MARYSVILLE
CITY ATTORNEY'S OFFICE

October 31, 2024

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504

RE: Comments on Suggested Amendments to CrR 3.1/CrRLJ 3.1/JuCR 9.2 - Standards for Indigent Defense

Dear Honorable Justices,

I am writing in opposition to the proposed changes.

"Proposed Standard 1. Compensation" does not comport with existing statutory and case law and should be rejected by the Court.

The unprecedented proposal to impose job classifications on the legislative and executive branches of local government through a court rule is contrary to law and should be rejected by the Court. While RCW 10.101.030 characterizes the standards as "guidelines" for local governments, in reality local governments will take significant risks if they operate outside these "guidelines." Neither the WSBA nor this Court have expertise in developing job classifications or performing compensation studies.

There are statutes that address the authority to set public defender salaries and the Court should respect those. RCW 36.26.060 gives the county board of commissioners the authority to "[f]ix the compensation of the public defender . . . ." Similarly, RCW 10.101.030 places responsibility for determining the "[c]ompensation of [public defense] counsel" on cities and counties.

In *State v. Perala*, 132 Wn. App. 98, 116-17, 130 P.3d 852, 860-61 (2006), the court recognized RCW 36.06.060 grants authority to each county board of commissioners to set public defenders salaries and distinguished RCW 36.06.090 which grants authority to a court to award attorney fees when the court appoints an attorney who is not a public defender. The proposed standard conflicts with RCW 36.06.060 and encroaches on each county's authority to set public defender salaries.

In *Matter of Salary of Juv. Dir.*, 87 Wn.2d 232, 236, 552 P.2d 163, 166 (1976) the Lincoln County Superior Court determined it would set the salary of one of its employees despite the governing statute – RCW 13.04.040 – providing that "[t]he probation counselors and persons appointed to have charge of detention facilities shall each receive compensation which Shall be fixed by the board of county

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commissioners . . . ." This Court reversed the decision of the Lincoln County Superior Court observing that while RCW 13.04.040 authorizes the superior court to designate the person to fill the position, the board of commissioners clearly had the authority to set the salary for the position:

> The Board fixes the compensation in the first instance. Thus, there is no ambiguity and no basis to claim judicial power to fix salaries inferred from its authority to appoint.

Noting that a court may possess inherent power in order "to be able to ensure its own survival when insufficient funds are provided by the other branches" this Court reviewed whether that situation was present and concluded it was not. *Matter of Salary of Juv. Dir.*, 87 Wn.2d 232, 252, 552 P.2d 163, 175 (1976) ("No evidence in the record supports by a preponderance of the evidence—let alone by a clear, cogent and convincing showing—respondent's determination that the salary paid to the Director of Juvenile Services was so inadequate that the court not fulfill its duties.").

Here, there are two statutes that clearly place the authority to set compensation for public defenders where it should be -- with counties and cities. The Court should respect those statutes. And there is no "clear, cogent, and convincing" evidence that paying public defenders the same as prosecutors is essential to the survival of the courts and, thus, no inherent authority for the Court to engage in job classification[1] and salary setting.

The Court should reject this proposal.

The proposed standards appear to be aimed at improving public defense working conditions, not at eliminating widespread ineffective assistance. If standards are truly necessary to ensure effective assistance, then they should be applied to all lawyers engaged in criminal defense.

The proposed standards are quite radical in scope and conclude that for criminal defense lawyers to provide effective assistance, caseloads must be slashed by more than two-thirds. That in turn assumes that defense attorneys, prosecutors, and judges, are uniformly violating

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[1] Ordinarily, a local jurisdiction will utilize its human resources professionals to classify the various jobs based on the duties, necessary skill and education, and other factors. This proposed standard also applies to how a local jurisdiction must pay contract public defenders, which is a completely different analysis. Contract public defenders have much different overhead costs and other factors which makes it improper to require equivalent funding as a government-run public defense office (or prosecutor's office). Analyzing all these factors is outside judicial expertise.

Moreover, there is no evidence connecting public defender pay and effective assistance. Some counties do pay public defenders on the same scale as prosecutors. Accordingly, if this is effective, it should be easy to show its effect in those counties.

their ethical duties by turning a blind eye to a breathtaking incidence of ineffective assistance of counsel.

The proposed caseload standard assumes that attorneys providing indigent defense are currently handling more than three times as many cases as the number at which they can provide effective assistance. If this is the correct standard, then tens of thousands of defendants would have received ineffective assistance and it seems likely that many cases would have been litigated post-conviction due to this statewide epidemic of ineffective assistance. It is improbable that so many defendants have been receiving ineffective assistance, but there has been no significant litigation exposing this situation.

Three aspects of the proposal illuminate what appears to be its driving purpose – to improve working conditions for those representing indigent defendants.

First, is the requirement to tie public defender compensation to prosecutor compensation and the requirement that if a jurisdiction contracts for public defense services it must pay the contractor at a rate reflecting the jurisdiction's overhead costs regardless of what overhead costs a public defense attorney or firm may have.[2] Cities generally have significant overhead costs because they are complicated organizations providing a wide variety of municipal services with substantial capital and human assets. A public defense attorney or firm is not comparable and will have much lower overhead costs. Accordingly, they will actually be paid more than a prosecutor when their lower overhead costs are accounted for.

