

Faulk, Camilla

From: Debi Perluss [DebiP@nwjustice.org]
Sent: Tuesday, April 29, 2008 9:35 AM
To: Faulk, Camilla
Subject: Comments on GR 34
Attachments: GR 34 ltr 4 29 08.pdf

Hi Camilla: The attached is being sent by mail today. I note that comments on proposed rules submitted by email must be limited to 1500 words. I am not sure if this applies to PDF attachments to emails as well. If so, I apologize for also submitting this attachment by email (it is about 2000 words). NJP appreciates the opportunity to comment on this Rule. Thanks

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César E. Torres
Executive Director

April 29, 2008

Justice Charles W. Johnson
Supreme Court of Washington
P.O. Box 40928
Olympia, WA 98504-0929

Re: Proposed General Rule 34

Dear Justice Johnson:

I am writing on behalf of the Northwest Justice Project in support of proposed General Rule 34. The Northwest Justice Project (NJP) is the statewide not for profit legal aid program that receives funding from the national Legal Services Corporation and from the state's Office of Civil Legal Aid. NJP is committed to providing high quality civil legal services to Washington's indigent and low income populations who have critical legal needs. For the persons represented by NJP, representation by competent counsel is essential to assert and protect their legal rights. When, due to our limited resources, NJP is unable to represent eligible persons with critical legal needs, we attempt to provide advice and limited self-help assistance, including help with drafting pleadings for self-filing in courts around the state. Based on our experience in providing such assistance on civil matters to well over 10,000 unrepresented low-income persons in Washington each year, we are very familiar with the inconsistent (and in some cases highly inappropriate) treatment of fee waivers throughout the state.

The lack of a statewide uniform approach to waiver of court imposed fees has, for a long time, resulted in inconsistent fee waiver policies and unjustified practices. Indigent persons are often prevented from being able to either initiate needed court actions or to ultimately obtain justice due to their inability to effectively complete the actions. Thus, the ability of indigent persons to achieve or receive justice by accessing the courts has to date been largely dependent on the jurisdiction in which they happen to reside. For example, in some counties there is a blanket policy of only making a partial waiver of the fees, and requiring payment of the portion not waived. Some jurisdictions have a policy of reviewing the fee waivers and requiring payment of fees *before* allowing a party to finalize the case, *e.g.* by entry of a final decree of dissolution. We list just a few specific examples below:

- A victim of domestic violence whose only income was TANF was unable to file a petition for dissolution and custody to protect her child because when she went to the clerk's office she was told she had to pay the filing fee. She was not informed of the



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possibility of a fee waiver. She waited three months before filing while she collected enough money to pay the filing fee.

- A victim of abuse whose only income was TANF was denied a fee waiver until an NJP attorney helped her complete the forms and special process the court used for attorney requests for fee waivers. While the victim obtained the filing fee waiver she was forced to pay the \$50 family law facilitator surcharge causing her to go without basic needs.
- A TANF recipient involved in a contested custody case was assessed a \$50 family court referral fee pursuant to a mandatory family court referral process imposed by the local court. Though the referral form indicates the fee can be waived due to hardship, the woman needed attorney representation to obtain the fee waiver, and then the waiver was subject to review before final orders could be entered.
- A low income mother of two for religious reasons opposed her husband's petition for dissolution, which had been filed in a county in which neither she nor the husband resided. To change venue to her county of residence, she had to initiate an action in her local court and move for change of venue in the other court. Though her county court waived the new filing fee, the court of improper venue required *her* to pay all the costs of moving the file to the court of proper venue and required full payment *before* it would transfer the file.

In addition to the above examples, some jurisdictions have a local practice of *requiring* a pro se family law litigant to have their pleadings reviewed by the family law facilitator before they are filed or orders are presented for entry to the court. If the facilitator fee, which ranges from \$20 to \$50 per visit, is not ever waived (and to date most courts have taken the erroneous view that they cannot be waived), an indigent family law litigant will be prevented from filing a dissolution petition, prevented from filing motions for temporary orders or other relief, and prevented from obtaining the entry of a final dissolution decree and/or parenting plan, solely because they are unable to pay the facilitator fee. Thus, the barrier created by court fees is compounded by the fact that user fees are imposed for a range of services that many jurisdictions mandate, whether the litigant desires the service or not.

This Court recently identified these types of court imposed fees as creating unconstitutional impairments to access to courts. *See, In re Marriage of King*, 162 Wn. 2d 378, 390, 174 P. 2d 659, 666 (2007), citing *Bullock v. Roberts*, 84 Wn. 2d 101, 524 P. 2d 385 (1974). Imposition of blanket policies and unspoken "rules" that, for example, require use of the facilitator and/or payment of fees before entry of the final dissolution decree or parenting plan, are similar to the policy found to offend the fundamental right of access to courts in *Bullock* and which would be addressed by statewide standards and procedures set out in GR 34.

Importantly, in *Marriage of King*, 162 Wn. 2d at 387, the Court identified the availability of family law facilitators and Unified Family Court investigators as statutory "safeguards" which mitigate the absence of counsel in complex contested custody cases. However, these resources are not readily available for indigent *pro se* litigants as fees for these services in

most counties are virtually never waived. Even when the court might entertain a fee waiver request, most *pro se* litigants are not told of the opportunity to obtain the waiver or are further obstructed by local process from seeking the fee waiver. For example, in one county the clerk requires payment of a \$2.00 fee to obtain a required fee waiver form that is customized for local use. While a \$2.00 fee seems nominal, for persons whose only income is from one of the needs-based programs listed in Section (c) of proposed GR 34¹, the form fee alone can be a deterrent to accessing the court.² A \$50 Family Court investigator fee or required multiple payments of \$20 Facilitator fees pose insurmountable barriers to court access for persons whose only income is public assistance.

