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April 30, 2008

Via Hand Delivery

Clerk of the Supreme Court
Attn: Camilla Faulk
415 12th Ave. SW
Olympia, WA 98504-0929

Re: Comments on Proposed Amendments to CrRLJ 3.1(d), 4.1 and 4.2.

Ladies and Gentlemen:

Enclosed are two unbound copies and 15 bound copies of a Comment on proposed amendments to CrRLJ 3.1(d), 4.1 and 4.2. This Comment is submitted on behalf of Kitsap County, the Kitsap County Prosecuting Attorney, the Washington State Association of Counties, the Association of Washington Cities and the cities of Bremerton, Bainbridge Island, Port Orchard, Poulsbo and Forks.

The 15 bound copies are for members of the Court and others involved with the development of court rules. We would be pleased to provide more copies if that would be helpful. If you would like an electronic version of these comments, we would be pleased to provide one. Please contact Julie Israel for an electronic version by phoning her at 206-447-5951 or by email at israj@foster.com.

The entities providing this Comment may separately provide additional comments focusing on issues specific to their jurisdictions. Also, please note that the enclosed Comment requests that if the Court's Rules Committee proceeds with consideration of the above-referenced rule amendments, the entities submitting this Comment would like the opportunity to provide an in-person oral presentation concerning the proposals.

Thank you for your consideration.

Sincerely,

Hugh D. Spitzer

HDS:jri
Enclosures

cc: Russ Hauge, Kitsap County Prosecuting Attorney
Hon. Josh Brown, Kitsap County Commissioner
Sheila Gall, Association of Washington Cities
Rashi Gupta, Washington State Association of Counties
Paul McMurray, City Attorney, City of Bainbridge Island
Roger Lubovich, City Attorney, City of Bremerton
Jennifer Forbes, City Attorney, City of Port Orchard
James Haney, City Attorney, City of Poulsbo
Rod Fleck, City Attorney, City of Forks

COMMENT ON PROPOSED RULES CrRLJ 3.1, 4.1 and 4.2

Submitted on Behalf of:

Washington State Association of Counties

Association of Washington Cities

Kitsap County

City of Bremerton

City of Port Orchard

City of Bainbridge Island

City of Poulsbo

City of Forks

April 30, 2008

WSAC
WASHINGTON STATE
ASSOCIATION OF COUNTIES

AWC
ASSOCIATION
OF WASHINGTON
CITIES

KITSAP COUNTY

SUMMARY

This Comment makes three fundamental points concerning the proposed amendments to CrRLJ 3.1, 4.1 and 4.2.

First: Fiscal Responsibility. This Comment describes the significant financial and operational burdens that would be imposed on counties and cities if they are required to provide the new services mandated by those amendments. The Comment recommends that the judicial branch of our State government act in the same financially responsible manner that our citizens expect of other branches when they consider adopting new legislation or new administrative rules – *i.e.*, conduct a reasonable fiscal impact study before changes are adopted so the actual, on-the-ground impact can be weighed and understood ahead of time. In other words, "look before you leap."

Second: Cooperation. After a financial impact study, if the Court still concludes that the new services mandated by the proposed amendments are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of the judicial branch's constitutional duties in our State, then the Court should not abandon its recent cooperation with the counties, cities, prosecutors, the defense bar and the State Bar Association to secure the State funding necessary to provide for our State's justice system, including indigent defense. Instead of simply imposing the cost of the amendments' new services on the counties and cities without regard to the corresponding cuts in *other* judicial services that the amendments' unfunded mandates will require, the Court should continue its collaborative work with the affected members of the justice community to secure the funding required to implement those changes. And, at the end of the day, if the Court believes that the proposed amendments' new services are necessary for the holding of court, the efficient administration of justice, or the fulfillment of the judicial branch's constitutional duties in our State, then the Court should require the State Legislature to fund those new services.

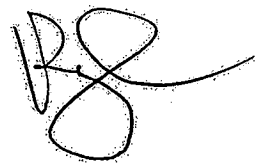
Third: Practicality. This Comment notes many of the serious on-the-ground, practical problems created by the proposed amendments' current wording. It will take years of trial court and appellate litigation to resolve the proposed amendments' vague and confusing language and to resolve the many unanswered questions that wording will raise in the real world. This Court should carefully consider and resolve these issues before mandating the amendments' substantive changes in the operation of the Washington State Courts.

The entities submitting this Comment are eager to work with this Court, the Administrative Office of the Courts, the Washington State Bar Association, and others dedicated to Washington's justice system to resolve the issues raised by the

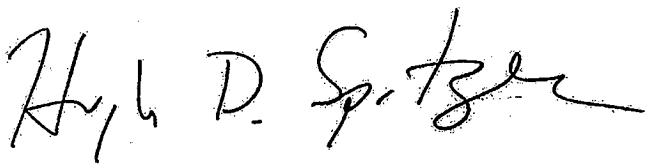
proposed amendments, and would be honored to assist in that resolution if the Court were to so allow.

The entities providing this Comment also request that if the Court decides to continue its consideration of the proposed amendments, we would like the opportunity to make an oral presentation to the Court's Rules Committee concerning the various problems posed by the possible rule changes.

Respectfully submitted,



Russ Hauge, Prosecuting Attorney, Kitsap County



Hugh Spitzer, Foster Pepper PLLC

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Acknowledgements

This Comment was drafted by and with the assistance of Kitsap County Prosecuting Attorney Russ Hauge; Deputy Prosecuting Attorneys Jeffrey Jahns and Jeremy Morris; Hugh Spitzer, Thomas Ahearne and Ramsey Ramerman of Foster Pepper PLLC; and Sheila Gall of the Association of Washington Cities.

Introduction

When the State Supreme Court promulgates court rules, it acts in a quasi-legislative capacity. When writing rules, the Court develops generalized regulations governing future actions by individuals and institutions that work within the justice system. Often those rules affect many outside the justice system, including separate branches and levels of government. When acting as a "legislator" or simply as administrative rule maker, the Court operates in a very different role from its normal function interpreting constitutions, statutes and the common law in the context of contested cases.

This Comment on proposed amendments to CrRLJ 3.1, 4.1 and 4.2 (the "Proposed Amendments") is submitted pursuant to GR 9(g) on behalf of Kitsap County, the Association of Washington Cities, the Washington State Association of Counties, the Cities of Bremerton, Bainbridge Island, Port Orchard, Poulsbo and Forks. They represent governmental institutions that are key to the success of our criminal justice system – the counties and cities that operate and pay for the bulk of that system, and the prosecutors and city attorneys who represent those governmental entities and their citizens.

The entities submitting this Comment may submit additional comments focused on issues of particular concern to them. Local governments have only recently begun to recognize the financial impacts of the Proposed Amendments, and it is likely that the Court will hear from more cities and counties in the coming months. It should be noted that the Washington Association of Prosecuting Attorneys does not take a collective

position on court rules. However, the Court may receive comments from individual Prosecuting Attorneys.

As noted in the Summary, this Comment consists of three parts:

- **Fiscal Responsibility:** This Comment describes the significant financial and operational burdens that would be imposed upon counties and cities if they were required to provide the new services mandated by the Proposed Amendments. This Comment recommends that the judicial branch of our State government act in the same financially responsible manner our citizens expect of other branches when they consider adopting new legislation or new administrative rules – i.e., conduct a reasonable fiscal impact study before such changes are adopted so that their actual, on-the-ground impact can be weighed and understood ahead of time.

- **Cooperation:** This Comment respectfully requests that the Court not abandon its recent cooperation with the counties, cities, prosecutors, defense bar, and the Washington State Bar Association to secure the State funding necessary to provide for our State's justice system, including indigent defense. The Court should not simply impose the cost of the Proposed Amendments' new services on the counties and cities without regard to the corresponding cuts in other judicial services that the amendments' unfunded mandates will require. Instead, the Court should continue its collaborative work with the affected members of the justice system community to secure the funding required to implement such changes. And, at the end of the day, if the Court believes that the Proposed Amendments' new services are necessary for the holding of court, the efficient administration of justice, or the fulfillment of the judicial branch's constitutional duties in our State, then the Court should require the State Legislature to fund those new services.

