WASHINGTON
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DISTRICT AND MUNICIPAL COURT JUDGES' ASSOCIATION

BOARD MEETING

September 11, 2016

HOTEL RED LION
SPOKANE, WASHINGTON

DISTRICT AND MUNICIPAL COURT JUDGES' ASSOCIATION
SCHEDULE OF BOARD MEETINGS

2016-2017

DATE	*TIME*	*MEETING LOCATION*
~~***Friday, July 8, 2016***~~ CANCELLED	~~12:30 – 3:30 p.m.~~	~~AOC SeaTac Office Center~~
Friday, Aug. 12, 2016	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Sunday, Sept. 11, 2016	9:00 a.m. – 12:00 noon	2016 Annual Judicial Conference, Spokane, WA
Friday, Oct. 14, 2016	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, Nov. 4, 2016	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, Dec. 9, 2016	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, Jan.13, 2017	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, Feb. 10, 2017	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, March 10, 2017	12:30 – 3:30 p.m.	AOC SeaTac Office Center
Friday, April 14, 2017	12:30 – 3:30 p.m.	AOC SeaTac Office Center
May 2017	TBD	In conjunction with Board Retreat
June 2017	TBD	In conjunction with Spring Program

AOC Staff: Sharon Harvey

Updated: June 13, 2016

WASHINGTON COURTS

DMCJA BOARD MEETING
SUNDAY, SEPTEMBER 11, 2016
9:00 AM – 12:00 PM
HOTEL RED LION
SPOKANE, WA

PRESIDENT JUDGE G. SCOTT MARINELLA

AGENDA	TAB
Call to Order	
General Business A. Minutes – August 12, 2016 (pp 1-6) B. Treasurer's Report – *Judge Robertson* C. Special Fund Report – *Judge Burrowes* D. Standing Committee Reports 1. Rules Committee Minutes for July 20, 2016 (pp 7-8) 2. Legislative Committee – *Judge Meyer* 3. Diversity Committee – *Judges Coburn and Short* E. Trial Court Advocacy Board (TCAB)	1
Action A. DMCJA Rules Committee Proposed Amendments to Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 3.5, *Decisions on Written Statements* (pp 9-13)	2
Liaison Reports A. District and Municipal Court Management Association (**DMCMA**) – *Ms. Paulette Revoir* B. Misdemeanant Corrections Association (**MCA**) – *Ms. Melissa Patrick* C. Superior Court Judges' Association (**SCJA**) – *Judge Sean O'Donnell* D. Washington State Bar Association (**WSBA**) – *Sean Davis, Esq.* E. Washington State Association for Justice (**WSAJ**) – *Loyd James Willaford, Esq.* F. Administrative Office of the Courts (**AOC**) – *Mr. Dirk Marler* G. Board for Judicial Administration (**BJA**) – *Judges Garrow, Jasprica, Logan, and Ringus*	
Discussion A. ACLU Proposed Amendments to General Rule 35, Jury Selection – *Mr. Salvador Mungia* (pp 15-29) B. DMCJA Audit - Whether to have a Full or Partial Audit 1. DMCJA Bylaws, Art. VII, Sec. 3(c) (pp 30-31)	3

C. DMCJA Incidental Fees Policy (pp 32-33) D. 3DaysCount Initiative Review – *Judge Marinella* (pp 34-35) E. JIS Report – *Mr. Dirk Marler* 1. RFP Evaluators	
Other Business The next DMCJA Board Meeting is October 14, 2016, 12:30 p.m. to 3:30 p.m., AOC Office, SeaTac, WA.	
Adjourn	

WASHINGTON COURTS

DMCJA Board of Governors Meeting
Friday, August 12, 2016, 12:30 p.m. – 3:30 p.m.
AOC SeaTac Office
SeaTac, WA

MEETING MINUTES

Members Present:
Chair, Judge G. Scott Marinella
Judge Scott Ahlf
Judge Joseph Burrowes
Judge Linda Coburn (via phone)
Judge Karen Donohue
Judge Michael Finkle
Judge Michelle Gehlsen
Judge Michael Lambo (non-voting)
Commissioner Rick Leo
Judge Mary Logan
Judge Samuel Meyer
Judge Kevin Ringus (non-voting)
Judge Rebecca Robertson
Judge Douglas Robinson
Judge Charles Short
Judge Tracy Staab
Judge David Steiner

Members Absent:
Judge Douglas Fair
Judge Janet Garrow (non-voting)
Judge Judy Jasprica (non-voting)

Guests:
Judge Sean O'Donnell
Judge Franklin Dacca
Ms. Melissa Patrick

AOC Staff:
Ms. Sharon R. Harvey
Ms. J Benway
Ms. Vicky Cullinane
Mr. Dirk Marler

CALL TO ORDER

Judge G. Scott Marinella, District and Municipal Court Judges' Association (DMCJA) President, noted a quorum was present and called the DMCJA Board of Governors (Board) meeting to order at 12:33 p.m. Judge Marinella asked attendees to introduce themselves.

GENERAL BUSINESS

A. Minutes

The Board moved, seconded, and passed a vote (M/S/P) to approve the Board Minutes for June 5, 2016.

B. Treasurer's Report

M/S/P to approve the Treasurer's Report. Judge Robertson reported that the new DMCJA Bookkeeper, Ms. Christine Huwe, prepared a June 2016 Summary of Reports for the DMCJA. Judge Roberts informed that the hiring of a bookkeeper will make things more consistent each year as the Treasurers change.

C. Special Fund Report

M/S/P to approve the Special Fund Report. Judge Ahlf reported that there is money in the Special Fund account. He informed that he has turned over all DMCJA financial information to the bookkeeper, who will issue checks. Thus, Judge Ahlf will provide members with Ms. Huwe's business address.

D. Standing Committee Reports

1. Rules Committee

Judge Dacca informed that Rules Committee Minutes for April and June are located in the August Board agenda packet.

CrRLJ 55, Entry of Default Judgment

Judge Dacca, DMCJA Rules Committee Chair, provided a status update on the Northwest Justice Project's (NJP's) proposed amendments to Civil Rule for Courts of Limited Jurisdiction (CrRLJ) 55, *Entry of Default Judgment*. In a memorandum dated November 19, 2015, Justice Johnson stated that these amendments would require (1) creditors to submit affidavits containing detailed proof in support of the default judgment applications, (2) affidavits from the original creditors and intervening debt buyers showing the history ownership attached to key documents in actions started by third-party debt buyers, (3) creditors counsel must submit an affirmation that the statute of limitations has not expired, and (4) the plaintiff must provide the court with an additional notice of the lawsuit and the court must mail the notice to the defendant at the address where process was served. Further, there would be no default entered if the notice is returned undeliverable.

Judge Dacca reported that a stakeholder meeting to discuss NJP's proposed amendments was held on July 28, 2016. The purpose of the stakeholder meeting was for interested parties to come to a consensus. Judicial attendees included Judge Dacca, Judge Marinella, Judge Elizabeth Martin, SCJA Civil Court Rules Committee Chair, and Ms. Paulette Revoir, District and Municipal Court Management Association (DMCMA) President. Judge Dacca reported that attendees did not agree to support the amendments, although the meeting notes that were distributed indicated that there was consensus. Judges Dacca and Marinella will send a note to the organizer regarding their views of the meeting. The DMCJA, upon recommendation of the DMCJA Rules Committee, opposed the NJP proposed amendments to CrRLJ 55 because it (1) would fundamentally alter how default and service are considered under Washington law, (2) places the burden on judges to ensure that detailed evidentiary requirements are met, and (3) is best addressed through legislation than court rule.

IRLJ 3.5, Decisions on Written Statements

Judge Dacca informed that a subcommittee of the DMCJA Rules Committee has proposed amendments to Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 3.5, *Decision on Written Statements*. The amendments would give local courts the option of conducting mitigation hearings via teleconference or video conference. In a mitigation hearing, the defendant stipulates that he or she committed the infraction but offers evidence that explains the reason for his or her act that may cause the judge to lessen the penalty. The proposed IRLJ 3.5 amendments have three basic parameters, namely, (1) the hearings shall be on the record, (2) defendants shall be advised the hearing was being audio recorded, and (3) the court shall advise the defendant in writing of its decision and any penalty imposed. Judge Dacca informed that these amendments were proposed in order for the courts to utilize modern technology. He also requested that Board members send to Judge Dacca or J Benway, AOC Staff for the Rules Committee, any recommendations regarding IRLJ 3.5. The DMCJA Rules Committee will meet on August 24, 2016 to discuss the issue. This topic will be an action item at the September DMCJA Board meeting.

