

WSR 23-13-063
RULES OF COURT
STATE SUPREME COURT
[June 8, 2023]

IN THE MATTER OF THE PROPOSED ) ORDER
NEW SUPERIOR COURT SPECIAL ) NO. 25700-A-1520
PROCEEDINGS RULE (SPR 98.24W) )
—UNLAWFUL DETAINERS— )
APPOINTMENT OF ATTORNEY )
[REVISED] )

A Consortium (Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program), having recommended the proposed new Superior Court Special Proceedings Rule (SPR 98.24W)—Unlawful Detainers—Appointment of Attorney [Revised], and the Court having published the proposed new rule for comment and then having determined that the proposed new rule should be modified, having now approved the revised proposed new Superior Court Special Proceedings Rule for publication on an expedited basis;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the proposed new rule as shown below is to be published expeditiously for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites.

(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 August 30, 2023. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 8th day of June, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 Supplement - Proposed SPR 98.24 (NEW)

The Washington Supreme Court Rules Committee reviewed the comments on a new proposed rule regarding the appointment of counsel in unlawful detainer proceedings (SPR 98.24). The proposed rule was originally submitted by: Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer

Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program

The original rule was published for comment by the October 2022 En Banc Conference with a comment expiration date of January 31, 2023. The Superior Court Judges' Association was granted an additional month until February 28, 2023 to provide comments.

Justice Yu, co-chair of the Rules Committee contacted Jim Bamberger, Director of the Office of Civil Legal Aid to obtain information regarding the availability of counsel for appointment in each county and to inquire whether additional funding would be available going forward. The attached materials were made available to Justice Yu and Mr. Bamberger stated that additional funds had been appropriated by the Legislature.

Justice Yu revised the proposed rule and such revisions were accepted by the Office of Civil Legal Aid and subsequently accepted by the Rules Committee. The Rules Committee is recommending that the revised rule be republished for comment.

[PROPOSED] SPR 98.\_\_\_\_W

UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

In all unlawful detainer cases where an individual qualifies for an attorney at public expense in accordance with RCW 59.18.640, the following protocols shall be followed:

1. If the tenant appears without an attorney, before taking any action in the case, the court shall:
  - a. Advise the tenant that if they are indigent, they have a statutory right to be represented by an attorney at public expense;
  - b. If applicable, refer the tenant for screening and appointment of counsel pursuant to any local order or established procedure consistent with RCW 59.18.640; and
  - c. Continue the hearing for a reasonable period of time so that counsel may be obtained.
2. If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may file a motion requesting that the court appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may file an ex parte motion for appointment and request that the court stay the execution of the writ for ten days. The lawyer seeking appointment shall establish by declaration that good faith efforts were made to notify the other party or, if no efforts were made, why notice could not be provided prior to the application for an ex parte stay, and describing the immediate or irreparable harm that may result if an immediate stay is not granted.
3. A stay issued under this rule will be set to expire ten days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court may lift the stay.

GR 9 COVER SHEET

Suggested Adoption of New Special Proceeding Rule

SUPERIOR COURT SPECIAL PROCEEDINGS

APPOINTMENT OF ATTORNEY FOR INDIGENT TENANT IN UNLAWFUL DETAINER PROCEEDINGS

A. Proponents: Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer

Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program

B. Spokespersons: Scott Crain, Michelle Lucas

C. Purpose:

The purpose of this proposed Civil Rule is to aid in the administration of justice by providing guidance to the Superior Courts in performing their duty to appoint counsel to unrepresented tenants facing eviction. In 2021, the legislature enacted Ch. 115 Laws 2021, creating a right to appointed counsel (RTC) for residential tenants in unlawful detainer proceedings. Codified at RCW 59.18.640, a court "must appoint counsel for an indigent tenant in an unlawful detainer proceeding". RCW 59.18.640(1). This proposed rule is intended to guide access to securing judicial relief for indigent tenants and to ensure that appointed counsel in unlawful detainer cases benefits all tenants who qualify, not only those with the language, technology, and access to resources.

