

# WASHINGTON STATE BAR ASSOCIATION

## Court Rules and Procedures Committee

### Meeting Minutes December 19, 2022

Members Present: Chair Paul Crisalli, Matthew Antush, Magda Baker, Rane Casalegno, Michael Chait, William Elsinger, Duffy Graham, James Horne, Michelle Maley, Coreen Wilson, and Andrew Van Winkle.

Members Excused: Lesli Ashley, Kyle Berti, Brian Esler, Zachary Jones Pekelis, Travis Kennedy, Matthew Monahan, Laurel Smith, Alexandra Smith, and Allison Widney.

Also Attending: Judge Bradley Maxa (Court of Appeals Judicial Liaison), Judge Blaine Gibson (Superior Courts Judges Association Liaison), J Benway (Administrative Office of the Courts Liaison), Nicole Gustine (WSBA Assistant General Counsel), and Kyla Reynolds (WSBA Paralegal).

---

The meeting was called to order at 9:35 a.m. once a quorum was established.

1. Approval of Minutes

A motion was made and seconded to approve the October 24, 2022, meeting minutes. The minutes passed by unanimous consent.

2. Subcommittee Assignments

Subcommittee assignments have been distributed. The subcommittees will begin to meet over the next month.

3. Other Business for the Good of the Order

Judge Blaine Gibson reported that the SCJA is working to create an ad hoc committee to review court rule proposals that are published for public comment. Judge Gibson is likely to serve on this committee. Chair Paul Crisalli was recently appointed to serve on the Electronic Signature Work Group convened at the request of the Supreme Court.

The meeting adjourned at 9:50 a.m. *The next meeting is scheduled for January 30, 2023.*

## GR 9 Coversheet

**Suggested Rule:** *New* CrR 8.11

**(A) Proponent:**

WSBA Court Rules & Procedures Committee

**(B) Spokesperson:**

Andrew Van Winkle, member, WSBA Court Rules & Procedures Committee

**(C) Purpose and Background:**

This rule is intended to provide a clear procedure for criminal defendants to obtain copies of their client files and discovery materials to assist bringing post-conviction claims for relief. The rule codifies the holding in *State v. Padgett*, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018), creates a retention schedule for these documents, and clarifies the procedure for redacting and delivering these documents.

This rule is necessary because many pro se litigants are unaware of their rights to access their client file and discovery materials. Many lawyers and judges are unaware of litigants' rights to these materials, resulting in wrongful denial of requests, and sometimes wrongful transfer of the request to the Court of Appeals under CrR 7.8(c)(2). The *Padgett* case, and more recently *State v. Murry*, No. 38492-6-III (Wash. Ct. App. December 15, 2022) (Unpublished Op.), show that a clear procedure for obtaining these materials is necessary to ensure litigants' timely access for purposes of pursuing post-conviction relief. While this rule overlaps with case law and ethics advisory opinions, codifying pro se litigants' rights in a court rule is appropriate because many litigants (especially incarcerated individuals) have limited capabilities for researching case law and ethics opinions, but have ready access to Washington's court rules.

In drafting this rule, the Committee solicited multiple rounds of stakeholder feedback from prosecutors, defense attorneys, and the Office of Public Defense. Thanks to their feedback, the Committee considered more than a half-dozen drafts of the suggested rule before voting to recommend adoption of the current draft.

The Committee acknowledges that portions of the rule overlap with CrR 4.7. The Committee recommended against amending CrR 4.7 because that rule only applies to discovery exchanged between the parties, while this rule addresses production of the client file in addition to discovery. Further, section 4 of the CrRs is organizationally devoted to pretrial matters. Because the suggested rule expressly applies after final

disposition, the Committee believed that it was better codified as a new rule in section 8 of the CrRs for miscellaneous matters.

Section (a) (Defendant's Access) codifies *Padgett* and *Murry* and acknowledges that the client file belongs to the client. Ethics Advisory Opinions 181, 1969, 2117, 2211 similarly recognize that portions of the file are the client's property. Opinion 2211 recognizes that this obligation exists regardless of other avenues available to the client for obtaining some of the information contained in the file. Opinion 181 also recognizes that a lawyer need not produce "miscellaneous material that would be of no value to the client," including duplicate copies. The requirement that the defense attorney act "promptly" to turn over the file was intentionally left open-ended because wide variations in felony case complexity make it impossible to develop a meaningful deadline that can be applied to every case.

