Washington State Bar Association

COURT RULES AND PROCEDURES COMMITTEE

2009-2010 ROSTER

(Updated 09/25/09)

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2009-2010 Meeting Schedule

October 19, 2009

November 16, 2009

No Meeting in December.

January 11, 2010

February 8, 2010

March 15, 2010

April 19, 2010

May 17, 2010

June 21, 2010

July 19, 2010

August 30, 2010

WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes
June 15, 2009

Committee Chair Roger Wynne called the meeting to order at 9:35 am.

Members present: Aaron Adee, Timothy Ashcraft (by phone), Manish Borde (by phone), Thomas G. Crowell, Anthony J. DiTommaso, Jr. (by phone), Rebecca Engrav, Hillary Evans (by phone), Boris Gaviria (by phone), John J. Juhl (by phone), James H. Kaufman (by phone), Horace Lee (by phone), Barbara McInvaiile (by phone), Todd L. Nunn, Rebecca C. Robertson, Karl F. Sloan (by phone), Nancy L. Talner (by phone), and Neil R. Wachter (by phone). Also attending were Judge Blaine Gibson (by phone), Nan Sullins (AOC Liaison), Makaliki Aholowaa (an associate of Rebecca Engrav), Elizabeth Turner (WSBA Liaison), and Anna Schmidt (WSBA Paralegal). Excused were Carrie L. Bashaw, Steven R. Buzzard, Dianna Caley, Dana Ferestein, James F. Gooding, Howard Goodfriend, Todd W. Howard, Suchi Sharma, and Lisa Williams.

Rebecca introduced her guest, Makaliki Aholowaa. The Chair asked if everyone has a copy of MAR 6.4 (the supplemental materials), which will be added to the agenda at the end of the meeting.

Minutes: Mr. Wynne pointed out that, on page 7, on the third line "he" should be changed to "the." The minutes, with that minor change, were approved by consensus.

Chair's Report: Marc Silverman, a non-member participant with our committee, will be on the BOG beginning this September. The Chair and Ms. Turner are currently putting together their report for the BOG, including proposals from the Committee. Mr. Wynne invited anyone who was interested to attend that BOG meeting, which will be held July 24 and 25 at the Tulalip Casino & Resort.

RAP Subcommittee: Subcommittee chair Ken Masters presented the subcommittee's suggested amendments to RAP 5.2, and noted that one small change had been made at the request of Chair Wynne (a "which" to "that" in the third line of the rule). The goal of the proposed amendment is to eliminate what has been for a long time a "trap for the wary." The subcommittee's motion to approve is approved by consensus.

ESI Subcommittee: Subcommittee chair Todd Nunn moved that the committee approve a language tweak to CR 26(f) [see p. 423]. This change to the proposed amendment previously approved by the committee is intended to capture situations where a pro se party might propose a discovery plan. Mr. Masters seconded the motion. The motion was approved by consensus.

Subcommittee X: While assisting in the preparation of the GR 9 sheets, subcommittee chair Rebecca Engrav realized that MAR 6.4 did not contain headings. Ms. Engrav submitted a revised version of the previously approved amendment, with headings, a minor change to 6.4(c) from the word "subsection" to "section," and a changed title to "Costs and Attorney Fees." Ms. Engrav moved to accept her proposed changes, which was seconded by Mr. Crowell. Mr. Masters asked if this rule has gone before the BOG. Ms. Turner stated that it has not.

Judge Gibson questioned whether the original title, referring to witness fees, should stay the same as there is a subsection still referring to witness fees. Ms. Engrav explained that the title should perhaps be changed to "costs and fees." Discussion ensued about whether to keep the title to a generic "costs and fees." Ms. Talner felt that specifying attorney's fees would add clarity. Mr. Adee thought it might be better to keep it broad. Ms. Engrav accepted the friendly amendment to change the title to "Fees and Costs". Mr. Wynne questioned whether the language in subsection (d) should then also be broadened to "fees." Mr. Crowell felt it should be left at "fees" to include expert fees. Mr. Masters suggested taking out the word "other" in subsection (d) when discussing costs because you don't want to include costs as a type of fee. Mr. Crowell explained why we would want to leave it at just fees and costs (instead of narrowing it to attorney fees and witness costs). Court Rules and statutes decide what fees and costs individuals will receive and changing this rule won't broaden that.

Ms. Engrav clarified that the motion on the table is to change the title to read "costs and attorney fees." Judge Gibson opined that statutes show a distinction between "costs and disbursements," although the term "disbursement" is not used as much. Mr. Kaufman moved to table the motion. There was no second so Mr. Kaufman's motion was dropped. Ms. Engrav moved to strike the first sentence through "proceedings" and add "Any award of costs and attorney fees shall…" Mr. Kaufman seconded Ms. Engrav's motion. Mr. Adee had an alternate wording for (d), "Any award under this rule…" and then continued on with "shall be payable…" Ms. Engrav did not feel it would be as consistent as the language she proposed, and did not accept Mr. Adee's friendly amendment. Judge Gibson opined that we need to remember that when this rule began, arbitrators never decided costs and attorney fees (only judges made those decisions). He thinks that is why this rule was written this way. Judge Gibson suggested going with Rebecca's language or striking subsection (d) altogether but supported Rebecca's language and the current motion Ms. Engrav's motion was approved by consensus.

Mr. Wynne announced that this is his last meeting as Chair, as well as the last meeting of the season. He thanked the veterans who have been on the committee. Mr. Wynne stated that the president elect will be making the appointment of the new Chair.

Mr. Wynne adjourned the meeting at 10:21am

Prepared by:
Elizabeth Turner (WSBA Staff Liaison)
With the assistance of Anna Schmidt (WSBA Paralegal)

WSBA

COURT RULES & PROCEDURES COMMITTEE

October 8, 2009

Honorable Charles Johnson
Washington Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

RE: WSBA Annual Submittal of Court Rules Materials

Dear Justice Johnson:

Enclosed is a copy of the 2008-2009 "Summary of Actions," a report provided to the WSBA Board of Governors by the WSBA Court Rules and Procedures Committee. Please use it as a guide for processing the memoranda enclosed with this letter.

As outlined in the first half of the Summary of Actions, the WSBA Board of Governors acted on four categories of recommendations from the WSBA Court Rules and Procedures Committee. One category (Item I.C in the Summary) comprised approximately 30 draft amendments to various RAPs submitted by the Court of Appeals to the WSBA for consideration. The Board provided the WSBA's recommendations directly to the Court of Appeals in March 2009, and we understand that the Court of Appeals will be submitting to you a slate of proposed RAP amendments that, with few exceptions, follows the WSBA's recommendations. We are therefore submitting nothing directly to you regarding that category.

Each of the other three categories outlined in the first part of the Summary involves a significant amount of material. To make that material easier to process, we are enclosing a separate memorandum summarizing the WSBA's recommendations regarding each category and attaching the material relevant to that category:

1. WSBA Proposals;

2. CR 26 & 45; responding to comments on the WSBA's proposed "claw back" amendments; and

3. WSBA Positions Regarding Amendments Proposed by Entities and Individuals (other than the Court of Appeals).

As you will see in the second half of the Summary, the WSBA Court Rules and Procedures Committee will be addressing a number of "carry over" items—including requests for input from the Supreme Court—in addition to paying particular attention to the criminal law rules, which return in 2009-2010 in the four-year, rule-review cycle.

If you have any questions about the enclosed materials, please direct them to me (I provide my contact information below) or Elizabeth Turner, WSBA Assistant General Counsel and Staff Liaison to the Court Rules and Procedures Committee (206-239-2109; elizabetht@wsba.org).

This season brings to a close my three-year tenure as Chair of the WSBA Court Rules and Procedures Committee. It has been a pleasure working with you and Nan Sullins during that time. As the Committee's new season commences this month, it will be under the leadership of Kenneth Masters, who I know is no stranger to you and your colleagues, and who I am confident will do a tremendous job carrying on the Committee's tradition of being of service to you, the Board of Governors, and all those who seek justice in our courts.

