

# **CHAPTER 5**

## **Preliminary Hearings and Trials**

### **I. Introduction**

#### **A. Purpose**

This chapter gives a general overview of the conduct of preliminary hearings and trials of sex offenders and provides guidance for affording appropriate protections to both the victims and perpetrators of sex offenses by effectively balancing the constitutional protections of the defendant with the statutory protections mandated for the victims.

#### **B. Index of Topics**

The following topics are covered in this chapter:

1. public access to courtrooms, and to sex offense trials and proceedings specifically (section II)
2. media coverage in courtrooms (section III)
3. the defendant's right to a speedy trial (section IV)
4. exclusion of victims and witnesses during trials and other proceedings (section V)
5. rights and protections of victims, survivors and witnesses while testifying (section VI)
6. admission of child victims' statements (section VII)
7. the confrontation clause in the context of sex abuse cases (section VIII)
8. the defendant's right to self-representation and cross-examination of alleged sexual offense victims (section IX)
9. testing and counseling for sexually transmitted diseases (section X)
10. jury selection (section XI)

## II. Public Access to Courtrooms

### A. Public Access to Criminal Trials in Washington Generally

Washington State’s constitution provides both the right to public access to criminal trials and a criminal defendant’s right to “a speedy public trial.”<sup>1</sup> Prejudice is presumed where a violation of the public trial right occurs.<sup>2</sup> However, “the public’s right of access to open proceedings is not absolute, and...may be outweighed by the necessity of ensuring a criminal defendant's right to a fair trial....”<sup>3</sup>

When considering a motion to close proceedings to the public, the trial court must conduct its analysis on the open record and involving all persons and parties who are present. The trial court must carefully consider the following criteria set forth in *Bone-Club* to determine if the need for closure sufficiently outweighs the constitutional guarantees mentioned above:

1. whether the proponent of the closure has shown a compelling interest in doing so, and, when the interest is based on a right other than a defendant’s right to a fair trial, whether there is a “serious and imminent” threat to that right;
2. whether those present during the motion for closure have had an opportunity to object;
3. whether the proposed method for curtailing open access is the least restrictive means available to protect the threatened interests;
4. the competing interests of the proponent of closure and the public; and
5. whether the order is broader in its application or duration than necessary to serve its purpose.<sup>4</sup>

When the state “attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”<sup>5</sup>

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<sup>1</sup> Washington Const. art. I, §§ 10 and 22; note also that the Sixth Amendment of the U.S. Constitution guarantees a criminal defendant’s right to a public trial

<sup>2</sup> *State v. Bone-Club*, 128 Wn.2d 254, 261-262, 906 P.2d 325 (1995)

<sup>3</sup> *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993) (citing *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 60, 615 P.2d 440 (1980))

<sup>4</sup> *State v. Bone-Club*, 128 Wn.2d at 258-259

<sup>5</sup> *Globe Newspaper Co. v. Superior Court for Norfolk Cnt’y*, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982)

“The public trial right applies to the evidentiary phases of the trial, and to other ‘adversary proceedings.’ (*citation omitted*) Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire.”<sup>6</sup> However, “[a] defendant does not...have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.”<sup>7</sup> Therefore, the right to a public trial does not necessarily extend to motions in limine unless they require the resolution of disputed facts.<sup>8</sup>

## B. Public Access to Sex Offense Trials and Proceedings

Washington’s strongly articulated constitutional protections of the right of the defendant and of the public to open proceedings extends to sex offense cases. There are some exceptions designed to protect victims of sexual violence and those convicted of such crimes.

