



# WSBA

## COURT RULES & PROCEDURES COMMITTEE

### **SUPPLEMENTAL MATERIALS**

#### **June 17, 2013 MEETING**

- Don Horowitz e-mail in response to the report from Subcommittee X regarding GR 30 & CR 5 (pp. 419-422)
- RALJ Subcommittee's supplemental/late materials (pp. 423-431)
  - Nan Sullins 11/06/12 e-mail forwarding suggested changes to RALJ 5.4 and RALJ 11.7 to Committee for review (pp. 423-424)
  - RALJ 5.4: King County Prosecuting Attorney's proposed amendment (pp. 425-427)
  - RALJ 5.4: Subcommittee's alternative language (p. 428)
  - RALJ 11.7: King County Prosecuting Attorney's proposed amendment (pp. 429-431)

## Sherry Mehr

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**To:** Donald Horowitz  
**Subject:** RE: June 17, 2013 Court Rules and Procedures Meeting - GR30

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**From:** Donald Horowitz [mailto:don.horowitz@gmail.com]  
**Sent:** Thursday, June 13, 2013 2:17 PM  
**To:** Sherry Mehr  
**Subject:** Re: June 17, 2013 Court Rules and Procedures Meeting - GR30

Dear Sherry,

Relative to the proposed changes in GR 30, I am fully in favor of the intent, but would suggest a few minor word changes for clarification purposes to make sure the intent is clear throughout.

My suggestions are:

New section (4) should read as follows (my new suggestions are in bold face):

"A court may adopt a local rule that mandates electronic filing by attorneys and electronic service of documents **by attorneys** on attorneys for parties of record, provided that the attorneys are not additionally required to file paper copies except or those documents set forth in (b)(2). **Such** electronic service may be made through an electronic transmission directly from the court (where available) or by a parties attorney. Absent such a local rule, **attorneys and** parties may electronically serve documents on other **attorneys and** parties of record only by agreement. The local rule shall not be inconsistent with this Rule and the electronic Filing Technical Standards, and the local rule shall permit paper filing and/or service upon a showing of good cause. Electronic filing **and service** should not serve as a barrier to access."

I hope this is helpful.

By the way, you should know that I was one of the drafters of the original GR30, as well as a member of the committee that revised it a few years later. This is my third time relative to this rule, and it's not surprising, as we knew at the start that as we gained experience and learned, modifications to make the rule better and more useful would be appropriate and necessary.

You are free to share this either before or during the meeting as you see fit. I usually prefer getting something in advance.

Thanks and best wishes,

Don Horowitz  
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On Tue, Jun 11, 2013 at 2:39 PM, Donald Horowitz <[horowitz13@hotmail.com](mailto:horowitz13@hotmail.com)> wrote:

Dear Sherry,

I will be attending the meeting by phone. I will of course be interested in the report on Electronically Stored Information, but will also have brief comments on the proposed changes to GR 30 and ER 901.

Best wishes,

Don Horowitz

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Subject: June 17, 2013 Court Rules and Procedures Meeting

Date: Tue, 11 Jun 2013 10:03:10 -0700

From: [sherrym@wsba.org](mailto:sherrym@wsba.org)

