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March 24, 2008

Justice Charles W. Johnson
Supreme Court of Washington
Post Office Box 40929
Olympia, Washington 98504-0929

Dear Justice Johnson:

RE: State Court General Rule 34

As president of the Superior Court Judges' Association (SCJA), I am writing to inform the Supreme Court Rules Committee that the SCJA maintains its opposition to proposed State Court General Rule 34. We ask that the Supreme Court not adopt the rule.

Our Association has drafted multiple letters expressing our opposition to the proposal this past year. The reasons for our opposition are set forth in the attached memorandum, thoughtfully prepared by the SCJA Civil Law and Rules committee.

In short, courts have clear authority to waive fees under title 36.18.022 RCW. The proposed rule actually seems to complicate a process that currently works well. While we welcome the opportunity to work with other stakeholders to address court-related concerns, this is one area that we continue to maintain our opposition.

Sincerely,

Vickie I. Churchill
President

cc: Board of Trustees
Judge Mary Yu, SCJA Civil Law and Rules Committee
Barbara Miner, Clerk's Association
Nanette Sullins, AOC



Superior Court Judges' Association

4 March 2008

To: President Judge Vickie Churchill
President Elect Judge Richard McDermott

FR: Judge Mary Yu, Chair, Civil Rules and Law Committee

RE: **Proposed GR 34**

This memorandum is a response to a request from President Elect Judge McDermott that the SCJA Civil Committee review recent amendments to proposed GR 34 and provide comments for SCJA consideration.

I. Overview and Summary Recommendation

As you recall, the Civil Committee previously reviewed proposed GR 34 in July 2007. At that time, the Committee had significant concerns about the income qualifications (200% of the federal poverty level), the fiscal impact on counties, shifting the decision-making from judges to clerks, and the Association of Clerks' opposition to the rule. The proposed rule now comes before us after some modifications.

We welcome the modifications to the income qualification which sets the poverty qualification level at 125% of the poverty level. This rate is the same level utilized in criminal cases and we are pleased with the consistency. In addition, we appreciate the preliminary dialogue that has occurred between the various associations and the proposing entities. We hope that further dialogue might occur so that we could sort out the differences and jointly propose a simple and efficient method for granting waivers and addressing the legitimate concerns of the legal aid community.

However, for the reasons stated below, we continue to have serious reservations about the practice of circumventing specific statutory provisions through the adoption of a court rule. Moreover, as judges we are reluctant to adopt a practice of delegating decisions to administrative staff which are properly judicial discretionary decisions. Ancillary to this concern is actual judicial review for case viability.

II. SCJA Civil Committee's Disposition

A. The Civil Committee Supports Access to Courts

First and foremost, it is imperative that the SCJA Officers and Board understand that the Civil Committee joins the Bar and the legal aid community in supporting measures to ensure access to our courts for all litigants. We sincerely share the concern that litigants with limited resources must be able to access court services in all legal matters. We also

recognize that various fees authorized by the legislature and imposed by courts and counties for services may in fact, become obstacles to such access and that in some circumstances full access may require the waiver of fees.

B. The Civil Committee Supports a Simple Process for Waivers

We endorse the idea that application for waivers must be simple and that approval of such requests also be expeditious and economically efficient for all concerned. As a matter of routine our courts approve waivers in criminal matters and the majority of such requests are handled on an ex parte basis with the trial judge in an expedient manner. Many of our judges also report that consideration and treatment of waivers in civil cases is the same as that in criminal cases and that in general, waivers for civil fees are granted.