2. Legislative Committee

Judge Meyer reported that the Legislative Committee met on August 12, 2016 to discuss proposed legislation from the DMCJA membership. He stated that Ms. Harvey sent out a message to the DMCJA listserv for legislative ideas and received many proposals. The biggest proposed issue relates to the closing of Municipal Courts, which impacts Judicial Independence. Judge Meyer stated that this proposal may come before the Board for approval. He further reported that the Superior Court Judges' Association (SCJA) has proposed amendments to RCW 4.12.050, *Affidavit of Prejudice*. Judge Meyer informed that the Committee will look at

the comparable courts of limited jurisdiction statute, RCW 3.34.110, *Disqualification of Judge*, to determine whether an amendment is needed. Judge Dacca inquired whether an issue regarding the transfer of landlord-tenant detainers was proposed. Judge Meyer informed that no such issue was proposed from the membership. Thus, Judge Dacca will confer with Judge Meyer regarding legislation relating to the issue.

3. Diversity Committee

Judge Coburn and Judge Short reported that a training for attorneys interested in becoming pro tempore judges will be held August 19-20, 2016, at the Washington State Bar Association (WSBA) headquarters in Seattle, WA. The purpose of the event is to diversify the district and municipal court bench. In 2016, the DMCJA Diversity Committee offered scholarships to attorneys who are unable to afford the $400 registration fee. This event is sponsored by the WSBA and the District and Municipal Court Judges' Association.

E. Trial Court Advocacy Board (TCAB) Update

Judge Marinella reported that the TCAB will meet during the 2016 Annual Judicial Conference in Spokane. He mentioned that the TCAB is seeking judicial funding through the Trial Court Improvement Fund, which was created in 2005 by Senate Bill (SB) 5454. Judge Marinella expressed appreciation to Judge Brett Buckley, Olympia District Court, for providing to Judge Marinella historical information regarding the Trial Court Improvement Fund. Judge Marinella informed that the Legislature has the discretion to either add or eliminate money from the Trial Court Improvement Fund. The TCAB will work to obtain more funding under SB 5454.

F. JIS Report

Judge Marinella reported that the Judicial Information Systems Committee (JISC) will meet on Friday, August 26, 2016. The JISC will vote on whether to release the request for proposal (RFP) for the courts of limited jurisdiction case management system (CLJ-CMS) Project. For the next legislative biennium, the JISC will seek thirteen million dollars for the CLJ-CMS Project, which would provide a statewide case management system for district and municipal courts. Judge Marinella encouraged Board members to speak with legislators now regarding the Project. Ms. Cullinane added that vendor proposals are due in December. Following that, evaluators from the court community and AOC will evaluate vendor proposals for several months, including vendor demonstrations and site visits. Project team members will be visiting courts in September and October to better understand current CLJ CMS processes. Ms. Cullinane emphasized that it is important that the word about the Project is expressed to the DMCJA membership. She stated that CLJ court administrators are actively working to spread the word to prepare court staff for change, as well as to encourage courts to clean up their bad data so that it is not replicated in the new system. She further reported on plain paper notices, which are experiencing a steady trickle of courts requesting to get set up for them. She then provided an update on Information Technology Governance (ITG) 41, Destruction of Records, and encouraged Board members to check in with their court staff regarding these record deletions.

G. Joint Branch Leadership Meeting Update

Judge Marinella informed that the DMCJA, SCJA, and Supreme Court met on July 14, 2016 to discuss issues impacting trial courts. Judge Marinella informed that he shared the 2016-2017 DMCJA priorities during the meeting. He also stated that judges must be careful about giving away their discretion when considering rules and legislation. He commended all DMCJA attendees and expressed appreciation for a member who attended the meeting via Skype.

Welcome to New Board and BJA Members

Judge Marinella welcomed new Board members Judge Michael Finkle, Judge Charles Short, and Judge Michael Lambo to the Board meeting. He then welcomed new BJA members, Judge Mary Logan and Judge Kevin Ringus to the Board meeting.

LIAISON REPORTS

A. Board for Judicial Administration (BJA) – Judge Ringus reported that the next BJA meeting is August 19, 2016. There will be an orientation to the BJA during this meeting since it is the first meeting for new BJA members. The group will also discuss the issue of courthouse security. Judge Ringus also informed that there are two final candidates for the Assistant Legislative Director position. The second round of interviews for the position will begin Monday, August 15, 2016.

B. Administrative Office of the Courts (AOC) – Mr. Marler informed that Ms. Cullinane has materials for judges to utilize when meeting with legislators to discuss the new courts of limited jurisdiction case management system (CLJ-CMS) project. He then reported that the Special Sex Offender Sentencing Alternative (SSOSA) form, which is used by superior courts, contained errors that may have impacted community supervision and treatment time for some Washington state sex offenders. The judges and lawyers who comprise the Pattern Forms Committee incorrectly interpreted legislation in 2008, which led to the error. The Pattern Forms Committee immediately produced a corrected form when the issue was recently brought to AOC leadership's attention. This issue will be discussed in a work session Sen. Padden plans for September 2016. He then expressed the importance of having committed and diligent attorneys and judges on the Pattern Forms Committee.

Further, Mr. Marler reported on the status of the workgroup regarding Senate Bill (SB) 6360, An act relating to the consolidation of traffic-based financial obligations through a unified payment plan system. He stated that the workgroup has met two times and will continue to work through issues regarding the program. There is a need to address the fact that one size will not fit all courts. Mr. Marler further mentioned legislative decision packages that were presented to the Supreme Court Budget Committee regarding web services, reimbursement of court interpreter costs, and support for pattern forms, therapeutic courts and courthouse facilitators. He then informed that there is a wide gap between court needs and the budget to cover those needs.

C. Superior Court Judges' Association (SCJA) – Judge O'Donnell reported that the AOC and SCJA will meet with a mediator in late August to discuss issues regarding AOC staff support for the Association. Judge O'Donnell stated that the SCJA will seek an Office of Superior Courts through legislation as it did in 2016 with Senate Bill (SB) 6317. He then informed that the SCJA will propose to make statewide security a priority at the next BJA meeting on August 19, 2016.

D. Misdemeanant Corrections Association (MCA) – Ms. Patrick reported that the MCA is working on reimaging its association. For instance, the group is considering changing its name to the Misdemeanant Probation Association to clarify its purpose. Further, there will be a logo contest to change the association's logo, which has been the same for thirty years. Ms. Patrick informed that the MCA would like to encourage new members to join. Probation officers may be enrolled at any time.

ACTION

A. Mental Health Study

M/S/P to make this discussion topic an action item. The Board voted to send the survey to the DMCJA membership. The Board also voted to omit any reference to the Amazon gift card reward. Judge Marinella and Ms. Harvey will work on a message to be sent to the DMCJA listserv.

B. 3DaysCount Initiative

M/S/P to make this discussion topic an action item. The Board voted to make a joint application with the Minority and Justice Commission and the SCJA for the Pretrial Justice Institute's (PJI) 3DaysCount initiative. Judge O'Donnell will contact Judge Marinella regarding program meetings. Judge Marinella will send meeting

information to Judge Logan to share with the Trial Court Sentencing and Supervision Committee (TCSSC). Judge Logan in the Chair of the TCSSC. Judge Ahlf will also assist with the program.

C. Reserves Committee Recommendation for $25 Special Fund Assessment

M/S/P to make this discussion topic an action item. The Board voted to collect Special Fund dues in the amount of twenty-five dollars ($25) in 2016-2017.

D. DMCJA Policy Regarding Spring Conference Incidental Fees

The Board voted to make this issue an action item. M/S/P to have Judge Burrowes send a letter to members who attended the 2016 DMCJA Spring Conference but did not pay their DMCJA dues. Thus, the letter will seek a reimbursement amount of two hundred fifteen dollars ($215), which will go to the general fund. The Board requested that Judge Burrowes put a time period for payment in the letter. The Board will revisit the issue at a future meeting.

