WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

April 9, 2010

Ron Carpenter, Clerk
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR 3.1, CrRLJ 3.1 and JuCR 9.2

Dear Mr. Carpenter:

The Washington Association of Prosecuting Attorneys (WAPA) opposes the proposed changes to CrR 3.1(d)(4), CrRLJ 3.1(d)(4), and JuCr 9.2(d)(1), that were published for comment by the Supreme Court.

In January 2009, proposed amendments to these very same rules were published for comment. Those proposed rules provided that:

> Before appointing a lawyer for an indigent person, the court shall satisfy itself that proposed counsel has demonstrated the proficiency, ability and commitment to quality representation appropriate to the proceedings, pursuant to the Standards for Indigent Defense Services as endorsed by the Washington State Bar Association and approved by the Washington State Supreme Court.

WAPA wrote in opposition to the prior proposal, stating that:

> 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.

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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.

The January 2010 proposal suffers from many of the same deficiencies as the January 2009 proposal. The proposed rule would supplant the locally, legislatively adopted standards with standards approved by the Washington Supreme Court. What those standards are, however, is not disclosed in the proposed rule. Are those standards those adopted by the Washington State Bar Association, the American Bar Association, or some other set of standards?

Each of the pre-existing standards that the proposed rules may be referencing rely upon a maximum per year case load. None of these standards, however, contain a definition of the term "case." In some jurisdictions, counsel for indigent clients count an initial appointment as one "case", and each post-bench warrant appearance by the same defendant on the same charge as a separate "case." The end result is that the defense bar claims credit for appearing in more "cases" then the prosecutor files.

The maximum per year case load does not take into account the number of open cases that a particular attorney is working. Under a literal interpretation of the standard, an attorney, who is assigned 15 cases a month for 10 months, would not be eligible for any additional assignments until the next year even if all of the 150 cases were concluded prior to the start of the next year. Another attorney, who received 15 cases a month for 9 months, but who was unable to resolve any of the cases, would be eligible for appointment to an additional 15 cases. The first circumstance cheats the tax payer, who must still pay that attorney's salary. The second example cheats the client, who is appointed to an attorney who is stretched to thin to be able to give his client's case the attention it deserves.

WAPA assumes that the purpose of both the January 2009 and January 2010 proposed amendments to CrR 3.1, CrRLJ 3.1, and JuCR 9.2 is to reduce claims of ineffective assistance of counsel, through the appointment of experience attorneys. While this goal is admirable, this court rule will not achieve the desired end. Experience demonstrates that when a court rule establishes criteria that counsel must satisfy prior to appointment, ineffective assistance of counsel claims will merely be accompanied by claims that the appointed counsel was improperly appointed. *See generally In re Personal Restraint of Stenson*, 153 Wn.2d 137; 102 P.3d 151 (2004) (claiming that successive PRP should be permitted on the grounds that prior counsel did not have the requisite amount of experience for appointment pursuant to RAP 16.25).

Sincerely yours,

Thomas McBride
Executive Secretary

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