- **Practicality:** This Comment notes many of the serious on-the-ground, practical problems created by the Proposed Amendments' current wording. It will take years of trial court and appellate litigation to resolve the Proposed Amendments' vague and confusing language, and to resolve the many unanswered questions that wording will raise in the real world. The Court should carefully consider and resolve these issues before mandating the amendments' substantive changes in the operation of the Washington State Courts.

The entities providing this Comment recognize the concerns behind the Proposed Amendments and fully understand this Court's desire to mandate new services that the Court might conclude are reasonably necessary for the holding of court, the efficient administration of justice, and the fulfillment of the judicial branch's

constitutional duties – including corresponding concerns regarding the representation of indigent persons and others who are charged with crimes in the courts of our State. Unfortunately, simply waving a magic court rule wand will not provide the new funding necessary to implement the changes to our State's criminal justice system that would be mandated by the Proposed Amendments. Nor does it prevent the substantial backlogs, bottlenecks, and court congestion that the Proposed Amendments' mandates will necessitate in our State's district and municipal courts. The entities providing this Comment accordingly urge that before adopting the Proposed Amendments as drafted, the Court should resolve the practical problems with the Proposed Amendments' wording, and conduct a responsible financial analysis of the resulting Amendments' real world impact on our State's justice system. Then, in cooperation with the counties and cities being required to provide the new services mandated by those Amendments, the Court should work together with the counties and cities to secure the funding necessary to provide those new services from the 2009 Legislature.

Financial and Operational Impacts

Providing the new services mandated by the Proposed Amendments will lead to significant increases in costs of providing prosecutorial and defense services in district and municipal courts throughout the state. Until a complete financial analysis is carried out, the full extent of the costs will not be known. But some idea of the scale of the impact can be understood by preliminary information developed by several counties, cities, and the associations that represent them.

As described in Attachment A ("*Financial and Operational Impacts of Proposed CrRLJ Amendments, Kitsap County District Court Cases*"), the Kitsap County Prosecuting Attorney received 4,366 district court criminal referrals and filed 3,600 new criminal cases in 2006 (the last year for which complete data has been compiled). Under the current justice system program, three full time deputy prosecutors handle this caseload, with the limited assistance of other prosecutors. Separately, in 2006, 2,800 third degree driving while license suspended ("DWLS 3") and criminal no valid operator's license charges were filed by law enforcement directly with the court. The DWLS 3 cases, which currently are handled by prosecutors in a limited fashion, comprise more than 43% of the cases filed in Kitsap County District Court. A bail forfeiture process for the DWLS 3 and no-valid-license cases enable the prosecutor's office to focus on more serious criminal offenses.

If the new services mandated by the Proposed Amendments (as currently worded) are implemented, the Kitsap County Prosecuting Attorney would have to significantly increase the staffing and resources devoted to the prosecution of the above offenses – directly adding one FTE deputy prosecutor, one FTE legal assistant, two

FTE records staff, an additional computer, and other equipment and office space to handling the increased caseload, at an estimated cost of $276,656 every year.

The new services mandated by the Proposed Amendments (as currently worded) would also require Kitsap County to hire additional public defender services, which are *conservatively* estimated at an additional $30,000 per year (based on flat-fees-per-case paid to the additional defense providers).

Thus, the added costs to Kitsap County for the additional staffing and equipment required to implement the Proposed Amendments (as currently worded) will be at least $300,000 per year.

Moreover, this relatively large increase in costs for Kitsap County is misleadingly low when compared to the Proposed Amendments' fiscal impact on some other counties across our State, because Kitsap County already provides a fairly high level of services in the district courts – meaning Kitsap County's percentage increase in justice system costs will likely be lower than many other counties. Grant County, for example, estimates that implementation of the Proposed Amendments would require the addition of two FTE prosecuting attorneys, two FTE administrative staff, and three FTE defense attorneys. Grays Harbor County estimates that it would need to fund one FTE prosecutor and one FTE defender, for a cost of more than $100,000. Walla Walla County expects that the Proposed Amendments would add an additional .25 FTE prosecutor, an extra .25 FTE defense attorney, and that assignments would take an additional half day per week. But the Walla Walla County Prosecuting Attorney reports that his Board of County Commissioners has indicated that it intends to *cut* the justice system budget in 2009 rather than increasing it.

The example of Kitsap County illustrates the large new fiscal burden that the Proposed Amendments would mandate upon the counties across our State. The 2000 census reported Kitsap County with a population of 231,969 out of a statewide population of 5,894,121 – with both populations having then further increased over the past eight years. If the Proposed Amendments mandates had roughly the same fiscal impact on all counties as they will on Kitsap County, the total cost (calculated on a per person basis using 2000 Census figures) would be at least $7.6 million. But, as discussed below, the full fiscal impacts deserve more careful, methodical analysis by the Court before it adopts the Proposed Amendments.

In addition to financial impacts, the Proposed Amendments would also increase court congestion. For example, Kitsap County District Court calendars are already at capacity. If implemented in their current form, the Proposed Amendments will significantly lengthen arraignment calendars. Many, perhaps most, of the DWLS 3 cases would have to proceed to a pretrial hearing calendar, and many more cases would then proceed to trial. The additional time required of prosecutors, defenders, court staff, and judges will directly reduce the availability of courtrooms, staff, and attorneys for other cases, both criminal and civil. And the cost of increasing the number of personnel and facilities to handle the increased number of proceedings beyond pre-trial hearings is not reflected in the rough cost impact assessment in the preceding paragraph.

Cities with municipal courts will experience similar cost and congestion impacts from the new services mandated by the Proposed Amendments, with the effect of those Proposed Amendments falling particularly hard on small cities and towns. For example,

as noted in the correspondence from the Association of Washington Cities ("AWC") that is attached as Attachment B, the City of Forks (population 3,175; general fund budget of $1,631,000) would require an additional part-time attorney and various district court operational changes, for a total of $40,000 per year. Forks would also have to increase its public defense payments to provide the new defense services mandated by the Proposed Amendments. (As Attachment B shows, the Association of Washington Cities' had accordingly asked the Board of Governors of the Washington State Bar Association to table action on its CrRLJ 4.1 recommendation until fiscal impacts were thoroughly evaluated – but the Board declined to pursue a fiscal analysis and proceeded with its recommendations anyway.)

The Association of Washington Cities subsequently surveyed cities and towns on the impact of the Proposed Amendments. It received responses for 82 cities and towns out of a total of 281 in our State, which represented 54% of the total State population living in incorporated areas. The survey summary (Attachment C) shows that the Proposed Amendments' financial impact varies from jurisdiction to jurisdiction because of different practices, city sizes, and resources – with the impact on many cities and towns being substantial.

A number of jurisdictions stated that they did not yet have adequate data to estimate cost impacts. But the survey responses of those 82 cities that could provide a rough fiscal estimate, show that the new services mandated by the Proposed Amendments would require at least $650,000 more for increased city prosecutor costs at preliminary hearings in those 82 cities and towns (out of our State's 281), as well as require approximately $800,000 more for increased city public defender costs.

A recent survey of several other cities, conducted to help prepare this Comment, provided more on-the-ground examples of fiscal impacts of the Proposed Amendments. For example, the City of Bremerton observes that its municipal court judge tries to limit his pretrial calendars to an average of 35 cases. The Proposed Amendments would result in an estimated 638 new cases requiring 18 additional pretrial calendars, each of which requires about four hours. The additional judicial and clerical costs would total about $40,000 per year, additional defense costs would be about $28,500, and additional prosecutor costs would be $52,000. The total increase would be at least $120,500 per year, not counting potential increases in jail time for defendants waiting for hearings.

Moreover, all of these estimates are low and do not reflect the added costs of proceedings *after* pre-arraignment hearings. Nor do the estimates relating to the 82 responding cities and towns reflect any of the potential fiscal impacts that the Proposed Amendments would impose on the many non-reporting jurisdictions. In short, even a partial survey of our State's cities and towns shows that the new services mandated by the Proposed Amendments will likely impose millions of dollars of new costs on our State's cities and towns. And the lack of readily available and complete data only confirms the reasonableness of conducting a methodical fiscal analysis before those Proposed Amendments are adopted.

