WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

April 28, 2009

Honorable Charles Johnson
Rules Committee Chairman
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR 3.1(d)(4), CrRLJ 3.1, JuCr 9.2(d), and CrR 4.8

Dear Justice Johnson:

The Washington Association of Prosecuting Attorneys (WAPA) opposes the proposed changes to CrR 3.1(d)(4), CrRLJ 3.1(d)(4), JuCr 9.2(d), and CrR 4.8, that were published for comment by the Supreme Court. The basis for our opposition is set forth below.

CrR 3.1(d)(4), CrRLJ 3.1(d)(4), and JuCR 9.2(d)

Counties take seriously their responsibility to protect indigent criminal defendants by providing them with adequate defense services. In meeting this responsibility, Counties require all indigent defense attorneys to comply with County promulgated standards. These standards, as directed by the Legislature, were adopted by the legislative authority after carefully considering the standards endorsed by the Washington State Bar Association. *See* RCW 10.101.03 (WSBA). These standards guide the hiring and contracting process, and the complaint and termination process. This ensures that each indigent defendant will be assigned an independent, competent, knowledgeable, and skilled attorney.

The proposed rule elevates the indigent defense standards endorsed by the WSBA, from "guidelines" to mandatory standards. This difference presents numerous problems, and creates unnecessary conflict between the judiciary and the local legislative authority. For example, the WSBA endorsed standards require that an indigent defense attorney who maintains a private practice, not accept more cases than he or she can reasonably discharge. The proposed rule changes would require that the judge investigate, on an ongoing basis, an indigent defense attorney's non-indigent defense practice to ensure that he or she is in compliance with the WSBA case load standards. Must the judge ask each indigent defense attorney the following questions: "have you had the opportunity to attend courses that foster trial advocacy skills and have you had the opportunity to review professional publications and other media"? *See*, WSBA Standards for Indigent Defense Services, Standard Ten. The Superior Court Judges' Association opposes the

proposed rule changes on the ground that the hiring and contracting public agency is in a much better position than the court to investigate the qualifications of defense counsel and monitor adherence to the public defense standards. *See* Superior Court Judges' Association April 25, 2008, letter.

The proposed rules, by placing each individual appointment in the hands of the judge, can impair the independence of the lawyer. The Commentary to the American Bar Association Criminal Justice Providing Defense Services Standards 5-1.3 highlight this issue, indicating that:

> As a means of achieving independence for counsel, standard 5-1.3 recommends that "[t]he selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by administrators of the defender and assigned counsel programs." Retained lawyers are neither chosen nor approved by the courts, and there are no compelling reasons for defenders and private assigned counsel to be treated differently. Moreover, if a lawyer desires continuous appointments from the court or elected officials, there may be a strong temptation to compromise clients' interest in ways that will maximize the number of future case assignments. The assignment of cases by the defender or assigned counsel program also should help to alleviate the fear of clients that the defense lawyer is working for the judge or court official in charge of appointments.

The recently released National Right to Counsel Committee's full report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, at 82-84 (April 2009)[1], contains numerous concrete examples of the problems that can arise when a contracting public agency's programs are made subject to judicial appointments or ratification.

CrR 4.8

Effective law enforcement depends on cooperation from victims of crimes and witnesses. This simple truth led the people of the State of Washington to adopt Const. art. I, § 35, and statutory protections. *See generally* Chapters 7.69, 7.69A, and 7.69B RCW. All of these provisions recognize that crime victims and witnesses are entitled to respect and to the rights guaranteed to them by the Washington Constitution and by various statues. Case law confirms this understanding, recognizing that statutory privileges, such as the attorney/client privilege, apply to criminal cases absent a particularized showing of significant need. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *State v. Kalokosky*, 121 Wn.2d 525, 547-48 (1993). Even then, the right of access does not include the unsupervised authority to search through the victim's or witnesses' files. *Ritchie*, 480 U.S. at 59.

Traditionally, a defendant's ability to violate a victim or witness's constitutional and statutory rights were limited. A criminal defendant had no constitutional right to discovery, and could only obtain police reports, records, and other items with court intervention. *See generally Wetherford v. Bursey*,

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[1]This report is available at http://www.tcpjusticedenied.org/.

