



Washington State Bar Association
COUNCIL ON PUBLIC DEFENSE

April 20, 2012

Washington State Supreme Court
c/o Justice Charles Johnson
Chair, Rules Committee
Temple of Justice
Post Office Box 40929
Olympia, WA 98504-0929

**Re: Comments Regarding Standards Under Amendments to
CrR 3.1, CrRLJ 3.1 and JuCR 9.2**

Honorable Justices:

In July 2010, the Washington Supreme Court adopted amendments to CrR 3.1, CrRLJ 3.1 and JuCR 9.2 requiring appointed counsel to certify compliance with Standards for Indigent Defense Services that were to be adopted by the Court. The WSBA Council on Public Defense ("CPD"), which includes prosecutors, judges, defense counsel, law professors, private practitioners and court administrative personnel, undertook to study and recommend to the WSBA Board of Governors specific standards that should become subject to the certification requirement.

By letter of October 26, 2010, Chief Justice Madsen requested that the CPD expand its deliberations to include a broad spectrum of stakeholders who were not already represented on the CPD. In response to Chief Justice Madsen's request, the CPD invited interested parties to participate in CPD meetings and many did so, including representatives of a number of jurisdictions and organizations that would be affected by the standards the Court ultimately adopts. Members of the CPD also attended meetings of the WSBA Board of Governors, the District and Municipal Court Judges Association Board of Governors and the Board for Judicial Administration to make presentations about the new rules, to discuss the proposed standards and to respond to questions.

The CPD made recommendations to the WSBA Board of Governors regarding standards for adoption in connection with CrR 3.1, CrRLJ 3.1 and JuCR 9.2. In June and September 2011, the WSBA Board of Governors accepted the CPD's recommendations of specific standards and recommended that the Washington Supreme Court adopt them.

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A number of thoughtful questions were raised during the nearly two years of meetings, presentations and discussions in which members of the CPD participated. As the comment period of April 30 draws near, the CPD thought it might be a useful service to the Court, Bar and public to prepare a list of Frequently Asked Questions, as well as the CPD's responses to those questions. This list is attached for the Court's consideration and for publication on the Court's comment website for members of the Bar and the public. The CPD remains fully supportive of the proposed standards and urges the Court to adopt them.

We hope that this information will be valuable and appreciate the opportunity to comment.

Respectfully,



Marc A. Boman, Chair
WSBA Council on Public Defense

Enclosure

cc: Justice Susan Owens, Washington Supreme Court
Steve Crossland, President, Washington State Bar Association
Paula Littlewood, Executive Director, Washington State Bar Association
Jacqueline McMurtrie, Vice-Chair, WSBA Council on Public Defense
Robert Boruchowitz, Chair, CPD Standards Subcommittee
Joanne Moore, Director, Office of Public Defense

WSBA Council on Public Defense's Answers to Frequently Asked Questions

New Court Rules Regarding Appointment of Counsel

Q: When will the court rules take effect?

A: Except for the proposed numerical caseload limits, the court rules are scheduled to take effect June 30, 2012. The numerical caseload limits are proposed to take effect January 1, 2013.

Q: What do the new rules require?

A: The new rules -- CrR 3.1, CrRLJ 3.1 and JuCR 9.2 -- require lawyers to certify compliance with some specific professional standards approved by the Washington Supreme Court in order to be appointed to represent indigent defendants.

Q: What professional standards are being considered by the Court?

A: The WSBA Board of Governors has recommended standards intended to promote effective representation, including experience qualifications for certain types of cases; requirements for office, telephone, mail and investigative services; and numerical caseload limits.

Q: Is the requirement for professional standards new in Washington?

A: No. In 1985, the WSBA endorsed *Standards for Public Defense*, including in the areas now being proposed under the rules. In 1989, the Washington legislature passed RCW §10.101.030 requiring counties and cities to adopt standards for the delivery of public defense services, including standards relating to attorney qualifications, administrative and support services and caseload limits. The statute specifically references these standards as the guide for local jurisdictions in adopting local standards.

Q: If the statute already provides for standards, why do we need a court rule?

A: The statute states that the standards endorsed by the WSBA "should serve as guidelines" but does not establish specific standards in each of the required areas. The Washington Supreme Court has made the decision that compliance with some specific standards should be a prerequisite to appointment of counsel for indigent persons in criminal cases. The Court cited the WSBA Standards in *State v. A.N.J.*, 168 Wn.2d 91 (2010).

Q: How are the proposed standards under the rules different than the standards required by RCW §10.101.030?

A. The proposed rules do not cover as many different standards areas as the statute. The difference that has been most controversial is that proposed Standard 3.4 includes placing numerical limits on attorney misdemeanor caseloads. The statute simply requires that cities and counties adopt case load limits, without specifying numbers of cases. If local governments followed the statute and used the WSBA standards as guidelines, there would be no difference between the statute and the court rule.

Q. Do the new rules require judges to certify to anything before making appointments?

A. No. It is the lawyer's responsibility to make the required certification. As in the past, judges will continue to make appointments, but only to lawyers who have completed the required certification.

Q. Aren't standards something that the legislature, not the Court, should adopt?

A. Washington recognizes a distinction between substantive law (which may only be adopted by the legislature) and procedural or administrative rules (which may be adopted by the Supreme Court). See *State v. Templeton*, 148 Wn.2d 193, 213 (2002) (en banc). The Washington and United States constitutions require that effective assistance of counsel be provided to those who cannot afford counsel. In addition, RCW §10.101.030 requires all cities and counties to adopt standards in each of the areas addressed by the new court rules. In requiring that lawyers execute a certification that they are in compliance with specified standards, the Court is prescribing a procedure by which both effective assistance of counsel and compliance with statutorily-mandated standards are made effective.

