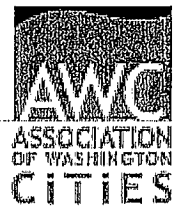

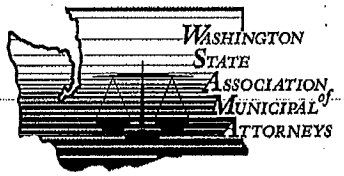

October 14, 2011

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

Re: Comments to Proposed Standards for Indigent Defense Services Amending CrR 3.1, CrRLJ 3.1 and JuCR 9.2

Dear Supreme Court Justices:

Thank you for the opportunity to comment regarding the proposed adoption of Standards for Indigent Defense Services pursuant to CrR3.1, CrRLJ 3.1, and JuCR 9.2. This letter shall serve as the comments of the Washington State Municipal Attorney's Association (WSAMA) as well as the Association of Washington Cities (AWC). WSAMA is the official association of city and town attorneys of the state of Washington with over 500 WSBA members, and AWC represents each of the 281 cities and towns of Washington.

The WSBA Board of Governors (BOG) has provided the Supreme Court with recommendations regarding the Standards for Indigent Defense Services (Standards). As you are aware, the Standards were recommended to the BOG by the Council on Public Defense (CPD). It is important to understand that while a representative of WSAMA and AWC attended meetings of the CPD during the development of the Standards, WSAMA and AWC representatives had no voting authority when the CPD's recommendations were finalized.

As Chief Justice Madsen observed in her February 14, 2011 letter to AWC President Kathy Turner and Washington State Association of Counties President John Koster, the issues concerning public defense are widespread, and have many consequences. With this background in mind, we offer alternative standards for the Court's consideration, as well as comments to the Standards provided by the BOG.

<u>These Proposed Standards Should Not be Adopted</u>

It is not necessary that the Standards currently under consideration be incorporated into court rule. These Standards already serve as guidelines for municipal agencies pursuant to RCW 10.101.030.

The Rules of Professional Conduct, and years of case decisions based upon well established constitutional principles guide the professionals who provide public defense services in the state of Washington. These are professionals who took an oath to follow the rules of their profession, and in all but a few exceptional cases, do. The fact that these Standards are being considered necessarily assumes that public defenders are not capable of following the RPCs, the federal and state Constitutions, and the oath of attorney.

Moreover, it is inappropriate for the Supreme Court to adopt these Standards. According to GR 9, "[t]he purpose of rules of court is to provide necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process." GR 9 makes it clear that court rules are to relate to the functioning of the court system, and not to matters such as attorney qualifications, the amount of work an attorney should be permitted to perform, or the types of communication devices that an attorney's office should be equipped with. The stated goal of these Standards is to improve the quality of indigent representation. They do not address "court procedure and practice" and they do nothing to promote a fair and expeditious *court process*. While some of the Standards may be an appropriate subject of amendments to the Rules of Professional Conduct, they are beyond the scope of the Court's rule-making authority as provided by GR 9.

In addition, and perhaps more importantly, the Standards constitute legislation and are therefore inappropriate for Supreme Court consideration. The caseload limitations in particular dictate the manner in which independent branches of government are to structure their criminal justice systems by dictating how many cases its attorneys, whether employed or contracted, may handle.[1]

It has been stressed repeatedly by the CPD that government agencies can comply with the caseload limitations by refusing to file certain cases, including traffic misdemeanors such as Driving While License Suspended, or by offering diversion programs. Court rules should not force the hand of local government determinations regarding resource allocation or influence a legislative determination regarding which cases should be prosecuted. This is an area into which the Supreme Court has never crossed because it is an area better fit for the legislative process. This is evident by RCW 10.101.030 which requires that government agencies adopt standards of public defense. If it has been determined that the public defense system of this state is in disarray, then the legislative process is the appropriate forum to rectify it.

