FILED
SUPREME COURT
STATE OF WASHINGTON
JUNE 8, 2023
BY ERIN L. LENNON
CLERK

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE PROPOSED NEW SUPERIOR COURT SPECIAL PROCEEDINGS RULE (SPR 98.24W)—UNLAWFUL DETAINERS – APPOINTMENT OF ATTORNEY [REVISED]

O R D E R

NO. 25700-A-1520

A Consortium (Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program), having recommended the proposed new Superior Court Special Proceedings Rule (SPR 98.24W)—Unlawful Detainers – Appointment of Attorney [Revised], and the Court having published the proposed new rule for comment and then having determined that the proposed new rule should be modified, having now approved the revised proposed new Superior Court Special Proceedings Rule for publication on an expedited basis;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the proposed new rule as attached hereto is to be published expeditiously for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than August 30, 2023. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 8th day of June, 2023.

For the Court

González, C.J.

GR 9 Supplement – Proposed SPR 98.24 (NEW)

The Washington Supreme Court Rules Committee reviewed the comments on a new proposed rule regarding the appointment of counsel in unlawful detainer proceedings (SPR 98.24). The proposed rule was originally submitted by: Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program

The original rule was published for comment by the October 2022 En Banc Conference with a comment expiration date of January 31, 2023. The Superior Court Judges' Association was granted an additional month until February 28, 2023 to provide comments.

Justice Yu, co-chair of the Rules Committee contacted Jim Bamberger, Director of the Office of Civil Legal Aid to obtain information regarding the availability of counsel for appointment in each county and to inquire whether additional funding would be available going forward. The attached materials were made available to Justice Yu and Mr. Bamberger stated that additional funds had been appropriated by the Legislature.

Justice Yu revised the proposed rule and such revisions were accepted by the Office of Civil Legal Aid and subsequently accepted by the Rules Committee. The Rules Committee is recommending that the revised rule be republished for comment.

[PROPOSED] SPR 98.___W
UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

In all unlawful detainer cases where an individual qualifies for an attorney at public expense in accordance with RCW 59.18.640, the following protocols shall be followed:

1. If the tenant appears without an attorney, before taking any action in the case, the court shall:
   a. Advise the tenant that if they are indigent, they have a statutory right to be represented by an attorney at public expense;
   b. If applicable, refer the tenant for screening and appointment of counsel pursuant to any local order or established procedure consistent with RCW 59.18.640; and
   c. Continue the hearing for a reasonable period of time so that counsel may be obtained.

2. If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may file a motion requesting that the court appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may file an ex parte motion for appointment and request that the court stay the execution of the writ for ten days. The lawyer seeking appointment shall establish by declaration that good faith efforts were made to notify the other party or, if no efforts were made, why notice could not be provided prior to the application for an ex parte stay, and describing the immediate or irreparable harm that may result if an immediate stay is not granted.

3. A stay issued under this rule will be set to expire ten days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court may lift the stay.

[PROPOSED] SPR 98.___W
UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

In all unlawful detainer cases where an individual qualifies for an attorney at public expense in accordance with RCW 59.18.640, the following protocols shall be followed: ~~applies to appoint attorneys for indigent tenants:~~

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1. If the tenant appears without an attorney, before taking any action in the case, the court shall: ~~must~~
   a. Advise ~~Inform~~ the tenant that if they are indigent, they have a statutory right to be represented by an attorney at public expense ~~if they are indigent~~;
   ~~b. Ask the tenant if they want the court to appoint an attorney if they are eligible;~~
   ~~c.~~b. If applicable, r~~R~~efer the tenant for screening and appointment of counsel pursuant to any local order or established procedure consistent with RCW 59.18.640; and
   ~~d.~~c. Continue the hearing for a reasonable period of time so that counsel may be obtained~~at least 14 days~~.

2. If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may file a motion requesting that the ~~move to~~ court appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may file ~~make~~ an ex parte motion for appointment and request that the court ~~to~~ stay the execution of the writ for ten days. ~~Upon such motion, the court shall appoint the lawyer and stay the writ for ten days.~~ The lawyer seeking appointment shall establish by declaration that good faith efforts were made to notify the other party or, if no efforts were made, why notice could not be provided prior to the application for an ex parte stay, and describing the immediate or irreparable harm that may result if an immediate stay is not granted.

3. A stay issued under this rule will be set to expire ten days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court may ~~shall~~ lift the stay ~~immediately~~.

Washington State Office of Civil Legal Aid

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Philippe Knab
Eviction Defense Program Manager
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To: Hon. Jennifer Forbes, President SCJA
Ashley Callan, President AWSCA
Tammy Ownbey, President WSACC

From: Philippe A. Knab, Eviction Defense Program Manager
Jim Bamberger, OCLA Director

Re: RCW 59.18.640 -- Court-Appointed Tenant Defense Program

Date: January 23, 2023

Monday, January 18, 2023, marked the first anniversary of full statewide implementation of the new legislative mandate for court-appointed attorneys to represent indigent tenants in unlawful detainer cases. We wanted to take this moment to (a) reflect on the monumental change in unlawful detainer practice, procedure, and outcomes resulting from the new mandate, and (b) express our gratitude for the collaborative support we have received from the Superior Court Judges' Association, Court Administrators, and Court Clerks as we navigated the uncharted waters of standing up the nation's first – and still only – mandate that courts appoint attorneys to defend indigent tenants in judicial eviction proceedings.

To understand the sea-change driven by the new mandate, it is important to revisit the pre-existing status quo. Historically, landlords were represented in more than 90% of residential unlawful detainer cases. Tenants were represented in less than 10%. Applications for writs of restitution were rarely challenged and default rates were extraordinarily high, leading to systemic displacement of tenants from their homes – large percentages of whom experience now tells us never should have been.