In addition to cost impacts, the court congestion effects on municipal courts are expected to be similar to those expected in the district courts. Quoting former State Bar Association Executive Director Jan Michels, the Association of Washington Cities and the Washington State Association of Municipal Attorneys have noted that "local

government cannot bear the total burden of providing state-mandated defense, interpreters, civil commitment representation, and juror and criminal witness costs....[L]ocal government funding constraints have forced courts (also funded by general funds) to choose between critical courtroom staffing, or seeking solutions for families in crisis or those who are chemically dependent." (Attachment B at 8/13/2007 letter.) Put more bluntly: the new services increasingly being required by State mandates such as the Proposed Amendments being discussed here are forcing local jurisdictions to take away from one part of the overall justice system to pay for other parts of that same system.

The unfortunate (and surely unintended) result of new State mandates such as those imposed by the Proposed Amendments here is that unless cities, towns, and counties are provided the State funding necessary to pay for those State mandates, those jurisdictions will have to cut other programs such as those needed for other parts of our State's judicial system. Robbing Peter to pay Paul will not result in an overall improvement of our State's court system.

Retaining Our Previous Cooperation on Court Funding

In 2004, all levels of Washington's courts, the State Bar Association, the counties, the cities, legislators, prosecutors, defenders, and various other governmental and public organizations cooperated in the Court Funding Task Force and its five work groups. The Task Force's report, *Justice in Jeopardy*, was published after one and a half years of work by more than 100 individuals with long involvement and deep understanding of the workings of Washington's court system, its administration, and its finances. Of the main Task Force's 42 members, 19 (45%) were judges or employees of the court system. The Task Force was staffed by the Administrative Office of the Courts. This was a monumental effort – and a highly cooperative one – among all those committed to developing and implementing "a plan to achieve adequate, stable and long-term funding of Washington's trial courts to provide equal justice throughout the state." [1]

Justice in Jeopardy documented how Washington State ranked last in the nation for State funding of its trial courts, prosecution, and indigent defense – pointing out that our State government was contributing only 10.8% of our overall court system's annual cost.[2]

Significantly, the judges, lawyers, court system professionals, and others who cooperated in writing *Justice in Jeopardy* also concluded that, based on agreed standards and measures of workloads, there was a ***$186 million*** shortfall in court and defense system funding. That report detailed the need for an additional ***$54 million*** for

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[1] Board for Judicial Administration Court Funding Task Force, *Justice in Jeopardy: The Court Funding Crisis in Washington State* (2004).

annual trial court operations and ***$132 million*** for indigent defense services. (The Task Force also concluded that civil legal services required more that an additional ***$18 million*** annually from the State to do an adequate job in that area.)

The 2004 Task Force's conclusion was simple. In FY 2000 dollars, "the total amount required to assure justice in Washington is ***$204 million annually***."[3] The report went on to make practical financial recommendations on how that gap could be filled.

The *Justice in Jeopardy* report was a cooperative effort of the bench, the bar, local governments, and public interest organizations committed to our State's judicial system. That coalition then worked together during the 2005 legislative session to seek what the Task Force had found were needed State funding increases for the trial courts, indigent defense, and other keys aspects of our State's justice system.

These cooperative efforts have produced a hopeful start. The 2005 Legislature passed SSB 5454,[4] which increased filing fees and certain other fees. The Legislature then appropriated $12.7 million in new funding for the 2005-07 biennium, including $2.3 million for criminal indigent defense assistance, $5 million for representation of parents in dependency and termination proceedings, $2.4 million for district and municipal court judge salaries, and $3 million for civil legal services. The $2.3 million for indigent defense funded $1 million of local pilot projects. In 2006, the same coalition of judges, lawyers, and local government representatives collaborated to successfully boost that funding to an annual State appropriation of **$6.5 million** for public defense

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[2] *Id.* at 4. That report further noted that the total cost of operating our State's trial courts was $342 million, and that $79 million was being spent on indigent defense services in criminal and dependency cases (in FY 2000 dollars). *Id.* at 12.

[3] *Id.* at 13. (Emphasis added.)

[4] Chap. 457, Laws of 2005.

improvements.[5] These State funds are administered by the Washington State Office of Public Defense under Chapter 10.101 RCW. In the last legislative session, the courts, local governments, and justice system advocates again worked together, securing, among other things, a new $2 million annual State commitment to costs of an enhanced program for providing interpreters in the trial courts.[6]

One of the most important outcomes from the *Justice in Jeopardy* report and the cooperative work of the bench, bar, local governments, and justice advocates was the Legislature's stating the following commitment in Section 1 of SSB 5454:

> The legislature recognizes the state's obligation to provide adequate representation to criminal indigent defendants and to parents in dependency and termination cases. The legislature also recognizes that trial courts are critical to maintaining the rule of law in a free society and that they are essential to the protection of the rights and enforcement of obligations for all.

In other words, the Legislature expressly recognized the *State's obligation* to provide for a larger share of the cost of indigent defense and other court services.

Unfortunately, lofty statements of principle are not always accompanied with lofty funding. The Legislature's current commitment of ***$6.5 million*** annually is a small step forward, but it is miniscule compared to the ***$132 million*** in new annual expenditures that the *Justice in Jeopardy* report had concluded was necessary to assure adequate indigent defense services based on accepted standards.

It is in this context that the Court is now considering Proposed Amendments which will, by rulemaking *fiat*, mandate that local jurisdiction provide new services at the district court and municipal court level. The Proposed Amendments would unilaterally

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[5] Washington State Office of Public Defense, *2007 Status Report on Public Defense in Washington State: Executive Summary* (2008).

[6] An enhanced interpreter program was implemented by SHB 2176 (Chap. 291, Laws of 2008).

impose millions of dollars in new prosecution, defense, and court staffing and facilities costs on the very same counties and cities who had been this Court's hardworking partners in securing needed State funding for our State's judicial system – new costs that will likely wipe out the modest amounts of new State funding that were gained by the painstaking cooperative work in the 2004 through 2008 legislative sessions. Instead of now abandoning the cooperative approach that this Court had previously taken with the affected stakeholders, this Comment respectfully requests that the Court carefully evaluate the financial impacts of its Proposed Amendments, and then join with the local governments, bar, and justice system community to once again work together to secure from the Legislature *truly adequate* funding for the impacts of the Proposed Amendments, as well as the other documented needs of trial courts and indigent defense services in our State's judicial system. We must jointly hold the Legislature to the commitments it made in SSB 5454. This Comment respectfully submits that it is this Court's obligation to lead that cooperative effort to secure from the legislature the State funds reasonably necessary for the holding of court, the efficient administration of justice, and the fulfillment of the judicial branch's constitutional duties.

Rulemaking is Quasi-Legislative, and Fiscal Impacts Must be Addressed

When a court adopts rules, it promulgates generalized regulations governing future actions by individuals and institutions that work within the justice system. This rulemaking process is not a contested case. This is not an appellate matter in which the Court is being asked to interpret a statute, a constitution, or the common law in the context of a dispute based on facts in a record. This is a quasi-legislative activity, akin to what State legislators do when they pass State laws or State agencies do when they promulgate State regulations."[7]

When Washington State's elected lawmakers consider bills, they are required by statute to undertake a careful financial analysis of the effects of the proposed legislation. Since 1977, State law has required that every bill have a fiscal note.[8] Current law requires a fiscal analysis "on the expected impact of bills...which increase or decrease or tend to increase or decrease state government revenues or expenditures".[9] And our State's voters have insisted that before acting, State legislators must take into account the impact of their proposals on taxpayers' pocketbooks. For example, section 1 of Initiative 960, passed in 2007, reiterated that:

> [The] people intend to protect taxpayers by creating a series of accountability procedures to ensure greater legislative transparency, broader public participation, and wider agreement before state government takes more of the people's money.[10]

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[7] *See, e.g., In re LiVolsi*, 85 N.J. 576, 584 ftnt 5, 428 A.2d 1268, 1272 ((1981) referring to "the quasi-legislative power granted it by [the state constitution] to formulate court rules and policy." *See also,* Guralnick v. Supreme Court of New Jersey, 747 F. Supp. 1109, 1116 (D.N.J. 1990); *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 709, 752 A.2d 200, 211 (2000).

[8] Chap. 25, Laws of 1977 ex. sess.

[9] RCW 43.88A.020.

[10] Sec. 1, Chap. 1, Laws of 2008.

