

WSR 22-01-111
RULES OF COURT
STATE SUPREME COURT
[December 6, 2021]

IN THE MATTER OF THE ) ORDER
SUGGESTED AMENDMENT TO ) NO. 25700-A-1408
CrRLJ 4.8—SUBPOENAS )

The Washington Defender Association, having recommended the suggested amendment to CrRLJ 4.8—Subpoenas, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as shown below is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

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

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. 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 6th day of December, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 Cover Sheet
Suggested Changes to CrRLJ 4.8

(A) Name of Proponent: Washington Defender Association

(B) Spokesperson: Magda Baker, Misdemeanor Resource Attorney, Washington Defender Association; Email: magda@defensenet.org, Phone: (206) 226-9512

(C) Purpose: Both CrRLJ 4.8 and CrR 4.8 both govern the issuance of subpoenas in criminal cases, but their wording and content differs. We suggest this Court make the two rules more similar by replacing the wording of current CrRLJ 4.8 with the wording of CrR 4.8 and then adding two pieces of text that address circumstance in courts of limited jurisdiction.

Many differences between CrR 4.8 and current CrRLJ 4.8 are merely stylistic, but two are substantive. First, the superior court rule includes more specific requirements for the form and service of subpoenas. Second, the superior court rule allows both lawyers and judges to sign subpoenas duces tecum, while the rule for courts of limited jurisdiction allows only judges to sign.

CrR 4.8 gives more specific guidance than current CrRLJ 4.8. Replacing the wording of the current rule for courts of limited jurisdiction with that of the superior court rule would give structure and guidance to judges and litigants. The superior court rule gives direc-

tion in several areas that the rule for courts of limited jurisdiction does not address or mentions more vaguely:

- CrR 4.8 (a) (1) (A) and (b) (1) (A) list information subpoenas must include, while CrRLJ 4.8 does not.
- CrR 4.8 (a) (4) explains when a subpoenaed witness is excused, while CrRLJ 4.8 does not.
- CrR 4.8 (b) (2) requires advanced notice before a party serves a subpoena duces tecum on a defendant or complaining witness, while CrR 4.8 does not.
- CrR 4.8 (b) (4) lists specific circumstances under which a court must quash or modify a subpoena, while CrRLJ 4.8 (b) (2) includes more vague and limited criteria.
- CrR 4.8 (a) (3) and (b) (3) require witnesses to waive personal service before service by mail is complete, while CrRLJ 4.8(c) says service is complete three days after the day a subpoena is mailed.

The second major difference between CrR 4.8 and CrRLJ 4.8 is that the rule for courts of limited jurisdiction requires judges to sign all subpoenas duces tecum, whereas the superior court rule requires judges to sign subpoenas duces tecum only if they are for inspection of premises. Compare current CrRLJ 4.8(b) and CrR 4.8 (b) (2). We are concerned that some defense attorneys in courts of limited jurisdiction are hesitant to use subpoenas duces tecum because the process for getting judicial approval can be cumbersome and could require them to disclose information about their clients' cases. Getting a judicial signature on a subpoena duces tecum can be slow and time consuming. Many courts of limited jurisdiction require counsel to give the court clerk a physical copy of the subpoena, wait days for judicial review and then pick up the signed subpoena in person. Lawyers must also sometimes explain the relevance of the documents they seek, which can require disclosure of their thoughts about a case.

Finally, we propose that this Court include two additions to the wording of CrR 4.8 in CrRLJ 4.8. First, current CrRLJ 4.8(a) requires that judges sign subpoenas for witnesses outside the county or counties not contiguous with it. We suggest including that requirement with an alteration in an amended CrRLJ 4.8. The alteration we propose would let lawyers in courts of limited jurisdiction sign subpoenas for police, Department of Licensing employees and laboratory employees anywhere in the state. Second, CrR 4.8(c) says simply that a court may hold a person who fails to obey a subpoena without adequate excuse in contempt. We ask this Court to include the wording of current CrRLJ 4.8 (e) (2) in an amended CrRLJ 4.8. That wording says that a court may not hold a subpoenaed witness in contempt or issue a material witness warrant unless there is proof the witness personally received a subpoena. These two additions would help guide judges and new lawyers in busy, high volume courts.

**(D) Hearing:** None recommended.

**(E) Expedited Consideration:** Expedited consideration is not requested.

**Reviser's note:** The typographical errors in 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.

*[Suggested changes to CrRLJ 4.8]*

CrRLJ 4.8 SUBPOENAS

~~(a) Issuance for Witnesses.~~ The defendant and the prosecuting authority may subpoena witnesses necessary to testify at a scheduled hearing or trial. The subpoena may only be issued by a judge, court commissioner, clerk of the court, or by a party's lawyer. If a party's lawyer issues a subpoena, a copy shall be filed with the court. If the subpoena is for a witness outside the county or counties contiguous with it, the judge must approve the subpoena.

