WSR 05-24-064
RULES OF COURT
STATE SUPREME COURT

[December 1, 2005]

IN THE MATTER OF THE ADOPTION OF THE AMENDMENTS TO RAP 1.1, 2.2, 5.2, 8.1, 9.6, 10.2, 10.3, 10.4, 10.5, 11.4, 12.3, 13.4, NEW RAP 13.5A, 13.7, 16.7, 16.9, 16.14, 16.16, 16.18, 17.4, 17.5, 18.1, 18.5, 18.6, 18.7, 18.13, 18.15, RAP FORMS 4, 6, 7, 12, 14, 17 AND NEW FORM 24, RALJ 4.1 AND 9.3, NEW GR 3.1, MAR 7.1, CR 43 AND 66, CRLJ 43 AND ER (DELETION OF ALL COMMENTS TO THE ERS) INTRODUCTORY COMMENT, COMMENT 101, 102, 103, 104, 105, 106, 201, 301, 302, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 501, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 701, 702, 703, 704, 705, 706, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008 AND 1101	)	ORDER NO. 25700-A-838

The Washington State Bar Association having recommended the adoption of the proposed amendments to RAP 1.1, 2.2, 5.2, 8.1, 9.6, 10.2, 10.3, 10.4, 10.5, 11.4, 12.3, 13.4, New RAP 13.5A, 13.7, 16.7, 16.9, 16.14, 16.16, 16.18, 17.4, 17.5, 18.1, 18.5, 18.6, 18.7, 18.13, 18.15, RAP FORMS 4, 6, 7, 12, 14, 17 and New Form 24, RALJ 4.1 and 9.3, New GR 3.1, MAR 7.1, CR 43 AND 66, CRLJ 43 and ER (deletion of all comments to the ERs) Introductory Comment, Comment 101, 102, 103, 104, 105, 106, 201, 301, 302, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 501, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 701, 702, 703, 704, 705, 706, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008 AND 1101, and the Court having approved the proposed amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the proposed amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Office of the Administrator for the Court's websites in January 2006.

(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 28, 2006. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or Camilla.Faulk@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 1st day of December 2005.

For the Court

Gerry L. Alexander

CHIEF JUSTICE

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 1.1 *concerning* Scope of Rules

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment adds a new paragraph (i), which clarifies that the Court of Appeals may issue General Orders. Because there are several references to General Orders in the RAPs (*see, e.g.*, RAP 10.6(e)), but no citations to them or information about where to obtain them, the suggested amendment also includes a reference to the AOC website to assist in location appellate court General Orders.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 1.1 SCOPE OF RULES

(a) - (h) [Unchanged.]

(i) General Orders. The Court of Appeals, pursuant to RCW 2.06.040, may establish rules that are supplementary to and do not conflict with rules of the Supreme Court. These supplementary rules will be called General Orders. The General Orders for each division of the Court of Appeals can be obtained from the division's clerk's office or found at www.courts.wa.gov.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 2.2 *concerning* Decisions of the Superior Court Which May Be Appealed

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 2.2 (a)(6) conforms the language of the rule to the language used in the Juvenile Court Act and elsewhere in the RCW and the Rules of Appellate Procedure, replacing "deprivation" of parental rights with "termination" of parental rights. See RCW Ch. 13.34; RAP 18.13 (Accelerated Review of Dispositions in Juvenile Offense, Juvenile Dependency and Termination of Parental Rights Proceedings). See also RCW Ch. 13.40; RCW Ch. 26.09; RCW Ch. 26.26; RCW Ch. 26.27; RCW Ch. 26.33. A concurrent suggested amendment to RAP 18.13(g) makes the same change.

The suggested amendment also replaces "which" with "that" throughout the rule, including in the title, for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 2.2 DECISIONS OF THE SUPERIOR COURT ~~WHICH~~ THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) - (2) [Unchanged.]

(3) *Decision Determining Action.* Any written decision affecting a substantial right in a civil case ~~which~~ that in effect determines the action and prevents a final judgment or discontinues the action.

(4) - (5) [Unchanged.]

(6) ~~*Deprivation*~~ *Termination of All Parental Rights.* A decision ~~depriving a person of all~~ terminating all of a person's parental rights with respect to a child.

(7) - (12) [Unchanged.]

(13) *Final Order After Judgment.* Any final order made after judgment ~~which~~ that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision ~~which~~ that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) - (4) [Unchanged.]

(5) *Disposition in Juvenile Offense Proceeding.* A disposition in a juvenile offense proceeding ~~which~~ that is below the standard range of disposition for the offense or ~~which~~ that the state or local government believes involves a miscalculation of the standard range.

(6) *Sentence in Criminal Case.* A sentence in a criminal case ~~which~~ that is outside the standard range for the offense or ~~which~~ that the state or local government believes involves a miscalculation of the standard range.

(c) [Unchanged.]

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment ~~which~~ that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 5.2
***concerning* Time Allowed to File Notice**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment corrects an erroneously numbered reference to the Superior Court Criminal Rules.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 5.2 TIME ALLOWED TO FILE NOTICE

(a) - (d) [Unchanged.]

(e) Effect of Certain Motions Decided After Entry of Appealable Order. A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, or (2) if a statute provides that a notice of appeal, a petition for extraordinary writ, or a notice for discretionary review must be filed within a time period other than 30 days after entry of the decision to which the motion is directed, the number of days after the entry of the order deciding the motion established by the statute for initiating review. The motions to which this rule applies are a motion for arrest judgment under CrR 7.4, a motion for new trial under CrR 7.~~6~~5, a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59.

(f) - (g) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 8.1
***concerning* Supersedeas Procedure**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendments to RAP 8.1 clarify that cash may be deposited in the registry of the Superior Court as supersedeas. The rule was amended in 2002 to allow a party to supersede a judgment with cash, as well as a supersedeas bond, as a matter of right. Formerly, cash was considered "alternate security" requiring the trial court's approval. The 2002 amendment did not, however, provide for any procedure for the posting of cash supersedeas. This amendment remedies that omission. This amendment further clarifies RAP 8.1(d) to clearly provide that cash may be deposited in the registry of the Superior Court as supersedeas. The amended rule will specify that the Superior Court Clerk

may be directed to invest the funds for the benefit of the party posting the cash, subject to the clerk's investment fee, as provided in RCW 36.48.090. A party posting the cash supersedeas must provide notice that it has done so. (A concurrent suggested amendment would establish a new Form 24—Notice of Cash Supersedeas.)

The amendment also clarifies RAP 8.1 (b)(4), relating to alternative security, to emphasize that the courts are authorized to approve, and the parties may stipulate to, any reasonable means of securing enforcement of the judgment, including but not limited to the posting of cash or other assets in an investment account.

Additionally, the suggested amendment corrects the format of the cross-references to subsections (b) and (d) in conformity with the format used elsewhere in the RAPs, and replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 8.1 SUPERSEDEAS PROCEDURE

(a) [Unchanged.]

(b) Right to Stay Enforcement of Trial Court Decision. A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review. Stay of a decision in other civil cases is a matter of discretion.

(1) *Money Judgment.* Except when prohibited by statute, a party may stay enforcement of a money judgment by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4)~~, below~~.

(2) *Decision Affecting Property.* Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property, or of tangible personal property, or of intangible personal property, by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4)~~, below~~. If the decision affects the rights to possession, ownership or use of a trademark, trade secret, patent, or other intellectual property, a party may obtain a stay in the trial court only if it is reasonably possible to quantify the loss ~~which~~ that would be incurred by the prevailing party in the trial court as a result of the party's inability to enforce the decision during review.

(3) [Unchanged.]

(4) *Alternate Security.* Upon motion of a party, or stipulation, the trial court or appellate court may authorize a party to post security other than a bond or cash, may authorize the establishment of an account consisting of cash or other assets held by a party, its counsel, or a non-party, or may authorize any other reasonable means of securing enforcement of a judgment. The effect of doing so is equivalent to the filing of a supersedeas bond or cash with the Superior Court.

(c) [Unchanged.]

(d) Form of Cash Supersedeas; Effect of Filing Bond or Other Security.

(1) A party superseding a judgment with cash deposited with the Superior Court should deposit the supersedes amount with the Superior Court Clerk, accompanied by a Notice of Cash Supersedeas. The Notice may direct the clerk to invest the funds, subject to the clerk's investment fee, as provided in RCW 36.48.090.

(2) Upon the filing of a supersedeas bond, cash or alternate security approved by the trial court pursuant to subsection (b)(4) ~~above~~, enforcement of a trial court decision against a party furnishing the bond, cash or alternate security is stayed. Unless otherwise ordered by the trial court or appellate court, upon the filing of a supersedeas bond, cash or alternate security any execution proceedings against a party furnishing the bond, cash or alternate security shall be of no further effect.

(e) - (h) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 9.6
***concerning* Designation of Clerk's Papers and Exhibits**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment adds a new subparagraph (G), which requires a party to designate any order sealing documents in its designation of clerk's papers if that party has designated any sealed documents. This provision will assist the appellate court in the proper handling of sealed trial court documents and prevent inadvertent disclosure of confidential matters.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

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

(a) [Unchanged.]

(b) Designation and Contents.

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

(A) the notice of appeal;

(B) the indictment, information, or complaint in a criminal case;

(C) any written order or ruling not attached to the notice of appeal, of which a party seeks review;

(D) 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;

(E) any written opinion, findings of fact or conclusions of law; ~~and~~

(F) any jury instruction given or refused ~~which~~ that presents an issue on appeal~~.~~; and

(G) any order sealing documents if sealed documents have been designated.

(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.

(c) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 10.2
***concerning* Time for Filing Briefs**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: These suggested amendments are based on a recommendation originally submitted by the judges and clerks of the Court of Appeals. The suggested amendment to RAP 10.2(c) deletes the reference to a response to a "pro se supplemental brief" because, owing to 2002 amendments to the RAPs, such briefs are no longer authorized. *See* RAP 10.10.

The suggested amendment to RAP 10.2(f) adds a provision recognizing that, in some circumstances, a case is set for consideration without oral argument. In such circumstances, the "consideration" date must be used by amicus curiae to measure the deadline for filing the brief of amicus curiae. A concurrent suggested amendment to RAP 11.4(j) (Submitting Case without Oral Argument) will implement this recommendation.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.2 TIME FOR FILING BRIEFS

(a) - (b) [Unchanged.]

(c) Brief of Respondent in Criminal Case. The brief of respondent in a criminal case should be filed with the appellate court within 60 days after service of the brief of appellant or petitioner. ~~If a pro se supplemental brief is filed the state shall, within 30 days after receiving service, file a supplemental response addressing any of the issues raised in the pro se supplemental brief or stating that no response is necessary.~~

(d) - (e) [Unchanged.]

(f) Brief of Amicus Curiae. A brief of amicus curiae not requested by the appellate court should be received by the appellate court and counsel of record for the parties and any other amicus curiae not later than 30 days before oral argument ~~in the appellate court~~ or consideration on the merits, unless the court sets a later date or allows a later date upon a showing of particular justification by the applicant.

(g) - (i) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 10.3
***concerning* Content of Brief**
Submitted by the Board of Governors of the Washington State Bar Association

Purpose: These suggested amendments to RAP 10.3 serve two purposes. First, new subsection 10.3 (a)(3) permits a party to include an optional "introduction" as an element of an appellate brief. Although such introductions are used frequently in the appellate courts, the current rule does not recognize them. Because an introduction is not necessary in every brief, but is often helpful to the court, an introduction is expressly made optional.

Second, former subsection 10.3 (a)(5) relating to the "argument" section of the brief is amended to encourage identification by the parties of applicable standards of review. Appellate briefs are more focused and productive when written in light of the pertinent appellate standard of review, the identification of which is relevant in every appellate proceeding. This amendment does not require identification of the standard of review (which might not be necessary in, for example, an amicus curiae brief), but instead uses the directory language of RAP 11.4(f) (the court "ordinarily encourages" oral argument).

Concurrent suggested amendments to RAP Form 6 will implement this change.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.3 CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) *Title Page.* A title page, which is the cover.

(2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) *Introduction.* A concise introduction. This section is optional. The introduction need not contain citations to the record or authority.

(~~3~~4) *Assignments of Error.* A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(~~4~~5) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(~~5~~6) *Argument.* The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(~~6~~7) *Conclusion.* A short conclusion stating the precise relief sought.

(~~7~~8) *Appendix.* An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) - (h) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 10.4
concerning Preparation and Filing of Brief by Party

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 10.4(b) deletes the reference to a "pro se supplemental brief in a criminal case," because, owing to 2002 amendments to the RAPs, such briefs are no longer authorized. *See* RAP 10.10. A concurrent suggested amendment to RAP 10.2(c) makes the same change. The suggested amendment also corrects an erroneous reference to a reply brief of a "cross respondent." In a cross-appeal, the final reply brief is filed by the cross appellant.

The suggested amendment to RAP 10.4(g) and suggested deletion of RAP 10.4(i) clarify application of GR 14 (as amended in 2003) and the GR 14 Appendix to appellate briefs governed by RAP Title 10. The general format requirements of GR 14 (a) & (b) do not apply to appellate briefs, but the citation format prescribed by GR 14(d) does expressly apply.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.4 PREPARATION AND FILING OF BRIEF BY PARTY

(a) [Unchanged.]

(b) Length of Brief. A brief of appellant, petitioner, or respondent~~, and a pro se brief in a criminal case~~ should not exceed 50 pages. Appellant's reply brief should not exceed 25 pages. An amicus curiae brief, or answer thereto, should not exceed 20 pages. In a cross-appeal, the brief of appellant, brief of respondent/cross appellant, and reply brief of appellant/cross respondent should not exceed 50 pages and the reply brief of the cross ~~respondent~~ appellant should not exceed 25 pages. For the purpose of determining compliance with this rule appendices, the title sheet, table of contents, and table of authorities are not included. For compelling reasons the court may grant a motion to file an over-length brief.

(c) - (f) [Unchanged.]

(g) ~~[Reserved. See GR 14(d).]~~ **Citation Format.** Citations should conform with the format prescribed by the Reporter of Decisions pursuant to GR 14(d). The format requirements of GR 14 (a) - (b) do not apply to briefs filed in an appellate court.

(h) [Unchanged.]

~~(i) The format requirements of GR 14 do not apply to briefs filed in an appellate court.~~

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 10.5
***concerning* Reproduction and Service of Briefs by Clerk**
Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendments to RAP 10.5(c) and the rule's title strike obsolete references to service of papers on the parties by the appellate court clerk. Rule 10.5 was amended in 1998 to remove the obligation of the clerk to serve briefs on parties, making such references superfluous. Concurrent suggested amendments to RAP 13.4(g) and RAP 16.16 make similar changes.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.5 REPRODUCTION AND SERVICE OF BRIEFS ~~BY CLERK~~

(a) - (b) [Unchanged.]

(c) ~~Service and~~ Notice to Appellant in Criminal Case when Defendant is Appellant. In a criminal case, the clerk will, at the time of filing of defendant/appellant's brief, advise the defendant/appellant of the provisions of rule 10.10.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 11.4
***concerning* Time Allowed, Order, and Conduct of Oral Argument**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: This suggested amendment is based on a recommendation originally submitted by the judges and clerks of the Court of Appeals. The suggested amendment specifies that an individual party may move to have a case decided without oral argument, clarifying that it is not necessary for all parties to join in such a motion. The suggested amendment also adds a new provision specifying that, in circumstances in which the case will be heard without oral argument, the appellate court clerk will notify the parties of the date that the case is set for consideration on the merits. The "consideration" date can then be used by the parties as a baseline from which other deadlines-at present measured from the date set for oral argument-can be calculated. Concurrent suggested amendments to RAP 10.2(f) (deadline for filing of amicus brief) and RAP 18.1(c) (deadline for filing and service of affidavit of financial need) will implement this recommendation.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 11.4 TIME ALLOWED, ORDER, AND CONDUCT OF ORAL ARGUMENT

(a) - (i) [Unchanged.]

(j) Submitting Case without Oral Argument. The appellate court may, on its own initiative or on motion of a~~ll~~ parti~~es~~y, decide a case without oral argument. If the appellate court decides that the case will be decided without oral argument, the clerk will advise the parties and others who have filed briefs of the date the case is set for consideration on the merits.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 12.3
***concerning* Forms of Decision**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: This suggested amendment is based on a recommendation originally submitted by the judges and clerks of the Court of Appeals. The suggested amendment to RAP 12.3(e) deletes the provision subjecting motions to publish to the ordinary RAP 17.4 motion procedures. Instead, the rule will specify that a party does not file an answer to a motion to publish unless requested to do so by the court. To protect the interests of a nonmoving party in situations in which the court is inclined to publish a decision, that party will be given an opportunity to file an answer prior to such a motion being granted.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 12.3 FORMS OF DECISION

(a) - (d) [Unchanged.]

(e) Motion to Publish. A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be served and filed within 20 days after the opinion has been filed. The motion must be supported by addressing the following criteria: (1) if not a party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals. ~~Rule 17.4 applies to motions to publish.~~ A party should not file an answer to a motion to publish or a reply to an answer unless requested by the appellate court. The court will not grant a motion to publish without requesting an answer.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 13.4
***concerning* Discretionary Review of Decisions Terminating Review**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 13.4(d) has two purposes. First, the amendment clarifies the procedure for raising new issues in an answer to a petition for review. RAP 13.4(d) states that if a party wishes to seek review of any issue that is not raised in the petition for review, "that party must raise that new issue in an answer." A related rule, RAP 13.7(b), provides, in part: "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." These provisions have been interpreted to mean that, if a party responding to a petition for review wishes to raise any issue that is not raised in the petition for review, that party must raise the issue in the answer to the petition for review, even if it was raised in the Court of Appeals and was not decided there. *See State v. Barker*, 143 Wn.2d 915, 919-20, 25 P.3d 423 (2001). Although this result is consistent with the language of the rules, it is not the only reasonable interpretation. One could reasonably conclude that an issue raised but not decided in the Court of Appeals need not be raised in an answer to a petition for review, assuming that an appellate court may affirm a trial court decision on any basis supported by the record. The consequence of this plausible but erroneous interpretation is severe, i.e., issues raised at trial and on appeal, but not decided by the Court of Appeals, are lost to a party who does not again assert them in answer to a petition for review. The suggested amendment eliminates this potential trap.

Second, the amendment limits the scope of a reply to an answer to petition for review. Under the current rule, a party may not file a reply to an answer to a petition for review unless "the answer raises a new issue." This provision has been subject to abuse by petitioning parties who attempt to cast an answering party's arguments in response to a petition for review as "new issues" in order to reargue issues raised in the petition. The proposed amendment is intended to clarify the rule's purpose by more clearly prohibiting a reply to an answer that is not strictly limited to responding to an answering party's request that the Court review an issue that was not raised in the initial petition for review.

The suggested amendment to RAP 13.4(g) deletes an obsolete reference to RAP 10.5 relating to service of papers on the parties by the appellate court clerk. Rule 10.5 was amended in 1998 to remove the obligation of the clerk to serve briefs on parties, making such references superfluous. The language is amended to reflect the current practice of the clerk to serve such papers when a party has failed to do so. Concurrent suggested amendments to RAP 10.5 and RAP 16.16 make similar changes.

Additionally, the suggested amendment replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 13.4 DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition ~~which~~ that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed

within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed.

(b) - (c) [Unchanged.]

(d) Answer and Reply. A party may file an answer to a petition for review. If the party wants to seek review of any issue ~~which~~ that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, ~~that~~ the party must raise ~~that~~ those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party ~~raises a new issue~~ seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) - (f) [Unchanged.]

(g) Service and Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5. The clerk will serve the petition, answer, or reply ~~as provided in rule 10.5(b)~~ if the party has not done so.

(h) - (i) [Unchanged.]

GR 9 Cover Sheet

Suggested Change to Rules of Appellate Procedure (RAP) Forms
New Rule 13.5A *concerning* Motions for Discretionary Review of Specified Final Decisions

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested new rule is based on a recommendation originally submitted by the Washington Association of Prosecuting Attorneys. Suggested new RAP 13.5A will render certain decisions made by the Court of Appeals subject to review by the Supreme Court under the criteria in section (b) of RAP **13.4** rather than the criteria in section (b) of RAP **13.5**. The Rules of Appellate Procedure provide that certain *final* decisions of the Court of Appeals are subject to review in the Supreme Court via motion for discretionary review. These are decisions made under RAP 16.14(c) (personal restraint petitions), RAP 16.18(g) (post-sentence petitions), RAP 18.13(e) (accelerated review of specified juvenile court matters), and RAP 18.15(g) (accelerated review of specified adult sentencing matters). Under existing rules, the standard for accepting review of such decisions is set out in RAP 13.5(b). But those standards were intended to govern review of *interlocutory* decisions. They are not well suited for determining whether an appellate court should review a *final* decision. Suggested new RAP 13.5A will govern motions for discretionary review of these final Court of Appeals decisions. The suggested rule would change the standard for accepting review, but not the procedure. The governing standard would be the standard governing petitions for review, as set out in RAP 13.4(b). The procedure, however, would continue to be the motion procedure, as set out in RAP 13.5 (a) & (c).

Concurrent suggested amendments to RAP 16.14(c), 16.18(g), 18.13(e), and 18.15(g), incorporating references to RAP 13.5A, will implement this change.

RULES OF APPELLATE PROCEDURE (RAP)
[NEW] RULE 13.5A. MOTIONS FOR DISCRETIONARY REVIEW OF SPECIFIED FINAL DECISIONS

(a) Scope of Rule. This rule governs motions for discretionary review by the Supreme Court of the following decisions of the Court of Appeals:

(1) Decisions dismissing or deciding personal restraint petitions, as provided in rule 16.14(c);

(2) Decisions dismissing or deciding post-sentence petitions, as provided in rule 16.18(g);

(3) Decisions on accelerated review that relate only to a juvenile offense disposition, juvenile dependency, or termination of parental rights, as provided in rule 18.13(e); and

(4) Decisions on accelerated review that relate only to an adult sentence, as provided in rule 18.15(g).

(b) Considerations Governing Acceptance of Review. In ruling on motions for discretionary review pursuant to this rule, the Supreme Court will apply the considerations set out in rule 13.4(b).

(c) Procedure. The procedure for motions pursuant to this rule shall be the same as specified in rule 13.5 (a) and (c).

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 13.7
***concerning* Proceedings After Acceptance of Review**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment conforms the rule to current practice by authorizing the submission of supplemental briefs when the Supreme Court accepts review by granting a motion for discretionary review. Several types of appellate proceedings can only be reviewed by the Supreme Court by granting a motion for discretionary review. *See* RAP 16.14(c) (personal restraint petition); RAP 18.13(e) (accelerated review of dispositions in juvenile matters); RAP 18.15(g) (accelerated review of adult sentencings). The ability to file a supplemental brief in a Supreme Court review proceeding arising out of a motion for discretionary review is

often at least as important as the ability to file such a brief in a review proceeding arising out of a petition for review.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 13.7 PROCEEDINGS AFTER ACCEPTANCE OF REVIEW

(a) - (c) [Unchanged.]

(d) Supplemental Briefs, Authorized. Within 30 days after ~~the acceptance by~~ the Supreme Court grants ~~of~~ a petition for review or a motion for discretionary review, any party may file and serve a supplemental brief in accordance with these rules. No response to a supplemental brief may be filed or served except by leave of the Supreme Court.

(e) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 16.7
***concerning* Personal Restraint Petition—Form of Petition**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based in part on a recommendation originally submitted by the Washington Association of Prosecuting Attorneys. The suggested amendment to RAP 16.7 (a)(1) requires a petitioner filing a personal restraint petition to list in the petition all prior collateral attacks on the conviction. Many such petitioners collaterally attack a conviction in numerous forums. It can be difficult to compile information on the totality of such filings because in some of these proceedings, the respondent is the attorney general, while in others it is the local prosecuting attorney. Also, at times, records of prior collateral attacks may have been purged pursuant to record retention protocols. Since the petitioner has the burden of establishing that his or her current petition is properly filed, and since an accurate determination of the existence and/or disposition of prior collateral attacks is pertinent to the inquiry, it is appropriate that petitioners are required to provide the relevant information in the initial petition.

The remainder of the suggested amendment updates that portion of the form petition in which the petition is dated, replacing "19__" with a generic "date" entry. The change recognizes the recent turn of the millennium and will eliminate the need to update the form upon the turn of each century in the future. The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.7 PERSONAL RESTRAINT PETITION—FORM OF PETITION

(a) Generally. Under the titles indicated, the petition should set forth:

(1) *Status of Petitioner.* The restraint on petitioner; the place where petitioner is held in custody, if confined; the judgment, sentence, or other order or authority upon which petitioner's restraint is based, identified by date of entry, court, and cause number; any appeals taken from that judgment, sentence or order; and a statement of each other petition or collateral attack as that term is defined in RCW 10.73.090, whether filed in federal court or state court, filed with regard to the same allegedly unlawful restraint, identified by the date filed, the court, the disposition made by the court, and the date of disposition.

(3) - (4) [Unchanged.]

(5) *Oath.* If a notary is available, the petition must be signed by the petitioner or his attorney and verified substantially as follows:

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

or

After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

[Signature]

Subscribed and sworn to before me this ____ ~~day of~~ _____, ~~19~~____ [*date*].

Notary Public in and for
the State of Washington, residing
at _____

If a notary is not available, the petition must be subscribed by the petitioner or his attorney substantially as follows:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct. Dated this _____ ~~day of~~ _____, ~~19~~____[*date*].

[Signature]

If a notary is available and a petition is filed ~~which~~ that is not verified, the appellate court will return the petition for verified signature and advise the petitioners custodian to make a notary available.

(6) *Verification.* In all cases where the restraint is the result of a criminal proceeding and the petition is prepared by the petitioner's attorney, the petitioner must file with the court no later than 30 days after the petition was received by the court a document that substantially complies with the following form:

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this ___ ~~day of~~ _____, ~~19~~ __[*date*].

[Signature]

If the petitioner has been declared incompetent, the verification may be filed by the guardian ad litem. If a petition has been filed to determine competency, the verification procedure shall be tolled until competency is determined.

(b) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 16.9
***concerning* Personal Restraint Petition—Response to Petition**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the Washington Association of Prosecuting Attorneys. The suggested amendment increases—from 30 days to 60 days—the amount of time permitted for filing a response to a personal restraint petition. Rule 10.2(c) permits the brief of respondent in a criminal case to be filed with the appellate court within 60 days after service. Because a party directly appealing a criminal conviction has no lesser claim to an expeditious resolution of the review proceeding than a party collaterally attacking a conviction, the rules should not abbreviate the permitted response period in personal restraint matters. It is expected that this change will obviate the need for the appellate court to resolve the many motions for extensions of the RAP 16.9 period that are now sought.