To: [Hillary.Graber@snoco.org](mailto:Hillary.Graber@snoco.org); [gbarton@karrtuttle.com](mailto:gbarton@karrtuttle.com); [katharinebond@gmail.com](mailto:katharinebond@gmail.com); [royb@roythelawyer.com](mailto:royb@roythelawyer.com); [dbrown@williamskastner.com](mailto:dbrown@williamskastner.com); [dchuang@ccdlaw.com](mailto:dchuang@ccdlaw.com); [lclark@scblaw.com](mailto:lclark@scblaw.com); [paul.crisalli@gmail.com](mailto:paul.crisalli@gmail.com); [Anne.cruiser@Clark.wa.gov](mailto:Anne.cruiser@Clark.wa.gov); [maureen@washapp.org](mailto:maureen@washapp.org); [tony@ditommasolaw.net](mailto:tony@ditommasolaw.net); [eric.eisenberg@lewiscountywa.gov](mailto:eric.eisenberg@lewiscountywa.gov); [Sean.Flynn@leg.wa.gov](mailto:Sean.Flynn@leg.wa.gov); [Beth.Fraser@snoco.org](mailto:Beth.Fraser@snoco.org); [DavidI@atg.wa.gov](mailto:DavidI@atg.wa.gov); [kailinj@hotmail.com](mailto:kailinj@hotmail.com); [djohnson@GordonDerr.com](mailto:djohnson@GordonDerr.com); [shannon@triallawyersnw.com](mailto:shannon@triallawyersnw.com); [larsen.bright.shawn@dorsey.com](mailto:larsen.bright.shawn@dorsey.com); [rogerleishman@dwt.com](mailto:rogerleishman@dwt.com); [nicole.mcgrath@teamchild.org](mailto:nicole.mcgrath@teamchild.org); [jeannie@mucklestone.com](mailto:jeannie@mucklestone.com); [kanelson@lbbslaw.com](mailto:kanelson@lbbslaw.com); [bp@zenderthurston.com](mailto:bp@zenderthurston.com); [sragonesi@kbmlawyers.com](mailto:sragonesi@kbmlawyers.com); [David.Stevens@davidstevens.org](mailto:David.Stevens@davidstevens.org); [ann.summers@kingcounty.gov](mailto:ann.summers@kingcounty.gov); [karendw@co.skagit.wa.us](mailto:karendw@co.skagit.wa.us); [kevin.korsmo@courts.wa.gov](mailto:kevin.korsmo@courts.wa.gov); [blaine.gibson@co.yakima.wa.us](mailto:blaine.gibson@co.yakima.wa.us); [Rebecca.robertson@cityoffederalway.com](mailto:Rebecca.robertson@cityoffederalway.com); [elizabetht@wsba.org](mailto:elizabetht@wsba.org); [Nan.Sullins@courts.wa.gov](mailto:Nan.Sullins@courts.wa.gov); [ken@appeal-law.com](mailto:ken@appeal-law.com); [sherrym@wsba.org](mailto:sherrym@wsba.org)

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**To: Members of the WSBA Court Rules & Procedures Committee, Liaisons, and Nonmember Participants**

**Date and Time of Meeting:** Monday, **June 17, 2013**, from 9:30 a.m. – 1:00 a.m.

**Place of Meeting:** WSBA offices, 1325 – 4<sup>th</sup> Avenue, Suite 600, Seattle.

**Agenda and Materials:** Attached

**Dial-In-Instructions:** Dial access number: [1-866-577-9294](tel:1-866-577-9294); dial the entry code when prompted: **55419#** [Once you enter the code, you will hear a “beep” as you join in the conference. A voice will ask you to state your name as our new system has roll call capability].

***Please RSVP to Sherry Mehr by replying to this email and stating whether you will attend in person, attend by telephone, or will not attend.***

Thank you,

Sherry

**Sherry Mehr**

**Paralegal | Office of General Counsel | Washington State Bar Association**

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## Sherry Mehr

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**To:** Elizabeth Turner  
**Subject:** RE: RALJ 5.4 and RALJ 11.7

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**From:** Sullins, Nan [<mailto:Nan.Sullins@courts.wa.gov>]  
**Sent:** Tuesday, November 06, 2012 1:39 PM  
**To:** 'hillary.evans@co.snohomish.wa.us'; Elizabeth Turner  
**Cc:** 'Jessica.Manca@kingcounty.gov'  
**Subject:** RALJ 5.4 and RALJ 11.7

Dear Hillary and Elizabeth:

Justice Charles Johnson, the chair of the Supreme Court Rules Committee, asked me to forward the suggested changes to RALJ 5.4 and RALJ 11.7 to the WSBA Court Rules and Procedures Committee to review and make recommendations upon.

Thanks,  
Nan

Nanette B. Sullins  
AOC Legal Services Manager  
360.357.2124  
360.357.2127 (fax)

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**From:** Manca, Jessica [<mailto:Jessica.Manca@kingcounty.gov>]  
**Sent:** Friday, October 12, 2012 2:40 PM  
**To:** Madsen, Justice Barbara A.  
**Subject:** GR 9 Suggested Rule Changes

Your Honor,

Nan Sullins advised me that electronic copies of GR 9 suggested rule changes should be sent directly to you.

