

October 18, 2024

VIA REGULAR U.S. MAIL AND VIA ELECTRONIC MAIL: supreme@courts.wa.gov

Clerk of the Supreme Court of Washington
P.O. Box 40929
Olympia, Washington 98504

**Re: Comments to proposed changes to the Washington State Supreme Court's
Standards for Indigent Defense**

Dear Honorable Justices:

The Mayors of Whatcom County's six small cities, which include the Cities of Blaine, Everson, Ferndale, Lynden, Nooksack and Sumas, ("Whatcom Small Cities") request that the Washington State Supreme Court reject the amendments to the Standards for Indigent Defense proposed by the Washington State Bar Association (the "Proposal"). To be clear, we affirm the need to provide for and protect a criminal defendant's constitutional right to effective assistance of counsel, and the cities we represent will continue to take affirmative steps to address this need.

However, the Proposal will do significantly more harm than good by severely impacting municipal criminal justice budgets, infringing on decision-making processes for local budgets, and effectively limiting funding of essential programs and services. Meanwhile, the Proposal does not address the stated crisis of attrition and the inability to recruit indigent defense attorneys.

1. The budget impacts would be extraordinary, even in the world of unfunded mandates.

Unlike the process leading to the Proposal, municipal budgets are developed holistically to fund public service delivery covering a variety of public needs including housing and development, public safety, public health, services to at-risk populations, judicial services,

community development, environmental stewardship, libraries, parks, public facilities, educational programing, and recreation, among others. The Proposal, by its nature, imposes budget impacts in isolation and without regard to the multiplicity of community needs typically addressed by cities, an approach that local elected officials representing diverse communities and interests cannot (and should not) do.

Too often, cities must adapt to unfunded mandates (Growth Management Planning requirements being only one example), but the percentage increases proposed here are extraordinary. In the final phase, the Proposal seeks to lower the current annual maximum caseload of 300 - 400 misdemeanor cases per attorney to 120 “type - low” cases or 80 “type - high” cases, resulting in an average maximum of 100 cases per year. Accordingly, the budget impact of the lower case limit alone will be a 300% increase in allocation to indigent defense. This increase does not include the budget impacts from requiring additional resources to be allocated to indigent defense, such as social workers to provide release plans, treatment services, housing, health care, and the like.

Meanwhile, state law limits city general tax revenue increases over the phasing period to 3% (1% per year) without a vote of the people. Whatcom Small Cities are facing budget cuts currently and/or have recently implemented layoffs. Implementation of the Proposal would severely affect our ability to support other mandated and essential services and localized priorities designed toward root-cause solutions, such as low-income and affordable housing and services to at-risk populations (such as youth and seniors). Implementation of the Proposal would be seriously detrimental to our communities.

Whatcom Small Cities will continue to fund indigent defense at the level needed to preserve the right to counsel enshrined in the U.S. and Washington State Constitutions. Nevertheless, our communities should not be forced to disproportionately allocate limited revenue to this service without regard to other public needs—and without regard to any particularized finding that indigent defense is currently lacking in Whatcom County municipal court systems.

2. The Proposal fails to provide a meaningful and flexible framework, consistent with RCW 10.101.030, for cities to develop and adopt their own standards.

The Proposal is a rushed, one-size-fits-all solution that disregards the Washington statutory scheme for the provision of indigent defense. Washington law delegates the development, adoption and enforcement of indigent defense standards to local

government while recognizing that WSBA-endorsed standards should serve as guidelines, not obligatory requirements.¹

There is wisdom in allowing cities to develop their own standards within *generalized* guidelines, especially given there is no statewide funding mechanism. Defense standards that may work in a Washington city located within or adjacent to a large urban core will not necessarily be applicable to a city that is more remote. Further, Whatcom County is a border county, relatively removed from a large urban core. There is no evidence that changing standards will automatically (or in the near future) produce more defense attorneys or result in higher attorney retention in our communities. Similarly, the cities of Whatcom County need the flexibility to adopt and implement criminal justice programs tailored to the needs of each community, with indigent defense standards being one, albeit important, element.

Some of our cities experience attrition in the general municipal workforce unrelated to indigent defense. We are focused on making our communities desirable, affordable, safe, and vibrant places to live and work, which we believe is the best means of attracting and retaining a quality workforce. Each city must be able to address its own workforce needs in its own way within generalized guidelines. For the reasons stated above, this Proposal will hinder, not assist, in that effort.

