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Washington State Supreme Court
c/o Justice Charles Johnson
Chair, Rules Committee
P.O. Box 40929
Olympia, WA 98504-0929

Re: Suggested Standards for Indigent Defense Services

Honorable Justices:

We are filing this comment on the "Suggested Standards for Indigent Defense Services" (the "Suggested Standards") on behalf of the following Washington cities (collectively, the "Cities"):

Auburn	Everett	Marysville	Renton
Bothell	Federal Way	Mount Vernon	Vancouver
Burien	Kent	Pasco	Walla Walla
Burlington	Kirkland	Port Angeles	Yakima
Des Moines	Lake Stevens	Pullman	Association of Washington Cities

In addition to submitting this letter, the Cities fully support the letter submitted on April 23, 2012, by the Association of Washington Cities and the Washington State Association of Municipal Attorneys. [1]

The effectiveness of our criminal justice system depends on sufficient resources in all corners and at all levels. These resources must be sufficient to ensure that defendants receive

[1] The Suggested Standards originally included caseload limits that were applicable to only felony cases. We filed a comment letter dated October 31, 2011, on behalf of the Cities and the Association of Washington Cities, responding to the original Suggested Standards. In that letter, we stated that how the Court handles felony caseload limits may affect how the Court handles misdemeanor caseload limits. The Court subsequently accepted comments on additional amendments to the Suggested Standards which would impose a caseload limit to misdemeanor cases. Under the amended Suggested Standards, the Cities will be directly (rather than indirectly) affected by the misdemeanor caseload limits, further emphasizing the concerns expressed in this comment letter and our earlier comment letter dated October 31, 2011.

effective assistance of counsel, as mandated by Article I, Section 22 of the Washington State Constitution and the 6th Amendment to the U.S. Constitution. There have been instances where effective assistance of counsel has not been provided, and where that has been addressed on a case-by-case basis (or jurisdiction-by-jurisdiction if a more structural flaw is identified). But adequate funding for indigent defense services is, fundamentally, the responsibility of elected lawmakers, *i.e.*, the Washington State Legislature and local elected officials. If legislators fail to provide adequate resources statewide, or if city councilmembers or county commissioners in specific communities fail to provide adequate resources, the courts may, in the context of a case, order that those expenditures be made in order to ensure that the accused receive the effective assistance of counsel. *State v. Perala*, 132 Wash. App. 98 (2006).

However, the Washington State Supreme Court is not a legislature.

A Fundamental Flaw in the Suggested Standards

This comment focuses on a single, but fundamental, flaw in the Suggested Standards, *i.e.*, that by adopting those standards the Court would effectively order the expenditure by cities of substantial sums—and would do so *not* through the legislative process, *not* through a formal rulemaking process, and *not* in the context of a case in which the judiciary, based on specific facts, determines that specific jurisdictions are unconstitutionally denying effective assistance of counsel. Mandating increased expenditures for indigent defense services through one-size-fits-all "standards" applicable to the indigent defense providers is a judicial mandate of public expenditures. There is no way to conceal the fact that by structuring the Suggested Standards as certification requirements for those providers, the costs will be transferred directly to the local elected bodies that must budget for public defender costs. This technique of forcing elected officials to appropriate funds ignores the precepts of *In re Juvenile Director*, 87 Wn.2d 232 (1976), *i.e.*, that because of separation-of-powers concerns, prior to mandating such expenditures the Court must find, "based on clear, cogent, and convincing proof of a reasonable need for additional funds," that a specific jurisdiction should be compelled to spend those funds because it is "reasonably *necessary* for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties." 87 Wn.2d at 250-51.

The Legislature holds the keys to adequate funding for the justice system. The Legislature enacts the bulk of the criminal laws. The Legislature dictates the length of sentences. And, most importantly, State funds may not be expended except pursuant to legislative appropriation. Wash. Const. Art. 8, Sec. 4. With respect to local governments, only the Legislature may authorize the imposition of taxes to fund the justice system, and cities may not impose taxes without express statutory authority—an authority that is sparingly granted. *Cary v. Bellingham*, 41 Wn.2d 468 (1952). Because of limited revenue sources coupled with substantial State mandates, cities are extremely constrained in their financial flexibility. Elected city councilmembers must make very tough choices, balancing a range of needs and responsibilities. Yet the Suggested Standards, if promulgated by an order, will constitute a back-door order to forcing cities to spend significantly greater resources on public defense services, because many service providers will not be able to provide the required certifications without first negotiating contracts with cities to provide the resources to enable those providers to do so.