Initiative 960 then requires that whenever proposed bills would increase fees and taxes, a thorough financial evaluation must be undertaken, and under certain circumstances a statewide advisory vote must be undertaken on each new tax or fee.[11]

Similarly, when Washington State agencies propose new administrative rules, they must evaluate the cost effect of their proposals. RCW 34.05.328 mandates that before a significant rule is adopted by a State agency, the State must "analyze alternatives to rule making and the consequences of not adopting the rule."[12] That statute also requires the State agency to determine "that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs."[13] Proposed rules with an impact on small businesses are also separately subject to an economic impact statement analysis.[14]

In sharp contrast to the fiscal consideration that our citizens have made clear they expect from out State government in general, the Proposed Amendments here are being considered for imposition without any review or analysis of their fiscal impact on the citizens of our State. To paraphrase the preamble to Initiative 960: Where are the accountability procedures to ensure greater transparency? Where is the process to develop wider agreement before the State forces local governments to take more of the people's money or to reallocate money from other general fund programs?

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[11] Sec. 6, Chap. 1, Laws of 2008.

[12] RCW 34.05.328(1)(d).

[13] RCW 34.05.328(1)(d). Under RCW 34.05.328(5)(c)(iii), a "significant legislative rule" subject to a cost-benefit analysis includes a rule that "subjects the violator of such rule to a penalty or sanction" or "establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit." Although, as discussed below, the standards, penalties, and sanctions are quite unclear in this instance, the Proposed Amendments would readily be treated as "significant legislative rules" if they were promulgated by a state agency.

[14] RCW 34.05.320 and Chap. 19.85 RCW.

The Court states that it is considering adoption of the Proposed Amendments for the primary purpose of changing the "culture" of the courts of limited jurisdiction in our State's judicial system.[15] That "culture" change mandated by the Proposed Amendments requires counties and cities to spend millions of additional taxpayer dollars to fund new prosecutorial and defense activities in district and municipal courts – new services which this Court presumably believes are reasonably necessary for the holding of court, the efficient administration of justice, and the fulfillment of the judicial branch's constitutional duties in our State. If that is true, and if the 2009 Legislature declines to provide the State funds necessary for the new services which the Proposed Amendments would require, this Court should then require that funding as part of its constitutional duty to safeguard the judicial branch in our State. See *In re Juvenile Director*, 87 Wn.2d 232, 251 (1976) (separation of powers doctrine provides that the courts can compel funding if "the court show[s] that the funds sought to be compelled are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties." *In re Juvenile Director*, 87 Wn.2d 232, 250 (1976)).

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[15] "Purpose" comment to Proposed Amendment to CrRLJ 3.1(d), at 161 Wn.2d Proposed-275. The stated purpose of the Proposed Amendments is "to change the culture of courts of limited jurisdiction that hold arraignment calendars without providing counsel as required by the existing court rules and state and federal constitutions." 161 Wn.2d at Proposed-279. But the Proposed Amendments have not been found by the Court or by the United States Supreme Court to be constitutionally required. In *Rothgery v. Gillespie Cty.*, 491 F.3d 293, 296 (5th Cir.2007), cert. granted 128 S.Ct. 714, 169 L.Ed.2d 552 (2007), the U.S. Supreme Court is now considering whether to overturn a Sixth Circuit decision that the Sixth Amendment right-to-counsel requirement is triggered at a pre-arraignment, non-prosecutorial hearing. But it would be presumptuous to predict the outcome in that case, and it would be unnecessary, and perhaps inappropriate, for the Washington State Supreme Court to enact a rule based on what it, or the U.S. Supreme Court, might rule at some future time. If the Court has held that counsel are constitutionally required in the circumstances that are the subject of the Proposed Amendments, then the applicable cases should be specifically cited. And while the "Purpose" section of the Proposed Amendments cites the 1972 case of *Argersinger v. Hamlin*, the fact that the *Rothgery* case is before the United States Supreme Court at this time means that it is not at all clear that *Argersinger* requires the increased staffing of prosecutors and public defenders as contemplated by the Proposed Amendments.

If the Court determines that the new services and staffing levels effectively mandated by the Proposed Amendments are reasonably necessary for the administration of justice in our State, and if the 2009 Legislature nonetheless refuses to fund those services, then this Court should include with its issuance of those Proposed Amendments a formal determination that the legislature is required to fund their implementation. That result is consistent with the *In re Juvenile Director* Court's explanation of the judicial branch's role. It is also consistent with the Legislature's own commitment in SSB 5454, where it expressly acknowledged the *State's* obligation to provide adequate representation to criminal defendants. The Court should hold the Legislature to its obligations.

We recommend that the Court charge the Administrative Office of the Courts with the responsibility of promptly developing more detailed information on the fiscal impact of the Proposed Amendments. After that financial impact information is available (and the technical problems outlined in the next section of this Comment are resolved), the Court, together with others in the coalition that wrote *Justice in Jeopardy* and helped gain passage of SSB 6670 in 2005, should work together to secure adequate *State* funding for the Proposed Amendments' *State*-mandated changes. In SSB 6670 the Legislature recognized the *State's* obligation to provide adequate representation to criminal indigent defendants and to adequately fund trial court operations. We should work together to hold the Legislature to that promise (as well as the legislative branch's obligations to the judicial branch under the *In re Juvenile Director* case).

One well-known political scientist has noted the proclivity in America for branches of governments to make policy decisions, and then force other branches, and

other governmental levels, to shoulder the burden of carrying out and/or paying for those decisions.[16] This practice leads to a mismatch of responsibilities and resources, not to speak of cynicism among the general public. We strongly recommend that this Court take the financially responsible and reasonable course here. Instead of imposing a new, significant burden on counties and cities through the indirect method of adopting court rules that exacerbate the very problem highlighted by *Justice in Jeopardy*, the Court should act in a straightforward manner: first by doing the necessary fiscal homework, and then, if necessary, ensuring that the cost of State-mandated increases in the services of our State's judicial system be placed where it belongs: namely, at the State level.

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[16] Paul E. Peterson, *The Price of Federalism* 16 (Brookings Institution, 1995). Professor Peterson observes: "Legislators at all levels of government will seek to distribute governmental benefits for which they can claim credit and, if at all possible, will shift governmental burdens to others levels...."

The Proposed Amendments' Practical Problems and Unanswered Questions

The following are a number of practical problems and unanswered questions created by the Proposed Amendments – issues that do not seem to have been carefully thought through during the Proposed Amendments' development, and which should be carefully addressed prior to any adoption.

1. *Are Violations Of The Proposed Rules Appropriately Treated as an Ethical Matter For The Judge And/Or Prosecutor? If so, the Proposed Amendments Should Expressly Say So.*

These court rules are not appropriately categorized as ethical rules. CrRLJ 1.2 provides that the "rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay." This purpose does not also state that the rules are also rules of professional conduct.

The purpose statement to the Proposed Amendments critiques current practice in Washington courts of limited jurisdiction based upon observations made in *some* courts. Rather than focusing on correcting improper practices in *those* courts, the Board of Governors instead suggested a significant modification affecting *all* courts of limited jurisdiction practice through the Proposed Amendments.

While court rules provide a guide for the orderly administration of court procedure, opposing parties often choose to waive non-compliance depending upon a myriad of factors. Frequently, these waivers of non-compliance are not brought to the court's attention.

If it is the intent to compel compliance with these Proposed Amendments through ethical sanctions filed against trial court judges and/or prosecutors, the Proposed Amendments should say so. If not the intent, the Proposed Amendments should say so. Judges and prosecutors are entitled to know whether these proposed rules will be treated as rules of professional conduct so that a proper record can be made when the parties choose to not follow the rules.

2. *Mandatory Trial Court Finding Of Defense Competence.*

Proposed CrRLJ 3.1(d)(4) requires the court, before appointing a lawyer for an indigent defendant, to satisfy itself that counsel has "demonstrated the proficiency, ability and commitment to quality representation" pursuant to the State Bar's adopted standards.

How exactly is this to be accomplished? Must a trial court make such a finding prior to making each appointment? Must the finding be on the record? May the competence finding be made once and apply to all future appointments of that attorney, regardless of how that attorney's caseload and other court commitments change? May a defendant claim on appeal that non-compliance (or a silent record in the defendant's case) justifies reversal of a conviction?

Most troubling is the lack of any standards to assist defense counsel in obtaining this court-appointed "specialty" finding. Washington State does not currently have a certification program for lawyers specializing in criminal law. Ostensibly, a new attorney who successfully passes the Washington State Bar Exam is regarded as competent to provide legal services, including services with respect to misdemeanors. RPC 1.1

requires a lawyer to provide competent representation to a client. If a lawyer fails to do so, the State Bar may take action. The Proposed Amendments in effect create an entirely new system of qualifying lawyers in the criminal practice area – far beyond the Court's and the State Bar's traditional roles in determining who may practice law.

