



KIMBERLY A. ALLEN
GRANT COUNTY CLERK
and Clerk of the Superior Court

Cheryl L. Hill-Roberson, *Chief Deputy Clerk*

April 29, 2024

Via E-mail: supreme@courts.wa.gov
Supreme Court Clerk

Re: Comment on proposed changes to RAP 9.6 Designation of Clerk's Papers

Dear Justices:

I am writing to explain my concerns surrounding changes proposed to RAP 9.6 by OPD. My current exhibit management processes mostly involve paper, photos, or physical exhibits; therefore, our processes do not use a lot of current technology. We still handle exhibits the "old fashioned way" in most instances. Very few of our exhibits are in "electronic" format.

Attorneys and judges struggle with what processes to use in court to make a good record when audio and video exhibits are played to a jury or when they must be edited to share only a portion of the exhibit with the jury. The Clerks' responsibility is to simply forward original physical "electronic" exhibits to the court of appeals. However, attorneys expect Clerks to know how to copy audio recordings, video surveillance footage, and body cam footage that may be in various software formats (.pdf, .txt, .jpg, .mp3, .wav, etc.) as well as stored on various electronic media sources (CDs, flash drives, etc.) for their review. This is a struggle for my office.

I understand how difficult it is for appellate attorneys to review exhibits at 39 Clerks' offices; however, that is OPD's choice in managing the location of its staff. OPD asserts "an attorney who fails to investigate the sufficiency of the evidence is almost certainly providing ineffective assistance of counsel." Yet, it has been this way since I started in the Clerk's office in 1988, it has been this way since OPD was established in 1996, and it is OPD who has changed its processes. It is OPD that is trying to shift its burden to the Clerks. OPD is now making blanket requests for everything from cases - - whether or not they need it.

My duty as the Clerk is to keep trial exhibits safe while in my custody. I have always made the record available for attorneys to review exhibits in my office with one employee present. I take the responsibility of safekeeping exhibits seriously, and I also understand that attorneys need to review exhibits and may need copies. I understand GR31(1) defines "Access" as the ability to "view or obtain" a copy of a court record. Yet, common sense says an attorney should not request copies of ALL documents and exhibits. GR31(a) is also clear that access to court records "**shall not unduly burden the business of the courts.**" OPD's process is unduly burdensome to the Clerks of Superior Court.

I fully understand that Clerks must allow attorneys access to the court record. That being said, it causes an abundance of stress and worry each time we are requested to copy exhibits. Here are some reasons why:

- I worry when I put a CD/thumb drive exhibit into my computer to make a copy that something I do will damage or corrupt the original exhibit. Then it will be of no use to the Court of Appeals. What then?
- I worry when I have no idea what is on a CD/thumb drive exhibit that was marked but never used at trial. What if it contains pornography and should be restricted? Will I be liable?
- I worry if a CD/thumb drive exhibit not used at trial turns out to be blank. I have no ability to know what is on an exhibit, nor do I have a duty to review it. I do not have a variety of software at my disposal to review it. If someone requests a blank exhibit, they receive a blank copy. Will they assume the Clerk's office has done something wrong? Probably - - but it is the attorneys' responsibility to ensure their exhibits contain the evidence relied on at trial, not the Clerk's.
- I worry because often I do not have enough staff to dedicate someone to scanning hundreds of paper/photo exhibits to convert them into electronic format. Many exhibits are too large, or we are physically unable to scan them (bloody clothing, guns, drugs, weapons, etc.). A copy request should not include those exhibits. Why aren't attorneys weeding those out of their requests based on their review of the trial files and the trial exhibit lists?
- I worry that our court marks jury questionnaires as "Court's Exhibits" in cases. Those questionnaires contain confidential information that is protected by GR31(j). Appellate attorneys should not have juror information to put into their client's file - - remember it is the client's file. If you just found that defendant guilty of a crime, would you want your private information from jury selection given to the defendant? The trial attorney does not get to keep copies of the juror information - - why should the appellate attorneys have copies?
- I worry that many exhibits contain personal information (tax returns, pay stubs, victims' addresses). Yet, distributing copies of these exhibits to the public and attorneys regularly defeats the court's intended purpose to protect this information under GR22. Shouldn't we all be concerned about this?

I also have the following concerns and comments:

- Exhibits are stored separately and not made a part of the actual case file. Once the appeal period passes, exhibits are returned to the parties or destroyed. I feel a workgroup should be formed to discuss new rules for handling exhibits during trial and post-trial that includes trial attorneys, judges, and Clerks as well as appellate attorneys, judges, and Clerks.
- Clerks receive a **lot** of exhibits that are never used or admitted at trial. It seems unreasonable that OPD is asking for copies of ALL exhibits.
- My office has processes for requesting copies of both pleadings and exhibits. It is unreasonable for Clerks to be responsible for doing ALL the work to make copies of ALL exhibits and ALL documents for OPD's review. Attorneys should review their cases first and limit their requests to what they actually need and what can be

reasonably copied rather than making a blanket request for everything. Any requests should also follow already established processes.

- OPD proposes Clerks should “take photos of exhibits”, but that should not be part of the rule changes. I do not have a need for a camera to perform my statutory duties. I do not have a camera to take photos of large or physical exhibits. Nor would I want to be responsible for taking a photo that accurately depicts an original exhibit.
- I do not have a color copier in my office because pleadings are to be in black and white. I have no need for a color copier. I cannot make color copies of exhibits.
- It is OPD’s decision to not have attorneys travel to courts to review official records and exhibits. However, attorneys should be expected to limit requests to what is needed from Clerks’ offices. Everyone is short-staffed and on tight budgets. It is unreasonable for OPD to shift this burden to the Clerks.

OPD argued “Appellate attorneys must review official court records to provide effective assistance of counsel...a competent attorney cannot base legal arguments off of exhibit copies obtained from a trial attorney or prosecutor. They must have access to the official exhibits which...requires the county clerks to make copies available.” However, it is reasonable to expect appellate counsel to start with a review of the client’s file from a trial attorney first and the trial exhibit list. A copy from a Clerk is no different than a copy from trial counsel – both are officers of the court – and no “copy” can be the “original”. After review, if they determine a need for access to the original exhibits, they already have access. If attorneys want to “review official exhibits” they do that at the Clerk’s office. Once they determine whether they need copies, then an appropriate copy request may be made as they have done for many, many years.

I agree technology has changed and continues to change. We must work together to create a better process for submitting and managing exhibits presented in trial courts and create a management system that works at multiple court levels. Courts, Clerks, and judicial partners should work together to create a system that works for all involved and address rule changes at that time. Until then, attorneys should first review trial counsel’s file and review original exhibits or documents at the Clerk’s office, then make an appropriate copy request for what they need.

If the Supreme Court is seriously considering OPD’s proposed changes to RAP 9.6, I respectfully request that a public hearing be held to allow stakeholders to voice their opinions and needs.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kimberly A. Allen', written over a horizontal line.

Kimberly A. Allen,
Grant County Clerk