(a) For Attendance of Witnesses at Hearing or Trial. A subpoena commanding a person to attend and give testimony at a hearing or at trial ("a subpoena for testimony") shall be issued as follows:

(1) Form; Issuance.

(A) A subpoena for testimony shall (i) state the title of the action, the case number, the name of the court in which the action is pending, and, if different, the name of the court from which the subpoena is issued; and (ii) command each person to whom it is directed to attend and give testimony at a specified time and place.

(B) (i) The court in which the action is pending or before which attendance is required may issue a subpoena for testimony under the seal of that court, or the clerk may issue the subpoena for testimony in response to a praecipe. (ii) An attorney for a party also may sign and issue a subpoena for testimony unless subsection (iii) of this rule applies. (iii) The judge must approve a subpoena for a witness outside the county or counties contiguous with it unless the witness is an employee of the Washington State Department of Licensing, a Washington police department or sheriff's office, or the Washington State Patrol, including the Washington State Patrol Crime Laboratory Division and the Washington State Patrol Toxicology Laboratory Division.

(C) A command to a person to produce evidence or to permit inspection may be joined with a subpoena for testimony or may be issued separately under section (b) of this rule.

(2) Notice. Notice to each party of the issuance of a subpoena for testimony is not required; provided that, when a subpoena for testimony also commands the person to whom it is directed to produce evidence or to permit inspection of things, the serving party shall give advance notice of such subpoena in the manner described in subsection (b) of this rule.

(3) Service—How Made. A subpoena for testimony may be served by any suitable person over 18 years of age, by giving the witness a copy thereof, or by leaving a copy at the witness's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When service is made by any person other than an officer authorized to serve process, proof of service shall be made by affidavit or declaration. A subpoena for testimony may also be served by first-class mail, postage prepaid, together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear. Service by mail shall be deemed complete upon the filing of the returned waiver of personal service, signed in affidavit or declaration form.

(4) When Witness Excused. A witness subpoenaed to attend a hearing or trial is excused from further attendance as soon as the witness has given testimony in chief and has been cross-examined thereon, unless a party moves in open court that the witness remain in attendance and the court so orders. Witness fees will not be allowed any witness after the day on which the witness's testimony is given, except when

the witness has in open court been required to remain in further attendance, and when so required the clerk shall note that fact in the minutes.

~~**(b) Subpoena Duces Tecum.**~~

~~(1) Upon application of either party, the court may issue a subpoena duces tecum, commanding the person to whom it is directed to produce books, papers, documents or other objects designated in it. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects, or portions of them, to be inspected by the parties and their lawyers.~~

~~(2) On motion made promptly the court may quash or modify the subpoena duces tecum if compliance would be illegal, unreasonable or oppressive.~~

**(b) For Producing Evidence or Permitting Inspection.** A subpoena commanding a person to produce and permit inspection and copying of designated documents, tangible things, or premises in the possession, custody, or control of that person ("a subpoena for production") shall be issued as follows:

(1) Form; Issuance.

(A) A subpoena for production shall (i) state the title of the action, the case number, the name of the court in which the action is pending, and, if different, the name of the court from which the subpoena is issued; (ii) command each person to whom it is directed to produce and permit inspection and copying of documentary evidence, tangible things, or premises in the possession, custody, or control of that person at a specified time and place; and (iii) set forth the text of subsection (b) (4) of this rule.

(B) The court in which the action is pending or before which attendance is required may issue a subpoena for production under the seal of that court or the clerk may issue the subpoena in response to a praecipe. An attorney for a party also may sign and issue a subpoena for production.

(C) A subpoena for production may be joined with a subpoena for testimony, or it may be issued separately, provided that a subpoena to inspect premises may not be combined with other subpoenas issued pursuant to this rule.

(2) Notice. Notice to parties of the issuance of a subpoena for production is not required provided that, whenever a party intends to serve a subpoena for production seeking evidence or inspection of things or premises belonging or pertaining to a defendant who is not the party seeking or issuing the subpoena, then the serving party must give all parties advance notice; and provided that whenever any party intends to serve a subpoena for production seeking evidence or inspection of things belonging or pertaining to an alleged victim or complaining witness, then the serving party shall provide advance notice to all parties and to the alleged victim or complaining witness; and provided that a subpoena for inspection of premises must be signed by the court and only after good cause is shown and advance notice is provided to all parties and the owner or occupier of the premises.

