WASHINGTON STATE
BAR ASSOCIATION
Court Rules and Procedures Committee

AGENDA

January 29, 2024 | 9:30 – 11:00 AM

Zoom Link | Meeting ID: 880 9920 3602 | Passcode: 859974

Call to Order

- Welcome and Introductions
- Approval of Minutes
  - November 27, 2023
- Subcommittee Reports
  - Mandatory Arbitration Rules
  - Civil Rules for Superior Courts
  - Civil Rules for Courts of Limited Jurisdiction
  - Subcommittee X
    i. Draft court rule comments (for Committee Action on 2/12/24)
- February Meeting Reschedule to 2/12/24
  - BOG Agenda Items
- Other Business for the Good of the Order

Adjourn

WASHINGTON STATE
BAR ASSOCIATION

Court Rules and Procedures Committee

Meeting Minutes
November 27, 2023

Members Present: Chair Michael Chait, Magda Baker, Stephanie Dikeakos, Eric Lindberg, Michelle Maley, Matthew O'Laughlin, Kelly Oshiro, Scott Prichard, Laurel Smith, Andrew Van Winkle.

Members Excused: Matthew Antush, Bill Elsinger, Brian Flaherty, James Horne, Matthew Stoloff, Geoffrey Wickes.

Also Attending: Judge Blaine Gibson (Superior Courts Judges Association Liaison), Judge Catherine McDowall, Judge Wade Samuelson (District Court Judges Liaison), J Benway (Administrative Office of the Courts Liaison), David Ward (Administrative Office of the Courts Liaison), Governor Allison Widney (BOG Liaison), Kyla Reynolds (WSBA Paralegal), and Nicole Gustine (Assistant General Counsel).

The meeting was called to order at 9:30 a.m. once a quorum was established.

1. Approval of Minutes
   A motion was made and seconded to approve the minutes of the October 30,2023, meetings. The motion passed by unanimous consent.

2. Subcommittee Assignments
   The Court Rules and Procedures Committee will review the following sets of rules and has set respective subcommittees:
   - Mandatory Arbitration Rules: Have not yet met. Defer to December meeting.
   - Civil Rules: Have not yet met. Defer to December meeting.
   - Civil Rules for Courts of Limited Jurisdiction: Have not yet met.
   - Subcommittee X: Was not able to gather folks to meet before this meeting; lots of work to do and will meet in December.

   Chair Chait will reach out to check in with the subcommittee chairs and encouraged the subcommittee chairs to try to hold their first meeting by the end of the year.

3. Suggested Amendments to the Superior Court and Court of Limited Jurisdiction Rules and Suggested New General Rule: Order No. 25700-A-1549
   Discussion of rules published for comment due 4/30/24. J Benway noted that the orders have been published but rules will be published in January.

The meeting adjourned at 9:45 a.m. *The next meeting is scheduled for December 18, 2023.*

DRAFT

To: WSBA Court Rules Committee
From: Judge Blaine Gibson
Re: Proposed rule changes relating to remote appearances
Date: January 16, 2024

The BJA Remote Proceedings Work Group has proposed a slate of rule changes designed to permit remote proceedings "in the effort to secure the just, speedy and inexpensive determination of every action." The proposals have been published for comment by the Supreme Court in Order Number 25700-A-1549, with a comment deadline of April 30, 2024.

The overall purpose of the proposed rule changes is to allow remote appearances, testimony, and trial as the parties agree or the court orders. To make it clear that remote appearances are possible in courts of limited jurisdiction, a new rule is proposed, ARLJ 15, which includes the language "Any participant required to physically appear may be permitted to remotely appear or appear through counsel in the discretion of the court." For Superior Court, CR 1 is proposed to be changed to:

> CR 1 SCOPE OF RULES
> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. <u>To this end, proceedings held by remote means are permitted.</u>

The proposed rule changes and my comments do not address the question of whether the present rules, or the proposed rules, satisfy the constitutional requirements for the presence of the defendant at all critical stages of the case. This memo also does not discuss the policy question of whether, and to what extent, remote appearances should be allowed.