### 1. Courts should close sex offense trials when considering an offer of proof regarding relevancy of victim’s past sexual behavior

RCW 9A.44.020(3),<sup>9</sup> Washington’s rape shield statute, provides:

In any prosecution for the crime of rape...or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

- a. A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
- b. The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
- c. **If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the**

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<sup>6</sup> *State v. Rivera*, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001)

<sup>7</sup> *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)

<sup>8</sup> *State v. Castro*, 159 Wn. App. 340, 344, 246 P.3d 228 (2011)

<sup>9</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020>

**necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.**

(Emphasis added)

## **2. Probable cause hearings for sexually violent predators are presumptively closed**

Probable cause proceedings under chapter 71.09 RCW (Washington’s sexually violent predator act), like other civil commitment proceedings, are presumptively closed. “[D]uring the initial probable cause determination, a party to a civil commitment proceeding under RCW 71.09 is similarly situated to a party to commitment proceedings under RCW 71.05...[and therefore] equal protection requires that the same confidentiality and closure protections apply to both.”<sup>10</sup>

## **3. Jury selection**

See the discussion in Section XI of this chapter.

# **III. Media Coverage in Courtrooms**

## **A. Judges Hearing High Profile Sex Offense Cases Should Consult GR 16 of the Washington State Court Rules of General Application**

Sexual assault cases can garner significant media attention. Court rules and case law generally presume an open and accessible courtroom. GR 16<sup>11</sup> of the Washington State Court Rules of General Application (Courtroom Photography and Recording by the News Media) provides:

- a) Video and audio recording and still photography by the news media are allowed in the courtroom during and between sessions, provided (1) that permission shall have first been expressly granted by the judge; and (2) that media personnel not, by their appearance or conduct, distract participants in the proceedings or otherwise adversely affect the dignity and fairness of the proceedings.
- b) The judge shall exercise reasonable discretion in prescribing conditions and limitations with which media personnel shall comply.
- c) If the judge finds that sufficient reasons exist to warrant limitations on courtroom photography or recording, the judge shall make particularized findings on the record at the time of

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<sup>10</sup> *In re Det. of D.A.H.*, 84 Wn. App. 102, 107, 924 P.2d 49 (1996) (citing *In re Young*, 122 Wn.2d 1, 49, 857 P.2d 989 (1993))

<sup>11</sup> [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=GR&ruleid=gagr16](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr16)

announcing the limitations. This may be done either orally or in a written order. In determining what, if any, limitations should be imposed, the judge shall be guided by the following principles:

1) Open access is presumed; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption; (2) Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and from any other person or entity deemed appropriate by the judge; and (3) Any reasons found sufficient to support limitations on courtroom photography or recording shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views.

The court may prohibit the press from photographing juvenile witnesses without the witnesses' and/or their parents' consent because it may dampen the witnesses' ability to speak or report the facts.<sup>12</sup> Any court restriction on photography should be no broader in its application or duration than necessary.

## B. Use of the “Fire Brigade” to Resolve Sixth Amendment and First Amendment Conflicts

Judges are encouraged to consult the [Bar-Bench-Press Committee](#) of Washington's all-volunteer Liaison Committee (known colloquially as the “Fire Brigade”) to assist in resolving a defendant's Sixth Amendment right to a fair trial with the public's and press's First Amendment right to unfettered reporting. Article IV, section 3, of the Bylaws of the Bench-Bar-Press Committee of Washington provides:

Liaison Committee assistance may be provided to any lawyer, judge or media professional requesting it. Assistance shall be limited to those involved in disputes resulting from conflicts between rights of fair trial and free press. Assistance may consist of consultation, mediation and/or the provision of information to requesting parties.<sup>13</sup>

The “Fire Brigade” was most notably utilized in 1990 when the Vancouver newspaper, *The Columbian*, published an interview and several writings of accused (and eventually convicted) sex offender and murderer Westley Allan Dodd.<sup>14</sup>

## IV. Right to a Speedy Trial

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<sup>12</sup> *State v. Russell*, 141 Wn. App. 733, 739, 172 P.3d 361 (2007)

<sup>13</sup> [http://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=64&committee\\_id=77](http://www.courts.wa.gov/committee/?fa=committee.display&item_id=64&committee_id=77)

<sup>14</sup> Rob Phillips, “A child murderer grants an exclusive” (includes related article on Westley Allan Dodd), *The Quill* (Sept. 1, 1990)

The right to a speedy trial operates as a control on the time limits by which most stages of a criminal proceeding must take place. The right may be asserted generally through the United States and Washington State constitutions or under Washington State Superior Court Rules.