Second, the proposed caseload standards limit working hours to 1,650 (not even the 2,080 assumed in the RAND report). Practicing law is not a 9 to 5 job. Particularly early in a lawyer's career, he or she will work long hours to develop professional expertise and knowledge.

Third, the proposed standards apply only to lawyers engaged in providing indigent defense. If the proposed standards are truly intended to protect the constitutional rights of those charged with crimes, then they must apply not just to attorneys representing indigent defendants, but to every attorney representing a criminal defendant. If a public defender cannot handle more than 120 misdemeanor cases a year, how is it that a private criminal attorney can do so? Why are private attorneys permitted to negotiate flat fee contracts while public defenders are forbidden to do so?

The Delphi Method is uniquely ill-suited to evaluate professional workload and should not be considered reliable by the Court. That criminal defense lawyers are constitutionally-

[2] Standard 1.B: "Reasonable contract or assigned counsel compensation rates shall be set at least on a pro rata basis consistent with the attorney's percentage of a full caseload (see Standard 3). For example, if a jurisdiction allocates $280,000 per year per full-time equivalent (FTE) prosecuting attorney for all costs associated with that FTE, including but not limited to combined salary, benefits, support staff, administrative, information technology, insurance, bar dues, training, and facilities expenses, then a contract for one-fourth of a full-time public defense caseload should be at least $70,000." (emphasis added).

mandated to provide effective assistance of counsel is irrelevant to whether the Delphi Method is sufficiently rigorous to produce reliable results.

The Court has received other comments recounting the weaknesses of the Delphi Method and I join them in pointing out the obvious weaknesses of the Delphi Method which suffers from selection bias and is completely dependent on subjective perceptions and anecdotal evidence.

By utilizing this method, the outcome was predetermined. Ask any group of workers or professionals if they are overworked and underpaid and the answer will be yes. If the Court were to select a panel of prosecutors "from more than 100 nominations of highly regarded attorneys with outstanding competence in adult criminal [prosecution] in state trial-level courts and a track record of good practice" (RAND at v) and utilize the Delphi Method to determine whether they have enough time to perform their essential job of holding accountable those who endanger the public by driving drunk or selling fentanyl, the answer from the panel will be that they do not have enough time.

That the constitution requires criminal defense attorneys to provide effective assistance to their clients but prosecutors have no such constitutionally-mandated level of performance does not alter the profound weakness of the Delphi Method for determining an appropriate workload.

The out-of-state case where the Delphi Method was utilized was not an adversarial testing of whether the Delphi Method produces reliable results and therefore should not be considered by the court as persuasive authority.

There is a case where the Delphi Method was utilized for determining whether public defenders were overworked -- *Dalton v. Barrett*, No. 2:17-CV-04057-NKL, 2019 WL 3069856, (W.D. Mo. July 12, 2019), *order vacated, appeal dismissed sub nom. Church v. Missouri*, No. 19-2584, 2020 WL 8255313 (8th Cir. July 8, 2020). The plaintiffs, individuals who received indigent defense services from the state office of public defense, were represented by the ACLU. The defendant, the state office of public defense, was represented by the general counsel for that office. Predictably the "parties" concluded that the defendants should have their caseloads drastically reduced because they were "grossly overburdened, and that the burden under which [MSPD] operates routinely and systematically harms indigent criminal defendants by depriving them of competent counsel."

The state attorney general attempted to intervene at the 11th hour, but the court denied that attempt – "in light of the Attorney General's two-year knowledge of the action and failure to provide a reasonable explanation for the delay in seeking intervention, the advanced stage of this litigation, and the substantial risk of prejudice to the existing parties who have reached an amicable resolution, the Court finds that the Attorney General's motion to intervene is untimely."

The parties in *Dalton* were aligned in seeking lower caseloads for public defenders, so the case did not involve any adversarial testing of the claims that the public defenders were underfunded and overworked. *Dalton* does not stand for the proposition that the Delphi Method has been proven reliable.

The underlying issues leading to a shortage of public defenders, prosecutors, and other public attorneys will not be alleviated by the proposed standards.

All public agencies report having difficulty hiring and retaining qualified lawyers. An obvious source of this problem is the exorbitant cost of law school and the schools' failure to contain costs. LawHub estimates that law school costs have risen at over 2.5 times the rate of inflation between 1985 and 2023.[3]

Tuition alone at Seattle University Law School is $60,000 a year. The university estimates that other costs amount to about $33,000 per year,[4] meaning a law student would need about $279,000.00 to attend law school (not including foregone earnings during those three years). A recent letter writer to the Bar News suggested paying tuition for students who would commit to a career in public defense. But to graduate just 100 new public defenders would cost $18 million over three years.

Lawyers can be properly trained at a much lower cost.

Sincerely,

Jon Walker

Jon Walker
City Attorney

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[3] https://www.lawhub.org/trends/tuition#:~:text=Inflation%20has%20been%20a%20factor,was%20%2455%2C963%20(2023%20dollars).

[4] https://law.seattleu.edu/media/school-of-law/documents/student-life/student-financial-services/cost-of-attendance/2024-25-coa-insert-jd.pdf