Section (b) (Redactions) was drafted to incorporate the redaction provisions of CrR 4.7 and specifies that redactions only apply to discovery from the prosecutor and not to documents generated by the defense during its investigation.

The rule also includes a waiver provision not present in CrR 4.7. While the section includes the threat of waiver, it is intended to foster communication between the attorneys and is intended to recognize that delays in approving redactions are not always due to laziness or neglect, but also because of an unexpected influx of new cases, a lengthy trial, or lengthy discovery requiring careful review. When additional time is necessary, it encourages the attorneys to agree to an appropriate deadline and allows the lawyers to go back and forth addressing redactions as they do now under CrR 4.7.

Section (c) (Format) allows the lawyer flexibility in the format they provide the file to the client. This flexibility follows existing guidance found in WSBA Ethics Advisory Opinion 2023. The Committee acknowledges that the format provided by the lawyer may not be a format that incarcerated individuals can access. Recognizing that court rules are "limited to attorneys and the courts," CrR 3.1 Preamble, the Committee believes that such logistical issues are best resolved outside of the rulemaking process.

Section (d) (Fee) follows existing guidance found in WSBA Ethics Advisory Opinions 181 and 2117.

Section (e) (Retention Schedule) follows the retention schedule already in existence elsewhere in Washington's court rules for other records relating to clients. RPC 1.15(B)(a) and 1.15A(c)(3). The Committee chose to follow the schedule in these other rules for consistency. The Committee also heard from several individuals that many criminal law practitioners already implement retention schedules longer than seven years. Considering the increasingly digital nature of practicing law and the low cost of digital

storage, the Committee believes that the retention schedule will not add significant costs on agencies and attorneys who do not already have a similar retention schedule.

In settling on seven years, the Committee consulted ethics publications as well as feedback from prosecutors and defense bar associations. The American Bar Association recommends lawyers adopt a five-year retention schedule. ABA Informal Opinion 1384 (1977). The WSBA does not currently have a recommended retention schedule for client files. *See* Ethics Advisory Opinions 1185 and 1634; *see also* <https://www.wsba.org/legal-professionals/member-support/practice-management/guides/document-retention-guide>. When crafting a retention schedule, the WSBA's document retention guide counsels lawyers to "take into account the statute of limitations for legal malpractice or other potential actions." Here, the Committee was primarily concerned with the time-bar in RCW 10.73.090. In the vast majority of instances, the time-bar in RCW 10.73.090 will run out within seven years of the trial lawyer ending their representation. The Committee acknowledges that there may be instances where the seven years runs prior to the expiration of the time-bar, but believes that seven years provides ample opportunity for the client to learn of and exercise their rights under this suggested rule.

Section (f) (Custody of Materials) copies CrR 4.7(h)(3) almost verbatim and is intended to address concerns about further dissemination of sensitive discovery materials by the defendant to others.

Section (g) (Enforcement) was taken from CrR 4.7(h)(7)(i) and was left broad to give superior courts maximum flexibility.

**(D) Hearing:**

Not requested.

**(E) Expedited Consideration:**

Not requested.

## **Proposed CrR 8.11**

**Author:** Andrew Van Winkle

**Purpose:** The purpose of this rule is to provide a clear procedure for criminal defendants to obtain copies of their client files and discovery materials to assist bringing post-conviction claims for relief. The rule codifies the holding in *State v. Padgett*, 4 Wn. App.2d 851, 424 P.3d 1235 (2018), creates a retention schedule for these documents, and clarifies the procedure for redacting and delivering these documents.

