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Chief Justice González and Associate Justices
Washington Supreme Court
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RE: Concerns with Washington State Bar Association Proposed Amendments On Caseload Standards

Dear Chief Justice and Associate Justices,

As King County Executive, I have been a strong supporter of a criminal justice system that overcomes the gross inequities of the past and provides robust public defense for persons accused of crimes. Among other things, during my time as executive, I have:

- Shifted resources away from the traditional criminal justice system toward community-based alternatives;
- Invested in a care and closure plan to promote youth healing, accountability and public safety, including approaches that go beyond juvenile detention;
- Supported the creation of a new charter department of public defense, which transitioned representation of indigent persons from an outside contractor model to a high-quality in-house operation;
- Ensured that King County's public defenders were paid the same as prosecutors in order to attract and retain dedicated public servants; and
- Supported and advocated for the availability of diversion programs, behavioral health treatment, substance use disorder treatment, specialized courts (drug court, mental health court, veterans court, etc.), and supportive housing.

This sampling represents the core mission of our political branches of government, not only in the area of criminal justice, but across a wide range of issues from the environment to transportation to health care and many, many others. Our

constitution requires those political branches to determine the overall priorities of government and how to best use scarce fiscal resources to fund those priorities to the extent possible.

The judicial branch of government is able to override the policy and budget determinations of the political branches only when there is a demonstrable constitutional violation that is challenged by a proper litigant before a court. *State v. Peterson*, 198 Wn.2d 643, 645 (2021) (the "judicial branch has the power to declare a statute or its application unconstitutional or invalid under narrow circumstances," but in the "absence of those circumstances, we are bound by our role in our divided government to uphold and apply the laws properly enacted by our elected legislative bodies"). To emphasize the deference owed to political branches, this court has emphasized the "high burden" faced by those challenging actions by the political branches. *E.g. Island County. v. State*, 135 Wn.2d 141, 147 (1998) (legislative actions must be proven unconstitutional "beyond a reasonable doubt because the legislature "speaks for the people").

Although King County agrees with the principle that public defense should be effective, vigorous and adequately funded, the current Washington State Bar Association ("WSBA") caseload proposal exceeds this court's proper authority and impinges on separation of powers by interfering with the prerogative of the political branches of government. It is this court's role – typically undertaken through the process of reviewing an individual case for constitutional error – to ensure that public defense satisfies *the basic constitutional floor for effective assistance of counsel*. In contrast, it is the role of the political branches – in light of competing interests, policy choices and financial demands – to provide any *levels of service that exceed that constitutional floor*. For the reasons discussed below, this court should reject the WSBA's proposal to adopt enhanced caseload standards and other measures under the guise of a procedural court rule.[1]

A. The Court Cannot Adopt a Procedural Rule That Conflicts With The Substantive Mandate of RCW 10.101.030

Although this court is empowered to adopt procedural rules, it has recognized that substantive law is the province of the legislature and that substantive legislative enactments prevail over substantive court rules. *State v. Gresham*, 173 Wn.2d 405,

[1] King County recognizes that the court has a current caseload rule. To the county's knowledge, there has been no constitutional challenge to the court's authority to adopt this rule, nor is it apparent that the court grappled with the issue of its authority to mandate a caseload standard when adopting the rule. In setting the county standard under RCW 10.101.030, see below, King County has opted to follow the guidance of this rule.

429 (2012) (substantive statute prevails over substantive court rule); *State v. A.M.W.*, 30 Wn. App. 2d 472, 487 (2024) (substantive rule that conflicts with statute "falls outside the scope of the Supreme Court's rule-making authority).

In this situation, the proposed rule directly conflicts with RCW 10.101.030, which specifically directs and empowers local governments to set caseload and other standards for indigent defense:

> *Each county or city under this chapter shall adopt standards* for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. *Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.*

(Emphasis added). This statute provides that indigent defense standards adopted by the WSBA "should serve as guidelines" in this endeavor, but are by no means mandated. *Id.*

In accord with this statute, King County has adopted standards related to the provision of public defense that mirror the existing court rule, not the proposed one. For example, K.C.C. 2.60.026.A.1 requires the King County public defender to follow Washington state standards for indigent defense, which incorporates this court's existing caseload standards. These caseload standards are also incorporated into King County Department of Public Defense ("DPD") labor agreements, adopted by the King County Council. In accord with the county's discretion under RCW 10.101.030, the labor agreements have language allowing some flexibility so that indigent persons can be assigned counsel even when a stricter application of caseload standards could otherwise make an attorney unavailable. The policy judgments in the code and labor agreements are funded in the budget proposed by the Executive and adopted by the King County Council.