Attached please find electronic copies of suggested rule changes to RALJ 5.4 and RALJ 11.7, along with accompanying GR 9 cover sheets.

Sincerely,

Jessica Murphy Manca

Deputy Prosecuting Attorney  
Criminal Division  
District Court- RALJ Deputy  
King County Prosecuting Attorney's Office  
Tel: (206) 296-9544  
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## GR 9 COVER SHEET

### Suggested Rule Change

#### RALJ 5.4

#### Application of Other Court Rules – Rules of Appellate Procedure

**PURPOSE:** The Office of the King County Prosecuting Attorney is suggesting a change to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), to clarify the scope of a “new trial” mandated in the event of a lost electronic record.

All proceedings in courts of limited jurisdiction are preserved through an electronic record. Unfortunately, these records are occasionally lost or destroyed through computer or microphone malfunction. RALJ 5.4 provides that the remedy for a lost electronic record is “a new trial.” The purpose of this suggested change is to clarify the meaning of a “new trial” when the lost or damaged electronic record pertains to a pretrial hearing, not a trial.

When a lost or damaged record pertains to the trial, RALJ 5.4’s remedy is logical and easily applied on remand. However, if the lost or damaged record pertains to a pretrial hearing, the remedy is more complicated and difficult to apply. Courts of limited jurisdiction need guidance on this issue.

For example, if the lost electronic record pertains to a pretrial CrRLJ 3.5 hearing, rather than a trial, then what is the scope of the “new trial” on remand? In this situation, RALJ 5.4’s remedy is ambiguous. Obviously, the appellant should be entitled to relitigate the CrRLJ 3.5 hearing for which the record was lost or destroyed. However, RALJ 5.4 does not specify that the appellant is entitled to relitigate the CrRLJ 3.5 hearing; it specifies that the appellant is entitled to “a new trial.”

Assuming that “a new trial” allows the appellant to relitigate pretrial matters for which the record was lost or destroyed, it is still unclear whether the appellant is entitled to relitigate pretrial matters for which the electronic record survived.

Take, for example, a case in which a CrRLJ 3.6 suppression hearing was held on a different date than a CrRLJ 3.5 hearing. If the record of the CrRLJ 3.6 suppression hearing survived but the record of the CrRLJ 3.5 hearing was destroyed, should the appellant be entitled to relitigate both the CrRLJ 3.5 hearing and the CrRLJ 3.6 suppression hearing? Because RALJ 5.4 protects an appellant’s right to obtain appellate review, and the appellant can obtain appellate review of any hearing for which the electronic hearing survived, the trial court should not be required to relitigate a hearing with a viable record that remains subject to appellate review. In that situation, relitigation of all pretrial matters is a waste of the court’s limited resources and an unnecessary windfall to the appellant.

However, there are circumstances in which the lost record from one pretrial hearing may affect the proceedings in a subsequent pretrial hearing. For example, if the testimony at a CrRLJ 3.5 hearing affected the court’s ruling at a subsequent CrRLJ 3.6 hearing, then the hearings are materially related and the appellant should be



entitled to relitigate both hearings.

Finally, there is also a question as to whether the appellant should receive a new trial when the record of a pretrial hearing is lost but the record of the trial survived. If the relitigation of the lost pretrial hearing would not affect the trial, there is no reason to hold a new trial. The trial record is still subject to review on appeal. A new trial should be held only if relitigation of a pretrial matter affects the evidence at trial.

The remedy provided by RALJ 5.4 lacks specificity. In its current form, the rule presumes that pretrial matters and trial are heard at the same time, such that any loss of an electronic record necessarily implies the loss of a trial record. In practice, however, courts of limited jurisdiction hold numerous pretrial hearings prior to trial. Some of those pretrial hearings affect trial, and some do not.