The suggested amendment also adds a reference to RCW 10.73.090 as a basis for the court to determine that a personal restraint petition should be dismissed without requiring a response. Under that statute, a court is required not to accept for filing a personal restraint petition that is in violation of the one-year jurisdictional bar. The procedure for dealing with such petitions is identical to that used with respect to petitions that are dismissed under RCW 10.73.140, i.e., the court dismisses the petition without calling for a response from the government. The addition of this statutory reference will provide notice to petitioners that a petition may be dismissed without response on this basis.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.9 PERSONAL RESTRAINT PETITION—RESPONSE TO PETITION

The respondent must serve and file a response within ~~30~~ 60 days after the petition is served, unless the time is extended by the commissioner or clerk for good cause shown, or unless the court can determine without requiring a response that the petition should be dismissed under RCW 10.73.090 or RCW 10.73.140. The response must answer the allegations in the petition. The response must state the authority for the restraint of petitioner by respondent and, if the authority is in writing, include a conformed copy of the writing. If an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those parts of the record ~~which~~ that are relevant. Respondent should also identify in the response all material disputed questions of fact.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 16.14
***concerning* Personal Restraint Petition—Appellate Review**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 16.14(c) is intended to implement suggested new rule RAP 13.5A (Motions for Discretionary Review of Specified Final Decisions). See the GR 9 statement of purpose for new RAP 13.5A.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.14 PERSONAL RESTRAINT PETITION—APPELLATE REVIEW

(a) - (b) [Unchanged.]

(c) Other Decisions. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5 ~~(a), (b), and (c)~~A.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 16.16
***concerning* Question Certified by Federal Court**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 16.16(e) deletes an obsolete reference to service of briefs on the parties by the appellate court clerk. Rule 10.5 was amended in 1998 to remove the obligation of the clerk to serve briefs on parties. This amendment will conform Rule 16.16 to standard appellate court practice since that time. Concurrent suggested amendments to RAP 10.5 and RAP 13.4(g) make similar changes.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.16 QUESTION CERTIFIED BY FEDERAL COURT

(a) - (d) [Unchanged.]

(e) Briefs.

(1) *Procedure.* The federal court shall designate who will file the first brief. The first brief should be filed within 30 days after the record is filed in the Supreme Court. The opposing party should file the opposing brief within 20 days after receipt of the opening brief. A reply brief should be filed within 10 days after the opposing brief is served. The briefs should be served in accordance with rule 10.2. The time for filing the record, the supplemental record, or briefs may be extended for cause.

(2) *Form and Reproduction of Briefs.* Briefs should be in the form provided by rules 10.3 and 10.4. Briefs will be reproduced ~~and sent to the parties~~ by the clerk in accordance with rule 10.5.

(f) - (g) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 16.18
***concerning* Post-Sentence Petitions**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment to RAP 16.18(g) is intended to implement suggested new rule RAP 13.5A (Motions for Discretionary Review of Specified Final Decisions). See the GR 9 statement of purpose for new RAP 13.5A.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.18 POST-SENTENCE PETITIONS

(a) - (f) [Unchanged.}

(g) Review of Court of Appeals Decision. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court by a motion for discretionary review on the terms and in the manner provided in rule 13.5 ~~(a), (b), and (c)~~ A.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 17.4
***concerning* Filing and Service of Motion—Answer to Motion**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment imposes a 20-page limit on motions and answers to motions, and 10-page limit on replies.

The RAPs do not currently impose any page limit on motions, with the exception of a 25-page limit on motions for reconsideration of a decision terminating review. *See* RAP 12.4(e); *see also* RAP 13.4(f) (imposing 20-page limit on petitions for review of decisions terminating review).

Most motions should be brief and concise, and it is infrequent that a procedural motion requires 20 pages or more. In rare instances—certain complex motions for discretionary review, for example—a party may be unable to cogently present a substantive motion, answer, or reply within the applicable page limit. In such cases, the suggested amendment authorizes the appellate court to grant permission to file an over-length motion, answer, or reply.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 17.4 FILING AND SERVICE OF MOTION—ANSWER TO MOTION

(a) - (f) [Unchanged.]

(g) Length of Motion, Response and Reply; Form of Papers and Number of Copies.

(1) A motion and response should not exceed 20 pages, not including supporting papers. A reply should not exceed 10 pages, not including supporting papers. For compelling reasons, the court may grant a motion to file an over-length motion, response, or reply.

(2) All papers relating to motions or responses should be filed in the form provided for briefs in rule 10.4(a), provided an original only and no copy should be filed. The appellate court commissioner or clerk will reproduce additional copies that may be necessary for the appellate court and charge the appropriate party as provided in rule 10.5(a).

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 17.5
***concerning* Oral Argument of Motion**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment deletes the final sentence of RAP 17.5(d), which refers to Rule 11.5. Rule 11.5 is "Reserved."

RULES OF APPELLATE PROCEDURE (RAP)
RULE 17.5 ORAL ARGUMENT OF MOTION

(a) - (c) [Unchanged.]

(d) Time Allowed, Order, and Conduct of Oral Argument. The Supreme Court and each division of the Court of Appeals will define by general order the amount of time each side is allowed for oral argument. If there is more than one party to a side in a single review or in a consolidated review, the parties on that side will share the allotted time equally, unless the parties on that side agree to some other allocation. The appellate court may grant additional time for oral argument upon motion of a party. The moving party is entitled to open and conclude oral argument. ~~Rule 11.5 applies to the conduct of argument of motions.~~

(e) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.1
***concerning* Attorney Fees and Expenses**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: These suggested amendments are based in part on a recommendation originally submitted by the judges

and clerks of the Court of Appeals. The suggested amendment to RAP 18.1(b) adds a reference to a response to a motion on the merits because a request for fees and expenses provided for in the rule may properly come in a response to the motion, not just in the motion itself.

The first suggested amendment to RAP 18.1(c) is intended to clarify that, in some circumstances, a case is set for consideration on the merits without oral argument. In such circumstances, the "consideration" date must be used by a party filing an affidavit of financial need to measure the 10-day deadline for filing and service of the affidavit. A concurrent suggested amendment to RAP 11.4(j) (Submitting Case without Oral Argument) will implement this recommendation.

The second suggested amendment to RAP 18.1(c) is a new provision intended to recognize that a party may challenge an affidavit of financial need. Such a challenge is at present recognized in RAP 18.1(e), but solely in the context of a motion on the merits. The same procedure should be available both in cases heard as motions on the merits and those briefed in the ordinary course. Because the deadline for filing the affidavit is ten days prior to oral argument or consideration on the merits, the deadline for a response is set at seven days after service so that the appellate court will have the answer before oral argument or consideration.

The suggested amendment to RAP 18.1(e) is intended to clarify that the section applies only to an affidavit of fees and expenses and not to an affidavit of financial need. The sentence relating to answers to affidavits of financial need is deleted so that the procedure for affidavits of financial need will be governed solely by RAP 18.1(c). Additionally, the suggested amendment conforms the terminology of the rule by replacing "response" with "answer" and specifies that an answer, like an objection, must be both filed and served.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.1 ATTORNEY FEES AND EXPENSES

(a) [Unchanged.]

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for ~~hearing or submitted for consideration~~ oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) [Unchanged.]

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The ~~response~~ answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. ~~In a rule 18.14 proceeding, an answer to an affidavit of financial need may be served and filed at any time before oral argument.~~ A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) - (j) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.5
***concerning* Service and Filing of Papers**

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment to RAP 18.5, adding new section (e), is intended to implement suggested new rule GR 3.1 (Service and Filing by an Inmate Confined in an Institution). See the GR 9 statement of purpose for new GR 3.1.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.5 SERVICE AND FILING OF PAPERS

(a) Service. Except when a rule requires the appellate court commissioner or clerk or the trial court clerk to serve a particular paper, and except as provided in rule 9.5, a person filing a paper must, at or before the time of filing, serve a copy of the paper on all parties, amicus, and other persons who may be entitled to notice. If a person does not have an attorney of record, service should be made upon the person. Service must be made as provided in CR 5 (b), (f), (g), and (h).

(b) Proof of Service. Proof of service should be made by an acknowledgment of service, or by an affidavit, or, if service is by mail, as provided in CR 5(b). Proof of service may appear on or be attached to the papers filed.

(c) Filing. Papers required or permitted to be filed in the appellate court must be filed with the clerk, except that an appellate court judge may permit papers to be filed with the judge, in which event the judge will note the filing date on the papers and promptly transmit them to the appellate court clerk.

(d) Filing by Facsimile. [Reserved. See GR 17—Facsimile Transmission.]

(e) Service and Filing by an Inmate Confined in an Institution. An inmate confined in an institution may file and serve papers by mail in accordance with GR 3.1.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.6
***concerning* Computation of Time**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendments to RAP 18.6 are intended to implement suggested new rule GR 3.1 (Service and Filing by an Inmate Confined in an Institution). See the GR 9 statement of purpose for new GR 3.1. In addition, to keep the phrase "except as provided" consistent in both RAP 18.6 (b) and (c), these amendments delete "otherwise" from the first clause of RAP 18.6(b).

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.6 COMPUTATION OF TIME

(a) [Unchanged.]

(b) Service by Mail. Except as ~~otherwise~~ provided in rule 17.4 or GR 3.1, if the time period in question applies to a party serving a paper by mail, the paper is timely served if mailed within the time permitted for service. Except as provided in GR 3.1, ~~I~~if the time period in question applies to the party upon whom service is made, the time begins to run 3 days after the paper is mailed to the party.

(c) Filing by Mail. Except as provided in GR 3.1, ~~A~~a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing. Except as provided in rule 17.4 or GR 3.1, any other paper, including a petition for review, is timely filed only if it is received by the appellate court within the time permitted for filing.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.7
***concerning* Signing and Dating Papers**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment specifies that, for each paper signed by an attorney, the signature block should include the attorney's Washington State Bar Association membership number. The requirement is currently limited to "briefs and motions."

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.7 SIGNING AND DATING PAPERS

Each paper filed pursuant to these rules should be dated and signed by an attorney (with the attorney's Washington State Bar Association membership number in the signature block) or party, except papers prepared by a judge, commissioner or clerk of court, bonds, papers comprising a record on review, papers ~~which~~ that are verified on oath or by certificate, and exhibits. ~~All briefs and motions signed by an attorney shall include the attorney's Washington State Bar Association membership number in the signature block.~~

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.13
***concerning* Accelerated Review of Dispositions in Juvenile Offense, Juvenile Dependency and Termination of Parental Rights Proceedings**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 18.13(e) is intended to implement suggested new rule RAP 13.5A (Motions for Discretionary Review of Specified Final Decisions). See the GR 9 statement of purpose for new RAP 13.5A.

The suggested amendment to RAP 18.13(g) is based on a recommendation originally submitted by Karl B. Tegland, attorney at law, and was approved by the WSBA Court Rules and Procedures Committee after consultation with the WSBA Family Law Section. It conforms the language of the rule to the language used in the Juvenile Court Act and elsewhere in the RCW, replacing "depriving a person of all" parental rights with "terminating all of a person's" parental rights. See RCW Ch. 13.34; RAP 18.13. See also RCW Ch. 13.40; RCW Ch. 26.09; RCW Ch. 26.26; RCW Ch. 26.27; RCW Ch. 26.33. A concurrent suggested amendment to RAP 2.2 (a)(6) makes the same change.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.13 ACCELERATED REVIEW OF DISPOSITIONS IN JUVENILE OFFENSE, JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

(a) [Unchanged.]

(b) Accelerated Review by Motion. The accelerated review of the disposition shall be done by motion. The motion must include (1) the name of the party filing the motion; (2) the offense in a juvenile offense proceeding or the issues in a juvenile dependency or termination of parental rights; (3) the disposition of the trial court; (4) the standard range for the offense, as may be appropriate; (5) a statement of the disposition urged by the moving party; (6) copies of the clerk's papers and a written verbatim report of those portions of the disposition proceeding ~~which~~ that are material to the motion; (7) an argument for the relief the party seeks; and (8) a statement of any other issues to be decided in the review proceeding.

(c) - (d) [Unchanged.]

(e) Supreme Court Review. A decision by the Court of Appeals on accelerated review that relates only to a juvenile offense disposition, juvenile dependency and termination of parental rights is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rules 13.3(e) and 13.5 ~~(a), (b) and (c)~~A.

(g) Content of Motion and Response. In addition to the requirements of section (b) of this rule, a party appealing from the disposition decision following a finding of dependency by a juvenile court or a decision ~~depriving a person of all~~ terminating all of a person's parental rights with respect to a child should (1) append to the motion a copy of the trial court's finding of facts and conclusions of law and copies of all dependency review orders; (2) identify by specific assignments of error those findings and conclusions challenged on appeal; and (3) set forth the applicable standard of governing review of those issues. Counsel for the respondent should respond to each assignment of error and should provide citations to the record for any evidence supporting the trial court's findings.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP) 18.15
***concerning* Accelerated Review of Adult Sentencings**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to RAP 18.15(g) is intended to implement suggested new rule RAP 13.5A (Motions for Discretionary Review of Specified Final Decisions). See the GR 9 statement of purpose for new RAP 13.5A.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.15 ACCELERATED REVIEW OF ADULT SENTENCINGS

(a) Generally. A sentence ~~which~~ that is beyond the standard range may be reviewed on the merits in the manner provided in the rules for other decisions or by accelerated review as provided in this rule.

(b) - (f) [Unchanged.]

(g) Supreme Court Review. A decision by the Court of Appeals on accelerated review that relates only to an adult sentence is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rules 13.3(e) and 13.5 ~~(a), (b) and (e)~~A.

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP)
Appendix of Forms - Form 4
***concerning* Statement of Grounds for Direct Review**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment deletes a provision of Form 4 that pertained to a superseded version of RAP 4.2. That rule formerly directed a party seeking direct review to indicate in its petition "whether the case is one which the Supreme Court would probably review if decided by the Court of Appeals in the first instance." That requirement was eliminated from RAP 4.2 in 1990, and therefore the directive serves no purpose in Form 4.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP)
FORM 4. STATEMENT OF GROUNDS FOR DIRECT REVIEW

[Rule 4.2(b)]

No. [*Supreme Court*]

SUPREME COURT OF THE STATE OF WASHINGTON

(Title of trial court proceeding with parties designated as in rule 3.4)	)))	STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT

[*Name of party*] seeks direct review of the [*describe the decision or part of the decision ~~which~~ that the party wants reviewed*] entered by the [*name of court*] on [*date of entry*.] The issues presented in the review are:

[*State issues presented for review. See Part A of Form 6 for suggestions for framing issues presented for review.*]

The reasons for granting direct review are:

[*Briefly indicate and argue grounds for direct review. ~~State and argue briefly whether the case is one which the Supreme Court would probably review if decided by the Court of Appeals in the first instance.~~ See rule 4.2.*]

[*Date*]

Respectfully submitted,

Signature

[*Name, address, telephone number, and Washington State Bar Association membership number of attorney*]

GR 9 Cover Sheet

Suggested Amendment to Rules of Appellate Procedure (RAP) Form 6
***concerning* Brief of Appellant**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendments to Form 6 are intended to implement concurrent amendments to RAP 10.3. See the GR 9 statement of purpose for the suggested amendments to RAP 10.3.

In addition, the suggested amendments delete from Form 6 all references to a 1967 treatise on appellate brief writing and add the specification that citation form is governed by GR 14(d). A general reference to the WSBA Appellate Practice Deskbook is added to the beginning of the form. The Deskbook is more current than the deleted treatise, is specifically applicable to appellate practice in Washington, and is

recognized by many practitioners as a helpful text for lawyers handling appeals in Washington's appellate courts.

The suggested amendments also replace the recommended system for enumerating the major headings of a brief from capital letters (A., B., C….) to capital roman numerals (I., II., III.,…).

RULES OF APPELLATE PROCEDURE (RAP)
FORMS 6. BRIEF OF APPELLANT

[Rule 10.3(a)]

[See Form 5 for form of cover and title page. For useful discussions of appellate brief writing, see the latest edition of the Washington State Bar Association Appellate Practice Deskbook.]

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I. Introduction *[Optional. See rule 10.3 (a)(3).]*
~~A~~II. Assignments of Error _____
Assignments of Error
No. 1 _____
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No. 3 _____
Issues Pertaining to Assignments of Error
No. 1 _____
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~~B~~III. Statement of the Case _____
~~C~~IV. Summary of Argument _____
~~D~~V. Argument _____
[If the argument is divided into separate headings, list each separate heading and give the page where each begins.]
~~E~~VI. Conclusion _____
~~F~~VII. Appendix _____ A-1
[List each separate item in the Appendix and give page where each item begins.]

TABLE OF AUTHORITIES

Table of Cases

[Here list cases, alphabetically arranged, with citations complying with rule 10.4(g), and page numbers where each case appears in the brief. Washington cases may be first listed alphabetically with other cases following and listed alphabetically.]

Constitutional Provisions

[Here list constitutional provisions in the order in which the provisions appear in the constitution with page numbers where each is referred to in the brief.]

Statutes

[Here list statutes in the order in which they appear in RCW, U.S.C., etc., with page numbers where each is referred to in the brief. Common names of statutes may be used in addition to code numbers.]

Regulations and Rules

[Here list regulations and court rules grouped in appropriate categories and listed in numerical order in each category with page numbers where each is referred to in the brief.]

Other Authorities

[Here list other authorities with page numbers where each is referred to in the brief.]

Note: For form of citations ~~generally~~, see ~~sections 71 through 76 of F. Wiener, Briefing and Arguing Federal Appeals (1967)~~ GR 14(d).

I. Introduction

[An introduction is optional and may be included as a separate section of the brief at the filing party's discretion. The introduction need not contain citations to the record or authority.]

~~A~~II. Assignments of Error

Assignments of Error

[Here separately state and number each assignment of error as required by rule 10.3 (a) and (g). For example:

"1. The trial court erred in entering the order of May 12, 1975, denying defendant's motion to vacate the judgment entered on May 1, 1975."

or

"2. The trial court erred in denying the defendant's motion to suppress evidence by order entered on March 10, 1975."]

Issues Pertaining to Assignments of Error

[Concisely define the legal issues in question form which the appellate court is asked to decide and number each issue. List after each issue the Assignments of Error which pertain to the issue. Proper phrasing of the issues is important. Each issue should be phrased in the terms and circumstances of the case, but without unnecessary detail. The court should be able to determine what the case is about and what specific issues the court will be called upon to decide by merely reading the issues presented for review. ~~For an excellent discussion of how to properly phrase issues, see sections 31 through 33 of F. Wiener, Briefing and Arguing Federal Appeals (1967).~~]

[Examples of issues presented for review are:

"Does an attorney, without express authority from his client, have implied authority to stipulate to the entry of judgment against his client as a part of a settlement which limits the satisfaction of the judgment to specific property of the client? (Assignment of Error 1.)"

or

"Defendant was arrested for a traffic offense and held in jail for 2 days because of outstanding traffic warrants. The police impounded defendant's car and conducted a warrantless 'inventory' search of defendant's car and seized stolen property in the trunk. The impound was not authorized by any ordinance. Did the search and seizure violate defendant's rights under the fourth and fourteenth amendments to the Constitution of the United States and under article I, sec-

tion 7 of the Constitution of the State of Washington? (Assignment of Error 2.)"]

~~B~~III. Statement of the Case

[Write a statement of the procedure below and the facts relevant to the issues presented for review. The statement should not be argumentative. Every factual statement should be supported by a reference to the record. See rule 10.4(f) for proper abbreviations for the record. ~~For a good discussion of this aspect of brief writing, see Wiener, supra, sections 23 through 28 and 42 through 45.~~]

~~C~~IV. Summary of Argument

[This is optional. ~~For suggestions for preparing a summary of argument, see Wiener, supra, section 65.~~]

~~D~~V. Argument

[The argument should ordinarily be separately stated under appropriate headings for each issue presented for review. Long arguments should be divided into subheadings. The argument should include citations to legal authority and references to relevant parts of the record. ~~See Wiener, supra, Sections 34 through 36, 38, and 46 through 64.~~ The court ordinarily encourages a concise statement of the standard of review as to each issue.]

~~E~~VI. Conclusion

[Here state the precise relief sought.]

[Date]

Respectfully submitted,
Signature

[*Name of Attorney*]
Attorney for [*Appellant, Respondent, or Petitioner*]
Washington State Bar Association
membership number

VII. APPENDIX

[Optional. See rule 10.3 (a)(~~7~~8).]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP)
Appendix of Forms - Form 7
***concerning* Notice of Intent to File Pro Se Supplemental Brief**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment deletes Form 7, the form for a Notice of Intent to File a Pro Se Supplemental Brief. Owing to 2002 amendments to the RAPs, such briefs are no longer authorized. *See* RAP 10.10.

RULES OF APPELLATE PROCEDURE (RAP)
FORM 7. NOTICE OF INTENT TO FILE PRO SE SUPPLEMENTAL BRIEF
[DELETED]
~~[Rule 10.1(d)]~~

~~No. [appellate court]~~
~~[SUPREME COURT or COURT OF APPEALS, DIVISION ___]~~
~~OF THE STATE OF WASHINGTON~~

~~[Title of trial court proceeding with parties designated as in rule 3.4]~~	~~)~~ ~~)~~ ~~)~~	~~NOTICE OF INTENT TO FILE PRO SE SUPPLEMENTAL BRIEF~~

~~I intend to file a brief of my own in this case. I have received a copy of the brief prepared by my attorney. I must send my brief to the address below on or before [clerk inserts appropriate date] if I want my brief to be considered by the court.~~

~~I am sending this notice to the court on [today's date.]~~

~~Signature~~
~~[Name of Attorney]~~
~~Attorney for [Petitioner or Respondent]~~

~~Send brief to:~~
~~[Name and address of appellate court]~~

GR 9 Cover Sheet

Suggested Amendment to Rules of Appellate Procedure (RAP) Form 12
***concerning* Order of Indigency**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment to adds a filing fee waiver to the Form 12 order and clarifies the situations in which counsel will be appointed and expenses will be paid in discretionary review proceedings.

The suggested amendment also replaces "which" with "that" for purposes of grammatical clarity.

RULES OF APPELLATE PROCEDURE (RAP) FORMS
FORM 12. ORDER OF INDIGENCY

[Rule 15.2]

SUPERIOR COURT OF WASHINGTON
FOR [_____] COUNTY

[*Name of plaintiff*],	)	
Plaintiff,	)	No. [*trial court*]
v.	)	
[*Name of defendant*],	)	ORDER OF INDIGENCY
Defendant.	)	

[*Set forth finding of indigency and state that applicable law grants review wholly or partially at public expense. For example: "The court finds that the defendant lacks sufficient*

funds to prosecute an appeal and applicable law grants defendant a right to review at public expense to the extent defined in this order." The court orders as follows:

1. The filing fee is waived.

~~1~~2. [*Name of indigent*] is entitled to counsel for review wholly at public expense. When review is discretionary, counsel will be provided and the expenses detailed below will be paid if review is accepted or as applicable law permits.

~~2~~3. The appellate court shall appoint counsel for review pursuant to RAP 15.2 [*If applicable: "Trial counsel must assist appointed counsel for review in preparing the record."*]

~~3~~4. [*Name of indigent*] is entitled to the following at public expense:

(a) Those portions of the verbatim report of proceedings reasonably necessary for review as follows:

[*Designate parts of report.*]

(b) A copy of the following clerk's papers:

[*Designate papers by name and trial court clerk's sub-number.*]

(c) Preparation of original documents to be reproduced by the clerk as provided in rule 14.3(b).

(d) Reproduction of briefs and other papers on review ~~which~~ that are reproduced by the clerk of the appellate court.

(e) The cost of transmitting the following cumbersome exhibits:

[*Designate cumbersome exhibits needed for review. See rule 9.8(b).*]

(f) Other items:

[*Designate items.*]

[*Date*]

Signature
[*Name of Judge*]
Judge of the Superior Court

Presented by:
[*Name of party and attorney for party presenting order; Washington State Bar Association membership number*]

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP)
Appendix of Forms - Form 14
***concerning* Invoice of Court Reporter—Indigent Case**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment is based on a recommendation originally submitted by the clerks and judges of the Court of Appeals. The suggested amendment deletes Form 14, the form for the court reporter's invoice in a criminal case. This was the form of invoice required under a superseded version of RAP 15.4. That rule was amended in 2000, and now a court reporter's claim for payment in an indigent case is made by filing an invoice in accordance with procedures established by the Washington State Office of Public Defense. *See* RAP 15.4 (a)(3); http://www.opd.wa.gov/invoices.htm (including form for court reporter's invoice). Form 14 no longer serves any purpose.

RULES OF APPELLATE PROCEDURE (RAP)
FORM 14. INVOICE OF COURT REPORTER—INDIGENT CASE
[DELETED]

~~[Rule 15.4(d)]~~

~~No. [appellate court]~~
~~[SUPREME COURT or COURT OF APPEALS, DIVISION ___]~~
~~OF THE STATE OF WASHINGTON~~

~~[Title of trial court proceeding with parties designated as in rule 3.4]~~) ~~INVOICE OF COURT REPORTER~~
) ~~INDIGENT CASE~~

~~[Name of claimant court reporter] submits this invoice to be paid from public funds. An order authorizing the expenses claimed by this invoice was entered in [name of court] on [date of entry]. My Social Security number [or, my firm's IRS employer identification number] is _____.~~

~~I swear or affirm that I transcribed or caused to be transcribed the original and one copy of a verbatim report of proceedings in this case. The report was prepared in compliance with RAP 9.2 (e) and (g). I transcribed _____ pages. The rate per page set by the Supreme Court is $_____. The total amount of this invoice is $_____.~~

~~_____~~
~~Signature~~
~~[Name, address, telephone number, and Washington State Bar Association membership number of claimant]~~

~~subscribed and sworn to before me this _____ day of _____, 19__.~~

~~_____~~
~~Notary Public in and for the State of Washington, residing at _____~~

~~I hereby certify that the amount claimed in this invoice is for that portion of the verbatim report of proceedings ordered by the trial court; that the typing of the report is in accordance with rule 9.2 (e) and (g); and that the bill is computed at the current rate per page set by the Supreme Court for the original and one copy, namely, $_____ per page.~~

~~[Date]~~

~~_____~~
~~Signature~~
~~[Name of Superior Court Clerk]~~
~~Clerk of the Superior Court of Washington for [_____] County~~

GR 9 Cover Sheet

Suggested Amendment to Rule of Appellate Procedure (RAP)
Appendix of Forms - Form 17
***concerning* Personal Restraint Petition for Person Confined by State or Local Government**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment updates those portions of Form 17 in which the personal restraint petition is dated, replacing formulations that include "19__" with a generic "date" entry. The change recognizes the recent turn of the millennium and will eliminate the need to update the form upon the turn of each century in the future.

