



Dear Clerk of the Supreme Court,

The Washington State Association of County Clerks (WSACC) respectfully submits this extended comment regarding proposed changes to RAP 9.6 DESIGNATION OF CLERK'S PAPERS.

Since September 2022, WSACC has been in conversation with representatives from the State Office of Public Defense (OPD) regarding issues of access to trial records and exhibits. WSACC's position is that the problem identified and the solution proposed by OPD in the GR9 Cover Sheet are oversimplified and will result in additional rule changes once the problem is properly identified and addressed.

The actual problem is that the current exhibit management processes and rules need to be updated to keep up with changing technology. Current rules, laws, and processes were not designed with the digital medium in mind. The lack of technology to access court records remotely adversely impacts many – not just appellate counsel. OPD's proposed rule is a 'band-aid' that would force the Clerks to undertake a workload and assume a risk that should be systemically corrected in partnership with the Courts, attorneys, and AOC. Each entity has its challenges that could be resolved by implementing an exhibit management system that allows parties to upload, manage, and access exhibits electronically throughout the various phases of a case. AOC plans to implement an exhibit management system in partnership with law and justice stakeholders (ITG 1372). WSACC requests court rules not change until the system is in place.

The points below illustrate some of the challenges and complexity of issues that should be addressed before enacting any proposed rule changes.

Access to Court Records

The Clerks have always allowed access to public court records – that is our duty, and that has not changed. What has changed is that OPD no longer wishes to travel to courthouses to view the record and is demanding remote access to court records when remote access is not available in every Clerk's Office in the state. Because of this, their solution is to modify the rule and require Clerks to make copies of "all documents in the court file and all exhibits," which is a tremendous workload that transfers the burden from OPD to Clerks. The rule also fails to acknowledge that most Clerk's Offices have established processes that grant every customer, attorney, and pro se litigant remote access to court documents. WSACC has provided OPD with a collective list of each county's process for accessing records.

A Clear Definition of All Exhibits

OPD asks that Clerks be required to send them copies of "all exhibits." Clerks regularly receive hundreds of exhibits for pre-marking, but the majority of these exhibits are never mentioned or used during trial. Does "all exhibits" mean everything that has been marked by the Clerk or just those that were referenced and/or admitted into the trial record? The expectation that Clerks will make copies of or convert all physical exhibits into electronic

format at the request of OPD is a massive undertaking that the Clerks cannot absorb within their current workload of mandated duties. Doing so would likely cause delays in the preparation and timely submission of the Clerk's Papers to the Court of Appeals.

Some trial courts have local rules that direct the Clerk to mark certain items as Court's Exhibits at the end of trial. Examples include Juror Questionnaires and Supplemental Jury Questionnaires in sex cases. Both of these are a record series that are neither trial exhibits nor part of the case file. Does the definition of "all exhibits" include the Court's exhibits? If so, some courts have local rules precluding parties from taking these records out of the courtroom due to the court's obligation to protect the privacy interests of jurors. GR 31(j) limits post-trial access, requiring attorneys to petition to access these records. Clerks believe juror questionnaires marked as exhibits should not be copied and provided at the request of appellate attorneys. We request clarification on what constitutes "copies of all documents and all exhibits."

Digital Exhibits

There are exhibit management systems on the market that allow Courts and Clerks to process, retain, and share digital exhibits efficiently and securely. However, few counties can afford such a system, resulting in trial courts "making do" with their present system. Because most courts do not have exhibit management software, attorneys utilize USB drives to present digital exhibits. However, attorneys do not generally use the USBs marked as exhibits when playing digital exhibits in trial; instead, they play the evidence directly from their laptops in the courtrooms. This has resulted in marked/retained exhibits that do not contain files. Due to county IT policies that prohibit the insertion of digital media into networked computers, Clerks do not verify the viability or integrity of exhibits nor ensure that digital media are not corrupt. There are instances where corrupted media have been submitted. This is out of the Clerk's control and exacerbates the requirement to 'copy' them.

