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September 26, 2011

Honorable Barbara A. Madsen
Chief Justice, Washington Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

RE: WSBA Court Rules & Procedures Committee Comment on SCJA's Proposed Amendment to CrR 3.1(g)

Dear Chief Justice Madsen:

Thank you for providing the WSBA Court Rules and Procedures Committee with the opportunity to comment on the Superior Court Judges' Association proposed amendment to CrR 3.1(g). The WSBA opposes further consideration or adoption of the amendment for the reasons discussed below.

The ability of a pro se criminal defendant to question a witness is controlled by several important areas of law, not based in court rules. A defendant's right to represent him or herself is constitutionally protected under both federal and State law, as is the defendant's right to confront witnesses. *E.g.*, U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. The court has inherent ability to control the courtroom, which also has a constitutional dimension. Wash. Const. Art. IV, §§ 1, 30. As the Court is well aware, there is a significant body of case law interpreting these provisions under both federal and State law.

At best, and against this backdrop, the proposed amendment is unnecessary. Under current case law, judges already have the ability to control questioning of a witness by a pro se defendant, subject to constitutional limitations in light of the facts and circumstances of each case. For example, precedent indicates that in certain circumstances it is permissible for the judge—or appointed stand-by counsel—to question a witness using questions prepared by the pro se defendant. *E.g.*, *State v. Estabrook*, 68 Wn. App. 309, 318 (1993) (affirming trial court's questioning of witness using questions prepared by pro se defendant; trial court explained to jury that the questions had been prepared by the defendant). And the court may surely limit harassing questions, *see* ER 611(a), and otherwise control decorum and behavior in the courtroom.

At worst, the proposed amendment gives trial courts a misleading impression about what is permissible and what factors they should consider. The amendment does not reference the constitutional aspects of these issues, and it is unclear if the "good cause" standard articulated in the proposed amendment is

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intended to be the constitutional standard, or something less. We are concerned that the proposed amendment could lead a court to enter an order that on the facts of the case would not be constitutionally justified. We think it likely that this rule would lead to litigation and constitutional challenges by the defendant in any case in which it was relied upon, putting jury verdicts at risk on appeal.

For these reasons, the WSBA opposes further consideration or adoption of the proposed amendment. If, however, the Court does consider the SCJA's proposed amendment, the WSBA believes it should not be done in an expedited fashion. The important issues at stake would deserve full consideration by judicial officers, both sides of the criminal bar, and victims' rights groups.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen R. Crossland". The signature is fluid and cursive, with the first name "Stephen" and last name "Crossland" clearly legible.

Stephen R. Crossland
President

cc: Paula C. Littlewood, WSBA Executive Director
Michele Radosevich, WSBA President-Elect
Ken Masters, Chair, WSBA Court Rules & Procedures Committee
Elizabeth Turner, Staff Liaison, WSBA Court Rules & Procedures Committee
Nanette Sullins, Administrative Office for the Courts

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