RULES OF APPELLATE PROCEDURE (RAP)
FORM 17. PERSONAL RESTRAINT PETITION FOR PERSON CONFINED BY STATE OR LOCAL GOVERNMENT

[Rule 16.7]

No. [*appellate court*]
[*Put name of appellate court that you want to hear your case.*]
OF THE STATE OF WASHINGTON

[*Put your name here.*],	)	
	)	PERSONAL RESTRAINT PETITION
Petitioner.	)	

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of this form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, _____ ,
(full name and address)
apply for relief from confinement. I am ___ am not ___ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: _____.
(identify type of order)

1. - 2. [Unchanged.]

3. I was sentenced after trial ___, after plea of guilty ___ on _____ ~~, 19___~~.
(date of sentence)
The judge who imposed sentence was _____.
(name of trial court judge)

4. - 8. [Unchanged.]

B. - D. [Unchanged.]

E. OATH OF PETITIONER

THE STATE OF WASHINGTON)
) ss.
County of _____)

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

_____
[*sign here*]

SUBSCRIBED AND SWORN to before me this ___ day of_____, ~~19__~~ _____.
[date]

_____
Notary Public in and for the State of Washington, residing at ____

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a notary: _____
_____
_____

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.
~~DATED this _____ day of _____, 19____ _____~~ [date].

_____
[*sign here*]

GR 9 Cover Sheet

Suggested Change to Rules of Appellate Procedure (RAP) Forms
New Form 24 *concerning* Notice of Cash Supersedeas

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: Form 24 is suggested to implement concurrent amendments to RAP 8.1. See the GR 9 statement of purpose for suggested amendments to RAP 8.1.

RULES OF APPELLATE PROCEDURE (RAP)
[NEW] FORM 24. NOTICE OF CASH SUPERSEDEAS

[Rule 8.1(d)]

		SUPERIOR COURT OF WASHINGTON
		FOR [_____] COUNTY
[*Name of plaintiff*],	)	**No. [*trial court*]**
Plaintiff,	)	
v.	)	**Notice of Cash Supersedeas**
[*Name of defendant*],	)	
Defendant.	)	

Submitted with this notice is a [*cashier's*] check totaling $_____ made payable to the _____ County Superior Court Clerk. The clerk is directed to hold the funds as a bond to supersede the judgment previously entered in this case against _____ plus interest likely to accrue during the pendency of the appeal and any costs that may be awarded to _____ on appeal.

[*Pursuant to RCW 36.48.090, the clerk is directed to invest the funds in an interest bearing trust account to accrue to the benefit of _____, subject to the clerk's investment service fee, all as provided in RCW 36.48.090.*] The funds shall be held pending return of the mandate in Court of Appeals Cause No. _____ and thereafter until disbursed pursuant to further order of court or by agreement of the parties.

DATED [*date*].

Signature

_____

Attorney for [*Plaintiff or Defendant*]

GR 9 Cover Sheet

Suggested Amendment to Rule for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 4.1 *concerning* Authority of Courts Pending Appeal

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: The suggested amendment is based on a recommendation originally submitted by Devin T. Theriot-Orr, attorney at law. The suggested amendment is intended to authorize a court of limited jurisdiction to determine issues of costs and attorney fees while a RALJ appeal is pending. This authority, which is equivalent to the authority of a superior court under RAP 7.2(i), will promote judicial economy and avoid piecemeal litigation in situations where attorney fees and costs are not resolved at the time of entry of judgment in a court of limited jurisdiction.

RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION (RALJ)
RULE 4.1 AUTHORITY OF COURTS PENDING APPEAL

(a) Superior Court. After a notice of appeal has been filed, the superior court has authority to perform all acts necessary to secure the fair and orderly review of the case.

(b) Court of Limited Jurisdiction. After a notice of appeal has been filed, and while the case is on appeal, the court of limited jurisdiction has authority to act in a case only to the extent provided in these rules, unless the superior court limits or expands that authority in a particular case.

(c) Questions Relating to Indigency. The court of limited jurisdiction has authority to decide questions relating to indigency.

(d) Attorney Fees and Costs. When a party is entitled to an award of attorney fees or costs, the court of limited jurisdiction has authority to determine such an award for a party's efforts in the court of limited jurisdiction. A party may obtain review of a court of limited jurisdiction's decision on attorney fees or costs in the same review proceeding as that challenging the judgment without filing a separate notice of appeal.

GR 9 Cover Sheet

Suggested Amendment to Rule for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 9.3 *concerning* Costs

Submitted by the Board of Governors of the Washington State Bar Association

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Purpose: These suggested amendments are based on a recommendation originally submitted by Karl B. Tegland, attorney at law. The suggested amendment to RALJ 9.3(a) specifies that costs authorized by statute may be recovered under the rule, but costs not so authorized, or those prohibited by statute, may not be. This clarification is prompted by the Court of Appeals decision in *City of Spokane v. Ward*, 122 Wn.App. 40, 92 P.3d 787 (2004) (costs may not be ordered in a traffic infraction case because by statute each party in a traffic infraction case is responsible for costs incurred by that party).

The suggested amendment to RALJ 9.3(g) clarifies that only statutory "costs" may be claimed in a cost bill under RALJ 9.3; attorney fees and other expenses must be requested under RALJ 11.2.

RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION (RALJ)
RULE 9.3 COSTS

(a) Party Entitled to Costs. The party that substantially prevails on appeal shall be awarded costs on appeal to the extent authorized by statute. Costs will be imposed against a party whose appeal is involuntarily dismissed. Costs will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so directs at the time the order is entered permitting the voluntary withdrawal of the appeal.

(b) - (f) [Unchanged.]

(g) Reasonable Attorney Fees. A request for reasonable attorney fees or expenses should not be made in the cost bill. The request should be made as provided in rule 11.2.

GR 9 Cover Sheet

Suggested Change to General Rules (GR)
New Rule 3.1 *concerning* Service and Filing by an Inmate Confined in an Institution

Submitted by the Board of Governors of the Washington State Bar Association

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(A) Purpose: The suggested rule is based on a proposal originally submitted to the Supreme Court by the American Civil Liberties Union of Washington (ACLU). After soliciting input from interested parties, the Supreme Court Rules Committee requested that the WSBA Court Rules and Procedures Committee evaluate the ACLU proposal and submit a revised version in light of the comments received. Considering commentary from the Washington State Association of Prosecuting Attorneys, the Superior Court Judges' Association, the ACLU, and the Washington State Association of Criminal Defense Lawyers, and working with a representative of the ACLU who attended subcommittee and committee meetings, the WSBA Court Rules and Procedures Committee approved this revised version of the proposal.

The central purpose of the rule is to remedy the result in *In re Carlstad*, 150 Wn.2d 583, 80 P.3d 587 (2003), in which the Supreme Court applied the plain language of RAP 18.6(c) and held that a personal restraint petition is timely filed only if it is received by the appellate court within the time permitted for filing. In that case, the petitioners were in prison and acting pro se when they filed collateral attacks on their judgments. Although each petitioner had filed the necessary pleadings with prison officials prior to the one-year expiration date for collateral attacks, the pleadings were not received by the court until after the expiration date, and the petitions were consequently dismissed. The *Carlstad* court declined to apply the federal prison mailbox rule created by the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), which was subsequently codified in the Federal Court Rules. *See* Fed. R. App. P. 4(c). Under the federal rule, a document is considered filed at the at the time of delivery to prison officials.

Suggested new GR 3.1 is modeled on the federal rule, although the language is modified to correspond to other Washington Court Rules relating to filing, service, and computation of time. In addition to dealing with inmate filing, section (b) of the suggested rule addresses timeliness of service by inmates, specifying that a document will be deemed "mailed" by an inmate at the time of deposit in an institution's internal mail system. This application of the prison mailbox rule has also been recognized in the federal system. *See, e.g., Schroeder v. McDonald*, 55 F.3d 454 (9th Cir. 1995). The suggested rule also includes a form declaration to assist inmates in complying with its requirements.

Finally, recognizing that the rule could create uncertainty in situations in which another party's deadline is measured from an inmate's filing or service, section (d) of the rule provides that such a period will not begin to run until the document is actually received by the party.

Concurrent suggested amendments to RAP 18.5 and RAP 18.6 will implement the new rule.

GENERAL RULES (GR)

[NEW] RULE 3.1 Service and Filing by an Inmate Confined in an Institution

(a) If an inmate confined in an institution files a document in any proceeding, the document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(b) Whenever service of a document on a party is permitted to be made by mail, the document is deemed "mailed" at the time of deposit in the institution's internal mail system addressed to the parties on whom the document is being served.

(c) If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing or mailing may be shown by a declaration or notarized affidavit in form substantially as follows:

DECLARATION

I, [*name of inmate*], declare that, on [*date*], I deposited the foregoing [*name of document*], or a copy thereof, in the internal mail system of [*name of institution*] and made arrangements for postage, addressed to:

[*name and address of court or other place of filing*];

[*name and address of parties or attorneys to be served*].

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at [*city, state*] on [*date*].

_____

[*signature*]

(d) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after filing or service of a document, and if an inmate files or serves the document under this rule, that period shall begin to run on the date the document is received by the party.

GR 9 Cover Sheet

Suggested Amendment to Superior Court Mandatory Arbitration Rule (MAR) 7.1
***concerning* Request for Trial De Novo**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The suggested amendment eliminates the requirement that a party requesting a trial de novo must file proof of service of the request prior to expiration of the 20-day period within which the request itself must be filed. The amendment also removes from MAR 7.1(a) the express requirement that service of the request occur within the 20-day period. The amendment is intended to remedy the result in *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997), and its progeny, *see, e.g., Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005); *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 445 (1999). *Nevers* and subsequent case law have held that timely service and timely filing of proof of service are mandatory; a failure to strictly comply with these requirements prevents the superior court from conducting a trial de novo. This is a harsh result. Considering the amount of litigation and appellate review that has been devoted to the

issue, the rule in its present form represents a trap for the unwary. It is not necessary that service and proof of service be accomplished within the 20-day limit, since the statute authorizing mandatory arbitration requires only that the request be filed. See RCW 7.06.050 (1)(b) (Within 20 days after entry and service of an arbitrator's decision, "any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held….")

Elimination of the requirement that a party serve the request will not relieve a party from the obligation to serve other parties. Service of all pleading and other papers is required by MAR 1.3 (b)(2). It will simply avoid the result of divesting the superior court of authority to hold a trial de novo if service is not effected within 20 days after the arbitration award is filed.

SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)
RULE 7.1 REQUEST FOR TRIAL DE NOVO

(a) ~~Service and~~ Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may ~~serve and~~ file with the clerk a written request for a trial de novo in the superior court ~~along with proof that a copy has been served upon all other parties appearing in the case~~. The 20-day period within which to request a trial de novo may not be extended. The request for a trial de novo shall not refer to the amount of the award and shall be in substantially the form set forth below:

SUPERIOR COURT OF WASHINGTON
FOR [_____] COUNTY

_____,	)	
Plaintiff,	)	No. _____
v.	)	REQUEST FOR
_____,	)	TRIAL DE NOVO
Defendant.	)	

TO: The clerk of the court and all parties:

Please take notice that [name of aggrieved party] requests a trial de novo from the award filed [date].

Dated: _____

_____
[Name of attorney for aggrieved party]

(b) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Superior Court Civil Rule (CR) 43 *concerning* Taking of Testimony

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: These suggested amendments correct erroneous cross-references, clarify the intent of subsection (f)(2) the rule dealing with the binding effect of prior testimony, depositions, and/or interrogatories, and replace "which" with "that" for purposes of grammatical clarity.

SUPERIOR COURT CIVIL RULES (CR)
RULE 43. TAKING OF TESTIMONY

(a) - (e) [Unchanged.]

(f) Adverse Party as Witness.

(1) *Party or Managing Agent as Adverse Witness.* A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association ~~which~~ that is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in rule 30~~(a)~~ (b)(1) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in rule ~~30(b)~~ 26(c), the court may make orders for the protection of the party or managing agent to be examined.

(2) *Effect of Discovery, etc.* A party who has served interrogatories to be answered by the adverse party or who has taken the deposition of an adverse party or of the managing agent of an adverse party shall not be precluded for that reason from examining such adverse party or managing agent at the trial. Matters admitted by the ~~The testimony of an~~ adverse party or managing agent ~~at the trial or on deposition or interrogatories shall not bind the adversary but~~ in interrogatory answers, deposition testimony, or trial testimony are not conclusively established and may be rebutted.

(3) *Refusal to Attend and Testify; Penalties.* If a party or a managing agent refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in rule 30~~(a)~~ (b)(1), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt. This rule shall not be construed:

(A) to compel any person to answer any question where such answer might tend to incriminate him;

(B) to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor

(C) to limit the applicability of any other sanctions or penalties provided in rule 37 or otherwise for failure to attend and give testimony.

(g) - (k) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Civil Rule for Courts of Limited Jurisdiction (CRLJ) 43
***concerning* Taking of Testimony**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: These suggested amendments correct erroneous cross-references, clarify the intent of subsection (f)(2) of the rule dealing with the binding effect of prior testimony, depositions, and/or interrogatories, and replace "which" with "that" for purposes of grammatical clarity. The internal cross-references are replaced by references to the Civil Rules (CR) because discovery under the CRLJs is conducted in accordance with Civil Rules 26 through 37. *See* CRLJ 26(e).

CIVIL RULES FOR COURTS OF LIMITED JURISDICTION (CRLJ)
RULE 43. TAKING OF TESTIMONY

(a) - (e) [Unchanged.]

(f) Adverse Party as Witness.

(1) *Party or Managing Agent as Adverse Witness.* A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association ~~which~~ that is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in ~~rule 30(a)~~ CR 30 (b)(1) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in ~~rule 30(b)~~ CR 26(c), the court may make orders for the protection of the party or managing agent to be examined.

(2) *Effect of Discovery, etc.* A party who has ~~filed~~ served interrogatories to be answered by the adverse party or who has taken the deposition of an adverse party or of the managing agent of an adverse party shall not be precluded for that reason from examining such adverse party or managing agent at the trial. Matters admitted by ~~The testimony of~~ an adverse party or managing agent in interrogatory answers, deposition testimony, or trial testimony are not conclusively established and ~~at the trial or on deposition or interrogatories shall not bind his adversary but~~ may be rebutted.

(3) *Refusal to Attend and Testify; Penalties.* If a party or a managing agent refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in ~~rule 30(a)~~ CR 30 (b)(1), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt. This rule shall not be construed:

(i) to compel any person to answer any question where such answer might tend to incriminate him;

(ii) to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor

(iii) to limit the applicability of any other sanctions or penalties provided in ~~rule~~ CR 37 or otherwise for failure to attend and give testimony.

(g) - (k) [Unchanged.]

GR 9 Cover Sheet

Suggested Amendment to Superior Court Civil Rule (CR) 66
***concerning* Receivership Proceedings**

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: This suggested amendment is based on a recommendation originally submitted by Karl B. Tegland, attorney at law, and was approved by the WSBA Court Rules and Procedures Committee after consultation with the WSBA Creditor-Debtor Section. The suggested amendment deletes and reserves CR 66 (Receivership Proceedings) in its entirety. In 2004 the legislature enacted comprehensive amendments to RCW ch. 7.60 and other statutes governing receiverships. *See* Laws of 2004, ch. 165. The legislation addresses the procedures governed by CR 66 and renders them superfluous. Redundant Civil Rules would cause needless confusion.

SUPERIOR COURT CIVIL RULES (CR)
RULE 66. RECEIVERSHIP PROCEEDINGS [RESERVED.
See RCW ch. 7.60.]

~~(a) Generally. Receivership proceedings shall be in accordance with the practice heretofore followed in the superior court or as provided by local rules. In all other respects, the action in which the receiver is sought or which is brought by or against a receiver is governed by these rules.~~

~~(b) Dismissal. An action wherein a receiver has been appointed shall not be dismissed except by order of the court.~~

~~(c) Notice to Creditors. A general receiver appointed to liquidate and wind up affairs shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication in a newspaper of general circulation in the county in which the action is pending, once each week for 3 weeks, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within 30 days from the date of first publication of such notice. If necessary to afford proper notice to such creditors, the court may by order enlarge the time for such publication or direct publication of such notice in other counties. In addition to such publication, the receiver shall give actual notice by mail at their last known addresses to all persons and parties to him known to be or to claim to be creditors.~~

~~(d) Request for Special Notices. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with~~

~~the clerk a written request stating that he desires special notice of any and all of the following named matters, steps or proceedings in the administration of said receivership, to wit:~~

~~(1) Filing of petitions for sales, leases, or mortgages of any property in the receivership;~~

~~(2) Filing of accounts;~~

~~(3) Filing of petitions for removal or discharge of receiver; or~~

~~(4) Such other matters as are officially requested and approved by the court.~~

~~Such request shall state the post office address of such person, or his attorney.~~

~~(e) Notices and Hearings. Notice of any of the proceedings set out in section (d) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address and deposited in the United States Post Office, with the postage thereon prepaid, at least 5 days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his attorney not less than 5 days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order of judgment, and such judgment shall be final and conclusive.~~

GR 9 Cover Sheet

Suggested Amendments to
RULES OF EVIDENCE (ER)

Deletion of Judicial Council Task Force Comments

Submitted by the Board of Governors of the Washington State Bar Association

(C) Purpose: The Judicial Council Task Force on Evidence originally prepared the Comments to the Rules of Evidence (ER) in 1979 to explain the genesis and intent of the evidence rules, which were being codified for the first time in Washington. The Comments have since been updated only sporadically. When the WSBA Court Rules and Procedures Committee considered the viability of revising or updating the Comments, the appropriate scope of such a revision became a matter of ongoing and irresoluble debate. The Committee then reviewed the continued viability of the Comments and reached the following conclusions: (1) the historical reason for adoption of the Comments—to assist practitioners in the transition from a common law-based evidence system to a rule-based system—is no longer pertinent, since lawyers are now familiar with using the rules and do not need such guidance; (2) because there is no mechanism in place for updating the Comments and keeping them current, they are frequently obsolete and insufficient and can be misleading; (3) a number of commonly used, well-respected, and thoroughly up-to-date evidence manuals are widely available for interpretive guidance, and the original Comments will continue to be available for research purposes in those volumes and in archived GR 9 materials.

For these reasons, the WSBA has concluded that the Comments have outlived their usefulness and recommends their deletion from the Rules of Evidence.

SUGGESTED AMENDMENTS TO
RULES OF EVIDENCE (ER)

~~INTRODUCTORY COMMENT~~

~~A comment prepared by the Judicial Council Task Force on Evidence appears after each rule. If the rule is identical to the corresponding rule in the Federal Rules of Evidence, no effort is made to reiterate the advisory committee's note to the federal rule. That information is readily available in works such as J. Weinstein, Evidence (1975), C. Wright & K. Graham, Federal Practice (1969), J. Moore, Federal Practice (1976), and D. Louisell & C. Mueller, Federal Evidence (1977). The rules are also discussed in Powell & Burns, A Discussion of the New Federal Rules of Evidence, 8 Gonz.L.Rev. 1 (1972).~~

~~The comments here focus on the intent of the drafters with respect to prior Washington law and on the reasons for departures from the federal rules. In these comments, the word "drafters" refers only to the Washington Judicial Council and its Task Force on Evidence. It does not refer to Congress, the Washington State Supreme Court, or to any other judicial or legislative body.~~

~~The rules do not purport to codify constitutional law. The application of a rule may be subject to constitutional restrictions or limitations which are not defined in the rule. See, for example, the comments to rules 104, 105, and 804.~~

TITLE I. GENERAL PROVISIONS
RULE 101. SCOPE

[Unchanged.]

~~Comment 101~~

~~Rule 1101 specifies in more detail the courts, proceedings, questions, and stages of proceedings to which the rules apply.~~

RULE 102. PURPOSE AND CONSTRUCTION

[Unchanged.]

~~Comment 102~~

~~The rule is the same as Federal Rule 102. This generalized statement of purpose is comparable to CR 1, CrR 1.2, and RAP 1.2. The Rules of Evidence, like other court rules, give the judge the authority to interpret the rules in a way which avoids an unjust result. See Petrarca v. Halligan, 83 Wn.2d 773, 522 P.2d 827 (1974).~~

~~"Following the rules is not an end in itself. Rather, the rules are carefully designed to enable judges, lawyers, litigants, and juries to achieve sound results.... Rule 102 recognizes the responsibility judges bear by enumerating goals which cannot be achieved mechanically, and which will compete with one another at times." 10 Moore's Federal Practice ¶ 102.02 (1976). See also United States v. Jackson, 405 F.Supp. 938 (1975).~~

~~This approach implies a considerable grant of discretion to the trial judge in situations not explicitly covered by the rules which may require differentiated treatment in the light of special factors. 1 J. Weinstein, Evidence ¶ 102[01] (1975). The rules place a burden on the lawyer to explain his position and the reasons for it at the trial level. It also places heavy burdens on the trial judge. J. Weinstein, supra.~~

~~"Judges should indicate which factors are significant and which goals paramount in a particular case and why, so that members of the Bar can adjust to changing nuances in the law in advising their clients and in conducting litigations. This process of accommodation to change will itself promote desirable change while preserving the sound fundamentals of the law of evidence." J. Weinstein, at 102-13.~~

RULE 103. RULINGS ON EVIDENCE

[Unchanged.]

~~Comment 103~~

~~Section (a). This section is the same as Federal Rule 103(a), except that the words "is made" are substituted for "appears of record" in subsection (a)(1). This change is necessary because the rules are applicable to courts, such as district courts, where testimony and argument are not recorded. Section (a) is consistent with prior Washington law. Harmless evidentiary errors are disregarded. Primm v. Wockner, 56 Wn.2d 215, 351 P.2d 933 (1960). A timely objection or motion to strike is ordinarily necessary to seek appellate review of the admission of evidence. State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963). In order to obtain appellate review of the exclusion of evidence, an offer of proof must be made which fairly advises the trial court whether the evidence is admissible. Northern State Constr. Co. v. Robbins, 76 Wn.2d 357, 457 P.2d 187 (1969). The procedure for objecting is defined by CR 46 and CrR 8.7.~~

~~Section (b). This section is the same as Federal Rule 103(b) except that the word "It" in the second sentence is changed to "The court" to improve readability. As a practical matter, the section is consistent with prior Washington law. The previous Washington rule, CR 43(c), provided that the court's statements about the character of the evidence had to be made in the absence of the jury. Although this mandatory provision is not found in rule 103, section (c) encourages the statements to be made in the absence of the jury, and this procedure would ordinarily be required in order to conform to the state constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16.~~

~~Section (c). This section is the same as Federal Rule 103(c) and differs slightly from prior Washington law. The previous rule, CR 43(c), distinguishes between offers of proof and statements by the court. Under that rule, the court could, in its discretion, direct that an offer of proof be made in the absence of the jury, but a statement by the court as to the character of the evidence had to be made in the absence of the jury. Under rule 103(c), inadmissible evidence is to be kept from the jury "to the extent practicable."~~

~~The court's discretion under rule 103(c) must be exercised cautiously in light of the state constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16.~~

~~Section (d). Federal Rule 103(d), Plain error, is deleted. The Washington Supreme Court recently codified the extent to which an error may be asserted for the first time in an appellate court. See RAP 2.5(a). Rule 103(d) defers to the Rules of Appellate Procedure and the decisions construing them.~~

~~To be distinguished is the extent to which counsel may acquiesce in a trial court ruling and then move for a new trial on the ground that the ruling was in error. That determination is made by reference not to the appellate rules but to the rules of civil and criminal procedure and decisional law. See, e.g., CR 46; CrR 8.7; Sherman v. Mobbs, 55 Wn.2d 202, 347 P.2d 189 (1959).~~

RULE 104. PRELIMINARY QUESTIONS

[Unchanged.]

~~Comment 104~~

~~Section (a). This section is the same as Federal Rule 104(a) and is consistent with prior Washington law. See RCW 4.44.080. The statute does not expressly say, as the rule does, that preliminary determinations are not subject to the rules of evidence, but this is the generally prevailing view. The civil and criminal rules for superior court, for example, authorize many preliminary determinations to be made on the basis of affidavits. See, e.g., CR 43(e) and CrR 2.3(e). The law with respect to privileged communications does apply to preliminary determinations. See also Rule 1101. Thus, a privilege may not be violated even in a preliminary hearing to determine whether the privilege exists.~~

~~The proceedings to which the rules of evidence do, and do not, apply are discussed in more detail in the comment to rule 1101.~~

~~Section (b). This section is the same as Federal Rule 104(b) and defines a procedure for handling the situation in which a party wishes to prove fact A, but fact A is relevant only if fact B is established. The order of proof under this rule, as generally, is determined by the judge. Rule 611. The court, in its discretion, may decide whether to hear evidence of fact A or B first, taking into account the relative prejudice of having the jury hear one rather than the other if the proponent fails to offer evidence of one of them sufficient to warrant a finding of its truth. Because of this danger of prejudice, the rule should be used with caution, especially in criminal cases.~~

~~The rule is substantially in accord with previous Washington law. See State v. Whetstone, 30 Wn.2d 301, 191 P.2d 818, cert. denied, 335 U.S. 858 (1948); 5 R. Meisenholder, Wash.Prac. § 1 (1965 & Supp.).~~

~~Section (c). This section is the same as Federal Rule 104(c). In a criminal case, a hearing on the admissibility of a confession is constitutionally required to be conducted in the absence of the jury. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). The rule further provides that the accused, as a witness, is entitled on request to have any preliminary hearing conducted in the absence of the jury. In other situations, and in civil cases, the judge has discretion to decide whether the interests of justice require preliminary matters to be considered in the absence of~~

~~the jury. Accord, Gilcher v. Seattle Elec. Co., 82 Wash. 414, 144 P. 530 (1914).~~

~~Section (d). This section is the same as Federal Rule 104(d) and is consistent with prior Washington law. It is designed to encourage participation by the accused in the determination of preliminary matters. Portions of the subject matter of rule 104 are covered in superior court by CrR 3.5(b), a more detailed rule. CrR 3.5 is not superseded by rule 104. The rules are not in conflict, and both apply in superior court. Neither rule prevents cross examination of the accused as to credibility at a preliminary hearing. See 1 J. Weinstein, Evidence ¶ 104[10] (1975).~~

~~Rule 104 does not address itself to questions of the subsequent use of testimony given by an accused at a preliminary hearing. See Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In superior court, CrR 3.5(b) restricts the use of preliminary testimony in some respects.~~

~~Section (e). This section is the same as Federal Rule 104(e) and is consistent with prior Washington law. See CrR 3.5, discussed above.~~

RULE 105. LIMITED ADMISSIBILITY

[Unchanged.]