Proposed Changes in General

For the most part, the proposed changes are simple. Terms such as "attend," "before the court," and "personally appear" that seem to require physical presence in court are replaced with more general terms, such as "appear" or "appearance," which would apply to either remote appearance or physical presence in court.

Rules CRLJ 43(a)(1) and CR 43(a)(1)

I have some concern about the proposal for CRLJ 43:

> CRLJ 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.~~

First, some history. Prior to 2010, CRLJ 43(a)(1) consisted of the single sentence to which the work group proposes to reduce it. Judges generally believed that the language "unless otherwise directed by the court" gave them discretion as to whether or not to allow remote testimony. Then the Court of Appeals, Division 2, decided *Kinsman v Englander*, 140 Wn. App. 835 (2007). In that case, the court held that, "where there is no statute or court rule permitting telephonic testimony, the trial court may direct the telephonic testimony of witnesses only after all parties' consent." *Id*. At 844. In other words, the court nullified the "unless otherwise directed by the court" language and decided that a judge can only allow remote testimony if all parties agree. Because this ruling appeared to remove the court's discretion, the rule was amended in about 2010 by addition of the second sentence, which the work group now proposes to remove. The second sentence was adopted from the parallel federal rule, which brought with it a history of court interpretation.

In order to avoid another *Kinsman*-like appellate decision, I suggest CRLJ 43(a)(1) include language similar to that proposed by the work group for CR 43(a)(1):

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.~~ Except as provided in CR 43(f)(1), the Court may permit, with appropriate safeguards, testimony by remote means if the parties agree and the Court approves, or if the Court determines the purposes of CR 1 will be served. In determining whether testimony should be allowed by remote means per CR 1, the court may consider whether the witness is subject to a trial subpoena; whether there will be any prejudice to any party or the witness if testimony by remote means is permitted; the witness' access to technology that allows the witness to be seen and heard; and court's ability to facilitate remote testimony. Advance notice of a party's intention to use remote testimony must be given no less than 10 days prior to trial, absent good cause shown.

This language makes it much clearer that the court does have discretion to allow remote testimony, under appropriate circumstances. Of course, the reference to CR 1 would need to be changed to ARLJ 15.

With regard to the proposed change to CR 43(a)(1), I suggest the court also be required

to consider whether there will be prejudice to any party or the witness if testimony by remote means is *not* permitted.

Minor Issues

I noted a small error in the work group's proposed change to CRLJ 7. The word "in" is omitted where indicated below in brackets. That word does appear in the current version of the rule.

> CRLJ 7 PLEADINGS ALLOWED: FORM OF MOTIONS
>
> (4) ~~*Telephonic*~~ *Argument by Remote Appearance*. Oral argument on civil motions, including family law motions, may be heard by ~~conference telephone call~~ remote appearance [in] the discretion of the court. ~~The expense of the call shall be shared equally by the parties unless the court directs otherwise in the ruling or decision on the motion.~~

I also have a question about this proposed language in 30(b)(7) regarding depositions: "Parties are strongly encouraged to agree to the mode and manner of deposition, in person or remote, before notice is served." A "rule" that simply urges people to behave in a certain way is not a rule. Is this appropriate language to be in a rule?

Mr. Robert Hill has proposed two alternatives for providing incarcerated individuals with adequate time to seek reconsideration in civil cases. One proposal would amend CR 59 and the other would create a new general rule, GR 3.2. The WSBA Court Rules and Procedures Committee supports the intent of Mr. Hill's proposal, but believes the proposal is underinclusive; therefore the Committee proposes this alternative. Mr. Hill's proposal and existing GR 3.1 omit consideration of individuals civilly committed to public institutions who may encounter just as much difficulty filing documents as those serving criminal sentences. The Committee also recognizes that there are several other instances beyond motions for reconsideration for which incarcerated individuals may not be able to meet current filing deadlines. Notably, Mr. Hill's proposal would extend the filing deadline for reconsideration out to 21 days. Because existing GR 3.1(a) deems documents filed upon deposit in an institution's internal mail system, the Committee does not believe a full 21 days is necessary for filing and responding to matters that are intended to be addressed on shortened time.