How will *pro bono* counsel be treated? Many lawyers who focus their practices in civil matters volunteer *pro bono* to serve as defense attorneys for indigent persons or to serve as special deputy prosecutors. How will they be qualified to serve?

The Proposed Amendments also do not address whether a "not competent finding" defense attorney may represent private clients in those jurisdictions which contract with the private bar for indigent defense services.

Further, is a trial court-mandated finding of competency a judicial act, a legislative act, or something else? May a suggested defense attorney put on evidence of competence? Is the process an open public hearing? Does the aggrieved lawyer have appellate review if the trial court declines to make a competence finding? What standard of review will apply?

Significantly, what obligations does a prosecutor have regarding a court's decision regarding defense counsel's competence? For example, case law holds that the Sixth Amendment guarantees that criminal defendants receive effective assistance of counsel, and courts have held that assistance free from conflicts of interest is implicit in that concept of effective assistance of counsel. *See, Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). With respect to a defense counsel's potential conflict of interest, courts have also held that a prosecutor must advise the court when it

is aware that a defense counsel has a potential conflict of interest. Thus, for example, federal appellate courts have repeatedly chastised prosecutors who failed to notify a trial court of a defense attorney's possible conflict or who failed to file a written motion to disqualify defense counsel due to a potential conflict. *See Mannhalt v. Reed*, 847 F.2d 576, 583-84, *cert. denied*, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (9th Cir. 1988) (Ninth Circuit reversed a Washington State conviction and chastised a King County prosecutor for not bringing potential conflict to the attention of trial court and for not moving for disqualification of defense counsel when prosecutor was aware of potential conflict); *United States v. Iorizzo*, 786 F.2d 52, 59 (2nd Cir. 1985) (appellate court chastised prosecutor for merely advising trial judge of potential conflict and for not filing a pretrial disqualification motion in writing when prosecutor was aware of potential conflict prior to trial); *United States v. Friedman*, 854 F.2d 535, 572 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1004, 109 S. Ct. 1637, 104 L. Ed. 2d 153 (1989) (prosecutor's interest in avoiding conflicts that might place any conviction it obtains at risk gives it standing to bring disqualification motions even if defendant wishes to privately retain counsel).

Given the prosecutor's important role in ensuring a defendant's Sixth Amendment rights are not violated by a conflicted defense attorney, would a prosecutor similarly be required to raise potential questions regarding defense counsel's competence under the Proposed Amendments? For instance, would a prosecutor be required to simply advise the trial court orally? Or would a prosecutor be required to collect the knowledge of the other prosecutors in his or her office, prepare a written motion to disqualify, and then pursue a written disqualification motion if the prosecutor's investigation indicated that defense counsel's effective and/or competent handling of that particular defendant's

defense may be compromised by that defense counsel's (1) currently having a large caseload; (2) having missed deadlines or court appearances in the recent past; (3) having previously been found ineffective by any other court; (4) having previously been disciplined by the bar; or (5) having ever previously been found to not be competent under the Proposed Amendments?

The Proposed Amendments should address the above questions before adoption. Leaving these procedural, competence, and (possibly) ethical questions unanswered will only result in an inconsistent court-by-court procedural patchwork without appropriate guidelines and without a uniform process to resolve uncertainties and disputes. Additionally, prosecutors across our State would be put in the difficult position of having a potential ethical duty to raise concerns about defense counsel's competence under the Proposed Amendments, with no guidance from this Court or from the Amendments themselves outlining the role the prosecutor must play in the court's determination of defense counsel's competence. These concerns are not trivial, because a defendant will certainly raise compliance with the Proposed Amendments on appeal after an unfavorable result in the trial court. If the Proposed Amendments are to become an appellate issue with possible reversal of conviction as a remedy, the procedure should be clearly stated in the applicable rule itself rather than left to bubble as a tar pit of disputes and uncertainty.

3. *Arraignment Within 14 Days.*

Proposed CrRLJ 4.1(a)(1) amends the arraignment rule to require arraignment within 14 days after the complaint is filed. But what is the remedy for violation?

CrRLJ 4.1(b) currently provides that a party who fails to object to an untimely arraignment loses the right to object. If a timely objection is made, the court must establish and announce a proper arraignment date. CrRLJ 4.1(b) places the burden on the defense to object. No burden is placed by the rule on the court to inquire concerning the timeliness of an arraignment date.

May the court ignore arraignment timeliness issues until raised by the defense? Or must the court *sua sponte* verify the timeliness of the arraignment? The Proposed Amendments should clarify whether the court has any obligation to ensure compliance with this rule.

4. *Counsel Required Before Arraignment.*

Proposed CrRLJ 4.1(c) states that a court may not arraign a defendant who appears without counsel if the defendant "is not represented and is unable to obtain counsel."

The phrase "unable to obtain counsel" is not defined in the Proposed Amendments. Is the proposed rule's intent that the court must accept any reason given by a defendant for not having counsel at arraignment? What if the defendant does not attempt to obtain counsel? Does a defendant's failure to seek counsel mean that the rule does not require the court to provide a lawyer for the defendant at arraignment?

Importantly, what is the remedy upon non-compliance with this proposed rule? Must the criminal case be dismissed? Is a constructive arraignment date set for time-for-trial purposes to 14 days if the defense attorney is not available until some date after 14 days? Is the judge and/or prosecutor looking at possible sanction for non-compliance?

CrRLJ 4.1(c) does not address the practicalities of caseloads in courts of limited jurisdiction, nor does it include solutions that take into account the essential role of district and municipal courts in our State's overall justice system. Further, the failure to clearly spell out a remedy upon violation of the Proposed Amendments' new court-created right to arraignment counsel is inexplicable because appellate courts are in no better position than trial courts to determine what a proper remedy should be. The rule is silent, so the appropriate remedy would just be a guess at the time. The remedy for violation of this proposed rule should be carefully drafted, vetted, discussed, and then expressly specified in the rule itself.

5. *Waiver Of Counsel.*

CrRLJ 4.1(d) spells out the process for a permissible waiver of counsel at arraignment. The Proposed Amendment in that section requires the court to make a finding prior to waiver of counsel that counsel was provided at arraignment.

It should be noted that federal case law does not require a trial court to make a finding that an attorney was present prior to a defendant exercising his or her right to proceed pros se. *See, e.g., Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (defendant has Sixth Amendment right to proceed pro se); and *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (Sixth Amendment right to counsel does not require the trial court, before accepting the defendant's waiver of counsel at a guilty plea hearing, to give a rigid and detailed admonishment of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risked overlooking a

defense). If a trial court makes the appropriate findings under *Iowa v. Tovar* that a defendant properly waived his or her right to counsel, does a subsequent constitutionally valid *pro se* guilty plea become invalid because the plea was taken without a defense attorney being present or available in violation of this proposed rule?

The Court only invites years of litigation and uncertainty (and potential reversals of convictions) if it does not specify the remedy for violation of this rule in the rule itself.

6. *Waiver Of Counsel–Bail Forfeitures.*

CrRLJ 3.2(o), (r), (s), (t), and (u) spell out various dollar amounts which a trial court may accept as a forfeiture of bail for listed misdemeanor and gross misdemeanor crimes in lieu of criminal prosecution. The current criminal citation and notice to appear form adopted by the Administrative Office of the Courts has a box on the front of the citation stating "Bail Forfeiture in U.S. $____." On the back of the copy of a criminal citation given to a defendant, the defendant is advised that he or she may avoid having to come to court by accepting the bail forfeiture option and mailing a payment to the court if the officer checks the bail forfeiture box on the front of the citation and places a dollar figure in the appropriate area.

Proposed CrRLJ 4.1(d) requires that a defendant waive his or her right to counsel on the record prior to proceeding pro se. This proposed rule conflicts with CrRLJ 3.2 and the current criminal citation form used by law enforcement. Further, if CrRLJ 4.1(d) eliminates mail-in bail forfeiture as an option for a defendant, the rule should clearly say so. CrRLJ 3.2 should also be clarified if mail-in bail forfeiture is eliminated by this proposed rule.