DISCUSSION

A. DMCJA Rules Committee Proposed Amendments to Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 3.5, Decisions on Written Statements

Judge Dacca reported on this issue during his DMCJA Rules Committee report.

B. Mental Health Study

This topic relates to a request from researchers at the University of Southern Mississippi to disseminate a mental health survey regarding how judges handle mental health issues in courts of limited jurisdiction. The survey offers an Amazon gift card for those judges interested in entering a drawing for the reward.

M/S/P to make this issue an action item.

C. Domestic Violence Offenders/Treatment Committee

Judge Marinella informed that there are vacancies for two DMCJA Representatives on the Domestic Violence Offenders/Treatment Committee. Washington Administrative Code (WAC) 388-60-0575 (3) requires that two members of the DMCJA represent the courts of limited jurisdiction perspective on the Committee. Judge Marinella solicited volunteers from the Board to participate on the Committee. Commissioner Leo, Judge Steiner, and Judge Logan volunteered to represent the DMCJA on the Domestic Violence Offenders/Treatment Committee.

D. 3DaysCount Initiative

Judge O'Donnell informed that the SCJA unanimously voted to apply for the Pretrial Justice Institute's (PJI) 3DaysCount initiative, which is a program that offers states assistance in improving and reforming their pretrial bail practices. He mentioned that both Yakima and Spokane are participating in the program with positive results. The overall idea is to move away from the cash bail release system, which is disproportionate to minorities and poor people, according to Judge O'Donnell. He further informed that one component of the initiative is the employment of evidence-based risk assessment tools. Participants in the initiative will determine whether the risk assessment tool is appropriate in Washington State. During the discussion, it was noted that there may be resistance by bail bondsmen regarding the 3DaysCount initiative. Judge O'Donnell requested that the DMCJA become a co-applicant with the SCJA and Minority and Justice Commission for the PJI 3DaysCount initiative. He stated that he would like the SCJA, DMCJA, and Minority and Justice Commission to complete the application together. He further reported that administrative staff support for the initiative will be provided via grant funds.

M/S/P to move this discussion to an action item.

E. Reserves Committee Recommendation for $25 Special Fund Assessment

The Reserves Committee met on June 6, 2016 and determined that the Board should collect Special Fund dues in the amount of $25 in order to maintain adequate funds for lobbying expenses related to judicial salaries and judicial retirement benefits.

M/S/P to make this topic an action item.

F. DMCJA Policy regarding Spring Conference Incidental Fees

In 2016, the DMCJA Board approved payment of 2016 DMCJA Spring Program incidental fees for all DMCJA members who are current on their DMCJA general and special fund dues. Judge Ahlf reported that fifteen members attended the DMCJA Spring Conference, however, they are not current on their dues. For this reason, they owe the Administrative Office of the Courts two hundred fifteen dollars ($215) for incidental fees. Judge Burrowes reported that he, as Treasurer, paid all costs for DMCJA members and now the Association must recover its money from those judges ineligible to receive funds.

Judge Marinella requested that Judge Burrowes write a letter requesting $215 from each participant who did not pay both their general fund and special fund dues. Judge Marinella encouraged the Board to conduct the issue as a business. Thus, there is a need to get reimbursed. There was discussion that repeated emails were sent by AOC staff.

M/S/P to make this topic and action item.

G. Brief Board Orientation – Judge G. Scott Marinella and AOC Staff

Judge Marinella addressed the new Board and advised them of their role and responsibility as a Board Member. He directed them to the Board Operational Rules and Modern Rules of Order in their packet. The Chair also charged new members with conducting themselves as a Board member and not in their individual capacity. He encouraged them to bring all issues impacting the association to the Board. Ms. Harvey stated that she is the Primary Staff for the DMCJA and encouraged the Board to contact her with any issues related to the Association and/or the Administrative Office of the Courts.

INFORMATION

Judge Marinella informed the Board that Judge Sara Derr, Spokane District Court, retired on June 30, 2016. He encouraged attendees to sign a retirement card for Judge Derr. Judge Marinella further informed that Judge Janet Garrow sent a thank you card to the DMCJA Board for offering her a DMCJA National Leadership Grant to attend a conference. He also mentioned that State Court Administrator, Ms. Callie Dietz, sent the Board a thank you letter for flowers sent to her husband's funeral service. The Chair then stated that the Annual Judicial Conference will be held from September 11-14, 2016, Red Lion Inn at the Park, in Spokane, WA.

OTHER BUSINESS
The next DMCJA Board Meeting is September 11, 2016, 9:00 a.m. to 12:00 p.m., in Spokane, WA.

ADJOURNED at 2:49 p.m.

DMCJA Rules Committee

Wednesday, July 20, 2016 (Noon – 1:00 p.m.)

Via Teleconference

MEETING MINUTES

Members:
Chair, Judge Dacca
~~Judge Buttorff~~
Judge S. Buzzard
~~Judge Fore~~
Judge Garrow
Judge Goodwin
Judge Hanlon
~~Judge Robertson~~
~~Judge Rozzano~~
Judge Samuelson
Judge Szambelan
~~Judge Williams~~
~~Ms. Linda Hagert, DMCMA Liaison~~

AOC Staff:
Ms. J Benway

Judge Dacca called the meeting to order at 12:05 p.m.

The Committee discussed the following items:

1. **Minutes from the June 2016 meeting**

It was motioned, seconded and passed to approve the minutes from the June 7, 2016 Rules Committee meeting as presented. Judge Szambelan abstained from voting as she was not in attendance.

2. **Update re Proposed Revisions to IRLJ 3.5**

Ms. Benway provided the most recent version of the GR 9 Cover Sheet for the proposed amendment, which would allow videoconference appearances at infraction mitigation hearings per local rule. Judge Dacca noted that the formatting was not identical to the book and asked that it be revised. Once the format is finalized, Judge Dacca will transmit the proposal to the DMCJA Board with a cover memo.

3. **Discuss Proposal to Amend CRLJ 55, pertaining to default judgments**

The Committee had previously reviewed and commented on a proposal by the Northwest Justice Project to modify procedures for pro se defendants facing default judgment in the consumer debt context. The Access to Justice Board has now planned a meeting for July 28 to discuss the concerns of the judicial community and possible ways to move the proposal forward. Judge Dacca stated that he is planning to attend the meeting and that Judge Marinella was

planning to call in to the meeting as well. The Committee requested that Ms. Benway provide Judge Dacca with the comments previously submitted to the Supreme Court Rules Committee concerning the proposal.

4. Update re Task Force on the Escalating Costs of Civil Litigation

Judge Dacca noted that the Final Report of the WSBA Task Force on the Escalating Costs of Civil Litigation included recommendations that implicated the rules of the courts of limited jurisdiction. Committee members expressed interest in becoming involved with the implementation effort of the Task Force and in examining the CLJ rules to determine if recommended changes could address the concerns raised by the Task Force. Judge Dacca will follow-up regarding the work of the Task Force.

5. Continued Discussion of Committee Expectations for 2016-2017

Judge Dacca continued the discussion begun at the Spring Conference regarding potential rule amendments for the upcoming year. Judge Goodwin stated that he was willing to review the CLJ civil rules and make recommendations regarding possible changes.

Judge Garrow asked about implementation efforts regarding recent amendments to CRLJ 26 and CRLJ 56. Ms. Benway noted that the rules become effective on September 1, 2016 and she would inquire regarding public outreach efforts.

6. Other Business and Next Meeting Date

The next Committee meeting is scheduled for the fourth Wednesday in August, August 24, at noon via teleconference.

There being no further business, the meeting was adjourned at 12:53 p.m.

TO: Judge Scott Marinella, President, DMCJA Board

FROM: Judge Frank Dacca, Chair, DMCJA Rules Committee

SUBJECT: Proposed Amendments to IRLJ 3.5

DATE: July 29, 2016

This past year, the DMCJA Rules Committee convened a subcommittee to consider whether certain rules for the courts of limited jurisdiction should be modified to facilitate access to justice. The outcome of that process is the attached proposal to amend IRLJ 3.5, pertaining to local rule options. As explained in the GR 9 Cover Sheet, the rule modifications would allow courts to receive testimony by video conference during mitigation hearings for infractions. The amended rule provides basic parameters for implementation of a local rule option for telephone and video conference appearances as to mitigation hearings, but in general the implementation of this local rule option should be left to local jurisdictions. In addition, the Committee recommends that the portion of the rule modifying the evidence standard be stricken as inappropriate in the contested hearing context.