GR 3.1
SERVICE AND FILING BY AN INCARCERATED PERSON

(a)(1) If an incarcerated person files a document in any proceeding, the document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(a)(2) In any proceeding for which a statute or court rule provides a filing deadline of fewer than 15 days, the deadline shall be automatically extended to 15 days for any document filed by an incarcerated person.

(a)(3) As used in this rule, "incarcerated person" means any resident, inmate, or patient of a federal, state, county, or municipal correctional, detention, treatment, or rehabilitative institution.

(b) – **(d)** [Unchanged]

The King County Department of Public Defense, the Washington State Office of Public Defense, and the Washington Defender Association have jointly proposed amendments to CrR 4.7 and CrRLJ 4.7. The WSBA Court Rules and Procedures Committee takes no position on whether the proposed amendments are good policy or whether they should be adopted. To the extent the Supreme Court is inclined to adopt the proposed amendments, the Committee believes they would benefit from some technical changes and minor clarifications.

Summary of the Committee's proposed changes: Municipal and District courts should not be referenced in CrR 4.7 because CrR 4.7 applies solely to superior court cases. The reference to a CrR 1.7 is misplaced because no such rule exists; superior court local rulemaking is conducted under GR 7. The Committee does not believe 3 months is sufficient time for all counties and courts to craft redaction rules relevant to their local practice. The Committee also believes the existing rulemaking timelines and procedures in GR 7 are more appropriate for adopting these new local rules, which are likely to be lengthy and detailed.

The word "guidelines" is replaced with "requirements" to indicate that compliance with the local redactions rule is mandatory unless an exception is granted by the court. If the local rules are not binding on lawyers, it would be unnecessary to provide a motion procedure for prosecutors and defenders to seek waiver of the "guidelines." If the proposed amendment's authors did not intend these "guidelines" to be mandatory, then the Committee believes subsections (3)(i) and (ii) should be omitted.

The proposed amendments use small cap alphabet letters for third tier subheadings. The Committee has replaced those with small cap roman numerals for consistency; existing CrR 4.7 uses small cap roman numerals for third tier subheadings. The Committee has replaced the word "accused" with "defendant" for consistency with existing usage within CrR 4.7. The Committee has replaced the words "attorney" and "defense counsel" with "defendant's attorney" for consistency and clarity. The Committee has replaced the word "discovery" with "materials" for consistency within CrR 4.7(h). Furthermore, the term "discovery" applies to all documents disclosed under CrR 4.7, while redactions are only intended to apply to certain documents disclosed by the prosecuting attorney. The Committee has replaced the word "motion" with "move" for consistency with other court rules and because the word "motion" is not a verb. New subsection (iii) takes the rulemaking language from the main body of the proposed amendment and moves it lower in the rule. It is also reworded to follow the provisions of GR 7(a) and addresses the potential ambiguity of what process courts are to follow after the effective date of this rule but while local rulemaking is pending.

With respect to the proposed amendments to CrRLJ 4.7, the proposed amendments purport to change CrRLJ 4.7(h)(3). This appears to be a typo as there is no such rule in the CrRLJs. The relevant provisions are found in CrRLJ 4.7(g)(3).

The Committee's proposals, below, display the defense groups' proposed amendments as if they were the current rule, and presents the Committee's proposed changes with underlining and strikethrough. The Committee recommends using the same language in both CrR 4.7(h)(3) and CrRLJ 4.7(g)(3).

CrR 4.7
DISCOVERY

(a) – (g) [Unchanged]

(h) Regulation of Discovery.

