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November 17, 2022

VIA FIRST CLASS MAIL and
Email to judy.gaul@atg.wa.gov

Hon. Robert Ferguson
Attorney General of the State of Washington
PO Box 40100
Olympia, WA 98504-0100

RE: Request for Attorney General Opinion on the topic of *RCW 2.08.150 and Visiting Judges*

Dear Attorney General Ferguson:

Background

San Juan County is a small county with a population of approximately 18,000 persons and one superior court judge. It is not part of a judicial district. RCW 2.08.065.

When the one superior court judge is unavailable due to voluntary or involuntary disqualification another judge is selected to fill in. This other judge is referred to as a “visiting judge” in RCW 2.08.150.

The San Juan County Superior Court Judge adopts local rules (called “LCR”) as authorized by the Washington Supreme Court. In 2022, a change was proposed to LCR 77 regarding visiting judges which directed that the home county of the visiting judge will serve as the default location for hearings. Our office objected to this proposed rule by way of a written memorandum dated May 10, 2022 (copy attached). Based upon our comments, the local rule was modified and then adopted. A copy of the current version of LCR 77, effective September 1, 2022, is found after the signature to this letter.

The dialog concerning visiting judges prompted other questions from the Superior Court Judge Kathryn Loring and a request that I seek your assistance by way of an Attorney General Opinion. Judge Loring and I share the belief that courts around the state, especially those serving

small jurisdictions could benefit from uniform guidance from your office when determining where and how to hold and schedule matters involving a visiting judge.

When court hearings occur remotely, the parties, their attorneys and the judge may all be located in places other than the county seat, which by statute is the location for courthouses in Washington. See *Thurston Cnty. ex rel. Bd. of Cnty. Comm'rs v. City of Olympia*, 151 Wn.2d 171, 86 P.3d 151 (2004) (holding Thurston County could not locate courthouse facilities in Tumwater, a location not at the county seat.) See also RCW 36.16.090.

Presently, the Washington Supreme Court has adopted a rule incident to the emergency circumstances of COVID-19 pandemic that expressly allows remote proceedings with a declaration that such matters are “deemed to take place” where the proceeding is pending.¹ This rule of the Supreme Court expressly authorizes the superior courts to hear matters by video where the location of the people involved is other than at the courthouse at the county seat and thereby poses additional questions that should be considered.

But the Supreme Court rule does not specify which county’s software will be used for remote and video hearings. We note that as the State Courts of Washington have responded to the COVID-19 pandemic, they have also obtained the computer hardware and software and training to allow the expansion and use of hearing which are held remotely. The software chosen by the various courts, and hence being used by parties, other participants and observers may differ. For example, Zoom is used in Skagit County, Microsoft Teams is used in San Juan County, and Star Leaf is used in Island County. These technology differences become important to the parties and spectators when the visiting judge is working on the case.

Questions Presented

1. Where a hearing **is held in person** before a visiting judge, must the hearing be held in the courthouse where the case was filed, or may the hearing be held at the courthouse of the visiting judge without consent of the parties? Are there certain types of **in person** hearings which must be held in one location or another?

¹ In connection with Emergency Rules adopted pursuant to COVID-19 Pandemic, the Washington Supreme Court adopted rule No. 25700-B-658 in which it recognized in Section 17 on pages 11 and 12 that ...

For purposes of any law specifying the location of court proceedings, whenever remote proceedings are authorized, they are deemed to take place in the courthouse where the matter is pending or venue exists regardless of where the judge, parties, witnesses, or others participating remotely are located.

This rule was recently restated by Order dated October 27, 2022, which concerns court operations after October 31, 2022.

- In responding to this question, I request that you consider the venue provisions of RCW 4.12.040(2) which in criminal cases provides that a case “shall not be sent for trial to any court outside the county unless the accused shall waive his or her right to a trial by a jury of the county in which the offense is alleged to have been committed.” *See also State v. Duran-Madrigal*, 163 Wn. App 608, 261 P.3d 194. Also, please consider the effect of RCW 4.12.040(1) which states that a judge “shall be **called in** from some other court.” (Emphasis supplied). The use of the phrase “called in” appears to suggest that this means the visiting judge must appear in person at the courthouse where the case is filed. Please also consider the interests of the community in participating and observing the open courts.
2. Where a hearing in a civil or criminal case is held, may a visiting judge assigned pursuant to RCW 2.08.150 **hold the hearing in the county where the case is tried** and appear from a location outside the county? Does the answer differ if the remote, video-only hearing involves a dispositive matter, such as change of venue, motions to dismiss, or motions for summary judgment, change of plea or sentencing?
 3. May a **remote** hearing occur in the visiting judge’s courtroom without consent of the parties or must it be held in the county where the case is filed?
 4. Does RCW 2.08.190 apply in San Juan County, a county in which the Superior Court Judge is not part of a district?
 - Please consider RCW 2.08.115 concerning judges serving a district with more than one county.
 - RCW 2.08.190 specifically authorizes a superior court judge to make decisions regarding certain matters “pending in any other county in his or her district” and then adds the proviso which states “PROVIDED, That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties.” If the proviso in RCW 2.08.190 does apply to matters pending in San Juan County, must the consent of the parties be obtained before conducting any **in person hearing** before a visiting judge when the visiting judge is located at the courtroom of his or her home county?
 5. If a court hearing is held in a visiting judge’s home county, is the clerk of the court for the county where the case is filed or the clerk of the court for the judge’s home county responsible for keeping the minutes and the record of proceedings held?
 - In evaluating this question, we note that while statutes provide for the duties of clerks, they do not specify whether a clerk in a visiting judge’s home county will provide services on matters filed in another county. Stated another way, the