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” This guarantee “is ‘to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”<sup>15</sup> The United States Supreme Court has determined that deprivation of the constitutional right is to be measured by four factors including the length of the delay, the prejudice to the defendant, the reason for the delay, and whether the defendant has demanded a speedy trial.<sup>16</sup>

Article I, Section 22 of the Washington State Constitution provides in part: “In criminal prosecutions the accused shall have the right ... to have a speedy public trial.” The allowable time for “a speedy public trial” is determined in accordance with CrR3.3<sup>17</sup> (time for trial) and CrR 4.1<sup>18</sup> (time for arraignment).

Unlike some other jurisdictions<sup>19</sup>, Washington does not guarantee a crime victim’s right to a speedy trial, even if that victim is a child.

## **V. Exclusion (Sequestration) of Victims and Witnesses**

As a limitation on the general rule that trials and other judicial proceedings are presumptively open to the public, Washington Rule of Evidence 615<sup>20</sup> (ER 615: Exclusion of witnesses) provides in part: “At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.” If a witness does not respect an exclusion order and enters the courtroom anyway, he or she may be barred from testifying.<sup>21</sup>

ER 615 further provides, in relevant part: “This rule does not authorize exclusion of...a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.” In a sexual assault case, victims are likely “reasonably

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<sup>15</sup> *Klopfer v. State of N.C.*, 386 U.S. 213, 222-23, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) (citing *Pointer v. State of Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965))

<sup>16</sup> *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)

<sup>17</sup>

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=sup&set=CrR&ruleid=supCrR3.3](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.3)

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[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=sup&set=CrR&ruleid=supCrR4.01](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.01)

<sup>19</sup> See <http://www.ndaa.org/pdf/NCPCA%20Speedy%20Trial%202011.pdf>

<sup>20</sup> [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=ER&ruleid=gaer0615](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0615)

<sup>21</sup> *Jerry Parks Equip. Co. v. Se. Equip. Co., Inc.*, 817 F.2d 340, 342-343 (5<sup>th</sup> Cir. 1987) (testimony excluded); but see *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984) (testimony allowed)

necessary” to the presentation of the state’s cause. Additionally, when applying ER 615 Washington courts should take into account RCW 7.69.030 (Rights of victims, survivors, and witnesses), which provides “victims and survivors of victims” the right “to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified.”<sup>22</sup> Victims in sexual assault cases also have the right to have a support person of their choosing, present at any judicial proceedings related to criminal acts committed against the victim.<sup>23</sup> Although Washington courts have yet to rule on whether the statute prevails over ER 615, “[t]he statute was enacted in 1985, later than Rule 615, so the statute at least arguably prevails on the theory that later in time controls.”<sup>24</sup>

## **VI. Rights and Protections of Victims, Survivors of Victims and Witnesses**

### **A. Victims’ and Witnesses’ Rights in General**

The Washington constitution makes specific provision for crime victims’ rights:

[A] victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.<sup>25</sup>

Chapter 7.69 RCW is intended

to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system...[and] ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no

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<sup>22</sup> RCW 7.69.030(11) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030>

<sup>23</sup> RCW 7.69.030(10)

<sup>24</sup> Karl B. Tegland, 5A *Wash. Prac., Evidence Law and Practice* § 615.3 (5th ed. 2012)

<sup>25</sup> Washington Constitution, art. I, §35

less vigorous than the protections afforded criminal defendants.<sup>26</sup>

There shall be a “reasonable effort” to ensure that victims have specific enumerated rights of victims that are set forth in RCW 7.69.030,<sup>27</sup> and that those rights can be harmonized with a criminal defendant’s due process rights.<sup>28</sup>