The proposed rule attempts to negate the ability of counties and cities to establish indigent defense standards by promulgating a procedural court rule *on the same topics* already addressed in the statute. A procedural court rule, however, is an improper vehicle to divest local governments of the substantive authority that RCW 10.101.030 grants them to establish appropriate local defense standards.

In the preamble to the standards for indigent defense, the proposed rule disavows any application of the standards to local governments because such an application exceeds the court's authority: "To the extent that certain standards may refer to or be interpreted as referring to local governments, *the court recognizes the authority of its rules is limited to attorneys and the courts*." (Emphasis added). But this recognized limitation does nothing to prevent a separation of powers violation. The proposed standards apply to both county employees who may provide defense services (including non-lawyers like investigators, mitigation specialists, etc.) as well as any attorney a local government might contract with for public defense services. WSBA's proposal that the court use its regulation of defense practitioners to deprive local governments of their right under RCW 10.101.030 to establish defense standards is too clever by half. Unable to regulate local governments directly, the proposed rule prohibits *any* attorney from entering into a contract with local governments unless the standards of the proposed rule are satisfied. Similar to an anti-trust situation, the court should not use its leverage over one party to a contract to force an unconstitutional accommodation on local governments.

This court should reject WSBA's effort to effectively invalidate a substantive statute through a procedural court rule. Separation of powers principles require the court to defer to the Legislature's determination that indigent defense standard should be established by counties and cities. If a particular county or city adopts indigent defense standards that violate constitutional requirements, this court remains able to review any convictions that arise from those jurisdictions for effective assistance of counsel. Moreover, if a municipal government establishes standards that are constitutionally deficient, the practice can be challenged through a civil rights lawsuit.

B. The Proposed Procedural Court Rule Violates Separation of Powers By Requiring the Expenditure of Local Funds Toward Defense Standards That Exceed Constitutional Requirements

Even if RCW 10.101.030 did not exist, the proposed rule violates separation of powers by effectively requiring the expenditure of local revenues to meet indigent defense standards that exceed the constitutional floor for effective assistance of counsel. The Rand Study, which the proposed rule goes well beyond by mandating higher salaries, increased staff, etc., generally characterizes its recommendations as prophylactic measures designed to prevent indigent defense services from falling below the constitutional floor. Although this is a laudable goal, it prioritizes indigent defense over competing interests like supportive housing for persons experiencing homelessness, medical care for the indigent, mental health services for persons in need, food assistance for children, etc.

This is why our constitutional system assigns budgeting and policy decisions to the political branches, while leaving the adjudication of individual cases to the judiciary.

Unlike the judiciary, the political branches are elected specifically to set policy and determine competing interests for public dollars when establishing budgets. It may well be that levels of service should be increased for indigent defendants and that measures should be taken to make public defense a more manageable career choice, but these are decisions for the political branches, not for this court.

Indeed, the Rand Study is not meant to mandate hard caseload limits, but "to assist governmental bodies, attorneys, policymakers, and other stakeholders when they plan for or manage the provision of counsel to represent adults who have been accused of criminal offenses in state trial courts but who cannot afford to engage an attorney (such provision is commonly referred to as *public defense*)." Rand Study at p. iii. The study's metrics are designed "to help in estimating the numbers of criminal defense attorneys who should be made available for appointments as the nature and size of noncapital adult criminal caseloads change over time." *Id.* It is also meant to help policy makers and managers better able "to identify instances when caseloads for those lawyers have risen to the point at which those *lawyers may be unable to adequately discharge their professional duties*." *Id.* (emphasis added).

Notably, policy makers, not courts, are the intended consumers of the Rand Study. The proposed rule before the court is an anomaly. King County has found no other court in the United States that is being asked to adopt the Rand Study caseloads by fiat as a hard cap on indigent defense services.

Apart from providing higher levels of service for indigent defendants, the proposed rule before the court is explicit in its goal of improving the working conditions of defense attorneys in an effort to make retention of those attorneys more likely. According to the GR 9 cover sheet accompanying the proposed rule, a primary purpose of the new proposed standards is "to address public defender attrition and difficulty recruiting new attorneys to the profession." To be sure, these are important goals, but there is no possible theory that would allow this court, though a procedural rule, to mandate the expenditure of local funds to reduce attorney workloads when establishing the government funding priorities is the exclusive prerogative of the political branches. There is no constitutional right that might require improved working conditions for public defenders (or any other attorney).

The WSBA's proposed rule violates the separation of powers because the expenditures required to comply with the proposed rule intrude on the prerogative of the political branches by forcing additional and substantial appropriations for defense services. *Cf. Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 236–37 (1976) (separation of powers implicated where court is asked to override legislative appropriation and set higher pay for judicial branch employees). This Court has strongly cautioned against interfering with legislative appropriation powers:

> The legislative branch generally has control over appropriations. . . . While we may find a waiting period of years [for legislative action] to be intolerable, *we would find it even more intolerable for the judicial branch of government to invade the power of the legislative branch. Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs.*

Hillis v. State, Dep't of Ecology, 131 Wn.2d 373, 390 (1997) (emphasis added; citations omitted).

