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The Hon. Barbara Madsen, Chief Justice
Supreme Court of Washington
Temple of Justice
Post office Box 40929
Olympia. WA 98504-0929

SUBJECT: Comments and Concerns Regarding Proposed Standards for Indigent Defense Services

Dear Chief Justice Madsen:

Thank you for the opportunity to provide comment on the proposed Standards for Indigent Defense Services. I wish to register the City of Burlington's significant concerns with the current proposal, and urge the Court to examine this issue in more detail in order that a workable set of Standards may be developed.

As you are aware, pursuant to CrR 3.1, CrRLJ 3.1, and JuCR 9.2, appointed counsel must certify compliance with the Standards for Indigent Defense Services to be adopted by the Court. The current proposed Standards are vague, largely unenforceable, and in this attorney's opinion, inimical to the provision of competent and diligent representation to the indigent accused. The specific comments that follow on the accompanying pages illustrate the significant confusion that I anticipate will result, should the proposed Standards be adopted. In setting out these comments, I have reproduced the particular Standard before adding my comments below; the Standards are in numerical order, rather than the order that they were originally published.

As others have already stated in their comments to this Court, I, too, am troubled by the process employed by the Washington State Bar Association to develop these proposed Standards. I understand that the State Bar's Council on Public Defense did not include as voting members any of the attorneys from private law firms that provide indigent defense services, or any attorneys who represent municipal governments. Such rulemaking in a vacuum is the antithesis of Washington's open and transparent government.

In sum, the proposed Standards are inappropriate for adoption. I again urge this Court to reject the proposed Standards, and set this matter over for due consideration.

Sincerely,

Scott G. Thomas, City Attorney
City of Burlington

> ***Standard 3.2 – Caseload Limits and Types of Cases***: The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

I observe that RPC 1.1, 1.3, and 6.2 address a lawyer's obligation to provide competent and diligent representation. In particular, comment 2 to RPC 1.3 succinctly states that "A lawyer's work load must be controlled so that each matter can be handled competently." RPC 1.1 provides that each lawyer is obligated to provide competent representation. Moreover, RPC 5.1 obligates lawyer-supervisors in a public defender office to refuse to accept a case or cases that exceed the office's ability to provide effective representation.[1]

Because RPC 1.1 and 1.3 already address every lawyer's work load, there are only two possible conclusions that may be drawn through the adoption of an additional standard made applicable only to public defense attorneys: (1) the new standard is redundant, or (2) the new standard establishes a different norm for public defense attorneys than the standard observed by all other lawyers.[2] Moreover, because an objective standard of reasonableness as articulated in *Strickland v. Washington*,[3] and as further refined in *Wiggins v. Smith*,[4] is the minimum that any lawyer must meet in order to provide effective assistance of counsel to criminal defendants, and because the 6th Amendment is more protective of a defendant's rights than the provisions of Article 1, section 22 of the Washington State Constitution,[5] if the new standard is not redundant, it must necessarily be more restrictive than *Strickland*. This conclusion is reinforced by the proposed standard's definition of a new term – "quality representation" – that has more typically been utilized in establishing reasonable attorney's fees under the lodestar method.[6] The decision to provide enhanced services beyond those required by the state and federal constitutions is a policy decision that should be made by the legislature, and not the courts.

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[1] *See also*, Washington State Bar Association Rules of Professional Conduct Committee Advisory Opinion No. 1336 (1990).

[2] The Washington State Bar Association Council on Public Defense was apparently of the belief that an indigent defendant would not be able to "fire" an appointed attorney, unlike a private attorney retained by a defendant who was not indigent. *See*, Council on Public Defense minutes, 2-11-11, p. 5. This is error. In point of fact, a trial judge is required to undertake a searching inquiry into the merits of a defendant's request for substitution of appointed counsel, even if the request is specious. *United States v. D'Amore*, 56 F.3d 1202, 1204 (9th cir. 1995).

[3] 466 U.S. 668 (1984)

[4] 539 U.S. 510 (2003)

[5] See, *State v. Sardinia*, 42 Wn. App. 533, 540,

[6] See, *Blum v. Stenson*, 465 U.S. 886, 898-901, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984).