During the first year of this program, more than 6,500 indigent tenants were appointed well-trained and competent defense attorneys. Data[1] generated unequivocally demonstrates the efficacy of the appointed counsel model in terms of protecting housing stability and achieving other positive outcomes for tenants. While still too high, we are noting some reduction in tenant default rates – a trend we expect to continue as more and more tenants understand that they are entitled to a civil public defender to represent them in their eviction cases.

[1] OCLA's implementation is data driven. Appointed counsel providers are required to track many data points from initial contact through case closing on a common case management system. These data are pushed to OCLA on a quarterly basis and loaded into an interactive data dashboard.

Moreover, the fact that tenants are now represented by counsel in these cases changed the cost-benefit analysis for landlords and their attorneys. This change drives a greater interest and willingness on the part of landlords and counsel to negotiate mutually acceptable settlements in these cases. Finally, recognition that these cases will now be litigated by competent defense counsel (along with other recent changes in eviction law and procedure (*e.g.*, just cause eviction)) has contributed to a significant reduction in the number of unlawful detainer filings in the post-moratorium period. During 2016-19, the average statewide number of UD filings ranged between 16,000 and 18,000 per year. Current data reported by AOC show an average monthly filing level of about 900 UDs. This leads us to project a "new normal" of about 12,000 UD filings per year.

OCLA's ability to timely and properly implement this program was greatly assisted by our judicial branch partners at SCJA and AWSCA, and our executive branch partners at WSACC. SCJA coordinated and led an inclusive work group that, among other things, generated the first bench card for unlawful detainer practice. It also hosted a series of trainings for judicial officers.[2] Courts and court administrators in every judicial district worked with OCLA and our tenant defense contractors to develop and adopt procedures to inform unrepresented tenants of their potential right to an eviction defense attorney and where to go to be screened for eligibility. They also established procedures for the appointment of attorneys for tenants who meet financial eligibility requirements. Individual judicial officers across the state have been open and inviting when we have asked to meet with them. They have shared observations and ideas and offered critique when and where they felt it was needed. Court clerks have made themselves available to help troubleshoot implementation issues relating to filing and access to court documents, waiver of court fees, and other matters.

Implementation of the new and untested requirement for court appointment of tenant defense attorneys has neither been simple nor uniform across the state. Judicial interpretation of the requirements of the law and the processes needed to effectively implement the same have varied. Defense counsel frequently file motions challenging landlord attorney and sometimes judicial practices as being at odds with the requirements of RCW 59.18.640 and recent changes in underlying state and federal landlord tenant laws. Several decisions have been appealed. As they have already begun to do,[3] we anticipate that the appellate courts will provide additional clarity and guidance in the coming years, leading to greater consistency of UD practice and procedure across the state moving forward.

OCLA's court-appointed tenant defense program remains a work in progress. We receive and review monthly case filing reports from AOC and caseload reports from our providers. We continue to assess and revise the allocation of tenant defense attorneys in specific judicial districts – adding capacity in some and reducing it in others. In some cases, we have changed providers. We have and are continuing to add capacity to ensure continuity of defense services

[2] Given experience to date, we suggest the need for additional training for judicial officers (including pro tem judicial officers) and hope to work with the SCJA Education Committee to make this happen soon.
[3] *See, e.g.*, Sherwood Auburn v. Pinzon (Div. I, No. 84119-0 (12/5/2022)) holding that the CARES Act 30-day notice requirement and not the RLTA's 14-day requirement applies in certain federally supported housing.

where they might have otherwise been interrupted because of demand or where one or more local attorneys is unavailable due to caseload, personal reasons, or turnover. In many cases, this requires the appearance of eviction defense attorneys from outside the jurisdiction. Where this occurs, they require the ability appear and participate virtually and submit materials electronically. We and our contracted tenant defense providers look forward to working with judicial officers, clerks, and court administrators to ensure such accommodations are routinely made.

When on January 18, 2021, we certified the final counties ready to go, we made a commitment to the courts, the rental housing industry, and most importantly tenant defendants that we would do our best to avoid disruption of normal operations that would be caused by suspension of the same. We have kept that commitment. Despite significant challenges including higher than anticipated time/case and turnover rates, OCLA has not yet suspended certification in any judicial district. We have asked the Legislature for funding necessary to ensure that we have sufficient tenant defense capacity and redundancy for the balance of this fiscal year and in the coming biennium.

In closing, we again thank you and your colleagues for your assistance and support as we designed and implemented this untested model. We recognize that the change driven by the Legislature's mandate for court-appointed tenant defense counsel disrupted pre-existing norms of practice and court operations in unlawful detainer cases. A year out, we trust you will agree that the benefits – greater fairness and due process in these unlawful detainer cases and greater housing stability for tenants – have been worth it.

Washington State Office of Civil Legal Aid

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James A. Bamberger, Director
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To: Sen. Christine Rolfes (Ch. SWM)
Sen. Lynda Wilson (Ranking SWM)
Rep. Timm Ormsby (Ch. H. App)
Rep. Drew Stokesbary (Ranking H. App)
Sen. Patty Kuderer (Ch. SHLG)
Sen. Phil Fortunato (Ranking SHLG)
Rep. Strom Peterson (Ch. HHSV)
Rep. Greg Gilday (Ranking HHSV)

From: Jim Bamberger, Director
Philippe Knab, Eviction Defense Programs Manager
Erin Ryan, Eviction Defense Programs Counsel
Office of Civil Legal Aid

Re: Report to the Legislature on Implementation of the Appointed Counsel Program for Indigent Tenants in Unlawful Detainer Cases (RCW 59.18.640; 2.53.050; sec. 116(7), ch. 297, laws of 2022)

Date: July 28, 2022

Please accept this memo as the Office of Civil Legal Aid's report on implementation, operation, and early data associated with the indigent tenant court-appointed attorney program established in sections 8 and 9, ch. 115, laws of 2021.[1]

1. Legislative Charge

Sections 8 and 9 of ch. 115, Laws of 2021 (2ESSB 5160, codified at RCW 59.18.640) established a court-appointed counsel program for indigent tenants in unlawful detainer (eviction) cases. The right to appointed counsel is held by all indigent tenants against whom unlawful detainer proceedings have been commenced. The duty to appoint attorneys to represent indigent tenants is assigned to the superior court.[2]

Administration was assigned to the Office of Civil Legal Aid (OCLA). RCW 59.18.640(1). OCLA was directed to develop and submit an implementation plan within 90 days of the effective date and given one year to fully implement the program statewide. The Legislature appropriated $24.1M for OCLA to implement and operate the program during the FY 22-23 biennium.

