

WSR 23-23-100
RULES OF COURT
STATE SUPREME COURT
[November 9, 2023]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1550
RAP 9.6—DESIGNATION OF)
CLERK'S PAPERS AND EXHIBITS)

The Office of Public Defense, having recommended the suggested amendments to RAP 9.6—Designation of Clerk's Papers and Exhibits, and the Court having approved the suggested amendments for publication; Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2024.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2024. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 9th day of November, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment

Rules of Appellate Procedure

RAP 9.6 — DESIGNATION OF CLERK'S PAPERS AND EXHIBITS

A. Proponent: Washington State Office of Public Defense

B. Spokespersons: Gideon Newmark, Appellate Program Managing Attorney, Washington State Office of Public Defense, PO Box 40957, Olympia, WA 98504-0957, (360) 586-3164, gideon.newmark@opd.wa.gov

C. Purpose: To clarify that superior court county clerks must copy all documents and electronic exhibits in the court file at the request of appellate attorneys, subject to any applicable restrictions. Many county clerks believe they have no such obligation, and have denied attorneys access to exhibit copies. The lack of a rule clarifying this responsibility imperils the smooth functioning of the appellate system and the constitutional right to effective assistance of counsel. Because of the statutory fee structure that applies to county clerk's offices, this rule will not impose a financial burden on the clerks. And nothing in this suggested rule change would compel county clerks to copy exhibits that they are prohibited from duplicating, or to copy items that cannot be duplicated. Finally, while some may argue that attorneys can obtain exhibit copies from trial counsel

or prosecutors, there is only one source for official exhibit copies: the county clerks.

In a workgroup hosted by the Court of Appeals, several county clerks asserted that their offices are not required to provide copies of exhibits in court cases. OPD has received reports of clerk's offices denying requests for copies of exhibits on various grounds, including lack of technology to duplicate an exhibit and insufficient staffing.¹ Such denials both the efficiency of the appellate system and the right to effective assistance of counsel.

The ability for attorneys to obtain copies of exhibits is vital to the smooth functioning of the appellate system. Appellate attorneys are responsible for designating the clerk's papers and exhibits, which are a major part of the appellate record. For the sake of judicial economy, attorneys must review all documents and exhibits in the court file before designating the clerk's papers and exhibits. Otherwise, the record could contain voluminous irrelevant or duplicative material, needlessly slowing down the appellate process. An appellate process that is slower and less efficient burdens the courts and all litigants who appear before them, not to mention delaying finality and justice for parties.

Furthermore, for indigent appeals, the inability to obtain copies of exhibits imperils the right to the effective assistance of counsel. The effective assistance of counsel requires attorneys to investigate the sufficiency of the evidence by reviewing the exhibits. An attorney who fails to investigate the sufficiency of the evidence is almost certainly providing ineffective assistance of counsel. And because Washington has a statewide appellate public defense system, attorneys appointed to indigent clients must be able to obtain copies of exhibits in order to review them.

Washington's statewide appellate public defense system, administered by OPD, relies on contract attorneys to represent indigent clients. Experienced appellate attorneys are concentrated in Western Washington. As such, many indigent appeals are assigned to attorneys who are located far from the county of origin. Under this system, it is impossible for attorneys to manage their caseloads and also travel to the county courthouse to view exhibits for every case.² In order to protect the right to effective assistance of counsel therefore, appellate attorneys need to be able to order copies of exhibits from county clerk's offices.

Without the ability to order copies, it becomes impossible for appellate attorneys to safeguard the right to effective assistance of counsel. Either they must proceed without fully investigating the evidence, or they must overextend themselves by traveling to many remote, hard-to-reach destinations to review exhibits in person. Neither option is compatible with the constitutional right to the effective assistance of counsel.

Requiring county clerks to provide copies of exhibits will not impose an undue burden on clerk's offices because the clerks have statutory authority to charge appropriate fees. County clerks may bill 50 cents per page for copying physical documents, and 25 cents per page for copying electronic documents. Both of these fees should cover the expenses for copying documents, especially since most documents are now stored electronically and can be duplicated with a few clicks of a mouse. While many exhibits may be stored on physical media, county clerks may charge \$20 for copying a DVD or other electronic media. Considering a DVD burner can be purchased for around \$25, and blank

DVDs cost around 25 cents, the fee structure seems more than adequate for duplicating DVDs. And while other common media such as USB drives may cost a bit more, they require no special equipment to copy.³

Even if the current statutory fees are insufficient, this should not be a barrier to adopting this suggested rule change. Rather, it would be an argument for the legislature to increase the permissible fees. Insufficient funding of a constitutionally mandated government function is not a valid excuse for depriving a party of their constitutional rights.

Nothing in this suggested rule change would require county clerks to copy exhibits that they are otherwise prohibited from copying, or to copy exhibits that cannot be copied. It was raised during the Court of Appeals workgroup that county clerks are prohibited from copying certain exhibits, such as those depicting child sexual exploitation. To address this concern, the suggested rule change explicitly disclaims any obligation on the part of the county clerks to copy exhibits when doing so is otherwise prohibited by law. To review such exhibits, attorneys would need to follow any special statutory procedures that apply.

