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April 23, 2012

Honorable Charles W. Johnson
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dear Justice Johnson:

Re: CrRLJ 3.1(d)(4)

During the rule-making procedure for proposed CrRLJ 3.1(d)(4), the District and Municipal Court Judges' Association (DMCJA) has continued to work with the Washington State Bar Association and its Council on Public Defense, and other stakeholders, as the Standards for Indigent Defense have been developed. Our June 3, 2011, letter expressed our position that the proposed rule should be withdrawn, along with our concerns about the definition of a "case" for the purpose of implementing caseload limits for misdemeanors on a statewide basis. This letter sets forth additional concerns regarding the adoption of the indigent defense standards through proposed CrRLJ 3.1(d)(4).

Like you, our judges want people to have effective legal counsel at every hearing, including arraignment. However, the proposed caseload standards for misdemeanors are unworkable for courts of limited jurisdiction in Washington, and would lead to budget issues that would affect courts' ability to provide counsel at arraignment and other hearings. Current law, including specific RCWs and Rules of Professional Conduct (RPCs), already provide guidelines, safeguards, mandates, remedies and professional obligations to provide for effective indigent representation. Even with a local-agreement option, the proposed standard as currently written would have unintended consequences and adversely effect representation. The proposed standards lack clarity and fail to address many factors pertinent to courts of limited jurisdiction, such that a specific number is a crude measuring stick for what constitutes effective representation.

Compliance standards regarding attorney performance do not belong in court rules of procedure and is beyond the scope of court's GR 9's rule-making function. Court rules are to "provide for necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process." While appointment of counsel appears to be a "court process" at first blush, the standards go beyond process and mandate many components that can fairly be construed as legislation and may impermissibly

encroach on the other branches of government. Further, it places the courts in a position where they are supervising attorneys, which calls into question the court's neutrality and interest in a particular group of cases. The defense standards are standards of attorney compliance and performance and therefore are properly part of the Rules of Professional Conduct which themselves are adopted by the Supreme Court.

The WSBA, not a trial court, is the appropriate authority to decide if an attorney's performance has failed to meet the requisite standards of professional conduct. The RPC's already provide a mechanism to remedy any issues that may arise for failure to comply with standards. Indeed, if the WSBA receives a complaint about a criminal defense attorney, they can engage in an initial review of records and make a determination if the attorney was in compliance with the standards of conduct regarding caseload limits. Furthermore, the WSBA already has a procedure in place to address non-compliance by attorneys. Having standards for caseload limits contained within a court rule will also require the court to determine remedial measures if there is non-compliance, which could potentially affect the due process rights of the attorneys themselves.

Fluid nature of cases makes a "per-year" certification impossible. The practical nature of misdemeanor cases precludes an accurate determination of whether an attorney can certify that he/she complies with the mandated caseload standards. For instance, attorney caseloads vary as it relates to hearing type (*e.g.*, is it 1/3 case because of first appearance or a probation violation; how do you add it to a "whole"/new case, which may morph into a situation that is weighted at 1/3 – such as a bench warrant or probation violation hearing?). This variance creates an accounting labyrinth, particularly when "per year" is an undefined time period. Also, some jurisdictions have appointed counsel who do not close files and remain appointed (*e.g.*, Does a 5-year DUI probation case still "count" after it's been counted once? If so, why should it when there's no activity on the file?).

Case-counting methodology is flawed as it relates to misdemeanors. There is a fundamental difference between how misdemeanor and felony cases "flow" through the criminal justice system. In a felony case, the defendant is sentenced and the Department of Corrections (DOC) handles any violations of probation; the case starts and ends as one case. Conversely, courts of limited jurisdiction often "touch" the same case multiple times for several different reasons (*e.g.*, probation hearings and bench warrants, etc.).

The time and complexity needed for effective representation can be extremely limited for some of these hearings. It is not usual for an unsophisticated Driving While License Suspended 3° (DWLS3) to have three bench warrants recall hearings or first appearances after being arrested on a warrant. However, it would be unusual to consider those three hearings to be "worth" the same as a DUI or domestic violence case, which tend to be complicated and require substantially more time, effort, and litigation.