## B. Victims of Sexual Assault Act

In the preface to the Victims of Sexual Assault Act, chapter 70.125 RCW, the Washington state legislature found that “[p]ersons who are victims of sexual assault benefit directly from continued public awareness and education, prosecutions of offenders, a criminal justice system which treats them in a humane manner, and access to victim-centered, culturally relevant services.”<sup>29</sup> The Act provides that “a personal representative of the victim’s choice may accompany the victim to the hospital or other health care facility, and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings,”<sup>30</sup> and requires specific considerations for court review of defense discovery requests in sexual assault cases for records of a community sexual assault program and underserved populations provider.<sup>31</sup>

## C. Rights of Child Victims and Witnesses

When enacting Chapter 7.69A (Child victims and witnesses) the Washington state legislature intended to

...insure that all child victims and witnesses of crime are treated with the sensitivity, courtesy, and special care that must be afforded to each child victim of crime and that their rights be protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the adult victim, witness, or criminal defendant.<sup>32</sup>

In addition to the rights of all victims and witnesses provided for in RCW 7.69.030, rights specific to child victims and witnesses are enumerated in RCW 7.69A.030.<sup>33</sup> The rights specifically afforded to child victims and witnesses include additional emphasis on promoting privacy, security, and understanding of the process.<sup>34</sup>

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<sup>26</sup> RCW 7.69.010 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.010>

<sup>27</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69.030>

<sup>28</sup> *State v. McDonald*, 183 Wn.2d 1, 18, 346 P.3d 748 (2015)

<sup>29</sup> RCW 70.125.020(7) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.020>

<sup>30</sup> RCW 70.125.060 <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.060>

<sup>31</sup> RCW 70.125.065 <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.125.065>

<sup>32</sup> RCW 7.69A.010 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.010>

<sup>33</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.69A.030>

<sup>34</sup> *Id.*



## D. Preserving Courtroom Decorum

### 1. Trial court discretion

“It is well settled in Washington that the trial court has broad discretion ‘to conduct [a] trial with dignity, decorum and dispatch and [to enable it to] maintain impartiality.’”<sup>35</sup>

Washington Rule of Evidence 611 (ER 611: Mode and Order of Interrogation and Presentation)<sup>36</sup> directs in part:

- (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Courts should exercise care to ensure that language used in the courtroom is respectful and neutral. Victims and witnesses, for example, should not be addressed by their first names.

When appropriate, in preliminary proceedings the judge should consider discussing with the parties their preferred gender pronouns. The court should model such use. See Ch. 10 of this bench guide.

### 2. Exceptions for minor victims and witnesses in sex offense cases

In *State v. Hakimi*,<sup>37</sup> Division I of the Washington Court of Appeals found that the trial court acted within its discretion under ER 611 in allowing two seven-year-old girls to hold a doll while testifying against the man who was alleged to have molested them. The court pointed to the girls’ reluctance to testify and their relative youth as good reasons for allowing them to carry a doll to the witness stand, even though they did not carry a doll while being interviewed by a child interview specialist. The court distinguished the case before them from *State v. Harper*,<sup>38</sup> in which Division III of the Washington Court of Appeals referred, in dicta, to allowing an 11-year-old victim to hold a teddy bear while

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<sup>35</sup> *State v. Hakimi*, 124 Wn. App. 15, 19, 98 P.3d 809 (2004) (citing *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969))

<sup>36</sup> [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=ER&ruleid=gaer0611](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0611)

<sup>37</sup> 124 Wn. App. at 22

<sup>38</sup> 35 Wn. App. 855, 862, 670 P.2d 296 (1983)

testifying against her stepfather in a similar sexual molestation case as an “other alleged error” that was unlikely to recur on appeal.

## VII. Admission of Child Victims’ Statements

The admission of out-of-court statements by child victims is governed by RCW 9A.44.120<sup>39</sup> (Admissibility of child’s statements—Conditions), which provides as follows:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

## VIII. The Confrontation Clause

In the seminal case *Crawford v. Washington*,<sup>40</sup> the U.S. Supreme Court held that testimonial hearsay evidence is admissible under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution only if the declarant witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. The Supreme Court expressly rejected the reliability of a declarant-witness’s statements as a determinative factor in the admissibility of such statements under the Confrontation Clause.<sup>41</sup> For a more detailed

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<sup>39</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120>

<sup>40</sup> *Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that admitting a defendant’s wife’s out of court statements made to police violated the Confrontation Clause)

<sup>41</sup> *Id.* at 68-69

discussion of the Confrontation Clause within the context of sexual offense cases, please refer to Chapter 6 (Evidence).