### **Draft Rule:**

#### **NEW CrR 8.11 DEFENDANT'S ACCESS TO DISCOVERY**

- (a) Defendant's access.** At any time after final disposition in the superior court, the defendant may request a copy of the defendant's client file and discovery materials from the defendant's attorney. The defense attorney shall promptly provide the defendant with a copy of the client file and discovery materials requested by the defendant. The defense attorney need not provide the defendant with duplicate materials contained in the client file or materials from the court's file that are not already in the attorney's possession.
- (b) Redactions.** Discovery materials previously furnished by the prosecuting attorney to the defense attorney under CrR 4.7 may not be provided to the defendant until appropriate redactions have been made and approved under CrR 4.7. The prosecuting attorney's right to object to redactions will be deemed waived if such objections are not communicated to the defense attorney within 30 days of the prosecuting attorney receiving the redacted discovery materials for approval, or within such timeframe as the prosecuting attorney and defense attorney agree.
- (c) Format.** The defense attorney may provide the client file and discovery materials in the medium originally received by the attorney, in any widely used digital medium, or in any medium agreed to by the defendant and the defense attorney.
- (d) Fee.** The defense attorney shall not charge a fee for copying or delivering one copy of the client file and discovery materials to the defendant if the defendant was found indigent during the proceedings.
- (e) Retention schedule.** The defense attorney and any successor attorney shall retain a complete copy of the defendant's client file and discovery materials for a minimum of seven years following termination of the representation or the date when turned over to a successor attorney.

**(f) Custody of materials.** Any materials furnished to the defendant under this rule shall remain in the exclusive custody of the defendant, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide.

**(g) Enforcement.** On motion of a party or a party's lawyer, the superior court may enter such orders as it deems just under the circumstances to enforce the provisions of this rule.

**Comment.** This rule is not intended to affect or supersede any statutes or rules applicable to jails or prisons regarding incarcerated individuals' use and possession of legal materials. This rule is not intended to affect or supersede any statutes or rules governing possession and dissemination of discovery materials (e.g. RCW 26.44.186; RCW 68.50.105). This rule may not encompass all ethical obligations and considerations relevant to disposition of client property. Attorneys seeking to comply with this rule should also consult the Rules of Professional Conduct and related Ethics Advisory Opinions.

## **Proposed CrR 8.11**

**Author:** Andrew Van Winkle

**Purpose:** The purpose of this rule is to provide a clear procedure for criminal defendants to obtain copies of their client files and discovery materials to assist bringing post-conviction claims for relief. The rule codifies the holding in *State v. Padgett*, 4 Wn. App.2d 851, 424 P.3d 1235 (2018), creates a retention schedule for these documents, and clarifies the procedure for redacting and delivering these documents.

### **Draft Rule:**

#### **NEW CrR 8.11 DEFENDANT'S ACCESS TO DISCOVERY**

- (a) Defendant's access.** At any time after final disposition in the superior court, the defendant may request a copy of the defendant's client file and discovery materials from the defendant's attorney. The defense attorney shall promptly provide the defendant with a copy of the client file and discovery materials requested by the defendant. The defense attorney need not provide the defendant with duplicate materials contained in the client file or materials from the court's file that are not already in the attorney's possession.
- (b) Redactions.** Discovery materials previously furnished by the prosecuting attorney to the defense attorney under CrR 4.7 may not be provided to the defendant until appropriate redactions have been made and approved under CrR 4.7. The prosecuting attorney's right to object to redactions will be deemed waived if such objections are not communicated to the defense attorney within 30 days of the prosecuting attorney receiving the redacted discovery materials for approval, or within such timeframe as the prosecuting attorney and defense attorney agree.
- (c) Format.** The defense attorney may provide the client file and discovery materials in the medium originally received by the attorney, in any widely used digital medium, or in any medium agreed to by the defendant and the defense attorney.
- (d) Fee.** The defense attorney shall not charge a fee for copying or delivering one copy of the client file and discovery materials to the defendant if the defendant was found indigent during the proceedings.
- (e) Retention schedule.** The defense attorney and any successor attorney shall retain a complete copy of the defendant's client file and discovery materials for a minimum of seven years following termination of the representation or the date when turned over to a successor attorney.

**(f) Custody of materials.** Any materials furnished to the defendant under this rule shall remain in the exclusive custody of the defendant, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide.

**(g) Enforcement.** On motion of a party or a party's lawyer, the superior court may enter such orders as it deems just under the circumstances to enforce the provisions of this rule.

**Comment.** This rule is not intended to affect or supersede any statutes or rules applicable to jails or prisons regarding incarcerated individuals' use and possession of legal materials. This rule is not intended to affect or supersede any statutes or rules governing possession and dissemination of discovery materials (e.g. RCW 26.44.186; RCW 68.50.105). This rule may not encompass all ethical obligations and considerations relevant to disposition of client property. Attorneys seeking to comply with this rule should also consult the Rules of Professional Conduct and related Ethics Advisory Opinions.



