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To the Supreme Court Rules Committee:

I have worked as an appellate public defender since 2019. Like many attorneys who contract with the Office of Public Defense, I handle appeals from all of Washington's 39 counties. To provide effective representation, an appellate attorney must almost always review exhibits that were offered and / or admitted in the trial court.

For my first three years on the job, I never had any difficulty obtaining copies of electronic trial exhibits from the superior court exhibit clerk in the county in question. But in 2022, I began to encounter barriers in certain counties.

I support the amendment to RAP 9.6, proposed by the Office of Public Defense, because I think it will help eliminate these barriers and ensure that criminal appeals proceed efficiently.

The following are three recent examples of cases in which I experienced barriers to exhibit-review. I think they illustrate the need for a statewide rule ensuring appellate counsel's access to *official* copies of trial court exhibits, which are by definition housed in the trial court.

Without a clear rule, ensuring appellate counsel's access to official copies of trial exhibits, appeals will be delayed and the quality of appellate public defense will be compromised.

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<u>Spokane County 2022-2023</u>

I submitted my first request for exhibits to the superior court on October 3, 2022; the court did not respond until October 18, when a Clerk's Office employee informed me that she could not provide most of the requested exhibits because they "were on CD and can't be copied and sent to you." My colleagues then told me that the Spokane County Superior Court has a policy against making copies of electronic exhibits, ostensibly because the exhibits might be damaged in the process.

On October 26, I emailed trial defense counsel and received no response. Finally, on November 3, I emailed the trial prosecutor, who immediately forwarded my request for processing as a public records request. This caused me some concern, because appellate counsel needs a *complete* and accurate reproduction of the trial record, and the point of a public records request is to facilitate *redactions*. Nevertheless, I let that process play out, thinking I had no other option.

More than three months later, my request had still not been fulfilled, and the public records officer working on it estimated it would take at least another two months. At that point, I reached out to trial counsel (defense and prosecutor) again. This time, the appellate prosecutor responded and was very helpful in gathering the needed exhibits and sending them to me electronically. However, one crucial exhibit was stored only with the trial court.

To help me obtain this exhibit, the appellate prosecutor provided me with a copy of a draft order authorizing trial counsel to "check out" an exhibit from the superior court so as to make copies for appellate counsel. I then had to draft an order for my case, and trial defense counsel had to get it signed and use it to make copies on my behalf. (I wondered why, if it is dangerous for the Clerk's Office to make copies of exhibits, it is safe for trial counsel.)

This process necessitated multiple motions for extensions of my opening brief deadline. My client's case dragged on for months longer than it should have, and I spent a tremendous amount of time drafting motions and chasing down exhibits. I feel this kind of delay is unfair to everyone, not least the defendant and alleged victims, who all want resolution.

<u>King County 2023</u>

I initially requested exhibits on February 17, 2023. When I checked back on March 4, I was told the request was in process, and that I could come down and copy the exhibits myself if I wanted to expedite things. I declined this invitation because it would eat up at least half a workday.

When I still had not heard anything by April 12, I called the King County exhibit room and was told that it would likely take another month to fulfill my request. I then said I would like to come down and copy the exhibits myself. I explained that I would probably need help with whatever copying technology they had, and I apologized for whatever annoyance this would cause. In response to this conversation, the exhibit clerk decided she would prefer to email me the exhibits. I enthusiastically accepted that offer.

When I still had not received the exhibits six days later, I sent a follow-up email at 4:18 pm. I then received a link to the exhibits the following morning at 9:27 am.

The exhibit-related delay in this case necessitated three separate motions to extend the brief deadline. I never understood what policy King County was applying to my request in this case. It was not, apparently, a policy facilitating in-person visits by appellate counsel, nor was it a blanket policy against providing electronic copies of exhibits.

Without a clear rule, ensuring appellate counsel's access to *official* copies of trial exhibits, the quality of appellate representation will be compromised.

Pacific County 2023

On May 17, 2023, I requested copies of two electronic exhibits from the Superior Court. A Clerk's Office employee promptly replied that she would send the two exhibits to my office. One day later, however, the same employee emailed to say she would be sending the exhibits to the Court of Appeals.

This alarmed me, because I needed to review the exhibits before drafting a brief, and sending exhibits to the Court of Appeals does not facilitate counsel's review—if fact, it makes it more difficult, because the Court of Appeals will not necessarily copy exhibits for counsel. I immediately emailed back to explain this.