## **IX. Defendant’s Right of Self-Representation and Cross-Examination of Alleged Sexual Offense Victims**

### **A. Self-Representation**

A defendant in a state criminal trial has a constitutional right to proceed without counsel when he/she voluntarily and intelligently elects to do so, and a lawyer may not be forced upon a defendant who insists upon conducting his/her own defense.<sup>42</sup> There is no requirement that the court notify the defendant of the right to self-representation. As the court noted in *State v. Fritz*,<sup>43</sup> “Unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool.” The right to waive counsel does not include a right to be immune from the consequences of self-representation.<sup>44</sup>

### **B. Cross-Examination**

The United States Supreme Court has held that “[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety or interrogation that is repetitive or only marginally relevant.”<sup>45</sup> Likewise, Washington Rule of Evidence 611 (ER 611: Mode and Order of Interrogation and Presentation)<sup>46</sup> provides that cross-examinations “should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”

In *State v. Estabrook*,<sup>47</sup> the Court of Appeals ruled that a trial court properly exercised its discretion under ER 611(a) in requiring a pro se defendant accused of taking indecent liberties with a developmentally disabled minor to submit his cross-examination questions to the court rather than ask them of the child directly. The Court of Appeals considered the conflicting interests that the trial court had to balance, “Estabrook’s right to

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<sup>42</sup> *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)

<sup>43</sup> 21 Wn. App. 354, 359, 585 P.2d 173 (1978)

<sup>44</sup> *State v. DeWeese* 117 Wn.2d 369, 382, 816 P.2d 1 (1991)

<sup>45</sup> *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); see also *Crawford v. Washington*, 541 U.S. at 62; Alanna Clair, “An Opportunity for Effective Cross-Examination: Limits on the Confrontation Right of the Pro Se Defendant”, 42 *U. Mich. J.L. Reform* 719, 726 (2009)

<sup>46</sup> [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=ER&ruleid=gaer0611](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=gaer0611)

<sup>47</sup> 68 Wn. App. 309, 314, 842 P.2d 1001 (1993)

dignity of self representation and the reasonable concern for a vulnerable and scared developmentally delayed child witness,” and noted that pursuant to ER 611(a), “the trial court was entitled to control the mode of witness interrogation so as to more effectively ascertain the truth and to protect the witness from harassment or undue embarrassment.”<sup>48</sup>

Other jurisdictions have noted, in holding that a defendant’s right to self-representation did not include the right to personally cross-examine an adult victim, that “[i]n certain cases, the intimidation of the witness during cross-examination and the tactical advantage gained by it may exceed what the Constitution and fundamental fairness in the adversarial process require.”<sup>49</sup>

## **X. Testing and Counseling for Sexually Transmitted Diseases**

Chapter 70.24 RCW:

- authorizes state and local public health officers to “examine and counsel or cause to be examined and counseled persons reasonably believed to be infected with or to have been exposed to a sexually transmitted disease”<sup>50</sup>;
- requires local health departments to conduct pretest counseling, HIV testing, and posttest counseling of all persons convicted of a sexual offense under Chapter 9A.44 RCW;
- requires that “testing...be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge”<sup>51</sup>; and
- authorizes jail administrators, with the approval of the local public health officer, to order pretest counseling, HIV testing, and post-test counseling for persons detained in the jail whose actual or threatened behavior is determined by the public health officer to present a possible risk to the staff, general public, or other persons.<sup>52</sup>