Additionally, significant time will be necessary prior to implementation of this rule so that the Administrative Office of the Courts can determine the language to be used on all criminal citations, and so that law enforcement has sufficient time to have these new CrRLJ 4.1(d) compliant citations printed.

7. *Defendant's "True" Name.*

Proposed CrRLJ 4.1(e) requires that all pleadings be in the name alleged by the defendant as his or her "true" name. There is no requirement that the defendant state this "true" name under oath, nor provide any evidence in support of this "true" name. In fact, the rule does not even permit a trial court to reject the defendant's claim when faced with clear evidence to the contrary. Under this rule as adjusted by the Proposed Amendments, if the defendant in a DUI or domestic violence case says his "true" name is "Gerry L. Alexander," the prosecution must proceed under that name even though it is clear that the Chief Justice did not commit the DUI or domestic violence offense. Upon conviction, the court will be required to report this conviction to the Judicial Information System and Department of Licensing under that (the Chief Justice's) name. Additionally, the conviction data will be sent to the Washington State Patrol, and will be forwarded to the Department of Justice's Interstate Identification Index (triple I), 28 USC §534, nationwide system.

This rule creates a significant (and unnecessary) opportunity for identity theft, and should be treated as simply unacceptable as currently drafted.

8. *Prosecutor Attendance At In Custody Arraignments.*

Proposed CrRLJ 4.1(f) requires the prosecuting authority to attend in-custody arraignments. The proposed rule does not set forth a remedy upon violation of the proposed rule.

If the local jurisdiction does not provide funding to pay for a prosecutor to attend, is the remedy dismissal? Release of the in custody defendant? Sanction against the prosecuting authority?

If the prosecutor in a particular jurisdiction does regularly attend in custody arraignments, but is unable to do so due to illness, vacation, etc., what is the remedy? Continuance of the arraignment with the defendant remaining in custody? Automatic release? Dismissal? Sanction against the individual prosecutor? Sanction against the relevant city or county? Again, the remedy for violation of this rule must be specified in the rule lest it create even more problems than it is presumably intended to solve.

Conclusion

We are pleased to provide this comment on the Proposed Amendments for the Court's consideration. As noted above, this Comment recommends that:

- Before adopting the Proposed Amendments, the Court should undertake a careful analysis of the fiscal impact that the new services mandated by those Amendments will impose upon the counties and cities of our State.

- Before unilaterally imposing the Proposed Amendments, the Court should work cooperatively with counties, cities, prosecutors, defenders, and others involved in our State's justice system to secure the State funding necessary to implement the Proposed Amendments' changes to our State's judicial system. If the Court finds that the Proposed Amendments are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties, then the Court should require the State Legislature to appropriate the necessary funds to so enable our State's justice system to carry out its constitutional responsibilities to our State's citizens.

- Before proceeding further with these Proposed Amendments, this Court should carefully consider, and then resolve, the many practical problems and lack of completeness identified in this Comment.

The entities providing this Comment request that if the Court decides to continue its consideration of the Proposed Amendments, we would like the opportunity to make an oral presentation to the Court's Rules Committee concerning the various problems posed by the possible rule changes.

50910756.2

ATTACHMENT A

Financial and Operational Impacts of Proposed CrRLJ Amendments
Kitsap County District Court Cases

Financial and Operational Impacts of Proposed CrRLJ Amendments
Kitsap County District Court Cases
(Prepared by the Office of the Kitsap County Prosecuting Attorney)

1. Current Kitsap County Arraignment Practice – In Custody Offenders

The Kitsap County Prosecutor's Office reviews all adult misdemeanor and gross misdemeanor in custody arrest and booking cases each business day Monday through Friday. Most of the in custody offenders who were arrested for allegedly committing new crimes (as opposed to defendants arrested on warrants) were arrested and booked for one of two types of offenses– (1) DUI, RCW 46.61.502 (including physical control, RCW 46.61.504 and minor driving after consuming, RCW 46.61.503); and (2) domestic violence.

RCW 46.61.50571(1) requires a person cited with the offense of DUI, physical control or minor driving after consuming shall appear in court within one judicial day after arrest. This statute applies to both in custody and out of custody DUI, physical control and minor driving after consuming arrestees.

RCW 10.31.100(2) requires law enforcement to arrest and take into custody a domestic violence offender who allegedly violates a domestic violence court order prohibiting contact with the protected party and who allegedly assaults a domestic violence victim when the incident occurred within 4 hours of contact with the suspect.

RCW 10.99.045(1) requires that a person arrested for a domestic violence offense shall appear in court within one judicial day after arrest. This statute applies to both in custody and out of custody domestic violence arrestees.

Kitsap County District Court Local Rule LCrRLJ 3.2.2 requires law enforcement to place a no bail hold upon the arrest and booking of an arrestee who allegedly committed a non-felony domestic violence offense. The local rule permits the arrestee to be released upon the posting of $5,000 bail if the person agrees to a court-ordered pre-arraignment no contact order wherein the arrestee agrees to have no contact with the alleged domestic violence victim until the next court date or 7 days.

If bail is set by law enforcement and the arrestee is able to post bail, the arrestee is released to appear on an out of custody calendar. If the arrestee is unable to post bail, the arrestee is seen by a judge the next judicial day after arrest.

Kitsap County operates a system wherein defense counsel is available at daily in custody calendars. If the defendant is indigent, the court appoints defense counsel at arraignment which usually occurs at the defendant's first appearance in court.

2. Current Kitsap County Arraignment Practice – Out of Custody Offenders

Out of custody offenders appear in Kitsap County District Court in one of three ways–(1) the offender appears the next judicial day after being arrested when the offender posted bail after being arrested for a DUI, physical control, minor driving after consuming, or a domestic violence offense; (2) the offender was served with a criminal citation by the officer to appear at a future arraignment set by the officer on the citation; or (3) the offender was charged by criminal complaint and received a summons in the mail to appear for a future arraignment calendar set by the court.

Kitsap County does not have a public defense office. Instead, the county contracts with various private law firms which provide indigent counsel services. The current Kitsap County contract provides for standby counsel to appear at out of custody arraignments to assist any defendant requesting to speak with an attorney prior to being arraigned.

The Crawford law firm is paid $45,689.64 annually for this service in Kitsap County District Court located in Port Orchard. The Hunko law firm is paid $7,488.00 annually for this service in Kitsap County District Court located in Poulsbo.

Both firms are paid a flat fee of $49 if they assist an out of custody defendant in resolving the case at arraignment.

The public defense contract pays a $225 flat fee per case when one of the public defense firms is appointed to represent an indigent defendant, regardless of whether the defendant is in custody or out of custody. Various local law firms contract with the county under this portion of the public defense contract.

It is anticipated for the reasons discussed below that additional public defense costs will be $30,000.00 per annum.

The Kitsap County Prosecutor's office files all Kitsap County District Court criminal cases by complaint. The only exception is if the only criminal charge possible is third degree driving while license suspended, RCW 46.20.342(1)(c), or criminal no valid operator's license, RCW 46.20.005 (no identification on person). Those cases are directly filed with the Kitsap County District Court by law enforcement through the issuance of a criminal citation and notice to appear.

3. The Third Degree Driving While License Suspended Problem

RCW 46.20.342(1)(c) makes it a misdemeanor (90 days in jail, and/or $1,000 fine maximum) for a person to operate a motor vehicle after the person's license or privilege to drive has been suspended by the Department of Licensing in the third degree due to various statutorily enumerated reasons. The number of persons charged with third degree driving while license suspended is staggering.

In Kitsap County, the prosecution received 4,366 District Court criminal referrals and filed 3,600 new criminal cases in 2006. Three full time deputy prosecutors handle this volume with limited assistance from other deputy prosecutors. An additional 2,800 third degree driving while license suspended and criminal no valid operator's license charges were filed by law enforcement. Thus, the three deputy prosecutors and support staff handle approximately 6,400 cases a year. Those 233 DWLS 3 cases filed per month are handled in a very limited fashion by the Prosecutor's Office, and make up over 43% of the cases filed in Kitsap County District Court.

Due to the high volume of these types of cases and the lack of prosecution staffing to handle them, the Kitsap County Prosecutor's Office makes a bail forfeiture offer pursuant to CrRLJ 3.2(o)(3) of $250 if the defendant does not have a valid driver's license at arraignment. If the defendant has a valid license, the prosecution's offer is to amend the criminal charge to no driver's license on person, RCW 46.20.017, and a $124 civil infraction penalty. See the Kitsap County Prosecutor's Office District and Municipal Court Plea Negotiation Standards at http://www.kitsapgov.com/pros, at page 29. Defendants often seek and are granted a continuance of the arraignment so that they can attempt to obtain a valid driver's license.

