a similar exemption in the proposed Washington rules.

On behalf of the Washington Attorney General's Office, I appreciate the opportunity to provide these comments. Thank you for your consideration.

Sincerely,

SHANE ESQUIBEL
Chief Deputy Attorney General

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