The proposed amendment to RALJ 5.4 clarifies that the remedy for a lost or damaged record of a pretrial hearing is relitigation of the pretrial hearing for which the electronic record was lost or destroyed. The trial court need not relitigate a pretrial hearing or trial for which the electronic record survived, unless the appellant can demonstrate that a pretrial hearing or trial was materially affected by the lost electronic record.

Spokesperson:

Jessica Murphy Manca  
Deputy Prosecuting Attorney  
Office of the King County Prosecuting Attorney

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1 **RALJ 5.4 LOSS OR DAMAGE OF ELECTRONIC RECORD**

2 In the event of loss or damage of the electronic record, or any significant or material  
3 portion thereof, the appellant, upon motion to the superior court, shall be entitled to a new trial,  
4 but only if the loss or damage of the record is not attributable to the appellant's malfeasance.  
5 <<<+++>> If the lost record pertains to material or significant pretrial matter, the appellant  
6 shall be entitled to a new hearing on the matter for which the record was lost or destroyed. The  
7 trial court will not relitigate a pretrial matter or a trial for which there is an electronic record  
8 subject to appellate review, unless the appellant demonstrates that the pretrial matter or the trial  
9 was materially affected by the lost electronic record. <<<+++>> In lieu of a new trial, the  
10 parties may stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited  
11 jurisdiction shall have the authority to determine whether or not significant or material portions  
12 of the electronic record have been lost or damaged, subject to review by the superior court upon  
13 motion.

**SUGGESTED AMENDMENT**  
**RULES FOR APPEAL OF DECISIONS OF COURTS OF**  
**LIMITED JURISDICTION (RALJ)**  
**RULE 5.4 – LOSS OR DAMAGE OF ELECTRONIC RECORD**

1           In the event of loss or damage of the electronic record, or any significant or material  
2 portion thereof, the appellant, upon motion to the superior court, shall be entitled to a new trial,  
3 but only if the loss or damage of the record is not attributable to the appellant’s malfeasance. If  
4 the lost record pertains to material or significant pretrial matter, the appellant shall be entitled to  
5 a new hearing on the matter for which the record was lost or destroyed. The trial court will not  
6 relitigate a pretrial matter or a trial for which there is an electronic record subject to appellate  
7 review, unless the ~~appellant demonstrates~~ **trial court determines** that the pretrial matter or the  
8 trial was materially affected by the lost electronic record. In lieu of a new trial, the parties may  
9 stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited jurisdiction  
10 shall have the authority to determine whether or not significant or material portions of the  
11 electronic record have been lost or damaged, subject to review by the superior court upon  
12 motion.  
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## GR 9 COVER SHEET

### Suggested Rule Change

#### RALJ 11.7(e)

#### Application of Other Court Rules – Rules of Appellate Procedure

**PURPOSE:** The Office of the King County Prosecuting Attorney is suggesting a change to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), to expressly allow the application of appropriate Rules of Appellate Procedure in appeals from courts of limited jurisdiction.

The purpose of this suggested change is to clarify that the enumerated Rules of Appellate Procedure supplement the Rules for Appeal of Decisions of Courts of Limited Jurisdiction when these rules do not conflict and when application is practicable. Currently, common appellate procedures permitted by the Rules of Appellate Procedure are not expressly incorporated under the RALJ.

Specifically, the RALJ do not provide a mechanism for moving to strike a brief that fails to comply with Title 7. Compare RAP 10.7. The RALJ do not provide a standard for consolidating cases on appeal. Compare RAP 3.3. The RALJ do not define the scope of issues that may be raised for the first time on review, nor do they define the scope of review for a case that has returned to the appellate court following remand. Compare RAP 2.5. The RALJ do not expressly permit a statement of additional authorities. Compare RAP 10.8. The RALJ do not give the court of limited jurisdiction the authority to settle the record. Compare RAP 7.2

The RALJ allow a respondent to seek cross-review of a decision of the court of limited jurisdiction. RALJ 2.1(a). However, unlike the Rules of Appellate Procedure, the RALJ do not specify the scope of cross-review. Compare RAP 2.4(a).

The RALJ provide a streamlined procedure for appeals from courts of limited jurisdiction. However, in the aforementioned circumstances, the RALJ procedure would benefit from limited application of the more clearly defined Rules of Appellate Procedure.