The expenditures required by the proposed rule would further deplete King County's General Fund. Even without considering the substantial downstream impacts of enhanced caseload standards on courts, prosecutors, law enforcement and jails, the cost of WSBA's proposal to King County would exceed $67 million annually.

Counties in Washington pay for the majority of public defense costs. The State allows counties to impose only two meaningful taxes to support their General Funds: a property tax and a sales tax. Property tax revenue growth has been limited to one percent per year (plus the value of new construction) since 2002. For King County, if that limit had been set to match actual population growth and inflation, the General Fund would have $475 million more revenue in 2025 than it currently has under the one percent limiting factor. For King County, property taxes represent about 60 percent of General Fund revenues. The one percent annual revenue growth limit has squeezed out money for most programs that are not mandated by the State. Lower public defense caseload standards, no matter how well justified, will simply increase costs to county General Funds, with no corresponding ability to increase revenue.

For King County's budget, adopting the WSBA caseload proposal would mean cutting spending on discretionary programs that require General Fund support, many of which are intended to help victims or to keep people out of the criminal justice system. For example:

- King County's 2025 Proposed General Fund Budget includes approximately $11 million for human services, down from $25 million fifteen years ago, not adjusted for inflation. This funding goes mostly to services for victims of sexual assault and domestic violence, civil legal aid for the indigent, and job training for at-risk youth. The State does not mandate these critical programs and almost certainly would be reduced or eliminated if the WSBA's proposed rule is adopted and implemented.

- For decades, King County's justice agencies have invested in programs and staff to help people navigate the complex justice system. This includes victim

advocates in the Prosecutor's Office and staff in the court systems to assist indigent and non-English speakers with business before the courts. The court clerk functions have additional staff to help people access justice and to help with recovery of restitution. Many of these programs would be reduced or eliminated to fund the new caseload rule.

- The King County Sheriff's Office is improving its relationships with the communities it serves through a new Community Programs and Services Division, pay premiums for bilingual deputies, storefront precincts, and similar activities. The Sheriff's Office serves nearly 250,000 residents of unincorporated King County but already has per capita staffing levels lower than any city. Thus, budget reductions would fall disproportionately on the efforts to build stronger trust with the people it serves.

Thus, implementation of the WSBA caseload proposal will result in devastating reductions to extremely valuable programs.

Due to the one percent limit and the limited (regressive) taxes that counties are allowed to collect, full and continued implementation of the caseload standards in subsequent years will exacerbate the General Fund shortfall. It is important to understand that the State has made county General Fund budgets a zero-sum game. Any increase in mandated costs requires something else to be cut by the same amount. Projections for the incremental costs of implementing later phases of the WSBA caseload standards suggest that it would be impossible for King County to comply with those standards unless the county shifts money to public defense by cutting mandatory General Fund programs, including some superior and district court operations. Due to the one percent limit, this problem would worsen over time. In short order, King County would be in a precarious position – forced to either cut legally mandated programs supported by the General Fund or violate WSBA caseload standards imposed by the court.

In essence, the WSBA caseload proposal would bring about a hostile takeover of the General Fund and dictate indigent defense spending as the highest priority for county government. The proposal to use a procedural court rule to override the policy and budgetary determinations of the political branches violates separation of powers, especially when there is no clear constitutional mandate forcing such unprecedented court action.

C. As An Accommodation To Its Co-equal Branches of Government, The Court Should Reject the WSBA's Precipitous Proposal and Give the Political Branches the Latitude To Further Consider Whether a Problem Exists and Formulate Any Solutions To That Problem

In accord with separation of powers principles and the comity owed to other co-equal branches of government, the court should reject the WSBA's proposed rule and grant the political branches the opportunity to address important questions surrounding indigent defense standards. Although the Rand Study is intended to assist policy makers, the Washington Legislature has not yet had an opportunity to consider its recommendations. The January 2025 legislative session will be the first full session of the legislature convened since the report was issued. The Rand Study acknowledges that a so-called "national standard" loses fidelity to local laws, rules and conditions that greatly impact defense workloads and appropriate caseloads. Before mandating that Washington governments spend *hundreds of millions of dollars* to comply with a theoretical national standard, the legislature should be given the opportunity to conduct a local workload study and address funding challenges. As the Rand Study acknowledges, "Because these [local] factors can vary substantially from jurisdiction to jurisdiction, the most accurate weighted caseload model is developed specifically for an individual state or jurisdiction." Rand Study at p. ix. Even within Washington, policy makers from local jurisdictions should have the opportunity to examine local conditions. The separation of powers principles built into our system demand this accommodation and disfavor the effort of proponents of the proposed rule to force a standard that may be a poor fit for Washington jurisdictions.