~~Comment 105~~

~~This rule is the same as Federal Rule 105 and should be read together with rule 403, which provides that evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, or the like. These rules are consistent with prior Washington law. See State v. Stevenson, 16 Wn.App. 341, 555 P.2d 1004 (1976); State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950).~~

~~The rules neither imply that limiting instructions are sufficient in all situations nor restrict the court's authority to order a severance in a multidefendant case. The availability and effectiveness of these practices must be taken into consideration in deciding whether to exclude evidence under rule 403. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him.~~

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

[Unchanged.]

~~Comment 106~~

~~This rule is substantially the same as Federal Rule 106. In the Washington rule, commas were added between the words "part" and "or" and between "statement" and "which". The added punctuation insures that the phrase "which ought in fairness" is read as modifying all of the nouns ("part…writing… statement") which precede it. The word "him" has been changed to "the party".~~

~~Existing Washington rules, CR 32(a) and 33(b), provide that the rules of evidence apply with respect to the admission of depositions and interrogatories. The drafters of Federal Rule 106 considered a number of suggestions to include language in the rule indicating that the other rules of evidence apply. The language was not included in the final draft, not because the other rules did not apply, but because the drafters thought such a provision would be surplusage. 1 J. Weinstein, Evidence ¶ 106[01] (1975). Thus, the rules of evidence apply to the admission of any additional evidence under rule 106, and irrelevant portions of documents remain inadmissible under this rule.~~

TITLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

[Unchanged.]

~~Comment 201~~

~~The rule is the same as Federal Rule 201 (a) through (f). Federal Rule 201(g), Instructing Jury, is deleted.~~

~~Prior Washington law has not offered a comprehensive theory of judicial notice. 5 R. Meisenholder, Wash. Prac. § 591 (1965 & Supp.) (hereinafter Meisenholder). Rule 201 establishes a coherent theoretical basis for the taking of judicial notice of adjudicative facts.~~

~~Section (a). The rule applies only to judicial notice of "adjudicative facts" as distinguished from "legislative facts". An adjudicative fact is the "what-happened", "who-did-what-and-when" kind of question that normally goes to a jury. It seems reasonable to require, as the rule does, that a judicially noticed adjudicative fact must be one not subject to reasonable dispute. Legislative facts are those a court takes into account in determining the constitutionality or interpretation of a statute or the extension or restriction of a common law rule upon grounds of policy. They will often hinge on social, economic, or political facts not generally known by intelligent people or readily determinable by resort to sources of unquestioned accuracy. See 2 K. Davis, Administrative Law § 15.03 (1958). Section (a) excludes legislative facts from the operation of the rule.~~

~~The determination of foreign law is governed by CR 44.1 and RCW 5.24.~~

~~Section (b). This section requires that a judicially noticed fact must not be subject to reasonable dispute and that it must be either generally known in the area or readily found in noncontroversial references.~~

~~For purposes of judicial notice, no distinction between adjudicative and legislative facts has been recognized in prior Washington law. Washington opinions have stated that courts may take judicial notice of facts which are within the common knowledge of the community and facts which are capable of certain verification by reference to competent authoritative sources. Rogstad v. Rogstad, 74 Wn.2d 736, 446 P.2d 340 (1968). See Meisenholder §§ 592, 593. This is consistent with section (b) and adoption of the rule does little to change the kinds of adjudicative facts which may be judicially noticed in Washington. Judicial notice of legislative facts continues to be governed by previous Washington law.~~

~~Sections (c) and (d). Under section (c), the court has discretionary authority to take judicial notice, regardless of~~

~~whether it is requested by a party. The taking of judicial notice is mandatory under section (d) only when a party requests it and the necessary information is supplied. No procedure is specified to determine what types of information may be considered, and from what sources; nor is the process of evaluation defined. These matters are, however, often defined by statute.~~

~~A number of statutes require the taking of judicial notice in specific instances. See, for example, RCW 4.36.090 (private statutes); RCW 4.36.110 (any ordinance of a city or town in Washington); RCW 5.24.010 (constitution, common law, and statutes of every state, territory, and other jurisdiction of the United States); RCW 28B.19.070 (rules for higher education); RCW 34.04.050(8) (rules of state agencies); RCW 35.03.050 (certain city charters); RCW 35.06.070 (existence of incorporated cities); RCW 35.22.110 (charters of first class cities); RCW 35A.08.120 (certain city charters); RCW 49.48.040 (seal of the Department of Labor and Industries of the State of Washington); RCW 49.60.080 (seal of state human rights commission); RCW 50.12.010 (seal of the employment security commissioner); RCW 51.52.010 (seal of the board of industrial insurance appeals); and RCW 61.12.060 (economic conditions -- discretionary with court).~~

~~The statutes cited are not in conflict with rule 201 and are not superseded. To the extent that a statute applies to legislative facts, the rule does not apply at all. To the extent that a statute applies to adjudicative facts, the statute states a more specific requirement than the more general process of broad applicability defined in the rule.~~

~~As a general rule, a court may take judicial notice of court records in the same case, but not records of a different case. This rule and certain exceptions are discussed in Meisenholder § 594.~~

~~Section (e). Basic considerations of procedural fairness require an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule provides this opportunity on request. If a party has received no prior notification that judicial notice will be taken, a request to be heard may be made after judicial notice has been taken. No formal procedure for giving notice is defined.~~

~~There has been no prior Washington authority for the proposition stated in section (e), but an opportunity to be heard may often have been accorded as a matter of practice. Meisenholder § 597.~~

~~Section (f). Section (f) appears to be consistent with prior Washington law. There are no decisions authorizing any particular practices or procedures for raising questions of whether particular facts should be judicially noticed. However, it seems beyond dispute that judicial notice may, under appropriate circumstances, be taken by appellate courts. See Meisenholder § 596.~~

~~Federal Rule 201(g), Instructing jury, is deleted. That rule provides:~~

~~(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.~~

~~Article IV, Section 16 of the Washington Constitution prohibits the court from charging the jury with respect to disputed matters of fact. See Hansen v. Wightman, 14 Wn.App. 78, 538 P.2d 1238 (1975) for a recent discussion of this provision. The drafters of the Washington rules felt that a literal application of the Federal Rule may be unconstitutional in some circumstances. The State of Nevada, in promulgating rules of evidence based on the federal rules, felt bound by a similar provision in its constitution to omit Federal Rule 201(g).~~

~~The drafters of the Washington rules felt that the court must be given more discretion, both with respect to whether to receive evidence contrary to a judicially noticed fact, and with respect to the manner of instructing the jury. Recognizing the difficulty of codifying a procedure which would be constitutional in every case, the drafters felt that the constitutional requirement would be better served by deleting the rule and permitting the courts to fashion a constitutional procedure on a case-by-case basis.~~

TITLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS [RESERVED]

[Unchanged.]

~~Comment 301~~

~~An earlier draft proposed by the task force and tentatively approved by the Judicial Council included rule 301, titled Presumptions in General in Civil Actions and Proceedings. The proposed rule was the same as Federal Rule 301 and read as follows:~~

~~In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.~~

~~On reconsideration, the Judicial Council decided to delete the proposed rule from its draft. This decision was based primarily on the fact that the federal courts have not yet developed a uniform practice under the rule, and that we would, in effect, be adopting a rule without knowing its intended application in practice. The Council was particularly concerned about the rule's effect upon "enhanced" presumptions which can be overcome only by clear, cogent, and convincing evidence. The commentators do not agree upon the intended effect of the federal rule in this regard. Some Judicial Council members also expressed the belief that presumptions were beyond the Supreme Court's rulemaking authority.~~

~~The Judicial Council recommends that this rule be reserved, and that it be the subject of further study.~~

RULE 302. APPLICABILITY OF STATE LAW IN CIVIL ACTIONS AND PROCEEDINGS [RESERVED]

[Unchanged.]

~~Comment 302~~

~~The drafters of the Washington rules deleted Federal Rule 302, Applicability of State Law in Civil Actions and~~

~~Proceedings. That rule would not apply to proceedings in a state court. The converse of Federal Rule 302 -- the extent to which federal law applies in state court -- is determined by reference to the law of preemption and would not appropriately be defined by a state court rule.~~

TITLE IV. RELEVANCY AND ITS LIMITS
RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

[Unchanged.]

~~Comment 401~~

~~Rule 401 is the same as Federal Rule 401. Although the terminology in some decisions differs from that of the rule, the Washington view of relevancy remains substantially unaltered by rule 401. See 5 R. Meisenholder, Wash. Prac. § 1 (1965 & Supp.).~~

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

[Unchanged.]

~~Comment 402~~

~~The rule is substantially the same as Federal Rule 402 and is consistent with previous Washington law. See 5 R. Meisenholder, Wash. Prac. § 1 (1965). Federal Rule 402 defers to the United States Constitution and Acts of Congress. Washington rule 402 defers generally to statutes, regulations, and rules which make relevant evidence inadmissible.~~

~~The rule's deference to other codified law making relevant evidence inadmissible applies generally throughout the rules in Title IV. For example, in rape cases, RCW 9A.44.020 defines detailed restrictions upon disclosure of the victim's past sexual behavior. The statute prevails over conflicting provisions in rule 404.~~

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

[Unchanged.]

~~Comment 403~~

~~This rule is the same as Federal Rule 403 and is consistent with previous Washington law. See State v. Stevenson, 16 Wn.App. 341, 555 P.2d 1004 (1976).~~

~~It is recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. The rule lists six safeguards by which the trial judge may, in the exercise of discretion, exclude evidence even though it is relevant.~~

~~The rule does not specify surprise as a ground of exclusion, following Wigmore's view of the common law. 6 Wigmore § 1849. The advisory committee note to Federal Rule 403 observes that claims of unfair surprise may still be justified in some cases despite procedural requirements of notice and the availability of discovery, but that the granting of a continuance is a more appropriate remedy than exclusion of the evidence.~~

~~In deciding whether to exclude evidence on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. The availability of other means of proof may also be an appropriate factor. These procedural factors may favor admission or exclusion, depending on the circumstances.~~

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

[Unchanged.]

~~Comment 404~~

~~This rule is the same as Federal Rule 404 and conforms substantially to previous Washington law.~~

~~Section (a). Section (a) deals with the question whether character evidence should be admitted to prove that a person acted in conformity therewith on a particular occasion. This use of character evidence is often called "circumstantial". The basic premise is that circumstantial character evidence is inadmissible unless it falls within one of the three exceptions. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405 in order to determine the appropriate method of proof. If the character is that of a witness, Rules 608 and 609 provide methods of proof.~~

~~To be distinguished are cases in which a person's character is "in issue". The admissibility of character evidence as proof of a material element is governed by rule 405, not rule 404.~~

~~Rule 404 does not permit the admission of circumstantial character evidence in civil cases. Under rules 404 and 405, evidence of character is admissible in a civil case only if the person's character is actually in issue. Previous Washington law is in accord. 5 R. Meisenholder, Wash. Prac. §§ 2, 3 (1965 & Supp.) (hereinafter Meisenholder).~~

~~Under rule 404 (a)(1), the accused in a criminal case may introduce evidence of his good character. Accord, State v. Arine, 182 Wash. 697, 48 P.2d 249 (1935). The evidence must be directed toward a trait of character which is pertinent to rebut the nature of the charge against the defendant. State v. Schuman, 89 Wash. 9, 153 P. 1084 (1915). A character witness for the accused is limited by rule 405(a) to testimony as to the reputation of the accused. Neither rules 404 and 405 nor previous Washington law permit the accused to demonstrate his good character by having a witness testify as to specific instances of good conduct by the accused. 2 J. Weinstein, Evidence ¶ 405[04], at 405-39 (1976); Meisenholder § 4, at 21 n. 7.~~

~~If the accused introduces evidence of good character under rule 404 (a)(1), the prosecution may rebut the evidence either by testimony from the prosecutor's own witnesses or by cross-examining the accused's witnesses. 2 J. Weinstein, Evidence ¶ 404[04], at 404-25 (1976). Rebuttal testimony by the prosecution's witnesses is limited under rule 405(a) to the reputation of the accused, but the prosecutor may inquire into specific instances of conduct on cross examination of the witnesses for the accused. 2 J. Weinstein, Evidence, at 405-20. Prior Washington law is in accord. Meisenholder § 4, at 22 n. 15, 23 n. 20.~~

~~Rule 404 (a)(2) admits evidence of the character of the victim in a criminal case under certain circumstances. Previous Washington law is substantially in accord with the rule.~~

~~Where there is an issue of self-defense, the accused may show the victim was the first aggressor by character evidence of the victim's reputation for violent disposition or for using deadly weapons in quarrels or fights. Meisenholder § 4, at 24. Evidence of specific acts or conduct is inadmissible to show the character of the victim, but it may be admissible for the limited purpose of showing whether the accused had a reasonable apprehension of danger from the victim. State v. Walker, 13 Wn.App. 545, 536 P.2d 657 (1975). In rebuttal, the prosecution may show the victim's good character for the pertinent trait, but only after the defendant has attacked that good reputation. Meisenholder § 4, at 25.~~

~~In rape cases, RCW 9A.44.020 defines detailed restrictions upon disclosure of the victim's past sexual behavior. By the terms of rule 402, the statute prevails over conflicting provisions in rule 404. See the comment to rule 402.~~

~~Section (b). Evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting that conduct on a particular occasion was in conformity with it. The evidence may, however, be offered for another purpose such as proof of motive or opportunity. The court must determine whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors. Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956). Previous Washington law is in accord. See State v. Whalon, 1 Wn.App. 785, 464 P.2d 730 (1970).~~

~~The fact that section (b) uses the discretionary word "may" does not confer arbitrary discretion on the trial judge. Whether evidence is admissible under this section is determined by reference to the considerations set forth in rule 403. Federal Rule 404, Report of the House Committee on the Judiciary. Although the words "crimes, wrongs, or acts" are deliberately imprecise, a number of recent decisions indicate that evidence of this sort should be admitted with extreme caution to avoid prejudice against the defendant, particularly when admitting acts which are not unlawful but which may tend to disparage the defendant. In State v. Draper, 10 Wn.App. 802, 521 P.2d 53 (1974), the court held that in a prosecution for delivery of a controlled substance, it was prejudicial error to admit evidence of a perhaps unusual amount of prescription drugs, lawfully in the defendant's possession. The error may be prejudicial even though the judge has instructed the jury to disregard the evidence of other conduct. State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). These and other decisions are collected and discussed in Meisenholder § 4 (Supp.1975).~~

RULE 405. METHODS OF PROVING CHARACTER

[Unchanged.]

~~Comment 405~~

~~For a discussion of the relationship between this rule and rule 404, see the comment to rule 404.~~

~~Section (a). This section differs from Federal Rule 405 in that the Washington rule does not permit proof of character by testimony in the form of an opinion. Previous Washington law has not permitted the introduction of opinion testimony to prove a person's character. Thompson-Cadillac Co. v. Matthews, 173 Wash. 353, 23 P.2d 399 (1933); Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 P. 1019 (1914); 5 R. Meisenholder, Wash. Prac. § 4 (1965 & Supp.). The drafters of the Washington rule felt that the policy established by decisional law was preferable to that of the federal rule.~~

~~On a practical level, the drafters were convinced that weaknesses in such opinion testimony cannot be exposed except with difficulty by cross-examination of the witness, and that challenges to the witness' answers on cross-examination by extrinsic evidence may not be completely realistic and that it may in effect disguise the opinion of the witness who testifies to reputation. However, again on a practical level, it seems preferable to opinion testimony, because it can much more easily and clearly be tested by cross examination of the witness.~~

~~References to opinion testimony were similarly deleted from rule 608.~~

~~Section (b). This section is the same as Federal Rule 405(b) and appears to be consistent with existing Washington law. See Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 P. 1019 (1914); Meisenholder §§ 2, 4.~~

~~In rape cases RCW 9A.44.020 defines in detail the extent to which the victim's past behavior is admissible and the procedure for seeking its admission. By the terms of rule 402, the statute prevails over inconsistent provisions in rule 405.~~

RULE 406. HABIT; ROUTINE PRACTICE

[Unchanged.]

~~Comment 406~~

~~This rule is the same as Federal Rule 406. The rule recognizes the relevancy of a person's habit or the routine practice of an organization in proving that conduct on a particular occasion was in conformity with the habit or routine practice. Rule 404 states the general rule that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Why should habit be treated differently under rule 406? The rationale is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. It is the notion of the invariable regularity that gives habit evidence its probative force.~~

~~It is not clear to what extent the rule changes previous Washington law. There are cases contrary to the rule, particularly where the evidence bears on the issue of negligence. Rossier v. Payne, 125 Wash. 155, 215 P. 366 (1923); State v. Lewis, 37 Wn.2d 540, 225 P.2d 428 (1950). In a recent case arising out of an automobile accident, the defendant sought to introduce testimony to the effect that the plaintiff was always a fast driver and always drove recklessly. The Court of Appeals affirmed the trial judge's refusal to admit the testimony, saying that it was irrelevant to the issue of whether the recklessness or speed of the plaintiff was the cause of the particular accident in issue. Breimon v. General Motors Corp., 8 Wn.App. 747, 509 P.2d 398 (1973).~~

~~Rule 406, however, appears to clarify Washington law rather than to significantly change it. Despite the cases cited above, evidence of habit has been held properly admitted in a number of cases collected in 5 R. Meisenholder, Wash. Prac. § 6 (1965 & Supp.). Evidence offered under this rule could,~~

of course, still be excluded if the court determined that the conduct sought to be shown did not reach the level of habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

[Unchanged.]

Comment 407

This rule is the same as Federal Rule 407 and is consistent with previous Washington law.

The rule of exclusion has been applied to evidence introduced on the question of liability. Cochran v. Harrison Mem. Hosp., 42 Wn.2d 264, 254 P.2d 752 (1953). Washington courts have justified the principle on the ground that such evidence is irrelevant, Aldread v. Northern Pac. Ry., 93 Wash. 209, 160 P. 429 (1916), and that it is contrary to the policy of encouraging safety measures to admit such evidence. Carter v. Seattle, 21 Wash. 585, 59 P. 500 (1899).

The rule bars evidence to prove "negligence or culpable conduct." It has been held that a virtually identical California statute is inapplicable to a products liability case in which the manufacturer is alleged to be strictly liable for placing a defective product on the market. Ault v. Int'l Harvester Co., 13 Cal.3d 113, 117 Cal.Rptr. 812, 528 P.2d 1148 (1975). But see Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) to the contrary.

The Washington cases are consistent with the rule in admitting evidence of subsequent remedial measures for purposes other than proving liability. The rule cites as examples proving ownership, control, or feasibility of precautionary measures, or impeachment. In Washington, see Hatcher v. Globe Union Mfg. Co., 170 Wash. 494, 16 P.2d 824 (1932), Brown v. Quick Mix Co., 75 Wn.2d 833, 454 P.2d 205 (1969) on feasibility of precautionary measures; Peterson v. King County, 41 Wn.2d 907, 252 P.2d 797 (1953) on nature of conditions existing at time of incident; Cochran v. Harrison Mem. Hosp., supra, dictum on issue of control of an instrumentality.

Under rule 407, the permissible "other purpose" must be controverted in order to avoid the introduction of evidence under false pretenses. The evidence must be relevant as proof upon the actual issues in the case. See 5 R. Meisenholder, Wash. Prac. § 10 (1965).

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

[Unchanged.]

Comment 408

This rule is the same as Federal Rule 408 and changes Washington case law only with respect to the admissibility of statements made in compromise negotiations.

The first sentence codifies the common law rule that evidence of an offer to compromise a claim is inadmissible to prove liability or lack thereof. It is consistent with previous Washington law. See Eagle Ins. Co. v. Albright, 3 Wn.App. 256, 474 P.2d 920 (1970). The foundation of the rule in Washington, as in the federal rules, is the policy favoring compromise and settlement of disputes. Berliner v. Greenberg, 37 Wn.2d 308, 223 P.2d 598 (1950).

The second sentence of the rule changed federal law by making evidence of conduct or statements made in compromise negotiations inadmissible. Cf. Factor v. Commissioner, 281 F.2d 100 (9th Cir. 1960). Similarly in Washington, the conduct or statements have been allowed in evidence as admissions of a party opponent, Romano Eng'g Corp. v. State, 8 Wn.2d 670, 113 P.2d 549 (1941), unless the statement of fact is expressly made without prejudice. Wagner v. Peshastin Lumber Co., 149 Wash. 328, 270 P. 1032 (1928).

By contrast, rule 408 makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event such efforts fail. The rule avoids the generation of controversy over whether a statement was within or without the area of compromise negotiations.

The rule also provides that the exclusionary rule applies only to claims disputed as to validity or amount. There has been no previous authority on this issue in Washington. 5 R. Meisenholder, Wash. Prac. § 9 (1965 & Supp.).

The third sentence, relating to evidence otherwise discoverable, was added by Congress to the Supreme Court draft of the federal rules. The sentence clarifies the dual objective of rule 408 to encourage compromise and to prevent immunization of evidence merely because it is presented in the course of compromise negotiations. 10 Moore's Federal Practice § 408.06 (1976). A party may not use rule 408 as a screen for curtailing the opposing party's rights to discovery. 2 J. Weinstein, Evidence ¶ 408[01] (1976). The Senate Report on rule 408 suggests, for example, that documents disclosed in compromise negotiations are not thereby insulated from discovery. The Conference Report makes it clear that this provision applies to factual evidence as well.

The fourth sentence is consistent with previous Washington law admitting evidence of compromise and offers of compromise when offered for some purpose other than liability. Meisenholder § 9. See Matteson v. Ziebarth, 40 Wn.2d 286, 242 P.2d 1025 (1952) (to prove lack of good faith where good faith in issue); Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910) (to prove employer-employee relationship). Settlement agreements may be introduced where breach is the issue, or to show bias or interest of witnesses. Meisenholder § 9. The word "negating" is substituted for "negativing," the word used in the federal rule. This is only an improvement in style. No substantive change is intended.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

[Unchanged.]

Comment 409

This rule is the same as Federal Rule 409 and is consistent with previous Washington law. See Libbee v. Handy, 163 Wash. 410, 1 P.2d 312 (1931). RCW 5.64.010 is consistent with the rule and is not superseded.

RULE 410. INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS

[Unchanged.]

~~**Comment 410**~~

~~This rule is substantially the same as Federal Rule 410 and changes previous Washington law in some respects. Prior to rule 410, offers to compromise criminal actions have not been privileged against disclosure. State v. Bixby, 27 Wn.2d 144, 177 P.2d 689 (1947). Rule 410 makes withdrawn guilty pleas, pleas of nolo contendere, and statements made in connection with offers to compromise criminal actions inadmissible even for impeachment, in any proceeding against the person making the plea or statement. 8 Moore's Federal Practice § 11.08[2]. The only exception is that a statement may be used in a criminal proceeding for perjury or false statement, and then only if the statement was made by the defendant under oath and in the presence of counsel. A third requirement in the federal rule, that the statement be made on the record, is not included in the Washington rule. This omission is necessary because the rules apply in courts, such as district court, where no formal record of the proceedings is kept.~~

~~"Perjury" and "false statement" are used generically in the rule to refer to crimes of that nature, regardless of their designations in the criminal code or other applicable statutes.~~

~~To admit a withdrawn guilty plea into evidence would frustrate the purpose of allowing the withdrawal and would place the accused in a dilemma inconsistent with the decision to award him a trial. Withdrawn pleas of guilty have long been inadmissible in federal prosecutions. Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). Rule 410 conforms to this practice. The provisions making offers to compromise inadmissible are designed to encourage the disposition of criminal cases by compromise.~~

~~The rule similarly makes pleas of nolo contendere inadmissible. This plea is not recognized in Washington, and rule 410 does not create the right to a plea of nolo contendere. See CrR 4.2(a). The rule would apply only to a plea in a jurisdiction which permits the plea, entered by a person later involved in proceedings in a Washington court.~~

~~The rule protects from disclosure only statements "made in connection with, and relevant to" the plea or offer. The rule should not be interpreted as barring admission of statements made to police officers during the early stages of investigation, before an indictment or information is filed. 2 J. Weinstein, Evidence ¶ 410[07] (1975). Nor are statements made as a result of a plea bargain necessarily inadmissible. In Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the defendant had entered into a plea bargain. Two weeks later he confessed to the crime charged. He subsequently withdrew from the bargain and demanded a trial. The Court held the confession admissible, so long as it was voluntary and the defendant knew he could have enforced the bargain whether he confessed or not.~~

~~Similarly, the rule probably does not bar the admission of evidence derived as a result of a statement which is inadmissible under rule 410. Suppose that the defendant accepts the prosecutor's offer to accept a guilty plea to a lesser offense if the defendant discloses the location of stolen property. The property is retrieved. The defendant later withdraws the plea and demands a trial. Although no cases directly in point have been found, rule 410 would not appear to bar the use of the property at trial as evidence of the defendant's guilt.~~

~~A final sentence was added to the federal rule to provide that the rule does not govern the admission or exclusion of evidence of a deferred sentence. That determination is made by reference to the statutes cited in the rule, the decisions construing them, and in some instances, constitutional principles. See also 5 R. Meisenholder, Wash. Prac., Evidence §§ 9, 300, 421, 423.~~

RULE 411. LIABILITY INSURANCE

[Unchanged.]

~~**Comment 411**~~

~~This rule is the same as Federal Rule 411 and is consistent with previous Washington law.~~

~~The rule is broadly drafted to include contributory and comparative negligence or other fault of the plaintiff as well as fault of a defendant. Like rules 407 and 408, rule 411 allows the evidence if offered for a purpose other than determining fault, such as proof of agency, ownership, or control, or bias or prejudice of a witness.~~

~~"It is undoubtedly the general rule in this state, in personal injury cases, that the fact that the defendant carries liability insurance is entirely immaterial on the main issue of liability…" Williams v. Hofer, 30 Wn.2d 253, 265, 191 P.2d 306 (1948).~~

~~Existing Washington law is consistent with the rule in admitting evidence of liability insurance for purposes other than a determination of liability. See Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910) on issue of agency; Jerdal v. Sinclair, 54 Wn.2d 565, 342 P.2d 585 (1959) on issue of ownership of automobile; Moy Quon v. Furuya Co., 81 Wash. 526, 143 P. 99 (1914) on issue of bias or prejudice of witness.~~

~~With respect to the plaintiff's insurance coverage, it seems probable that the fact that plaintiff is so covered is inadmissible. 5 R. Meisenholder, Wash. Prac. § 8 (1965 & Supp.), citing Rich v. Campbell, 164 Wash. 393, 2 P.2d 886 (1931). This is in accord with the rule, as is the prohibition against defendant's introduction of evidence that he does not have liability insurance. King v. Starr, 43 Wn.2d 115, 260 P.2d 351 (1953).~~

~~The rule does not affect the view that if the mention of insurance is inadvertent and it appears that neither the attorney nor the witness deliberately raised the subject, a mistrial will not be granted. See, e.g., Williams v. Hofer, 30 Wn.2d 253, 191 P.2d 306 (1948). The reference to insurance may, on motion, be stricken and the jury instructed to disregard it. Meisenholder § 8.~~

RULE 412. SEXUAL OFFENSES—VICTIM'S PAST BEHAVIOR

[Unchanged.]