[1] The program is commonly referenced as the tenant right to counsel (RTC) program. This report uses the terms "appointed counsel program" or "right to counsel (RTC) program" interchangeably.

[2] "Subject to the availability of amounts appropriated for this specific purpose, the court must appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters 59.12 and 59.20 RCW." RCW 59.18.640(1).

This report responds to the Legislature's directive that:

> By June 30, 2022, the department [OCLA] shall provide to the legislature a detailed report of program expenditures and outcomes including but not limited to the number of individuals served, the average cost of a representation case, and the number of qualified individuals who qualified for but were unable to receive representation for funding or other reasons.

In late June, we advised you that this report would be delayed by about one month as we continued to review and analyze data.

The appointed counsel for indigent tenants program has only been fully operational since mid-January 2022. Six months into full statewide operation, it is premature to run a cost per case analysis. This is, in large part, because the unlawful detainer practice itself (for plaintiffs, tenant defendants, judicial officers, and court administrators) is still in the early stages of transition. Specifically,

- OCLA's data acquisition, reporting, and analytical tools are new and still in the early stages of implementation; technical issue identification and resolution and data cleaning efforts continue with each new sync from OCLA-contracted providers
- Tenant defense practice is new and still evolving
- Plaintiffs' practice is also in a significant evolutionary moment with simultaneous implementation of the RTC program, just cause eviction, the Eviction Resolution Pilot Program (ERPP), and other substantive and procedural changes enacted during the 2021 legislative session
- Court and court administrative management of unlawful detainer cases are also in a state of transition resulting in ever-evolving processes, timelines, and expectations
- The substantive mix of unlawful detainer caseloads is changing as Washington State moves further away from the eviction moratorium and as federal and state pandemic rental assistance is increasingly exhausted

While a work in progress, the interactive dashboard referenced in the Data and Reporting section below and attached to this report offers insight into many of the data points that OCLA is tracking and monitoring. In addition, OCLA engaged a research team at the University of Washington's Evans School of Public Policy and Governance to track and report on a range of indicators for the June 30, 2023 report. That report will include the cost per case data requested by the Legislature.

2. Key Tenant RTC Implementation Mileposts

- <u>April 22, 2021</u> – Governor Inslee signs 2ESSB 5160 making the right to appointed counsel program (RTC Program) effective

- July 15, 2021 – OCLA publishes initial RTC Program Implementation Plan
- July – August 2021 – OCLA contracts with 13 civil legal aid programs to provide RTC services in every judicial district of the state and issued authorization to recruit and hire up to 70 FTE attorneys to be trained and dedicated to represent indigent tenants throughout Washington State
- September 2021 – statewide Eviction Defense Screening Line (EDSL) opens for operation; indigency screening and assignment of eligible tenants to RTC contracted providers occurs on average within two working days following referral to or tenant request for screening and assignment
- October 2021 – OCLA certifies that RTC attorneys are hired, trained, and available for appointment in the first 18 of the state's 37 judicial districts
- January 18, 2022 – OCLA certifies that RTC attorneys are trained and available for appointment in all 37 judicial districts
- April 22, 2022 – first anniversary of the RTC Program; *full implementation completed three months early*

3. Indigent Tenants' Right to Appointed Counsel

Under RCW 59.18.640(1) all indigent tenants have a right to a civil public defender to represent them in unlawful detainer actions commenced under RCW 59.12; 59.18; and 59.20. This right:

- Attaches upon commencement by a landlord of an unlawful detainer (UD) action seeking to reclaim possession of rental residential property occupied by a tenant[3]
- Requires appointment of an OCLA-contracted attorney by the superior court in all unlawful detainer cases where the tenant defendant(s) is(are) indigent

To ensure effective and uniform implementation of the right to appointed counsel, OCLA engaged the Superior Court Judges' Association (SCJA) and a broad range of stakeholders (including representatives of the rental housing industry) to develop uniform protocols for courts to follow when a tenant appears in response to an Order to Show Cause. To ensure courts adhere to the requirements of RCW 59.18.640, OCLA also conditioned certification of RTC services on court adoption of a standing order or administrative assignment in each of the 37 judicial districts outlining the process for appointment of counsel for indigent tenants in unlawful detainer cases in the jurisdiction.[4]

Under both a "bench card" developed by the SCJA (attached) and local court-adopted protocols, judicial officers must advise every unrepresented tenant defendant of their possible right to appointed counsel; provide them with information about where and how to be screened for

[3] UD actions are commenced either by (a) service of a Summons on the tenant or (b) filing of a Summons and Complaint in the superior court in the county in which the property is located.
[4] OCLA certification is a condition precedent to the authority of a court to entertain an unlawful detainer action involving an indigent tenant.

eligibility, including the number to the Eviction Defense Screening Line; and continue the hearing for time necessary (a) for the tenant to be screened, (b) for tenants found eligible, to seek appointment of an attorney to represent them, and (c) for counsel to meet with their clients and prepare defenses to the claim for writ of restitution.[5]

4. Components of OCLA's Appointed Counsel (RTC) Program

The RTC program has five core components:

- **Eviction Defense Screening Line (EDSL)** – EDSL (855-657-8387) is staffed by non-attorney screeners who receive telephonic and online requests from tenants for screening and assignment to an OCLA-contracted attorney. EDSL also receives referrals from courts, court administrators, legal aid programs, community-based programs, and others on behalf of tenants against whom unlawful detainer actions have been commenced. RCW 59.18.365 requires landlords to include the EDSL contact number in their UD summons.
- **RTC Legal Aid Programs and Contractors** – Thirteen (13)[6] established legal aid programs were initially engaged to provide representation for indigent tenants found eligible for appointment. Each program was assigned responsibility to hire, train, and oversee the work of attorneys dedicated exclusively to representation of RTC-eligible clients. Some judicial districts do not experience a level of demand sufficient to support a full-time eviction defense attorney. There, tenants are represented by trained attorneys under contract with a local or statewide legal aid program. Contract attorneys also represent tenants in judicial districts where the primary OCLA-contracted provider has a conflict that prohibits it from representing a tenant and there is no other OCLA-contracted provider available to serve tenants in the judicial district. While contract attorney representation is not the preferred approach to providing effective assistance of counsel, it is a necessary corollary to the staffed attorney model.
- **RTC Appellate Representation** – Recent revisions of laws governing landlord-tenant relations and eviction practice fundamentally changed the rules of the game. HB 1236 established a uniform requirement that evictions be based on "just cause". Among other things, SB 5160 established both the ERPP and the indigent tenant RTC program. These laws are new and subject to an array of interpretations that are now being examined by judicial officers in every corner of the state. Conflicting judicial decisions in UD cases interpreting these new laws has generated a need to seek clarification and legal certainty through the appellate process. It also demonstrated a need to establish meaningful and coordinated appellate capacity within the indigent tenant RTC program.

[5] Writs or judgments entered against indigent tenants who have not been properly apprised of their rights under RCW 59.18.640 are likely void and subject to being vacated.

[6] Northwest Justice Project, King County Bar Association/Housing Justice Project, Tacomaprobono Community Lawyers Housing Justice Project, LAW Advocates of Whatcom County, Skagit Legal Aid, Snohomish Legal Services Housing Justice Project, Kitsap Legal Services, Thurston County Volunteer Legal Services, Clark County Volunteer Lawyer Program, Yakima County Volunteer Attorney Services, Benton-Franklin Legal Aid, Spokane County Bar Association Housing Justice Project, Chelan-Douglas County Volunteer Attorney Services.

Appellate advocacy is a specialized practice. While a few RTC contracted programs have experience and capacity to undertake appeals of adverse judicial decisions, most do not. Statewide appellate capacity needed to be established to accept and pursue appeals on behalf of tenants served by OCLA-funded programs without internal appellate capacity or expertise.

- **Statewide Training and Support** – Statewide training, technical assistance, and support capacity is critical to consistent and effective implementation of indigent tenants' right to effective assistance of counsel.
- **Conflict and Emergency RTC Capacity** – Early experience indicated a need to establish statewide capacity to (a) provide cover for local RTC attorneys who may be at caseload limits, on leave, or otherwise unavailable, (b) address situations where the primary RTC program(s) in a particular region are unable to represent the tenant(s) due to conflicts of interest with currently or previously represented clients, and (c) provide emergency representation for tenants faced with the potential loss of their right to appointed counsel or dispossession from housing due to improper issuance of a writ of restitution.

5. Data and Reporting

The appointed counsel program in Washington State is new and unique among "tenant right to counsel" programs nationally. To ensure proper stewardship of scarce state resources, assess efficacy of the RTC program, and to provide public policy makers with the best information possible about the human, fiscal, and operational costs and benefits of the program, OCLA approached data gathering, tracking, analysis, and reporting with a sense of urgency. Components of this effort are outlined below.

- OCLA-contracted providers are required to use the LegalServer case management system. This powerful cloud-based system provides a platform for comprehensive client demographic and legal service tracking, time keeping, and outcome data. OCLA contracted with JustTech, a national data analytics firm with expertise in the LegalServer system, to build a uniform data module for the RTC Program. This module is resident on each RTC contractor's incidence of LegalServer and is regularly updated as new information or data needs are indicated.
- Each RTC-contracted program syncs RTC data quarterly to OCLA's incidence of LegalServer. The data shared is comprehensive, yet (as required under applicable Rules of Professional Conduct) protects information that might lead to disclosure of client identity.
- In addition to LegalServer data, OCLA receives monthly reports from all RTC contractors documenting the number of open cases (both brief and extended representation) and average professional attorney time per closed case. OCLA uses this data to track and compare experience between and across programs, and to compare with UD filing and writ data provided monthly by the Administrative Office of the Courts.

- OCLA's data analytics contractor created and updates an interactive dashboard that tracks a range of data points captured by RTC-contracted programs. An initial version of the RTC data dashboard showing experience from January through May 2022 is attached.[7]

As noted earlier, OCLA contracted with the University of Washington's Evans School of Public Policy to monitor, analyze, and produce a report by June 30, 2023 that responds to the data points outlined in section 116(7), ch. 297, Laws of 2022 (the FY 2021-23 supplemental operating budget).

6. Coordination and Communication with Courts, Court Administrators and Clerks:

Upon passage and the Governor's signing of SB 5160, OCLA engaged with the Superior Court Judges Association (SCJA), the Association of Superior Court Administrators, and the Washington Association of County Clerks to help facilitate effective implementation of the court-appointment program. These efforts resulted in adoption of protocols in all judicial districts that ensure timely identification, screening, and appointment of counsel for indigent tenants in all unlawful detainer proceedings. Examples of related efforts include:

- OCLA participates in the SCJA's ERPP Work Group. Staffed by the Administrative Office of the Courts, this group brings together rental housing industry members, judicial officers, clerks, court administrators, legal aid, state rent assistance, and dispute resolution program representatives. The Work Group meets monthly.
- OCLA published and shared eleven (11) memoranda (all hosted on OCLA's website) judges, court administrators, and clerks on issues related to effective and proper implementation of the RTC Program established in RCW 59.18.640.
- OCLA worked with the SCJA Education Committee, rental housing interests, and legal aid providers to offer an initial three-day training for judicial officers on the legislative changes to landlord-tenant substantive law and unlawful detainer practice and procedure enacted in 2021. OCLA is currently working with the SCJA Education Committee to update and enhance the UD training for judicial officers with a focus on peer-to-peer judicial officer engagement so that there is consistency of understanding and expectation among all who preside over unlawful detainer dockets.