#### Spokesperson:

Jessica Murphy Manca  
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1 **RALJ 11.7 APPLICATION OF OTHER COURT RULES**

2 **(a) Civil Rules.** The following Superior Court Civil Rules are applicable to appellate  
3 proceedings in civil cases in the superior court when not in conflict with the purpose or intent of  
4 these rules and when application is practicable: CR 1 (scope of rules), CR 2A (stipulations), CR  
5 6 (time), CR 7(b) (form of motions), CR 11 (signing of pleadings), CR 25 (substitution of  
6 parties), CR 40(a)(2) (notice of issues of law), CR 42 (consolidation; separate trials), CR 46  
7 (exceptions unnecessary), CR 54(a) (judgments and orders), CR 60 (relief from judgment or  
8 order), CR 71 (withdrawal by attorney), CR 77 (superior courts and judicial officers), CR 78  
9 (clerks), CR 79 (books and records kept by the clerk), CR 80 (court reporters), and CR 83 (local  
10 rules of superior court).

11 **(b) Criminal Rules.** The following Superior Court Criminal Rules are applicable to  
12 appellate proceedings in criminal cases in the superior court when not in conflict with the  
13 purpose or intent of these rules and when application is practicable: CrR 1.1 (scope), CrR 1.2  
14 (purpose and construction), CrR 1.4 (prosecuting attorney definition), CrR 3.1 (right to and  
15 assignment of counsel), CrR 7.1 (sentencing), CrR 7.2 (presentence investigation), CrR 8.1  
16 (time), CrR 8.2 (motions), CrR 8.5 (calendars), CrR 8.6 (exceptions unnecessary), CrR 8.7  
17 (objections), and CrR 8.8 (discharge).

18 **(c) Civil Rules for Courts of Limited Jurisdiction.** The following Civil Rules for  
19 Courts of Limited Jurisdiction are applicable to appellate proceedings in civil cases in the court  
20 of limited jurisdiction when not in conflict with the purpose or intent of these rules and when  
21 application is practicable: CRLJ 5 (service and filing), CRLJ 6 (time), CRLJ 7(b) (motions),  
22 CRLJ 8 (general rules of pleading), CRLJ 10 (form of pleadings), CRLJ 11 (verification and  
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1 signing of pleadings), CRLJ 25 (substitution of parties), CRLJ 40(b) (disqualification of judge),  
2 and CRLJ 60 (relief from judgment or order).

3       **(d) Criminal Rules for Courts of Limited Jurisdiction.** The following Criminal Rules  
4 for Courts of Limited Jurisdiction are applicable to appellate proceedings in criminal cases in the  
5 court of limited jurisdiction when not in conflict with the purpose or intent of these rules and  
6 when application is practicable: CrRLJ 1.7 (local court rules--availability), CrRLJ 1.5 (style and  
7 form), CrRLJ 3.1 (right to and assignment of lawyer), CrRLJ 8.9 (disqualification of judge),  
8 CrRLJ 8.9(c) (disqualification of judge--transfer), CrRLJ 7.8(a) (clerical mistakes), CrRLJ 8.1  
9 (time), and CrRLJ 8.2 (motions). (Editorial Note: Effective September 1, 1987, Justice Court  
10 Criminal Rules (JCrR) were retitled Criminal Rules for Courts of Limited Jurisdiction (CrRLJ).  
11 Effective September 1, 1989, Justice Court Civil Rules (JCR) were retitled Civil Rules for Courts  
12 of Limited Jurisdiction (CRLJ).)

13 <<++++>> **(e) Rules of Appellate Procedure.** The following Rules of Appellate Procedure are  
14 applicable to appellate proceedings in criminal cases in the court of limited jurisdiction when not  
15 in conflict with the purpose or intent of these rules and when application is practicable: RAP  
16 2.4(a) (scope of review), RAP 2.5 (circumstances which may affect the scope of review), RAP  
17 3.3 (consolidation of cases), RAP 7.2(b) (authority of trial court to settle the record), RAP 10.7  
18 (submission of improper brief), RAP 10.8 (additional authorities). <<++++>>