I also point out that the standard is vague, and poorly crafted. To illustrate, it is unclear what level of attention, care, and skill that Washington residents would expect public defense attorneys to provide. In addition, the standard purports to apply to a broad variety of attorneys and organizations that provide criminal defense services to indigent defendants, including "defender organizations, county offices, contract attorneys [and] assigned counsel." Because CrR 3.1(d)(4) and CrRLJ 3.1(d)(4) each require a lawyer appointed to represent an indigent person to certify to the court that the lawyer complies with applicable Standards for Indigent Services as approved by the court, it is important for each lawyer making such a certification to understand the scope of that lawyer's certification to the court. Will the lawyer be certifying that he or she complies with the Standards, that his or her partners (or supervisors) also comply, that all of the lawyers in a defender organization that the lawyer is employed by comply, or something else entirely? Again, the proposed standard 3.2 provides little guidance, and thus invites error.

Standard 3.3 – Caseload Limits and Types of Cases: General Considerations: Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload ceilings. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward more serious offenses or case types that demand more investigation, legal research and writing, use of experts and/or social workers or other expenditure of time and resources. In particular, felony caseloads should be assessed by the workload required, and certain cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

Definition of case: A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation.

Standard 3.4 – Caseload Limits and Types of Cases: Caseload Limits: The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

150 Felonies per attorney per year; or

[Misdemeanor cases – reserved]

250 Juvenile Offender cases per attorney per year; or

80 open Juvenile Dependency cases per attorney; or

250 Civil Commitment cases per attorney per year; or

1 Active Death Penalty trial court case at a time plus a limited number of non death penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of Standard 3.2; or

36 Appeals to an appellate court hearing a case on the record and briefs per attorney per year. (The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)

Initially, allow me to observe that 1973 was a momentous year in U.S. History. The United States Supreme Court issued its landmark decision in *Roe v. Wade*. The twin towers of the World Trade Center were constructed in New York, to become the tallest building in the world; Secretariat won the Triple Crown, and Watergate Hearings began in the United States Senate whereupon President Nixon assured the nation that, "I am not a crook." And in 1973, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") delivered its report to the Administrator of the Law Enforcement Assistance Administration, an agency within the United States Justice Department, which formulated for the first time national criminal justice standards and goals for crime reduction and prevention at the state and local levels.

Chapter 13 of the Report addressed criminal defense, and Standard 13.12 specifically addressed the workload of public defenders:

Standard 13.12 Workload of Public Defenders

The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to

> lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office. [7]

For the first time, a caseload limit for defenders had been established (although the definition of a "case" differed significantly from the definition included in the proposed Standard.) Reportedly, the NAC's attempt to create a national caseload standard met with limited success. This was due in part to the fact that the standards were developed by estimating the amount of time an average attorney would take to complete tasks during the pendency of a case, rather than through an empirical study. These "educated guesstimates" were then averaged to produce the estimated amount of time needed to bring a particular type of case to a conclusion, which allowed the development of a standard based upon the amount of time available to the typical attorney in a year.[8] Much as the NAC's work was based on guesstimates, the caseload limits contained in the proposed Standards now presented for consideration by this Court appear to be based on little more than speculation and conjecture.

If the events set out in the opening paragraph of this section appear to date the author, who remembers each of the referenced events occurring, that is because he is getting old. But then, so too are the caseload standards – the very ones that this Court is considering for adoption. The author remembers some other things from the past: dictating various documents for production by a typist, who would have to correct typing mistakes either by rubbing the typing paper with an ink eraser, or if better funded, by applying white-out and then waiting for it to dry before proceeding; using a rotary telephone, when one was available, to reach colleagues, and then leaving a message with a receptionist when the other party was not available (and having the message transmitted, eventually, by hand); and searching for the one copy of a book that was essential to whatever it was that I was occupied with. To state the obvious, the world has changed, and so has the methods through which lawyers accomplish their work. A standard developed nearly four decades ago, and which, according to the minutes of the Council on Public Defense, has not been critically examined since that time is not worthy of serious consideration.[9]

Nationwide, those who manage public defense agencies recommend that an empirical approach be utilized to establish attorney workloads, which takes into account the actual amount of work that is required to bring a case to conclusion. An empirical approach requires the indigent defense organization to track the exact amount of time that it takes to reach a disposition in a wide variety of cases, and utilize the resulting data to develop an accurate assessment of each attorney's workload. As lawyers who practice criminal law are well aware, a workload is affected by many facts that differ from county to

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[7] www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve, last viewed 10-15-11.