7. Early Lessons and Findings

Since commencing operations in October 2021, RTC attorneys have been appointed for all tenants screened and found eligible for appointed counsel in every case in every judicial district in the state. While this is a benchmark worth celebrating, we caution that there remain significant numbers of tenant defendants who do not know of their rights to appointed counsel,

[7]After each monthly data sync, OCLA staff, JustTech, and the research team at the UW Evans School review and assess for irregularities and changes that need to be made to ensure consistent and reliable pushes of all relevant data points. This is a work in progress, and "data cleaning" efforts are ongoing both at the programmatic and statewide level. Significant data discrepancies remain between providers in a number of fields reported in the most recent data dashboard.

do not understand the complex documents served on them at the start of an unlawful detainer proceeding, experience significant barriers to asserting their legal rights, and who fail to appear in response to the Order to Show Cause. For these tenants, the right to counsel is illusory. For OCLA and the RTC provider community, the challenge is to identify and inform tenants of their rights and how they can timely assert and defend them. This work is in progress.

Though the program has been fully operational on a statewide basis for only six months, several early lessons and observations can be shared now. These include:

a. The Reforms of 2021 (Including RTC) Are Having A Salutary Effect

As of the date of this report, UD filings remain significantly below historical norms, though there has been a progressive increase in filings in recent months.[8] Initial experience suggests that the cumulative impact of the substantive and procedural changes enacted in 2021 (HB 1236 and 2ESSB 5160) resulted in a recalibration of cost-benefit considerations for landlords (and their counsel) when considering whether to commence an unlawful detainer proceeding.

In a sharp departure from prior practice, the 2021 reforms place tenant property rights on a more balanced footing with those of landlords. As a consequence, landlords (and counsel) appear to recognize that writs no longer come cheap or easy; that should they decide to commence a UD proceeding, they will be required and tested to prove their right to extraordinary, accelerated relief (summary dispossession of their tenants' right to live in their home); and that their tenants will be effectively represented by skilled attorneys appointed by the court.

As noted above, HB 1236 (introducing just cause evictions) altered the eviction landscape in Washington State at the same time as the appointed counsel requirements and imposition of ERPP processes for cases involving nonpayment of rent took effect. Preliminary data suggests that most UD cases filed in the year since enactment of HB 1236 and 2ESSB 5160 did not involve allegations of nonpayment of rent. Most cases handled by RTC attorneys during this time involved some cause-based reason or other claim of legal basis for relief not involving payment of rent.[9] By their very nature, cause-based cases involve a possession-related factual dispute, requiring significantly more time for attorneys to litigate than nonpayment of rent cases.

The balance between the percentage of cause-based and rent-based UD filings is likely to change as the availability of rent assistance subsides and rental rates continue their unparalleled inflationary rise, placing more tenants – including those with excellent rental histories – at increasing risk of inability to pay and eviction. These trends have already begun to drive increased numbers of nonpayment cases being filed.

[8] Average UD filings in Washington State during the pre-pandemic period were between 16,000 and 18,000 per year. The most recent filing data (June 2022) shows a monthly total of 997. This is an increase from prior post-moratorium months and suggests that we are now entering a period of significant UD filing increases.

[9] A significant number involve claims of landlord intent to reoccupy or sell the property. These, too, must be tested to assess whether the claim of intent is legitimate or a ruse to avoid the need to prove just cause.

b. Representation Preserves Tenancies and Promotes Residential Housing Stability

Court-appointed attorneys represented tenants in close to 3000 Unlawful Detainers proceedings between January 1 and May 31, 2022. Data from OCLA-contracted providers confirms that legal representation protected tenant rights to remain in their homes in more than 50% of closed cases in which the outcome is known. Further, in cases where an adverse outcome regarding continuity of the tenancy is indicated, attorneys are successfully negotiating agreements that extend time to move, result in orders of dismissal and orders of limited dissemination, provide the tenant relief from future claims of back-due rent, and other outcomes that significantly benefit the tenant and reduce the long-term negative impact on their ability to find rental housing.

c. RTC Attorneys are Professional and Effective; Courts Processes Have Not Suffered

The unlawful detainer process under RCW 59.12, 59.18, and 59.20 is accelerated, allowing landlords to quickly recover property as an interim measure through judicial issuance of a writ of restitution. Writs issue following hearings in which landlords are required to "show cause" or demonstrate that there are no material facts at issue and they are entitled to immediate recovery of the premises. Historically, landlords faced few obstacles in securing lightning quick relief even in cases in which they were not entitled to the same under applicable law and the facts of the case.

Historically well over 90 percent of UD cases involving indigent tenants were not contested either because the tenant did not show or because the unrepresented tenant was unable to explain why the landlord (represented by counsel) should not evict them. The Legislature recognized the unfairness of this situation and determined that indigent tenants should be represented before they are summarily disposed of their right to live in their homes. The right to appointed counsel now established in RCW 59.18.640 ensures that such representation is available for indigent tenants.

During legislative debate, concerns were raised that the appointed counsel program would interfere with the right of landlords to early relief. 2ESSB 5160 did not change the time in which a hearing must be scheduled on a landlord's claim of right to a writ of restitution, nor did it alter the landlord's right to early relief where the facts and law support it. However, nothing in pre-existing law requires that judgment on the claim for early relief be granted within a specific timeframe, and nothing in 2ESSB 5160 changed that.

