

WASHINGTON STATE BAR ASSOCIATION

Court Rules and Procedures Committee

Meeting Minutes

March 28, 2022

Members Present: Chair Isham Reavis, Lesli Ashley, Magda Baker, Rane Casalegno, Paul Crisalli, Ofelia Granados, Zachary Pekelis Jones, Margaret Macrae, Laurel Smith, Alexandria Smith, Andrew Van Winkle, and Coreen Wilson.

Members Excused: Tony DiTommaso, Brian Esler, Duffy Graham, Travis Kennedy, Karen Knutsen, Matthew Monahan, Jeff Sbaih, Kathleen Shircliff, and Emory Wogenstahl.

Also Attending: Judge Blaine Gibson, Judge Bradley Maxa, J Benway (AOC Liaison), Nicole Gustine (WSBA Assistant General Counsel), and Kyla Jones (WSBA Paralegal).

The meeting was called to order at 9:45 a.m. once a quorum was established.

1. Approval of Minutes

A motion was made and seconded to approve the February 28, 2022, meeting minutes. The motion passed unanimously.

2. Subcommittee Reports

- Criminal Rules for Superior Courts (CrR)

The CrR subcommittee plans to meet in April to discuss proposed changes for the April 25, 2022, meeting.

- Criminal Rules for Courts of Limited Jurisdiction (CrRLJ)

- CrRLJ 4.7

Subcommittee Chair Rane Casalegno presented a proposed change to CrRLJ 4.7. The subcommittee solicited preliminary feedback from various stakeholders. The Committee discussed differences between District Court and Superior Court and if there is a need for the rules to vary. The rule change needs to account for pro se parties in some way.

The subcommittee will solicit more preliminary feedback and review this rule at a subcommittee meeting. The subcommittee will bring this back to the Committee at a later date.

- Subcommittee X

- USPS Changes/Impact to CR's

The subcommittee reviewing this proposal voted unanimously to not propose a change to CR 5(b)(2)(A). The discussion noted that the rule change will not fix other underlying issues with service by mail. All corresponding deadlines would need to be adjusted and sometimes mail gets lost. Chair Reavis will update the BOG and ask if extending the

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deadlines in the Civil Rules is something the BOG would like the Committee to do.

3. Mental Proceeding Rules

The Committee received a request to review the Superior Court Mental Proceeding Rules. The rules have not been updated since at least 2015. The RCW's associated with the MPR's have been revised several times, some as recently as this July.

The Committee suggested requesting feedback on this issue from the BOG. The MPR's are outside the scope of the Committee's review under GR 9. If the BOG would like the Committee to work on the MPR's, there was a suggestion to create an ad hoc subcommittee to do this work. Committee member Andrew Van Winkle volunteered to assist for this project.

4. Future Meeting Dates

Chair Reavis discussed a change to the Committee's calendar. The Committee will plan to meet on July 5th instead of July 25th. The Committee discussed the idea of meeting in person with a hybrid video conferencing option. A suggestion was made to revisit this issue in the fall for next fiscal year.

5. Other Business for the Good of the Order

No remaining business.

The meeting adjourned at 10:18 a.m.

CrRLJ 4.7 DISCOVERY

(a) Prosecuting Authority's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting authority shall, upon notice the court has assigned appointed counsel, or the filing of a notice of appearance by appointed counsel, or notice the defendant is proceeding pro se ~~written demand~~, disclose to the defendant or the defendant's counsel the following material and information within ~~his or her~~ the prosecuting authority's possession or control concerning:

(i) the names and addresses of persons whom the prosecuting authority intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(iv) any books, papers, documents, photographs, or tangible objects which the prosecuting authority intends to use in the hearing or trial or which were obtained from or belonged to the defendant;

(v) any record of prior criminal convictions known to the prosecuting authority of the defendant and of persons whom the prosecuting authority intends to call as witnesses at the hearing or trial;

(vi) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(vii) any expert witnesses whom the prosecuting authority will call at the hearing or trial, the subject of their testimony, and any reports relating to the subject of their testimony that they have submitted to the prosecuting authority;

(viii) any information indicating entrapment of the defendant;

(ix) specified searches and seizures;

(x) the acquisition of specified statements from the defendant; and

(xi) the relationship, if any, of specified persons to the prosecuting authority.

(2) Unless the court orders otherwise, discoverable materials shall be made available for inspection and copying within 21 days of notice the court has assigned appointed counsel, or the filing of a notice of appearance by appointed counsel, or notice the defendant is proceeding pro se ~~arraignment or within 21 days of receipt of the demand by the prosecuting authority, whichever is later.~~

(3) Except as otherwise provided by protective orders, the prosecuting authority shall disclose to defendant or defendant's lawyer any material or information within ~~his or her~~ the prosecuting authority's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession, or control of members of ~~his or her~~ the prosecuting authority's staff.