~~**Comment 412**~~

~~[1988 Amendment]~~

~~In Washington, the admissibility of evidence of a sexual offense victim's past sexual behavior is covered by statute. RCW 9A.44.020, similar in approach to Federal Rule 412,~~

provides that in any prosecution for rape, or for an attempt or assault with intent to commit such crime, evidence of the victim's past sexual behavior is inadmissible on the issue of credibility and may only be admitted on the issue of consent pursuant to the procedures prescribed in the statute.

Inclusion of a reserved ER 412 was intended to remind users of the rules to refer to the statute for guidance. It also recognized the Washington Supreme Court's continuing rule-making authority in this area (as the statute covers a subject within the court's purview) and thus preserved the court's flexibility should it decide at some future time to adopt a rule relating to a victim's past sexual conduct.

TITLE V. PRIVILEGES
RULE 501. GENERAL RULE

[Unchanged.]

Comment 501

[1988 Amendment]

This rule was initially left reserved. The 1988 amendment added references to statutory privileges for the guidance and convenience of both judges and practitioners.

Only the name of the privilege was given, with the text reserved and a statutory reference provided. The qualified journalist's privilege, though found in case law and based on common law rather than the constitution, was included as well. The amendment allowed ready reference to the more common privileges by the bench and bar without eliminating a less often used privilege by accidental omission from the list.

TITLE VI. WITNESSES
RULE 601. GENERAL RULE OF COMPETENCY

[Unchanged]

Comment 601

This rule differs significantly from Federal Rule 601. The federal rule eliminates all grounds of incompetency not specifically recognized in the succeeding rules in Title VI. Included among the grounds abolished are religious belief, conviction of a crime, and interest in the litigation. No mental or moral qualifications are specified. The drafters of the Washington rules felt that the subjects covered in Title VI are, in many cases, adequately covered by existing statutes and rules which have become familiar to the members of the bench and bar. Accordingly, rule 601 defers to other statutes and rules defining grounds for incompetence. The grounds for incompetence defined in Title VI supplement those found in existing statutes and rules.

Civil Cases. Washington statutory law is more restrictive than the federal rules. The basic statutory provision on competence is RCW 5.60.020: "Every person of sound mind, suitable age and discretion, except as hereinafter provided, may be a witness in any action, or proceeding." This statute is supplemented by RCW 5.60.050 which specifies those who are incompetent to testify: "[t]hose who are of unsound mind, or intoxicated at the time of their production for examination, and… [c]hildren under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

"The statutory provisions requiring that a witness be of sound mind have been interpreted as being a codification of the common law rule as to mental capacity. A person will be held competent to testify if he understands the nature of an oath and is capable of giving a correct account of what he has seen and heard. State v. Moorison, 43 Wn.2d 23, 259 P.2d 1105 (1953).

The trial judge has wide discretion in determining the competency of a child as a witness. There is a presumption that a child over ten years of age is competent to testify. For children under ten years of age the test is fairly explicit. "Where it appears that a child has sufficient intelligence to receive just impressions of the facts respecting which he is to testify, has sufficient capacity to relate them correctly and has received sufficient instruction to appreciate the nature and obligations of an oath, he should be permitted to testify no matter what his age." (Footnotes omitted.) Stafford, The Child as a Witness, 37 Wash.L.Rev. 303, 304-05 (1962). It is often appropriate to determine the competency of a child in the absence of the jury. This procedure is authorized by rule 104(c).

The competency of a person who has been convicted of a crime is the subject of several codified rules. The original Washington statute, RCW 5.60.040, provides that, "any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon." A later statute, RCW 10.52.030, provides that, "[e]very person convicted of a crime shall be a competent witness in any civil or criminal proceeding". This later statute contained no exception for those convicted of perjury. Mullin v. Builders Dev. & Fin. Serv., Inc., 62 Wn.2d 202, 381 P.2d 970 (1963) held that RCW 10.52.030 applied only to criminal cases, while RCW 5.60.040 applied only to civil cases. Thus, the Washington law appears to be that prior conviction of a crime does not make a witness incompetent to testify except, in a civil case, for a prior conviction of perjury.

Interest was abolished as a ground for disqualification by RCW 5.60.030, but that statute does contain an exception to that rule in the form of a dead man's statute.

As to religious beliefs, see the comment to rule 610.

Criminal Cases in Superior Court. Competency of witnesses in superior court criminal cases is governed by CrR 6.12. The language of the rule is quite broad. By its terms, interest is abolished as a basis for incompetency. As to age, the rule eliminates the ten-year-old standard and applies the test of competency to children generally.

By implication, the rule abolishes other bases of incompetency. Among those are conviction of crime and religious belief. The rule parallels the law in civil cases by retaining unsound mind and intoxication as grounds for a finding of incompetency.

The Supreme Court has not determined by written opinion whether the statutory grounds for incompetency apply in criminal cases after the adoption of CrR 6.12, and the issue appears to be debatable. See 5 R. Meisenholder, Wash. Prac. §§ 164, 165 (1975 Supp.). The drafters of the rules of evidence recommended that the law be clarified by incorporating the rules of evidence by reference into CrR 6.12(a). Because the rules of evidence incorporate the statutory

~~grounds for incompetency, the statutes would also become clearly applicable to criminal cases.~~

~~[1991 Supplement to Comment]~~

~~The second paragraph of the original comment referred to RCW 5.60.050 as specifying among those who are incompetent to testify "[c]hildren under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." A 1986 amendment to RCW 5.60.050(2) eliminated the age limitation. The statute now reads "[t]hose who appear incapable of receiving just impressions…".~~

RULE 602. LACK OF PERSONAL KNOWLEDGE

[Unchanged.]

~~Comment 602~~

~~This rule is the same as Federal Rule 602 and is consistent with previous Washington law. The required personal knowledge need not be absolute. Testimony has been held competent although qualified by the following expressions: "according to his best impression", "to the best of his judgment and belief", "to the best of your knowledge", that the witness "thought" thus and so, to "your best recollection", in the "best judgment" of the witness, and "it is my belief". These qualifications were expressed in the question or the answer and were apparently interpreted as qualifications upon memory, observation, perception, or the reliance of the witness upon his memory or observation. 5 R. Meisenholder, Wash. Prac. § 331 (1965 & Supp.).~~

RULE 603. OATH OR AFFIRMATION

[Unchanged.]

~~Comment 603~~

~~This rule is the same as Federal Rule 603 and is substantially in accord with previous Washington law. The statutes relating to oaths, RCW 5.28.010 through 5.28.060, provide that different forms of the oath may be used as required by the special circumstances of the witness. The statutes are consistent with the rule and are not superseded. The use of an affirmation may be substituted for an oath if the witness so desires. While the form of the oath or affirmation may be varied, it has been held that some form of swearing in the witnesses is required. In re Ross, 45 Wn.2d 654, 277 P.2d 335 (1954).~~

RULE 604. INTERPRETERS

[Unchanged.]

~~Comment 604~~

~~This rule is the same as Federal Rule 604. Statutory law provides for interpreters for persons of impaired speech or hearing involved in legal proceedings. RCW 2.42.010-.050. It speaks of a "qualified interpreter" as "one who is able readily to translate spoken English to and for impaired persons and to translate statements of impaired persons into spoken and written English". RCW 2.42.020(2). The interpreter is required to take an oath that he will make a true interpretation to the person being examined of all the proceedings in a language which that person understands, and that he will repeat the statements of such person to the court or other agency conducting the proceedings, in the English language, to the best of his skill and judgment. RCW 2.42.050. Although the statute is more detailed than the rule, it in no way conflicts with the rule and is not superseded.~~

~~[1991 Supplement to Comment]~~

~~Legislation adopted in 1989 modified existing statutes governing the appointment of interpreters. Further amendments adopted in 1990 recodified portions of RCW 2.42 into a new chapter 2.43. Practitioners should also be aware of General Rule 11.1, adopted in 1989, which sets forth a code of conduct for interpreters.~~

RULE 605. COMPETENCY OF JUDGE AS WITNESS

[Unchanged.]

~~Comment 605~~

~~This rule is the same as Federal Rule 605 and is consistent with previous Washington law. Maitland v. Zanga, 14 Wash. 92, 44 P. 117 (1896). The rule is absolute; there are no limitations or qualifications.~~

~~The rule provides for automatic objection. This saves counsel from the predicament of choosing between remaining silent and thereby waiving objection, or objecting, which is apt to be considered an offensive attack on the judge's integrity.~~

~~The rule does not prevent the judge from testifying in collateral proceedings as to what occurred in an earlier trial. A judge is barred from testifying only at a trial over which he is presiding.~~

RULE 606. COMPETENCY OF JUROR AS WITNESS

[Unchanged.]

~~Comment 606~~

~~This rule is the same as section (a) of Federal Rule 606. Section (b), Inquiry into validity of verdict or indictment, is omitted.~~

~~This rule is contrary to RCW 5.60.010, which provides that a juror who is otherwise competent may testify at trial. Although rule 601 defers generally to statutes, it only defers to statutes which make a person incompetent to testify. It leaves open the possibility for subsequent court rules establishing other grounds for incompetency. Thus, rule 606 prevails over, and supersedes, RCW 5.60.010.~~

~~Section (b) of Federal Rule 606 concerns the extent to which testimony, affidavits, or statements of jurors may be received for the purpose of invalidating or supporting a verdict or indictment. Previous Washington law has defined the extent to which jurors' testimony and affidavits are admissible in terms of their being inadmissible if the evidence "inheres in the verdict." For a more complete discussion of this doctrine, see 2 L. Orland, Wash. Prac. § 294 (3d ed. 1972). Federal Rule 606(b) is omitted in deference to existing Washington law.~~

RULE 607. WHO MAY IMPEACH

[Unchanged.]

~~Comment 607~~

~~This rule is the same as Federal Rule 607 and reverses the traditional common law rule against impeaching one's own witness. The common law rule has been the subject of much criticism in that it is based on false premises. A party does not vouch for the credibility of witnesses because a party rarely has free choice in selecting them. Denial of the right to impeach would leave the party at the mercy of the witness as well as of the adversary. See Federal Rule 607 advisory committee note.~~

~~There is precedent for permitting impeachment of one's own witness. Rule 32 (a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of a deposition, and rule 43(b) has allowed the calling and impeachment of an adverse party or of a person identified with an adverse party. Similar provisions are found in the corresponding civil rules in Washington.~~

~~Prior Washington law has allowed a party to impeach the party's own witness but only if the party was "taken by surprise by reason of affirmative testimony prejudicial to the interests of the party calling the witness". State v. Thomas, 1 Wn.2d 298, 303, 95 P.2d 1036 (1939). The two-part test required both the showing of surprise and testimony prejudicial to the party's interests. The requirement of prejudice was not met when the witness merely failed to testify as favorably as expected. Cole v. McGhie, 59 Wn.2d 436, 361 P.2d 938, 367 P.2d 844 (1961). Cf. State v. Calhoun, 13 Wn.App. 644, 536 P.2d 668 (1975).~~

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

[Unchanged.]

~~Comment 608~~

~~Section (a). This rule differs from Federal Rule 608 in that it does not authorize the introduction of evidence of character in the form of an opinion. The rule thus parallels the approach taken in rule 405. The rule restricts the use of character evidence for impeachment to evidence of the witness' reputation for truthfulness, in accordance with existing Washington law. See State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963). The proper procedure for introducing evidence of character is described in 5 R. Meisenholder, Wash. Prac. § 301 (1965 & Supp.). The drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction.~~

~~By statute, a rape victim's reputation concerning sexual matters is inadmissible in proceedings against the accused. RCW 9A.44.020. The statute is consistent with the rule and is not superseded.~~

~~Section (b). This section is the same as Federal Rule 608(b) and gives the court discretion to allow inquiry on cross examination into specific instances of conduct bearing upon the credibility of the witness. The effect of rule 608(b) upon existing Washington law is not entirely clear. Although there is not total consistency in the Washington case law, the general rule appears to be that acts of misconduct not the subject of a prior conviction have not been admissible for impeachment purposes. "[A] witness may not be impeached by showing specific acts of misconduct. This is true whether the impeachment is attempted by means of extrinsic evidence or cross-examination." (Citations omitted.) State v. Emmanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). There are some cases written in terms of a discretionary power in the judge to admit evidence of acts of misconduct, but these appear to be early cases and probably do not represent the current rule. Meisenholder § 301. Prior to the adoption of RCW 9.79.150, in prosecutions involving sexual matters, the judge had the discretionary power to permit the prosecuting witness to be questioned about acts of unchastity. State v. Linton, 36 Wn.2d 67, 216 P.2d 761 (1950). The statute removes the judge's discretion by making sexual conduct inadmissible on the issue of credibility. The drafters of the Washington rules felt that the rule, restricted as it is to matters probative of truthfulness or untruthfulness, clarified the law and reflected a sound policy.~~

~~A third, unlettered section appears in Federal Rule 608. That section provides:~~

~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.~~

~~This section was omitted from the Washington rule, not because of any fundamental disagreement with the policy expressed, but because the drafters felt that the subject was more appropriately left to developing principles of constitutional law.~~

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

[Unchanged.]

~~Comment 609~~

~~This rule is substantially the same as Federal Rule 609 and is more restrictive than previous Washington law.~~

~~Two Washington statutes provide that the credibility of a witness may be attacked by evidence that the witness had been previously convicted of a crime. RCW 5.60.040; 10.52.030. The statutes, and some limitations developed by decisional law, are discussed in 5 R. Meisenholder, Wash. Prac. § 300 (1965 & Supp.). The Washington Supreme Court has recently expressed some concern about the constitutionality of the statutes, but it has not invalidated them. State v. Murray, 86 Wn.2d 165, 543 P.2d 332 (1975) (Rosellini, J., concurring); State v. Hultenschmidt, 87 Wn.2d 212, 550 P.2d 1155 (1976). Justice Rosellini, concurring in State v. Murray, above, observed that, "These statutes, relating as they do to the judicial process, may be superseded by rule of court." 86 Wn.2d at 170. Rule 609 offers a balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of the accused who chooses to testify. The two statutes in point are superseded.~~

~~Section (a). This section narrows the scope of convictions which may be used to impeach the accused in a criminal case. RCW 10.52.030, which is superseded by the rule, did~~

~~not contain the restrictions expressed in section (a). This portion of the rule will not cause a different result in most civil cases because misdemeanor convictions were not ordinarily admissible for impeachment in civil cases under prior law, and they remain excluded by the 1-year limitation defined by the rule. See Willey v. Hilltop Assocs., 13 Wn.App. 336, 535 P.2d 850 (1975); RCW 9A.04.040.~~

~~Section (b). This section narrows the scope of convictions which may be used for impeachment. No time limit was found in previous Washington law. See State v. Robinson, 75 Wn.2d 230, 450 P.2d 180 (1969).~~

~~Section (c). This section supersedes prior Washington law holding that a pardon has no effect upon the admissibility of a conviction for impeachment. See State v. Serfling, 131 Wash. 605, 230 P. 847 (1924); State v. Knott, 6 Wn.App. 436, 493 P.2d 1027 (1972).~~

~~Section (d). This section gives somewhat more discretion to the trial judge than prior Washington law holding juvenile adjudications inadmissible for impeachment. See State v. Temple, 5 Wn.App. 1, 485 P.2d 93 (1971). The federal term, "juvenile adjudication," is changed in the text of the rule to "finding of guilt in a juvenile offense proceeding". This change conforms to the Washington juvenile court act and makes it clear that adjudications of dependency remain inadmissible.~~

~~Section (e). The first sentence of this section is consistent with prior Washington law. State v. Robbins, 37 Wn.2d 492, 224 P.2d 1076 (1950). There appears to be no prior law directly bearing upon the second sentence.~~

~~In some situations a party may wish to use evidence of a prior conviction as substantive evidence of a fact alleged in subsequent litigation. Rule 609 would not apply because it relates only to impeachment by evidence of a conviction. Criminal convictions as substantive evidence are governed by rule 803 (a)(22).~~

~~[1988 Amendment]~~

~~[Section (a).] The 1988 amendment eliminated an ambiguity in the general rule governing impeachment by evidence of a prior conviction. Limitations on the use of felony convictions for impeachment, which under the earlier language of the rule appeared to apply only to criminal defendants or witnesses testifying on behalf of such defendants, were made applicable to all witnesses in both civil and criminal cases.~~

~~The drafters concluded that prior convictions for felonies not involving dishonesty or false statement can be highly prejudicial and that the restrictive test set forth in rule 609 (a)(1) should apply evenhandedly to all witnesses in any kind of case to which these rules apply.~~

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

[Unchanged.]

~~Comment 610~~

~~Although the rule is the same as Federal Rule 610, it is not intended to reflect any departure from a similar provision in the Washington Constitution. Const. art. 1, § 11 (amend. 34).~~

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

[Unchanged.]

~~Comment 611~~

~~This rule is the same as Federal Rule 611. Although the rule is primarily one of discretion, it is not intended to broaden the discretion permitted under previous law. As to the scope of cross examination, see State v. Robideau, 70 Wn.2d 994, 425 P.2d 880 (1967). As to leading questions, see State v. Scott, 20 Wn.2d 696, 149 P.2d 152 (1944).~~

RULE 612. WRITING USED TO REFRESH MEMORY

[Unchanged.]

~~Comment 612~~

~~This rule is substantially the same as Federal Rule 612. An introductory reference in the federal rule to the Jencks Act, 18 U.S.C. § 3500, is omitted from the Washington version because the statute would normally be inapplicable in state court. Also omitted from the Washington version is a clause at the end of the federal rule, providing: "except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." Although this provision appears to be a restriction on the federal court's discretion, the advisory committee's note to Federal Rule 612 indicates that the provision is included only to parallel the Jencks Act, and that other alternatives such as contempt or dismissal remain available under the Federal Rules of Criminal Procedure. The drafters of the Washington rule felt that this approach was unduly confusing and that the clause could be eliminated without compromising the substance of the rule.~~

~~Under previous Washington law, there has been a distinction between memoranda used to refresh memory before trial and those used during the appearance of the witness in court. Under State v. Little, 57 Wn.2d 516, 358 P.2d 120 (1961), memoranda used in court are clearly subject to a right of inspection by opposing counsel, but there has been no similar right to inspect memoranda used to refresh memory before trial. State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935). The rule changes previous law to the extent that it gives the court discretion to permit inspection of memoranda used before trial.~~

RULE 613. PRIOR STATEMENTS OF WITNESSES

[Unchanged.]

~~Comment 613~~

~~This rule is a modification of Federal Rule 613 and conforms substantially to previous Washington law.~~

~~Section (a) of the federal rule abolishes the old English requirement that a witness be shown a prior written statement before opposing counsel can cross-examine the witness about the statement. Similarly, the federal rule provides that the contents of a prior oral statement need not be disclosed to the witness before cross examination.~~

~~In Washington, previous decisional law is not entirely clear but appears to be closer to the common law view. With reference to the prior oral statements, counsel must ask foundation questions which substantially repeat the prior inconsistent statement and direct the attention of the witness to the circumstances under which he purportedly made the statement. With reference to prior written statements, similar foundation questions are required, but there appears to be no decisional law requiring the written statement to actually be shown to the witness before cross examination. 5 R. Meisenholder, Wash. Prac., Evidence § 296 (1965 & Supp.).~~

~~The advisory committee's note to Federal Rule 613 indicates that the federal drafters considered the common law rule to be a "useless impediment to cross-examination." The drafters of the proposed Washington rule agreed to the extent that the common law requirement can be a useless impediment under some circumstances. The drafters felt, however, that the court should be given some measure of discretion to require that the prior statement be disclosed if it would be manifestly unfair to begin cross-examining the witness before disclosing the statement. Accordingly, section (a) of the rule provides that the court "may require" that the prior statement be shown or its contents disclosed to the witness before cross examination.~~

~~Both the federal rule and the Washington rule also provide that the prior statement must, on request, be shown or disclosed to the lawyer who originally called the witness. This provision, which is consistent with previous law, protects against unwarranted insinuations that a statement was made when in fact it was not. It also serves to prepare counsel for an effort to rehabilitate the witness on redirect examination. Butcher v. Seattle, 142 Wash. 588, 253 P. 1082 (1927).~~

~~Section (b) is the same as Federal Rule 613(b) and provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny the statement. Previous Washington law is in accord. Meisenholder § 296. The rule affords a measure of discretion in "the interests of justice" to allow for unusual circumstances such as a witness becoming unavailable by the time a prior inconsistent statement is discovered.~~

~~There are prior Washington decisions to the effect that if the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. It is felt that the additional extrinsic evidence would usually be of little value and would be a waste of time. Meisenholder § 296. Although rule 613 does not expressly bar the admission of extrinsic evidence under these circumstances, rule 403 gives the court broad discretion to exclude evidence on the grounds that it would cause undue delay, be a waste of time, or that it is a needless presentation of cumulative evidence.~~

~~It should be remembered that rule 613 relates to the admission of evidence for impeachment rather than as substantive evidence. Section (b) of rule 613 expressly disclaims any application to admissions of a party-opponent as defined in rule 801 (d)(2). The admissibility of hearsay statements as substantive evidence is governed by the rules in Title VIII.~~

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

[Unchanged.]

~~Comment 614~~

~~Sections (a) and (b) are modifications of Federal Rule 614. Section (c) is the same as Federal Rule 614(c). As modified, the rule is consistent with previous Washington law.~~

~~Section (a). There is dictum to the effect that a trial judge may call witnesses in Washington. Ramsey v. Mading, 36 Wn.2d 303, 217 P.2d 1041 (1950). The phrase "where necessary in the interests of justice" has been added to the language of the federal rule to insure against unlimited, unreviewable discretion. If the court intends to call a witness, the judge, in fairness, should confer with counsel before calling the witness, and the conference should be on the record.~~

~~The federal rule provides that the court may also call a witness "at the suggestion of a party." The Washington rule substitutes the phrase "on motion of a party." The drafters of the Washington rule felt that the word "suggestion" was ambiguous and that "motion" was more precise in terms of established practice under the civil and criminal rules.~~

~~Section (b). A trial judge in Washington may question a witness so long as the questions do not violate the constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16; State v. Brown, 31 Wn.2d 475, 197 P.2d 590, 202 P.2d 461 (1948); 5 R. Meisenholder, Wash. Prac. § 269 (1965 & Supp.).~~

~~Section (c). Counsel may object to the judge's questions on the basis of any of the rules of evidence. This section is designed to relieve counsel of the embarrassment of objecting to the judge's questions in front of the jury. The objection is not automatic, however, as it is under rule 605.~~

RULE 615. EXCLUSION OF WITNESSES

[Unchanged.]

~~Comment 615~~

~~This rule differs from Federal Rule 615 in that the word "may" has been substituted for "shall" in the first sentence, and the words "reasonably necessary" have been substituted for "essential" in the last sentence. The word "may" preserves the discretionary nature of the rule under previous Washington law. State v. Adams, 76 Wn.2d 650, 458 P.2d 558 (1969). The drafters of the Washington rule felt that the federal rule's use of the word "essential" in subsection (3) established an inordinately strict test which could force an unjustified reversal on appeal. The test of "reasonably necessary" offers more flexibility.~~

~~The rule modifies previous Washington law in that it delineates certain witnesses who may not be excluded. Under previous law, the judge was given more discretion in this regard. State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962).~~

TITLE VII. OPINIONS AND EXPERT TESTIMONY
RULE 701. OPINION TESTIMONY BY LAY WITNESSES

[Unchanged.]

~~**Comment 701**~~

~~This rule is the same as Federal Rule 701. It is essentially a rule of discretion and differs from previous law more in form than substance. The rule requires the trial judge, on the basis of the posture of the particular case, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result. In applying the rule, it should be kept in mind that its purpose is to eliminate time-consuming quibbles over objections that would not affect the outcome regardless of how they were decided. The emphasis belongs on what the witness knows and not on how he is expressing himself. 3 J. Weinstein, Evidence paragraph 701(02) (1975).~~

~~In several recent cases the Washington Supreme Court has cited section 401 of the Model Code of Evidence as controlling the admission of a lay opinion testimony in Washington. See Church v. West, 75 Wn.2d 502, 452 P.2d 265 (1969); 5 R. Meisenholder, Wash. Prac. section 341 (1975 Supp.). Section 401 would usually yield the same result as decisional law predating it. Some examples of admissible opinion testimony are: the speed of a vehicle, the mental responsibility of another, whether another was "healthy", the value of one's own property, and the identification of a person. Meisenholder section 341 (1975 Supp.). The 2004 amendment is not intended to affect the typical examples of admissible opinion testimony cited in the preceding sentence.~~

~~Differences between existing Washington law and rule 701 are largely matters of form rather than substance. Although Model Code section 401 assumes that the witness may generally testify in terms of inference and opinion, the court may require the testimony to be stated in nonabstract detail if it finds that the witness is capable of doing so satisfactorily and that the statement by the witness of his conclusory inferences might mislead the trier of fact. Rule 701 approaches the problem in reverse. It assumes that the witness will give his testimony by stating his observations in as raw a form as practicable, but permits him to resort to inferences and opinions when this form of testimony will be helpful. Both rules give the trial court a wide latitude of discretion. As a practical matter, rule 701 is unlikely to change Washington law. See Meisenholder section 343.~~

~~The subject matter of rule 701 is analyzed in greater detail in Powell & Burns, A Discussion of the New Federal Rules of Evidence, 8 Gonz. L. Rev. 1, 14- 16 (1972).~~

RULE 702. TESTIMONY BY EXPERTS

[Unchanged.]

~~**Comment 702**~~

~~This rule is the same as Federal Rule 702 and is consistent with previous law giving the court broad discretion to determine whether a witness is qualified to express an expert opinion. See State v. Tatum, 58 Wn.2d 73, 360 P.2d 754 (1961).~~

~~The Washington Supreme Court has more recently cited section 401 of the Model Code of Evidence as governing the admissibility of expert testimony. See Church v. West, 75 Wn.2d 502, 452 P.2d 265 (1969). However, the results and language of these opinions indicate that in effect the court interprets section 401 in line with the prior general Washington case law. 5 R. Meisenholder, Wash. Prac. § 351 (Supp.1975).~~

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

[Unchanged.]