Sincerely,

Roger Wynne, 2008-2009 Chair,
WSBA Court Rules & Procedures Committee
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769
206-233-2177
roger.wynne@seattle.gov

Enclosures:

- WSBA Court Rules and Procedures Committee 2008-2009 "Summary of Actions"
- Memo #1: WSBA Proposals (with enclosures);
- Memo #2: CR 26 & 45; responding to comments on the WSBA's proposed "claw back" amendments (with enclosures); and
- Memo #3: WSBA Positions Regarding Amendments Proposed by Entities and Individuals (other than the Court of Appeals; with enclosures).

cc (w/ enclosures):

Nanette Sullins, Administrative Office for the Courts
Salvador Mungia, President, WSBA
Kenneth Masters, Chair, WSBA Court Rules & Procedures Committee
Elizabeth Turner, Staff Liaison, WSBA Court Rules & Procedures Committee

WSBA

COURT RULES & PROCEDURES COMMITTEE

September 25, 2009

2008-2009 Review Year Summary of Actions (*Final*)

I. Matters Acted On by the Board of Governors

A. Amendments Proposed by the WSBA Court Rules and Procedures Committee

The Board of Governors recommended that the Supreme Court adopt the following court rules amendments, which were proposed by the WSBA Court Rules and Procedures Committee:

- **RAP 5.2 (a) and (b)** [setting a deadline for filing a motion for discretionary review when a motion for reconsideration is pending].
- **RAP 12.5(b)** [clarifying the timing of the court's issuance of a mandate when a party has filed a motion to publish the court's decision].
- **ER 502 (new)** [providing substantive standards for resolving claims of inadvertent disclosure of privileged material].
- **ER 1101(c)(3)** [clarifying that certain juvenile court hearings are exempt from the Rules of Evidence].
- **CR 43(a)(1)** [following a federal rule allowing testimony by contemporaneous transmission where appropriate].

B. Response to the Supreme Court's Request for Review of Comments on the WSBA's 2008 "Claw Back" Proposals

At the request of the Supreme Court, the Board of Governors reviewed and prepared responses to comments received by the Supreme Court on the WSBA's 2008 proposals to amend CR 26 and 45. As part of that review, the Board recommended the following:

- **CR 26** [**no revision** to the WSBA's 2008 proposal to add a discovery "claw back" provision similar to the federal rule]; and
- **CR 45** [**revise** the WSBA's 2008 proposal to add a subpoena "claw back" provision and conform the method of subpoena service to CR 5 by amending the form subpoena to indicate the proposed method of recording a deposition and by clarifying the GR 9 cover sheet for the proposal].

C. Draft Amendments Proposed by the Court of Appeals

At the request of the Court of Appeals, the Board of Governors considered approximately 30 draft amendments to various RAPs and forwarded the WSBA's recommendations to the Court of Appeals for its consideration. The WSBA understands that the Court of Appeals will be submitting to the Supreme Court a slate of proposed RAP amendments that, with few exceptions, follows the WSBA's recommendations.

D. Amendments Proposed by Other Entities and Individuals

The Board of Governors considered the proposals submitted by the entities and individuals identified below. Most, but not all, of these proposals were first submitted to the Supreme Court, which requested WSBA review. The Board of Governors took the following positions regarding these proposals:

The Office of Public Defense:

- **RAP 5.3 and 15.2, and Forms 12, 12A, and 13** [clarifying the procedures for determining indigency for purposes of appeal]: **endorse with suggested modifications.**
- **RAP 6.2** [ensuring that appellate counsel have adequate time to prepare a motion for discretionary review after appointment by the Court of Appeals]: **endorse**.
- **RAP 9.2** [clarifying that closing argument may be transcribed at public expense without specific authorization by the trial court]: **endorse with suggested modification.**
- **RAP 15.5** [extending the time for determining claimed expenses from 10 days to 15 days]: **endorse.**

Washington Appellate Lawyers Association:

- **RAP 9.6(c)** [encouraging court clerks to number and compile clerk's papers in electronic format]: **endorse with suggested modifications**.
- **RAP 11.3** [establishing a process for seeking recusal of appellate judges]: **endorse with suggested additional amendment to RAP 17.2(a)**.
- **RAP 18.1(h)** [clarifying that an award of fees and costs on appeal is a sum certain on which prejudgment interest should accrue]: **endorse**.

Amici curiae counsel:

- **RAP 10.2(f)** [lengthening the time to file an amicus curiae brief]: **oppose**.

- **RAP 10.6(d)** [shortening the time to object to a motion to file an *amicus curiae* brief from five days to two days]: **oppose**.

Alan Parmalee:

- **Various CRs** [suggesting categories of amendments to address the process by which courts process Public Records Act cases]: **oppose**.

Washington Association of Prosecuting Attorneys:

- **RAP 2.2(a)(10) and (11)** [eliminating an appeal as a matter of right for a defendant whose CrR 7.8 motion to vacate judgment is denied]: **oppose**

- **RAP 2.2(b)(5)** [granting the state the ability to appeal a pre-sentencing withdrawal of a guilty plea as a matter of right]: **oppose**.

- **RAP 2.2(b)(6) and (7)** [allowing the state to appeal sentences that are unauthorized or omit a required provision]: **endorse with modifications**.

- **RAP 12.3** [requiring the clerk of the appellate court to transmit a copy of a decision terminating review in a criminal case directly to the defendant]: **oppose**.

- **RAP 14.3** [specifically enumerating fees paid for court-appointed counsel (as authorized by RCW 10.73.160) among the items that may be awarded as costs when the state prevails in an appeal]: **oppose.**

- **RAP 16.15(h)** [directing litigants to RCW 10.73.150, which governs the appointment of counsel at public expense in personal restraint petitions]: **oppose**.

- **RALJ 2.2(c)(2)(b)** [allowing the state to appeal an order suppressing evidence under certain circumstances]: **oppose.**

- **RALJ 2.2(c)(5)** [granting the state the ability to appeal a pre-sentencing withdrawal of a guilty plea as a matter of right]: **oppose**.

- **RALJ 9.3(c)** [specifically enumerating fees paid for court-appointed counsel (as authorized by RCW 10.73.160) among the items that may be awarded as costs when the state prevails in an appeal]: **oppose**.

- **RALJ 10.2(a)(2)** [establishing a procedural mechanism for obtaining an involuntary dismissal of an appeal for want of prosecution]: **oppose.**

II. Other Committee Activity

A. Other matters addressed by the WSBA Court Rules and Procedures Committee

The Committee or its chair addressed several other matters that required no formal Board action:

- **Proposed Family Law Civil Rules**. Volunteers from the Rules Committee reviewed and offered editorial suggestions to the draft state-wide Family Law Civil Rules proposed by the WSBA's Local Rules Task Force.

- **Review of draft deposition transcript.** After consultation with the Rules Committee chair, an attorney opted not to pursue through a rules amendment a remedy to a situation in which a transcriptionist would allow the non-party deponent to review a draft transcript only by purchasing a copy or traveling to the transcriptionist's office.

- **RPC 1.15A.** The Committee chair forwarded to the WSBA RPC Committee a proposed amendment to RPC 1.15A that the Legal Foundation of Washington mistakenly submitted to the Rules Committee.

B. Matters on which the Committee decided to take no further action (all were internal Committee proposals)

- **CR/CRLJ 50 and CR/CRLJ 59** [whether to extend the time period for filing motion for new trial/reconsideration from 10 to 14 days].

- **CR 45** [whether to clarify whom to service with a notice of deposition and with a subpoena when deposing a third party].

C. Matters still pending in Committee (expected to carry over to the 2009-2010 review year)

- **MAR 3.2, 6.3, 6.4, and 7.1** [responding to the Supreme Court's and the Board's requests to reexamine the proposed amendment to the time limit for filing a request for a trial de novo, including amending related rules].

- **CR 26, 33, 34, 37 and 45** [conforming, where appropriate, to the 2006 federal amendments dealing specifically with the challenges posed by the discovery of electronically stored information].

- **CrR 4.8** [responding to the Supreme Court's request for review of comments on the WSBA's 2008 proposal to redraft the criminal subpoena rule].

- **CrRLJ 7.3** [responding to the Supreme Court's request for WSBA review of a proposal to amend this rule regarding judgment, and of a comment on that proposal].

TO: Honorable Charles Johnson, Washington State Supreme Court

FROM: Roger Wynne, 2008-2009 Chair, WSBA Court Rules & Procedures Committee

SUBJECT: WSBA Annual Submittal of Court Rules Materials, 2008-2009;
Memo #1: WSBA Proposals

DATE: September 25, 2009

The WSBA Board of Governors recommends that the Supreme Court adopt the following court rules amendments, which were proposed by the WSBA Court Rules and Procedures Committee. Enclosed with this memo are GR 9 cover sheets and the text of these suggested amendments.

A. RAP 5.2 (a) and (b): Set a deadline for filing a motion for discretionary review when a motion for reconsideration is pending.

The current version of RAP 5.2(b) does not address the deadline for filing a motion for discretionary review where the would-be appellant first seeks reconsideration of the subject action by the trial court. The WSBA proposes filling that gap in a manner that conforms to existing appellate court practice.

B. RAP 12.5(b): Clarify the timing of the court's issuance of a mandate when a party has filed a motion to publish the court's decision.

The WSBA proposes to resolve a conflict between RAP 12.5(b) and RAP 13.4(a) over the timing of the court's issuance of a mandate when a party has filed a motion to publish the court's decision.

C. ER 502 [new]: Provide substantive standards for resolving claims of inadvertent disclosure of privileged material.

As discussed in Memo #2, the WSBA last year proposed adding "claw back" provisions to CR 26 and 45. Those provisions are only procedural. They set up a process by which to assert and resolve claims of an inadvertent production of privileged communications or work product. They do not affect the law that controls the substance of those claims.