C. The Civil Committee Has Serious Reservations About GR 34 for Legal Reasons

Notwithstanding our support for the principles enunciated above, we have serious reservations about the legality of proposed GR 34 for the following reasons:

- 1) Proposed GR 34 grants authority to the clerk for approving waivers in civil cases. The proposed rule is contrary to statutory provisions granting express authority to the court, not the clerks, for granting waivers. A court rule is not the appropriate mechanism for circumventing a statutory provision.
- 2) Waivers of fees is not a ministerial administrative function and judges should not give up, by court rule, discretion to decide whether a waiver should be granted in any particular case, civil or criminal.¹
- 3) Proposed GR 34 is overly broad and includes waiver of fees not expressly authorized as “waiveable” by the legislature. The statutory provision on waivers is limited to filing fees.
- 4) Proposed GR 34 would require the clerk to waive fees in cases, which on their face, are without merit. Examples are cases where the court clearly lacks jurisdiction or the complaint is incomprehensible as a result of delusional judgment. Review of a fee waiver is an opportunity for judicial review, even if cursory, of an initial filing. We appreciate the effort to develop uniform standards for waivers and only express concern about the provision requiring a non-lawyer to sign a Declaration pursuant to CR 11 since not all such individuals will fully understand or appreciate the implications for signing such a document.

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¹ There were two committee members who felt comfortable delegating fee waivers to clerks but concurred that the preferred approach to such delegation be by legislation or through the adoption of a model rule for local court adoption.

III. Legal Authority

A. Authority for the Imposition of Fees

The statutory authority for the imposition of various fees (including filing) are found in RCW 36.18.012; 36.18.016; 36.18.018; and 36.18.020; Each of these enabling provisions direct the clerk to collect certain fees for various services. The statutes set the amount of fees that may be collected for certain services and whether certain percentages are to be divided between the state and county.

Review of these sections is necessary and I have attached a chart which summarily displays these fees and whether the imposition of such fees is mandatory or discretionary.

B. Authority for Waiving Fees

The statutory authority for waiving clerk fees is contained in RCW 36.18.022. It grants authority to the *court* to waive such filing fees when financial hardship can be shown by affidavit.

The court may waive the filing fees provided for under RCW 36.18.016(2)(b) and 36.18.020(2) (a) and (b) upon affidavit by a party that the party is unable to pay the fee due to financial hardship.

The language of the statute is plain and direct. There is no provision allowing any other entity other than the court to waive such filing fees.

There is also no other statutory provision permitting waiver of any other fees other than those in 36.18.016(2)(b) and 36.18.020(2) (a) and (b). These fees are filing fees in an initial petition for dissolution, separation, or determination of validity of marriage and filing fees for filing the initial paper in civil cases, counter or cross claims, third party pleadings, and appeals from a court of limited jurisdiction but not for criminal defendants.

IV. Proposed General Rule 34

Proposed General Rule 34 grants authority to any individual seeking a waiver of fees beyond that enumerated in RCW 36.18.022. Section (a)(2) of the rule includes the waiver of fees for modification actions, jury demands, fees for certified copies, copies of court recordings, courthouse facilitators for pro se litigants, venue changes, faxed documents, mandatory arbitration, requests for trial de novo, administrative law reviews, petitions for unlawful harassments, and the filing of notice of money due for victim compensation.

We take no position on the policy question of whether these fees should be ones that are waived or not, or whether the court has inherent authority to waive any fee.

Section (b) of GR 34 requires that the clerk automatically waive the fees listed above upon presentation of a financial statement and a declaration from an attorney who is working in conjunction with a not-for-profit legal service organization (referred to as a “qualified legal services provider”). Note the language in (b)(1): The fees referred to in subsection (a)(1) *shall be waived* when the applicant presents to the clerk: . . . (*emphasis added*).

The rule retains the approval of a waiver by the court when the person seeking such a waiver proceeds *pro se* or for some reason the application is denied by the clerk. Despite the provision authorizing an administrative procedure for granting waivers, section (h) of GR 34 recognizes that the court retains constitutional and inherent authority and discretion to grant or deny a waiver.

Finally, the commentary to the rule acknowledges that the underlying purpose of the rule is to encourage volunteer lawyers to accept referrals from legal aid organizations. However, there is no explanation as to the reasons why application to the court is an obstacle to pro bono representation.

