To: COMMENTS supreme@courts.wa.gov.

From: Ken Henrikson

Standards Certification of Compliance for CrR 3.1.

ENFORCEMENT, COMPLIANCE AND CONTROL MECHANISM IS INEFFECTIVE AND DENIES THE 6TH Amendment right to "Independent Counsel"; is facially perjurious as any document that guarantees the weather.

Any attorney signing such a document gets job security. Any attorney who refuses to sign can reasonably expect to be out of a job. How do I know?

(a) I've heard managers state that if an employee works more hours than usual, it must be because he is too inefficient than most attorneys/investigators so he is not a "good fit". They espouse this reasoning during the federal D.O.L FLSA investigation on a complaint I filed.

(d) I've inherited cases a week before trial when little work has been done. All unpredictable.

(d) Just ask attorneys whether they can really "know" if their certification is true for every client.

LOOK AT THE DEFINITIONAL ELEMENTS OF PERJURY

If a thing is unknowable, then no certifying attorney, regardless of the case-weighting" scheme used can "know" his certification is true. If it turns out to be false, then it's "perjurious" by definition:

FIRST,

RCW 9A.72.080 Statement of what one does not know to be true.

Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he or she knows to be false.

Thus, unlike defamation, "truth" isn't a defense to perjury even if it later proves true.

Whether the backlog of cases, vacations, case transfers, or co-mingling of funds and resources from one set of client's budgets to another, or whether a case requires extraordinary work are never known since the signer has no control. "Knowing" is not blind faith or loyalty. The fact that indigent clients are not 3rd party beneficiaries has no relevance here.

Does the certifying attorney have reason to doubt that he has insufficient time would materially prejudice the client?

Yes. Just spend 2 hours at the any master calendar. See many motions to continue for in custody clients, dissatisfied that their lawyer wasted time and they have to spend more time in jail because of overlod.

Compare: private attorneys who don't sign the Rule 3.2 certification: They (properly) refuse to accept a prospective client's case if insufficient time to prepare. Why? **Because they are paid by the work they do** . Unlike public defender, private attorney does not lose (100%) of their clients and income if they regularly refuse cases. The private attorney knows his resource limitations, while the public defender can't know because he has no control over what case file he'll find in his inbox tomorrow. So he doesn't know whether his blind-faith certification is material to whether he can accept that case w/o prejudice. But with perjury, knowledge of materiality is also irrelevant. The private attorney rejects most clients because he knows whether he has the time to take the case.

SECOND,

RCW 9A.72.010

(1) "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding;

Here, the outcome is whether the quality of representation will meet the standards of the lawyer's certification. If that isn't possible to know (as a private attorney who has control over his caseload) then whether the attorney actually believes, **in good faith,** that he just hopes his statement won't become material in hindsight, is no defense to perjury. The managers who control the resources should sign it. But the problem is it's the managers you list on your list of drafters who have no responsibility under this rule. I have no voice because I am not, nor will I ever be a "manager." Sour grapes? "Whatever."

RCW 9A.72.020 *…… the declarant was aware of such recitation at the time he or she made the statement.*

Here, it is rarely objectively possible to "know" ("be aware of") that this statement is true "at the time it is made". This is very different from the private attorney who controls his caseload. Except in rare circumstances, the Supreme Court's certification requirement is felonious on its face.

THIRD,

RCW 9A.72.020 *(2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his or her statement was not material is not a defense to a prosecution under this section.*

Neither is it reasonable to warrantee against a case having to be continued for months (or often years) due to inadequate resources or training where the case has to be delayed because other cases are already backed up, so it's not "material". This kind of blind certification meets the definition of contract and insurance fraud codified in RCW. Managers who assign the cases have their own standards, spheres of ignorance, and motivations conflicting with client interests (like the universal need to "look good", staying within the comingled budget for all clients), and other corporate interests. And the RPC 1.7 violations that inhere in every case weighting

formula, which has been gradually mitigated over the decades but still produces routine atrocities. This is not "insulting" any more than any Business Administration course in organizational behavior and accounting is.