Due process requires that tenants be given notice of the landlord's claim for early relief and a fair opportunity to contest the same. Appointing and providing the tenant's attorney an opportunity to properly contest the landlord's claim of right to possession may very well extend cases beyond their historical average timelines. This is the inevitable consequence of restoring fairness to and ensuring due process in a system that was previously skewed heavily in favor of the landlord.[10]

[10] Significant changes in average time per case have not been observed. OCLA data shows that contested cases involving extended representation are on average closed within 77 days of being opened.

Every day across the state, court-appointed attorneys provide zealous, effective, ethical, and professional representation on behalf of tenants in unlawful detainer cases. Judicial officers across the state with whom OCLA staff regularly consult confirm that tenants receive effective assistance of counsel in these cases, know and effectively identify and argue applicable law, understand the circumstances of their clients' cases, file appropriate motions, and are highly professional.

Locally and statewide, judicial officers recognize the substantial change in UD practice resulting from the 2021 landlord-tenant reforms. Several courts have convened "landlord-tenant working groups" that bring landlord attorneys, tenant attorneys, ERPP staff from the local dispute resolution center, and providers of rental assistance. Meetings of these work groups offer a forum for identifying, discussing, and resolving issues related to UD process and procedure. In superior courts as diverse as Yakima, Kitsap, Skagit, Snohomish, and Spokane, discussions in these work groups resulted in substantial changes to standing court orders and consensus of understanding related to local UD practice and procedure.

The SCJA and local superior court judicial officers have been vital partners in the program's implementation and deserve credit for early successes. The development of the UD bench card and presentation of judicial officer training referenced above helped get the RTC implementation effort on a solid footing. Presiding judicial officers consistently forward OCLA's update memoranda to their peers.

While some challenges remain, courts are routinely informing tenants of their rights to appointed counsel, providing them time to be screened for eligibility, appointing attorneys for indigent tenants, and respecting the new and enhanced role of tenant defendants' court-appointed attorneys.

d. Attorney Recruitment and Retention is a Challenge

Commencing in July 2021, OCLA-contracted RTC programs had to quickly recruit, train, and deploy more than 70 full-time attorneys statewide to accept court appointments in UD cases. Recruiting and retaining attorneys to practice in rural regions of the state – particularly in eastern Washington – has been a challenge.

Attorney retention is also challenging. Given the RTC attorneys' heavy caseloads and accelerated timelines in these cases, UD defense practice is intense, fast-paced, and stressful. The program has already witnessed turnover in the ranks of RTC attorneys, and more is inevitable. Recognizing the need to create a permanent "pipeline" of attorney talent dedicated to eviction defense and other housing justice related work, OCLA partnered with Seattle University School of Law (SU Law) to start a first-of-its-kind Housing Justice Collective (description attached). Through the Housing Justice Collective, SU Law will develop academic, clinical and internship offerings intended to train and regularly place into practice new lawyers who are enthusiastic about tenant defense and are prepared to start appointed counsel tenant defense work immediately upon passage of the bar exam.

e. Caseloads; Time/Case

The RTC Implementation Plan made several assumptions that were incorporated into OCLA's budget and operational planning. Two assumptions grounded in historical practice prior to enactment of 2ESSB 5160 and SHB 1236 involved the average number of contested extended representation cases that dedicated RTC attorneys can handle at one time (25) and the average time per case to defend tenants in such cases (5 hr./case). Neither assumption is being borne out in practice.

The substantive and procedural changes in eviction law and practice made UD cases more complicated and increased the time needed for attorneys to effectively defend tenants against landlord efforts to evict them. Average attorney time from appointment through resolution of a contested UD case ranges from between 10 and 15 hours. The average time from appointment through case closure is 77 days. OCLA has begun a deeper dive into what is driving these numbers and will continue to assess whether changes in assumptions on time/case, caseload levels, or both are indicated.

8. Conclusion

The Legislature made a bold commitment to justice and fairness by enacting the nation's first right to court-appointed counsel for indigent tenants in eviction cases. Six months into the program's full operation, the right to an attorney (RTC) is clearly a game-changer. The balance of power between landlords with attorneys and tenants predominately without attorneys in unlawful detainer cases substantially shifted, ensuring a greater chance of just results consistent with applicable law in these cases that involve some of the greatest stakes – the right to live in one's home.

While data is just beginning to come in, there can be no doubt about the program's beneficial impact – from reducing the number of unnecessary UD filings through achieving results that protect tenant residential housing rights from wrongful summary dispossession.

The Office of Civil Legal Aid embraces the trust and confidence the Legislature demonstrated when it assigned this program to it. We have been earnest and transparent in our planning, implementation, and early oversight of the program. We will continue to monitor, adjust, and administer the program in a manner that ensures that all indigent tenants who face judicial eviction – wherever in the state they reside – receive consistent, high quality, effective legal representation by trained and increasingly experienced eviction defense attorneys.

We look forward to submitting our biennial implementation report next year.

Jim Bamberger, OCLA Director
Philippe Knab, Eviction Defense Programs Manager
Erin Ryan, Eviction Defense Programs Counsel

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Questions/Comments should be forwarded to evictiondefense@ocla.wa.gov

Attachments:

- OCLA Eviction Defense Data Dashboard (Jan. – May 2022)
- SCJA Unlawful Detainer Bench Card
- OCLA-Seattle University Housing Justice Collective

UNLAWFUL DETAINER BENCH CARD

2021

CONTENT OVERVIEW

The Administrative Office of the Courts (AOC) has approved the contents of this bench card as of August 9, 2021; however, AOC is not the originator and will not be maintaining or updating content to ensure accuracy beyond this date. Please contact the Eviction Resolution Pilot Program (ERPP) Work Group or the Superior Court Judges' Association ad hoc Unlawful Detainer Work Group with questions regarding this resource.