Courts Should not Compel Expenditures Without Proving Necessity Based on "Clear, Cogent and Convincing Proof"

The Suggested Standards' approach to mandating public expenditures by Order is at odds with the stated philosophy and the specific approach of *In re Juvenile Director*. Importantly, that court funding matter arose in the context of a specific case based on specific facts. The Lincoln County Board of Commissioners declined to increase the salary of that county's director of juvenile services, who worked within and under the supervision of the Lincoln County Superior Court. That superior court brought a lawsuit against the commissioners, and a visiting judge ordered an increase in the juvenile director's salary. The Washington State Supreme Court reversed, holding that while the judiciary has the inherent power to compel funding of its own functions in order to preserve the rule of law, there is also an inherent risk that the courts will be biased in favor of court funding. 87 Wn.2d at 249.

> Hence, it is incumbent upon courts, when they must use their inherent power to compel funding, to do so in a manner which clearly communicates and demonstrates to the public the grounds for the court's action. This can be accomplished by imposing on the judiciary the highest burden of proof in civil cases when courts seek to exercise their inherent power in the context of court finance.

87 Wn.2d at 251. Accordingly, *In re Juvenile Director* held that the burden is on the court to demonstrate, through "clear, cogent, and convincing proof of a reasonable need for additional funds" that elected officials should be ordered to expend funds for a justice system function. 87 Wn.2d at 250-51. *In re Juvenile Director* held that the Lincoln County Superior Court had not met that burden. The result was different in *State v. Perala*, a case relating to public defender services in Grant County. There, the Court of Appeals held that based on a demonstrated state of emergency, the Superior Court had indeed provided clear, cogent and convincing proof that funds were necessary for the efficient administration of justice or the fulfillment of constitutional duties. 132 Wash. App. at 118.

We cannot overemphasize how important it is that when the courts mandate expenditures, they should do so in the context of a case in controversy—a case involving the real parties in interest (including the cities that must bear the cost), a case with its unique facts (clear, cogent and convincing facts) upon which the court, in its judicial capacity, determines that such a mandate is absolutely necessary to provide the effective assistance of counsel to one or more individuals, or to protect the administration of justice. This is particularly important because the proposed statewide guidelines will affect an array of localities with different populations, criminal justice issues, and approaches to indigent defense. There may be specific communities in which day-to-day practices or the level of public defender funding is such that effective assistance of counsel is not being provided. But that should be determined, and the remedies structured, on a case-by-case basis.

A Rulemaking Approach is Inappropriate

The Suggested Standards are neither fish nor fowl. They obviously do not involve a case, but they are not true rules either. They are not proposed to be included in formal court rules, but rather are adopted by reference. The proposed adoption of the Suggested Standards have not used the usual and relatively open court rules development process. But in any event, court rules are *not* the appropriate vehicle to legislate the structure of indigent defense services. That is principally the realm of the Legislature, which, as noted above, controls the statewide power of the purse and controls grants of taxing power to local governments. The Legislature has enacted laws governing such services (Chap. 10.101 RCW) and in recent years has provided some increased funding for indigent defense. If the Court desires to increase public defender funding (or at least protections for current funding levels), the right approach is increased lobbying. *Rulemaking* is not the appropriate technique.

Standards have previously been approved by the Court or by various arms of the judicial administration system. These include, among others: Electronic Filing Technical Standards for the Washington State Courts; Courthouse Safety Standards, 2009; Washington State Child Support Schedule Definitions and Standards; Mandatory Continuing Judicial Education Standards; and Advisory Case Processing Time Standards (Board for Judicial Administration). But these types of standards relate to the internal governance of the court system, or, as in the case of the Child Support Schedule Definitions and Standards, were adopted to assist the courts statewide in carrying out policy decisions made by the Legislature in a statute (Chapter 26.19 RCW). But those standards are not as broad in their sweep (and most instances not as broad in their cost impacts) as the Suggested Standards.