During the course of implementation of RCW 59.18.640, the Office of Civil Legal Aid (OCLA) and its contractors have encountered many tenant defendants who are or were unaware of their right to counsel and only seek assistance after the entry of a default judgment or the entry of a writ of restitution. Tenants are losing their homes often because they do not understand the legal process they are involved in, and are unaware of their right to representation. Tenants often do not understand their legal situation until they are served by law enforcement with a writ of restitution telling them they will be physically removed from their home. Besides being effectively deprived the right to counsel in instances where counsel could not be appointed prior to the execution of the writ of restitution, this leads to increasing pressure on tenant defense attorneys to seek appointment in last minute requests for assistance, on the eve of physical eviction. The problem is particularly acute in jurisdictions with few ex parte dockets to present emergency motions, long travel distances with no or limited remote access, or fewer contractors providing RTC services because of the difficulty in bringing emergency motions to try and keep tenants housed until the case can be heard on the merits.

Since the rollout of the RTC program, approximately 10 percent of requests for assistance to the Northwest Justice Project Eviction Defense Screening Line or CLEAR<sup>1</sup> were matters already in default or where a writ of restitution had been issued. The urgency with which these matters must be addressed to prevent physical eviction and allow tenants access to appointed counsel puts a considerable strain on the RTC providers. Due to the expedited nature of unlawful detainer proceedings, RTC providers are faced with incredibly tight timelines on cases that run the normal course through the legal system. As a new program that is being implemented during a major housing crisis, there is no reliable model to ensure that an RTC attorney will be available to address emergency motions quickly enough to keep tenants housed. Although the writ of restitution is not the final decision in an unlawful detainer case, tenants face irreparable harm if forced to vacate their homes when the issue of possession was never properly litigated and they did not receive aid of appointed counsel. Additionally, the harm faced by tenants disproportionately impacts renters by race. The 2017 University of Washington Evictions Study highlights the racial disparity in evictions. Data for King and Pierce counties show that Black adults are respectively 5.5 and 6.8 percent more likely to be evicted than White adults.

<sup>1</sup> CLEAR (Coordinated Legal Education, Advice and Referral) is a toll-free legal hotline for people with low incomes housed at the Northwest Justice Project.

The proposed rule will address the following issues:

Section 1 is intended to ensure equitable access to attorneys for all tenants who may be eligible for appointed counsel in their eviction cases. The language of RCW 59.18.640 puts the onus on the court to raise the issue of the availability of appointed counsel. As written, the court's duty to appoint counsel inherently includes the duty to inform litigants of the availability of counsel. Access to legal counsel for tenants cannot be equitably obtained if courts rely on tenants to assert that right when many may not even be aware of it.

This section provides guidance to the courts for how to conduct this process. Although many jurisdictions have general orders that relate to the Eviction Resolution Pilot Program or RTC generally may provide that tenants be informed of their right to counsel, a majority of the orders do not include a process for how that will be accomplished resulting in disparate practices across jurisdictions. Ensuring that this colloquy is required in all unlawful detainer actions is imperative to provide legal representation to all qualified tenants. It also provides uniformity across jurisdictions so tenants and attorneys alike have reasonable expectations for how a matter will proceed before the court. This will further reduce disparate treatment of litigants in different regions.

Section 2 creates an opportunity for people to access meaningful representation when they were not afforded the benefit of an attorney before a finding was made against them. Legal processes and paperwork are confusing, and the imminent loss of a home is a highly stressful situation. The legal system is designed by and for attorneys. Unrepresented litigants face incredible barriers trying to navigate it on their own, and these barriers are compounded when taking other access issues into account such as primary language, level of education, immigration status, and access to technology and resources. In turn, these additional barriers are most often linked to race and economic status resulting in more negative outcomes for members of our community who identify as Black, Indigenous, and People of Color.