In September 2008, a new federal rule—FRE 502—took effect that establishes standards by which to resolve instances of inadvertent disclosure and waiver of the attorney-client privilege and work product protection. The WSBA Court Rules and

Procedures Committee reviewed the language of FRE 502 and its Advisory Committee Notes, researched and analyzed Washington law regarding attorney client privilege and the work product doctrine, and considered a number of materials, including:

- correspondence from the Advisory Committee on Evidence Rules to the Senate Judiciary Committee summarizing the proposed federal rule;

- other state laws that have adopted some version of the rule in their evidence rules, civil rules, or both (including rules in Arizona, Louisiana, and Arkansas);

- cases interpreting FRE 502 (*e.g., Rhoads Industries v. Building Materials Corp.*, 254 F.R.D. 216 (E.D.Pa. 2008)); and

- Washington cases, including *Sitterson v. Evergreen School District No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008).

Although the WSBA Court Rules and Procedures Committee circulated a draft new ER 502 to stakeholder groups for comment, the proposal garnered no opposition. The WSBA now recommends that the Supreme Court adopt it.

D. ER 1101(c)(3): Clarify that certain juvenile court hearings are exempt from the Rules of Evidence.

This proposal would clarify the exemption of certain juvenile court hearings from the Rules of Evidence. Statutory references in the current rule are both incorrect and under-inclusive. In their place, the proposal would refer to the exempt juvenile court hearings through specific terms of art that are well understood by practitioners in juvenile law. The WSBA Court Rules and Procedures Committee carefully vetted this proposal with such practitioners.

E. CR 43(a)(1): Testimony by contemporaneous transmission where appropriate.

This proposal would alter CR 43(a)(1) to mirror its federal counterpart to expressly give courts the authority to allow testimony "by contemporaneous transmission from a different location" (such as by video or telephone transmission) "for good cause in compelling circumstances and with appropriate safeguards." Because the federal law regarding this high standard is well developed, the proposed GR 9 cover sheet conveys the drafters' intent that Washington courts interpreting this language seek guidance from relevant federal authority, including the Advisory Committee Notes to the amendment that added this language to the federal rules.

Enclosures: GR 9 cover sheets and proposed amendments for:

1. RAP 5.2;
2. RAP 12.5;
3. ER 502;
4. ER 1101; and
5. CR 43.

GR 9 COVER SHEET

Suggested Amendment
RULES OF APPELLATE PROCEDURE (RAP)
Rule 5.2 – Time Allowed to File Notice)

(Clarifies the timing of a notice of discretionary review
when a motion for reconsideration is filed)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

Roger Wynne, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-233-2177)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. Purpose: This suggested amendment clarifies the current practice of the appellate courts to consider a notice of discretionary review timely if it is filed within 30 days of an order deciding a timely motion for reconsideration of the act that the party filing the notice wants reviewed. In what appears to be an oversight, the current version of RAP 5.2(b) does not address this situation. This suggested amendment also provides grammatical clarity in the parallel provision of section 5.2(a).

D. Hearing. A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

SUGGESTED AMENDMENT
RULES OF APPELLATE PROCEDURE (RAP)
RAP 5.2 – Time Allowed to File Notice

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court ~~which~~ that the party filing the notice wants reviewed, or (2) the time provided in section (e).

(b) Notice for Discretionary Review. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice for discretionary review must be filed in the trial court within the longer of (1) 30 days after the act of the trial court ~~which~~ that the party filing the notice wants reviewed, or (2) 30 days after entry of an order deciding a timely motion for reconsideration of that act under CR 59.

[(c) - (g) unchanged.]

GR 9 COVER SHEET

Suggested Amendment
RULES OF APPELLATE PROCEDURE (RAP)
Rule 12.5 – Mandate

(Clarifies when the Court of Appeals will issue a mandate)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

Roger Wynne, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-233-2177)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. Purpose: Under the current version of RAP 12.5(b), the Court of Appeals will issue its mandate 30 days after a decision is filed unless a timely motion for reconsideration has already been filed. The current version of the rule authorizes issuance of the mandate even though a timely motion to publish has been filed pursuant to RAP 12.3(e). However, under RAP 13.4(a), a party may petition for review by the Supreme Court 30 days from a determination of a timely motion to publish. It is therefore possible that the mandate will issue (because no motion for reconsideration was filed) even though the Court of Appeals is considering a motion to publish, the resolution of which should trigger an opportunity to seek review by the Supreme Court.

The suggested amendment resolves this conflict between RAP 12.5(b) and RAP 13.4(a) essentially by deferring to the time limits in the latter rule. In dealing with motions for reconsideration and to publish, the suggested amendment to RAP 12.5(b)(2) ties issuance of the mandate to the existing deadline for filing a petition for review in RAP 13.4(a). In this way, the mandate will not issue until after the opportunity to petition for review has passed.

This suggested amendment does *not* add a motion to publish to the list in the first sentence of RAP 12.5(b) of pleadings that the parties can stipulate not to file in order to accelerate issuance of the mandate. If the parties make the stipulation as currently provided in the first sentence, the rest of section (b)—including the suggested provision

about a motion to publish—would not apply, so there will be no conflict: the mandate will issue notwithstanding the motion to publish and the parties will have already agreed not to seek review by the Supreme Court. If the parties want to stipulate about a motion for reconsideration and petition for review, they are free to work out between them whether that stipulation is contingent on either of them refraining from filing a motion to publish.

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

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

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

SUGGESTED AMENDMENT
RULES OF APPELLATE PROCEDURE (RAP)
RAP 12.5 – Mandate

[(a) unchanged]

(b) When Mandate Issued by Court of Appeals. The clerk of the Court of Appeals will issue the mandate for a Court of Appeals decision terminating review upon stipulation of the parties that no motion for reconsideration or petition for review will be filed. In the absence of that stipulation, and except to the extent the mandate is stayed as provided in rule 12.6, the clerk will issue the mandate:

(1) Thirty (30) days after the decision is filed, unless (i) a motion for reconsideration of the decision or a motion to publish has been earlier filed, (ii) a petition for review to the Supreme Court has been earlier filed, or (iii) the decision is a ruling of the commissioner or clerk and a motion to modify the ruling has been earlier filed.

(2) If a motion for reconsideration or motion to publish is timely filed ~~and denied~~, 30 days after expiration of the time for filing a petition for review under rule 13.4(a) ~~filing the order denying the motion for reconsideration, unless a petition for review to the Supreme Court has been earlier filed~~.

(3) If a petition for review has been timely filed and denied by the Supreme Court, upon denial of the petition for review.

[(c) – (e) unchanged]

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GR 9 COVER SHEET

Suggested New Rule
WASHINGTON RULES OF EVIDENCE (ER)
Rule 502– Attorney-Client Privilege, and Work Product; Limitations on Waiver)

(Adding provisions conforming to Federal Rule of Evidence 502)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

Roger Wynne, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-233-2177)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. Purpose: This suggested amendment would fill a gap in Washington law regarding the inadvertent disclosure of privileged communications or work product. The existing law consists of RPC 4.4(b), which provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." However, Comments 2 and 3 of that rule make clear that it imposes no duty beyond the notification requirement.

Washington law would evolve further, but still not completely, if the Court were to adopt suggested amendments to CR 26 and 45, which the Court has published for comment. If adopted, those amendments would establish what is often referred to as a "claw back" procedure that is based on 2006 amendments to Federal Rules of Civil Procedure 26 and 45. The procedure would allow parties to assert claims of an inadvertent production of privileged communications or work product. However, that procedure would not affect the law that controls the substantive resolution of those claims.

Until recently, there was essentially no law in Washington regarding whether, and under what circumstances, the inadvertent disclosure of attorney-client privilege and work product material caused a waiver of those protections. See *Harris v. Drake*, 152 Wn.2d

480, 495, 99 P.3d 872 (2004) (Alexander, C.J., dissenting) ("Indeed, there are no Washington cases discussing the inadvertent disclosure of work product protected materials.")

The current suggested amendment would fill that gap by providing the substantive law to resolve such waiver claims. The amendment would add a new Rule of Evidence 502 based closely on Federal Rule of Evidence FRE 502, which was signed into law on September 19, 2008. The suggested new ER 502 would comprise six sections, each corresponding to a section of the federal rule[1]:

> **(a) Disclosure made in a Washington State proceeding or to a Washington State office or agency; scope of a waiver.** This section provides for when a disclosure of privilege communication can operate to waive the privilege for other, undisclosed communications. In other words, it addresses the scope of "subject matter waiver."
>
> **(b) Inadvertent disclosure.** This section provides for the circumstances under which an inadvertent disclosure in a Washington proceeding can cause the waiver of attorney-client privilege or work product protection.
>
> **(c) Disclosure made in a non-Washington State proceeding.** This section provides for the circumstances under which a disclosure in a non-Washington proceeding, in the absence of a court order, can cause the waiver in a Washington proceeding of attorney-client privilege or work product protection.
>
> **(d) Controlling effect of a court order.** This section provides for the effect of court orders on the waiver of privilege or work product.
>
> **(e) Controlling effect of a party agreement.** This section provides for the effect of party agreement, in the absence of a court order, on the waiver of privilege or work product.
>
> **(f) Definitions.** This section provides definitions for "attorney-client privilege" and "work-product protection" as used in the rule.