It was also raised during the Court of Appeals workgroup that clerks cannot make copies of physical items, such as firearms, drugs, and clothing. It should not need to be said, but the RAPs cannot obligate clerks to do something that is physically impossible. However, to address this sincere concern, the suggested RAP change makes clear that clerks are not obligated to copy exhibits which consist of physical items like firearms, drugs, or clothing.

Finally, it was suggested during the workgroup that attorneys should obtain copies of exhibits from trial counsel, or from prosecutors. Such an alternative is insufficient for one simple, insurmountable reason: trial attorneys and prosecutors are not the official custodians of any court records. Appellate attorneys must review official court records to provide effective assistance of counsel. There is an unjustifiable risk that any unofficial records they receive are inaccurate. As such, 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, as argued above, requires the county clerks to make copies available.

For the foregoing reasons, OPD requests that the Court approve this suggested rule change.

- 1 Attorneys have also been told that they could not come to the courthouse to view exhibits in person, creating a total denial of access to records that are public under GR 31. But because in-person access to exhibits is not an adequate remedy to the denial of exhibit copies in indigent appeals, this suggested rule change does not address in-person access.
- 2 This is assuming that in-person access is allowed. As noted in footnote 1 above, this is not always so.
- 3 Some clerks have suggested that they cannot duplicate USB drives because county IT policy prohibits inserting unknown USB drives into county computers. This problem can be overcome by using a non-networked computer with virus scanning technology to copy USB drives. Or, if a county considers USB drives too dangerous to access under any circumstances, they should be banned as a medium for court exhibits. Court exhibits are public records under GR 31. Any county IT policy barring access to exhibits stored on USB drives is an unambiguous violation of GR 31 and the public's constitutional right to open courts.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is requested. The suggested amendment is to clarify the clerical process, and should be adopted quickly to avoid clients having their cases prejudiced or delayed by the inability of their attorneys to obtain exhibit copies.

F. **Supporting material:** Suggested rule amendment.

SUGGESTED AMENDMENT

RULES OF APPELLATE PROCEDURE (RAP) RULE 9.6—DESIGNATION OF CLERK'S PAPERS

(a) Generally. The party seeking review should, within 30 days after the notice of appeal is filed or discretionary review is granted, serve on all other parties and file with the trial court clerk a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court. A copy of the designation shall also be filed with the appellate court clerk. Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter, a party may supplement the designation only by order of the appellate court, upon motion. Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.

(b) Copies Necessary for Preparation of Designation. On request, the trial court clerk shall provide, via postal mail, electronic mail, or internet file transfer, copies of all documents in the court file and all exhibits, regardless of format, to the parties. Copies shall be in substantially the same form as the original (e.g. copies of color photographs must be provided in color), except that the clerk may provide photographs of cumbersome exhibits that cannot feasibly be copied, such as large maps or diagrams. The clerk may charge appropriate fees for copies in accordance with applicable law. Nothing in this subsection shall be interpreted to mandate copying of exhibits whose copying is otherwise prohibited by law, such as exhibits protected under RCW 9.68A.180. Nothing in this subsection shall be interpreted to mandate copying of exhibits that consist of physical items that cannot be duplicated, such as firearms, clothing, or drugs.

~~(bc)~~ Designation and Contents.

(1) The clerk's papers shall include, at a minimum:

- (A) the notice of appeal or the notice for discretionary review;
- (B) the indictment, information, or complaint in a criminal case;
- (C) the summons and complaint or case initiating petition in a civil case;
- (D) any written order or ruling not attached to the notice of appeal, of which a party seeks review;
- (E) the final pretrial order, or the final complaint and answer or other pleadings setting out the issues to be tried if the final pretrial order does not set out those issues;
- (F) any written opinion, findings of fact, or conclusions of law;
- (G) any jury instruction given or refused that presents an issue on appeal; and
- (H) any order sealing documents if sealed documents have been designated;

(I) in a criminal case where a cost bill may be filed, any order concerning the defendant's indigency and current or likely future ability to pay discretionary legal financial obligations.

(2) Each designation or supplement shall specify the full title of the pleading, the date filed, and, in counties where subnumbers are used, the clerk's subnumber.

(3) Each designation of exhibits shall include the trial court clerk's list of exhibits and shall specify the exhibit number and the description of the exhibit to be transmitted.

~~(ed)~~ Format.

(1) Full copies of all designated pleadings shall be included, unless the trial court orders otherwise.

(2) The trial court clerk shall number the papers sequentially from beginning to end, including any supplemental clerk's papers, regardless of which party designated them.

(3) The trial court clerk shall make available a copy of the clerk's papers transmitted to the appellate court to any party, upon payment of the trial court clerk's reasonable expenses. If the trial court clerk generates the clerk's papers in electronic format, the trial court clerk shall make available to any party a copy of the clerk's papers in electronic format, upon payment of the trial court clerk's reasonable expenses.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the state supreme court and appear in the Register pursuant to the requirements of RCW 34.08.040.