V. Recommendation

1. The SCJA should not support proposed GR 34 even as modified. We do not see why our position ought to change given the serious procedural and substantive legal questions we have about the rule as outlined in this memo. Moreover, the Clerks remain opposed to the rule and have expressed a preference that they not be given this discretion.
2. We encourage a dialogue between all interested parties to explore a workable procedure that respects the distinct roles of the clerk and the court while addressing the needs of the legal aid community as expressed in the commentary to the rule. We also acknowledge the importance of uniformity and believe there could be a workable compromise if the proposed rule were confined to section (c). By way of example, we propose the adoption of a rule which permits mailing fee waiver applications for ex parte approval by the court.

I trust that this memorandum outlines the concerns of the Civil Committee and the reasons for our objection to the adoption of proposed GR 34.

Please do not hesitate to contact me if you have any questions or if our Committee might play an affirmative role on behalf of SCJA on this most important topic.

Paid Service

Fee Discretionary / Mandatory

36.18.016

36.18.016(2)(a)	Filing of a petition for modification of a decree of dissolution or paternity, within the same case as the original action, and any party filing a counterclaim, cross-claim, or third-party claim in any such action.	\$36	Mandatory
36.18.016(2)(b)	Filing of the first or initial petition for dissolution, legal separation, or declaration concerning the validity of marriage (in addition to filing fee).	\$30	Mandatory
36.18.016(3)(a)	Demand for a jury of six in a civil action.	\$125	Mandatory
	Demand for a jury of twelve in a civil action.	\$250	Mandatory
36.18.016(4)	Preparing a certified copy of an instrument on file or of record in the clerk's office, for the first page or portion of the first page.	\$5	Mandatory
	Each additional page.	\$1	Mandatory
	Authenticating or exemplifying an instrument (price for each seal affixed).	\$2	Mandatory
	Preparing a copy of an instrument on file or of record in the clerk's office without a seal (per page charge).	\$.50	Mandatory
	Copying a document without a seal or file that is in an electronic format (per page charge)	\$.25	Mandatory
	Copies made on a compact disc (per each CD)	\$.25	Mandatory
36.18.016(5)	Executing a certificate, with or without a seal.	\$2	Mandatory
36.18.016(6)	For a garnishee defendant named in an affidavit for garnishment and for a writ of attachment.	\$20	Mandatory
36.18.016(7)	Filing a supplemental proceeding.	\$20	Mandatory
36.18.016(8)	Approving a bond, including justification on the bond, in other than civil actions and probate proceedings.	\$2	Mandatory
36.18.016(9)	Issuance of a certificate of qualification and a certified copy of letters of administration, letters testamentary, or letters of guardianship.	\$2	Mandatory
36.18.016(10)	Preparation of a passport application, the clerk may collect an execution fee as authorized by the federal government.	Per Fed. Gov'n't	Discretionary
36.18.016(11)	Clerk's services such as processing ex parte orders, performing historical searches, compiling statistical reports, and conducting exceptional record searches.	No greater than \$20/hr	Discretionary
36.18.016(12)	Duplicated recordings of court's proceedings (per audio tape).	\$10	Mandatory
	Per video tape or other electronic storage medium.	\$25	Mandatory
36.18.016(13)	Registration of land titles, Torrens Act, under RCW 65.12.780.	\$20	Mandatory
36.18.016(14)	Issuance of extension of judgment under RCW 6.17.020 and chapter 9.94A RCW,	\$200	Mandatory
	When the extension of judgment is at the request of the clerk, the two hundred dollar charge may be imposed as court costs under RCW 10.46.190.	---	--
	Facilitator surcharge--authorized under RCW 26.12.240.	---	--
36.18.016(15)	Filing a water rights statement under RCW 90.03.180.	Up to \$20	Mandatory
36.18.016(16)	Filing a claim of frivolous lien under RCW 60.04.081.	\$25	Mandatory
36.18.016(17)		\$35	Mandatory