Thank you for consideration of these comments. If you have any questions, please contact me at 253-798-7712 or fdacca@co.pierce.wa.us.

Attachment: GR 9 Cover Sheet and Proposed Rule Amendments

CC: DMCJA Rules Committee
J Benway, AOC Staff

GR 9 COVER SHEET

Suggested Amendment to
WASHINGTON STATE COURT RULES:
INFRACTION RULES FOR COURTS OF LIMITED JURISDICTION

Amend IRLJ 3.5: Decision on Written Statement (Local Option)

Submitted by the District & Municipal Courts Judges Association

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A. **Name of Proponent:** District & Municipal Courts Judges Association

B. **Spokesperson:** Judge Scott Marinella
President, DMCJA

C. **Purpose:** The proposed amendment provides an opportunity for courts to adopt a local rule permitting a telephonic or video conference appearance in lieu of an in-person appearance for a mitigation hearing related to an infraction. The proposed amendment also edits the language regarding hearings on written statements for clarity and readability and removes an exemption from the Rules of Evidence.

(1) Allowing Video Conference Mitigation Hearings

The Rules Committee recognizes that the use of technology, including telephone conferencing and video conferencing, is widespread in our communities. The committee believes that the IRLJ 1.1(b) requirement for a "just, speedy, and inexpensive determination of every infraction case" would be enhanced with the addition of an opportunity for citizens to employ telephone and video conference appearances in lieu of a personal appearance. Adding the option for a local rule provides an opportunity to utilize technology to make the court more accessible.

The Committee suggests limiting the use of telephone and video conference appearances to mitigation hearings only. In a mitigation hearing, the defendant is stipulating that the infraction was committed and the evidence received by the court is typically testimony from the defendant regarding mitigating circumstances. The Committee's conclusion is that the challenges surrounding the presentation and admission of evidence in a contested hearing by telephone or video conference are not present in a mitigation hearing.

The amended rule provides three basic parameters for implementation of any local rule option for telephone and video conference appearances on mitigation hearings: (1) the hearings shall be on the record, (2) defendants shall be advised the hearing was being audio recorded and (3)

written notice of the decision and any penalty imposed shall be sent to defendants. However, much of the "how" regarding the implementation of this local rule option should be left to local jurisdictions. In the future, the Rules Committee should examine best practices based upon the experiences of local courts and perhaps suggest further changes to the proposed rule.

(2) Proposed Amendments to Existing Sections

Decisions on written statements are still available as a local rule option. The caption for IRLJ 3.5 is changed to read 'Local Rule Options' and the rule is reformatted with decisions on written statements as section (a) and telephone and video conference hearings as section (b). Reformatting the rule allows for future expansion and addition of local rules.

The section exempting decisions on hearing statements from the Rules of Evidence is removed. ER 1101 establishes exemptions from the rules of evidence and local rule decisions on written statements are not exempted by ER 1101. Additionally, removing the exemption permits evidentiary objections on written statements. Subjecting in person appearances and decisions on written statements to the same evidentiary standards removes the possibility of inconsistent results.

With the exception of the evidence rules exemption, all of the requirements for decisions on written statements remain within the rule. Some redundant language has been eliminated and the text of the rule has been reformatted for readability.

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

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

Proposed Amendment:

RULE IRLJ 3.5
~~DECISION ON WRITTEN STATEMENTS~~LOCAL RULE OPTIONS
~~(Local Option)~~

(a) Decisions on Written Statements.

(1) *Contested Hearing Procedures.* The court shall examine the citing officer's report and any statement or documents submitted by the defendant. The examination may be held in chambers and shall take place within 120 days after the defendant filed the response to the notice of infraction. The court shall determine whether the plaintiff has proved by a preponderance of the evidence submitted whether the infraction was committed~~examination may be held in chambers and shall not be governed by the Rules of Evidence~~.

~~(1) *Factual Determination.* The court shall determine whether the plaintiff has proved by a preponderance of all evidence submitted that the defendant has committed the infraction.~~

(2) ~~*Disposition*~~*Mitigation Hearing Procedures*. A mitigation hearing based upon a written statement may be held in chambers and shall take place within 120 days after the defendant filed the response to the notice of ~~If the court determines that the~~ infraction ~~has been committed, it may assess a penalty in accordance with rule 3.3~~.

(3) *Notice to ~~Parties~~Defendant.* The court shall notify the ~~parties~~ defendant in writing of its decision~~whether an infraction was found to have been committed and what penalty~~, ~~if~~ including any penalty~~, was~~ imposed.

(4) *No Appeal Permitted.* There shall be no appeal from a decision on written statements.

(b) Telephonic or Video Conference Mitigation Hearings.

(1) *Local Rule Permitted.* A court may adopt a local rule permitting defendants to appear at a mitigation hearing by telephone or video conference in lieu of an in-person appearance~~Mitigation hearings based upon written statements may be held in chambers~~.

(2) *Requirements.* Such local rule shall comply with the requirements that the hearings shall be conducted on the record, the defendant be advised that the hearing is being audio recorded, and the court shall advise the defendant in writing of its decision and any penalty imposed.

Clean Version:

RULE IRLJ 3.5
LOCAL RULE OPTIONS

(a) Decisions on Written Statements.

(1) *Contested Hearing Procedures.* The court shall examine the citing officer's report and any statement or documents submitted by the defendant. The examination may be held in chambers and shall take place within 120 days after the defendant filed the response to the notice of infraction. The court shall determine if the plaintiff has proved by a preponderance of the evidence submitted whether the infraction was committed.

(2) *Mitigation Hearing Procedures.* A mitigation hearing based upon a written statement may be held in chambers and shall take place within 120 days after the defendant filed the response to the notice of infraction.

(3) *Notice to Defendant.* The court shall notify the defendant in writing of its decision, including any penalty imposed.

(4) *No Appeal Permitted.* There shall be no appeal of a decision on a written statements.

(b) Telephonic or Video Conference Mitigation Hearings.

(1) *Local Rule Permitted.* A court may adopt a local rule permitting defendants to appear at a mitigation hearing by telephone or video conference in lieu of an in-person appearance.

(2) *Requirements.* Such local rule shall comply with the requirements that the hearings shall be conducted on the record, the defendant be advised that the hearing is being audio recorded, and the court shall advise the defendant in writing of its decision and any penalty imposed.

TO: Judge David Steiner, President, DMCJA Board

FROM: Judge Frank Dacca, Chair, DMCJA Rules Committee

SUBJECT: Proposed General Rule 35

DATE: March 30, 2016

As you know, the ACLU-W Committee has proposed a new GR rule to address potential bias in peremptory juror exclusions and has requested comment from the DMCJA. In addition to a proposed GR 35, Mr. Salvador Mungia has further submitted a letter dated February 23, 2016 outlining the background and issues relating to this proposal.

At your request, the DMCJA Rules Committee considered the proposed new GR and the issues cited in Mr. Mungia's letter at its regular meeting on March 23, 2016. At the outset, the Committee wishes to point out that a GR 35 currently exists under the title of Official Certified Superior Court Transcripts. Therefore, any new such GR would be GR 36, not GR 35.

In its discussion, the Rules Committee expressed its appreciation of the thoughtful concern demonstrated by the ACLU regarding this developing area of case law. The Committee is also cognizant that the Supreme Court of Washington is continuing to closely review this important area in cases which may come under consideration. For these reasons, the Rules Committee recommends that the Board not endorse this proposed Rule.

Thank you for consideration of these comments. If you have any questions, please contact me at 253-798-7712 or fdacca@co.pierce.wa.us.

Attachments: Letter from Mr. Mungia Regarding Proposed GR 35
Proposed New General Rule, GR 35

CC: DMCJA Rules Committee
J Benway, AOC Staff

GORDON THOMAS HONEYWELL

Direct: (253) 620-
E-mail:

February 23, 2016

Jennifer Benway
Legal Services Senior Analyst
Administrative Office of the Court
P.O. Box 41170
Olympia, WA 98504-1170

RE: DMCJA Rules Committee

Dear Jennifer:

I want to thank the DMCJA Rules Committee for considering our Proposed General Rule 35. This ACLU-W committee has been working on this issue for over two years. We are now taking the proposed rule to various stakeholders with one of the obvious stakeholders being the DMCJA.