Court rules are required to be "clear and definite in application." GR 9(a)(6). The Standards under consideration are not. They are replete with undefined terms and phrases, are vague, and in some cases, go beyond court defined principles of sound public defense (see comments in next section). The proposed Standards were approved by the BOG without the benefit of review by the WSBA's Court Rules and Procedures Committee. At a minimum, prior to the Supreme Court's further consideration of the Standards, it is recommended they be returned to the WSBA for review by the Court Rules and Procedures Committee.

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[1] Also, while it is the individual public defender who must submit a certification, the caseload limitations, in large part, deal with the establishment of the local government's criminal justice system, which the defense attorney may have little control over. Therefore, certification is inappropriate.

Any Standards Adopted Should be Included Directly in the Court Rules

CrR3.1, CrRLJ 3.1, and JuCR 9.2 are all written such that the Standards will be adopted by reference and not included in the court rules. Based upon a review of other court rules, existing court rules only reference other court rules or sections of the Revised Code of Washington. The court rules and the RCWs are easily accessible. However, the Standards for Indigent Defense Services are not easily accessible or retained in an official manner. If the goal is more effective representation of the indigent, the Standards should be readily accessible by both attorneys and indigent defendants alike, and therefore, should be written directly into the court rules.

Proposed Alternative Standards

WSAMA presented the CPD and the BOG with an alternative to the proposal of the CPD. Unfortunately, neither the CPD nor the BOG openly considered the alternative. Below is the alternative rule for the Court's consideration. It is clear and concise, meets most of the goals of the BOG's proposal, and is prepared such that it would be written directly into the court rules. In addition, the below alternative calls for a certification that an attorney can make about conduct or services within his or her personal control, as opposed to the Standard's requirement that an attorney certify to issues that he or she has no control over.

Rule CrR 3.1(d)(4), JuCR 9.2(d)(1) and CrRLJ 3.1(d)(4)

(d) Assignment of Lawyer.

(4) Before appointing a lawyer for the indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court orally or in writing that he or she ~~complies~~ meets or will comply with the following ~~applicable Standards for Indigent Defense Services to be approved by the Supreme Court.~~:

(i) That he or she has a caseload such that he or she can provide to the defendant effective assistance of counsel as guaranteed by the Constitution. In making this certification, the defense attorney shall consider the number of open cases for which he or she is counsel of record; the type or complexity of those cases as well as the new case; his or her experience; any local standards; and the manner in which the jurisdiction processes cases.

(ii) That he or she has access to a location that will accommodate confidential meetings with the defendant and the receipt of mail, and maintains adequate communications services to ensure accessibility to the defendant and prompt response to defendant contact.

(iii) That he or she will arrange to meet with the defendant prior to the entry of a plea, settlement, or the commencement of trial.

(iv) That he or she will evaluate the evidence against the defendant and the likelihood of conviction at trial and will consider the use of additional investigation services and necessary experts, if any, and that the lawyer will advise the defendant such that the

defendant may make a meaningful decision as to how to proceed with his or her defense.

(v) That he or she will inform the defendant of the specific elements required to prove the commission of the charged crime(s); possible defenses; possible consequences; and the standard range sentences, any mandatory sentences and the maximum terms of incarceration and supervision that could result from a conviction for the charged crime(s).

Comments to WSBA's Proposed Standards for Indigent Defense

The following are comments to the Standards for Criminal Defense Services proposed by the WSBA BOG. They appear in the order that the Standards appear in the Court's July 13, 2011 order.

Standard 3.2 Proposed Standard 3.2 uses the phrases "effective representation" and "quality representation"; while the term "effective representation" is left undefined, the phrase "quality representation" is defined as "the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system." This definition is vague at best as there is no measure of what "Washington citizens would expect of their state's criminal justice system." It would be impossible for an attorney to certify compliance with this part of the Standard.

In addition, the phrase "quality representation" would be new to criminal justice jurisprudence. There are only eight appellate level cases in Washington and the Ninth Circuit that have used the phrase (most of them being cases challenging court ordered attorney's fees), and none of them have defined it.