November 17, 2022

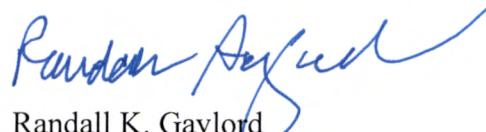
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question becomes whether a superior court judge, acting as a visiting judge, has the authority to direct the functions of the clerk of the court of his or her home county on the matter filed in the other county. See also RCW 2.32.050(9) (stating that superior court clerks must conform to the direction of the court). In answering this question we ask that you consider the case of *Burrowes v. Killian*, 195 Wn.2d 350, 363, 459 P.3d 1082, 1089 (2020) where the Supreme Court announced that “Although the judges may create local rules, WASH. CONST. art. IV, § 24, those rules may not interfere with the core functions of the county clerk.”

6. Where a visiting judge is assigned pursuant to RCW 2.08.150, may the visiting judge delegate authority to a court commissioner or referee to conduct hearings as authorized by Chapter 2.24 RCW? If delegation to a court commissioner or referee is permitted, must the court commissioner or referee be a person appointed by the visiting judge or must it be a person appointed by the presiding judge the county where the case is filed?

We appreciate your attention to this request and recognize the difficulties and opportunities that arise as the courts adjust to the challenges of COVID-19 pandemic. We appreciate your guidance as judges, court clerks, staff, parties to cases and their attorneys work to assure that statutory and constitutional procedures are advanced in the best interests of the public.

Sincerely,



Randall K. Gaylord
Prosecuting Attorney

//rkg

C (all by email):

Hon. Kathryn C. Loring, Superior Court Judge for San Juan County

Hon. Lisa Henderson, Court Clerk for San Juan County

Ms. Amy Vira, Prosecuting Attorney – Elect for San Juan County

San Juan County Council

Mr. Mike Thomas, County Manager

Mr. Russell Brown, Executive Director of Washington Association of Prosecuting Attorneys

Jeffrey Even, Solicitor General's Office via email only: Jeffrey.even@atg.wa.gov

San Juan County Superior Court
Local Rules
Effective September 1, 2022

LCR 77

(o) Visiting Judge.

- (1) When the elected judge is not sitting on a case, whether from a recusal, a notice of disqualification or otherwise, Island County Superior Court, as the Court designated by Supreme Court of Washington Order 25700-B-548, and consistent with RCW 4.12.040, shall assign a visiting judge from any Washington Superior Court.
- (2) Consistent with RCW 2.08.030, RCW 2.08.150, and RCW 2.08.190, unless otherwise stipulated by the parties, San Juan County Superior Court sessions involving a visiting judge shall be held in the San Juan County Superior Court Courtroom at 350 Court St. in Friday Harbor, with the San Juan County Clerk administering and recording the proceeding and the San Juan County Superior Court's remote hearing platform being used, when applicable.
- (3) The visiting judge may appear at hearings remotely via video at their option; provided, however, that the visiting judge shall appear in person in the San Juan County Superior Court Courtroom for hearings in criminal cases where testimony is taken and trial in all cases. The parties may request in-person appearance of the visiting judge at other hearings, but such in-person attendance is not guaranteed.
- (4) All hearings involving a visiting judge shall be specially set, and the parties shall coordinate scheduling through the Court Administrators for San Juan County Superior Court and the Superior Court of the visiting judge, as directed.
- (5) Notices of hearing, notes for motion, and proposed scheduling orders shall include the nature of the hearing, the pre-approved date/time, and the name of the visiting judge.
- (6) Unless the visiting judge directs otherwise, all courtesy copies for a visiting judge shall be provided to the court administrator of the Superior Court of the visiting judge in the manner directed by that Superior Court's local court rule or policy (e.g., as to whether a hard copy or electronic copy is required).
- (7) The Local Civil Rules for San Juan County shall govern all proceedings heard by a visiting judge except as expressly set forth herein, including as to when parties or witnesses may appear remotely.
- (8) The assigned visiting judge may elect to have a court commissioner hear an individual motion as otherwise permitted by law. Where a motion to revise a commissioner's ruling is brought pursuant to RCW 2.24.050, LCR 53.2(e) governs the process.