A. The Problem: *Batson* isn't working

The three-part test set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986) is not working.[1] As Michigan State University law professors Catherine M. Grosso and Barbara O'Brien wrote in their article about racial bias in jury selection in North Carolina:

> Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place.

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[1] As you know, in order to make a *Batson* challenge, a party challenging a peremptory challenge "must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. Second, "the burden shifts to the State to come forward with a [race]-neutral explanation" for the challenge. *Id.* at 97. Third, "the trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Id.*

Their 2012 study found that North Carolina prosecutors used 60 percent of their peremptory challenges to strike black jurors, who made up only 32 percent of potential jury members. The study also found that defense attorney used 87 percent of their strikes against white jurors, who made up 68 percent of the jury pool.

In Houston County, Alabama, prosecutors between 2005 and 2009 used their peremptory strikes to eliminate 80 percent of the blacks qualified for jury service in death penalty cases. The result was that half of these juries were all white, and the remainder had only a single black member, even though the county is 27 percent black.

In 2012, a state trial judge in North Carolina found that prosecutors in his state had created a "cheat sheet" of race-neutral reasons to offer when challenged. Among the reasons given were "air of defiance," "arms folded" and monosyllabic responses. (New York Times, August 16, 2015.)

Here are some reasons prosecutors have offered for excluding blacks from juries: They were young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in the military, had a hyphenated last name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard. (New York Times, August 16, 2015.)

As was stated in the Washington Post:

> Studies and experience have concluded that only the most incompetent lawyer will fail to come up with a justification that a judge can accept.

(Washington Post, October 25, 2015.)

B. Washington State is no exception

"Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection," wrote Washington State Supreme Court Justice Wiggins in *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013). "In part, this is because *Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional or unconscious."

Kirk Saintcalle, an African American defendant, challenged his first-degree felony murder conviction for a 2007 homicide, alleging racial bias in jury selection at his trial. The only black person in the jury pool was singled out by prosecutors for additional questioning about her views on race in the justice system. During that questioning, she revealed that a friend had been murdered two weeks earlier.

The prosecutor used a peremptory challenge to dismiss the potential juror claiming he did so because the potential juror said she did not know how her friend's murder would affect her during the trial. The prosecutor also justified his use of the peremptory by stating that the potential juror had checked out during voir dire. The prosecutor attempted to use a peremptory challenge against the sole Mexican-American juror in the venire but the judge sustained a *Batson* challenge to that strike rejecting each of the prosecutor's proffered reasons as pretextual.

The Court ruled that *Batson* requires a finding of purposeful discrimination and the trial court's finding of no purposeful discrimination was not clearly erroneous. Accordingly, the Court sustained the trial court's rejection of the Batson challenge. The Court made it clear, however, that *Batson* is not working.

> However, we also take this opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only "purposeful discrimination," whereas racisms is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.

C. The *Batson* bar is high

As the *Saintcalle* Court noted, *Batson* requires a finding of purposeful discrimination – an element that makes it difficult on the attorney making the objection, difficult on the attorney accused of engaging in behavior alleged to be purposeful, and difficult on the judge if the judge upholds the objection.

In addition, Washington courts have used the expansive language of *State v. Vreen*, 143 Wn.2d 923, 927 (2002) that the prosecutor's explanations need not be "persuasive, or even plausible" to accept a range of reasons for peremptory challenges. *See, e.g., State v. Williams*, No. 28608-4-II, 2003 Wash. App. LEXIS 2893 at *7 (Wash. Ct. App. Dec. 9, 2003); *State v. Titialii*, No. 30187-3-II, 2005 Wash. App. LEXIS 2571 at *17 (Wash. Ct. App Sept. 27, 2005).

The following are some reasons given for exercising peremptory challenges that have survived *Batson* objections.

- The potential juror expressed hostility to the justice system by noting the racial disparities in the seated jury pool, asking "[i]s this really a makeup of Tacoma or Pierce County?" *State v. Thomas*, 166 Wn.2d 380, 396 (Wash. 2009).

- The potential juror has low intelligence. Opening Brief of Appellant at *7, *State v. Sadler*, 147 Wn. App. 97 (Wash. Ct. App. 2008) (No. 35021-1-II), *available at* http://www.courts.wa.gov/content/Briefs/A02/350211%20appellant.pdf.
- "[The potential juror] has a large family, similar to the family makeup of the defendants." *State v. Titialii*, No. 30187-3-II, 2005 Wash. App. LEXIS 2571 at *15 (Wash. Ct. App Sept. 27, 2005).
- The potential juror answered "[t]here is no comment to make. None of it's applicable to me. I'll do my best" when asked if she could set aside prejudice. *State v. Jalothot*, No. 28660-2-II, 2003 Wash. App. LEXIS 1716 at *8 (Wash. Ct. App. July 29, 2003).
- The potential juror was suspicious of the criminal justice system because she said "it's not infallible. There's problems, as there are anywhere else" to a question about flaws in the system. *State v. Nordlund*, No. 26859-1-II, 2002 Wash. App. LEXIS 2219 at *14 (Wash. Ct. App. Sept. 13, 2002).
- The potential juror mentioned "beyond a shadow of a doubt" in an answer when the legal standard was actually "beyond a reasonable doubt." *State v. Powell*, 55 Wn. App. 914, 916 n.1 (Wash. Ct. App. 1989).

In several cases the reasons proffered for striking a minority juror also applied to non-minority jurors who were not removed. *See, e.g.*, Opening Brief of Appellant at *7, *State v. Sadler*, 147 Wn. App. 97 (Wash. Ct. App. 2008) (No. 35021-1-II), *available at* http://www.courts.wa.gov/content/Briefs/A02/350211%20appellant.pdf (a minority juror was challenged in part for (1) having a military background and (2) not understanding the word "sadomasochism" – several jurors with similar characteristics were not challenged); *State v. Luvene*, 127 Wn.2d 690, 700 (Wash. 1995) (a minority juror was removed because (1) a family member had a criminal history and (2) the juror appeared uncomfortable discussing the death penalty – the prosecutor did not challenge several other jurors had similar characteristics).

D. The Proposal

Our Proposed General Rule 35 eliminated the requirement for a finding of purposeful discrimination. Instead, it employs a test of whether an objective person viewing the peremptory challenge could find that race or ethnicity was a factor for the peremptory challenge. The proposed rule includes comments to provide guidance to judges and lawyers. Comments four and five provide examples that are discussed in case law and provides that if those are the proffered reasons then there is a rebuttal presumption that the peremptory challenge is invalid.

E. Our Request

We have two requests. The first is that we would like to have any feedback you may have regarding the proposed rule. We have presented the proposed rule to the Washington State Minority and Justice Commission and received the comment that the trial judge should not have to rely upon an objection being made by a litigant but instead *sua sponte* rule that a peremptory challenge is invalid under the rule. We thought that was a valid point and will be including that in the next draft. Any suggestions you may have will be welcomed and considered.

Second, we would like to have the DMCJA endorse either the rule itself or at least the overall concept and framework of the proposed rule. We have received the latter from the Minority and Justice Commission and would welcome a similar endorsement from the DMCJA. I am presuming that your committee will be making a recommendation to the DMCJA Board for the endorsement we are seeking so I am hoping your committee will recommend supporting the proposed rule.

I am available to meet with either the committee, or the DMCJA Board, if requested to do so to answer questions or provide further information.

Once again, thank you for taking the time to consider this proposal.

Salvador A. Mungia

RULE 35. JURY SELECTION

(a) **Scope of rule.** This procedure is to be followed in all jury trials.

(b) A party may object to an adverse party's use of a peremptory challenge on the grounds that the race or ethnicity of the prospective juror could be viewed as a factor in the use of the challenge. When such an objection is made the adverse party must, on the record, articulate the reasons for the peremptory challenge.

(c) Using an objective observer standard the court shall evaluate the reasons proffered for the challenge. If the court determines that an objective observer could view race or ethnicity as *a* factor for the peremptory challenge then the challenge shall be denied.