The courts have consistently referred to "effective assistance of counsel" as the constitutional requirement of any attorney serving a defendant, and it would be appropriate for this court to utilize the phrase to take advantage of the over 2000 Washington appellate level cases that have considered what "effective assistance of counsel" means. To do otherwise would imply that the Supreme Court intends the court rule to establish a standard different from that set by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I of the Washington State Constitution. This the Court should not do.

Moreover, the standard applies to "defender organizations, county offices, contract attorneys [and] assigned counsel." It is thus unclear if a lawyer who certifies to a court that he or she is in compliance with the Standards is only making that certification on the lawyer's own behalf, or if the certification is intended to apply to the entire organization that employs the lawyer. To complicate matters, we observe that RPC 1.8 (m)(2) establishes a bright line rule, that a lawyer may not knowingly accept compensation from another lawyer who has entered into an agreement to provide defense services and pay the costs of providing conflict counsel, investigatory services, or expert services. It is therefore imperative that the lawyer making such certification to the Court understand the extent of the lawyer's obligation to investigate any agreement entered by a third party through which the lawyer is compensated to ascertain if a violation of RPC 1.8 (m)(2) has occurred.

The following proposed changes to Standard 3.2, which rely on established expectations regarding the effectiveness of representation, are submitted for your consideration:

~~*Caseload Limits and Types of Cases*~~ *Workload Limits*: Public defense attorneys shall ~~allow each lawyer to~~ give each client the time and effort necessary to ensure effective ~~representation~~ assistance of counsel. ~~Neither defender organizations, county offices, contract attorney's nor assigned counsel~~ Public defense attorneys should not accept workloads that, by reason of their excessive size, interfere with the rendering of ~~quality representation~~ effective assistance of counsel. ~~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.~~

Standard 5.2 Standard 5.2 is entitled, "Administrative Costs." However, the standard has nothing to do with administrative costs. The title should accurately reflect the subject contained within the body of the standard.

The standard itself requires an attorney to maintain an office and telephone services. Unfortunately, the standard fails to acknowledge various alternative communication methods of today's modern offices. In this day and age, as modes of communication rapidly evolve, the incorporation of a particular technology into a court rule should be critically assessed. Similarly, the proposed standard implicitly requires each lawyer who provides public defense services to establish an office, presumably in close proximity to the population of potential clients expected to be served by the lawyer. However, many lawyers in all fields of practice do not adhere to the formality of establishing an office in each jurisdiction in which they practice. Presumably, the goal of this standard is to ensure that lawyers have access to a private space in which they may confer with their client. Office-sharing arrangements and similar flexible options will better meet this goal. This is particularly true in more rural areas of the state, where defense attorneys must frequently travel significant distances to meet with their clients.

The following proposed changes to Standard 5.2 are submitted for your consideration:

> ~~Administrative Costs~~ Accessibility to Client: Public defense attorneys shall have access to a location ~~have an office~~ that accommodates confidential meetings with clients and the receipt of mail, and shall maintain adequate ~~telephone~~ communication services to ensure accessibility to the client and prompt response to client contact.

Standard 13 Many public defenders maintain a private practice. Standard 13 puts a limit on the amount of private work a court appointed attorney can perform. The caseload limits set forth in Standard 3.4 (discussed below), provide that an attorney can only handle a set number of cases per year (e.g "150 Felonies per attorney per year").

Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation. The comments to these rules point out that lawyers are obligated to maintain proficiency (comment 6 to RPC 1.1); properly investigate and prepare cases (comment 5 to RPC 1.1); act promptly in pursuit of client goals (comment 3 to RPC 1.3); engage in reasonable communication with the client (comment 1 to RPC 1.4); and control workload so each matter can be handled competently (comment 2 to RPC 1.3). These rules are universal, apply to all lawyers, and provide no exception for lawyers who represent indigent persons charged with crimes.