Following the federal model will provide Washington courts and practitioners access to authority interpreting that model. Several states (including Arizona, Arkansas, Iowa, Louisiana) are considering or have adopted some version of the federal rule in their evidence rules, civil rules, or both.

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[1] The only section of the federal rule not mirrored in the suggested Washington rule is FRE 502(f), which deals with the controlling effect of the federal rule on other types of proceedings, including state proceedings. Such a provision is unnecessary in Washington, where there is no question of application of the ERs to an inferior jurisdiction and where the suggested new ER 502 will have the same application as all other ERs in Washington proceedings.

Suggested new ER 502 would be consistent with RPC 4.4(b) and would complement and work in concert with the pending suggested "claw back" amendments to CR 26 and CR 45.

Suggested new ER 502 would also be consistent with the Washington Court of Appeals' recent use of the new federal rule to resolve a claim of an inadvertent waiver. *Sitterson v. Evergreen School District No.*, 147 Wn. App. 576, 196 P.3d 735 (2008), was the first appellate ruling in Washington deciding whether inadvertent production waives the attorney-client privilege. The court noted that there are three potential approaches to waiver by inadvertent production: "(1) the traditional 'absolute waiver' approach…; (2) the absolute 'no waiver' approach; and (3) the 'balanced' approach." *Id.*, 147 Wn. App. at 585-86. The court decided to apply the "balanced approach," and cited as support for that decision the fact that "Congress recently amended the federal rules of evidence to reflect a balanced approach to inadvertent waiver of the attorney client privilege." *Id.* at 587-88 and n.8 (quoting FRE 502).

D. Hearing: A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

SUGGESTED NEW RULE

WASHINGTON RULES OF EVIDENCE (ER)

ER 502 – ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

1 The following provisions apply, in the circumstances set out, to disclosure of a
2 communication or information covered by the attorney-client privilege or work-product
3 protection.

4 **(a) Disclosure Made in a Washington Proceeding or to a Washington Office or**
5 **Agency; Scope of a Waiver.** When the disclosure is made in a Washington proceeding or to a
6 Washington office or agency and waives the attorney-client privilege or work-product protection,
7 the waiver extends to an undisclosed communication or information in any proceeding only if:

8 (1) the waiver is intentional;

9 (2) the disclosed and undisclosed communications or information concern the same
10 subject matter; and

11 (3) they ought in fairness to be considered together.

12 **(b) Inadvertent Disclosure.** When made in a Washington proceeding or to a
13 Washington office or agency, the disclosure does not operate as a waiver in any proceeding if:

14 (1) the disclosure is inadvertent;

15 (2) the holder of the privilege or protection took reasonable steps to prevent disclosure;
16 and

17 (3) the holder promptly took reasonable steps to rectify the error, including (if
18 applicable) following CR 26(b)(6).[[1]]

19 **(c) Disclosure Made in a Non-Washington Proceeding.** When the disclosure is made

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[1] The Court has published for comment a suggested amendment to add a new CR 26(b)(6). The text of this suggested amendment assumes adoption of the new CR 26(b)(6). If the Court does not adopt that new subsection, the phrase ", including (if applicable) following CR 26(b)(6)" should be removed from this suggested new rule.

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in a non-Washington proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Washington proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Washington proceeding; or

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Washington court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Washington proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

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GR 9 COVER SHEET

Suggested Amendment
WASHINGTON RULES OF EVIDENCE (ER)
Rule 1101 – Applicability of Rules

(Clarifying the exemption for certain juvenile court hearings from the Rules of Evidence)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

Roger Wynne, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-233-2177)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. Purpose: The suggested amendment clarifies which juvenile hearings are exempt from the Rules of Evidence and removes specific statutory citations (one of which is incorrect).

The current language of ER 1101(c)(3) references RCW 13.34.130(4), which in prior years governed review hearings in dependency matters but now addresses other matters. This reference is out of date; RCW 13.34.138 is the current statute. In addition, courts adjudicate review hearings in At-Risk Youth (ARY) proceedings (RCW 13.32A.198) and permanency planning hearings in dependencies (RCW 13.34.145) without the Rules of Evidence, but these types of hearings are not specifically mentioned in ER 1101(c)(3).

The suggested amendment confirms that the above hearings, as well as those already listed in ER 1101(c)(3), are exempt from the Rules of Evidence. By using the terms "preliminary determinations in juvenile court," "juvenile court hearings on declining jurisdiction," and "disposition, review, and permanency planning hearings in juvenile court," the suggested amendment confirms that the following juvenile hearings are exempt from the Rules of Evidence:

1. Preliminary determinations;
2. Hearings on declining jurisdiction (RCW 13.40.110);

3. Disposition hearings in offender (RCW 13.40.150), dependency (RCW 13.34.130), ARY (13.32A.197), and Child in Need of Services (CHINS) (RCW 13.32A.179) proceedings;
4. Review hearings in dependency (RCW 13.34.138), ARY (RCW 13.32A.198), and CHINS (RCW 13.32A.190) proceedings; and
5. Permanency planning hearings in dependency (RCW 13.34.145) proceedings.

The suggested amendment eliminates specific statutory references to avoid the need to amend ER 1101(c)(3) again if the juvenile statutes are changed. Because the terms used are specific terms of art that are well understood by practitioners in juvenile law, there is no need to cite the specific statutes. The drafters of the suggested amendment do not intend for juvenile hearings other than those listed above (under whichever RCW sections govern them in future) to be exempt from the Rules of Evidence.

The drafters of the suggested amendment intend no change to the application of the Rules of Evidence when contempt is adjudicated in these juvenile hearings. Regardless of whether the type of hearing in general is exempt from the Rules of Evidence, under current law the Rules of Evidence must be applied when non-direct contempt is adjudicated. *See, e.g.*, *In re M.B.*, 101 Wn. App. 425, 469 & n.114, 3 P.3d 780 (2000) (Rules of Evidence apply to contempt issues in ARY, CHINS, and dependency proceedings); ER 1101(c)(3) (stating that the Rules of Evidence do not apply to contempt proceedings in which the court may act summarily, meaning direct contempt, thus indicating that the Rules of Evidence do apply when the basis for the contempt is an action that occurred outside of the courtroom). An attempt to reflect this current law on contempt proceedings more expressly and broadly in the Rules of Evidence is beyond the scope of this suggested amendment.

D. Hearing: A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

SUGGESTED AMENDMENT
WASHINGTON RULES OF EVIDENCE (ER)
ER 1101 – Applicability of Rules

[(a) – (b) unchanged]

(c) When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations:

(1) *Preliminary Questions of Fact*. [unchanged]

(2) *Grand Jury*. [unchanged]

(3) *Miscellaneous Proceedings*. Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court~~ proceedings under RCW Title 13~~; juvenile court hearings on declining jurisdiction~~ under RCW 13.40.110~~; disposition, ~~hearings in juvenile court;~~ review, and permanency planning hearings in juvenile court~~ under RCW 13.32A.190 and RCW 13.34.130(4)~~; dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under the Civil Commitment Act, RCW 71.05.

(4) *Applications for Protection Orders*. [unchanged]

[(d) unchanged]

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GR 9 COVER SHEET

Suggested Amendment
SUPERIOR COURT CIVIL RULES (CR)
Rule 43 – Taking of Testimony

(Allowing for testimony by contemporaneous means)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

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C. Purpose: In 1996, the following provision was added to Federal Rule of Civil Procedure 43(a): "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Most states have adopted the substance of this provision. *See Greener v. Killough*, 1 So.3d 93, 102 (Ala. Civ. App. 2008). A sampling of reported and unreported federal District Court decisions demonstrates that, even though courts respect the general rule that testimony should be taken in person in open court, they will invoke this provision to allow for video or telephonic testimony if necessary to avoid undue hardship and if no party will be prejudiced. *See, e.g.*:

- In re Vioxx Products Liability Litigation, 439 F.Supp.2d 640, 641-44 (E.D.La. 2006) (allowing contemporaneous transmission of testimony where witness possessed information highly relevant to plaintiff's claims, action was a bellwether trial for multidistrict litigation involving thousands of lawsuits over damage allegedly caused by a drug prescribed to millions of patients in every state, the plaintiff steering committee offered to pay witness's travel expenses, the defendant's refusal to voluntarily produce the witness was for purely tactical advantage, and the defendant would not suffer any true prejudice in having witness testify by contemporaneous videoconferencing);

- Sussel v. Wynne, 2006 WL 2860664 at 4-(D. Hawaii 2006) (allowing contemporaneous transmission of testimony by a witness in Alabama where it would be difficult and costly for him to appear at a trial in Hawaii);

- Dagen v. CFC Group Holdings Ltd., 2003 WL 22533425 (S.D.N.Y. 2003) (allowing contemporaneous transmission of testimony from employees residing in Hong Kong because employer potentially would have suffered incurable prejudice if the court excluded testimony of those witnesses, and the employer raised international travel considerations, legitimate business concerns, and cost rationales for its request); and

- Edwards v. Logan, 38 F. Supp.2d 463, 465-68 (D. Va. 1999) (allowing contemporaneous transmission of testimony where the relevant issue was relatively straightforward and thus amendable to effective video presentation, transporting the inmate-witness from New Mexico to Virginia would be an expensive security risk, and staying the action until the prisoner's release could cause a decade-long delay).