This bail forfeiture fast-track "triage" process permits the Prosecutor's Office to focus on more serious criminal offenses with the resources provided. The Prosecutor's Office does not open a file on these cases, nor does it review the defendant's criminal history prior to making the bail forfeiture offer.

Virtually all such defendants accept the bail forfeiture offer at arraignment, and make arrangements with the court staff to make payments on the assessed amount or pay the amount through community service. Most defendants choose to not speak with standby defense counsel, and accept the bail forfeit offer.

4. The Proposed CrRLJ Amendments And Their Impact On DWLS 3 cases.

The Proposed CrRLJ Amendments will have a significant financial impact on the Kitsap County Prosecutor's Office's ability to successfully prosecute DWLS 3 cases.

Kitsap County District Court criminal dockets are already crowded to the point of breaking. Proposed CrRLJ 3.1(d)(4) and CrRLJ 4.1(c) are being interpreted by the local Kitsap bar to modify contract arraignment standby counsel into the role of being appointed counsel for the defendant on a limited appearance basis. Such a conclusion, that counsel actually represents the defendant rather than being present to assist a defendant on a standby basis, has enormous financial and ethical consequences.

What criminal defense lawyer in good faith could recommend resolving any criminal case upon meeting a client at an arraignment calendar and given a minute or two to discuss the case? The lawyer would wisely recommend that the defendant enter a not guilty plea, and set the case for a pretrial hearing.

The issuance of discovery to the defense is a prosecutorial duty. CrRLJ 4.7(a). Under the current Kitsap County system, the prosecution does not create a file because the DWLS 3 cases

are resolved at arraignment. Under the proposed CrRLJ amendments, it would be incumbent upon the prosecutor to obtain discovery, obviously open a prosecution litigation file, and issue discovery to the defense.

The process of opening 43% more files (2,800 DWLS 3 cases) a year with current prosecution staffing levels is not possible. The Kitsap County Prosecutor's Office, as part of opening criminal referrals, conducts a thorough criminal history check on each defendant (including obtaining and printing Judicial Information Services defendant case history screens and Department of Licensing driving record screens).

After the prosecution file is opened, consistent with current office practice, a prosecutor will need to review the file, prepare a criminal complaint, and prepare a written plea offer. Prosecution staff will need to copy the charging document and attached probable cause statement (generally the police report), and process the copies with the court. After the arraignment, the Prosecutor's Office will need to copy discovery and provide it to defense counsel.

These procedures require staff time, and cost money. The procedures include–file creation, file costs, criminal histories, issuance of discovery, copy costs, additional hearings with the need to file and pull files, calendar preparation documenting the location of the files, closing of files, destruction of files, and quality control measures.

The Kitsap County Prosecutor's Office estimates that the following additional staffing would be necessary to implement these proposed court rules due to the Rules' impact on DWLS 3 cases–1 FTE deputy prosecutor, 1 FTE legal assistant, 2 FTE records staff, and additional computer, copy and other ancillary equipment. The potential cost just for the Prosecutor's Office is $276,656.00 per year.

5. The Proposed CrRLJ Amendments And Their Impact On Court Congestion

Kitsap County District Court calendars are already at capacity.

Arraignment calendars will take longer. It takes time for a defense attorney to speak with a defendant and look at the information about the case available at arraignment. Defense counsel will rarely if ever recommend that the defendant accept the prosecutor's offer at arraignment. The likely impact will be to have these cases all proceed to the pretrial hearing calendar. Eventually, more cases may be set for trial which requires more prosecution time to prepare witness lists, issue subpoenas, coordinate with witnesses, try the cases, etc.

Those defendants who seek to proceed *pro se* will certainly take more arraignment court time to do so. The court will need to carefully go through the proposed CrRLJ amendment waiver of counsel discussion.

6. Public Defense Proficiency

The supervision of a new public defender could likely mirror that of the requirements for a Rule 9 intern. One would assume that a senior attorney would supervise and train an attorney for

a certain length of time to assure proficiency. It is curious as to who will certify that the "senior attorney" is qualified and proficient to train. Many senior attorneys are literally lost when attempting to practice in a court of limited jurisdiction, especially concerning complex DUI and driver's licensing matters.

Once an attorney's training period has been completed, does the senior attorney then schedule an en banc hearing before the bench to have the attorney certified as proficient? Alternatively, does each judge individually need to find that an attorney is proficient to practice before that court? One also ponders post certification requirements regarding requirements to maintain a proficiency rating. And lastly, if this rule applies to "public defenders" should it or does it not apply to new attorneys who are private practitioners?

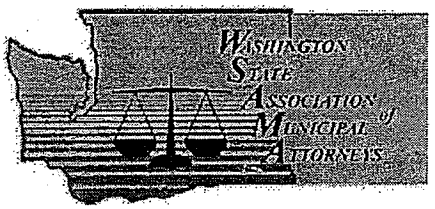
All of this takes court time—time which current Kitsap County District Court dockets simply do not have.

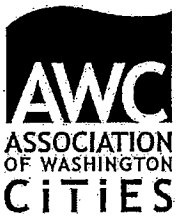
ATTACHMENT B

ASSOCIATION OF WASHINGTON CITIES

COMMENT LETTERS

February 8, 2007 and August 13, 2007





February 8, 2007

Ms. Ellen Conedera Dial, President
Board of Governors
Washington State Bar Association
1325 Fourth Ave., Ste. 600
Seattle, WA 98101-2539

RE: Request to Table Action on Proposed Amendment to CrRLJ 4.1

Dear Ms. Dial:

The Association of Washington Cities and the Washington State Association of Municipal Attorneys join their colleagues in the Washington Association of Prosecuting Attorneys with whom they share responsibility to prosecute misdemeanors and gross misdemeanors in the district and municipal courts of this State in opposing the proposed changes to court rule CrRLJ 4.1. The proposed change would require prosecutors to appear at arraignment proceedings in the district and municipal courts. That would significantly increase costs and impact prosecution resources for minimal public benefit. The impacts would most likely be hardest felt by the smaller jurisdictions.

Having a prosecutor at every arraignment is not necessary to protect the judiciary's role as a neutral decision-maker. Informing a defendant of the charges filed against him or her, accepting a plea, and possibly imposing conditions of release do not place the court in a prosecutorial role.

Particularly in the smaller jurisdictions, where the same prosecutor may be responsible for duties in several courthouses in remote locations, it may be impossible for the prosecutor to cover all such calendars

As a specific example of possible financial impacts on a smaller jurisdiction, the city attorney in Forks made an assessment of current operations of his office in relationship to Clallam County District Court I. In all likelihood, because of the multiple roles the city attorney already has, ranging from land use planning to natural resource policy to civil legal responsibilities, the City would have to hire a part-time attorney to comply with the proposed rule and address all criminal matters. The cost to do this and cover the various operations of the District Court would in fact require a .5 FTE at roughly $40,000 a year. In addition, it would require a renegotiation of the existing contract with the Clallam-Jefferson County Public Defenders Office that would probably require a part-time public defender assigned and available in Forks for a minimum of two days a week. This could increase costs for public defense up to the same amount as that for criminal prosecution noted above. Considering that the legal department's various funding sources at this time only amount to approximately $72,000 a year, it is evident the proposed rule change would have a significant impact upon Forks and many other cities in a similar situation.

Especially in light of the recent financial constraints hitting local government, it is increasingly difficult for cities and counties to do more – while seeing less revenue come in. For that matter, the need for local government to do other things (more things) in spite of decreasing revenues is facing most if not all local governments, and the smaller jurisdictions are perhaps the hardest hit of all. Whatever must be done needs to involve the executive and the legislative branches, in addition to the judiciary.

We urge the Board of Governors to table action on this proposed rule until the matter has been thoroughly evaluated and fiscal and other impacts of it are better understood by those who would be affected.