In no other practice area in the state of Washington is there a limit on the amount of business that an attorney can engage in. Indeed, as in all other learned professions, each practitioner must be granted personal discretion and appropriate leeway as to the number of hours that practitioner will dedicate to his or her practice. Simply stated, the amount of work that an attorney can undertake requires the application of professional judgment as to the attorney's skills and the kinds of cases the attorney handles in light of the attorney's duties of competence and diligence, and other factors that may impact a lawyer's workload. Arguably, it is inappropriate for the Supreme Court to dictate how much private business a hard working attorney may perform. The limit set forth in Standard 13 has the potential to reduce the pool of qualified public defenders who either do not want their business restricted, or may, at the beginning of the year, refuse court appointments in anticipation of being retained in future private cases. This will necessarily result in a degradation of indigent defense services, as skilled practitioners refuse to perform public sector defense work.

Moreover, the rule does not address how an attorney who maintains a private practice is to determine whether he or she has achieved the limit if he or she maintains a practice representing a mix of felony, juvenile, or juvenile dependency cases per year.

Finally, there is no misdemeanor caseload limit being considered in these Standards. Therefore, for the misdemeanor defense attorney, there is no "percentage of a full-time caseload which the public defense cases represent" for the attorney to compare his or her private work to. Therefore, the second sentence of Standard 13 cannot be applied to the misdemeanor public defender who maintains a private practice.

We recommend that the Supreme Court eliminate Standard 13 in its entirety. The current proposal is unenforceable, and has little meaning. The better practice is to rely on the existing Rules of Professional Conduct to ensure that all attorneys provide competent representation. In the event the Supreme Court elects to emphasize the need for private counsel to provide competent representation, then we propose Standard 13 be revised to read as follows:

> *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~~ give each public defense client the time and effort necessary to ensure effective assistance of counsel. Attorneys with a private practice should not accept public defense workloads that, by reason of their excessive size, interfere with the rendering of effective assistance of counsel to public defense clients.

Standard 14. Standard 14 establishes minimum qualifications of attorneys providing services to indigent defendants. We observe that while the majority of this proposed standard would seem to apply equally to any attorney practicing law, and specifically criminal law, in Washington State, several elements are made applicable only to those attorneys who provide services to criminal defendants. By way of example, Proposed Standard 1(A) requires lawyers to "satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court." We understand that this Standard would thus be co-extensive with APR 1 (b), which limits the practice of law to those who have passed the state bar examination, and complied with other applicable provisions of the Admission to Practice Rules. The provisions set out in Proposed Standards 14 (E) and (F), however, are different.

Proposed Standard 14 (E) requires only those lawyers providing criminal defense services to *indigent* defendants to be familiar with the consequences of a conviction or adjudication. In addition, proposed Standard 14 (F) requires only those lawyers providing criminal defense services to *indigent* defendants to be familiar with mental health issues. In effect, these two standards elevate the scope of experience and education of those lawyers who provide indigents with criminal defense services above that required of defense counsel who are in private practice. Wholly apart from the surreal outcome of imposing two different standards on the lawyer who provides criminal defense services to both indigent defendants and defendants who pay for the lawyer's services with their own funds, the imposition of a unique standard on those lawyers who provide legal services to indigent defendants would seem to exceed the Constitutional standard of effective assistance of counsel.

Because those lawyers who provide defense services and are in private practice must also meet a minimum standard in order to provide effective assistance of counsel – the standard currently recognized by Washington state and federal courts as meeting constitutional requirements – the proposed standard must either establish a different, higher standard, or the language must be surplusage and redundant. Even though we observed above that portions of the standard would seem to apply equally to any attorney practicing law in Washington state, we would suggest that, as in the case of statutory construction, the better rule of construction is to give effect to all of the language of a rule and avoid an interpretation that renders portions of a rule moot or redundant. Following this principle, if the proposed standard is meant to establish a higher bar than the standard observed by private defense counsel, then by enacting the proposed standard, the Supreme Court would be exceeding the constitutional guarantee of effective assistance of counsel. On the other hand, if the proposed standard is merely redundant, then the proposed standard introduces confusion to the Washington Court Rules. In either case, the proposed standard is problematic.