(b) Defendant's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the defendant shall disclose to the prosecuting authority the following material and information within ~~his or her~~ defendant's possession or control concerning:

(i) the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any books, papers, documents, photographs, or tangible objects which the defendant intends to use in the hearing or

(iii) any expert witnesses whom the defendant will call at the hearing or trial, the subject of their testimony, and any reports relating to the subject of their testimony that they have submitted to the defendant;

(iv) any claim of incompetency to stand trial;

(v) whether ~~his or her~~ the defendant's prior convictions will be stipulated or need to be proved;

(vi) whether or not ~~he or she~~ the defendant will rely on a defense of insanity at the time of the offense; and

(vii) the general nature of ~~his or her~~ the defendant's defense.

(2) Unless the court orders otherwise, discoverable materials shall be made available for inspection and copying not later than 14 days prior to the date set for trial.

(3) References in this section to defendant shall be deemed to include the defendant's lawyer, where appropriate.

(c) Physical and Demonstrative Evidence.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting authority or the defendant may require or allow the defendant to:

(i) appear in a lineup;

(ii) speak for identification by a witness to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of the crime charged; (v) try on articles of clothing;

(vi) permit the taking of samples of or from his or her blood, hair, and other materials of his or her body including materials under his or her fingernails which involve no unreasonable intrusion thereof;

(vii) provide specimens of ~~his or her~~ the defendant's handwriting; and

(viii) submit to a reasonable physical, medical, or psychiatric inspection or examination.

(2) Provisions may be made for appearance for the purposes stated in this section in an order for pretrial release.

(d) Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority, the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary Disclosures.

(1) Upon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure of the relevant material and information not covered by sections (a) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iii).

(2) *Informants.* Disclosure of an informant's identity shall not be required when ~~his or her~~ the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) Regulation of Discovery.

(1) *Investigations Not To Be Impeded.* Except as otherwise provided by protective orders or as to matters not subject to disclosure, neither the lawyers for the parties nor other prosecution or defense personnel shall advise persons, other than the defendant, who have relevant material or information to refrain from discussing the case with the opposing lawyer or showing the opposing lawyer any relevant material, nor shall they otherwise impede the opposing lawyers investigation of the case.

(2) *Continuing Duty To Disclose.* If, after compliance with this rule or orders pursuant to it, a party discovers additional material or information which is subject to disclosure, ~~he or she~~ that party shall promptly notify the other party or ~~his or her lawyer~~ counsel of the existence of such additional material. If the additional material or information is discovered during trial, the court shall also be notified.

(3) *Custody of Materials.* Any materials furnished to a lawyer pursuant to these rules shall remain in the exclusive custody of the lawyer 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, a defense lawyer shall

be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) *Protective Orders.* Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit ~~his or her~~ the party's lawyer to make beneficial use of it.

(5) *Excision.* When some parts of certain material are discoverable under this rule and other parts are not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) *In Camera Proceedings.* Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) *Sanctions.*

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(ii) The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.

(iii) A lawyer's willful violation of an applicable discovery rule or an order issued pursuant thereto may subject the lawyer to appropriate sanctions by the court.

WASHINGTON STATE BAR ASSOCIATION

Court Rules and Procedures Committee

April 18, 2022

Hon. Brian M. Tollefson
President, Board of Governors
Washington State Bar Association
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RE: Mail Delays and Mental Proceeding Rules

Dear President Tollefson:

I write on behalf of the Court Rules and Procedures Committee to request guidance from the Board of Governors regarding two matters before our Committee. The first matter is whether our Committee should continue exploring a proposed rules change in response to the U.S. Postal Service's ongoing delays in services. The second is whether our Committee should undertake a review of the Superior Court Mental Proceedings Rules (MPRs).

Mail Delays

As you will recall, on March 10 I addressed the Board of Governors regarding the issue of postal service delays, and particularly its impact on service by mail. With the change in service, pleadings or motions served by mail increasingly arrive shortly before, or even after, the deadline for a response. In some cases, the papers never arrive at all. The issue particularly affects litigants in jurisdictions without rules providing for electronic service, and inmates who frequently have no option but to rely on service by mail.

Following the BOG meeting, a subcommittee of the full Court Rules and Procedures Committee studied whether a potential rule change might address the issue of unreliable mail service. The subcommittee looked at the responses of other jurisdictions and obtained information from interested stakeholders. But ultimately, the subcommittee found no potential response beyond increasing the amount of time allowed to respond to papers served by mail.

Adding more time to respond would lessen some of the problems caused by delay, but could create others by delaying litigation. It would not address problems with mailed items which never arrive. Ultimately this is an issue which only the U.S. Postal Service has the power to fix. However, if it is the wish of the BOG, our Committee will proceed with crafting a proposal increasing the time to respond to pleadings or papers served by mail.

Mental Proceedings Rules

The MPRs have not changed since at least 2015. However, the RCWs associated with mental proceedings, Chapter 71.05 RCW, have been revised several times, with additional revisions becoming effective this July.



Although the MPRs are not on the schedule for regular review by our Committee, if the BOG wishes we will conduct a review of the MPRs to see if any rules need to be harmonized with the RCWs.

Please let me know any guidance the BOG is willing to give our Committee regarding these issues. Please do not hesitate to contact me if there are any questions. Thank you.

Sincerely,

s/Isham M. Reavis

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cc: Lauren Boyd
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