3. Though the Proposal is framed as a court rule, its effect would be legislative in nature.

This problem is true of the current Court Rule Standards, but the challenges noted above call for heightened concern. The Proposal contains requirements (rather than guidelines) including:

- Compensation levels to be included in contracts;
- Specific cost items to be included in contracts;
- Municipal budget elements; and
- Procurement methods for contracts.

In other words, the tenor and substance of the Proposal belies the current court rule Preamble that states that “the authority of [the] rules is limited to attorneys and the courts.” The Proposal encroaches on municipal governments (and their legislative councils) which

¹ RCW 10.101.030.

have been delegated the authority and duty to enforce the right to counsel within municipal court systems.²

In many ways, the circumstances related to the adequacy of indigent defense are similar to the issues the Court confronted in its *McCleary v. State of Washington* decision. In *McCleary*, this Court ruled that the Legislature had failed to fulfill its constitutional obligation to our state's 1.1 million students. The Court also retained jurisdiction in the case and ordered the state to report back on its progress in complying with the Court's order. Two years later, the Court found the Legislature in contempt for its failure to establish a plan for fully funding K-12 public education.

The issues related to indigent defense services are similar to *McCleary* in that they both arise from constitutional requirements and/or state legislation (RCW 10.101.030), not local ordinances, codes or charters. As such, the funding should be derived from the State Legislature, not municipal budgets. In this way, the State can allocate funds where the needs related to indigent services are greatest.

Here, the Proposal is especially problematic because it violates the wisdom (and—in its legislative effect—the essence) of RCW 43.135.050 which prohibits “increased level of service” under an existing program without corresponding reimbursement from the State.

4. There has been insufficient explanation as to why the current standards regarding misdemeanor caseload limits, effective as of 2015, did not achieve the desired result.

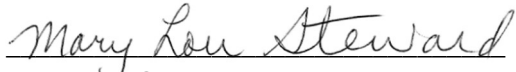
The adoption of those standards was approximately ten years ago. The National Public Defense Workload Study (“NPDWS”) criticizes, unpersuasively, the current caseload limits as being based on information that had deep roots and is therefore no longer valid.³ Of more concern, it appears that those recommending the Proposal did not analyze the possibility that the adoption of caseload limits and other aspects of the Proposal will not achieve the desired result, or what may be a better approach in Washington State, or what may be other options for Washington’s diverse communities. The Proposal does not include an explanation of why the outcome will be different this time in this state. This is not a true data-driven, evidenced-based approach. This, in addition to the lack of any study tailored to Washington and its diverse communities, results in a flawed proposal.

We respectfully request that you reject the Proposal.

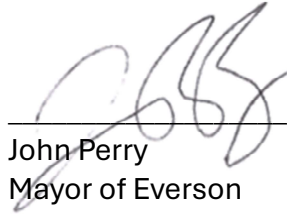
² *Davidson v. State*, 196 Wn.2d 285 (2020).

³ Nicholas M. Pace et al., *National Public Defense Workload Study* (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA2500/RRA2559-1/RAND_RRA2559-1.pdf.

Sincerely, the Mayors of Small Cities of Whatcom County,



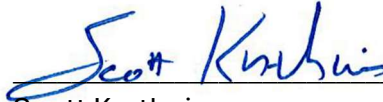
Mary Lou Steward
Mayor of Blaine



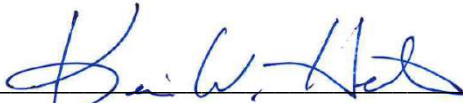
John Perry
Mayor of Everson



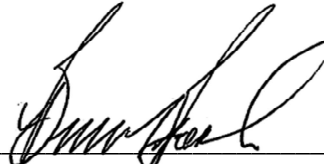
Greg Hansen
Mayor of Ferndale



Scott Korthuis
Mayor of Lynden



Kevin Hester
Mayor of Nooksack



Bruce Bosch
Mayor of Sumas

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: Proposed Indigent Defense Standards
Date: Friday, October 18, 2024 9:14:13 AM
Attachments: [Letter Re Indigent Defense Standards.pdf](#)

From: Scott Korthuis <KorthuisS@LYNDENWA.ORG>
Sent: Friday, October 18, 2024 9:09 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: Proposed Indigent Defense Standards

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Honorable Justices,

Please find attached a letter from the Small Cities of Whatcom County regarding the proposed indigent defense standards.

Regards,

Scott Korthuis

Chairman, Small City Caucus
Mayor

City of Lynden

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Lynden, WA 98264
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