The Washington Supreme Court, in *In the Matter of Juveniles A, B, C, D, E*,<sup>53</sup> held that the requirement in RCW 70.24.340 of mandatory HIV testing of sexual offenders, including juvenile sexual offenders, properly applies even to offenders whose actions involve no passing of bodily fluids, and does not violate the Fourth Amendment. In Washington State, only the victims of convicted sexual offenders may learn the attacker's HIV status.<sup>54</sup>

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<sup>48</sup> Id. at 316

<sup>49</sup> *Partin v. Commonwealth*, 168 S.W.3d 23, 29 (Ky. 2005) (citing Lane, “Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: Fields v. Murray,” 74 *N.C. L. Rev.* 863, 894 (March 1996))

<sup>50</sup> RCW 70.24.024 (1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.024>

<sup>51</sup> RCW 70.24.340(2) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.340>

<sup>52</sup> RCW 70.24.360 <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.360>

<sup>53</sup> 121 Wn.2d 80, 87-95, 847 P.2d 455 (1993)

<sup>54</sup> <http://www.doh.wa.gov/portals/1/Documents/Pubs/410-007-KNOWCurriculum.pdf>

## XI. Jury Selection

The court should be especially attentive in sex offense trials to possible biases among prospective jurors. For example, studies have shown that juror judgments in rape cases are influenced more by their own attitudes and beliefs about rape than the facts presented.<sup>55</sup> Additionally, because potential jurors' biases and the reasons for them are often very personal and potentially embarrassing in sexual offense cases, the court must direct jury selection with particular caution and delicacy. Recommendation # 20 by the Washington State Jury Commission<sup>56</sup> states as follows:

During jury selection in cases such as sexual harassment or sex crimes, counsel often will ask potential jurors whether they have ever been sexually harassed, assaulted, or molested. Jurors may find such questions embarrassing and intrusive and be less willing to speak publicly about their prior experience. In sensitive cases, the court should consider using written questionnaires and examining jurors outside the presence of other jurors. The questionnaires would identify which jurors should be separately questioned. Jurors' privacy would thereby be protected while allowing the parties effective jury selection. The trial court has this discretion and should use it in appropriate cases.

Whether or not questionnaires are used, biases are also likely to be identified during general voir dire in open court, and the court must be alert to the dangers of public voir dire eliciting information or comments from prospective jurors that may prejudice or taint other prospective jurors or unintentionally invade privacy or cause embarrassment, and the court should be prepared to intervene if the discussion between counsel and prospective jurors appears to risk either danger occurring. The court should consider giving attorneys more time and leeway during sexual offense cases.

The Washington State Supreme Court's Committee on Jury Instructions has recently revised WPI (Civil Advance Oral Instruction—Beginning of Proceedings) 1.01 to include reference to jury restraint from conscious or implicit bias:

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

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<sup>55</sup> See e.g. Natalie Taylor, "Juror attitudes and biases in sexual assault cases," Trends & Issues in crime and criminal justice No. 344, Australian Institute of Criminology (2007)

[http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi344.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi344.pdf)

<sup>56</sup> [https://www.courts.wa.gov/programs\\_orgs/pos\\_jurycomm/?fa=pos\\_jurycomm.showreport&id=rec20](https://www.courts.wa.gov/programs_orgs/pos_jurycomm/?fa=pos_jurycomm.showreport&id=rec20)

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

....

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.<sup>57</sup>

Although as of the publication date of this Sexual Violence Bench Guide, the WPIC (Criminal) Pattern Instruction has not yet been revised with similar language, practitioners may wish to consider this language in appropriate voir dire of jurors.