Sincerely,

James Pidduck
President
Washington State Association of Municipal Attorneys

Stan Finkelstein
Executive Director
Association of Washington Cities

August 13, 2007

The Honorable Chief Justice Gerry Alexander
Washington State Supreme Court
415 12th Ave SW
PO Box 40929
Olympia, WA 98504-0929

RE: **Comment on the Proposed Rule, CRIMINAL RULES FOR COURTS OF LIMITED JURSIDICTION CrRLJ 4.1(f)**

The Association of Washington Cities and the Washington State Association of Municipal Attorneys respectfully request the Court to adopt the Proposed Rule CrRLJ 4.1(f), put forth by the District and Municipal Court Judges Association (DMCJA) published for comment stated as follows:

> CrRLJ 4.1 Arraignments
> (f) The complaint or citation and notice or the substance of the charge, shall be read to the defendant, unless the reading is waived, and a copy shall be given to the defendant.

Taken together with other proposed changes, including requiring defense counsel to be present/available at arraignments - CrRLJ 4.1(c), Waiver of Counsel - CrRLJ 4.1 (d)(1), Waiver of Interpreter - CrRLJ 4.1 (d) (2) and Pleas - CrRLJ 4.2, this will insure representation at first appearance/arraignment for misdemeanant defendants and provides for adequate safeguards in the process for the judicial officers to take pleas. Though these rules will have significant fiscal impacts to jurisdictions charged with funding these activities, this is the preferred course of action of our associations.

The rule before you is silent on the issue of mandatory prosecutor appearances at arraignment, leaving it instead to the discretion of local judges. WSAMA and AWC have confidence that the judges in our state are fully capable of observing high standards of integrity, impartiality and independence when performing their duties under the arraignment rule as it presently exists; a prosecutor at arraignment is not necessary to protect the judiciary's role as a neutral decision-maker. This is also consistent with input AWC received from a survey of our members on the fiscal impacts of these rules. Of respondents, nearly 60% assign a prosecutor to attend arraignments. Leaving this practice to be determined locally, as is currently done, appears to work in the majority of our responding cities.

A competing rule, proposed by the Washington State Bar Association under CrRLJ 4.1(f), would require a prosecutor to be present at all in-custody arraignments and read the charge. We see this to be an unnecessary burden to all local governments, especially the smaller ones, that would provide little or no economic or judicial efficiency, but instead will direct funds away from other local government responsibilities. We would therefore respectfully ask the Court to reject this proposal. While community safety and the administration of justice are top priorities in local communities, general fund budgets must also pay for streets, parks, libraries, community support programs for the poor, and public defense contracts. These are limited resources. If a larger portion is required to pay for prosecution services, other general fund activities, including those used to protect the rights of the accused, will suffer.

In her Executive's Report in the February 2007 *Washington State Bar News* Director M. Janice Michels aptly wrote, "...local government cannot bear the total burden of providing state-mandated defense, interpreters, civil commitment representation, and juror- and criminal witness costs." Ms.

Michels also observed, "...local government funding constraints have forced courts (also funded by general funds) to choose between critical courtroom staffing, or seeking solutions for families in crisis or those who are chemically dependent." We agree. For these reasons, we prefer the DMCJA proposal that would rely on the discretion of the judge to determine if it is necessary for a prosecutor to be present at all in-custody arraignments and read the charge.

In considering the proposed rules, we would also ask the Court to be aware that local jurisdictions are well into the 2008 budget process. There is no provision to pay for the cost of these rule changes. If these changes are implemented, we ask that the rule not take effect until the 2009 budget cycle, beginning January 1, 2009, at the earliest.

Respectfully,

Michael Weight, President
WA State Association of Municipal Attorneys

Stan Finkelstein, Executive Director
Association of Washington Cities

ATTACHMENT C

AWC PUBLIC DEFENSE RULE SURVEY SUMMARY

AWC Public Defense Rule Survey Summary

In April and May 2007, AWC conducted a survey of cities on the impact of the proposed rule CrRLJ 4.1 requiring prosecutors and public defenders at all arraignments. This survey was an attempt to capture the costs and other impacts of this requirement on cities. The responses varied significantly, based in part on city size and the frequency in which municipal and district courts hold arraignments.

Survey Response:

- 72 survey responses, representing 82 cities (30% of 281 cities)
- Those 81 cities represent 54% of the state's total city (incorporated) population.

City Prosecutor Impacts:

How cities provide for prosecution services:

- 57% contract with a private firm
- 17% have an on-staff city attorney
- 16% have other arrangements (primarily contracting with the district court for all municipal court services)
- 10% contract with the county prosecutor

The majority of responding cities do assign prosecutor staff to attend arraignments

- 59% assign prosecutor staff to attend arraignments

Of those that assign staff to attend arraignments, the majority attend almost all the time.

65% attend almost all (90-100%) of first appearances and arraignments
12% attend more than half (50-90%)
4% attend less than half (10-50%)
20% attend less than 10%

Additional Costs:

- 29% reported that compliance would involve hiring additional staff
- Of the responding cities, additional public defender hiring needs per city ranged from 0.2 staff to 2 full time attorneys and 0.1 to 1 support staff
- Additional costs overall ranged from a 20% increase to 200% of the current level.

City Public Defense Impacts:

How cities provide for public defense services:

- 74% contract with a private firm
- 9% contract with the county prosecutor
- 9% have other arrangements (primarily contracting with the district court for all municipal court services)
- 7% contract with a public defender agency
- 1% have on-staff city public defenders

The majority of responding cities do not have public defense staff that attend arraignments

- 40% responded that public defense staff attends first appearances and arraignments

Of those in which public defenders attend arraignments, the majority attend more than half the time, but higher portion attend less than 10% of the arraignments in comparison to prosecutor staff.

45% attend almost all (90-100%) of first appearances and arraignments
8% attend more than half (50-90%)
6% attend less than half (10-50%)
40% attend less than 10%

- Several cities noted that public defenders in private firms are working at full capacity on contracts that involve several cities and conflicting arraignment calendars.
- Some cities noted that public defenders attend only in-custody arraignments.
- Other cities noted that the public defender is generally available in or near the courtroom to answer questions if needed or assigned.
- Answers to this question were also impacted by the timing of indigence determinations and court assignment of counsel.

Additional Costs:

- 26% reported that compliance would involve hiring additional staff
- Of the responding cities, additional public defender hiring needs per city ranged from 0.25 staff to 2 full time attorneys and 0.25 to 1 support staff
- Additional costs overall ranged from a 15% increase to 200% of the current level.

Sample of Additional Survey Comments:

- Of particular significance, two of the respondents that already follow this practice noted that they are only able to meet the requirement because they have grant funding from the Office of Public Defense under a program for improved indigent defense services.
- "This rule would penalize the small communities that contract for prosecution and public defender service."
- "The City would find that the benefit does not outweigh the costs for requiring such staffing at an arraignment level as most cases would not be resolved until later on in the process."
- A number of cities noted that the courts would have to schedule additional calendars or increase time for arraignments.
    - "These costs of appearing at every single arraignment do not include the likelihood that the court will have to add a calendar to get through all of the arraignments. The presence of counsel will likely slow down the current procedures and limit the number of arraignments that can be scheduled on each date."
    - "The City will need to schedule more use of its multipurpose center which serves as a courtroom, reducing its availability for other uses."
- Some cities mentioned that the arraignment process is handled in part by fax and telephone access with prosecutors and public defense, rather than in-person meetings.
    - "Yes, the public defender does appear in most cities. Prosecutors fax over complaints and bail requests if needed. It does not seem that a physical presence is necessary for the prosecutor. We never know when an arrest will occur, to have

to always have a free body each day is not realistic for small firms, which most cities have."

- Funding is a significant factor.
  - "Cities are already burdened with unfunded mandates. If funded, there are great advantages to improved legal representation."
  - "The City would not be able to comply with this rule unless a full time city attorney was on staff and additional funds would need to be available for additional public defender time. This is money the city does not have."
- Advance timing and ability to budget for increased expenses are also issues.
  - "The rule change, if adopted, will create a huge financial hit to the City's budget. If it is adopted, the City will need at least one year's advance notice in order to prepare for the change and figure out where the dollars are to come from; i.e., what other program(s) will be cut to make up the difference in the budget. Also, assuming the City is able to access the dollars, it would need time to: (1)re-negotiate its contract with the current prosecutor at a higher amount; (2) terminate its contract with the current prosecutor, and hire prosecutors in-house as employees; or (3)terminate its contract with the current prosecutor, and negotiate a contract for prosecution services with the county."