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April 30, 2025

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Via email: supreme@courts.wa.gov

Re: CrR 3.1/CrRLJ 3.1/JuCR 9.2 Standards for Indigent Defense (appellate caseloads)

To the Honorable Justices:

I am a staff attorney at Nielsen, Koch & Grannis. Our firm contracts with the Office of Public Defense (OPD) to provide indigent appellate defense, which is 100% of my caseload. I am writing to urge the Court to adopt the interim appellate caseload standard of 25 cases per year, recommended by the Council on Public Defense and the Washington State Bar Association, pending the results of the forthcoming OPD-funded workload study.

I have been an appellate public defender for six years. Although I have become much more efficient during my six years as a public defender, I am still constantly behind in my assignment load. At a minimum, I must request a two-month extension of every opening brief deadline; typically, I need to request much more.

In the 2023/2024 fiscal year (FY), this problem was exacerbated by an OPD software error that channeled more than 100 extra cases to my firm. But every experienced attorney in my office knows that the problem predated this error and is getting worse over time.

My colleagues and I are all relieved that OPD has commissioned a workload study. It is very difficult for us, in our fragmented and opaque system of private contractors, to obtain big picture data to validate our lived experience. We have, however, been able to glean a few salient data points from our firm's records:

- OPD uses a case weighting system that assigns appellate defenders one base credit per case, plus an additional credit for every 800 pages of transcript. This formula was developed using a regression analysis, nearly a decade ago, to

achieve an overall average of 350 transcript pages per credit. But our firm's average last year was 24 percent higher: 434 transcript pages per credit. For the past ten years, the cases assigned to our firm have never dipped below 350 transcript pages per credit, but they have often substantially exceeded this average. It therefore appears the case weighting formula is not working as intended, at least at our firm.

- The number of personal restraint petitions (PRPs) assigned to our firm has increased substantially since 2020. Our records indicate they have more than doubled, from about 6 per year from 2015-2020 to about 15 per year in the last five years. My more experienced colleagues also note that the nature of our PRP assignments has changed in recent years: whereas the Court of Appeals used to identify discreet legal issues in its appointment orders, it now appoints us to identify and brief all potentially viable claims. Both these changes are significant because the case weighting system does not account for any of the things that make many PRPs particularly time-consuming: novel issues involving the time bar and other procedural hurdles, the assembly of massive appendices, and investigation. In May, June, and July of 2024, I was assigned one new PRP each month; to date, I have spent a total of 472 hours on these three cases, with oral arguments still to come. The two most time-consuming of these PRPs were awarded only two credits each, because they arise from Department of Corrections (DOC) or Indeterminate Sentence Review Board (ISRB) "proceedings," and therefore do not involve any trial transcripts. This is despite the fact that these two cases required me to conduct substantial investigation and assemble nearly 700 pages of appendices.

- Murder case assignments to our firm have almost doubled since 2015/2016, outpacing even local homicide trends. For obvious reasons, these most serious cases tend to involve complex records.

- Parental rights case assignments fluctuate year to year, but they have overall risen steadily over the past decade. Like PRPs, these cases burden attorneys in ways the case-weighting system does not address: they involve voluminous exhibits and require urgent prioritization under the Rules of Appellate Procedure (RAPs). Because these cases are subject to accelerated review, under RAP 18.13A, an attorney who gets a parental rights case must pause competing assignments and draft all the requisite motions to push back the associated filing deadlines.

Our firm has submitted a collective comment, with graphs illustrating the trends discussed above. It is critical that this Court understand: the increases in each category (murders, PRPs, parental rights cases, transcript pages per credit) compound one another. Last year, I specialized in DOC- and ISRB-related PRPs, while my most experienced colleagues took on high volumes of murder cases and other cases with exceptionally long

transcripts. We all drowned in our workloads, but the attorneys who also regularly take on parental rights cases faced the additional burden of accelerated review. There is no way to distribute this work that would mitigate this compounding effect.

The FY 2023/2024 OPD software error inflated my personal caseload by 7 "cases": from 36 credits to 43. As explained below, the effects of this 20 percent increase were devastating, and the consequences will reverberate long after it has been "corrected." But the years preceding this error were already very bad.

Before the OPD software error, I worked almost every weekend and still filed numerous motions to extend opening brief deadlines in virtually all my cases. After this error, I frequently needed extensions of 120 days or more, despite working long days and every weekend. As a consequence of the software error, my case backlog swelled to a dozen unbriefed cases, for months on end. But even before the error (excluding the outlier pandemic year of 2020/2021), my constant case backlog ranged from four to eight opening briefs. I was never caught up, despite unceasing efforts.[1]

For two reasons, these chronic workload problems are not going to resolve with the correction of the OPD software error. First, as the more experienced attorneys in my office can attest, the 36-case credit standard has been increasingly unsustainable for many years. Second, those of us affected by the software error make up a substantial percentage of Washington's appellate public defenders, and we are suffering serious fatigue and professional development stagnation. Under these circumstances, simply reverting to the status quo is flirting with disaster. We need the relief of the interim standard, and we need it fast.