~~**Comment 703**~~

~~This rule is the same as Federal Rule 703. The first sentence codifies the universally accepted principle that an expert may base an opinion on (1) firsthand information or (2) facts or data presented to him at trial and is consistent with previous Washington law. See 5 R. Meisenholder, Wash.Prac. §§ 354, 355 (1965 & Supp.). The second sentence allows an expert to base an opinion on data which could not be admitted in evidence provided it is of the type reasonably relied upon by experts in forming opinions upon the subject in their particular field of competence. Before an expert will be permitted to testify upon the basis of facts not admissible in evidence, the court will have to find pursuant to rule 104(a) that the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field in reaching conclusions. If there is a serious issue the trial judge will examine the expert outside the presence of the jury to determine whether these conditions are met. Since rule 703 is concerned with the trustworthiness of the resulting opinion, the judge should not allow the opinion if the expert can show only that he customarily relies upon such material or that it is relied upon only in preparing for litigation. The expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit. 3 J. Weinstein, Evidence ¶ 703[01] (1975).~~

~~The expert will ordinarily be in the best position to know what data can be reasonably relied upon, and the court will usually follow the expert's advice on the point. The court's decision will, to a large extent, be based on the degree of confidence it has in the professional caliber and ethics of the expert group involved. Physicians are likely to be given more leeway than accidentologists. 3 J. Weinstein, Evidence ¶ 703[01].~~

~~Several older Washington cases suggest that the opinion of an expert based solely upon hearsay reports or other hearsay is inadmissible. Meisenholder § 357. One case, however, held that a doctor could state his opinion that the eyesight of a person was normal when the doctor's opinion was based upon his office record of visual field charts prepared by a technician during the course of examination by the technician. Engler v. Woodman, 54 Wn.2d 360, 340 P.2d 563 (1959). And in State v. Wineberg, 74 Wn.2d 372, 444 P.2d 787 (1968), the court held that an expert could, in the trial court's discretion, be permitted to give an opinion as to the value of property even though some of the factors (e.g., comparable sales prices) would be inadmissible as hearsay, so long as the opinion was the product of the expert's own independent judgment. Rule 703 reflects the approach taken in the more recent cases.~~

RULE 704. OPINION ON ULTIMATE ISSUE

[Unchanged.]

Comment 704

~~This rule is the same as Federal Rule 704 and is consistent with previous Washington law. In rejecting challenges that opinions should have been excluded because they were opinions on ultimate facts, the court has permitted opinions to be voiced upon various matters: that the physical condition of prosecuting witness could not have been the result of ordinary normal sexual intercourse, the point of impact between vehicles based upon skidmarks, the sanity or insanity of a criminal defendant, the possibility of gainful employment, how a disease would be communicated, and other matters. 5 R. Meisenholder, Wash.Prac. § 356 (1965 & Supp.).~~

~~Except for testimony concerning foreign law, experts are not to state opinions of law or mixed fact and law. On this basis, questions such as whether X was negligent can be excluded. Meisenholder § 356.~~

~~The introduction of evidence under rule 704 is subject to the restrictions of rules 701 and 702, which require opinions to be helpful to the trier of fact, and rule 403, which authorizes the exclusion of time-wasting evidence.~~

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

[Unchanged.]

~~Comment 705~~

~~This rule is the same as Federal Rule 705. It clarifies Washington law by defining a procedure which cannot be determined by reference to decisional law. See 5 R. Meisenholder, Wash.Prac. § 354 (1965 & Supp.). The use of hypothetical questions, often criticized by the authorities, becomes an optional tactic rather than a requirement, unless otherwise ordered by the court.~~

~~Without preliminary disclosure at trial of underlying data, effective cross examination is often impossible unless the information has been obtained through pretrial discovery. The court, therefore, should liberally grant permission for depositions and other discovery with respect to experts under CR 26 (b)(4). Smith & Henley, Opinion Evidence: An Analysis of the New Federal Rules and Current Washington Law, 11 Gonz.L.Rev. 692, 697-98 (1976).~~

RULE 706. COURT APPOINTED EXPERTS

[Unchanged.]

~~Comment 706~~

~~This rule is the same as Federal Rule 706, except that a provision in section (b) for compensating experts from public funds was deleted. Rule 706 does not apply to the appointment of defense experts in indigent criminal cases. That practice is governed by a more specialized rule, CrR 3.1.~~

~~Legal writers and revisers have long favored reforming trial practice by implementing the trial judge's common law power to call experts. Their imprecations against the "battle of experts" led to the drafting of the Uniform Expert Testimony Act in 1937, which later formed the basis for rules 403-410 of the Model Code of Evidence, for rules 59, 60, and 61 of the Uniform Rules of Evidence, and Federal Rule of Evidence 706. 3 J. Weinstein, Evidence ¶ 706 [01] (1975).~~

~~There is dicta in the Washington cases suggesting that a judge may appoint an expert witness in nonjury cases. Ramsey v. Mading, 36 Wn.2d 303, 310-11, 217 P.2d 1041 (1950). (The dictum in Ramsey was inaccurately characterized as a holding in State v. Swenson, 62 Wn.2d 259, 277, 382 P.2d 614 (1963).) A relatively small number of rules and statutes relate to the appointment and compensation of experts in specific kinds of cases. Rule 706 codifies the common law power of the court to call an expert and defines a procedure applicable to all cases.~~

~~Expert witness fees in state condemnation proceedings are payable from public funds, as anticipated by Federal Rule 706, but only pursuant to a statutory scheme which imposes certain conditions and restrictions not found in the federal rule. See RCW 8.25.070. The statute does not mention the possibility of the expert being appointed by the court, and the statute does not authorize the disbursement of public funds for an appointed expert. The drafters of the Washington rule eliminated the language in Federal Rule 706 authorizing disbursement of public funds in deference to applicable statutes.~~

~~There is an obvious danger that the jury will be more impressed by an expert appointed by the court than by one called by a party. It has been argued that to disclose to the jury the fact that an expert was appointed by the court would violate the state constitutional prohibition against a judge commenting on the evidence. 5 R. Meisenholder, Wash.Prac. § 363 (1965); Const. art. 4, § 16. The court's discretion to make such a disclosure under section (c) should be used with extreme caution to avoid the possibility of commenting on the evidence.~~

TITLE VIII. HEARSAY
RULE 801. DEFINITIONS

[Unchanged.]

~~Comment 801~~

~~This rule is the same as Federal Rule 801, except that subsection (d)(2)(iv) has been modified with respect to the admissibility of statements by agents and servants.~~

~~Section (a). The definition of "statement" is consistent with previous Washington law. Oral assertions, written assertions, and assertive conduct all constitute statements, but acts of nonassertive conduct do not. 5 R. Meisenholder, Wash.Prac. § 387 (1965 & Supp.).~~

~~Section (b). Section (b) is self-explanatory.~~

~~Section (c). The definition of "hearsay" is substantially in accord with previous Washington law. See Moen v. Chestnut, 9 Wn.2d 93, 113 P.2d 1030 (1941).~~

~~Section (d). This section excludes from the definition of hearsay several types of statements which literally are within the definition. Statements excluded from the hearsay rule section (d) are admissible as substantive evidence. The rule does not affect the use of prior inconsistent statements to impeach a witness. The use of these statements for impeachment is governed by rule 613.~~

~~Subsection (d)(1) defines the extent to which prior out-of-court statements are admissible as substantive evidence if the declarant is presently available for cross examination at trial. One Washington case is in accord with the theory expressed by the rule. State v. Simmons, 63 Wn.2d 17, 385~~

~~P.2d 389 (1963). Other cases, however, are to the contrary. Meisenholder § 381. The rule clarifies the law by detailing the circumstances under which the statements are admissible and conforms state law to federal practice.~~

~~Subsection (d)(1)(i) provides that a witness' prior inconsistent statement is admissible as substantive evidence if it was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule does not require the statement to have been subject to cross examination at the time it was made. See 120 Cong. Rec. 2386 (1974), quoted in 4 J. Weinstein, Evidence 801-24 (1975). The rule would not, however, necessarily admit statements made in pretrial affidavits. The rule applies only to statements given in a trial, hearing, proceeding, or deposition. Although the meaning of "proceeding" is not yet clear, it has been observed that the words of limitation were designed in part to prevent the admission of affidavits given by a coerced or misinformed witness. 4 J. Weinstein, Evidence ¶¶ 801 (d)(1)[01], 801 (d)(1)(A)[01] (1975). The constitutionality of a California statute even less restrictive than rule 801 (d)(1)(i) was upheld in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).~~

~~Subsection (d)(1)(ii) makes statements admissible as substantive evidence which were previously admissible only to rehabilitate an impeached witness. See Meisenholder § 306.~~

~~Subsection (d)(1)(iii) is consistent with previous Washington law. See State v. Simmons, 63 Wn.2d 17, 385 P.2d 389 (1963).~~

~~Subsection (d)(2) differs from previous Washington law more in theory than in practice. Previous decisions have considered admissions by party-opponents to be hearsay but have admitted them as an exception to the hearsay rule. Meisenholder § 421. Rule 801 continues to admit the statements, not as an exception to the hearsay rule, but by excluding them from the definition of hearsay altogether.~~

~~Statements of others that are expressly adopted by a party have been held admissible as admissions. State v. McKenzie, 184 Wash. 32, 49 P.2d 1115 (1935). Statements by authorized persons have been similarly held to be admissions. State ex rel. Ledger Pub'g Co. v. Gloyd, 14 Wash. 5, 44 P. 103 (1896).~~

~~Federal Rule 801 provides in relevant part: "A statement is not hearsay if… [t]he statement is offered against a party and is… a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship…." The Washington cases have not adopted the rule of broader admissibility expressed by the federal rule. The traditional rule, which was applied in early Washington decisions, was that, "the acts and declarations of the agent, when acting within the scope of his authority, having relations to, and connected with, and in the course of, the particular transaction in which he is engaged, are, in legal effect, the acts or declarations of his principal." Tacoma & E. Lumber Co. v. Field & Co., 100 Wash. 79, 86, 170 P. 360 (1918). This was known as the "res gestae" rule, and the admissibility of an agent's statement depended upon how closely the statement was related to the transaction in question. Meisenholder § 425(1).~~

~~Later decisions have phrased the rule not in terms of res gestae, but in terms of whether the agent was authorized to make the statement on behalf of the principal. Meisenholder § 425(1). This has become known as the "speaking agent" approach and has continued to be applied in relatively recent decisions. See, e.g., Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 422 P.2d 496 (1967). Accord, Restatement (Second) of Agency §§ 286-288 (1958). The drafters of the Washington rule felt that existing Washington law, as exemplified by the later cases, reflected the better policy and deleted the language in the federal rule which would have broadened the admissibility of statements by agents.~~

~~The provision concerning statements by coconspirators is consistent with previous Washington law. Meisenholder § 430.~~

RULE 802. HEARSAY RULE

[Unchanged.]

~~Comment 802~~

~~The language of Federal Rule 802 is modified to adapt the rule to state practice. The rule preserves other court rules such as CR 43(e), authorizing the admission of hearsay evidence under particular circumstances.~~

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

[Unchanged.]

~~Comment 803~~

~~This rule is the same as Federal Rule 803, except that one addition is made in subsection (a)(13), a minor editorial improvement is made in subsection (a)(22), and subsection (a)(24) is omitted.~~

~~Subsection (a)(1). This subsection is consistent with previous Washington law. Beck v. Dye, 200 Wash. 1, 92 P.2d 1113, 127 A.L.R. 1022 (1939).~~

~~Subsection (a)(2). This subsection is consistent with previous Washington law. Beck v. Dye, supra.~~

~~Subsection (a)(3). This subsection is a specialized application of the rule expressed in subsection (a)(1). Under previous law it was not clear whether statements to a physician of the declarant's present pain and suffering were admissible. See 5 R. Meisenholder, Wash.Prac. § 472 (1965 & Supp.). The statements are admissible under rule 803.~~

~~Statements of the declarant's then existing state of mind have been admissible in Washington if there is need for their use and if there is circumstantial probability of their trustworthiness. Raborn v. Hayton, 34 Wn.2d 105, 208 P.2d 133 (1949). The rule is substantially in accord.~~

~~The provision relating to wills appears to change Washington law. Cf. Carey v. Powell, 32 Wn.2d 761, 204 P.2d 193 (1949). This portion of rule 803 is based on practical considerations of necessity and expediency and conforms Washington law to the practice followed in a majority of American jurisdictions. 4 J. Weinstein, Evidence ¶ 803(3)[05] (1975).~~

~~Subsection (a)(4). This subsection changes Washington law. Under previous cases, statements of past symptoms and statements relating to medical history, even though made to a treating physician, have been inadmissible as independent~~

substantive evidence. Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962). Statements made to a treating or nontreating physician have been allowed into evidence, but only for the purpose of supporting the physician's medical conclusions. Kennedy v. Monroe, 15 Wn.App. 39, 547 P.2d 899 (1976). Rule 803 admits the statements for the purpose of proving the truth of the matter asserted. The justification for the rule, already followed in a number of states, is the patient's motivation to be truthful. Meisenholder § 472. Further, it is unrealistic to assume that a juror, instructed according to previous law, would be able to draw the distinction necessary to hear the statements in order to justify a medical conclusion but to disregard them as to the truth of the matter asserted.

The rule is subject to the restrictions imposed by the law of privileged communications.

Subsection (a)(5). This subsection codifies the familiar hearsay exception for past recollection recorded. Under previous Washington law, the exception only applied if the witness had no independent recollection of the facts. State v. Benson, 58 Wn.2d 490, 364 P.2d 220 (1961). Rule 803 is slightly broader in that it requires only that the witness must have insufficient recollection to testify fully and accurately.

Subsection (a)(6). Federal Rule 803(6) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by statutes and decisions already familiar to the bench and bar. See Meisenholder, ch. 28.

Subsection (a)(7). Federal Rule 803(7) is modified to refer to RCW 5.45 rather than to subsection (a)(6). The rule resolves an issue which has not been addressed in this state's decisional law. Meisenholder § 516.

Subsection (a)(8). Federal Rule 803(8) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by the statute and decisions already familiar to the bench and bar. See Meisenholder, ch. 29.

Subsection (a)(9). There do not appear to be any previous Washington cases or statutes directly bearing on the admissibility of vital statistics as a hearsay exception. RCW 5.44.040, preserved by subsection (a)(8), may be controlling in many instances.

Subsection (a)(10). A similar provision is found in CR 44(b). CR 44 is not superseded.

Subsection (a)(11). There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that a religious organization may qualify as a "business" under RCW 5.45.010. Subsection (a)(11) clarifies the law by making specific records of religious organizations admissible as hearsay exceptions.

Subsection (a)(12). There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that the statutes preserved by subsection (a)(6) and (8) may also cover the subject matter of subsection (a)(12).

Subsection (a)(13). This subsection conforms substantially to previous Washington law. Meisenholder § 542. Tattoos have been added to the items enumerated in the federal rule. The drafters felt that tattoos often reflect personal or family history and are apt to be as trustworthy as the other items listed in the rule.

Subsection (a)(14). The hearsay exception for records of documents affecting an interest in property has previously been recognized in Washington. Copies of all deeds which must be filed with the county auditor are admissible. RCW 5.44.070. Copies of city or town plats are admissible. RCW 58.10.020. "Whenever any deed, conveyance, bond, mortgage or other writing, shall have been recorded… in pursuance of law, copies of record of such deed, [etc.] …shall be received in evidence to all intents and purposes as the originals themselves." RCW 5.44.060. The rule does not conflict with the statutes. It supplements the statutes but does not supersede them.

Subsection (a)(15). There is little prior authority on the admissibility of evidence of statements in documents affecting an interest in property, but what little there is supports an exception to the hearsay rule in accord with the rule. In Adams v. Mignon, 197 Wash. 293, 303, 84 P.2d 1016 (1938), the court held that the trial court did not err when it admitted an abstract of title into evidence: "The abstract, while not conclusive as to facts shown by the record, was admissible for what it was worth."

Subsection (a)(16). The rule reduces the time limit from 30 to 20 years. Compare Spokane v. Catholic Bishop, 33 Wn.2d 496, 206 P.2d 277 (1949). Authentication is accomplished pursuant to rule 901 (b)(8).

Subsection (a)(17). This subsection is substantially in accord with previous Washington law. See Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969); Meyer Bros. Drug Co. v. Callison, 120 Wash. 378, 207 P. 683 (1922).

Subsection (a)(18). This subsection makes statements contained in treatises, periodicals, and pamphlets admissible as substantive evidence, but only when the expert is on the stand and available to explain and assist in the application of the information. Prior cases holding that treatises are not admissible to prove the truth of the statements contained therein are no longer controlling. Cf. Dabroe v. Rhodes Co., 64 Wn.2d 431, 392 P.2d 317 (1964). The traditional use of treatises on cross examination is authorized by rules 611, 703, and 705.

Subsection (a)(19). Previous Washington law has authorized admission of evidence of reputation within the family or among close associates on matters of family history. Meisenholder § 542. Subsection (a)(19) clarifies the law by stating more specifically the scope of this hearsay exception. The rule does not require the declarant to be unavailable, nor does it require that the statements must be made prior to litigation with no motive to deceive. Cf. Carfa v. Albright, 39 Wn.2d 697, 237 P.2d 795, 31 A.L.R.2d 983 (1951); Armstrong v. Modern Woodmen of Am., 105 Wash. 356, 178 P. 1 (1919).

Subsection (a)(20). This subsection is substantially in accord with previous Washington law, except that the rule does not require the declarant to be unavailable before the hearsay exception applies. See Kay Corp. v. Anderson, 72 Wn.2d 879, 436 P.2d 459 (1967); Alverson v. Hooper, 108 Wash. 510, 185 P. 808 (1919).

Subsection (a)(21). Under previous law, the scope of this exception could not be stated definitively. Meisenholder § 544. The rule clarifies the law by establishing reputation as

~~a general exception to the hearsay rule. The methods of proving character are defined by rule 405.~~

~~Subsection (a)(22). No similar exception to the hearsay rule is defined by previous Washington law. Meisenholder § 545. Admissibility is limited by the restrictions stated in the rule. The rule does not deal with the substantive effect of a judgment as res judicata, nor does it govern evidence of a conviction for impeachment. The latter is governed by rule 609. Even though the rule permits certain convictions to be used as substantive evidence in later litigation, the rule does not preclude the defendant from offering an explanation of the conviction based on newly acquired evidence. 4 J. Weinstein, Evidence ¶ 802(22)[01] (1975).~~

~~Subsection (a)(23). There do not appear to be any previous Washington statutes or cases directly in point. The leading case is Patterson v. Gaines, 47 U.S. (6 How.) 550, 12 L.Ed. 553 (1848).~~

~~Section (b). Federal Rule 803(24) is deleted. The drafters decided not to adopt any catchall provision. Despite purported safeguards, there is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult. Nor would it be likely that an appellate court could effectively apply corrective measures. There would be doubt whether an affirmance of an admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.~~

~~Flexibility in construction of the rules so as to promote growth and development of the law of evidence is called for by rule 102. Under this mandate there will be room to construe an existing hearsay exception broadly in the interest of ascertaining truth, as distinguished from creating an entirely new exception based upon the trial judge's determination of equivalent trustworthiness, a guideline which the most conscientious of judges would find extremely difficult to follow.~~

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

[Unchanged.]

~~Comment 804~~

~~This rule is the same as Federal Rule 804, except that a minor editorial change is made in subsection (b)(2), and subsection (b)(5) is omitted. The rule defines the hearsay exceptions which apply only if the declarant is unavailable.~~

~~Section (a). Previous Washington law has defined "unavailability" differently in various contexts. See State v. Ortego, 22 Wn.2d 552, 157 P.2d 320, 159 A.L.R. 1232 (1945); State v. Solomon, 5 Wn.App. 412, 487 P.2d 643 (1971); Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942). Rule 804 clarifies the law by establishing a general definition applicable to all cases.~~

~~The admissibility of hearsay against a defendant in a criminal case is also subject to overriding constitutional considerations. In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), for example, the Supreme Court held that the confrontation clause of the Sixth Amendment requires the government to make stringent efforts to procure the attendance of a prosecution witness before the witness can be considered "unavailable". A lesser standard prevails in civil cases and in criminal cases where the statement is being offered on behalf of the accused. These and other constitutional restrictions on rules 801 and 804 are discussed in 4 J. Weinstein, Evidence ¶ 804(a)[01] (1975).~~

~~Read literally, subsection (a)(3) seems to require only that the declarant assert a lack of memory to be considered unavailable. The rule does not appear to require that the court believe that the declarant is telling the truth. The Report of the House Committee on the Judiciary, however, indicates that "the Committee intends no change in the existing federal law under which the court may choose to disbelieve the declarant's testimony as to a lack of memory." Federal Rules of Evidence for the United States Courts and Magistrates 140 (West 1975). Accord, 4 J. Weinstein, Evidence ¶ 804(a)[01] (1975).~~

~~Since the witness must testify to the lack of memory and is, therefore, subject to cross examination about his claim, the concern of some courts that the witness may make a perjured allegation of forgetfulness to avoid having to be cross-examined about his testimony is considerably lessened. Cross examination about the making of the statement and his present recollection gives the trial judge an opportunity for assessing the witness' credibility. 4 J. Weinstein, Evidence ¶ 804(a)[01].~~

~~Subsection (b)(1). This portion of the rule is substantially in accord with previous Washington law in civil cases. 5 R. Meisenholder, Wash. Prac. §§ 401-408 (1965 & Supp.). See also CR 43 (h) and (j). In criminal cases, previous Washington law has imposed greater restrictions on the use of former testimony. The use of testimony at a former trial has been limited to proceedings on the same charge. State v. Lunsford, 163 Wash. 199, 300 P. 529 (1931). Rule 804 is less restrictive but is, of course, subject to constitutional limitations. For example, it has been held that under the state constitution, the defendant in criminal cases against whom the former testimony is introduced must have been present at the former trial and must have had the opportunity to confront and cross-examine witnesses. State v. Ortego, 22 Wn.2d 552, 157 P.2d 320, 159 A.L.R. 1232 (1945).~~

~~Subsection (b)(2). Previous Washington law has recognized a limited exception for dying declarations. It has applied only in criminal cases involving prosecution for homicide. Hobbs v. Great N. Ry., 80 Wash. 678, 142 P. 20 (1914). Death must have actually resulted from the injuries creating the belief in impending death. State v. Lewis, 80 Wash. 532, 141 P. 1025 (1914). Declarations containing conclusions or opinion have been inadmissible to that extent. State v. Swartz, 108 Wash. 21, 182 P. 953 (1919). Rule 804 broadens the scope of this exception. The rule substitutes the word "trial" for "prosecution" to avoid the unwarranted implication that the defendant might not be allowed to introduce a dying declaration.~~

~~Subsection (b)(3). Under previous Washington law, this exception has applied only to declarations against the declarant's pecuniary or proprietary interest. Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942). There has been no apparent authority concerning statements of matters which could furnish the basis for tort liability or invalidate a claim, nor has~~

~~there been authority concerning statements furnishing the basis for criminal liability. Meisenholder § 441. Rule 804 expands and clarifies the scope of this exception.~~

~~Subsection (b)(4). Previous Washington law has recognized an exception for statements of personal or family history substantially in accord with rule 804, although the rule is much more detailed. The rule does not require the statement to have been made prior to the litigation and with no motive to deceive, a restriction apparently imposed by previous law. Meisenholder § 542.~~

~~Subsection (b)(5). Federal Rule 804 (b)(5) is deleted for the same reasons that Federal Rule 803(24) is deleted. See the comment to rule 803(b).~~

RULE 805. HEARSAY WITHIN HEARSAY

[Unchanged.]

~~Comment 805~~

~~This rule is the same as Federal Rule 805. It accepts the trustworthiness of each hearsay statement once it has been deemed worthy of an exception. Thus, if a dying declaration incorporated a declaration against interest by another out of court declarant, both statements would be admissible as exceptions to the hearsay rule. The statement of the second declarant is not admissible, however, if it does not fall within an exception. See, for example, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), holding information from a bystander incorporated in an admissible police report to be inadmissible as hearsay.~~

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

[Unchanged.]

~~Comment 806~~

~~This rule is the same as Federal Rule 806. The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility is subject to impeachment and support just as if he had testified.~~

~~The use of an inconsistent statement to impeach a hearsay declarant is not subject to the usual requirement that the witness have been afforded an opportunity to deny or explain it. Cf. rule 613. The foundation requirement is relaxed here because, as a practical matter, the declarant seldom will have been confronted with inconsistent statements when making an out of court statement later admitted as an exception to the hearsay rule. See 4 J. Weinstein, Evidence ¶ 806[01] (1975).~~

RULE 807. CHILD VICTIMS OR WITNESSES [RESERVED]

[Unchanged.]

~~Comment 807~~

~~Though not covered by the federal rules, hearsay statements made by a child victim or witness were the subject of a recent addition to the Uniform Rules of Evidence. In Washington, these statements are governed by RCW 9A.44.120, which allows a statement made by a child under the age of 10 describing sexual contact to be admissible in dependency and criminal proceedings under certain circumstances.~~

~~While the Washington statute is limited to statements describing "any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule," the Uniform Rule covers statements that describe "an act of sexual conduct or physical violence…". The drafters of ER 807 elected to reserve the rule and refer to the statute, rather than supersede it by adopting the Uniform Rule.~~

~~The reserved rule again recognized that the admissibility of a child's statement is a proper area for the Washington Supreme Court's rulemaking authority.~~

TITLE IX. AUTHENTICATION, IDENTIFICATION AND ADMISSION OF EXHIBITS

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

[Unchanged.]

~~Comment 901~~

~~Federal Rule 901 has been modified to restrict the application of subsection (b)(3), to delete subsection (b)(7), and to adapt subsection (b)(10) to state practice.~~

~~Section (a). The rule treats preliminary questions of authentication and identification as matters of conditional relevance under rule 104(b). The court should admit the evidence if sufficient proof is introduced to permit a reasonable juror to find in favor of its authenticity or identification. 5 J. Weinstein, Evidence ¶ 901(a)[01] (1975). There is no apparent conflict between section (a) and previous Washington law. See 5 R. Meisenholder, Wash.Prac. §§ 38, 61 (1965 & Supp.). The rule is concerned only with proving authenticity. It does not govern admissibility. An authentic document may still be inadmissible under another rule.~~

~~Example 1. This portion of the rule is consistent with previous Washington law. Allen v. Porter, 19 Wn.2d 503, 143 P.2d 328 (1943); State v. Cottrell, 56 Wash. 543, 106 P. 179 (1910). The rule does not require that the witness' testimony, alone, be sufficient for authentication. This is true for the other examples as well. Any combination of methods illustrated by rule 901 (b)(1) through (10) will suffice so long as rule 901(a) is satisfied. 5 J. Weinstein, Evidence ¶ 901 (b)(1)[01] (1975).~~

~~Example 2. This portion of the rule is consistent with previous Washington law. State v. Simmons, 52 Wash. 132, 100 P. 269 (1909); Meisenholder § 61.~~

~~Example 3. Federal Rule 901 (b)(3) permits the comparison to be made by the "trier of fact." The Washington rule substitutes the word "court" to avoid any suggestion that the jury initially determines whether the requirement of authentication has been satisfied. It is the judge who determines whether the proponent of the evidence has made a prima facie demonstration that it is genuine. Once this demonstration is made, the document is sufficiently authenticated for admissibility. Meisenholder § 61. After the document is admitted, however, evidence challenging its authenticity is pertinent and authenticity ultimately becomes a factual issue for the jury. See, e.g., State v. Bogart, 21 Wn.2d 765, 153 P.2d 507 (1944); Mitchell v. Mitchell, 24 Wn.2d 701, 166 P.2d 938 (1946); State v. Haislip, 77 Wn.2d 838, 467 P.2d 284 (1970).~~

In a jury case, the initial comparison by the judge should probably be made in the absence of the jury. This procedure is authorized by rule 104(e).