429 U.S. 545, 559 (1977).

To enhance the search for the truth, Washington adopted criminal discovery rules. *See* CrR 4.7 and CrRLJ 4.7. These rules as initially conceived were designed to facilitate the exchange of information that was not otherwise impeded by constitutional limitations or statutory inhibitions. *State v. Boehme*, 71 Wn.2d 621, 632 (1967). The route of discovery authorized by these rules have been characterized by this Court as

> in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

Id., at 632-33.

One portion of CrR 4.7 that insures fairness to victims and witnesses and preserves the trial court's role as traffic coordinator is CrR 4.7(d). This rule sets forth a procedure by which a defendant can obtain material or information that is in the hands of a treating physician, school, bank, or government agency. The procedure begins with the defendant requesting assistance from the prosecuting attorney. If the prosecuting attorney's efforts fail, the defendant must then make the materiality showing established in *Ritchie*. *See, e.g., State v. Blackwell*, 120 Wn.2d 822 (1993). If the defendant satisfies this burden, the court will authorize the defendant to issue a suitable subpoena for the materials or enter an order directing the production of the materials for an *in camera* review.

The proposed amendment to CrR 4.8 is inconsistent with the above well-established practices. First, the proposed amendment is asymmetrical authorizing the defendant to issue subpoenas for the production of evidence without giving notice to the prosecution. No constitutional or statutory authority mandates this disparate treatment. To the extent this provision would apply to physical evidence collected at the crime scene, the lack of notice can impede both the timely performance of forensic tests and the prosecution's ability to maintain the chain of custody. The California Court of Appeals' opinion in *Walters v. Superior Court of Orange County*, 80 Cal. App. 4th 1074, 95 Cal. Rptr. 2d 880 (2000), explains why it is improper for a trial court to issue an ex parte order directing the release of the State's physical evidence to a defendant prior to trial.

Second, the proposed amendment to CrR 4.8 appears to authorize defendants to issue subpoenas for production to non-parties without prior court approval and without a showing that the evidence sought is material. While section (b)(2) of the proposed rule requires notice to be given to an alleged victim or complaining witness when a record relates to her, the rule does not extend the same courtesy to any other witness. Thus, a defendant could seek the cell phone records of the citizen who stumbled upon the deceased body without any notice to that citizen or to the prosecuting attorney. In conspiracy cases, the rule provides no guidance when one defendant seeks production of information related to the other defendant.

The limited notice mandated by the proposed rule is chimerical in nature, as section (b)(2)(B) of the proposed rule allows the court to excuse compliance with the advance notice requirement. This

provision of the rule, as written, would violate Const. art. I, § 10 by concealing the application and the court's order from the public without any consideration of the *Ishikawa* factors.

Third, the proposed rule switches the burden from the defendant to make a particularized showing of need to the victim or witness. While a bank or a hospital that is confronted with an oppressive demand for records have counsel, a rape victim or a hapless bystander will frequently lack the funds necessary to retain counsel to defend their privacy. While this Court has tacitly acknowledged the propriety of the prosecuting attorney's assertion of the victim or witnesses' privilege,[2] and other courts expressly acknowledge the prosecuting attorney's role,[3] many trial court judges refuse to hear prosecutors on these issues.

Many, but not all of the problems presented by the proposed rule can be resolved by amending section (b) to read as follows:

> (b) For Producing Evidence or Permitting Inspection. When a court authorizes a subpoena for materials in the possession or control of other persons pursuant to CrR 4.7(d), the ~~a~~ subpoena commanding the ~~a~~ person to produce and permit inspection and copying of designated documents or tangible things . . . .

WAPA appreciates the opportunity to explain our opposition to the above rules. Based upon the above concerns, WAPA urges this Court to reject the proposed rules in their current form.

Sincerely yours,

Pamela B. Loginsky
Staff Attorney

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[2]*See, e.g., State v. Gonzalez*, 110 Wn.2d 738, 757 P.2d 925 (1988) (prosecutor permitted to defend victim's right not to answer questions during a pre-trial interview that would be prohibited at trial under the rape shield law) .

[3]*See, e.g., People v. Humberto S.*, 43 Cal. 4th 737, 182 P.3d 600, 76 Cal. Rptr. 3d 276 (2008) (prosecutors have a right to appear and to present argument in opposition to a defense request for a victim's counseling records; a prosecutor's submission of argument at such a hearing does not amount to the representation of third party interests, and does not provide a basis for recusal).