In Washington State, as in many other jurisdictions, the Court's inherent rulemaking powers are to be exercised for procedural matters and for the administration of our judicial system—arguably including the technical standards referenced in the preceding paragraph. "The civil rules are based upon the court's 'inherent power to adopt procedural rules necessary to the operation of the courts,' while the legislature enacts substantive law." *Christensen v. Ellsworth*, 162 Wn.2d at 374 (quoting *Emwright v. King County*, 96 Wn.2d 538, 543, (1981)). Procedural rules can be differentiated from substantive law, in that " 'practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.' " *Christensen v. Ellsworth*, 162 Wn.2d at 374 (internal citation omitted).

In Washington State, a court rule is valid if there is a nexus between the rule and the court's rule-making authority over procedural matters. *State v. Templeton*, 148 Wn.2d 193, 217 (2002). In *Templeton*, the State had argued that CrRLJ 3.1, which governs the practices and procedures of police authorities and not those of the courts, violated the separation of powers doctrine and was not a proper exercise of the court's rule-making authority. *Id.* at 212. The Court noted that it "acquires its rule-making authority from the Legislature and from its inherent power to prescribe rules of procedure and practice." *Id.* A court rule is valid, if there is "[a] nexus between the rule and the court's rule-making authority over procedural matters . . . despite possible discrepancies between the rule and legislation or the constitution." *Templeton*, 148 Wn.2d at 217 (citing *State v. Fields*, 85 Wn.2d 126, 128-29 (1975); *State v. Smith*, 84 Wn.2d

498, 501–02 (1974)). Ultimately, the Court held that the right to counsel under CrRLJ 3.1 was a proper exercise of its procedural rule-making authority because it affects and regulates the process of taking and obtaining evidence and the preservation of such evidence—which is a procedural matter. *Templeton*, 148 Wn.2d at 217. But the Suggested Standards are not procedural, nor can they legitimately be characterized as necessary for administration of the justice system. They are legislation mandating statewide indigent practices—the sort of thing that is (appropriately) governed by Chapter 10.101 RCW.

"[T]he proper boundary for judicial rulemaking is marked by the vague notion that some issues should not be entrusted to the judiciary, but should instead be subjected to the full rigors of political debate." Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal. L. Rev. 1, 33 (1991). Issues that should not be subject to judicial rule-making are those that bear on collective and individual values. *Id.* Further, it is important to recognize the inherent dangers in judicial rule-making. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 Stan. L. Rev. 673, 675 (1975). "Rule-making power allows courts to govern their internal matters; it does not allow a court to promulgate a rule that intrudes upon substantive legislative matters." *State v. Robinson*, 972 A.2d 150, 159 (R.I. 2009). Courts have inherent power to promulgate necessary procedural rules, but should not enact laws governing substantive rights because that would be an invasion of the legislative function. *Church v. Church*, No. 02A01-9312-CH-00266, 1994 WL 34177, at *3 (Tenn. Ct. App. Feb. 3, 1994) (quoting *Haynes v. McKenzie Memorial Hosp.*, 667 S.W.2d 497, 498 (Tenn.App. 1984)). The substance/procedure distinction is the test for determining the validity of court rules, and appropriately so. Kent R. Hart, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 Utah L. Rev. 153, 165 (1992).

We very much appreciate the opportunity to comment on the Suggested Guidelines. As noted at the beginning of this letter, we fully support our obligations to provide sufficient funds so that indigent defendants receive effective assistance of counsel, and acknowledge that there have been isolated situations where that has not occurred. But there is a right way to increase indigent defense services budgets, and there is a wrong way. The Suggested Standards are the wrong way. The right way is to engage directly with the Washington State Legislature so that adequate resources are made available to this critical segment of the criminal justice system.

Respectfully submitted,

FOSTER PEPPER PLLC

Hugh D. Spitzer

cc: City Attorneys of Listed Cities
Association of Washington Cities
Washington State Association of Municipal Attorneys