The proposed GR 34 sets up a uniform system that incorporates the range of fees an indigent litigant is typically faced with having to pay in order to use the court systems. Given that most *pro se* cases that require fees authorized to be waived under proposed GR 34 arise in the context of domestic relations, the actual number of fee waivers for items other than initial and modification petitions, change of venue or a Facilitator charge is likely to be fairly limited. However, for those domestic relations petitioners who really need a dissolution decree or parenting plan to protect their families or to stabilize their living situation, a clear and simple process by which they can pursue the filing and obtain the relief they need is critical.

With respect to the specifics of the proposed Rule, NJP supports the concept of an automatic fee waiver based on an attorney's certification that the client is represented by a Qualified Legal Services Program (QLSP) accompanied by a financial declaration that the applicant is on a needs-based public assistance program as an efficiency that will greatly assist in the administration of justice. This is consistent with the approach that NJP takes to determinations of eligibility for its own services.

NJP is unclear, however, as to why a different standard or process should apply (that would deny automatic waiver) to *pro se* litigants who sufficiently demonstrate that their only income is from a needs-based public assistance program. As in other situations in which *pro se* litigants receive less favorable treatment than litigants who are represented by counsel (as reflected in the examples above), one can reasonably anticipate that fee waivers will be disparately denied for unrepresented litigants who are financially similarly situated to those represented by a QLSP. As an unintended result, QLSP's may shoulder a greater burden by having to assist eligible persons solely for the purpose of obtaining the fee waiver—an inefficiency that is part of the impetus for a uniform rule. NJP expresses no opinion on whether, in either case (the indigent person being represented by a QLSP or not), the waiver should occur through presentation of the request to the clerk or through an *ex parte* court in the first instance. However, the availability of a simple mechanism by which low income persons can file an application to obtain a fee waiver based on a financial declaration, without having to either travel long distances (in rural areas) or to come to court for an *ex*

¹ For example, under Washington's General Assistance for Unemployable persons (GA-U) program, the subsistence grant for a disabled individual is \$339 per month. Under the TANF program, an adult with two minor children receives a subsistence grant of \$546 per month.

² If the fee waiver forms were available from the court web-site or in a public place in the clerk's office, this would alleviate the need for court personnel to take time to provide the form.

parte presentation of a waiver application, is extremely beneficial. For many low-income persons, a trip to court and waiting for a turn before a crowded *ex parte* docket requires scarce funds to pay for gas, parking or bus fare, child care, or results in valuable lost time away for low-wage work. But it should be noted that in some counties fees are also imposed for the presentation of an order to an *ex parte* court itself (e.g. Klickitat³, Jefferson⁴ and Clallam⁵ Counties), and these fees should also be subject to waiver.

NJP further supports the Rule's authorization of fee waivers for persons whose income is from a source other than a needs-based public assistance program or may be slightly above the Federal Poverty Level, but is still sufficiently low that requiring payment of various court imposed fees would effectively preclude their ability to seek judicial relief. Given the increased costs of basic needs such as food, rent, and gasoline, particularly when a crisis may result in the need to access the courts, the ability of the working poor to find resources to pay filing fees and other court imposed costs often poses a significant hardship. The actual ability of low income persons to come up with unanticipated court fees, and not a strict application of an income limit, is the appropriate measure of whether the fees should be waived. It is appropriate that these applications for fee waivers be determined on a case-by-case basis.

As the members of this Court are well aware, access to the courts is often impeded by the high price of getting through the courthouse door. While the cost of hiring a lawyer is a significant barrier for most low and moderate income persons to pursue legal claims or to protect legal rights (see, e.g., *In re Marriage of King*, 162 Wn. 2d at 405-06, Madsen, J. dissenting), many, many people are deterred from pursuing their legal rights because they cannot afford to pay the cost of filing fees and other court imposed expenses. Indeed, in upholding the inherent power of courts to waive fees in *O'Connor v. Matzdorff*, the Court cited with approval an article "lamenting the slowness of the movement toward justice for the indigent." John MacArthur Maguire, *Poverty and Civil Litigation*, 36 Harv. L.Rev. 361 (Feb. 1923). See *O'Connor v. Matzdorff*, 76 Wn. 2d 589, 458 P. 2d 154, 156 (1969). Proposed GR 34 will, if adopted, step up the pace of movement toward justice for indigent persons who need to access the court system to gain family protection or to otherwise address basic needs. In the absence of GR 34, *O'Connor's* promise of equal access to courts will continue to be illusory in many courts of this state. On the basis of the foregoing, NJP urges the Court to adopt proposed GR 34.

Respectfully,

Deborah Perluss
Director of Advocacy/General Counsel

C NJP Board of Directors
César E. Torres, Exec. Director

³ See Klickitat County Clerk's Fee Schedule at:
<http://www.klickitatcounty.org/clerk/ContentROne.asp?fContentIdSelected=1126216509&fCategoryIdSelected=973058854&fX=X>

⁴ See Jefferson County Clerk Fee Schedule at <http://www.co.jefferson.wa.us/supcourt/PDFs/Clerkfee.pdf>

⁵ See Clallam County Clerk's fee schedule at: www.clallam.net/board/feetables/115-A.pdf