A tenant does not have the right to appointed counsel until a lawsuit is formally commenced, either by service of a summons and complaint or by the filing of the lawsuit with the court. The impact of this is that despite having received a notice terminating their tenancy, tenants do not have a right to consult with an attorney before the matter is escalated and the court can enter orders to remove them from their home. The 10-day stay of proceedings when appointed counsel appears that this rule proposes is intended to provide a reasonable amount of time for appointed counsel to review the case, confer with the tenant, and allow for meaningful representation without tenants facing the consequence of being removed from their home *before* having the legal assistance that is contemplated in RCW 59.18.640.

Section 3: Section 3 provides limitations to the relief this rule sets forth for tenants. If a stay is issued under Section 2 of this proposed rule, that stay will lift automatically after 10 days if the tenant's attorney does not identify grounds for why it should be extended and move for an extension of the stay in order to have a substantive hearing on the matter where the tenant will be fully represented. The unprecedented nature of requests for same-day assistance to avoid physical eviction creates bottlenecks to assistance resulting in reduced capacity to provide RTC services, over-utilization of ex

parte court procedures to stay writs or shorten time on motions to vacate.

In conclusion, the Supreme Court's intervention is necessary to provide administrative guidance to the Superior Courts and ensure that indigent defense in unlawful detainers is provided equitably regardless of location in the state.

D. Hearing: A hearing is not recommended.

E. Expedited Consideration: The proponents are requesting expedited consideration because since Right to Counsel services began in October 2021, providers have observed the inconsistent application of the new legislation by superior courts in unlawful detainer proceedings that is having an immediate impact on RTC-eligible tenants' opportunities to access meaningful representation, resulting in denial of representation and often homelessness, despite the legislatively recognized emergency impacting residential tenants in unlawful detainers cited in Laws 2021 ch. 115 sec. 21. The Court's expedited consideration is necessary to ensure that the right to counsel is a right to effective assistance of counsel, which cannot be guaranteed when tenants are not given a continuance and the opportunity to contact and meet with their lawyer prior to the hearing.

F. Supporting Material: Suggested rule amendments.

SPR 98.24W

UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

[NEW]

In all unlawful detainer cases where RCW 59.18.640 applies to appoint attorneys for indigent tenants:

- (1) If the tenant appears, before taking any action in the case, the court must
  - (a) Inform the tenant they have a right to be represented by an attorney at public expense if they are indigent;
  - (b) Ask the tenant if they want the court to appoint an attorney if they are eligible;
  - (c) Appoint an attorney if the tenant is eligible; and
  - (d) Continue the hearing for at least 14 days.
- (2) If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may move to appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may make an ex parte motion for appointment and to stay the writ. Upon such motion, the court shall appoint the lawyer and stay the writ for 10 days.
- (3) A stay issued under this rule will be set to expire 10 days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court shall lift the stay immediately.

[PROPOSED] SPR 98.\_\_\_\_W

UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

[Changes proposed to SCJA underlined]

In all unlawful detainer cases where RCW 59.18.640 applies to appoint attorneys for indigent tenants:

1. If the tenant appears, before taking any action in the case, the court must
  - a. Inform the tenant they have a right to be represented by an attorney at public expense if they are indigent;
  - b. Ask the tenant if they want the court to appoint an attorney if they are eligible;

c. Refer the tenant for appointment of counsel pursuant to any local order or established procedure consistent with RCW 59.18.640; and

d. Continue the hearing for at least 14 days.

2. If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may move to appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may make an ex parte motion for appointment and to stay the writ. Upon such motion, the court shall appoint the lawyer and stay the writ for ten days. The lawyer seeking appointment shall establish by declaration that good faith efforts were made to notify the other party or, if no efforts were made, why notice could not be provided prior to the application for an ex parte stay, and describing the immediate or irreparable harm that may result if an immediate stay is not granted.

3. A stay issued under this rule will be set to expire ten days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court shall lift the stay immediately.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.