(1) – (2) [Unchanged]

(3) *Custody of Materials*. Any materials furnished to ~~a~~ the defendant and/or the defendant's attorney pursuant to these rules shall remain in the exclusive custody of the defendant and/or the defendant's attorney and be used only for the purposes of conducting the party's side of the case, 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. ~~Further, each Municipal, District, and Superior Court shall, through the local rule-making process under CrR/CrRLJ 1.7, publish guidelines for redactions within three months of adoption of this rule. Defense counsel may redact discovery consistent with these guidelines and provide a copy of the discovery to the accused.~~ Further, the defendant's attorney may only provide a copy of the materials to the defendant after making all redactions required by local court rule. ~~Each defense~~ The defendant's attorney shall maintain a duplicate copy of ~~discovery~~ the redacted materials furnished to the ~~represented~~ defendant ~~that show the redactions made in accordance with this court rule. The duplicate copy of discovery with redactions shall be kept~~ in the defendant's case file for the duration of the case.

i. ~~a.~~ ~~A~~ The prosecuting attorney may ~~motion~~ move the court for an order ~~to modify redactions beyond the Court's published guidelines by scheduling a hearing~~ requiring redactions beyond those required by local court rule by filing and serving a motion for additional redactions within 7 days of the prosecuting attorney furnishing defendant's counsel with materials under subsection (a) of this rule. ~~discovery being provided to defense counsel to address what additional redactions beyond their guidelines are required.~~

ii. ~~A defense~~ The defendant's attorney may ~~motion~~ move ~~the court~~ for an order limiting the redactions required by local court rule for any reason deemed appropriate by the court. ~~to modify redaction conditions.~~

iii. Each superior court shall adopt a local rule for making redactions under this rule. The local court rule must be filed on or before July 1, 2025, with an effective date of September 1, 2025. For all cases pending before September 1,

2025, redactions will continue to be made under the prior version of this court rule.

(4) – (7) [Unchanged]

CrRLJ 4.7
DISCOVERY

(a) – (f) [Unchanged]

(g) Regulation of Discovery.

(1) – (2) [Unchanged]

(3) *Custody of Materials*. Any materials furnished to ~~a~~ the defendant and/or the defendant's attorney pursuant to these rules shall remain in the exclusive custody of the defendant and/or the defendant's attorney and be used only for the purposes of conducting the party's side of the case, 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. ~~Further, each Municipal, District, and Superior Court shall, through the local rule-making process under CrR/CrRLJ 1.7, publish guidelines for redactions within three months of adoption of this rule. Defense counsel may redact discovery consistent with these guidelines and provide a copy of the discovery to the accused.~~ Further, the defendant's attorney may only provide a copy of the materials to the defendant after making all redactions required by local court rule. ~~Each defense~~ The defendant's attorney shall maintain a duplicate copy of ~~discovery~~ the redacted materials furnished to the ~~represented~~ defendant ~~that show the redactions made in accordance with this court rule. The duplicate copy of discovery with redactions shall be kept~~ in the defendant's case file for the duration of the case.

i. ~~a. A~~ The prosecuting attorney may ~~motion~~ move the court for an order ~~to modify redactions beyond the Court's published guidelines by scheduling a hearing~~ requiring redactions beyond those required by local court rule by filing and serving a motion for additional redactions within 7 days of the prosecuting attorney furnishing defendant's counsel with materials under subsection (a) of this rule. ~~discovery being provided to defense counsel to address what additional redactions beyond their guidelines are required.~~

ii. ~~A defense~~ The defendant's attorney may ~~motion~~ move ~~the court~~ for an order limiting the redactions required by local court rule for any reason deemed appropriate by the court. ~~to modify redaction conditions.~~

iii. Each court of limited jurisdiction shall adopt a local rule for making redactions under this rule. The local court rule must be filed on or before July 1, 2025, with an effective date of September 1, 2025. For all cases pending before September 1, 2025, redactions will continue to be made under the prior version of this court rule.

