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April 24, 2008

Mr. Ronald R. Carpenter
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Proposed Changes to RPC 1.8 - Conflict of Interest: Current Clients.

Dear Mr. Carpenter,

I am writing in support of the proposed changes to RPC 1.8. By way of introduction, I direct the Innocence Project Northwest Clinic at the University of Washington School of Law. I wrote an article about the need for this type of rule change entitled *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. Mich. J.L. Reform 773 (2006).

As the comments to the proposed rule change indicate, indigent defense contracts that require the contracting attorney to pay for conflict counsel create a financial disincentive for the contracting attorney to acknowledge a conflict and seek to withdraw. Such contracts penalize the contracting attorney for withdrawal, since conflict lawyers are paid from money received by the contracting attorney. Funds that could be used to finance the contracting attorney's law firm operations are instead diverted to outside counsel. And the funds are diverted to counsel whose client's interests are in conflict with the contracting attorney's client's interests.

The proposed changes to RPC 1.8 serve two purposes. First, attorneys are put on notice that agreeing to pay for conflict counsel out of an indigent defense contract budget violates the rules of professional responsibility. Second, a rule of professional responsibility prohibiting attorneys from entering into such agreements provides clear guidelines to government entities engaging in negotiations for indigent defense contracts.

The proposed rule changes to RPC are needed. Many counties in Washington State have indigent defense contracts that require the contracting attorney to pay for conflict counsel. A recent report found that three of the thirty-nine counties in Washington State require the indigent defense contractor to pay conflict counsel; nine counties have contracts that are so vague it is not possible to determine who is responsible for paying conflict counsel and one county contract is silent as to who is responsible for paying the costs. See American Civil Liberties Union of Washington, *The Unfulfilled Promise of Gideon: Washington's Flawed System of Defense for the Poor* 21 (2004).

I thank the Court for considering my comments.

Sincerely,

A handwritten signature in black ink, appearing to read "J. McMurtrie".

Jacqueline McMurtrie, Associate Professor
Director, Innocence Project Northwest Clinic