Federal appellate courts and appellate courts in states that have adopted the substance of the federal provision apply an "abuse of discretion" standard to review, and generally affirm, trial court decisions to either grant or deny motions to present testimony by contemporaneous transmission. *See, e.g.*:

- El-Hadad v. United Arab Emirates, 496 F.3d 658, 668-69 (D.C. Cir. 2007), cert. den. 128 S.Ct. 1872, 170 L.Ed.2d 744 (2008) (affirming a decision to allow testimony from Egypt where the district court required the plaintiff to "prove he had pursued and repeatedly been denied a visa to the United States (as well as show careful preparations for translation and teleconferencing)");

- Air Turbine Technology, Inc. v. Atlas Copco AB, 410 F.3d 701, 714 (11th Cir. 2005) (affirming denial of a motion for video testimony—"a matter expressly reserved to the sound discretion of the trial court"—where no compelling circumstances were shown and the motion was brought just one month before trial);

- Lawrence v. Delkamp, 750 N.W.2d 452, 455-57 (N.D. 2008) (affirming trial court's decision to disallow telephonic testimony because there were not adequate safeguards in place, including someone on site with the witness to administer the oath); and

- Dunsmore v. Dunsmore, 173 P.3d 389, 392-93 (Wyo. 2007) (affirming the trial court's decision to rescind its order to allow telephonic testimony because it was within the court's discretion).

Washington is among the minority of states that has not adopted the substance of this provision. In *Kinsman v. Englander*, 140 Wn. App. 835, 167 P.3d 622 (2007), the trial court admitted the deposition testimony of an “unavailable” witness. Later in the trial, the court allowed, over one party’s objection, that same witness to testify telephonically in rebuttal. The Court of Appeals, Division III, held that telephonic/video testimony is not allowed in Washington unless both parties consent. *Id.*, 140 Wn. App. at 844. The court noted that CR 43 does not have language expressly authorizing such testimony, as does the parallel federal rule. *Id.* n.8. *Accord Greener*, 1 So.3d at 102-03 (citing *Kinsman* to reach the same result in Alabama, which also lacks language similar to the federal rule).

The suggested amendment would add the language found lacking in *Kinsman* and would expressly give Washington courts the authority to allow testimony by contemporaneous means in an appropriate case, even if all parties do not consent. The suggested language mirrors the federal provision. The drafters of the suggested amendment intend that Washington courts should seek guidance from federal court interpretations of the federal provision and from the 1996 Advisory Committee Note to Federal Rule of Civil Procedure 43 when interpreting this provision. For reference, the Note provides in relevant part:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.
>
> The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.
>
> Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.
>
> Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is

not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

D. Hearing. A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 43 – Taking of Testimony

(a) Testimony.

(1) *Generally*. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) *Multiple Examinations.* **[unchanged]**

[(b) – (k) unchanged]

TO: Honorable Charles Johnson, Washington State Supreme Court

FROM: Roger Wynne, 2008-2009 Chair, WSBA Court Rules & Procedures Committee

SUBJECT: WSBA Annual Submittal of Court Rules Materials, 2008-2009;
Memo #2: CR 26 & 45; responding to comments on the WSBA's proposed "claw back" amendments

DATE: September 25, 2009

2006 amendments to Federal Rules of Civil Procedure 26 and 45 established a process through which a person who has inadvertently disclosed privileged or trial-preparation materials in discovery or in response to a subpoena may alert the receiving party of that event and pursue relief in court.

In October 2008, the WSBA proposed to the Supreme Court adding versions of these "claw back" provisions to CR 26 (dealing with discovery between parties) and CR 45 (dealing with subpoenas). The proposal also included an amendment to the language regarding "abode" service in CR 45(b)(1) to conform it more closely to CR 5(b)(1).

Although the Supreme Court published these proposed amendments for comment, the Court recently referred the proposals back to the WSBA for a response to two comment e-mails the Court received. For ease of reference, I am enclosing copies of those e-mails.

This memo responds to the Court's request for a response. In summary, the WSBA is proposing no revisions to the proposed amendment to CR 26. For your reference, I am enclosing a copy of the GR 9 cover sheet and text of that proposal, which remain unchanged from the version the WSBA submitted to you in October 2008. The WSBA is revising its proposed amendment to CR 45 to implement one comment and in response to an observation the WSBA made while considering another comment. I am therefore enclosing a revised GR 9 cover sheet (one "redlined" version to highlight the revisions made to the 2008 version, and one "clean" version) and text (revised only to add the "METHOD OF RECORDING" box) of the WSBA's revised proposed amendment to CR 45

1. Response to the comment from Lorraine Lofton.

Lorraine Lofton notes that the subpoena form appended to CR 45 still has no entry corresponding to the existing requirement in CR 45(a)(2) that a "subpoena for attendance at a deposition shall state the method for recording the testimony." Ms. Lofton recommends adding such an entry to the form.

The WSBA agrees with Ms. Lofton and is therefore amending its proposal to add a box in which to indicate the proposed method for recording a deposition. Enclosed are a modified GR 9 cover sheet and text for the proposed amendment to CR 45.

2. Response to comments from Kate Adams.

Kate Adams offers comments on the "claw back" provisions proposed for CR 26 and 45. As a general response, it is important to keep in mind the value in adhering to the language of parallel federal rules where appropriate: where Washington uses language that differs from a parallel federal rule, courts may find that Washington intended a substantively different rule that precludes use of otherwise relevant federal authority as guidance in Washington.[1] Although one should never automatically assume that the language of federal rules is appropriate in Washington, it is helpful to employ a rebuttable presumption that Washington is best served by using the language of the federal provisions when attempting to mirror those provisions. In this instance, the WSBA does not think that Ms. Adams' comments overcome that presumption.

First, Ms. Adams proposes striking "sequester" from the requirement that "a party must promptly return, sequester, or destroy the specified information." Ms. Adams asks: "How does one 'sequester' information?" Although neither the federal rule nor Advisory Committee Note provides a definition, Webster's On-Line Dictionary does: "to set apart; segregate." Given that definition, and considering the context in which the word is used, the WSBA recommends that the proposed amendment use "sequester" as does the parallel federal provision.

Second, Ms. Adams also proposes significant alterations to the following sentence proposed by the WSBA, which is functionally identical to the parallel federal sentence:

> After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information in camera to the court for a determination of the claim."

Ms. Adams bases her proposed alterations of that sentence on the following observation: "These items must be presented in the alternative, otherwise they are in conflict, because if a person <u>must</u> destroy the information, then the person is unable to present it to the court in camera." The WSBA respectfully disagrees with Ms. Adams' observation, and thus with her proposed alterations. As proposed, the rule would not require the destruction of any information; it would provide a choice among returning, sequestering, or destroying the information. If a person with that information wishes to pursue the option of presenting the information for *in camera* review, that person would simply choose to sequester the information until it is presented to the court.

[1] Because of that, the WSBA has amended the GR 9 cover sheet for its proposed amendment to CR 45 to note that the drafters intended no substantive difference in meaning when employing a term in the Washington version of the "claw back" provision that is more consistent with a term already employed in CR 45.

Finally, Ms. Adams offers other changes on the basis of her observations that the proposed "claw back" provisions: (1) are intended to facilitate claims of inadvertent disclosure from persons other than the person responding to the discovery request (as in the case of CR 26) or subpoena (as in CR 45); and (2) should require notice to non-parties that they should not use or disclose information subject to a claim of privilege. The WSBA respectfully disagrees with these observations in the context of each rule:

- The discovery "claw back" provision in CR 26 does not facilitate claims of third persons. The rule consistently uses "party" to establish duties and rights for parties to the action, not third persons. If a third person is concerned that one party in a suit has produced to another party information to which the third person may wish to assert a privilege, CR 26 is not the appropriate rule for seeking intervention or relief.

- Although the subpoena "claw back" provision in CR 45 necessarily deals with third persons—non-parties responding to subpoenas—there is no need to direct a third person not to use or disclose information that he or she has already disclosed in responding to a subpoena. That information is already in the possession of the third person—it is his or hers to use as that third person deems appropriate, subject to whatever privileged relationship he or she might be in. CR 45 is correctly targeted at notifying the other parties to the suit that they—who are presumably outside of any relevant, privileged relationship—should not use or disclose that information until the claim of privilege is resolved.