Determining the nature and extent of biases identified and their impact upon a prospective juror's ability to serve impartially requires special caution. The competing interests of the defendant's and public's constitutional right to a public trial and the protections against undue invasions of privacy or embarrassment to which potential jurors are entitled and which are necessary to accommodate the seating of impartial juries are directly implicated. Although individual questioning of jurors in chambers is not permitted unless the defendant waives his/her right to a public trial,<sup>58</sup> referring to potential jurors only by initials and not requesting identifying information during questioning are additional ways to prevent invading a prospective juror's privacy. The court has discretion to determine how much or little identifying information about prospective jurors is disclosed to the parties; however, there is a strong presumption in favor of juror privacy.<sup>59</sup>

In sex offense trials, invariably some prospective jurors will have biases or beliefs that may affect their ability to serve. For this reason, in sex offense trials it is generally advisable to inform prospective jurors at the beginning of jury selection that if there are matters or issues that may interfere with their ability to weigh the evidence impartially and follow the instructions of law but that involve sensitive private information that they would be uncomfortable disclosing in open and public proceedings they may request that the court

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<sup>57</sup> *WPI 1.01 (Civil Advance Oral Instruction-Beginning of Proceedings) and Comment* (4th ed. 2016)

<sup>58</sup> *See State v. Herron*, 183 Wn.2d 737, 356 P.3d 709 (2015)

<sup>59</sup> Washington State Jury Commission, Protecting Juror Privacy, Recommendation 18:

[https://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=277&committee\\_id=101](https://www.courts.wa.gov/committee/?fa=committee.display&item_id=277&committee_id=101)

consider conducting voir dire regarding such matters in chambers. However, the constitutional right to an open trial extend to the jury selection phase and require that the trial court consider alternatives to closed, in chambers voir dire. Questioning prospective jurors individually in the courtroom is one way that the court may be able to balance these concerns.

As noted above in Section II, trial courts must carefully consider the criteria set forth in *State v. Bone-Club*<sup>60</sup> (repeated below for ease of reference) before closing preliminary proceedings such as voir dire to determine if the need for closure sufficiently outweighs the constitutional guarantees to a public trial, provided for in Washington State’s Constitution:

1. whether the proponent of the closure has shown a compelling interest in doing so, and, where the interest is based on a right other than a defendant’s right to a fair trial, whether there is a “serious and imminent” threat to that right;
2. whether those present during the motion for closure had an opportunity to object;
3. whether the proposed method for curtailing open access is the least restrictive means available to protect the threatened interests;
4. the competing interests of the proponent of closure and the public; and
5. whether the order is broader in its application or duration than necessary to serve its purpose.<sup>61</sup>

The *Bone-Club* analysis must be made on the record and with input from any parties or persons present. In *State v. Wise*, the Washington Supreme Court clarified that the public trial right applies to jury selection,<sup>62</sup> and that failing to conduct a *Bone-Club* analysis before closing voir dire is structural error presumed to be prejudicial.<sup>63</sup> As a result of this error, the court in *Wise* granted the defendant a new trial after finding that he had not waived his right to a public trial by failing to object to the closed voir dire.<sup>64</sup>

The court applied the rule in *Wise* to voir dire closure in *State v. Paumier*,<sup>65</sup> and again granted the defendant in that case a new trial. The court distinguished its rulings in *Wise* and *Paumier* from *State v. Momah*,<sup>66</sup> another case involving allegedly improper closure of voir dire, but in which the court reached the opposite result from the other two cases. In *Momah*, the court found that the defendant “affirmatively accepted the closure,

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<sup>60</sup> 128 Wn.2d 254

<sup>61</sup> Id. at 258-59

<sup>62</sup> *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113, 1117 (2012) (citing *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 725, 175 L.Ed.2d 675 (2010))

<sup>63</sup> Id. at 14

<sup>64</sup> Id. at 15

<sup>65</sup> 176 Wn.2d 29, 32, 288 P.3d 1126 (2012)

<sup>66</sup> 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, \_\_\_ U.S. \_\_\_, 131 S. Ct. 160, 178 L. Ed.2d 40 (2010)

argued for the expansion of it, actively participated in it, and sought benefit from it” and that the “trial court recognized the competing article I, section 22 interests.... [and] carefully considered the defendant's rights....”<sup>67</sup>

The court could also consider providing a list of resource numbers to all prospective jurors in the event any prospective jurors have experienced past traumatic experiences and would benefit from seeking additional support. Appendix A to Chapter 1 contains a list of community resources, by county.

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<sup>67</sup> Id. at 147