(4) – (7) [Unchanged]

The Office of Public Defense has proposed amendments to RAP 9.6 and the Washington State Court of Appeals Rules Committee has proposed a new RAP in RAP Title 9. Both proposals seek to address the same problem: granting appellate criminal defense attorneys with access to the superior court file. The WSBA Court Rules and Procedures Committee (CRPC) supports the proposal submitted by the Washington State Court of Appeals Rules Committee and recommends its adoption instead of the RAP 9.6 amendments proposed by the Office of Public Defense. The CRPC finds the Washington State Court of Appeals Rules Committee's proposal to be streamlined and appropriately tailored to the problem. The CRPC is also concerned by the language proposed by the Office of Public Defense, requiring copies to be in color if the original was provided in color. This language will place a new unfunded mandate on counties that do not maintain color scanning or that destroy original filings after digitization. This language is also inconsistent with GR 14(a), which prohibits "colored pages, highlighting or other colored markings." The CRPC is aware of the appellate bar's frustration with color filings that become unreadable upon digitization in black and white, but believes it is a problem that needs to be addressed outside the rulemaking process due to the increased costs associated with accommodating color filings.

The Washington State Court of Appeals Rules Committee has proposed an addition to RAP 18.6 defining the term “end of day.” The WSBA Court Rules and Procedures Committee (CRPC) recommends against adoption of this proposed addition at this time. If adopted in its current state, the CPRC believes the proposed rule will result in confusion. The term “end of day” is not used anywhere in the RAPs; thus, defining the term would be superfluous. If the purpose of the rule is to require service and filing of documents no later than 5 P.M. on the due date, then the proposed rule will not achieve the intended result. To achieve that result, there must be additional language commanding that result, for example: “Service and filing of documents under these rules must be completed no later than end of day on the date due calculated under these rules.” Furthermore, the Supreme Court, Division I, Division II, and Division III each close their clerks’ offices prior to 5 P.M. By defining “end of day” as 5 P.M., the proposed rule will give individuals who file documents in person (usually pro se litigants) the false impression that they may file documents with the appellate courts all the way up to 5 P.M.

The Washington State Court of Appeals Rules Committee has proposed an addition to RAP 18.8, creating a streamlined process for seeking a first extension of time to file a brief. The WSBA Court Rules and Procedures Committee (CPRC) takes no position on whether the proposed rule is good policy or whether it should be adopted.

If adopted, the CRPC recommends two changes to maintain consistency within the RAPs. Because proposed RAP 18.8(b) refers to an act a party is required to perform, the word "shall" needs to be changed to "should" to maintain consistency with RAP 1.2(b). Under RAP 1.2(b) the word "shall" is only used when referring to an act by a non-party and the word "should" is used when referring to an act a party is required to perform. The word "appeal" in the proposed rule needs to be changed to "review proceeding" to maintain consistency with other RAPs, including RAPs 18.12 (governing accelerated review). As used in the RAPs, the term "appeal" usually refers to matters filed as a matter of right under RAP 2.2. The term "review proceeding" is used when a term is needed to encompass appeals, but also personal restraint petitions and cases accepted on discretionary review. Because briefs are filed in matters other than appeals and because "any review proceeding" may be accelerated under RAP 18.12, the reference to "appeals" in the portion of the proposed rule discussing briefs in accelerated cases should be changed to "review proceeding."

The Washington State Court of Appeals Rules Committee has proposed an addition to RAP 16.7, requiring PRP petitioners to list their anticipated release date. The WSBA Court Rules and Procedures Committee (CRPC) takes no position on whether the proposed rule is good policy or whether it should be adopted.