Technology Costs

OPD suggests Clerks purchase and have available stand-alone PCs with virus scanning software, DVD burners, USBs, CDs, cameras and copiers that scan/copy in color. The purchase and maintenance of a dedicated computer that includes the required software, licenses, tech support, and maintenance will cost several thousand dollars annually. It's unreasonable to expect Clerks to cover these expenses in their budgets or justify the need for a computer that is used for such a limited purpose. Local government budgets are tight, and Clerks as department heads are obligated to fulfill our office's mandated functions with the funds provided by county commissioners. It is inaccurate that statutory copy fees will cover the necessary costs for equipment, supplies, and staff time to make copies or convert exhibits to a digital format.

The suggested language for RAP 9.6 requires Clerks to take photographs of large exhibits that "cannot feasibly be copied, such as poster boards and physical exhibits." Most Clerk's offices do not have cameras as they aren't required to perform our statutory duties. Staff do not have access to county-issued cell phones to take photos. If the amendments to RAP 9.6 were to be adopted and photographs of exhibits were taken, what kind of record would that

photograph of a court exhibit create, and would they then be subject to public disclosure and retention?

OPD suggests Clerks make *color* copies of color photographs. Because a color copier is expensive, most Clerk's offices do not have one.

Exhibits with Protected Information

Although GR 22 and GR 31(e) have protections for safeguarding personal identifiers on court documents, the same protections are not utilized when these documents are marked as exhibits. GR 31(e) states that "personal identifiers should be redacted by parties in all documents filed with the court"; however, this is not done on exhibits. Because exhibits are kept separate from the court file and are only viewable in person upon request, they are generally not accessed by the public post-trial, which ensures sensitive information on exhibits remains in Clerk custody and is not introduced into the public domain. If a rule is adopted that requires Clerks to make copies of all exhibits, we are concerned about copying and distributing exhibits that contain protected information.

Copying of Exhibits

Per the Constitution, the Legislature sets the Clerk's Duties. Copying exhibits is not a Clerk's duty anywhere in statute.

Stare Decisis

RAP15.2(e) states in part, *"...If trial counsel is not appointed, trial counsel must assist (appellant) counsel appointed for review in preparing the record."* This rule is already in effect and is an appropriate and efficient use of court resources. Trial counsel transfers or provides necessary access to its file when new counsel takes on appellant responsibilities. This duty rests with trial counsel, not with Clerks. Civil counsel, privately paid defense counsel, and attorneys for the state have not expressed that they require a paradigm shift in exhibit access to protect their client's rights.

In closing, Clerks understand that technology has changed. However, the rules regarding managing court records and exhibits have not kept pace. The solution is not to tax Clerks with the responsibility and risk of patching together a method they oppose. The solution is for all judicial partners to implement a holistic approach to make the entire system more efficient and accurate. Clerks object to adopting this proposed rule for the reasons above. Still, they are in favor of and support the implementation of an exhibit management solution that will address the concerns of all stakeholders.

If the Supreme Court is still considering adopting OPD's proposed changes to RAP 9.6, the Clerks request that a public hearing be scheduled. This letter represents a collective response, which is not all-encompassing. This rule has the potential to adversely impact 39 counties, and each Clerk should have an opportunity to address these issues directly.

Sincerely,



Melissa Beaton
President
Washington State Association of County Clerks

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: WSACC's comment re change to RAP 9.6 - Designation of Clerk's Papers And Exhibits
Date: Monday, April 29, 2024 11:00:19 AM
Attachments: [WSACC response to RAP 9.6.docx](#)

From: Melissa Beaton <mbeaton@co.skagit.wa.us>
Sent: Monday, April 29, 2024 8:58 AM
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Subject: WSACC's comment re change to RAP 9.6 - Designation of Clerk's Papers And Exhibits

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Good morning,

Please see attached response on behalf of the Washington State Association of County Clerks.

Respectfully submitted,

Melissa Beaton

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