1) OVERVIEW OF EVICTION PROCEDURES

IN GENERAL

1) Title 59 RCW regulates several types of leasehold estates and provides for statutory procedures to remove people from property.
2) Several of the chapters incorporate provisions within other chapters as discussed briefly below and chapters outside of Title 59 authorize removal of an individual from land under RCW 59.12.
3) Residential Tenancies are governed by the Residential Landlord-Tenant Act, RCW 59.18, [RLTA] with the general unlawful detainer [UD] statute, RCW 59.12, applicable to the extent it is not supplanted by the RLTA. *Housing Authority of the City of Pasco et al. v. Pleasant*, 126 Wn. App. 382 (2005). UDs are narrow summary proceedings to determine the right of possession and related issues such as restitution of premises and rent. *Munden v. Hazelrigg*, 105 Wash. 2d 39 (1985). Thus, counterclaims, affirmative defenses, and set-offs are generally not allowed in UD actions unless they are based on facts which excuse tenant's breach (*e.g.* landlord's breach of implied warranty of habitability or covenant of quiet enjoyment). *Munden*, 105 Wash. 2d 39. RCW 59.18.380 permits tenants to raise any defense arising out of the tenancy, but courts have held that for UD purposes, a defense "arises out of the tenancy" only when it affects tenant's right of possession or is based on facts which excuse tenant's breach. *See, e.g., Josephinium Associates v. Kahli*, 111 Wn. App. 617 (2002). If, however, possession/right of possession has been resolved, then courts may convert UD actions into general civil actions where any applicable crossclaims, counterclaims and affirmative defenses may be asserted. *See, e.g., Barr v. Young*, 187 Wn. App. 105 (2015) (citing *Munden*, 105 Wash. 2d at 45-46).

UNLAWFUL DETAINER ACT (CHAPTER 59.12)

1) Creates statutory proceeding to remove an individual from property either through forcible or unlawful detainer. RCW 59.12.010; RCW 59.12.020; RCW 59.12.030
2) The summary procedure may be used by a party seeking possession when authorized by statute. *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523 (1998)

RESIDENTIAL LANDLORD-TENANT ACT (RLTA) (CHAPTER 59.18)

1) Modifies RCW 59.12 eviction procedures for residential tenancies
2) Incorporates notice and service provisions from RCW 59.12.030 and RCW 59.12.040
3) Summons and hearing procedures are governed by RCW 59.18.365 through RCW 59.18.410

LOCAL MANDATES

Eviction Resolution Programs have additional requirements in participating Counties. Some local codes are more restrictive than statute.

FEDERALLY SUBSIDIZED HOUSING

Tenants receiving a federal subsidy (e.g., Housing Choice Voucher (Section 8), Public Housing, Low-Income Housing Tax Credit) may be subject to federal regulations with additional requirements.

MOBILE HOME LANDLORD-TENANT ACT (CHAPTER 59.20)

1) Applies to tenants who own a manufactured housing model and rent a lot in a mobile home community with at least two mobile home lots within it. RCW 59.20.030(9); RCW 59.20.040
2) The grounds for termination are contained in RCW 59.20.080, not RCW 59.12.030.
3) Service of pre-eviction notice governed by RCW 59.20.150.
4) Incorporates RLTA hearing procedures. RCW 59.20.040

OTHER EXAMPLES OF RCW 59.12 SUMMARY PROCEEDINGS

1) Real Estate Contract Forfeitures. RCW 61.30, applies when a seller retains the title to the property as security to payment within a real estate contract of sale.
2) Condominium conversions. RCW 64.90.655

EVICTIONS FOLLOWING FORECLOSURE/DEED OF TRUST SALE

Owners and tenants may be removed through Ch. 59.12 RCW after deed of trust sale. RCW 59.12.032, 61.24.060

2) PRE-LITIGATION NOTICE AND JUST CAUSE EVICTIONS

IN GENERAL

Landlord must (a) strictly comply with time and manner in serving the notice and (b) substantially comply with the required contents of the notice. RCW 59.18.057, RCW 59.18.365, *Christensen v. Ellsworth*, 162 Wash. 2d 365 (2007). Service is prescribed by RCW 59.12.040 and RCW 59.18.365.

- **Just Cause Evictions.** Applies to all periodic leases. A **periodic lease** is a **month-to-month** lease or a lease for a period of time that automatically converts to month-to-month lease at the end of that period. A periodic lease cannot convert to a lease of a specified time without an agreement.
- A lease of a **specified time** is a lease with a defined ending date of at least 12 months at initiation of the tenancy, and of at least 6 months thereafter. A lease of a specified time is terminated upon at least 60-days' written notice and good cause is not required to terminate the lease.
- **Notice period:** This is the minimum notice period required to terminate under this "just cause to evict." A lawsuit may be filed if the tenant does not move out after the expiration of this minimum time period. Premature filing results in dismissal of the lawsuit.

JUST CAUSE TO EVICT (all listed in ESHB 1236 unless otherwise cited)	**NOTICE PERIOD**
• Waste, nuisance, or unlawful activity	3 day
• Comply with rules or vacate (also see "four or more 10-day notices")	10 day
• Rent failure RCW 59.12.030	14 day
• Shared housing (owner shares kitchen or bathroom) • Unwanted sexual advances or sexual harassment by tenant against landlord or another tenant.	20 day
• Rental agreement expires and tenant fails to sign proposed, reasonable rental agreement (not for month-to-month tenancies) • Fraud in application	30 day
• Condemnation of property, certified condemnation • Transitional Housing – tenant no longer qualifies, or program expired	30 day
• Four or more 10-day comply notices given within preceding 12 months and containing specific required language explaining violations, etc. • Other legitimate business or economic reason not otherwise specified in the law • Sex offender	60 day
• Owner to Sell property	90 days for others
• Occupancy by owner or their immediate family member where no other substantially equivalent unit available and vacant to house them in same building	90 days
• Rehabilitate or Change Use of Property RCW 59.18.200(1)(c) • Convert to condominiums RCW 64.90.655	120 days

3) RIGHT TO COUNSEL

APPLICABILITY OF RIGHT TO COUNSEL (RTC)

1) Applies only to low-income tenants.
2) Court must appoint counsel for indigent tenants in UD proceedings under RCW Chapters 59.12 and 59.20. E2SSB 5160 §8.
3) Check the local agreement between your Court and RTC providers, which will have specific procedures for your county.