If adopted, the CRPC recommends a technical change to resolve a latent ambiguity in the proposed rule due to the existence of multiple "anticipated release dates." The CRPC is aware that many petitioners challenge their release date and their earned release credit calculation. As currently drafted, the proposed rule does not specify whether a petitioner is supposed to specify the "anticipated release date" that the petitioner believes they are entitled to or whether a petitioner needs to specify the petitioner's "anticipated release date" as calculated by the Department of Corrections. The CRPC is also aware that a petitioner may be serving consecutive sentences in multiple cases such that the petitioner's "release date" (i.e. sentence expiration) on the case under review may be different from their actual physical release date. A petitioner may also be serving a sentence in a case unrelated to the present petition and may have long ago finished serving their sentence in the case under review (e.g. *Blake* petitions). Accordingly, the proposed rule should specify which of the many possible release dates the petitioner is supposed to list in their petition. Because the CRPC does not know which release date the Court of Appeals Rules Committee has in mind, the CRPC has not proposed any suggested language to fix this ambiguity.

The King County Prosecuting Attorney's Office has proposed a new RAP governing references to minors in appellate cases. The WSBA Court Rules and Procedures Committee takes no position on whether the proposed rule is good policy or whether it should be adopted. To the extent the Supreme Court is inclined to adopt the proposed rule, the Committee believes it would benefit from changes for clarity and changes to maintain a consistent style within the RAPs. The Committee's proposed changes are noted below via underlining and strikethrough. While the King County Prosecuting Attorney's Office did not specify where the proposal should be placed within the RAPs, the Committee believes the proposed rule would fit best within the RAPs by creation of a new RAP 18.18.

RAP 18.18
References to Minors and Crime Victims

(a) References to Minors. Except as provided in subsection (d) of this rule, minors ~~shall~~ should be referred to by their initials in all documents filed in the appellate court. ~~for the public record in criminal proceedings and civil commitment actions pursuant to Chapter RCW 71.09.~~

(b) Definition of "Minor." For purposes of this rule, "minor" means any person ~~under the age of eighteen (18)~~ less than 18 years of age ~~at the time that any portion of the relevant crime~~ when the facts giving rise to the case occurred, regardless of ~~their~~ the person's age when the document is filed in the appellate court. ~~for the public record.~~

(c) References to Crime Victims. Except as provided in subsection (d) of this rule, all victims and alleged victims of the following offenses shall be referred to by their initials in all documents filed in the appellate court ~~criminal proceedings and civil commitment actions pursuant to Chapter RCW 71.09~~: (1) any offense contained in Chapter 9A.44 RCW; (2) any offense contained in Chapter 9A.88 RCW; (3) any offense contained in Chapter 9A.86 RCW~~,~~; (4) any offense alleged to have been committed with sexual motivation as defined in RCW 9.94A.030(48); (5) a violation of RCW 9A.56.120 or RCW 9A.56.130 when the threat is based on exposing past sexual conduct~~,~~ or sexual extortion ~~if the victim was being extorted to commit sexual acts~~; (6) a violation of RCW 9A.40.100 based on causing the victim to engage in either a sexually explicit act or a commercial sex act; or (7) any other offense defined as a "sex offense" under RCW 9A.44.128 or RCW 9.94A.030.

(d) Application.

(1) This rule ~~does not apply:~~ applies to all review proceedings in the appellate court that began as a criminal proceeding, juvenile offense proceeding, civil commitment proceeding under Chapter 71.09 RCW, guardianship proceeding under Chapter 11.130

RCW, shelter care/dependency/termination proceeding under Chapter 13.34 RCW, and any other court proceeding for which a law requires reference to minors by their initials.

(2) This rule does not apply when prohibited by the United States Constitution or the Washington State Constitution. ~~i. If the appellate court determines that using a minor or victim's full name is necessary to uphold a constitutional right.~~

(3) ~~ii. To minor defendants in either adult court criminal proceedings or civil commitment proceedings under RCW 71.09~~ This rule does not apply to documents filed in the appellate court under Title 9 of these rules.

(4) ~~iii.~~ This rule does not apply to ~~To~~ documents filed under seal in the appellate court.

~~iv. In non-criminal proceedings, except civil commitment actions pursuant to Chapter 71.09 RCW~~