[8] See David J. Carroll, Director of Research and Evaluations for the National Legal Aid and Defender Association, Indigent Defense Services in the State of Maryland: A National Perspective.

[9] *See,* Washington State Bar Association Council on Public Defense minutes, 1-21-11; 2-11-11.

county, and from time to time. For example, a prosecuting attorney's policies concerning plea bargaining practices can increase, or decrease, the necessity and frequency of trials and motion practice. In the same way, a trial court's calendar management practices and local rules can have a substantial impact on attorney workload, as can legislative changes and judicial decisions.[10] The experience and skills that a defense attorney is able to apply to a particular case will have a significant impact on the time required to resolve the case, as will the complexity of the underlying charges. The artificial and unnecessary limits within the proposed Standards will likely lead to the assignment of inexperienced attorneys to such cases.

The lack of a credible foundation is just one of the shortcomings of the proposed Standard 3.3 and 3.4; other problems are apparent in the language used to frame the Standards. Under proposed Standard 3.4, the definition of a "case" is the filing of any document with the court naming an individual as a defendant or as a respondent. Unfortunately, in many instances a defendant will fail to appear after arraignment, and will remain fugitive until the defendant's presence is secured through a bench warrant; oftentimes, this will occur far into the future. For example, in Skagit County District Court, the Court automatically withdraws a public defender from a case after a bench warrant has been out for more then 30 days. The Court has instructed defense counsel not to file a notice of withdrawal of counsel, owing to the large number of defendants who fail to appear. Under the proposed Standard, however, an appointed defense attorney would continue to be regarded as the absent defendant's counsel, ultimately sidelining that attorney. The proposed Standard is simply unworkable.

Moreover, I observe that the proposed Standard is a model of imprecision. To illustrate, when is a defense attorney "fully supported," and how does he or she know it? What is a case of "average complexity," and what is the comparator? What is a "reasonably even" distribution of cases throughout the year, and how does one determine that? What is a "more serious offense?" What are the "certain cases and types of cases" that should be weighted differently? This Court should not place any attorney who provides criminal defense services in jeopardy of committing misconduct for failing to select the correct answer to the questions posed by this vague and arbitrary standard.

> ***Standard 5.2 – Administrative Costs***: Public defense attorneys shall have an office that accommodates confidential meetings with clients and receipt of mail, and adequate telephone services to ensure prompt response to client contact.

In *United States v. Lucas*,[11] the court of appeals decided a case in which an inmate who had been detained in a facility some 120 miles distant from his court-appointed counsel's office alleged that the distance "effectively "prevented all communication between the

[10] *See* Keeping Defender Workloads Manageable, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series No. 4 (2001).
[11] 873 F.2d 1279 (9th Cir., 1989)

inmate and his attorney, thereby denying him the assistance of counsel and resulting in a violation of the 6th Amendment. The 9th Circuit Court of Appeals disagreed, finding that Lucas and his counsel could easily have discussed his case after a day of pre-trial motions at the court house, or any time by telephone. The *Lucas* court pointed to a similar holding out of the 4th Circuit, in which that court held that a defendant confined during trial at a penitentiary instead of a much closer county jail was not prejudiced because the defendant "was made readily and conveniently accessible to his counsel at the trial courthouse, and elsewhere, at all reasonable times."[12] If a remote office passes constitutional muster, one must wonder what goal Standard 5.2 is intended to advance?

What is more, Standard 5.2 is applicable only to "public defense attorneys." While this term has been left undefined, it clearly includes only a portion of the bar. Because the ready availability of an office is not an issue of constitutional magnitude under federal law, and because the Standard is made applicable only to those attorneys who are compensated out of the public purse, the adoption of this Standard would implicitly intrude upon the domain of another branch of government. The Supreme Court should not cross this line. Standard 5.2 should either be rejected in its entirety, or made applicable to the entire bar.

> ***Standard 6.1 – Investigators***: Public defense attorneys shall use investigation services as appropriate.

In light of the fact that proposed Standard 6.1 is completely devoid of specificity, it is difficult to understand how it adds anything.

> ***Standard 13 – Limitations on Private Practice***: Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Again, this proposed Standard will provide a strong incentive for experienced attorneys to avoid public defense cases, and focus instead on private clients.

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[12] *Rees v. Peyton*, 341 F.2d 859, 864 (4th Cir. 1965)