## Board for Judicial Administration

### Legislative Committee

#### *Legislation Request Form*

Please submit completed forms and supporting documentation/drafts to [Sondra.Hahn@courts.wa.gov](mailto:Sondra.Hahn@courts.wa.gov).

Proposals must be submitted by June 20.

#### **Request Title**

Electronic service of pleadings as an alternative to personal service

#### **Requesting Entity (Organization & Contact Person)**

Judge Dave Larson. This proposal was made to DMCJA Legislative Committee, but it was suggested that it be presented to the BJA because of its impact to all levels of court.

#### **Request Background—What precipitated the request?**

The response to COVID and changes in technology over the years has highlighted the need and the availability of alternative methods to assure that proper notice is given by those instituting legal actions and to those facing civil or criminal legal action.

#### **Summary/Request Justification**

Currently, service of original process in civil matters is controlled by RCW 4.28 as well as court rules. Alternative methods in lieu of personal service currently includes, but is not limited to, substitute service with follow-up mailing (RCW 4.28.080(17)), publication (RCW 4.28.100), registered mail (in a number of sections), service by mail in landlord tenant actions (RCW 59.12.085), non-resident motorists by mail (RCW 46.64.040), etc. The minor change suggested would open up an additional method of providing notice to make it easier for people serving process to give notice, but more importantly it would provide an additional way for people to avoid default judgments in civil cases and warrants in criminal cases. The homeless or transient populations would benefit the most.

Criminal court rules can be amended without this proposed legislation, (CrR 2.2(d)(2), CrRLJ 2.2(d)(2), IRLJ 2.2(c)(3), to specifically allow for email service. However, statutory changes would be needed to require the Department of Licensing to track email addresses if that is desired. A mandate for local courts and AOC to record email addresses in JIS could be added to court rules without any statute being amended, but that assumes that there would be no fiscal impact from such a move.

Currently, people can opt in to notice by email with private businesses as well as state and local government agencies, so we need to consider as a branch the need to catch up with current technology and practices.

**RCW(s) Impacted (please provide potential bill draft language: underlined additions to RCW, strikeouts for deletions, and identify new sections)**

This is a partial list of other relevant statutes:

- RCW [4.28](#) could use a new section entitled “Service by Electronic Means – When Authorized” (see language below).
- RCW [23.95.450](#) could use a provision allowing service by electronic means
- RCW [59.12.085](#) could use a provision allowing service by electronic means
- RCW [46.08.195](#) would need to add email addresses
- RCW [46.20.205](#) would need to add email addresses
- RCW [46.64.040](#) would need to add email addresses
- RCW [59.12.085](#) would need to add permission to use email addresses
- There are probably many more statutes that would need amendment

This is the proposed language to be used primarily for civil and criminal cases (This proposal may need to be split up with one for civil cases and one for criminal cases) :

“Whenever a person is required to be served with a notice or pleadings of any kind at any stage of a criminal or civil legal proceeding, including commencement of the action itself, the party or entity needing to provide such notice or pleading may<sup>1</sup> send it via email to the last email address provided by the person to be served to the Department of Licensing and/or provided by the person to be served and recorded in the judicial information system if all other methods of service provided by law have failed. Both email addresses are to be used if there are different email addresses recorded with the Department of Licensing and the judicial information system. It is the responsibility of each person to keep their email address updated with the Department of Licensing pursuant to RCW 46.08.195 and RCW 46.20.205. Each person is responsible to keep their email address updated with the courts, but only after their first appearance in a criminal or civil proceeding and only while the action is still pending, including probation or other supervision in criminal cases.”

**Court Level Impact**

This measure would primarily affect courts of limited jurisdiction and superior courts.

**Fiscal Impact**

There is no anticipated fiscal impact, except if the proposal necessitates the updating or modification of computer systems to track email addresses by AOC or DOL.

**Funding Available/Secured**

Not applicable

---

<sup>1</sup> This could, be “shall” instead of “may”

**Legislative Strategy Recommendations**

This should not require a significant strategy. I can certainly help find a sponsor and help marshal it through the process.