Paid Service		Fee	Discretionary / Mandatory
36.18.016(18)	Preparation of a change of venue (in addition to the per page charges in subsection (4) of this section).	\$20	Mandatory
36.18.016(19)	Receiving faxed documents. Each additional page.	\$3 \$1	Mandatory Mandatory
36.18.016(20)	Preparation of clerk's papers under RAP 9.7 (per page fee).	\$50	Mandatory
36.18.016(21)	Copies and reports produced at the local level as permitted by RCW 2.68.020.	Variable	Mandatory
36.18.016(22)	Investment service charge and earnings under RCW 36.48.090.	Varies	Mandatory
36.18.016(23)	Nonstatutory services rendered by clerk by authority of local ordinance or policy.	Varies	Mandatory
36.18.016(24)	Filing a request for mandatory arbitration (fee borne by party filing a statement of arbitrability). This charge shall be used solely to offset the cost of the mandatory arbitration program.	Not greater than \$200	Discretionary
36.18.016(25)	Filing a request for trial de novo of an arbitration award.	Not greater than \$250	Mandatory
36.18.016(26)	A public agency may not charge a fee to a law enforcement agency, for preparation, copying, or mailing of certified copies of the judgment and sentence, information, affidavit of probable cause, and/or the notice of requirement to register, of a sex offender convicted in a Washington court, when such records are necessary for risk assessment, preparation of a case for failure to register, or maintenance of a sex offender's registration file.	---	---
36.18.016(27)	Filing of a will or codicil under the provisions of chapter 11.12 RCW.	\$20	Mandatory
36.18.018			
36.18.018(2)	Appellate review under RAP 5.1(b).	\$250	Mandatory
36.18.018(3)	All copies and reports produced by the administrative office of the courts as permitted under RCW 2.68.020 and supreme court policy.	Variable	Mandatory
36.18.020			
36.18.020(2)(a)	Filing fee for party filing the first or initial paper in any civil action, including, but not limited to an action for restitution, adoption, or change of name, and any party filing a counterclaim, cross-claim, or third-party claim in any such civil action.	\$200	Mandatory
	Unlawful detainer action filing fee (does not include an order to show cause or any other order or judgment except a default order or default judgment in an unlawful detainer action).	\$45	Mandatory
	Proceedings filed under RCW 28A.225.030 alleging a violation of the compulsory attendance laws.	No Fee	Mandatory
36.18.020(2)(b)	Any party, except a defendant in a criminal case, filing the first or initial paper on an appeal from a court of limited jurisdiction or any party on any civil appeal.	\$200	Mandatory
36.18.020(2)(c)	For filing of a petition for judicial review as required under RCW 34.05.514.	\$200	Mandatory
36.18.020(2)(d)	For filing of a petition for unlawful harassment under RCW 10.14.040.	\$53	Mandatory
36.18.020(2)(e)	For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a).	\$200	Mandatory

Paid Service

Fee

Discretionary / Mandatory

36.18.020(2)(f)	In probate proceedings, filing the first paper therein by the party initiating the proceedings.	\$200	Mandatory
36.18.020(2)(g)	For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220.	\$200	Mandatory
36.18.020(2)(h)	Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmation of a conviction by a court of limited jurisdiction a defendant in a criminal case shall be liable for a fee.	\$200	Mandatory
36.18.020(2)(i)	With the exception of demands for jury hereafter made and garnishments hereafter issued, civil actions and probate proceedings filed prior to midnight, July 1, 1972, shall be completed and governed by the fee schedule in effect as of January 1, 1972: PROVIDED, That no fee shall be assessed if an order of dismissal on the clerk's record be filed as provided by rule of the supreme court.	---	Mandatory
36.18.020(3)	No fee shall be collected when a petition for relinquishment of parental rights is filed pursuant to RCW 26.33.080 or for forms and instructional brochures provided under RCW 26.50.030.	No Fee	Mandatory