(A) Time and Manner. If advance notice is required under this rule, then no fewer than five days prior to service on the person named in the subpoena for production, notice shall be provided in the manner prescribed by CR 5(b). The parties may agree to shorten the time for advance notice when a subpoena seeks solely evidence or tan-

gible things belonging or pertaining to a defendant. The court may shorten the time for advance notice upon a showing of good cause by a party; provided that, any alleged victim or complaining witness whose evidence, tangible things, or premises are sought shall receive notice and an opportunity to be heard on any motion to shorten time.

(B) Court May Excuse Notice. A court on ex parte motion may excuse compliance with the advance notice requirement upon the serving party's showing of good cause; any such court order, along with a copy of the subpoena for which notice is excused, shall be filed under seal pursuant to GR 15.

(3) Service—How Made. A subpoena for production shall be served in the manner prescribed in CR 5(b); provided that, if the subpoena for production is joined with a subpoena for testimony, then subsection (a) (3) of this rule shall govern service.

(4) Protection of Persons Subject to Subpoena for Production. On timely motion, the court may quash or modify a subpoena for production if it (A) fails to allow reasonable time for compliance; (B) requires disclosure of privileged or other protected matter and no exception or waiver applies; (C) is unreasonable, oppressive, or unduly burdensome; or (D) exceeds the scope of discovery otherwise permitted under the criminal rules. The court may condition denial of a motion to quash or modify upon the advancement by the party on whose behalf the subpoena for production is issued of the reasonable cost of producing the books, papers, documents, tangible things, or premises.

(5) Applicability of Other Notice and Privacy Provisions. The provisions of this rule do not modify or limit privacy protections and notice requirements provided by court rule, statute, regulation, or other applicable law.

~~(c) Service. A subpoena may be directed for service within their jurisdiction to the sheriff of any county or to any peace officer of any municipality in which the witness may be, or it may be served as provided in CRLJ 45(b), or it may be served by first-class mail, postage prepaid, sent to the witness' last known address. Service by mail shall be deemed complete upon the third day following the day upon which the subpoena was placed in the mail.~~

~~(d) Proof of Service.~~

~~(1) When personal service is made by someone other than a sheriff or peace officer, proof shall be by affidavit or by certification under RCW 9A.72.085 or any law amendatory thereof.~~

~~(2) Proof of service by mail may be by affidavit or certification, under RCW 9A.72.085 or any law amendatory thereof, of the person who mailed the papers, or by written acknowledgment of service.~~

~~(e) Sanctions.~~

~~(1) If at any time during the proceedings it is brought to the court's attention that a party's lawyer has abused the power to issue subpoenas, the court may impose upon the lawyer such terms as are just.~~

~~(2) No subpoena shall be the basis for a material witness warrant or a contempt of court citation unless there is proof of personal receipt.~~

(c) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. No subpoena shall be the basis for a material witness warrant or a contempt of court citation unless there is proof of personal receipt.

**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.

*Supplemental Information*

For the sake of clarity, we set out the wording of CrR 4.8 below and add underlined text where our proposal regarding CrRLJ 4.8 differs from the superior court rule:

**(a) For Attendance of Witnesses at Hearing or Trial.** A subpoena commanding a person to attend and give testimony at a hearing or at trial ("a subpoena for testimony") shall be issued as follows:

(1) *Form; Issuance.*

(A) A subpoena for testimony shall (i) state the title of the action, the case number, the name of the court in which the action is pending, and, if different, the name of the court from which the subpoena is issued; and (ii) command each person to whom it is directed to attend and give testimony at a specified time and place.

(B) (i) The court in which the action is pending or before which attendance is required may issue a subpoena for testimony under the seal of that court, or the clerk may issue the subpoena for testimony in response to a praecipe. (ii) An attorney for a party also may sign and issue a subpoena for testimony unless subsection (iii) of this rule applies. (iii) The judge must approve a subpoena for a witness outside the county or counties contiguous with it unless the witness is an employee of the Washington State Department of Licensing, a Washington police department or sheriff's office, or the Washington State Patrol, including the Washington State Patrol Crime Laboratory Division and the Washington State Patrol Toxicology Laboratory Division.

(C) A command to a person to produce evidence or to permit inspection may be joined with a subpoena for testimony or may be issued separately under section (b) of this rule.