Example 4. This portion of the rule reflects, for example, the reply letter technique. A letter is sufficiently authenticated by showing that a letter was sent to a person and that the letter to be introduced is in reply to the first letter. Conner v. Zanuzoski, 36 Wn.2d 458, 218 P.2d 879 (1950). Other examples of circumstantial proof are cited in Meisenholder § 63.

Example 5. This portion of the rule is substantially in accord with previous Washington law. State v. Williams, 49 Wn.2d 354, 301 P.2d 769 (1956). Proper identification and authentication do not assure admissibility. RCW 9.73.050, for example, makes sound recordings inadmissible under certain circumstances.

Example 6. This portion of the rule is substantially in accord with previous law in Washington and elsewhere. Meisenholder § 66. One Washington decision appears to hold that self identification by the answering party is insufficient for authentication. State v. Manos, 149 Wash. 60, 270 P. 132 (1928). Self identification is sufficient under rule 901 so long as the call was made to the telephone number assigned to that particular person.

Example 7. Federal Rule 901 (b)(7) is deleted, not because of any fundamental disagreement with its content, but because the subject matter is covered by existing statutes and rules which have become familiar to the bench and bar. CR 44 does not supersede the cited statute. Either procedure may be used. State v. Hodge, 11 Wn.App. 323, 523 P.2d 953 (1974). A common law procedure for authenticating original government documents is described in State v. Bolen, 142 Wash. 653, 254 P. 445 (1927).

Example 8. The rule reduces the time limit from 30 to 20 years. Cf. Spokane v. Catholic Bishop, 33 Wn.2d 496, 206 P.2d 277 (1949).

Example 9. This portion of the rule would apply, for example, to the authentication of photographs and X-rays. Meisenholder § 32. Authorities discussing computer printouts are cited in the Advisory Committee Note to Federal Rule 901. See also Seattle v. Heath, 10 Wn.App. 949, 520 P.2d 1392 (1974).

Example 10. Statutes and other court rules defining methods of authentication are not superseded by rule 901.

RULE 902. SELF-AUTHENTICATION

[Unchanged.]

Comment 902

This rule is the same as Federal Rule 902, except that sections (d) and (j) have been modified to adapt the rule to state practice. Unlike the ten subsections in rule 901, the ten sections in rule 902 are not set forth as examples. They comprise instead the scope of the rule. This rule does not preclude the opposite party from disputing the authenticity of a document listed in the rule. It should also be emphasized that the rule is concerned only with the authenticity of certain documents. It is not concerned with their admissibility. A document deemed authentic may still be inadmissible under another rule.

By the terms of rules 901 (b)(10) and 902(j), statutory methods of authentication are preserved as alternative procedures. See, e.g., RCW 5.44. CR 44, Proof of Official Record, relates to some of the matters governed by rule 902. CR 44 is not superseded and remains as an alternative procedure. R. Meisenholder, 3 West's Federal Forms § 3926 (1976 Supp.).

Section (a). This section simplifies the procedure for determining the authenticity of a domestic public document bearing a seal. Forgeries are unlikely, and detection is relatively easy and certain.

Section (b). A document purporting to bear an official signature is more easily forged in the absence of a seal. The rule thus requires the additional safeguard of authentication by an officer who does have a seal.

Section (c). This section is substantially the same as CR 44 (a)(2).

Section (d). This section reflects the familiar practice of recognizing certified copies of public records. The rule defers to statutes such as RCW 5.44 which address the procedure for certification in more detail.

Section (e). By statute, certain official publications are considered authentic. See, e.g., RCW 5.44.070, .080. The rule accepts all official publications as authentic. The rule does not confer authenticity upon statutes, rules, and court decisions reprinted by nongovernmental publishers. 5 J. Weinstein, Evidence ¶ 902(5)[01] (1975).

Section (f). Newspapers and periodicals are considered authentic because the risk of forgery is minimal. The rule could not be determined with certainty under previous Washington law. 5 R. Meisenholder, Wash.Prac. § 65 (1965 & Supp.).

Section (g). The laws protecting trade inscriptions minimize the risk of forgery. The rule generalizes upon a policy which has been previously implemented on a piece-meal basis. See, e.g., RCW 16.57.100 (brands as evidence of title to livestock); Kneeland Inv. Co. v. Berendes, 81 Wash. 372, 142 P. 869 (1914) (seal of corporation on stock certificate held sufficient authentication).

Section (h). The rule is consistent with RCW 64.08.050. The persons authorized to take acknowledgments are defined by RCW 64.08.010.

Section (i). The rule incorporates the provisions of the Uniform Commercial Code relating to authenticity. See RCW 62A.1-202 (certain documents deemed to be prima facie evidence of their own authenticity and genuineness); RCW 62A.3-307 (signatures presumed to be genuine); RCW 62A.3-510 (certain documents are admissible in evidence and create presumption of dishonor).

Section (j). Federal Rule 902(10) has been modified to refer to state law as well as to federal statutes. Statutory procedures such as those defined in RCW 5.44 are preserved. As to self-authenticating wills, see RCW 11.20.020. Some statutes provide that a document is presumptively authentic, but only after it has been certified or otherwise verified in a specified manner. See, e.g., RCW 77.04.090 (rules and regulations of state game commission). Section (j) does not eliminate these restrictions. Certified copies are governed by section (d). Other documents not falling within sections (a) through (i) but made presumptively authentic by statute are

~~subject to any statutory conditions or restrictions on authenticity.~~

~~[1988 Amendment]~~

~~[Section (d).] The 1988 amendment removed a gap in the portion of this rule that allowed certified copies of public records to be self-authenticating. The prior rule permitted certification by compliance with "any law of the United States or of this state." The drafters agreed that "[t]he rationale underlying the notion of self-authentication is that the likelihood of fabrication or honest error is so slight in comparison with the time and expense involved in authentication that extrinsic evidence is not required. Evidence of nonauthenticity may, of course, be introduced." (Footnote omitted.) Graham, Federal Evidence § 902.0 (2d ed. 1986).~~

~~The amended rule expanded the certification provision to permit certification that complies with "the applicable law of a state or territory of the United States." While in most instances the "applicable law" will be that of the state from which the record originated, including of course the state of Washington, there may be exceptional circumstances where this is not the case. The amendment defers to other choice of law principles in these situations.~~

~~The second portion of the amendment, adding the language "treaty or convention" to "law of the United States," acknowledged that international agreements may affect the admissibility of evidence in a state court. For example, the recently enacted notary statute recognized foreign notarial acts by providing that "[a]n 'apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the designated office." RCW 42.44.150(2). See also RCW 42.44.180. While it may be that the term "law" encompasses treaties and conventions, the drafters concluded that no room should be left for debate.~~

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

[Unchanged.]

~~Comment 903~~

~~This rule is the same as Federal Rule 903. It eliminates the traditional common law requirement of live testimony from a subscribing witness and reflects the prevailing modern view. E. Cleary, McCormick on Evidence § 220 (2d ed. 1972). The rule preserves statutes which require live testimony under particular circumstances.~~

RULE 904. ADMISSIBILITY OF DOCUMENTS

[Unchanged.]

TITLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

~~Comment 1001~~

~~This rule is the same as Federal Rule 1001 except that "sounds" has been added to section (a). This addition is also found in Uniform Rule 1001. The rule establishes definitions which apply throughout Title X. "Original" includes a counterpart intended to have the effect of an original. Thus, for example, an original and a photocopy of a contract, both bearing the original signatures of the parties and intended as originals, would both be originals under the rule. Previous Washington law is in accord. 5 R. Meisenholder, Wash.Prac. § 94 (1965 & Supp.). To qualify as a "duplicate", a copy must be produced by a method which virtually eliminates the possibility of error. Copies produced manually, whether handwritten or typed, are not within the definition.~~

~~The rules in Title X do not govern the authenticity of an "original". That determination is made by reference to the rules in Title IX. The authenticity of any piece of evidence, even documents which are self-authenticating under rule 902, may be disputed by the opposing party. Federal Rule 902 advisory committee note. Thus, for example, an opposing party may challenge the integrity of an electronic recording even though it qualifies as an "original" under Title X. See also Comments, ER 901 and 902. Similarly, the rules do not prevent a party from challenging the accuracy of data fed into a computer or the integrity of the computer's storage system, even though a printout qualifies as the "original".~~

RULE 1002. REQUIREMENT OF ORIGINAL

[Unchanged.]

~~Comment 1002~~

~~Federal Rule 1002 has been modified to refer to state rules and statutes instead of to federal statutes. Taken together, rules 1001 and 1002 extend the traditional best evidence rule from writings to photographs and recordings as well. Previous Washington law has applied the best evidence rule only to writings. 5 R. Meisenholder, Wash.Prac. § 99 (1965 & Supp.). Although the rule now requires original photographs, rule 1001(e) defines an original photograph broadly as the negative or any print therefrom. The rule defers to statutory exceptions to the normal rule of requiring the original. These statutes are cited and discussed in Meisenholder § 98.~~

RULE 1003. ADMISSIBILITY OF DUPLICATES

[Unchanged.]

~~Comment 1003~~

~~This rule is the same as Federal Rule 1003 and relaxes the best evidence rule with respect to duplicates. Under rule 1003, the admission of duplicates is not limited to situations where the original is unavailable. Cf. 5 R. Meisenholder, Wash.Prac. § 95 (1965 & Supp.). The rule applies only to duplicates as defined in rule 1001 and thus assures the admission of accurate reproductions. The rule changes the law more in theory than in practice. As a practical matter, photocopies are reliable reproductions and are widely used both in commercial transactions and in litigation. The rule reflects this reality and at the same time affords ample opportunity to challenge the authenticity of a duplicate.~~

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

[Unchanged.]

~~Comment 1004~~

~~This rule is the same as Federal Rule 1004 and rejects any suggestion of a "second best" evidence rule. It is substantially in accord with previous Washington law. Although there is no case directly in point, the decisions appear to assume that there are no degrees of secondary evidence. 5 R. Meisenholder, Wash.Prac. §§ 95, 96 (1965 & Supp.).~~

~~Proof of a lost or destroyed will is governed by RCW 11.20.070. The statute defines "lost" and "destroyed" for purposes of probate and establishes the procedure to be followed. The statute is not in conflict with the rule and is not superseded.~~

~~Section (d), relating to collateral matters, reflects existing law in Washington and elsewhere. Meisenholder § 93.~~

~~The definition of "collateral" is elusive in the absence of specific facts. "In the final analysis the question of whether a document's terms are collateral depends upon the importance of the terms to the issues in the case. Insistence upon proof by introduction of an original document to prove its terms is a waste of time when the terms are relatively unimportant and not the subject of an important factual issue." Meisenholder § 93. See also E. Cleary, McCormick on Evidence § 236 (2d ed. 1972).~~

~~Thus, for example, in State ex rel. Walton v. Superior Court, 18 Wn.2d 810, 140 P.2d 554 (1943), the principal issue was whether an easement over the land to be condemned was necessary in order to reach certain timber. The court held that oral testimony concerning ownership of the land to be benefited by the easement was admissible because ownership was a collateral question. In another case, oral testimony concerning a contract was held admissible to show the relationship between the plaintiffs and their right to sue jointly. Hull v. Seattle, R. & S. Ry., 60 Wash. 162, 110 P. 804 (1910).~~

RULE 1005. PUBLIC RECORDS

[Unchanged.]

~~Comment 1005~~

~~This rule is the same as Federal Rule 1005. It exempts public records from the requirement of producing the original under rule 1002 because their removal from public custody is often not feasible. Unlike rule 1002, which makes no distinction among degrees of secondary evidence, this rule expresses a preference for certified or compared copies over other forms of secondary evidence.~~

~~Various statutes authorize the use of certified copies. RCW 5.44.040 (certified copies of public records); RCW 5.44.060 (certified copies of recorded instruments); RCW 5.44.070 (certified copies of transcripts of county commissioners' proceedings); RCW 5.44.090 (certified copies of instruments restoring civil rights). The rule authorizes proof by certified copy of any public record.~~

~~The rule changes Washington law in the sense that no previous authority has been found which equates compared copies with certified copies.~~

~~The last sentence of the rule authorizes proof by other forms of secondary evidence if neither a certified nor a compared copy can be obtained with reasonable diligence. Although this approach has been authorized in a number of factual situations, no previous authority has been found which applies the rule generally to public records. See 5 R. Meisenholder, Wash.Prac. §§ 95, 96 (1965 & Supp.).~~

RULE 1006. SUMMARIES

[Unchanged.]

~~Comment 1006~~

~~This rule is the same as Federal Rule 1006 and is substantially in accord with previous Washington law. See Keen v. O'Rourke, 48 Wn.2d 1, 290 P.2d 976 (1955). The rule does not require that the summary be prepared by a person with special expertise, but as a practical matter, the summary would ordinarily be prepared by a qualified person in order to avoid a challenge to its accuracy under rule 1008. See 5 J. Weinstein, Evidence ¶ 1006[01] (1975).~~

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

[Unchanged.]

~~Comment 1007~~

~~This rule is the same as Federal Rule 1007 and conforms to the view expressed in E. Cleary, McCormick on Evidence § 242 (2d ed. 1972). An adverse party's oral testimony, deposition, and writings are within the scope of the rule; oral admissions made out of court are not. Written responses to interrogatories and requests for admission are admissible under this rule. 5 J. Weinstein, Evidence ¶ 1007[05] (1975). There appears to be no previous Washington law on this point. 5 R. Meisenholder, Wash.Prac. § 97 (1965 & Supp.).~~

RULE 1008. FUNCTIONS OF COURT AND JURY

[Unchanged.]

~~Comment 1008~~

~~This rule is the same as Federal Rule 1008 and defines a specialized approach to determining questions under rule 104 for matters within the scope of Title X. RCW 4.44.080 and .090 allocate questions of law and fact to the court and jury, respectively. The rule is more specific than the statutes but does not conflict with them. The statutes are not superseded.~~

TITLE XI. MISCELLANEOUS RULES
RULE 1101. APPLICABILITY OF RULES

[Unchanged.]

~~Comment 1101~~

~~Federal Rule 1101 has been modified by deleting references to matters heard only in federal court and by adding references to certain proceedings heard in the state courts. The rule conforms substantially to previous Washington practice.~~

~~Section (a). The rules of evidence apply generally to civil and criminal proceedings, including mental commitment proceedings, reference hearings, and juvenile court factfinding and adjudicatory hearings. See RCW 71.05.250, RCW 71.05.310, MPR 3.4, RAP 16.12, JuCR 3.7, and JuCR 7.11. Juvenile court hearings on whether to decline jurisdiction are not excused from the operation of the rules. These~~

~~hearings have a substantial impact upon the case and deserve the formality of evidentiary rules. Cf. In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975).~~

~~The words "judge" and "court" are used interchangeably throughout the rules and refer to a judge, judge pro tempore, commissioner, or any other person authorized to hold a hearing to which the rules apply.~~

~~Section (b). The law concerning privileged communications applies to all proceedings, including those listed in section (c).~~

~~Subsection (c)(1). This portion of the rule is a restatement of a similar provision in rule 104. The rules need not be applied, for example, at a hearing on a motion to suppress evidence. United States v. Matlock, 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974); 32B Am.Jur.2d Federal Rules of Evidence (1982). The rule, like all of the other rules, does not attempt to specify the situations in which due process would require a full evidentiary hearing. That determination is made by reference to constitutional law.~~

~~In the absence of a constitutional requirement, the rule still does not prevent the court from requiring a certain measure of reliability with respect to the admission of evidence in the proceedings specified in section (c). The court should have the discretion to require an appropriate level of formality.~~

~~Subsection (c)(2). The statutes contain special evidentiary provisions for grand juries and inquiry judges. See RCW 10.27.120, .130, .140, .170. Although there are no Washington cases directly in point, the majority view is that the validity of a grand jury indictment may not be challenged on the basis of insufficient or incompetent evidence unless none of the witnesses was competent. Annot., 37 A.L.R.3d 612 (1971); Annot., 39 A.L.R.3d 1064 (1971).~~

~~Subsection (c)(3). Proceedings with respect to extradition, rendition, and detainers are essentially administrative matters, and the rules of evidence have traditionally not applied. Gibson v. Beall, 249 F.2d 489 (D.C.Cir.1957); United States v. Flood, 374 F.2d 554 (2d Cir.1967).~~

~~The view that the rules of evidence do not apply to preliminary determinations in criminal cases is consistent with the Superior Court Criminal Rules. See, e.g., CrR 3.2(k), relating to hearings on pretrial release. The rule refers to "determinations" rather than to "examinations," the federal rule's terminology. This change was made to clarify the intent to relax the rules of evidence with respect to all preliminary matters, not just at hearings in which the accused gives testimony.~~

~~The normal rules of evidence do not apply to hearings with respect to sentencing or probation. State v. Short, 12 Wn.App. 125, 528 P.2d 480 (1974); State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962); State v. Kuhn, 81 Wn.2d 648, 503 P.2d 1061 (1972). As to sentencing proceedings in cases involving the death penalty, see also RCW 10.95. As to search warrants, see CrR 2.3(c). The rules do not apply to hearings with respect to pretrial release. CrR 3.2(k).~~

~~The provision regarding contempt applies to contempt committed in the presence of the court as defined by RCW 7.20.030.~~

~~The rule clarifies the law with respect to habeas corpus hearings. A statute, RCW 7.36.120, directs the court to hear and determine the matter "in a summary way." The Supreme Court has held that the trial court may thus determine factual matters by reference to affidavits. Little v. Rhay, 68 Wn.2d 353, 413 P.2d 15, cert. denied, 385 U.S. 96 (1966). Later, a division of the Court of Appeals held that such affidavits should be considered only to assist in formulating the issues of fact and not in themselves to determine disputed questions of material fact. Little v. Rhay, 8 Wn.App. 725, 509 P.2d 92 (1973). A dissenting opinion argued that the majority opinion nullified the statute and disregarded earlier decisions of the Supreme Court. Rule 1101 adopts the approach taken by the earlier Supreme Court decisions. This is contrary to Federal Rule 1101, which makes the rules of evidence applicable to federal habeas corpus proceedings, but the underlying federal statute requires testimony to be taken. Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).~~

~~The rules do not apply to small claims courts, supplemental proceedings, or to coroners' inquests, primarily because the purposes of these proceedings would be frustrated by strictly imposing rules of evidence. As a practical matter, the rules have not been applied to these proceedings in the past.~~

~~Factfinding and adjudicatory hearings in juvenile court are conducted in accordance with the rules of evidence. JuCR 3.7 and JuCR 7.11. Once the facts have been determined, however, the appropriate form of disposition is determined with less formality. The situation is analogous to the distinction between a criminal trial and sentencing. Rule 1101 thus authorizes a relaxation of the rules of evidence for disposition hearings in juvenile court. A corresponding relaxation of the rules is authorized for dispositional determinations under the Uniform Alcoholism and Intoxication Treatment Act, RCW 70.96A, and the Civil Commitment Act, RCW 71.05.~~

~~[1989 Amendment]~~

~~[Section (d).] The 1989 amendment reflected a contemporaneous amendment to the Mandatory Arbitration Rules, which in turn addressed the applicability of the Rules of Evidence to mandatory arbitration hearings. A new section (d) was added to ER 1101, providing simply that the admissibility of evidence in a mandatory arbitration proceeding "is governed by MAR 5.3." The cross reference was appropriate because, under mandatory arbitration, the Rules of Evidence cannot be said clearly to apply or not to apply. Rather, the extent of their applicability is left to the determination of the arbitrator under MAR 5.3.~~

RULE 1102. AMENDMENTS [RESERVED]

[Unchanged.]

RULE 1103. TITLE

[Unchanged.]

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.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 06-02-003
NOTICE OF PUBLIC MEETINGS
WASHINGTON ECONOMIC DEVELOPMENT FINANCE AUTHORITY
[Memorandum—December 21, 2005]

The Washington economic development finance authority (WEDFA) is an independent agency (#106) within the executive branch of the state government. The authority has four regular board meetings each year, one per quarter. The authority's meetings are open to the public, and access for persons with disabilities is provided at all meetings of the authority.

The meeting schedule for January 2006 is January 17, 5:30 p.m., at the Water Street Cafe, 610 Water Street S.W., Olympia, WA.

Please call Jonathan A. Hayes, Executive Director, at (206) 587-5634 if you have any questions.

WSR 06-02-009
INTERPRETIVE STATEMENT
DEPARTMENT OF REVENUE
[Filed December 22, 2005, 1:31 p.m.]

CANCELLATION OF INTERPRETIVE STATEMENT

The department of revenue is announcing the cancellation of this interpretive statement in the Washington State Register pursuant to the requirements of RCW 34.05.230(4).

The department of revenue has cancelled the following excise tax advisory (ETA):

ETA 89-005 A Statement of Purpose and Intent with Respect to the Taxability of Newspapers and Definition of a "Newspaper." ETA 89-005 (formerly RPM 89-5) was issued in 1989 to provide an interim definition of "newspaper" to be used until a definition could otherwise be provided that would comply with constitutional free speech guarantees. ETA 89-005 is being canceled because the interim definition conflicts with and is superseded by the statutory language ultimately enacted into law (RCW 82.04.214).

A copy of the cancelled document is available via the internet at http://www.dor.wa.gov/content/laws/eta/eta.aspx, or a request for copies may be directed to Roseanna Hodson, Interpretations and Technical Advice Unit, P.O. Box 47453, Olympia, WA 98504-7453, phone (360) 570-6119, fax (360) 586-5543.

Alan R. Lynn
Rules Coordinator

WSR 06-02-018
PUBLIC RECORDS OFFICER
UNIVERSITY OF WASHINGTON
[Filed December 23, 2005, 9:32 a.m.]

The contact information for the University of Washington's office of public records and open public meeting has changed. The contact information is Director of Public Records and Open Public Meeting, Eliza A. Saunders, 4311 11th Avenue N.E., Suite 360, Seattle, WA 98105, internal mailbox 35-4997, e-mail pubrec@u.washington.edu, phone (206) 543-9180.

Eliza A. Saunders

WSR 06-02-019
NOTICE OF PUBLIC MEETINGS
GREEN RIVER COMMUNITY COLLEGE
[Memorandum—December 23, 2005]

RESOLUTION NO 2005-2006/1
RESOLUTION SETTING SCHEDULE OF REGULAR MEETINGS - 2006

The board of trustees of Green River Community College will meet the third Thursday of each month as follows:

January 19
February 16
March 16
April 20
May 18
June 15
July 20
August 17
September 21
October 19
November 16
December 21

The board of trustees of Community College District No. 10 does hereby set the regular meeting dates for the board of trustees on the third Thursday of each month, commencing at 4:00 p.m., in the board room of the administration building, Green River Community College, 12401 S.E. 320th Street, Auburn, WA 98092. Notice of any change from such regular meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date.

WSR 06-02-020
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF AGRICULTURE
(Fryer Commission)
[Memorandum—December 21, 2005]

The Washington fryer board meetings for 2006 will be held on:

Wednesday, February 15, 2006
Washington Farm Bureau Building
1011 10th Avenue S.E.
Olympia, WA

Tuesday, May 9, 2006
Tuesday, August 8, 2006
Tuesday, October 10, 2006

The meetings for May 9, August 8, and October 10, 2006, will be held at the Renton Community Center, 1715 Maple Valley Highway, Classroom B, Renton, WA.

Any questions you may have can be addressed to JoAnne Naganawa, Washington Fryer Commission, at (425) 226-6125 or e-mail joanne@cluckcluck.org.

WSR 06-02-021
NOTICE OF PUBLIC MEETINGS
OFFICE OF THE INTERAGENCY COMMITTEE
(Governor's Forum on Monitoring)
[Memorandum—December 21, 2005]

At a regular meeting on October 5, 2005, the governor's forum on monitoring adopted the following meeting schedule.

January 17, 2006	Tuesday	Sawyer Hall, Lacey
April 4, 2006	Tuesday	To be determined
May 11, 2006	Thursday	To be determined
July 18, 2006	Tuesday	To be determined
October 3, 2006	Tuesday	To be determined
December 6, 2006	Wednesday	To be determined

The exact location of each meeting has not been determined. For persons who wish to attend, please contact Patty Dickason at the Office of the Interagency Committee (IAC), (360) 902-3085, or check the monitoring forum web page at http://www.iac.wa.gov/monitoring/schedule.htm for additional meeting information.

The governor's forum on monitoring schedules all public meetings at barrier free sites. Persons who need special assistance, such as large type materials, may contact Patty Dickason at the IAC office.

WSR 06-02-022
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF AGRICULTURE
(Barley Commission)
[Memorandum—December 20, 2005]

The Washington barley commission is filing the following schedule of times, dates, and locations of our 2006 scheduled meetings:

Meeting Type	Date	Time
Regular Meeting	March 22, 2006	9:00 a.m.
Annual Meeting	June 30, 2006	9:00 a.m.
Regular Meeting	October 4, 2006	9:00 a.m.
Regular Meeting	December 5, 2006	9:00 a.m.

All of the meetings will be held in the Washington Wheat Commission's Conference Room, West 907 Riverside Avenue, Spokane, WA.

If you have any questions, please call our office at (509) 456-4400.

WSR 06-02-023
PUBLIC RECORDS OFFICER
CASELOAD FORECAST COUNCIL
[Memorandum—December 21, 2005]

Pursuant to section 3, chapter 483, Laws of 2005, the public records officer of the caseload forecast council, is Kathleen Turnbow, P.O. Box 40962, Olympia, WA 98504-0962, e-mail Kathleen.turnbow@cfc.wa.gov, phone (360) 902-0089, fax (360) 902-0084.

