

April 25, 2022

Justice Charles Johnson, Co-Chair  
Justice Mary Yu, Co-Chair  
Washington Supreme Court Rules Committee  
Temple of Justice  
PO Box 40929  
Olympia, WA 98504-0929

RE: Comments on Proposed General Rule 42, Independence of Public Defense Services

Dear Justice Johnson, Justice Yu, and members of the Rules Committee:

The Washington State Office of Public Defense (OPD) and the Washington Defender Association (WDA) write in strong support of Proposed General Rule 42, Independence of Public Defense Services. Ensuring independence of public defense services prevents undue judicial interference in public defense, and just as important, guards against even the appearance of undue influence.

In Washington, where neither courts nor public defense services are unified or centrally administered, a Supreme Court General Rule is necessary to ensure independence of public defense services in the dozens of lower courts. For instance, in one county where the Board of Commissioners implemented recommended best practices and established a county public defense agency to administer contracts with qualified attorneys, the court disregarded the county's contracts and continued to unilaterally pick and appoint counsel. Proposed GR 42 will prevent such interference with the administration of public defense.

For 20 years, the American Bar Association (ABA) has identified independence as crucial to ensuring ethical public defense services. Independence is the first of the ABA's *Ten Principles of a Public Defense Delivery System* (2002) because independence is the cornerstone that supports the ABA's other nine principles addressing workloads, training and experience, adequate resources, and professional oversight. Washington has made considerable progress in implementing these other principles through the Supreme Court's adoption of Standards for Indigent Defense and Court Rules requiring attorneys to certify compliance with certain Standards. With adoption of Proposed GR 42 the Court will provide vital leadership to solidify the foundational principle of independence.

When a court directly or indirectly controls public defense services, in concert with its inherent power and authority over individual cases, it can create a chilling effect on a public defense attorney's advocacy. Consider the following recent experiences shared with WDA by

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attorneys providing public defense services in Washington trial courts:

- The court forwarded an ex parte request for defense funding in a case (with request to seal) for input from the prosecutor, to see if it was a “reasonable” request.
- The court told public defense attorneys to not bring motions under current law due to objections by the prosecutor. This involved automatically shackling in-custody defendants after that practice was found to be unconstitutional.
- Prosecutors and Assistant Attorneys General asked judges to not appoint certain defense attorneys who are known to litigate.
- Judges summoned public defense attorneys into chambers and advised them to not object during hearings.

The above are just a few of the examples described to WDA as relatively commonplace -- distressing circumstances for any lawyer. But, unlike other lawyers, public defense attorneys in these situations could reasonably fear the loss of their jobs or other retribution if they did not please the court that oversaw their contract or placed them on an appointment list. Proposed GR 42 is necessary to insulate public defense attorneys (and judicial officers) from such potential ethical conflicts. Because of these critical ethical considerations, Proposed GR 42 should apply in all case types where people have a constitutional or statutory right to counsel.

OPD and WDA understand that Proposed GR 42 may require some trial courts and local governments to adjust existing administrative arrangements, thus we support a limited delay in implementation. Our organizations are committed to facilitating a smooth transition. As it did when the Court adopted the Standards for Indigent Defense, OPD can again provide substantial technical assistance to help courts and local governments efficiently implement administrative practices that meet the criteria of Proposed GR 42 and safeguard the independence of public defense services. For example, in addition to meeting with local officials upon request, OPD can host live webinars with courts and policymakers, and can provide examples of non-court administrative structures that are already working well in communities across the state.

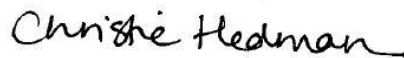
The Washington State Bar Association’s Council on Public Defense (CPD) worked diligently for well over a year to develop Proposed GR 42. The CPD shared drafts broadly and incorporated numerous perspectives, including from trial courts. As a result, the proposed general rule reflects careful consideration of local impacts and allows for several alternative approaches to effectively implement independence. The CPD and the WSBA Board of Governors – both of which include current and former prosecutors and judicial officers among their membership -- voted unanimously to endorse Proposed GR 42. We encourage the Court to give great weight to the extensive development process and adopt the rule.

OPD and WDA are available to provide additional information or answer questions to assist the Court in finalizing this important new rule.

Best regards,



Larry Jefferson, Director  
Washington State Office of Public Defense



Christie Hedman, Executive Director  
Washington Defender Association

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**To:** [Linford, Tera](#)  
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**Date:** Thursday, April 28, 2022 8:03:29 AM  
**Attachments:** [OPD - WDA Comments -- Proposed General Rule 42 - Independence.pdf](#)

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**From:** Sophia Byrd McSherry [mailto:Sophia.ByrdMcSherry@opd.wa.gov]  
**Sent:** Wednesday, April 27, 2022 5:28 PM  
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Dear Clerk of the Supreme Court:  
Attached is a comment letter on Proposed GR 42, Independence of Public Defense Services.

**Sophia Byrd McSherry** (she, her)  
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