Comment

[1] The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race. This rule provides a different standard than that provided for in *Batson v. Kentucky*, 476 U.S. 79 (1986) to determine whether a peremptory challenge is invalid. For purposes of this rule it is irrelevant whether it can be proved that a prospective juror's race or ethnicity actually played a motivating role in the exercise of a peremptory challenge.

[2] An objective observer is one who is aware that purposeful discrimination and unintentional, institutional, or unconscious bias have resulted in the unfair exclusion of potential jurors based on race in Washington.

[3] In determining whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, the court shall consider the following: (a) the number and types of questions posed to the prospective juror, and (b) whether other

prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.

[4] Because historically the following reasons proffered for peremptory challenges have operated to exclude racial and ethnic minorities from serving on juries in Washington, there is a presumption that the following are invalid reasons for a peremptory challenge: (a) having prior contact with law enforcement officers; (b) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (c) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (d) living in a high-crime neighborhood; (e) having a child outside of marriage; (f) receiving state benefits; and (g) not being a native English speaker.

[5] If any party intends to exercise a preemptory challenge on the basis that a prospective juror has been sleeping, not paying attention, or providing unintelligent answers, sufficient advance notice must be provided to the court and opposing party so that the behavior can be verified and addressed in a timely manner.

District and Municipal Court Judges' Association

TO: President Steiner; DMCJA Officers; DMCJA Board of Governors
FROM: Linda W.Y. Coburn, DMCJA Board Member

SUBJECT: Proposed General Rule 35

DATE: June 1, 2016

This association has been asked to comment on proposed General Rule 35.[1] This rule is proposed by the ACLU-W Committee. The DMCA Rules Committee recommends that the Board not endorse this proposed rule because "the Supreme Court of Washington is continuing to closely review this important area in cases which may come under consideration."[2] At previous board meetings, members of the Rules Committee also expressed a concern that the recommended objective observer standard would be difficult for a judge to apply.

The rules committee has not put forth an alternative recommendation to address the concerns around discriminatory practices in jury selection. However, not weighing in on this issue is equivalent to condoning a current system that has proven to be inadequate at best and discriminatory at worse.

There will always be developing case law. The fact that cases may come under review by our Supreme Court should not be a basis to sit on our hands. In fact, the Supreme Court has openly acknowledged that *Batson* is not working and are open to opportunities to properly address it. That could not be more evident than the length and depth of the opinions given in *State v. Saintcalle*, 178 Wn.2d 34, 35-36 (2013). I strongly urge each of you to read this case before taking a position on this issue or choosing to not take a position on this issue.

While the Supreme Court in *Saintcalle* affirmed the conviction and held that the State offered race-neutral reasons for exercising a peremptory strike on the lone African-American venire person, it did so acknowledging that the current *Batson* standard needs to change. *Id.* Despite thoughtful, detailed reasoning as to why the current system is not acceptable, the court declined to create a new standard in *Saintcalle* because the issue had not been raised, briefed, or argued, and the parties did not seek to advance a new standard *in that case*. That is a far cry from suggesting that members of the legal community should not propose solutions and wait for the Supreme Court to take action through the appeal process. The court has pronounced the recognition of a very serious problem and the need to change.

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[1] As pointed out in the March 30, 2016 letter from Judge Frank Dacca, chair of the DMCJA rules committee, General Rule (GR) 35 already exists and any additional rule would be GR 36, not GR 35.
[2] March 30, 2016 letter from Judge Dacca.

THE PROBLEM

> [W]e . . . examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. Twenty-six years after *Batson,* a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination."

Id. Nothing prohibits the court from addressing this issue through its rule-making authority. In fact, asking the court to address this issue through the rule-making process would allow the court to better examine the system as a whole as opposed to focusing on whether the trial court properly ruled on a Batson challenge under the very standard that needs to be changed.

"In over 40 cases since *Batson,* Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge." *Id.* 45-46. That is not surprising considering the United States Supreme Court's recent decision in *Foster v. Chatman,* No. 14-8349, 578 U.S. ____ (2016).

In *Foster*, the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Despite a *Batson* challenge, the trial court and Georgia Supreme Court upheld the decision holding that the State provided race-neutral reasons for striking the black jurors. Thirty years later, through a writ of habeas corpus, the Supreme Court reversed the conviction after considering documents from the prosecution's case file from trial, which was obtained through the Georgia's Opens Records Act. The file included:

> 1) copies of the jury venire list on which names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks";
>
> 2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay";
>
> 3) notes identifying black prospective jurors as "B#1," "B#2," and "B#3";
>
> 4) notes with "N" (for "no") appearing next to the names of all black prospective jurors;
>
> 5) a list titled "[D]efinite NO's" containing six names, including the names of all the qualified black prospective jurors;
>
> 6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and

> 7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

The Court held that the "prosecutors were motivated in substantial part by race when they struck two of the black jurors from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows."

It took 30 years and a highly unusual circumstance of disclosed documentation to show that the prosecution focused on jurors' race. But for the discovery of the notes in the prosecutors' file, the strikes against those black jurors in *Foster* would simply have been added to a long list of denied *Batson* challenges because prosecutors were able to articulate a race-neutral basis for why they struck jurors from the panel.

However, since *Batson,* there has been a plethora of research, case studies and analysis that suggest that the nature of implicit bias is such that attorneys cannot recognize it in themselves. One particularly insightful study is an experiment where the only difference between prospective jurors was their race. *See* Saintcalle, 178 Wn.2d at 90 (Gonzalez, J., concurring) (citing Samuel R. Sommers & Michael I. Norton, *Race–Based Judgments, Race–Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 Law & Hum. Behav. 261, 266–67 (2007).

> In one condition, the first prospective juror was depicted as white and the second prospective juror as black; in a second condition, the races were reversed but the underlying information remained the same. When the first profile was black, attorneys chose to challenge that prospective juror 79 percent of the time; when that same profile was white, attorneys challenged that prospective juror only 43 percent of the time. Likewise, when the second profile was depicted as black, attorneys challenged that prospective juror 57 percent of the time; when that same profile was white, attorneys challenged that prospective juror only 21 percent of the time. Thus the attorneys, acting as prosecutors, were significantly more likely to challenge a juror profile when it was depicted as a black prospective juror as opposed to a white prospective juror, all else being equal.

Id.

When participants[3] were asked to explain his or her choice of whom to strike,

> [a] full 96 percent of participants cited relevant underlying substantive information from either profile as 'their most important justification,' and only 8 percent of the attorneys (and an even smaller proportion of college students and law students) cited race as being influential at all. . . . The experimenters rightly concluded that their study 'provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence.'

[3] Similar effect was found among college students and law students.

Id. Thus, a standard that only addresses "purposeful" discrimination will not work when attorneys themselves are unaware that their choices may be influenced by race. Relying on the trial judge to determine whether the race-neutral justification for striking a juror is pre textual does not help.

> [S]ocial science research tells us that trial judges generally are unable to accurately and reliably determine credibility based on demeanor alone, regardless of their confidence in doing so. *See*, e.g., Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 Am. Psychologist 913, 913–17 (Sept. 1991) (experimenters presented video clips of individual persons describing feelings about a movie each was allegedly watching; trial judges performed only slightly better than chance in determining who was lying about watching the movie, and confidence was not correlated to performance); *see also*, e.g., Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 Cardozo L. Rev. 809 (2002).

Saintcalle, 178 Wn.2d at 94 (Gonzalez, J., concurring).

PROPOSED SOLUTIONS

1) Proposed GR 35.

This proposed rule attempts to give tools to trial judges so that they are better equipped at analyzing *Batson* challenges. The comments to the rule provide examples of what should not be acceptable race-neutral reasons to justify a peremptory strike. Having the experiences listed in comment four of the proposed rule, alone, should not be a basis to withstand a *Batson* challenge. The comments also advise that if parties intend to strike a juror based on their inattentiveness then the party must timely raise the issue with the opposing party and the court so that the behavior can be verified and addressed. These comments simply articulate what trial judges should already be demanding from parties in order to properly consider *Batson* challenges.