Kathleen Turnbow
Confidential Secretary

WSR 06-02-032
NOTICE OF PUBLIC MEETINGS
WORKFORCE TRAINING AND EDUCATION COORDINATING BOARD
[Memorandum—December 28, 2005]

2006 BOARD MEETING SCHEDULE

Thursday, January 26, 2006	Meeting #108	WorkSource, Tumwater
Thursday, March 16, 2006	Meeting #109	WorkSource, Tumwater
Wednesday, May 10, 2006	Dinner	Walla Walla
Thursday, May 11, 2006	Meeting #110	Walla Walla
Thursday, June 29, 2006	Meeting #111	Tacoma
Thursday, August 3, 2006	Retreat	Leavenworth
Friday, August 4, 2006	Retreat	Leavenworth
Wednesday, September 27, 2006	Dinner	Spokane
Thursday, September 28, 2006	Meeting #112	Spokane
Wednesday, November 15, 2006	Dinner	Seattle
Thursday, November 16, 2006	Meeting #113	Seattle

WSR 06-02-033
NOTICE OF PUBLIC MEETINGS
BOARD OF ACCOUNTANCY
[Memorandum—December 27, 2005]

2006 BOARD MEETING SCHEDULE

Following is the schedule of regular meetings the board plans to hold during 2006:

Date	Day	Meeting	Location
January 27, 2006	Friday	Regular	SeaTac
April 28, 2006	Friday	Regular	SeaTac
July 28, 2006	Friday	Regular	Bellingham
October 27, 2006	Friday	Annual	Spokane

The exact location of each meeting has not been determined. For persons who wish to attend, please contact Cheryl Sexton at the board office, (360) 664-9194 or fax (360) 664-9190 for the meeting location. Meetings usually begin at 9:00 a.m. The board of accountancy schedules all public meetings at barrier free sites. Persons who need special assistance, such as enlarged type materials, please contact Cheryl Sexton at the board office, TDD 800-833-6384, voice (360) 664-9194, or fax (360) 664-9190.

WSR 06-02-034
NOTICE OF PUBLIC MEETINGS
GRAYS HARBOR COLLEGE
[Memorandum—December 22, 2005]

The Grays Harbor College board of trustees will meet in the boardroom on the main campus in the Joseph A. Malik Administration Building, unless otherwise noted, on the following dates at 5:30 p.m.

January 17, 2006 (Room 1512, Spellman Library, Grays Harbor College campus)
February 21, 2006
March 21, 2006
April 18, 2006
May 16, 2006
June 20, 2006
September 19, 2006
October 17, 2006
November 21, 2006

WSR 06-02-046
NOTICE OF PUBLIC MEETINGS
WASHINGTON STATE REHABILITATION COUNCIL
[Memorandum—December 29, 2005]

WSRC Quarterly Meeting
January 19-20, 2006

You are invited to attend an open public meeting of the Washington state rehabilitation council quarterly meeting:

January 19, 2006	Committee Day	9 a.m.-4 p.m.	3rd Floor Training Room
January 19, 2006	Community Forum	7-9 p.m.	Nisqually Room, 1st Floor
January 20, 2006	Full Council	9-4 p.m.	Nisqually Room, 1st Floor

DSHS Division of Children and Family Services Building, 6860 Capitol Boulevard, Tumwater, bus route 13.

The Washington state rehabilitation council (WSRC) was established as a result of amendments made to the Rehabilitation Act in 1992 and by governor's executive order 94-04 (superseding executive order 93-04). The WSRC advises the department of social and health services, division of vocational rehabilitation and performs responsibilities outlined by the federal statute that established the WSRC. The WSRC is part of the governor's effort to move toward a collaborative and comprehensive statewide system of rehabilitation services for individuals with disabilities. The WSRC works to increase opportunities for self determination and empowerment of people with disabilities and to create awareness of people with disabilities as a valuable human resource.

Please note: The council requests that meeting participants do not use fragrances and scented products as an accommodation to other individuals.

Interpreters will be on site. For assistive listening equipment or other reasonable accommodation needs, please call Kathy Krulich no later than January 6, 2006, at 1-866-252-2939 or (360) 407-3604 or by e-mail at krulik@dshs.wa.gov.

Please note: The January 19th Community Forum is audio taped recorded.

WSR 06-02-047
NOTICE OF PUBLIC MEETINGS
UNIVERSITY OF WASHINGTON
[Memorandum—December 28, 2005]

The following list represents the office of public records and open public meeting for 2006.

2006 Regular Meetings

Committee Name	Chair
Aeronautics and Astronautics	Adam Bruckner
American Ethnic Studies	Lauro Flores
Aquatic and Fishery Sciences	David Armstrong
Asian Languages and Literature	Michael Shapiro
Astronomy	Bruce Balick
ASUW Board of Directors	
ASUW Senate	
Biochemistry	Alan Weiner
Biology	Dee Boersma, Tan Daniel
Biomedical and Health Informatics	Peter Tarczy-Hornoch, MD
Biostatics	Bruce Weir
Board of Regents	
Bothell, Academic Affairs/Curriculum Committee	Colin Danby
Bothell, Academic Council	Tom Bellamy
Bothell, Business	Steve Holland
Bothell, CSS	Chuck Jackels
Bothell, Education	Susan Franzosa
Bothell, IAS	JoLynn Edwards
Bothell, MAPS	JoLynn Edwards
Bothell, Masters' Program	Mary Baroni

Committee Name	Chair
Bothell, Nursing	Mary Baroni
Bothell, Nursing Advisory	Mary Baroni
Chemical Engineering	Eric Stuve
Chemistry	Paul Hopkins
Classics	James Clauss
Communications	Gerald Baldasty
Comparative Medicine	Denny Liggitt
Computer Science and Engineering	David Notkin
Dance	Elizabeth Cooper
Dental Public Health Sciences	Douglas Ramsay
Drama	Sarah Nash Gates
EEU, Area of Special Education	Ilene Schwartz
Electrical Engineering	David Allstot
Environmental Health	David Kalman
Faculty Council	Dayle Durbon
Faculty Senate	Ashley Emery
Family Medicine	Alfred Berg
Forest Resources	
Genome Sciences	Robert Waterston
Germanics	Sabine Wilke
GPSS Executive	
GPSS Finance and Budget Committee	
GPSS Senate	
Harborview, Board Lunch	
Harborview, Board Meetings	
Harborview, Bond Oversight Committee	
Harborview, Executive Committee	
Harborview, Facilities Ad Hoc Committee	
Harborview, Finance Committee	
Harborview, Health Care/Strategic Planning	
Harborview, Hospital Quality Assurance	
Harborview, Joint Conference Committee	
Health Services	William Dowling
History	John Findlay
IACUC	
Immunology	Christopher Wilson
Industrial Engineering	Richard Storch
Information School	Harry Bruce

Committee Name	Chair
Law School	Dean Knight
Marine Affairs	
Mathematics	Selim Tuncel
Mechanical Engineering	Mark Tuttle
Medical Education and Biomedical Informatics	Doug Schaad
Medical History and Ethics	Wylie Burke
Medicine Board	Ann Ramsay-Jenkins
Microbiology	E. Peter Greenberg, MD
Nursing, Ad Hoc Committee of Professors	
Nursing, APT Committee	M. Killien
Nursing, Faculty	S. Spieker
Nursing, Faculty Council	S. Spieker
Nursing, Faculty Retreat	T. Simpson
Nursing, BNHS Faculty	M. Heitkemper
Nursing, Deans and Chairs	Dean Nancy F. Woods
Nursing, FCN Faculty	K. Swanson
Nursing, Governing Council	Dean Nancy F. Woods
Nursing, PCH Faculty	P. Butterfield
Obstetrics and Gynecology	David Eschenbach
Oral and Maxillofacial Surgery	O. Ross Beirne, DMD, PhD
Oral Medicine	Edmond Truelove
Oral Medicine Clinical Services	
Orthodontics	Gregory King
Pathobiology	Andy Stergachis
Pathology	Nelson Fausto, MD
Pharmacy Curriculum Committee	Gail Anderson
Pharmacy Executive Committee	Dean Sid Nelson
Pharmacy Faculty	Danny Shen
Physics	David Boulware
Psychosocial and Community Health	Patricia Butterfield
Public Health Executive Committee	Dean Patricia Wahl
Rehabilitation Medicine	Lawrence Robinson, MD
Restorative Dentistry	Richard McCoy
Scandinavian Studies	Terje Leiren
Social Science Chairs/Admins.	Dean Judy Howard
Sociology Executive Committee	Stewart Tolnay
Sociology Faculty	Stewart Tolnay
Speech and Hearing Sciences	Christopher Moore
Statistics	Peter Guttorp

Committee Name	Chair
Tacoma, Business	Shahrokh Saudagaran
Tacoma, Institute of Technology	Dr. Orlando Baiocchi
Tacoma, Interdisciplinary Arts and Sciences	Bill Richardson
Tacoma, Nursing	Dr. Marjorie Dobratz
Tacoma, Social Work	Dr. Marcie Lazzari
Tacoma, Urban Studies	Dr. Brian Coffey
Technical Communication	Judith Ramey
Use of University Facilities	Gus Kravas
Women Studies	David G. Allen

[These schedules are available for public inspection at the Office of Public Records and Open Public Meetings, 4311 11th Avenue N.E., Suite 360, Seattle, WA 98105, Campus Mail Box 354997, office phone (206) 543-9180, e-mail pubrec@u.washington.edu.]

WSR 06-02-049
NOTICE OF PUBLIC MEETINGS
HOME CARE QUALITY AUTHORITY
[Memorandum—December 28, 2005]

Following is the scheduled home care quality authority (HCQA) 2006 board meetings. The HCQA board meets the third Tuesday of every other month. The 2006 HCQA board meeting schedule is as follows:

February 21, 2006	ADSA HQ Building 640 Woodland Square Loop S.E. Lacey Conference Room 1-7.1 and 1-7.2
April 18, 2006	DSHS - Blake Building East 4500 10th Avenue S.E. Lacey Rose Conference Room
June 20, 2006	ADSA HQ Building 640 Woodland Square Loop S.E. Lacey Conference Room 1-7.1 and 1-7.2
August 15, 2006	ADSA HQ Building 640 Woodland Square Loop S.E. Lacey Conference Room 1-7.1 and 1-7.2
October 17, 2006	Lacey Government Center 1009 College Street S.E. Lacey Conference Room 104A
December 19, 2006	ADSA HQ Building 640 Woodland Square Loop S.E. Lacey Conference Room 1-7.1 and 1-7.2

If you have any further questions, please feel free to contact Jackie Myers at (360) 725-2618 or at JMyers@hcqa.wa.gov.

WSR 06-02-050
RULES COORDINATOR
PROFESSIONAL EDUCATOR STANDARDS BOARD
[Filed December 29, 2005, 2:31 p.m.]

Nasue Nishida will be replacing Esther Baker as the new rules coordinator for the professional educator standards board. Her contact information is Nasue Nishida, Policy and Research Analyst, Professional Educator Standards Board, 600 Washington Street South, Room 249, P.O. Box 47236, Olympia, WA 98504-2736, phone (360) 725-6238, fax (360) 586-4548, e-mail nnishida@ospi.wednet.edu.

Jennifer Wallace
Executive Director

WSR 06-02-051
PROFESSIONAL EDUCATOR STANDARDS BOARD
[Filed December 29, 2005, 2:32 p.m., effective January 1, 2006]

During the 2005 legislative session, ESSB 5732, starting at section 101, reconstituted the state board of education and transferred its powers, duties, and functions for teacher certification and preparation programs to the professional educator standards board. Effective January 1, 2006, all references in law to the state board of education in these areas of the revised code is to be construed to mean the professional educator standards board. By operation of law, all records, contracts, rules, and pending business of the state board of education in the areas of teacher certification and preparation programs are now transferred to the professional educator standards board.

Therefore, at this time we request the following rules contained in Title 180 WAC be transferred to new chapters under Title 181 WAC, the professional educators standards board's title:

Chapter 180-77 WAC	Chapter 181-77 WAC
Chapter 180-77A WAC	Chapter 181-77A WAC
Chapter 180-78A WAC	Chapter 181-78A WAC
Chapter 180-79A WAC	Chapter 181-79A WAC
Chapter 180-82 WAC	Chapter 181-82 WAC
Chapter 180-82A WAC	Chapter 181-82A WAC
Chapter 180-83 WAC	Chapter 181-83 WAC
Chapter 180-85 WAC	Chapter 181-85 WAC
Chapter 180-86 WAC	Chapter 181-86 WAC
Chapter 180-87 WAC	Chapter 181-87 WAC
Chapter 180-88 WAC	Chapter 181-88 WAC

We further request that above listed chapters of Title 180 WAC be decodified.

Jennifer Wallace
Executive Director

WSR 06-02-052
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF LICENSING
(Real Estate Commission)
[Memorandum—December 29, 2005]

2006 Real Estate Commission Meeting Dates and Times

March 16, 2006
Planning Session: 9:30 a.m. to 12:00 p.m.
Regular Commission Meeting: 1:30 p.m. - 4:00 p.m.
Phoenix Inn
416 Capitol Way North
Olympia, WA 98501

June 14, 2006
Regular Commission Meeting: 9:00 a.m. - 12:00 p.m.
Phoenix Inn
416 Capitol Way North
Olympia, WA 98501

September 19, 2006
Regular Commission Meeting: 9:00 a.m. - 12:00 p.m.
Oxford Suites
115 West North River Drive
Spokane, WA 99201

December 1, 2006
Regular Commission Meeting: 9:00 a.m. - 12:00 p.m.
Doubletree Inn
18470 International Boulevard
Seattle, WA

The department of licensing has a policy of providing equal access to its services. This correspondence is available in an alternate format. If you need special accommodations, please call (360) 902-3600 or TTY (360) 664-8885.

WSR 06-02-053
NOTICE OF PUBLIC MEETINGS
STATE BOARD OF HEALTH
[Memorandum—December 30, 2005]

2006 Board Meeting Schedule

Meeting Date	City	County	Location
January 11, 2006	Olympia	Thurston	AmeriTel Inn
February 8, 2006	Tumwater	Thurston	Tentative - meet if needed
March 8, 2006	Tumwater	Thurston	To be determined
April 12, 2006	Spokane	Spokane	To be determined
May 10, 2006	SeaTac	King	To be determined
June 14, 2006	TBD	Benton*	To be determined
July 12, 2006	TBD	Island*	To be determined
August 9, 2006	SeaTac	King	Tentative - meet if needed
September 13, 2006	Tumwater	Thurston	Tentative - meet if needed
***October 18, 2006	Yakima	Yakima	Yakima Convention Center to coincide with joint conference on health
November 8, 2006	TBD	Okanogan*	To be determined
December 13, 2006	SeaTac	King	To coincide with legislative conference

*Counties not visited in the past ten years
** First Wednesday of the month instead of the usual second Wednesday
***Third Wednesday of the month instead of the usual second Wednesday

Locations subject to change as needed - see our web site at www.sboh.wa.gov for the most current information.

WSR 06-02-054
NOTICE OF PUBLIC MEETINGS
UNIVERSITY OF WASHINGTON
[Memorandum—December 29, 2005]

Following are clarifications to two meeting schedules sent on December 28, Oral Medicine & Asian Languages & Literature. Additionally, enclosed is the meeting schedule for the philosophy department faculty meetings.

ASIAN LANGUAGES & LITERATURE
Seattle
Departmental Faculty Meeting

Meeting Date	Location (Building and Room #)	Time
January 11	Smith Hall 407	3:30 p.m.
February 8	Smith Hall 407	3:30 p.m.
March 8	Smith Hall 407	3:30 p.m.
April 12	Smith Hall 407	3:30 p.m.
May 10	Smith Hall 407	3:30 p.m.

SCHOOL OF DENTISTRY
DEPARTMENT OF ORAL MEDICINE
Open Meetings/2006

The following dates have been scheduled for open oral medicine faculty meetings (OM) and open oral medicine clinical services faculty meetings (OMCS). All are Wednesdays in HSB B317 from 12:30-1:30 p.m.:

January 5	OM
January 12	OMCS
February 2	OM
February 9	OMCS
March 2	OM
March 9	OMCS

April 6	OM
April 16	OMCS
May 4	OM
May 11	OMCS
June 1	OM
June 8	OMCS
July 6	OM
July 13	OMCS
August 3	OM
August 10	OMCS
September 7	OM
September 14	OMCS
October 5	OM
October 12	OMCS
November 2	OM
November 9	OMCS
December 7	OM
December 14	OMCS

If you have any questions, please contact Merry Tourtelot at 616-6015 or merryt@u.washington.edu.

Seattle

Philosophy Faculty Meetings

Meeting Date	Location (Building and Room #)	Time
Tuesdays unless cancelled	Savery 331K	3:30 p.m.

WSR 06-02-057

NOTICE OF PUBLIC MEETINGS

EASTERN WASHINGTON UNIVERSITY

[Memorandum—December 28, 2005]

The board of trustees of Eastern Washington University will hold a special meeting on Thursday, December 29, 2005, at 8:30 a.m. at the Davenport Hotel in Spokane. The board will convene an executive session according to RCW 42.30.110. The board will take no action and will not convene in open session.

WSR 06-02-058

NOTICE OF PUBLIC MEETINGS

EVERETT COMMUNITY COLLEGE

[Memorandum—December 27, 2005]

NOTIFICATION OF SPECIAL MEETING

The board of trustees of Everett Community College will hold a special executive session on January 3, 2006, at 5:00 p.m. in the Olympus Board Room at Everett Community College to discuss personnel matters. Please call (425) 388-9572 for information.

WSR 06-02-066

AGENDA

DEPARTMENT OF ECOLOGY

[Filed January 3, 2006, 12:42 p.m.]

Pursuant to RCW 34.05.314, following is the department of ecology's rule agenda for January 2006 through June 2006.

If you have any questions please contact Jerry Thielen at (360) 407-7551 or e-mail at jthi461@ecy.wa.gov.

Rule-making Agenda

*The bolded dates indicate filings that have occurred.

WAC Chapter	Chapter Title	CR-102 Filing Date	CR-103 Filing Date
173-218, 173-216, 173-226 AO 01-10 5/01	Underground injection control program	July 05	January 06
173-333 AO 04-07 3/04	Persistent bioaccumulative toxins (PBT) rule	October 05	January 06
173-423 AO 05-10 6/05	Motor vehicle emission standards	October 05	December 05
173-503 AO 04-14 4/03	Instream resources protection program—Lower and Upper Skagit water resources inventory area (WRIA 3 and 4).	October 05	April 06

WAC Chapter	Chapter Title	CR-102 Filing Date	CR-103 Filing Date
173-300 AO 05-13	Certification of operators of solid waste incinerator and landfill facilities	January 06	April 06
173-18, 173-20, 173-22, 173-27 AO 05-12 7/05	Shoreline Management Act rules	January 06	June 06
173-224 AO 05-17 10/05	Wastewater discharge permit fees	February 06	May 06
317-40 and 173-185 (new)	Oil transfer operations	March 06	May 06
173-455 (new), 173-400, 173-407, 173-425, 173-491, 173-495 AO 05-14 9/05	Air quality fee rule	March 06	July 06
317-10, 173-181 AO 00-03 7/99	Oil spill contingency plans and response contractor standards	March 06	May 06
173-430 AO 04-10 6/04	Agricultural burning	March 06	July 06
173-153 AO 05-18 10/05	Water conservancy boards	March 06	July 06
173-532 AO 04-08 4/04	Water resources program for the Walla Walla Basin WRIA 32	April 06	September 06
173-503A AO 04-01 2/04	Instream flow rule for the Samish Subbasin	June 06	December 06
173-528 AO 05-06 3/2/05	Salmon-Washougal instream resources protection and water management program WRIA 28	September 06	March 07
173-527 AO 05-05 3/2/05	Lewis instream resources protection and water management program WRIA 27	October 06	April 07
173- 460 and 173-400 AO 05-19 11/05	Controls for new sources of toxic air pollutants and general regulation for air pollution sources (WAC 173-400-110 only)	October 06	March 07
173-525 AO 05-03 3/2/05	Grays Elochoman instream resources protection and water management program WRIA 25	November 06	May 07
173-526 AO 05-04 3/2/05	Cowlitz instream resources protection and water management program WRIA 26	November 06	May 07
173-517 AO 04-02 3/04	Quilcene-Snow instream resources protection and water management program	December 06	June 07

WAC Chapter	Chapter Title	CR-102 Filing Date	CR-103 Filing Date
173-518 AO 04-03 3/04	Elwha Dungeness instream resources protection and watershed management program	December 06	March 07
173-98 AO 02-15 10/02	Uses and limitations of the water pollution control state revolving fund	January 07	June 07
173-95A and 173-98 AO 05-16 9/05	Uses and limitations of the water pollution control revolving fund and uses and limitations of the Centennial clean water fund	February 07	June 07
173-700 AO 04-13 7/04	Wetland mitigation banking—Pilot rule	July 07	January 08

Jerry Thielen
Rules Coordinator

WSR 06-02-067
AGENDA
DEPARTMENT OF TRANSPORTATION
[Filed January 3, 2006, 2:56 p.m.]

Following is the department of transportation's January 1 through June 31 [June 30], 2006, semi-annual rules development agenda for publication in the Washington State Register pursuant to RCW 34.05.314.

There may be additional rule-making activity not on the agenda as conditions warrant.

Semi-Annual Rules Agenda
January - June 2006

WAC Chapter	Chapter Title	Sections	Purpose of Rule	Agency Contact	Next Action
468-66	Highway Advertising Control Act		This chapter is being revised to add fundamental definitions, revise fee schedule, and facilitate ease of understanding.	Pat O'Leary (360) 705-7296	Public hearing on 1/3/06
468-100	Uniform relocation assistance and real property acquisition	001 through 603	To amend WAC 468-100 to reflect regulatory changes made by the Federal Highway Administration (FHWA) to the Federal Regulations in 49 C.F.R. Part 24 Section 24 that went into effect on February 3, 2005.	Dianna Ayers (360) 705-7329	CR-103 filing on 1/3/06 (CR-105 was filed on 11/1/05)
468-210	Pilot registration		Washington state legislation passed SSB 5414 rescinding pilot registration. Chapter 468-210 WAC is no longer in effect.	John Sibold (360) 651-6301	CR-103 filing in February 2006 (CR-105 was filed on 12/7/05)
468-300	State ferries and toll bridges	010, 020, 040, 220	Review of Washington state ferries' farebox revenue has been completed, resulting in a proposal to raise ferry fares.	Ray Deardorf (206) 515-3491	CR-102 filing in February 2006 (CR-101 was filed on 12/19/05)

WAC Chapter	Chapter Title	Sections	Purpose of Rule	Agency Contact	Next Action
468-300	State ferries and toll bridges	700	Review of the preferential loading rules for Washington state ferries' vessels.	Ray Deardorff (206) 515-3491	CR-102 filing in February 2006 (CR-101 was filed on 12/21/05)
468-38	Vehicle size and weight—Restricted highways—Equipment		Without further clarification and correcting the rules, in part, are at risk of misinterpretation creating burden on both administrative and enforcement activities.	Barry Diseth (360) 705-7805	CR-102 filing in January 2006 public hearing on 2/22/06

Cathy Downs
Rules Coordinator

WSR 06-02-070
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Aging and Disability Services Administration)
(Adult Family Home Advisory Committee)
[Memorandum—January 3, 2006]

The adult family home advisory committee, established under RCW 70.128.225, is scheduled to meet from 9:00 a.m. to noon in the Blake Office Park East Building, 4500 10th Avenue S.E., Lacey, on the following dates:

February 9, 2006	Rose Room
May 11, 2006	Rose Room
September 14, 2006	Dogwood Room
December 6, 2006	Rose Room

If you have any questions, need directions or a parking permit for the meeting, please contact Mr. Roger A. Woodside at (360) 725-3204 or e-mail woodsr@dshs.wa.gov.

WSR 06-02-071
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Aging and Disability Services Administration)
(Boarding Home Advisory Board)
[Memorandum—January 3, 2006]

The boarding home advisory board, established under RCW 18.20.260, is scheduled to meet from 9:00 a.m. to noon in the Blake Office Park East Building, 4500 10th Avenue S.E., Lacey, on the following dates:

April 6, 2006
July 6, 2006
September 7, 2006
December 7, 2006

The meetings will be held in the Rose Room.

If you have any questions, need directions or a parking permit for the meeting, please contact Mr. Denny D. McKee at (360) 725-2590 or e-mail mckeedd@dshs.wa.gov.

WSR 06-02-085
AGENDA
DEPARTMENT OF NATURAL RESOURCES
[Filed January 4, 2006, 10:27 a.m.]

Following is the department of natural resources' semi-annual rules development agenda for publication in the Washington State Register, pursuant to RCW 34.05.314. There may be additional rule-making activity not on the agenda as conditions warrant.

Please call Jenifer Gitchell at (360) 902-1634, or e-mail at jenifer.gitchell@wadnr.gov if you have questions.

RULES DEVELOPMENT AGENDA
January 2006 to July 2006

WAC Chapter or Section	Purpose of rule being developed or amended
332-52	Revise and update rules to reflect current recreation and public access policy.
332-24-710	Update boundary of forest protection zone in Kitsap County.
332-24-720	Update boundary of forest protection zone in Pierce County.
332-24-730	Update boundary of forest protection zone in King County.
332-24-___	Define boundary of forest protection zone in Whatcom County.
332-30-151	Clarify activities that are in conflict with reserve status.
332-100-040	Adjust distribution of rents from harbor area leases.

WAC Chapter or Section	Purpose of rule being developed or amended
332-30-106	Clarify definition of "aquaculture."

Jenifer Gitchell
Rules Coordinator

WSR 06-02-090
AGENDA
DEPARTMENT OF HEALTH
STATE BOARD OF HEALTH

[Filed January 4, 2006, 10:52 a.m.]

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 06-03 issue of the Register.

WSR 06-02-098
NOTICE OF PUBLIC MEETINGS
OFFICE OF THE INTERAGENCY COMMITTEE
(Interagency Committee for Outdoor Recreation)

[Memorandum—December 30, 2005]

The interagency committee for outdoor recreation (IAC) will meet Thursday, February 2 and Friday, February 3, 2006, at the Natural Resources Building, Room 172, 1111 Washington Street S.E., Olympia, WA.

This meeting will focus on the adoption of manuals and WACs associated with the new Washington wildlife and recreation program (WWRP) programs, matching resources, and supplanting local capacity. Other agenda items will include a 2006 planning session, name change update, Straddleline ORV Park update and possible executive session, and management update reports. The board is also planning a local tour on Friday afternoon.

If you plan to participate or have materials for committee review, please submit information to IAC no later than January 19, 2006. This will allow for distribution to committee members in a timely fashion.

IAC public meetings are held in locations accessible to people with disabilities. Arrangements for individuals with hearing or visual impairments can be provided by contacting IAC by January 27, 2006, at (360) 902-2637 or TDD (360) 902-1996.