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Clerk of the Supreme Court  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504-0929

Dear Clerk of the Supreme Court,

Please consider this comment on the most recently proposed rule change to RAP 9.6 regarding Designation of Clerk's Papers.

As a preliminary issue, Clerk's already regularly complete document requests for appellate counsel pre and post designation. Charges for both copies and designation can be found in RCW 36.18.016(4), RCW 36.18.016(21) and RAP 9.7(a). These documents are often provided on CD when the case is so large it cannot be transmitted by electronic means or is of a confidential nature.

The fee statute does not however cover the copying of exhibits, USB drives, Thumb drives, or other audio/video recordings stored on electronic devices outside the Clerks case management system, The "Case file" is a permanent record. Exhibits are not and are held only temporarily pursuant to GR 20(c) and then returned or destroyed. See also GR15(i).

Copies of electronic devices can be requested from the party that submitted the exhibit in court. The proponents of the rule change claim that requesting a copy from trial court counsel or a prosecutor is not of the official court record held by the Clerk. But this misunderstands the practical reality of how exhibits get introduced at trial. Exhibits are generally authenticated by fact or expert witnesses at trial, and these records are generally certified copies of State agency records, and not the original held by the agency. The copies admitted at trial are not the official record, but rather are copies of state agency records held as an exhibit and ultimately returned or destroyed. See GR 20(c) and RAP 15.2(c) below. In many cases, the exhibits aren't even retained by the Clerk.

**GR 20(c)** Original Exhibit. When a photograph, videotape, or other facsimile representation is **substituted**, the original exhibit must be retained by the **presenting party or agency** until at least sixty (60) days following case completion and must produce the original exhibit upon the court's direction. Case completion is defined as the date of filing of the judgment of acquittal, final judgment, or dismissal, or the date the judgment becomes final after appeal.

**RAP15.2(e)** below in part already allows assistance to appellant counsel in preparing the record on appeal: "...trial counsel must assist counsel appointed for review in preparing the record."

The clerk may secure all exhibits at trial, but they may also substitute an original pursuant to GR20(c). Exhibits can also be withdrawn on the record and those exhibits would be removed from the Clerk's custody and maintained by the party. This is why trial counsel can produce these exhibits better than the Clerk.

Exhibits are never scanned into the official case file, as they often contain unredacted personal identifying information, crime scene homicide photos, or images depicting abuse to a minor. The proponents of the rule change would like you to believe that exhibits can be duplicated with a few clicks of a mouse. This is just not true. Exhibits are generally kept in evidence lockers or vaults for safekeeping and are generally only transmitted through the COA secure portal (except those exhibits that cannot be copied).

**GR15(g)** allows that any record sealed by the trial court shall also be sealed by the appellate court. But the same cannot be said when transmitting restricted or confidential materials contained within exhibits without a secure portal from the Clerk's office. A shared system, developed with stakeholders, with the shared goals of protecting restricted information impacting litigants and pro se parties managing their own appeal would be ideal.

Clerks maintain a separate role in the court system, one of neutrality and independence from any other participant. By providing access, as opposed to being tasked with reproduction, this allows each party to do their own legal work to obtain the necessary records located in the case file and separately stored exhibits. Making the Clerks responsible for reproducing properly and adequately, the exhibits in any case will hamper that in independence and neutrality.

Regarding the Clerk's ability to charge fees, the statutory fees cover documents, or documents maintained in the Clerks Superior Court case management system in electronic format. The fees do not cover separately held electronic devices. The proponents of the rule cavalierly suggest that the current fee structure would cover electronic devices, copying, securing a DVD burner and the minimal costs for a stack of CD's. This is unrealistic. The fee structure for court records does not anticipate the many and varied ways that exhibits get played, saved, and used in a trial.

The proponents of the rule change appear to lack awareness of the challenges this will place on Clerks and presents an uncooperative perspective. Another important concern Clerks face is that we should not simply amend the rule for one class of litigant. If the rule is to be amended, it should also apply to pro se parties managing their own appeal. The Supreme Court has always been an advocate for protecting private and/or sensitive information concerning youth or juveniles. This proposed rule change would require that Clerks provide dependency case file information to pro se litigants by electronic mail, or internet file transfer. It would require Clerks to copy all documents in the case file and all exhibits regardless of the exhibits' format. Once the records are transmitted without a secure portal will Clerk's also risk incurring liability when sensitive information is compromised or released to individuals who may use it for their own benefit? Unlike Judges, Clerks do not have immunity for acts they perform in good faith.

Unlike what's proposed in this rule change, WSP, DOL, and other state agencies provide a secure portal for required reporting of conviction information as well as requiring confidentiality agreements for users of those portals. This suggested rule change contains no similar safeguards.

Designation of Clerk's papers are transmitted though COA portal, yet technology is not all encompassing. We've been directed to copy a document too large to be uploaded, copied to a CD and mailed to the COA. Simply amending the rule, with no other procedural or infrastructure changes, will still result in many records failing to be transmitted by electronic means (including images containing color or large records that cannot be transmitted as the amended rule suggests).

In Skamania County, the Clerk has processed hundreds of Designations of Clerks papers over the years successfully and to everyone's satisfaction. It wasn't until the new pandemic and post pandemic processes allowing virtual appearances by parties that has engendered a refusal by appellate counsel to travel to the various courts. Appellate counsel concentrated in Western Washington appear to be driving this proposed rule change because "[it] is impossible for attorneys to manage their caseloads." This was never an issue prior to remote appearances becoming more the norm than an occasional exception. But appellate counsel being unwilling to travel occasionally does not seem like a good excuse for imposing new, complicated, and difficult tasks on the County Clerk, which by virtue of their independence and neutrality, is ill-equipped for the contemplated tasks. These changes won't help protect the rights of litigants, it will undermine them, and make them less secure.

County Clerks are elected in each of the 39 counties in the state. Each has elected to use their own case management system. Requests for documents in Pierce and King County

will be inherently different than counties who use Odyssey and Odyssey DMS, where parties can register to access documents. By filing a notice of appearance for confidential case types, appointed counsel can be added as an appeal attorney, not trial counsel as suggested by proponents of the rule.

Clerks using Odyssey and County DMS systems have worked hard to upload documents to the state Digital Archives, and thereby making access to court records more efficient and equally accessible to all litigants (except those records prohibited from release by law). Appellate counsel could access the needed documents online and then submit a reimbursement to OPD, which would efficiently remove the first request from individual Clerks and shift it to the more efficient archive upload. Eliminating duplicative work on the Clerk when processing the second request once the Designation of Clerk's papers is filed.

Rushing to make a rule change that is unlikely to improve the process of getting the proper records and information to appellate counsel will just shift the burden to County Clerks, who are already understaffed and overworked. A compromised approach working in unity with stakeholders to better serve all litigants will require development of an electronic exhibit program addressing storage, access and record keeping standards set in policy for most organized agencies.

Respectfully,



Grace D. Cross

Skamania County Clerk