A case does not go away when we file the opening brief. Instead, it may hang around for two years or more, usually requiring a reply brief, often requiring a petition for Supreme Court review, sometimes requiring oral argument, and always requiring an unpredictable amount of client counseling.[2] In my experience, there is always at least one case every year,

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[1] I take one vacation every year, to Oregon for three days. Last August, I wrote a complex, 4,000-word reply brief on this vacation. (This client's convictions and long sentence were subsequently reversed in full.) On the 2023 trip, I wrote a complex answer to a petition for review. (This Court ultimately denied review.) On Christmas Eve last year, I spent the first half of the day at urgent care, and I spent the afternoon and evening writing an opening brief. I worked every holiday in 2024 except for Christmas Day.

[2] The prospect of retrial or resentencing, or of undoing a plea agreement, may expose a client to serious risk. Determining and explaining this risk is a time-consuming part of an appellate lawyer's job. And, regardless of risk, every professional should strive to translate jargon for their clients. Consistent with RPC 1.4, I feel strongly that I should be accessible to my clients, almost all of whom are incarcerated with limited access to the phones, and many of whom have mental health impairments and require patient and creative counseling. I therefore keep my phone with me all the time, ready to interrupt my writing when a client

and usually more, for which effective representation means a profound and unusual time investment. (In my caseload, examples include a direct appeal requiring a 50-state survey for an Eighth Amendment challenge, and numerous PRPs requiring substantial investigation and the assembly of enormous appendices.) The 36-case / credit system cannot absorb these predictable outliers.[3]

As a result, an attorney who fulfills her duty of diligence, under Rule of Professional Conduct (RPC) 1.3, is punished harshly, falling farther and farther behind and earning ever more reprimands and threats from the Court of Appeals in rulings on her motions to extend. Worse, this attorney's subsequent clients are punished, waiting many months for even a first consult about the merits of an appeal.

In our current, over-stretched system, the need to fulfill RPC 1.3 (diligence) begets violations of RPC 1.3 (promptness). It is a sickening feeling to file a brief when I wonder if I have missed an issue, or when I question the client's grasp on the ramifications of the appeal. But, under constant threat of sanctions by the Court of Appeals for late filings, this sickening feeling becomes atmospheric. One just learns to live with it, looping back for damage control as the new assignments pile up.

In the 36-case regime, the need to fulfill RPC 1.3 also comes at the expense of our duties under RPC 5.1. Rule 5.1 requires supervising attorneys to make "reasonable efforts" to ensure new attorneys comply with the RPCs. But what is "reasonable" when every supervising attorney is overwhelmed by her own responsibilities to clients? In my view, what we have deemed "reasonable" under these circumstances, out of necessity, is neither fair to new attorneys (or their clients) nor good for the profession. We give new attorneys a few tips and warnings and then hope they ask the right questions as they arise, because we have no time for actual supervision.

Finally, the chronic backlog I am describing is a problem that exacerbates itself. The failure to address it is therefore short-sighted.

Because we are chronically behind, the attorneys in my office spend an inordinate amount of time drafting motions to extend opening brief deadlines.[4] The time I spend

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wants to talk. Because I represent clients in all of Washington's correctional facilities, I very rarely meet a client in person. This saves the State lots of money (in my time and travel expenses), but I often question whether I am providing my clients—particularly those with literacy deficits and other communication issues—with adequate service.

[3] Nor can it absorb predictable events in an attorney's personal life, such as an elder or a child suddenly needing unexpected care.

[4] This Court recently approved an amendment to RAP 18.8 authorizing one "streamlined" request for an extension of 30 days, by an attorney who has not previously requested any extension. RAP 18.8(b). While I appreciate the sentiment of this rule, I have so far found myself reluctant to invoke it. Certain appellate court officials view every public defender's

drafting these motions—in which I have to detail an ever-shifting and expanding list of assignments that have prevented me from getting to other assignments—keeps increasing: the further behind I fall, the more time I have to take away from my cases to ask for more time for my cases . . .

And because we are forced to triage our responsibilities, we are not attending to our professional development. Under RPC 1.1, we must stay abreast of developments in the law. In the era of GR 14.1, this includes the increasingly vast landscape of unpublished decisions. But something somewhere has to give, and so I find myself skimming new opinions for anything obviously relevant to an open case, hoping to get back to them in depth later, and ultimately almost never doing so. This means my research for each individual case takes longer, as I must issue-spot from a place of relative ignorance.

In sum, the current system cannot hold. The forthcoming workload study gives me faint hope that OPD is going to undertake badly needed reforms. Until it does, we need the emergency measure of the interim standard.

Thank you for your attention to this matter,

Erin Moody
Staff Attorney, Nielsen Koch & Grannis

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extension request with extreme suspicion, and I therefore prefer to maintain a detailed (not "streamlined") public record of my workload and efforts to meet impossible deadlines.

From: OFFICE RECEPTIONIST, CLERK
To: Farino, Amber
Cc: Ward, David
Subject: FW: CrR 3.1/CrRLJ 3.1/JuCR 9.2 Standards for Indigent Defense (appellate caseloads)
Date: Wednesday, April 30, 2025 8:20:13 AM
Attachments: Public Comment re Interim Caseload Standard.pdf

From: Erin Moody <MoodyE@nwattorney.net>
Sent: Tuesday, April 29, 2025 9:14 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: CrR 3.1/CrRLJ 3.1/JuCR 9.2 Standards for Indigent Defense (appellate caseloads)

Good morning,

Attached please find my comment in support of the proposed amendments to CrR 3.1, CrRLJ 3.1, and JuCR 9.2, regarding appellate caseload standards for indigent defense.

Thank you very much,

Erin Moody

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