

April 26, 2024

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

Re: Comments to Proposed Changes to RAP 9.6 and OPD's GR(9) Statement in Support Thereof

Dear Clerk of the Supreme Court,

The Kitsap County Clerk's Office respectfully submits the following objections to proposed RAP 9.6 and OPD's GR9 statement/assertions in support thereof to the Washington Supreme Court:

As a Clerk's office that does provide access to exhibits, OPD's claim about some clerks denying access even for in-person review is concerning. However, these proposed changes seem to be based on concerns of what could happen and does not include supporting data that demonstrates that actual harm is happening/has happened in the appellate courts or to indigent clients.

The lack of experienced appellate attorneys across the state (such that they are all concentrated in Western Washington) is the underlying issue. Pro se litigants and other attorneys are expected to take time to travel to our office for viewing exhibits in person. This is at their own expense. Appellate counsel should be expected to do the same. The time and travel costs should be factored into appellate counsel contracts, not turned into unfunded requirements for Clerks to cover. The charging of statutory fees will not cover the costs the hiring of additional staff to accommodate this extra work, and our existing appeals clerks have other (non-appellate) duties to perform each day in addition to processing appeals that will have to be delayed if subjected to performing these proposed additional tasks.

OPD's position does not address our strong concerns about loading a foreign USB drive that may or may not contain malware or ransomware onto machines tied to county networks. The idea that county clerks somehow can ban certain types of media for court exhibits is not feasible. Judges vote to enact local court rules and decide to admit exhibits during hearings and trials, not county clerks.

Who is liable and what is the remedy if any malware/ransomware is inadvertently copied from these foreign devices by clerks and provided to appellate counsel?

The proposed requirement that "Copies shall be in substantially the same form as the original (e.g. copies of color photographs must be provided in color)" is unduly burdensome, because not all county clerks can afford color copiers. Additionally, our

office scans all filed documents in black and white not only due to GR14(a), which provides, in part:

Papers filed shall not include any colored pages, highlighting or other colored markings. This rule applies to attachments unless the nature of the attachment makes compliance impractical.

Grayscale and color copies also make for much larger electronic files. Our office can only send email attachments of 5MB or less. Given that our office processes over 750,000 documents per year, our staff does not have time to review every page of each filing prior to scanning, let alone change the scan settings every time a party or attorney fails to comply with GR14(a).

Additionally, our office has not maintained individual case files since 2015 (for cost savings of over \$15,000 annually); our daily filings are instead bound in paper and rubber bands, sorted only by case type and the date of filing. It is not feasible to expect our office can pull each original document filed for a particular case, review each original document for highlighting or other colored markings, and reproduce any documents not in compliance with GR14(a) in a timely manner solely for providing them in substantially the same form to appellate counsel for purposes of their file review and completing their designation(s).

OPD's proposal also doesn't mention dependency/termination/title 13 guardianship appeals, which already (pursuant to RAP 18.13A(g)) requires the entire file and all exhibits to be designated, requires the clerk to give priority to the preparation and filing of said clerk's papers and exhibits, and requires the clerk to provide a copy of the prepared clerk's papers and exhibits to appellate counsel. Since appellate counsel is receiving the entire indexed and paginated record on an expedited basis, there is not a legitimate reason to duplicate this work for appellate counsel in advance of receiving the prepared clerk's papers for these cases. Our office withstood multiple instances of appellate attorneys/firms insisting we should perform this unnecessary and duplicative work for them when RAP 18.13A was enacted, and we request that RAP 18.13A cases be explicitly excluded from the proposed changes to RAP 9.6.

OPD's assumption that cumbersome exhibits (aside from physical objects like clothing, drugs, and guns) are easily reproducible is false. Our vault contains plenty of oversized posterboard charts and photos, folded easel paper-pad pages that counsel and/or witnesses draw on during trial, survey maps, etc., which all exceed the maximum reproduction size (12"x18") of our copy machines. GR14(b) allows anything to be submitted as an exhibit for purposes of ensuring legibility. We do not have any sufficient space within our office for taking photographs of oversized charts, maps, and diagrams, nor the necessary camera, lighting equipment, and/or photo editing software to ensure that shadows and/or reflections are not inadvertently added to these photographed exhibits. We also share the Washington State Association of County Clerks' (WSACC) concerns as to what kind of record such photographs would create.

The portion of the proposed rule change explicitly disclaiming any obligation on the part of the County Clerks to copy exhibits when doing so is otherwise prohibited by law puts a burden on the county clerks, who would not only need to know what is or is not prohibited by law to copy but also what “special statutory procedures would apply” when counsel still wants to review these sensitive exhibits. However, given that all use of technology in our county, including email and faxes, is subject to the Public Records Act, what special statutory procedures would permit PRA-exempt transmission of such sensitive exhibits to appellate attorneys? If that answer is none, then appellate counsel would need to review these exhibits in person, and they would need to travel to the courthouse where they are located.

Perhaps OPD and the Supreme Court could work with the County Clerks on updating GR14 such that hearing/trial exhibits can be provided by trial counsel/parties in formats that are capable of being stored securely and electronically, that can be easily reproduced and removed (once the required retention period has elapsed) within the confines of our existing technologies (or through new programs/exhibit management systems) while allowing oversized charts, maps, and some other physical objects to be demonstrative versions that can be returned at the conclusion of the hearing/trial. We are aware that plans exist (ITG 1372) to implement an exhibit management system, and we support WSACC’s request that the court rules not change until such a system is in place.

Lastly, consideration has not been given to the clerks’ financial burden regarding purchasing all of the necessary equipment to make OPD’s proposal happen. While our office may be able to obtain a non-networked computer for duplication of CDs and flash drives, that is not the case for all county clerk’s offices.

If this proposal is the only way to resolve OPD’s concerns, below is a list of items offices would require ensuring their appellate attorneys can receive reproductions of exhibits:

- non-networked computers with CD drives (there is difficulty finding CPUs with CD drives included),
- blank CDs and flash drives,
- digital cameras,
- photography lighting and neutral backdrop
- photo-editing software, and
- sufficient trainings and staffing to use and keep said equipment operational in all 39 counties.

The interests of finality and justice for parties, indigent or otherwise, are not any more (or less) important for appellate court participants than they are for trial court participants. This proposal does not address changing anything about the current system that might help make exhibits more accessible overall or expand the number of experienced appellate counsel across the state. Instead, it adds responsibilities that are not funded to the county clerks, whose budgets and staffing levels are also thinly

stretched. It will only benefit a select few within a system that purports to promote equality under the law.

Sincerely,

David T. Lewis III, Kitsap County Clerk
Rebecca Wildes, Chief Deputy
Patricia Croston, Records Supervisor
Kitsap County Clerk's Office
614 Division Street MS-34
Port Orchard, WA 98366