It is important to acknowledge that the political branches have far greater flexibility in fashioning remedies addressed to indigent defense. The court is limited to procedural rules and the review of individual cases. By contrast, the political branches can address case load concerns by establishing diversion programs, decriminalizing some behaviors, incentivizing particular filing practices, etc. When it comes to retaining defense counsel, political bodies can offer incentives like signing bonuses, retention bonuses, higher salaries, improved office space, law school loan forgiveness, etc. The authority of the political bodies to adopt and implement creative solutions to vexing problems is nearly unlimited. This court should be reticent to short-circuit this crucial political process – including the consideration of competing priorities – by adopting the WSBA's proposed rule.

After all, there is nothing before this court suggesting that the proposed rule must be quickly adopted to avoid actual ineffective assistance of counsel problems. When ineffective assistance does arise, the judicial branch is well equipped to monitor defense counsel performance and vacate convictions where necessary. No one is claiming a rash of ineffective assistance claims. There is more than sufficient time for the political branches to consider the problem and identify areas where solutions are necessary. If those solutions appear ephemeral and criminal defendants are regularly

deprived of their constitutional right to counsel, this court may take the issue up at a later date or urge the legislature for a different approach.

Separation of powers exists because "[a]l would be lost if the same [person] or the same body of leaders, either of the nobles or of the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminal and civil cases." W. Gwyn, The Meaning of the Separation of Powers 110 (1965) (*quoting* Montesquieu). Because the proposed rule violates this cornerstone of our constitutional democracy by misusing judicial authority to interfere with the prerogatives of the political branches, it should be rejected.

D. King County ITA Court: A Case Study Where Caseload Standards Operated to Deprive Patients of Adequate and Available Representation

A practical problem with caseload standards was illustrated by King County's recent experience with its local Involuntary Treatment Act ("ITA ") court. *See* ch. 71.05 RCW. Because caseload standards represent an absolute cap on cases for a given period of time, rather than a workload standard that limits the number of active cases an attorney may be responsible for on a day-to-day basis, ITA patients were left without attorneys to represent them while those attorneys were effectively relieved of their primary job duties.[2]

Like criminal cases, indigent representation of patients facing civil commitment under the ITA is subject to caseload standards. Under these caseload standards, public defenders are precluded from exceeding the caseload standard for the prior 12-month period. During several months in spring 2024, the King County Superior Court was informed by the King County Department of Public Defense ("DPD") that existing caseload standards prevented it from assigning counsel to represent patients. These notices were provided several days prior to the end of each month. For example, several days prior to the end of May, no defense attorneys were available to take new ITA filings. Because most ITA cases are resolved shortly after assignment and the statute limits the time for resolution, application of the caseload standards left vulnerable patients without counsel and public employee attorneys without the ability to perform their primary job.

Ultimately, the Superior Court ordered DPD to provide indigent counsel for patients facing civil commitment despite the caseload standards. DPD complied with the order. Although it questioned the Superior Court's authority to violate the caseload standards, it acknowledged that its attorneys were able to exceed the *existing* caseload standard without endangering effective assistance of counsel.

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[2] Essentially, the caseload standards work on a "piecework" model where an attorney has a set number of cases to complete in a given year and then is freed from the burden of their primary job responsibilities.

If the court continues to consider implementing a caseload standard, it should avoid the problems illustrated by this case study. For almost every attorney in our profession, resolution of one case results in the assignment of another case. A standard that focuses on the reasonableness of an attorney's current ***workload*** avoids the anomalies of a caseload standard, where an extremely "efficient" defense counsel might be able to claim months of extra state-funded vacation simply by resolving their maximum caseload sometime in the fall. A workload standard – which ensures that attorneys handle a steady course of work during their employment maximizes the use of attorney resources to the benefit of clients and avoids incentives to game a caseload system by quickly settling all assigned cases.

The relative merits of a caseload versus a workload approach are yet another question unaddressed by the WSBA proposal. It is also another policy and budget choice best left for the pollical branches to study and determine.

For these reasons, King County urges this court to reject the WSBA proposed caseload rule. So long as the constitutional floor of effective assistance of counsel is preserved, the appropriate level of service is necessarily one for the political branches to determine after considering a myriad of competing interests and budget priorities. As elected representatives of the people, the political branches are well equipped to make these tough choices while the court remains equally well equipped over the course of judicial review to ensure that defense counsel performs within constitutional parameters.

Thank you for considering these comments.

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Dow Constantine
King County Executive