Standards ignore significant factors, such as experience. In some situations, an arbitrarily imposed maximum could still constitute an excessive number of cases for a brand new attorney who has no criminal law experience. Conversely, an extremely experienced attorney may decide it no longer makes economic sense to continue indigent representation because he/she is precluded

from handling a caseload that may very well be within that attorney's capabilities. A caseload-limit is simply a number that has no bearing on the effectiveness of representation that a defendant may receive.

The RPCs already restrict an attorney's workload. The attorney must already exercise independent professional judgment to consider factors such as case complexity, severity of punishment, availability of attorney and staff assistance, and other time commitments. *See* comment 5 to RPC 1.1. When an experienced attorney is numerically limited from representing clients to whom he/she would already owe duties under the RPCs, more indigent defendants will be represented by attorneys with less experience and fewer skills.

Criminal defense caseload limits should apply to all attorneys. The rationale for this theory appears to be that having a large caseload precludes adequate and competent counsel in criminal cases, which impacts a defendant's right to due process. If this theory is correct, all criminal defendants are entitled to assurance that their counsel is meeting caseload limit standards. Therefore, standards for criminal defense caseload limits should apply to all attorneys, not to a specific subset of attorneys who provide indigent defense services.

In past discussions, the Office of Public Defense has argued that the Rule's caseload requirements should not apply to all attorneys because people who hire their own attorney have a choice in representation, and can simply choose to hire someone else. This argument is flawed. Cost for private representation varies. Individuals who do not qualify for indigent defense services often do not have a significant choice in who they can afford to hire. Those who hire a private attorney frequently cannot afford to pay another retainer for a new attorney if they believe that their attorney has too large a caseload and is not providing competent representation. Accordingly, if due process and competent representation is the basis for changing the rule, then all attorneys who practice criminal defense should be subject to these standards.

The proposed rule provides no procedure or remedy for a lawyer failing to comply with the proposed standards. What is the duty of the court if the court appoints a lawyer who is not present at initial appearance, and the lawyer fails to certify compliance in accordance with the rule "at the first appearance of the lawyer in the case?" Should the court hold the lawyer in contempt? Should the court file a complaint with the disciplinary board of the WSBA? Should the court appoint another lawyer? Would it matter what the reason was for the lawyer failing to file the certification? What about the confusion this could cause the indigent client? What is the procedure when a lawyer certifies compliance but the court has reason to know that the lawyer is not in compliance? These are just some of the unanswered questions that will have to be answered if the proposed rule is adopted.

A judge, on the other hand, may be subject to discipline for failing to follow any court rule. "A judge shall comply with the law, including the Code of Judicial Conduct." CJC 1.1. The practical consequences of the "certification" process provided for in proposed CrRLJ 4.1(d) creates an administrative and ethical minefield for courts of limited jurisdiction.

The proposed rule creates an undue administrative burden for courts of limited jurisdiction. This rule states:

> Before appointing a lawyer for an indigent person, or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.

This rule implies that the court must make a finding of fact that the lawyer has complied with the standards at a specific point in time in a criminal case. Contrary to practice in superior court, a formal "in-court" arraignment may be waived in courts of limited jurisdiction by appearance of counsel. *See* CrRLJ 4.1(g)(1)("The appearance or the plea of not guilty shall be made only in writing or in open court, and eliminates the need for a further arraignment.") Reading CrRLJ 3.1(d)(4) and CrRLJ 4.1(g) together, it would require a judge to review each written notice of appearance by a lawyer for an indigent person for caseload compliance at the time of, or at least before the end of any day, any written appearance is filed. Given the number of cases in courts of limited jurisdiction, this creates a large and undue administrative burden.

In sum, having these standards set forth within CrRLJ 4.1(d) as proposed is problematic for many reasons. Accordingly, the District and Municipal Court Judges' Association respectfully requests that the proposed rule be withdrawn.

Sincerely,

Gregory D. Tripp

Judge Gregory Tripp
President DMCJA

cc: Chief Justice Barbara Madsen
Judge Laura Inveen, President, SCJA
Camellia Faulk, AOC
Shannon Hinchcliffe, AOC
Nan Sullins, AOC