The public defender can't "know" whether he/she can or would be in compliance with standards of practice because he can't know whether a case will end in a plea with a few hours of work, or a complex case with hundreds of hours and statistical weighting formulas are not infallible. Managers who own contract or government-run defender agencies have a fixed budget or unfunded mandates. Over the past 10 years many states have recognized that any form of "Case Weighting" or other attorney compensation scheme except for individual pay for work for each client. But without this, the certification becomes perjurious because materiality of acceptance of a case cannot be known "at the time" of signing. The idea of case weighting is a misuse of statistical analysis that ends in tragedy. It's not a perjury defense that 90% of the certifications turn out to be true so it's not perjury if only 10% prove false. *See: 9A.72.050 Perjury…Inconsistent statements*

I SUGGEST THIS SOLUTION:

All attorneys must conceptualize clients as individual clients WITH THE SAME RPC PROTECTIONS..

Presumptive rights, like Miranda rights, are for the attorney and client; printed on the form, consistent with the RPC's for private attorneys, such as to the right to refuse or a contingent transfer of other cases at any time, and compensation proportionate to the work actually done; similar control mechanisms as with any private law firm. No comingling of case credits through statistical formulas as absurd as pull-tabs for fees, overhead relevant to each client. As with private clients, a confidential monthly timesheet DIRECTLY TO THE CLIENT with the same itemized hours so the client can instantly know he's spent 2 years of continuing incarceration when none of the exculpatory witnesses have been contacted when the prosecutor might have dismissed a year ago with an early workup, all because "unpredictably" the avalanche of trial cases in his box. I routinely observe that many clients would have shortened their incarceration by even years had the attorney known the client could see his billing.

The certification doesn't meet the affirmative defense standards for duress.

Conditioning and faith is not "duress: I tried battered spouse defense in a Securities Fraud case but it failed because I'm a bad lawyer. If they don't sign, they have no job when everybody else signs it. It is a Milgram-esque peer-pressure document. Client is "the learner". The attorney signs it in good faith, as it uses faith in adopting the vague promises and definitions that superiors proffer. The same "superiors" who are all high managers who drafted these rules that transferred responsibility and blame to the powerless. These definitions of adequate representation are task oriented not goal oriented. That task over goal orientation is what these certifications trigger, which lowers the quality of legal services.

I defended attorneys/investigators (not very well) in employer discipline proceedings, when the manager might discourage overtime requests. I saw the chilling effects of working too many hours, through my filing FLSA complaints with federal agencies and their investigation. Investigators work secretly without asking for overtime pay. The "unauthorized work" led to

acquittals and dismissals that wouldn't have happened; a substitute for pay; the coin of the realm; the "hostage theory". An agency "borrows" resources funded for another division, thereby reducing the resources for other clients. Cases get continued; they stay incarcerated, triggering a sort of domino-Ponzi effect; another "unknowable" factor that makes the 3.2 certification facially perjurious. It's not "independent" counsel when government's goals (as an employer or contractor) pressures the attorney to be dependent (for his food) and cannot provide the independence the Constitution requires as some decisions have figured out.

From: OFFICE RECEPTIONIST, CLERK
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Subject: FW: COMMENT ATTACHED
Date: Monday, May 3, 2021 8:17:39 AM
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From: HENRIKSON [mailto:henrikson@prodigy.net]
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Subject: COMMENT ATTACHED

To: Comments c/o Washington Supreme Court
From: Kenneth Henrikson #17592

COMMENT ATTACHED

Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by **no later than April 30, 2021**. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

IN THE MATTER OF THE SUGGESTED)
AMENDMENTS TO COUNCIL ON PUBLIC)
DEFENSE'S INDIGENT DEFENSE APPELLATE)
PERFORMANCE GUIDELINES AND PROPOSED)
AMENDMENTS TO CrR 3.1 Stds, CrRLJ 3.1 Stds,)
AND JuCR 9.2 Stds)