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Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

RE: Comment on Proposed Change to RALJ 5.4

The Washington Defender Association opposes the proposed change to RALJ 5.4. There is no need to change this clear long-standing rule by adding language that creates ambiguity and is likely to lead to increased and piecemeal litigation. RALJ 5.4 has been the subject of very little litigation in its 30 year history, having been amended only once since it was adopted in 1981.[1] When the rule was amended in 1995, it was noted that only "***[a] handful of cases are reversed each year because it is alleged that a tape is lost, damaged, or inaudible.***"[2] There is no reason to change this rule, which creates little burden on courts of limited jurisdiction but ensures that there are adequate measures in place for parties to fairly litigate their cases.

The proposed amendment would create confusion about when a matter is "material." This court has previously held that a lost portion of the record is material for purposes of RALJ 5.4 when it is material "to the appeal."[3] However, because the proposed language precludes a new trial unless the missing record "materially affected" "the pretrial matter or trial," the amendment suggests a matter is instead material when it is important to a pre-trial or trial matter. We expect that this change will create confusion and litigation where very little has occurred during the rule's 30 year existence.

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[1] In 1995, the rule was amended to add the last sentence. 127 Wn.2d 1130-34. The proposed rule was accompanied by the following comment.

> (1) Background: The amendment was developed by the WSBA Court Rules and Procedures Committee, based on a suggestion from Seattle Municipal Court Judge Ronald Kessler.
> (2) Purpose: Parties occasionally will dispute whether the electronic record (i.e., audiotapes) are lost, damaged or, more likely, inaudible in part. No procedure currently exists for determining these disputes. (A handful of cases are reversed each year because it is alleged that a tape is lost, damaged, or inaudible.) The superior courts are reluctant to listen to the tapes to make an independent determination.
> The committee determined that a reasonable procedure would be for the trial court to listen to the tapes and make a decision.

K. Tegland, 4B Wash. Pract., Rules Practice RALJ 5.4 (6th ed. 2002) (emphasis added).

[2] K. Tegland, 4B Wash. Pract., Rules Practice RALJ 5.4 (6th ed. 2002) (emphasis added).

[3] *State v. Osman*, 168 Wn.2d 632, 642-45, 229 P3d 729 (2010).

The proposed amendment further creates ambiguity through its distinction between trial and pretrial matters. For example, a trial court may hold motions in limine before voir dire in order to address the admissibility of evidence or confrontation issues. The proposed amendment provides no guidance on whether such a proceeding is a pretrial matter that the appellant must show materially affected the trial.

This amendment would generate piecemeal appellate litigation. Under the amendment, the appellant is entitled to a new pretrial hearing if that record is lost, but the amendment anticipates that the appeal will go forward on the remaining record and then be remanded for the new hearing on the pretrial matter. If the appellant is successful in re-litigation of a non-dispositive pretrial matter, then presumably the appellate court will review the trial record from the first stage of the appeal to determine if the previous admission of the now suppressed statements was prejudicial and requires a new trial. This procedure increases appellate litigation, uses more judicial resources and is confusing.

Finally, the current version of RALJ 5.4 provides motivation for courts of limited jurisdiction to carefully maintain the electronic record for appellate review. Curtailing the remedy undermines that function of the rule. RALJ 5.4 as it has existed for the last 30 years has efficiently met that function.

The current version of RALJ 5.4 works well. It is a clear rule that is easily followed by the parties and creates a minimal burden on courts to ensure that adequate records are kept in order for parties to litigate their cases. Changing this rule will create confusion, result in piecemeal litigation and ultimately reduce the integrity of court proceedings. WDA urges you to reject this change.

Thank you for your consideration.

Sincerely,

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