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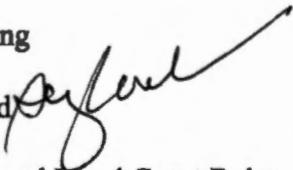
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MEMORANDUM

May 10, 2022

TO: Hon. Kathryn Loring

FROM: Randall K. Gaylord 

RE: Comment to Proposed Local Court Rules

BACKGROUND

Thank you for the invitation to comment to the proposed local court rules. We offer this comment regarding proposed rule LCR 77. In addition to the written comments below, we would be happy to discuss if you have any questions.

PROPOSED RULE LCR 77(o)

As proposed, LCR 77 (o) is contrary to the enabling statute for visiting judges, RCW 2.08.150 insofar that the rule directs that the home county of the visiting judge will serve as the default location for hearings.

Pursuant to RCW 2.08.150, a "visiting judge" is a judge who travels to another county "to hold a session of the superior court of the county of the judge ... which shall have made the request, at the seat of judicial business of such county." RCW 2.08.150.

This statute makes plain that the a "visiting judge" travels to the county seat in Friday Harbor. Litigants, their attorneys and witnesses should not be given the burden to prove prejudice in a judicial decision made out of San Juan County due to the convenience of the visiting judge. We believe the rule is written this way because the citizens of San Juan County and the general public have a right to attend San Juan County cases at the San Juan County courthouse, in person if they choose. It is unfair to require them to learn the systems and schedules of other superior courts and then commit all day to travel to observe or attend San Juan County matters.

Another statute that applies is RCW 2.08.190 which states that superior court judges have power:

(3) to decide and rule upon all motions, demurrers, issues of fact, or other matters that may have been submitted to him or her in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: PROVIDED, That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties.

RCW 2.08.190 (emphasis added).

That statute was discussed in *Toney v. Lewis County*, 197 Wn. App 1056 (2017) (unreported). In *Toney*, a Lewis County case came on for summary judgment proceedings in front of a visiting judge from Cowlitz County. *Id.* The hearing on the motion was heard in Cowlitz County.

In upholding the ruling because they found no prejudice, the Court noted that without the consent of the parties, the proceeding “was irregular and not authorized by statute.” *Id.* at Part II of Slip Opinion.

The use of the visiting judge local rule should not lead to a default “change in venue” to the county of the judge assigned to the case. Other specific rules apply to change of venue. For example, in criminal cases, venue is controlled by RCW 4.12.040(2) and the case “shall not be sent for trial to any court outside the county unless the accused shall waive his or her right to a trial by a jury of the county in which the offense is alleged to have been committed.” “Try” or “trial” should be viewed broadly and includes any fact-finding hearing including [summary judgment] trial, and post-trial proceedings. *State v. Duran-Madrigal*, 163 Wn. App 608, 261 P.3d 194 (2011).

RCW 4.12.040 (1) further supports the interpretation we are applying. This rule discusses disqualification, and when that occurs states that upon disqualification, a judge shall be “called in from some other court.” (emphasis supplied). As LCR 77(o) is written the parties are “sent out” to judge in another county and told to use the court administrator, equipment and facilities of that court.

SUGGESTED ALTERNATIVE TO LCR 77 (o)

To be consistent with the above law, we urge that LCR 77(o) be modified to read as follows:

Strike everything that is proposed and insert the following:

(o)

(1) After duly appointing a visiting judge pursuant to Article 4 Section 7 of the Washington Constitution and RCW 2.08.150, the visiting judge shall hold session(s) of the San Juan County Superior Court at the seat of judicial business in Friday Harbor. RCW 2.08.150. The visiting judge shall use the physical quarters, and when appropriate and consistent with these rules, equipment for remote appearances provided for the San Juan County Superior Court.

(2) The parties shall coordinate the date and time for hearings with the visiting judge, the court administrator for the visiting judge and the court administrator in San Juan County.

(3) When a hearing involves the presentation or consideration of factual matters such as trial, guilty plea, summary judgment, motions to dismiss or other dispositive motions, the hearing will take place, in person, in San Juan County, unless all parties agree to an alternative hearing arrangement.

(4) Unless the visiting judge directs otherwise, courtesy copies for a visiting judge shall be provided to the court administrator of the Superior Court of the visiting judge.