Because the WSBA disagrees with the observations underlying these final set of changes proposed by Ms. Adams, the WSBA respectfully recommends not adopting them.

Enclosures:

- Comment letters from Lorraine Lofton and Kate Adams.

- GR 9 cover sheet and text of the proposed amendment to CR 26 (unchanged from the October 2008 published for comment by the Court); and

- GR 9 cover sheet (revised; one "redlined" version to highlight the revisions, and one "clean" version) and text (revised only to add the "METHOD OF RECORDING" box) of the proposed amendment to CR 45.

produced the information....," the corresponding sentence in the suggested amendment begins with "The person responding to the subpoena...." The drafters used this term simply for the sake of consistency with CR 45(d)(1) (which begins with "A person responding to a subpoena....") and intend no substantive difference from the parallel sentence in the federal rule.

D. <u>Hearing</u>. A hearing is not requested.

E. <u>Expedited Consideration</u>: Expedited consideration is not requested.

F. <u>Supporting Material</u>: Suggested rule amendment.

GR 9 COVER SHEET

Suggested Amendment
SUPERIOR COURT CIVIL RULES (CR)
Rule 45 - Subpoena

(Clarifying "abode service" and procedures for assertion of privilege or work-product protection after production in response to a subpoena, and conforming the form subpoena to the text of the rule)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

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C. Purpose: A newly redrafted version of CR 45 took effect September 1, 2007. These suggested amendments would refine that version in ~~two~~ three ways.

First, this suggested amendment would add a box to the form subpoena corresponding to the existing requirement in CR 45(a)(2) that a "subpoena for attendance at a deposition shall state the method for recording the testimony."

Second, this suggested amendment would make the language regarding service in CR 45(b)(1) conform more closely to CR 5(b)(1). Under the prior and current versions of CR 45, a subpoena may simply be left at "the place of such person's abode." This amendment would replace that with language from CR 5(b)(1), requiring the document to at least be left at the person's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

~~Second~~Finally, this suggested amendment would add a new subsection CR 45(d)(2)(B) that would incorporate the proposed "claw back" rule of CR 26(b)(6) (which applies to discovery generally) expressly into the procedures for subpoenas. This would essentially track Federal Rule of Civil Procedure 45(d)(2)(B). For more information, please see the statement of purpose for the concurrent suggested amendment of CR 26. Although the last sentence of the federal provision begins with "The person who

produced the information....," the corresponding sentence in the suggested amendment begins with "The person responding to the subpoena...." The drafters used this term simply for the sake of consistency with CR 45(d)(1) (which begins with "A person responding to a subpoena....") and intend no substantive difference from the parallel sentence in the federal rule.

D. Hearing. A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendment.

GR 9 COVER SHEET

Suggested Amendment
SUPERIOR COURT CIVIL RULES (CR)
Rule 45 - Subpoena

(Clarifying "abode service" and procedures for assertion of privilege or work-product protection after production in response to a subpoena, and conforming the form subpoena to the text of the rule)

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

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A. Name of Proponent: Washington State Bar Association.

B. Spokespersons:

Roger Wynne, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-233-2177)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. Purpose: A newly redrafted version of CR 45 took effect September 1, 2007. These suggested amendments would refine that version in three ways.

First, this suggested amendment would add a box to the form subpoena corresponding to the existing requirement in CR 45(a)(2) that a "subpoena for attendance at a deposition shall state the method for recording the testimony."

Second, this suggested amendment would make the language regarding service in CR 45(b)(1) conform more closely to CR 5(b)(1). Under the prior and current versions of CR 45, a subpoena may simply be left at "the place of such person's abode." This amendment would replace that with language from CR 5(b)(1), requiring the document to at least be left at the person's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

Finally, this suggested amendment would add a new subsection CR 45(d)(2)(B) that would incorporate the proposed "claw back" rule of CR 26(b)(6) (which applies to discovery generally) expressly into the procedures for subpoenas. This would essentially track Federal Rule of Civil Procedure 45(d)(2)(B). For more information, please see the statement of purpose for the concurrent suggested amendment of CR 26. Although the last sentence of the federal provision begins with "The person who

PREMISES	DATE AND TIME
ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER	

PROOF OF SERVICE

SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the State of Washington that the foregoing information contained in the Proof of Service is true and correct.

Executed on ________________________ ____________________________________

DATE/PLACE SIGNATURE OF SERVER

____

ADDRESS OF SERVER

____

CR 45, Sections (c) & (d):

(c) [Unchanged.]

(d) (1) [Unchanged.]

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the

TO: Honorable Charles Johnson, Washington State Supreme Court

FROM: Roger Wynne, 2008-2009 Chair, WSBA Court Rules & Procedures

SUBJECT: WSBA Annual Submittal of Court Rules Materials, 2008-2009;
Memo #3: WSBA Positions Regarding Amendments Proposed by Entities and Individuals (other than the Court of Appeals)

DATE: September 25, 2009

In the formal cycle for periodic review of particular court rules sets, the 2008-2009 season brought the WSBA and its Court Rules and Procedures Committee ("Rules Committee") back to the Rules of Appellate Procedure. As in the past, the Court of Appeals worked actively with the Rules Committee this season on a slate of draft amendments under consideration by appellate judges, commissioners, and clerks. After reviewing the Rules Committee's recommendations on this season's slate of approximately 30 draft amendments, the WSBA Board of Governors provided the WSBA's recommendations directly to the Court of Appeals in March 2009. The WSBA understands that the Court of Appeals will be submitting to you proposed RAP amendments that, with few exceptions, follow the WSBA's recommendations. We are therefore submitting nothing directly to you regarding those recommendations.

This memorandum conveys the WSBA's positions on various amendments, most of them to the RAPs, proposed this season by other groups and one individual. The details of the proposals are in the documents following this memorandum. With one exception noted below, the Supreme Court has asked the WSBA to review these proposals. The Court has not yet published any of these proposals for public comment.

With some exceptions noted below, the WSBA's positions—some positive and some negative—on most of these proposals engendered little controversy and were the result of consensus or unanimous Board votes.

A. Office of Public Defense (*endorse with modifications*)

The Office of Public Defense ("OPD") has suggested the following amendments to the Supreme Court:

- **RAP 5.3 and 15.2, and Forms 12, 12A, and 13**: all dealing with the procedures for determining indigency for purposes of appeal;
- **RAP 6.2**: to ensure that appellate counsel has adequate time to prepare a motion for discretionary review after appointment by the Court of Appeals;

- **RAP 9.2**: to clarify that closing argument may be transcribed at public expense without specific authorization by the trial court; and

- **RAP 15.5**: to extend the time for determining claimed expenses from 10 days to 15 days.

The details of these suggestions, and the reasons for them, are stated in the GR 9 cover sheets and text amendments following this memo.

The WSBA **endorses** all of OPD's suggested amendments, with the following recommended **modifications** to improve clarity and consistency:

In **RAP 9.2**, set out the text of section (b) for reference.

In **RAP 15.2**, in section (b), strike "in written findings" from the added language and move it to after "The trial court shall determine…" so that, as amended, the first sentence of section (b) reads: "The trial court shall determine in written findings the indigency, if any, of the party seeking review at public expense." This will make clear that "if circumstances warrant," as used in the second sentence, refers only to a hearing, not the need for written findings.

In proposed new **RAP Form 12A**:

- in the first paragraph, second line, put a comma after "…in this action";

- to the beginning of the last sentence of the first paragraph, add "The Court further finds that…"; and

- in the third numbered sentence, change "which" to "that."

In **RAP Form 13**:

- move "[Attach Appendix A]" into subparagraph 2(b), to indicate that the appendix is only necessary if box 2(b) is checked; and

- remove each "that" at the start of each item of the certification in Appendix A.

The WSBA understands that OPD intends to submit a revised proposal to the Supreme Court with versions of its suggested amendments that incorporate the modifications recommended by the WSBA.

B. Washington Appellate Lawyers Association (*endorse with modifications*)

The Washington Appellate Lawyers Association ("WALA") submitted to the Supreme Court proposals to amend five RAPs. Since then, WALA has decided not to pursue two of those proposals because:

- the WALA proposal to amend RAP 10.6(d) is similar to one being proposed by a group of *amici curiae* counsel (see below); and
- the WALA proposal to amend RAP 13.4(g) is similar to one currently pending with the Court.

The WSBA **endorses** the remaining three proposals from WALA, with **modifications** to two of them:

- **RAP 9.6(c)**: parallels an amendment to RAP 9.7(a) that is likely to be submitted by the Court of Appeals and that encourages court clerks to number and compile clerk's papers in electronic format. The WSBA recommends **modifying** the final sentence of proposed new subsection (c)(3) as follows:

  > If the trial court clerk generates the clerk's papers in electronic format, the trial court clerk shall make available to any party a copy of the clerk's papers in electronic format, upon payment of the trial court clerk's reasonable ~~reproduction~~ expenses~~, which shall not exceed the charges for reproduction of paper copies of the clerk's papers~~.