The biggest change from the current framework is the removal of the requirement that the court find purposeful discrimination. The proposed rule introduces the use of an "objective observer standard." Comment to the rule defines "objective observer" as "one who is aware that purposeful discrimination and unintentional, institutional, or unconscious bias have resulted in the unfair exclusion of potential jurors based on race in Washington." Using this standard in evaluating the reason given for the peremptory challenge, the court determines whether an objective observer could view race or ethnicity as a factor for the peremptory challenge. If the then answer is in the affirmative, the challenge shall be denied.

While some have questioned the ability of the trial court to apply such a standard, it is important to note that the "objective observer" standard is not a foreign concept. It is used to determine whether government violates the Establishment Clause. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The objective observer under that

analysis is presumed to be aware of the " 'text, legislative history, and implementation' " of the state action. *Id.*

Thus, while it may be challenging to apply, it is not a foreign concept that is new to courts. It certainly would be easier to apply than the current framework which places attorneys and trial judges in an uncomfortable position of having to declare someone as acting purposefully to discriminate. Furthermore, this standard would instill confidence in the fairness of our system of justice.

2) Abolish Peremptory Challenges

Those who oppose or are hesitant to abolish peremptory challenges routinely argue that this has been a historical practice that has helped ensure the fairness of trials. However, aside from the fact that it has been a historical practice, there is no guarantee in the United States Constitution or the Washington State Constitution of a right to strike jurors, who are otherwise qualified, without cause. What is guaranteed is the right to a fair and impartial jury. U.S. Const. amend. VI; Const. art. I, § 21 and § 22 (amend.10).

It is true that court rules and statute have established parameters of the exercise of peremptory challenges. However, court rules and statutes that allow for a violation of a right to a fair and impartial jury are unconstitutional.

Justice Gonzalez goes to great length to explain the historical beginnings of the peremptory challenge. *See Saintcalle*, 178 Wn.2d at 75-76 (Gonzalez, J., concurring). It is important to understand that this tradition of peremptory challenges was carried over from England and adopted in the Washington Territory without substantial debate. More importantly, this long-standing tradition was created during a time when Blacks and women were not allowed to serve on a jury. Certainly, the research and data developed over the past 30 years provides crucial insight as to the harm that has come from the peremptory challenges now that Blacks and women are allowed to serve on the jury.

Further, there is nothing to substantiate that peremptory challenges actually create a more fair and unbiased jury. One study created "shadow" juries made up of jurors who were excused via peremptory challenges. These shadow juries actually observed the trial they were excused from. The researchers found that "[i]n the aggregate, prosecutors 'made about as many good challenges as bad ones,' defense counsel fared only 'slightly better,' and the results brought into question 'the role of peremptory challenges in furthering the constitutionally prescribed goal of trial by an impartial jury.' " *Saintcalle*, 178 Wn.2d at 103 (Gonzalez, J., concurring) (quoting Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L.Rev. 491, 498–500 (1978)).

The reality is attorneys find it difficult to give up the one area of the trial where they have control – peremptory challenges. Any attorney who has had any success at trial, most likely attributes part of that success to the attorney's ability to remove jurors who they deemed as unfavorable.

> [M]ost lawyers rely on intuition, lore, and anecdotal experience in exercising peremptory challenges. But in practice attorneys rarely if ever can actually confirm the effectiveness of their decisions concerning peremptory challenges. Thus, anecdotal experience and lore in this context are based on nothing more than intuition, which is entirely arbitrary, erratic, and unreliable without any sort of regular experiential validation. Over time, well-established psychological tendencies—such as confirmation bias (the tendency to look for confirmation but not falsification of our hypotheses) and selective information processing (the tendency to readily accept confirming evidence but devalue contradictory evidence)—likely entrench attorneys' preexisting biases, including closely held racial stereotypes and generalizations, and give attorneys false confidence in the effectiveness of their decisions concerning peremptory challenges..

Saintcalle, 178 Wn.2d at 104 (Gonzalez, J., concurring) (internal citations omitted).

There are skilled attorneys who do an amazing job of excusing jurors for cause. Many, however, do a poor job of voir dire. The existence of peremptory challenges, unfortunately, has created attorneys who, instead of further developing their voir dire abilities to explore and establish for-cause challenges, have relied on using peremptory challenges as an easy, non-controversial way to excuse jurors who they "believe" would be unfavorable. At the same time, some courts adhere to a preset time frame for voir dire even when information is disclosed that should be explored further to determine if a for-cause challenge is appropriate.

In other words, if adjustments need to be made to assure that parties are given the appropriate amount of time to explore for-cause challenges, so be it. Time constraints should not be a reason to continue to use a framework that has proven to do exactly opposite of what was intended. Instead of creating a more diverse jury, *Batson*'s parameters have simply created a sophisticated way to strike jurors of color for facially race-neutral reasons.

As Justice Breyer observed, "the use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller–El v. Dretke*, 545 U.S. 231, 270, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring). The recent holding in *Foster* likely will simply be a lesson on what to avoid when documenting thoughts about jury selection so as not to create the appearance of racial focus.

When *Batson* was decided, Justice Marshall opined that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 476 U.S. 79, 102-03, 106 S.Ct. 1712, 1726 (1986)(Marshall, J., concurring).

WHAT NOW?

Given the undisputed problems with the current *Batson* framework, I move that the DMCJA take the position that asks our Supreme Court to consider proposed GR 35 and solicit public comment on it as well as an alternative proposal to abolish the use of peremptory challenges. Just because some would consider this change to be radical and unprecedented, that should not be the determining factor of whether it is the right thing to do.

As Justice Gonzalez noted, "[i]t should be remembered that in 1911, Washington became only the second state in the nation to allow women to serve on juries. *See* Joanna L. Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1135 n.118 (1994) (citing Laws of 1911, ch. 57, § 1). Prior to that time, the Supreme Court of the Washington Territory proved unwilling to break free from the long standing and entrenched legal tradition of all-male juries." *Saintcalle*, 178 Wn.2d at 75 (Gonzalez, J. concurring).

Just as we look back and scratch our heads in disbelief that this State once prohibited women from serving on juries, one day we may be looking back and scratch our heads in disbelief that we allowed attorneys to excuse qualified jurors with no explanation. Understanding human nature and how biases can play a role in "gut instincts," why would we allow parties to have a free pass to remove anyone they wish who otherwise is a qualified juror?

ARTICLE VII - Board of Governors

Section 1. Membership:

There shall be fourteen members of the DMCJA Board of Governors elected from the membership at large, of whom five (5) shall be officers, and nine (9) shall be board members and shall be designated as board positions one (1) through nine (9). Board membership shall at all times include at least three municipal court judges of whom one is part-time, three district court judges of whom one is part-time, and one commissioner or magistrate, and positions one (1) through seven (7) shall be designated respectively. Positions eight (8) and nine (9) shall be open positions.

If any position designated one (1) through six (6) is not filled because there is no candidate for the position, then that position shall be filled by a qualified candidate by appointment by the President with ratification of the Board of Governors at the first Board meeting following the annual election.

If the position designated seven (7) is not filled because there is no candidate for the position, then the President shall appoint a qualified commissioner or magistrate willing to accept the position, with ratification of the Board of Governors at the first Board meeting following the annual election. If no qualified commissioner or magistrate accepts appointment to the position, then the position shall be considered an open position for that term and any qualified judicial officer may be appointed by the President with ratification of the Board of Governors at the first Board meeting following the annual election.

If after any annual election there is not at least one member of the Board of Governors from a minority group and one member from each gender, the Board of Governors shall be increased to include such additional member or members by appointment by the President with ratification of the Board of Governors at the first Board meeting following the annual election. The additional member or members so elected shall serve for a three-year term.

Section 2. Vacancies:

All vacancies in office shall be filled by a member of the Association appointed by the President with ratification of the Board of Governors.

Section 3. Meetings:

(a) The Board of Governors shall meet at the call of the President, during the Annual Meeting, and at such other times as the President or a majority of the Board of Governors may deem necessary provided written notice is given to all members of the

Board at least 10 days in advance. The Association may reimburse the Board of Governors their necessary travel expenses to attend any Board meeting, except in connection with the Annual Meeting.

(b) A quorum for a meeting of the Board of Governors shall be one-half of its members.