Q. Doesn't the establishment of numerical caseload limit constitute an impermissible judicial mandate of public expenditures?

A. No. Many other court rules have financial implications. For example, CrR 3.3's requirement that defendants be brought to trial within 60 or 90 days necessitates a sufficient number of prosecutors, defense counsel, judges and court staff to meet the court-imposed time for trial requirements. Yet, no one seriously asserts that it is an impermissible judicial mandate of public expenditures. Jurisdictions retain broad discretion to design public defense systems so that they are both cost effective and compliant with CrR 3.3. This will also be true in implementing the numerical caseload certification requirement of Standard 3.4. While a jurisdiction can choose to prosecute to the fullest every criminal law violation and increase funds for public defense in order to do so, it may also choose to re-classify offenses, change prosecution practices, divert cases and find other ways to promote public safety and, at the same time, make public defense services more efficient and affordable. The City of Spokane, for example, has

implemented a diversion program for driving while license suspended third degree cases that has reduced the defender caseload by one- third.

Q: Why aren't all the standards proposed to take effect at the same time?

A: The WSBA has proposed phasing in the new certification procedure and delaying implementation of the standard on numerical caseload limits to give attorneys and jurisdictions that are exceeding the proposed caseload limits time to make necessary changes, including in budgeting.

Q: Aren't the misdemeanor caseload numbers of 400 cases per year (or 300 cases per year if case weighting is used) arbitrary? Don't they impose a "one size fits all" requirement on all lawyers regardless of experience and skill?

A: No. The misdemeanor caseload limits are based on extensive study by the WSBA and by other state and national professional organizations over many years. Effective representation involves more than merely processing cases. Experience shows that when caseloads exceed the long established limits essential elements of effective representation suffer, including factual investigation of charges, communication with clients regarding the charges and possible defenses, as well as plea and trial options, the consequences of conviction, legal research, motions practice, and trial preparation. See *State v. A.N.J.*, 168 Wn.2d 91 (2010). Moreover, where limits are not imposed, economic factors drive some attorneys to take on more cases than they can effectively handle.

Q: Does each jurisdiction have to do "case weighting"?

A: No. Each jurisdiction could simply apply the regular caseload limit numbers in the Standards without doing a case weighting analysis.

Q: Some misdemeanor cases have more than one citation from the same incident. Does each of those have to be counted as one case?

A: No. The standards amend the "definition of a case" to provide that, in courts of limited jurisdiction, multiple citations from the same incident can be counted as one case.

Q: Some prosecutors routinely reduce certain kinds of misdemeanor offenses to non-criminal violations at the arraignment. Do those have to count as one case each?

A: No. The standards provide that such cases can be weighted as 1/3 of a case if the local jurisdiction uses a case-weighting system.

Q: If a lawyer acts as "attorney of the day" at arraignments to advocate for release and enter a not guilty plea, does each of those arraignments count as one case?

A: No. The standards note that those situations can be counted as less than one case. Representation on arraignment calendars may also be counted based on an allocation of the attorney's time devoted to such representations.

Q: What if a client fails to appear or hires private counsel after the case has begun?

A: The standards also address these situations, noting that they might justify being weighed less than one case if the local jurisdiction uses a case-weighting system...

Q: Do the proposed standards require each public defense attorney to lease space for a private office and receive mail at that office?

A: No. The WSBA's Council on Public Defense has recommended that each attorney *have access to* an office that provides space for confidential meetings with clients. Each lawyer must also have mail and telephone services available to ensure prompt responses to clients.

Q: How would each lawyer certify compliance? Would there have to be a separate piece of paper in each case?

A: Lawyers could certify compliance in their notices of appearance or they could file separate documents as determined by each court.

Q: What if a lawyer reaches the caseload limit in the tenth month of a given year? Does the lawyer have to stop taking cases?

A: This situation should not occur in a jurisdiction that has implemented the standards as they contemplate an even distribution of cases throughout the year. Attorneys should not be given and should not accept excessive caseloads at the beginning of the year since the purpose of the rules is to give the attorney the time, attention and effort necessary to investigate the charge and possible defenses, communicate regarding trial and plea options and perform other tasks (such as legal research, motions practice, trial preparation and trial) necessary to ensure effective representation. See, Standard 3.3 General Considerations.

Q: What are the practical requirements to implement the numerical caseload limits for jurisdictions or courts that have not done this before?

A: Each jurisdiction will need to assess (count) the number of cases that it has had in the past and can reasonably expect in the future year, giving some thought to how many may appear in court in each month. If case weighting is used, then certain cases will be assigned a value less than or more than "one". Once the total number of cases expected for the next year is known, then the jurisdiction will need to assure that an adequate number of attorneys are available to meet this need. This may require the routine availability of a secondary resource for conflict cases or overflow cases in peak

times. If this is planned in advance, then it is a simple matter for the case to be assigned. The primary public defender can follow the number of cases during the year and assign overflow cases to the alternate source. One simple method is to appoint the public defender by agency name and then let the public defender monitor and assign cases consistent with the numerical caseload standards. If there is no public defender agency, individual attorneys seeking appointments will be responsible for monitoring their caseloads.