- **RAP 11.3**: establishes a process for seeking recusal of appellate judges. To this proposal, the WSBA suggests **adding** the following amendment to **RAP 17.2(a)** to conform the rule to current practice, in which recusal motions are heard by the judges:

  > (a) Generally. The judges determine (1) a motion in a brief, (2) a motion to modify a ruling by a commissioner or the clerk, (3) a motion for reconsideration of a decision, (4) a motion to recall the mandate, except for a motion made to correct an inadvertently issued mandate, ~~and~~ (5) a motion to publish, and (6) a motion for recusal. All other motions may be determined initially by a commissioner or the clerk of the appellate court.

- **RAP 18.1(h)**: makes clear that an award of fees and costs on appeal is a sum certain on which prejudgment interest should accrue.

C. *Amici curiae* counsel (*oppose*)

A group of experienced *amici curiae* counsel from the civil plaintiff and defense bar (including members of the Washington State Association for Justice and the Washington Defense Trial Lawyers) jointly recommended two amendments for consideration by the Rules Committee. Although the Supreme Court has not asked the WSBA to review and comment on these proposals, the WSBA believes it appropriate to inform the Court of this review in case these proposals are actually submitted to the Court.

The WSBA **opposes** these two suggested amendments, the proposed text and rationales for which are in documents following this memo:

- **RAP 10.2(f)**: This would lengthen the time to file an amicus curiae brief. The Board was informed of the Rules Committee's understanding that the Supreme Court is opposed to this proposal because it might cause the appellate court to receive a brief too close to the date for oral argument.

- **RAP 10.6(d)**: This would shorten the time to object to a motion to file an amicus curiae brief from five days to two days. The Board was informed that many in the Rules Committee felt that this would not provide enough time and that a significant number of objections would not be heard under a two-day deadline.

D. Alan Parmalee (*oppose*)

The Supreme Court forwarded a letter from Mr. Alan Parmalee to the WSBA for review and comment. In his letter, Mr. Parmalee, a Washington State inmate, recommends categories of amendments to various civil rules to address the process by which courts process Public Records Act cases.

The WSBA **opposes** these amendments and suggests to the Court that this is a matter best addressed through the legislative process.

E. Washington Association of Prosecuting Attorneys (*endorse one with stylistic modifications; oppose the remainder*)

The Supreme Court asked the WSBA to review and comment on seven RAP and RALJ amendments proposed by the Washington Association of Prosecuting Attorneys ("WAPA"). The Rules Committee, along with its RAP Subcommittee, considered and debated these proposals. As is often the case in matters involving criminal procedure, these proposals generated a considerable amount of debate and little consensus. As in the past, the Rules Committee benefitted from the assistance of Seth Fine, an appellate attorney with the Snohomish County Prosecutor's Office, and Eric Broman, who concentrates on appeals for criminal defendants. Each was able to clarify the policy

issues at stake, inform the debate with their consideration knowledge and experience, and answer the questions posed by Subcommittee and Committee members. Mr. Broman also provided memoranda in opposition to certain WAPA proposals. As always, the Committee also benefitted from the insights of its diverse membership (which this year included six prosecutors, both civil and criminal) and judicial liaisons.

The WSBA Board of Governors considered the WAPA proposals at its July 24, 2009 meeting. Gary Riesen of WAPA attended that meeting and addressed the Board regarding several of WAPA's proposals.

This memo conveys the WSBA's positions regarding WAPA's proposals, including the Board's vote on each recommendation from the Rules Committee. (The Rules Committee's recommendations came on divided Committee votes.) To assist the Court to understand the nature of the debates surrounding these proposals, this memo summarizes the arguments voiced in favor and opposition to each proposal during the Rules Committee's deliberations. However, Committee members did not independently research or verify the arguments that they heard.

An historical note is in order. These same proposals came before the Rules Committee in its 2004-2005 season. That season gave rise to an extraordinary volume of proposed amendments, including over 60 proposed RAP amendments and six proposed RALJ amendments. Unfortunately, WAPA submitted a total of 19 proposals in February 2005, leaving the Rules Committee just four meetings in which to consider them. The seven proposals WAPA resubmitted this season were among the almost two dozen proposals—from WAPA and others—that the Rules Committee voted against pursuing in 2005. At that time, the Rules Committee was unable to generate detailed reports for those negative recommendations for the Board to consider in July 2005. Instead, the then-chair forwarded his RAP Subcommittee's reports (comprising 50 pages of material) to the Board with the following note: "I have included a memo of the rejected proposals and the subcommittee's reports regarding them. If the Board of Governors recommends further consideration of any of these RAPs, we will undertake it when the next Committee convenes in October." The Board did not direct the Rules Committee to take further action on those proposals in 2005. Other than to note the proposals that the WSBA decided not to pursue, the WSBA provided no details to the Supreme Court on those proposals in its fall 2005 report. WAPA did not seek further Court action in 2005 on the seven proposals that the WSBA opted not to pursue at that time.

In light of this history, and given that it would be difficult to adequately capture the 2004-2005 Rules Committee's rationale for its negative recommendations, the WSBA conducted what is essentially a *de novo* review this season. Current Rules Committee members were aware of their predecessors' recommendations—and Mr. Broman urged the Rules Committee to readopt those recommendations—but nevertheless gave the proposals full consideration with fresh eyes.

1. **RAP 2.2**

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests three amendments to RAP 2.2. The WSBA considered each separately.

a. **RAP 2.2(a)(10) and (11) (*oppose*)**

This amendment would eliminate an appeal as a matter of right for a defendant whose CrR 7.8 motion to vacate judgment is denied. WAPA's goal is to prevent a defendant from using a motion to vacate as a way to avoid seeking relief by way of a personal restraint petition.

Among the additional arguments voiced in favor of the amendment were that a judge's decision to decide a motion to vacate on the merits, even if an infrequent occurrence, has significant financial consequences because of the right of appeal.

Among the arguments voiced in opposition to the amendment were that: an amendment to CrR 7.8(c) in 2007 has resulted in nearly all post-judgment motions being transmitted to the Court of Appeal for consideration as personal restraint petitions; and there is little evidence of misuse of this process or of financial impacts on counties.

By Board consensus, the WSBA **opposes** this amendment.

b. **RAP 2.2(b)(5) (*oppose*)**

This amendment would grant the state the ability to appeal a *pre*-sentencing withdrawal of a guilty plea as a matter of right, just as the state currently may appeal a *post*-sentencing withdrawal as a matter of right.

Among the additional arguments voiced in favor of the amendment were that:

- ❑ even if not routine, this procedure ought to parallel the state's current right to appeal a pre-sentencing order granting a new trial;
- ❑ an appeal seems to be a better option than the default being trial; and
- ❑ because this is a relatively rare occurrence, it would not have a major impact on defendants.

Among the arguments voiced in opposition to the amendment were that:

- ❑ there is no justification to treat a verdict differently than a guilty plea (both should be appealed after trial);

- rather than have a right to what is essentially an interlocutory appeal, the state can seek discretionary review of a plea withdrawal or can try the case;
- it is not easy to withdraw a guilty plea;
- the case law cited by WAPA in its GR 9 cover sheet does not support WAPA's argument;
- the state has not demonstrated the existence of a problem that would justify the amendment; and
- there may be a fiscal impact on counties, which may have to confine defendants longer pending resolution of an appeal.

By a Board vote of 9-0-1, the WSBA **opposes** this amendment.

c. RAP 2.2(b)(6) and (7) (*endorse with stylistic modifications*)

This amendment would allow the state to appeal sentences that are unauthorized or omit a required provision. Prosecutors view the amendment as codifying existing case law holding that the state may appeal sentences and sentencing decisions that are illegal.

Among the arguments voiced in opposition to the amendment were that:

- the state already has the right to appeal sentences below the standard range or that miscalculate the standard range (*see* RAP 2.2(b)(7));
- the Department of Corrections may file a petition if the court has imposed a sentence that suffers from an error of law (*see* RCW 9.94A.585(7) and RAP 16.18); and
- the state may seek discretionary review where the trial court has exceeded its authority.

By a Board vote of 9-0-1, the WSBA **endorses** this amendment **with stylistic modifications**. As shown in bold and double-underlining and double-strikeout font, those modifications are, in both (b)(6) and (b)(7), to substitute capital letters for the proposed subsection designations (which WAPA proposes adding as i, ii, iii, and 4) and separating those designations by commas, to be consistent with the style used in RAP 9.2.

(6) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that ~~(i)~~**(A)** is below the standard range of disposition for the offense~~; (ii)~~**, (B)** ~~or that~~ the state or local government believes involves a miscalculation of the standard range~~; (iii)~~**, (C)** includes provisions that are unauthorized by law~~; or (4)~~**, or (D)** omits a provision that is required by law.