Moreover, we observe that "familiarity" with the consequences of a conviction, including immigration issues, as well as with mental health issues is a standard that is so vague as to be devoid of meaning.

Standards 3.3 and 3.4 Standards 3.3 and 3.4 are proposed to become effective on January 1, 2013. While misdemeanor caseload limits are not proposed, there are still significant issues with Standards 3.3 and 3.4 that warrant the comments of the AWC and WSAMA.

Quality Not Considered With Caseload Limits

The fundamental problem with the caseload limits presented in the Standards is that they serve as a crude instrument to address perceived attorney workload issues, but do not take into consideration factors such as the experience (or lack of experience) of the public defender, which have a significant impact on attorney workload. An attorney fresh out of law school will not have the same experience, understanding of process, advocacy skills, negotiating skills, and trial skills as an attorney who has practiced for many years. The caseload limits speak only to numbers, and have no bearing on the effectiveness of the representation that a defendant may receive.

In some instances, caseloads below an arbitrarily-established maximum will be excessive, and therefore unethical in accordance with the Rules of Professional Conduct, while in other instances, caseloads in excess of the maximum will be well within an experienced attorney's capabilities; yet, this attorney will be sidelined once he or she achieves the limit. The determination of whether an attorney must restrict his or her workload requires the exercise of independent professional judgment, considering factors such as case complexity, severity of punishment, availability of attorney and staff assistance, time

commitments to extraneous matters, and others. See, e.g., comment 5 to RPC 1.1. When skilled lawyers are sidelined, indigent defendants will be represented by a public defender with less experience and fewer skills. Simply put, while the caseload limits may be intended to achieve better representation for indigent defendants, the limits do not speak to the effectiveness of the representation, and in some cases, may compromise a defendant's interests.

We observe as well that acceptable workloads, which are intertwined with the ethical duties of competence and diligence that are set out in RPC 1.1 and 1.3, may only be determined by an attorney. We refer the reader to RPC 1.8 (f)(2) and 2.1, which requires a lawyer to exercise independent professional judgment. See also comment 29 to RPC 1.8, which makes clear that RPC 1.8 (f) applies fully to lawyers who provide indigent defense. This is especially true when issues of client confidences are implicated. A lawyer's determination that his or her workload adversely impacts the lawyer's obligation to provide diligent, competent services should be given due consideration. Unfortunately, the imposition of an arbitrary caseload limit based upon an artificial selection of "average" cases that an "average" lawyer can handle violates this fundamental tenet. In particular, larger public defense agencies are ill-equipped to vary an arbitrary caseload limit, perversely leading inexperienced lawyers to violate their ethical obligations of competence and diligence. To be clear, differences in the complexity of assigned cases; difficulties communicating with clients who do not speak English; unique legal research issues, and differences in the skills possessed by every lawyer make it nearly impossible to establish a caseload limit that has any rational meaning.

Caseload Limits May Circumvent the Legislative Budget Process

Caseload limits have the potential to impact the budgets of local government agencies. The state of Washington is one the few states in the U.S. in which public defense costs (including trial and appellate costs) are the responsibility of local government. Again, while misdemeanor caseloads are not contained within these standards, the AWC and WSAMA submit that the caseload limits carry the prospect of circumventing the local legislative budget making process. This arguably constitutes an infringement of local government legislative authority.

In addition, if caseload limits place local governments in the position of having to hire more public defenders, local governments may be forced to seek less experienced defenders who are less costly when compared to more experienced defenders in order to defray costs. This could reduce the overall effectiveness of representation.

Standard 3.3 is Vague

Standard 3.3 provides that the caseload limits reflect the limits for cases of "average complexity and effort." This phrase is left undefined, and as a result, will leave attorneys guessing as to whether the cases they are handling are of average complexity and will require average effort.