(c) The Board of Governors shall provide for at least on an annual basis, an audit of the books, records and accounts maintained by the Treasurer and the audit shall review the Treasurer's Annual Report.

ARTICLE VIII - Board for Judicial Administration

Section 1. BJA Representative:

The Association shall be represented on the Board for Judicial Administration (BJA) by the Association President and by four members, as follows: One (1) municipal court judge, one (1) district court judge and two (2) members at large. Selection shall be by vote of the membership as with other Association officers. The Association President position shall be for the period of the Association Presidency. The President-Elect shall be an *ex officio* member of the BJA during their term as President-Elect. All other positions shall be for a term of four years—provided that the terms of members which begin on July 1, 2010 and July 1, 2011 shall be for two years. Representatives shall not serve more than two terms consecutively. A representative may serve an unexpired term, less than a full term, and then serve two consecutive terms.

Selection of BJA representatives shall be based on demonstrated commitment to improving the courts and should reflect ethnic, gender, geographic and caseload differences.

Section 2. Election of Representatives:

Election of all representatives shall be held at the Spring Conference. Terms of office shall commence on July 1, of the year in which elected, or at the conclusion of the Annual Meeting, whichever last occurs.

Section 3. Vacancies:

All vacancies in office shall be filled by a member of the Association appointed by the President with ratification of the Board of Governors.

History of DMCJA Good Standing and Conference Incidental Fees (AKA Registration)

Historical Facts

The DMCJA Board established in 2009 that special fund dues are part of the dues required for a member to be "in good standing."

March 13, 2009 minutes, under Treasurer's Report, *"It was confirmed that payment of special fund dues are part of the dues required to be paid for a member to be in good standing."*

April 10, 2009 minutes, under Treasurer's Report, *"For a member to be in good standing, it was confirmed that the administration of the May 1 deadline for payment of dues include a so-called mailbox rule: the payment must be postmarked by May 1."*

Supporting Details

- DMCJA Bylaws, Article III, Section 1 (a), *"All duly elected or appointed and qualified judges, commissioners, magistrates and General Rule 8 judicial officers of courts of limited jurisdiction in the state of Washington shall be eligible to active membership in the Association upon payment of regular dues and assessments."*
- DMCJA Bylaws, Article IV, Section 3, "*After May 1, a non-paying member shall not be a member in good standing or entitled to any rights or privileges of active membership and shall be so notified in writing by the Secretary-Treasurer*."

2005-2009 Spring Conference Penalty Fee, imposed to members *not* in good standing

- As part of the 2005 Spring Conference registration, the DMCJA Board decided that members who were not "in good standing," meaning general dues & the special fund assessment was paid, must pay an additional **$15** conference penalty fee (to AOC). The $15 was a, *"pro rata share of the actual expenses incurred by the DMCJA in planning and staging the Spring Conference."* See 2005 memo from President Judge Eileen Kato, which was included in the DMCJA conference flyer.
- Per the above, **$25** was imposed for the 2006 conference. See Judge Nakata's memo.
- **$25** was imposed for the 2007 conference. See Judge Fitterer's memo.
- **$25** was imposed for the 2008 conference. See Judge Shelton's memo.
- **$25** was imposed for the 2009 conference. See Judge Paja's memo.
- September 11, 2009 Board meeting minutes, "*Conference Penalty Fee: The Board reviewed the historical purposes of creating the conference penalty fee to address the costs of members who fail to pay DMCJA special dues. Administrative issues and burdens of implementing the penalty fee inspired review of the effectiveness of the current approach. After discussion, the Board decided to eliminate the penalty fee in favor of further efforts to educate members about the beneficial uses for the special funds that support court of limited jurisdiction judicial officers. In addition to underwriting efforts to promote appropriate salary, benefits, and retirement for judicial officers, it is also used to recognize individual members at important times (including memorial remembrances).*

2009-2016 Conference Incidental Fee Scholarships

- May 8, 2009 Board Retreat Notes
  "Judge Phillips established that one of his primary goals for the coming year is to provide financial support to the membership for judicial education. The economic recession has impacted court budgets at all levels of government. The idea proffered is to support education while reducing the costs of judicial education in court's budgets by the DMCJA paying the incidental fee for each member of the Association for their attendance at either the Annual Conference in 2009 or the Spring Conference in 2010. Judge Tripp and Judge Phillips provided data on the overall costs of the proposal at different levels of financial support; full or 50 percent. The decision to provide full funding for this concept was made at the Board meeting, which immediately followed the Retreat."
- May 9, 2009 Board Minutes
  "The Board adopted the budget developed at its Board Retreat May 8 and 9." The line item budget included $40,000 for member conference incidental fees.
- In 2009, email to membership indicated that the DMCJA Board allocated association funds to pay for *either* the 2009 Fall Conference incidental fee *or* the 2010 Spring Conference incidental fee for all members who had paid their general association dues.
- 2010 Spring Conference (THE LAST YEAR SPECIAL FUND DUES WERE ASSESSED), members were notified by the Nominating Committee Chair, Judge Paja, that general dues and special funds must be post-marked no later than May 1, 2010, in order to be able to vote at the business meeting, and to be eligible to participate in activities and committees.
- 2011—no action, no funding offered
- 2012-2015, DMCJA Board paid conference incidental fees for members current on their general association dues. (Note: Special Fund not assessed in 2012-2015)
- 2016, special fund dues were assessed, and judicial officers and court administrators were notified when the conference flyer was distributed that DMCJA would pay the $215 incidental fee if a member had paid general and special fund dues.

September 1, 2016

Dear Judge Scott Marinella,

On behalf of the Washington State Supreme Court's Minority and Justice Commission, the District and Municipal Court Judges' Association and the Superior Court Judges' Association, we invite you to attend an informational meeting on Friday **October 7, 2016** from **8:30 a.m. to 12:30 p.m. at Seattle City Hall** to discuss an innovative pretrial reform initiative. The initiative, known as '3Days Count' is sponsored by the Pretrial Justice Institute (PJI), a national organization devoted to reforming bail and diversion decision-making practices through the use of data-driven and evidence informed decisions. It emphasizes an elimination of outcomes in pretrial detention that are influenced by race, gender, social class or economic status. The rationale for reform as explained by PJI:

> "Our justice system currently operates like a complex maze, with too many entry points and too few exits. As a result, many people enter jail—and stay in pretrial detention—unnecessarily, which increases their chances of getting stuck in the maze. In fact, each year nearly 12 million people are booked into U.S. jails, mostly for nonviolent misdemeanors, and more than 60 percent of jail inmates are unconvicted—largely because they are too poor to post even small money bond amounts. Even three days in jail can be too much, leaving low-risk defendants less likely to appear in court and more likely to commit new crimes—because of the stress incarceration places on fundamentals like jobs, housing and family connections. Meanwhile, half of the highest-risk defendants go free by posting money bail under laws that currently hinder judges' ability to detain based on risk."

You can learn more about PJI and '3Days Count' here: http://www.pretrial.org

At the meeting on October 7, we will hear from representatives of PJI, as well as the Laura and John Arnold Foundation (http://www.arnoldfoundation.org/about/) regarding diversion options and the utility of evidence based risk assessment tools used in pretrial release scenarios. You'll also hear about how '3Days Count' could work in Washington.

As you may know, the Minority and Justice Commission recently sponsored a symposium before the Supreme Court on the issue of pretrial reform. Those efforts, combined with the interest and involvement of Washington's trial judges, have prompted our organizations to act. Pretrial reform efforts are currently underway in Spokane and Yakima counties. Statewide reform, through an evaluation of best practices both here and nationally, is a natural next step.

Your organization has been identified as an important partner in this reform effort, and we hope you are able to attend this meeting to hear from the program sponsors, ask questions, and discuss next steps with us. To RSVP for the meeting, please send an email to Cynthia Delostrinos at Cynthia.Delostrinos@courts.wa.gov. We ask that you notify us whether you are interested in participating in the meeting and/or continued efforts of this group by September 16, 2016.

Sincerely,

Judge Michael Downes
Snohomish County Superior Court
President, Superior Court Judges' Association

Judge Scott Marinella
Columbia County District Court
President, District and Municipal Court Judges' Association

Justice Mary Yu
Washington State Supreme Court
Co-Chair, Minority and Justice Commission