The following day, the Pacific County Clerk sent me an email saying the Clerk's Office will never make copies of electronic exhibits for appellate counsel:

> Our office is unable to make "copies" of virtual exhibits, there is too much liability that a mistake/error could take place and the original exhibit damaged.
>
> In order to get a copy, our office will need a court order signed by a judge to release the exhibit to the attorney/office that admitted the exhibit (in this case the State) so that they can make a copy and then return the original to our office.

Like my experience with Spokane County, this experience confused me: if it is dangerous for the Clerk's Office to copy electronic exhibits, why is it safe for them to relinquish an exhibit to defense counsel so that defense counsel can copy the exhibit?

After getting this message from the Clerk, I contacted defense counsel and the Prosecutor's Office to see whether they could help me. The Prosecutor's Office declined to help, telling me this was defense counsel's responsibility. Defense counsel was not available to appear in court to "check out" the exhibits, and he instead provided me with several digital files, which he believed "probably" contained the material ultimately filed as the two exhibits I was seeking. I reviewed the material and decided it was sufficient to facilitate my effective representation, but obviously this is not ideal.

My decision to rely on these unofficial copies was heavily influenced by the culture of time pressure in public defense.

Unfortunately, it is extremely common for me to request a 60-day extension (or two 30-day extensions), for all but the smallest and simplest cases, just to complete my initial review of the trial transcript and filings. This is because, when a new case is assigned to me, I typically have between five and eight other new cases ahead of it in my workload queue (in addition to reply briefs, petitions for review, and other filings for cases already in progress). Exhibit-related delays exacerbate this already serious problem.

Appellate counsel has two options when it comes to reviewing exhibits. She can request every single exhibit marked for identification, as soon as the appeal is assigned to her, even though many of these will prove completely unnecessary to effective representation on appeal. Or, she can review the clerk's papers and trial transcripts first, and then request only those exhibits that are necessary to effective appellate representation. To avoid massively inconveniencing county clerks, my colleagues and I always choose the latter course.

This means that, even after requesting workload-related extensions to facilitate our review of the written record, we are sometimes forced to request further extensions while we wait to receive exhibits. We have no control over the speed with which the trial court provides the exhibits, but we are often threatened with punitive sanctions when we request exhibit-related extensions.

The following is an example of a ruling, from Division Two of the Court of Appeals, in response to a motion requesting a 30-day deadline extension *solely* to allow the trial court sufficient time to provide copies of exhibits:

> Appellant is granted an extension of time to and including October 10, 2022 to file the Appellant's Opening Brief. Appellant's failure to file the Appellant's Opening Brief by that date will result in the imposition of sanctions in the amount of $250. RAP 10.2(i). In addition, the Court will consider a Clerk's Motion for Further Sanctions without oral argument if the Appellant's Opening Brief is not filed by October 10, 2022. The Court will not grant the Appellant any further continuances for filing the Appellant's Opening Brief absent a showing of compelling circumstances. Appellant has received 90 days of additional time to file the Opening Brief.

My colleagues and I understand that the Court of Appeals needs to enforce deadlines—to the extent feasible in our under-resourced system of public defense. But, over time, rulings like these exert a subtle pressure on counsel to compromise. We can insist on following proper protocol, reviewing only official copies of exhibits, or we can rely on something that is most likely good enough, for the sake of efficiency.

Hopefully, I have made the right choice in each of my individual cases, but the point is we should not be put to this choice. The Office of Public Defense's proposed amendment to RAP 9.6, placing the responsibility on the superior court clerk to provide appellate counsel with official copies of trial exhibits, will improve both the efficiency of the appellate process and the efficacy of public defender representation.

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To be clear, most county exhibit clerks continue to provide copies of reproducible exhibits (electronic and otherwise) in a timely manner without issue. In my experience, the barriers are limited to certain counties. But a rule is needed to address the barriers that already exist and to prevent others from arising.

Someone has to be responsible for providing appellate counsel with official copies of trial exhibits. It only makes sense to locate this responsibility in the trial court, where the official exhibit is housed and catalogued.

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: comment re: OPD"s proposed amendment to RAP 9.6
Date: Thursday, April 25, 2024 11:07:53 AM
Attachments: RAP 9.6 Comment re OPD proposed rule.pdf

From: Erin Moody <MoodyE@nwattorney.net>
Sent: Thursday, April 25, 2024 11:05 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comment re: OPD's proposed amendment to RAP 9.6

Attached please find my comment regarding the Office of Public Defense proposed amendment to RAP 9.6.

Thank you very much,

Erin Moody

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