The standard then goes on to require the adjustment of the caseload limits downward when more serious or demanding cases are handled. Again, there is insufficient direction for the attorney regarding whether to reduce the caseload limit. The Supreme Court should not adopt a caseload limit system that will leave attorneys wondering if they are satisfying the standard. Simply stated, Standard 3.3 is so vague that attorneys will be required to certify their best guess as to whether they are working within the requirements of the court rule.

In addition, Standard 3.3 assumes "a reasonably even distribution of cases throughout the year." The reality is that an attorney may receive few appointments during the first half of the year, and numerous

appointments during the second half. It is not clear in the rule the importance of this phrase, or the consequence of there being an uneven distribution of cases throughout the year.

It is unreasonable to expect an attorney to make a certification to the court, under threat of contempt findings or misconduct, that he or she complies with a rule that is so vague that compliance is questionable. We recommend that Standard 3.3 be eliminated in its entirety.

The Definition of Case is Too Broad

Proposed Standard 3.3 defines "case" as "the filing of a document with the court naming a person as a defendant or respondent, to which an attorney is appointed in order to provide representation." This definition is too broad.

In some instances, an attorney is appointed as standby counsel. Under this definition, this appointment would constitute a case even though the attorney would be required to perform only a minimal level of work. In many courts in the state, attorneys are provisionally appointed to assist defendants during the arraignment or bail process, and are then excused as counsel. These appointments would constitute a case under the standard as well. In other instances, an attorney is appointed for a defendant who subsequently fails to contact the defense attorney, and fails to appear at the defendant's next scheduled court appearance. These appointments, too, would constitute a case under the standard.

The following proposed changes to the definition of "case" are submitted for your consideration:

> Definition of Case: A case is defined as ~~the filing of a document with the court naming a person as a defendant or respondent, to which an attorney is appointed in order to provide representation.~~ the appointment, by the court, of an attorney to represent a defendant in a criminal case or other cause of action filed against the defendant. When a group of cases against a defendant will be tracked by the court contemporaneously, the group of cases will be considered one case. Provisional or temporary appointments, or appointments in a standby capacity, shall not constitute a case.

The Year restriction in the Caseload Limits is Overly Restrictive

Many of the caseload limits provide a predetermined number of cases on a per-year basis. For example, Standard 3.4 would limit an attorney to "150 Felonies . . . per year."

There are a number of problems with attaching a caseload limit to a "per year" time period. First an attorney may be appointed to a case, and then remain the attorney of record for a protracted period while a convicted defendant is in a probationary status or while his case is on appeal. Even if there was little work for the attorney to perform during the protracted period, the matter would count as a case.

It appears that the "per year" language in Standard 3.4 is intended to be based on a calendar year. Theoretically, a public defender could obtain 150 felony assignments during the latter half of the year, and another 150 felony during the beginning of the following year, and suddenly have a caseload of 300 felonies.

If the intent of the standard is to allow a public defender to, for example, handle 150 felonies, then the per-year language should be removed. The following are proposed changes to the caseload limits:

150 open felony cases ~~felonies per attorney per year~~; or
250 open juvenile offender cases; or
80 open juvenile dependency cases ~~per attorney~~; or
250 open civil commitment cases ~~per attorney per year~~; or . . .

Conclusion

It is critical that standards that become court rule relate to court processes and procedures. Standards must also be clear and concise, especially when attorneys will be required to certify they comply with the standards. The Standards under consideration are not appropriate for court rule. It is our hope that the Court will consider amending the court rules to remove the requirement of standards, or consider the alternative rule that has been proposed. If the Court intends to adopt some form of the Standards, it is our hope that the Court will refer the standards back to the WSBA Court Rules and Procedures Committee, and consider our comments. We thank you for the opportunity to comment.

Sincerely,

Joseph Svoboda, President
Washington State Association of Municipal Attorneys

Nancy McLaughlin, President
Association of Washington Cities