(2) *Notice.* Notice to each party of the issuance of a subpoena for testimony is not required; provided that, when a subpoena for testimony also commands the person to whom it is directed to produce evidence or to permit inspection of things, the serving party shall give advance notice of such subpoena in the manner described in subsection (b) of this rule.

(3) *Service—How Made.* A subpoena for testimony may be served by any suitable person over 18 years of age, by giving the witness a copy thereof, or by leaving a copy at the witness's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When service is made by any person other than an officer authorized to serve process, proof of service shall be made by affidavit or declaration. A subpoena for testimony may also be served by first-class mail, postage prepaid, together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear. Service by mail shall be deemed complete upon the filing of the returned waiver of personal service, signed in affidavit or declaration form.

(4) *When Witness Excused.* A witness subpoenaed to attend a hearing or trial is excused from further attendance as soon as the witness has given testimony in chief and has been cross-examined thereon, unless a party moves in open court that the witness remain in attendance and the court so orders, Witness fees will not be allowed any witness after the day on which the witness's testimony is given, except when

the witness has in open court been required to remain in further attendance, and when so required the clerk shall note that fact in the minutes.

**(b) For Producing Evidence or Permitting Inspection.** A subpoena commanding a person to produce and permit inspection and copying of designated documents, tangible things, or premises in the possession, custody, or control of that person ("a subpoena for production") shall be issued as follows:

(1) *Form; Issuance.*

(A) A subpoena for production shall (i) state the title of the action, the case number, the name of the court in which the action is pending, and, if different, the name of the court from which the subpoena is issued; (ii) command each person to whom it is directed to produce and permit inspection and copying of documentary evidence, tangible things, or premises in the possession, custody, or control of that person at a specified time and place; and (iii) set forth the text of subsection (b)(4) of this rule.

(B) The court in which the action is pending or before which attendance is required may issue a subpoena for production under the seal of that court or the clerk may issue the subpoena in response to a praecipe. An attorney for a party also may sign and issue a subpoena for production.

(C) A subpoena for production may be joined with a subpoena for testimony, or it may be issued separately, provided that a subpoena to inspect premises may not be combined with other subpoenas issued pursuant to this rule.

(2) *Notice.* Notice to parties of the issuance of a subpoena for production is not required provided that, whenever a party intends to serve a subpoena for production seeking evidence or inspection of things or premises belonging or pertaining to a defendant who is not the party seeking or issuing the subpoena, then the serving party must give all parties advance notice; and provided that whenever any party intends to serve a subpoena for production seeking evidence or inspection of things belonging or pertaining to an alleged victim or complaining witness, then the serving party shall provide advance notice to all parties and to the alleged victim or complaining witness; and provided that a subpoena for inspection of premises must be signed by the court and only after good cause is shown and advance notice is provided to all parties and the owner or occupier of the premises.

(A) *Time and Manner.* If advance notice is required under this rule, then no fewer than five days prior to service on the person named in the subpoena for production, notice shall be provided in the manner prescribed by CR 5(b). The parties may agree to shorten the time for advance notice when a subpoena seeks solely evidence or tangible things belonging or pertaining to a defendant. The court may shorten the time for advance notice upon a showing of good cause by a party; provided that, any alleged victim or complaining witness whose evidence, tangible things, or premises are sought shall receive notice and an opportunity to be heard on any motion to shorten time.

(B) *Court May Excuse Notice.* A court on ex parte motion may excuse compliance with the advance notice requirement upon the serving party's showing of good cause; any such court order, along with a copy of the subpoena for which notice is excused, shall be filed under seal pursuant to GR 15.

(3) *Service—How Made.* A subpoena for production shall be served in the manner prescribed in CR 5(b); provided that, if the subpoena

for production is joined with a subpoena for testimony, then subsection (a)(3) of this rule shall govern service.

(4) *Protection of Persons Subject to Subpoena for Production.* On timely motion, the court may quash or modify a subpoena for production if it (A) fails to allow reasonable time for compliance; (B) requires disclosure of privileged or other protected matter and no exception or waiver applies; (C) is unreasonable, oppressive, or unduly burdensome; or (D) exceeds the scope of discovery otherwise permitted under the criminal rules. The court may condition denial of a motion to quash or modify upon the advancement by the party on whose behalf the subpoena for production is issued of the reasonable cost of producing the books, papers, documents, tangible things, or premises.

(5) *Applicability of Other Notice and Privacy Provisions.* The provisions of this rule do not modify or limit privacy protections and notice requirements provided by court rule, statute, regulation, or other applicable law.

**(c) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. No subpoena shall be the basis for a material witness warrant or a contempt of court citation unless there is proof of personal receipt.

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