(7) ~~(6)~~ Sentence in Criminal Case. A sentence in a criminal case that ~~(i)~~**(A)** is outside the standard range for the offense~~; (ii)~~**, (B)** ~~or that~~ the state or local government believes involves a miscalculation of the standard range~~; (iii)~~**, (C)** includes provisions that are unauthorized by law~~; or (4)~~**, or (D)** omits a provision that is required by law.

2. RAP 12.3 (*oppose*)

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests adding a new RAP 12.3(f) to require the clerk of the appellate court to transmit a copy of a decision terminating review in a criminal case directly to the defendant. WAPA believes that this will ensure an accurate record and will forestall defendants from seeking to recall mandates on the ground that their counsel did not provide them timely notice of the decision.

Among the additional arguments voiced in favor of the amendment were that:

- it would not impose an undue burden on the clerk;
- it would be little more than a declaration of mailing, which clerks already prepare;
- it would provide evidence that the decision had actually been sent; and
- it would promote more efficient appeals because it would limit requests for additional time under the doctrine of "equitable tolling."

Among the arguments voiced in opposition to the suggested amendment were that:

- clerks oppose the amendment as an unnecessary burden;
- it would not provide proof of receipt, still leaving defendants able to argue that they are entitled to more time;
- defense counsel are more likely than clerks to know the location of their clients and are ethically obligated to inform their clients of decisions terminating review;

- clerks will likely rely on defense counsel to locate defendants, which will add needless burden on defense counsel to assist the clerks; and
- there is insufficient evidence of a need for the amendment.

By a unanimous Board vote, the WSBA **opposes** this amendment.

3. **RAP 14.3 (*oppose*)**

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests specifically enumerating fees paid for court-appointed counsel (as authorized by RCW 10.73.160) among the items that may be awarded as costs when the state prevails in an appeal. WAPA believes this would codify the procedure contained in that statute.

Among the arguments voiced against this suggestion were that it is not necessary, redundant in light of the existing enumeration of "such other sums as provided by statute" among recoverable costs, and runs counter to the practice of avoiding specific statutory references (which might become obsolete through legislative action) in the rules, where practical.

By a unanimous Board vote, the WSBA **opposes** this amendment.

4. **RAP 16.15(h) (*oppose*)**

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests amending RAP 16.15(h) to direct litigants to RCW 10.73.150, which governs the appointment of counsel at public expense in personal restraint petitions.

Among the additional arguments voiced in favor of the amendment is that the statute is the current law and that reference to it in the rule is therefore both helpful and appropriate.

Among the arguments voiced against this amendment were that: members of the defense bar oppose it because it improperly seeks to limit the circumstances in which counsel may be appointed; it might make courts refrain from appointing counsel in other situations outside of the statute; and it runs contrary to the practice of avoiding specific statutory references that may become obsolete through legislative action.

By a unanimous Board vote, the WSBA **opposes** this amendment.

5. RALJ 2.2(c)(2)

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests two amendments to RALJ 2.2. The WSBA considered each separately.

a. RALJ 2.2(c)(2)(b) (*oppose*)

Although not specifically stated in WAPA's submission, the Committee learned during discussion that the motivation for, and intended target of, this suggested amendment are what WAPA calls the "mass-suppression" of blood alcohol content ("BAC") evidence in driving under the influence ("DUI") cases. The suggested amendment would allow the state to appeal an order suppressing evidence if doing so will not place the defendant in double jeopardy and if the trial court certifies that the order "involves a fundamental and urgent recurring question of law as to which there is substantial ground for a difference of opinion" and that "immediate review of the order is in the public's interest." (Note that to correctly indicate the scope of its proposal, WAPA should underline the semicolon and "or" at the end of section (a) in its proposal.)

Among the additional arguments voiced in favor of the amendment were that:

- ❑ this rule could provide a sweeping and efficient response to an important set of evidentiary challenges that the DUI defense bar is able to mount;
- ❑ the amendment would provide greater consistency and fairness by more quickly yielding appellate opinions to provide a measure of uniformity in trial court proceedings;
- ❑ a writ of review has a high standard that BAC suppression cases would not meet; and
- ❑ the amendment is not overly broad because its standards would make it difficult to apply outside of the BAC/DUI context.

Among the arguments voiced in opposition to the amendment were that:

- ❑ the rule is too broad and would open the door wider to interlocutory appeals in other contexts;
- ❑ the state has not made a case in support of broadening that right even in the context of DUI/BAC cases;
- ❑ the state has other options for seeking appellate review of wide-spread BAC suppression rulings without resorting to an interlocutory review as a matter of right;

- ❑ this is essentially an effort to turn a discretionary review standard into an appeal of right, which is confusing because it creates an unprecedented hybrid of discretionary review and appeal of right; and

- ❑ an appeal of right would not necessarily solve the perceived problem because appeals might not get beyond the Superior Court level.

By a unanimous Board vote, the WSBA **opposes** this amendment.

b. RALJ 2.2(c)(5) (*oppose*)

This suggested amendment parallels WAPA's suggested amendment to RAP 2.2(b)(5) to grant the state the ability to appeal a *pre*-sentencing withdrawal of a guilty plea as a matter of right, just as the state currently may appeal a *post*-sentencing withdrawal as a matter of right.

The Committee heard no arguments beyond those offered in response to the suggested amendment to RAP 2.2(b)(5).

By a unanimous Board vote, the WSBA **opposes** this amendment.

6. RALJ 9.3(c) (*oppose*)

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests amending RALJ 9.3(a) to parallel WAPA's suggested amendment of RAP 14.3 to specifically enumerate fees paid for court-appointed counsel (as authorized by RCW 10.73.160) among the items that may be awarded as costs when the state prevails in an appeal.

The Committee heard no arguments beyond those offered in response to the suggested amendment to RAP 14.3.

By a unanimous Board vote, the WSBA **opposes** this amendment.

7. RALJ 10.2(a)(2) (*oppose*)

As detailed in the following GR 9 cover sheet and proposed text, WAPA suggests adding a new RALJ 10.2(a)(2) to establish a procedural mechanism for obtaining an involuntary dismissal of an appeal for want of prosecution where a criminal defendant/appellant allows an appeal to languish for 90 days and then fails to appear upon 14 days notice. According to WAPA, such a dismissal requires a waiver of appeal, and such a waiver may be based on the defendant's refusal to submit herself to the jurisdiction of the court by appearing as required. *See generally State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997); *State v. Estrada*, 78 Wn. App. 381, 382, 896 P.2d 1307 (1995) (discussing "fugitive from justice" doctrine).

Among the additional arguments voiced in support of this suggested amendment was that, because many parties have an interest in resolving criminal cases, they should not be allowed to languish.

Among the arguments voiced in opposition to this suggested amendment were that:

- it likely conflicts with Washington's "knowing and voluntary" waiver requirement (*see Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1159 (2007));
- a defendant often cannot be located within a 14-day timeframe (for example, if the defendant has taken employment that requires temporary travel);
- the proposed term "deemed abandoned" could tie the court's hands to invoke equitable principles under the facts of a given case;
- beyond cluttering the court's and prosecuting attorney's docket, there is little harm in leaving such appeals open;
- it should be difficult to terminate a criminal appeal, even if it imposes costs or hardship on the government, because the courts should attempt to resolve cases on the merits, especially criminal cases; and
- any current flaw in the procedure could perhaps be better addressed by an amendment to the criminal rules, rather than the appellate rules.

By a Board vote of 9-1-0, the WSBA **opposes** this amendment.

Enclosures: Except as otherwise noted, GR 9 cover sheets and proposed amendments from:

OPD for:

1. RAP 5.3 and 15.2, and Forms 12, 12A, and 13 (one, combined GR 9 cover sheet);
2. RAP 5.3 (text of amendment);
3. RAP 15.2 (text of amendment);
4. RAP Form 12 (text of amendment);
5. RAP Form 12A (text of amendment);
6. RAP Form 13 (text of amendment);
7. RAP 6.2;

8. RAP 9.2;

9. RAP 15.5;

WALA for:

1. RAP 9.6;

2. RAP 11.3; and

3. RAP 18.1;

Amici curiae counsel for:

1. RAP 10.2 (one document with text and "Comment"); and

2. RAP 10.6 (one document with text and "Comment");

Alan Parmalee (letter to the Supreme Court regarding categories of amendments to various civil rules to address the process by which courts process Public Records Act cases); and

WAPA for:

1. RAP 2.2;

2. RAP 12.3;

3. RAP 14.3;

4. RAP 16.15;

5. RALJ 2.2;

6. RALJ 9.3; and

7. RALJ 10.2.

Criminal Rules Subcommittee (CrR/CrRLJ)

Rebecca Robertson, Chair
Mario Cava
Thomas Cunnane
Toni DiTommaso
Lise Ellner
Paul Henderson
Anthony Howard
John Juhl
Patrick McKenna
Karl Sloan
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