**Stakeholder Impact**

The Department of Licensing would need to track email addresses in its records and the courts/AOC would need to track email addresses in JIS.

**Potential Opposition**

There may be pushback by people or groups that see this as a way to make it easier to sue someone or as a way to unfairly avoid default judgments that would have been previously entered. However, due process is achieved and the case can proceed on the merits if all other methods of service have failed and the defendant is finally able to learn of the litigation via email.

**From:** [Elizabeth Sweet](#)  
**To:** [Kyla Reynolds](#)  
**Cc:** [Paul Crisalli](#); [Nicole Gustine](#)  
**Subject:** Re: [External]Where to direct question re CrR 3.1?  
**Date:** Tuesday, January 17, 2023 8:48:16 AM  
**Attachments:** [image001.png](#)

You don't often get email from elizabeth@sweetjusticenw.com. [Learn why this is important](#)

Thank you, Ms. Reynolds. Here is my question:

When an indigent defendant is assigned a public defender (municipal court level) and the matter is resolved by entry of a plea, finding of guilty, entry of a diversion agreement or deferred prosecution, etc., but the defendant has ongoing, court-monitored requirements such as fine payments, chemical dependency evaluations, etc, and must return to court for review hearings for months or even years, is the defendant entitled to continue receiving public defense services for the review hearings without having to re-apply for public defense eligibility?

I appreciate your help! Thank you.

On Fri, Jan 13, 2023 at 11:44 AM Elizabeth Sweet <[elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com)> wrote:  
Thank you!

On Fri, Jan 13, 2023 at 10:36 AM Kyla Reynolds <[Kylaj@wsba.org](mailto:Kylaj@wsba.org)> wrote:

Hello Ms. Sweet, any inquiries may be directed to the attention of the Chair of the Court Rules and Procedures Committee, Paul Crisalli (copied here), or if you send them to me, I can pass that along to the Committee. The WSBA Court Rules and Procedures Committee reviews court rules pursuant to a [schedule of review](#) set by the Court, and is actively reviewing the IRLJ's and ER's. The Committee also has a "Subcommittee X" which takes up out-of-cycle rule suggestions. Subcommittee X may be best suited to review your questions or suggestions.

Please let me know if you have any questions. Thank you,



**Kyla Reynolds (Jones) | Paralegal II | Office of General Counsel**

Washington State Bar Association | 206-733-5941 | [kylaj@wsba.org](mailto:kylaj@wsba.org)

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | [www.wsba.org](http://www.wsba.org)

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact [accommodations@wsba.org](mailto:accommodations@wsba.org).

CONFIDENTIALITY STATEMENT: The information in this e-mail and in any attachment may contain information that court rules or other authority protect as confidential. If this e-mail was sent to you in error, you are not authorized to retain, disclose, copy or distribute the message and/or any of its attachments. If you received this e-mail in error, please notify me and delete this message.

---

**From:** Elizabeth Sweet <[elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com)>  
**Sent:** Monday, January 9, 2023 9:53 AM  
**To:** WSBA CourtRules <[WSBACourtRules@wsba.org](mailto:WSBACourtRules@wsba.org)>  
**Subject:** [External]Where to direct question re CrR 3.1?

You don't often get email from [elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com). [Learn why this is important](#)

Good morning. I am a conflicts public defender for the City of Bremerton. I am seeking clarification on CrR 3.1 re Standards for Indigent Defense. To whom should I propose my questions? Thank you.

--

Elizabeth Sweet, Attorney  
832 Madison Ave. N.  
Bainbridge Island, WA 98110

Office: (425) 367-0290

Direct: (425) 505-1865

[elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com)  
<http://www.sweetjusticenw.com>

--

Elizabeth Sweet, Attorney  
832 Madison Ave. N.  
Bainbridge Island, WA 98110  
Office: (425) 367-0290  
Direct: (425) 505-1865  
[elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com)  
<http://www.sweetjusticenw.com>

--

Elizabeth Sweet, Attorney  
832 Madison Ave. N.

Bainbridge Island, WA 98110

Office: (425) 367-0290

Direct: (425) 505-1865

[elizabeth@sweetjusticenw.com](mailto:elizabeth@sweetjusticenw.com)

<http://www.sweetjusticenw.com>