SCREENING FOR ELIGIBILITY

- If the tenant does not have an attorney at the hearing, the tenant is to be referred either to the Eviction Defense Screening line or to the Court's designated RTC provider.
- If the tenant has not been screened, the hearing may be continued to a future hearing date (generally between 7-14 days).
- If the tenant has completed the screening and is either ineligible (not indigent) or waives the appointment of counsel, the hearing may proceed on the merits.

SAMPLE SCRIPT FOR SELF-REPRESENTED TENANTS

- *"You may have a right to be represented by an attorney in this case at no cost to you."*
- *"To be eligible, you must be low-income. This is an income test. Do you want to be screened to see if the court will appoint you an attorney?"*
- *"To get an attorney appointed for you, you must go through the screening process. You will need to contact _____ (either the Eviction Defense Screening Line or the name of the local RTC provider, depending on your court's protocol)."*
- *"We are providing you with the telephone number/website."* ***(Alternatively)*** *"This person will help you today to complete the screening process before you leave the building."*

For continuances: *"I will continue the eviction hearing for __ days to allow you to complete the screening process. If you are eligible, this will give you time to meet with an attorney about this case. You must contact _____ (designated screening entity) right away. If you do not, the court might decide that you waived your right to an attorney at the next hearing and you would need to represent yourself."*

Eviction Defense Screening Line: 1-855-657-8387

4) SHOW CAUSE HEARINGS (RCW 59.18.380)

OBJECTIVE OF THE HEARING. RCW 59.18.380. Determine whether:

1) Landlord has met burden of proof for claim of possession.
2) The tenant has "any legal or equitable defense or set-off arising out of the tenancy." For UD purposes, a defense arises out of the tenancy only when it affects tenant's right of possession or is based on facts which excuse tenant's breach. *Josephinium Associates*, 111 Wn. App. 617.
3) A trial is necessary because of a "substantial issue of material fact of the right of the plaintiff to be granted other relief [other than possession].
4) Landlord should be in possession pending trial.

CONDUCT OF HEARING

1) Court shall examine the parties and witnesses to ascertain the merits of the complaint and answer. RCW 59.18.380, *Leda v. Whisnand*, 150 Wn. App. 69 (2009).
2) Must allow tenant to present evidence supporting defenses. *Leda*, 150 Wn. App 69 (2009).
3) Rules of evidence apply at show cause hearings. *Leda*, 150 Wn. App. 69.

LANDLORD'S BURDEN OF PROOF

1) By preponderance of evidence, show compliance with Unlawful Detainer statutes. *FPA Crescent Assoc., LLC v. Jamie's, LLC*, 190 Wn. App. 666 (2015).
2) Strict compliance with time, place, and manner of pre-eviction notice. *Christensen v. Ellsworth*, 162 Wn.2d 365 (2007).
3) Substantial compliance with notice form. *Provident Mut. Life Ins. Co. of Philadelphia v. Thrower*, 155 Wn.(1d) 613 (1930).
4) Allegations in support of basis for termination. *Indigo Real Estate v. Wadsworth*, 169 Wn. App. 412 (2012).
5) Tenant is still in possession or right to possession remains in issue. *Munden*, 105 Wn.2d 39.

TENANT DEFENSES

1) Tenant in UD may assert any legal or equitable defense or other set-off arising out of the tenancy. RCW 59.18.380. An UD defense arises out of the tenancy when it affects tenant's right of possession or is based on facts which excuse tenant's breach. *Josephinium Associates*, 111 Wn. App. 617; *Barr*, 187 Wn. App. 105, 109.
2) If dispute over breach of lease, summary judgment may be improper. *Housing Authority*, 126 Wn. App. 382.

→ **IF TENANT'S DEFENSE IS DISPOSITIVE, DENY LANDLORD'S REQUEST FOR RELIEF. OR…**

A) IF SUBSTANTIAL ISSUE OF MATERIAL FACT, SEND TO TRIAL and DETERMINE IF WRIT SHOULD ISSUE PENDING TRIAL

1. If it appears landlord has right to possession by preponderance of evidence, may issue writ pending trial. RCW 59.18.380
2. If writ is to be issued, must require bond to be posted by Plaintiff. RCW 59.18.380
3. Tenant may stay writ within 3 days by posting rent owed. RCW 59.18.380

B) IF NO SUBSTANTIAL ISSUE OF MATERIAL FACT, THEN ORDER WRIT & JUDGMENT:

1. No monetary judgment if alternative service (e.g., mail + post) was used. RCW 59.18.055
2. Judgment may only include rent, a late fee up to $75 if lease provides for it, court costs, and attorney fees. RCW 59.18.410(1)
3. Attorney fees may not be awarded if: a) tenant failed to respond; or b) the total amount of rent awarded in the judgment for rent is equal to or less than two months of the tenant's monthly contract rent or one thousand two hundred dollars, whichever is greater. RCW 59.18.290(3)

PAYMENT PLAN

Tenant may seek payment plan under RCW 59.18.410(3) at Show Cause Hearing or before writ executes.

5) COMMON TENANT DEFENSES

IN GENERAL

Tenant may assert defenses orally or in writing at Show Cause Hearing. RCW 59.18.380

PROCEDURAL DEFENSES

1) No Landlord-Tenant relationship.
2) Tenant vacated and relinquished all claim to possession. *Munden,* 105 Wash. 2d 39.
3) Improper service of pre-eviction notice. *Christensen,* 162 Wn.2d 365.
4) Failure to abide by Federal or local rules regarding evictions pertaining to tenant's housing.
5) Tenant is tenant-at-will. *Turner v. White,* 20 Wn. App. 290 (1978)
6) Improper Summons – must strictly comply with form requirements. RCW 59.18.365, *Truly v. Heuft,* 138 Wn. App. 913 (2007).
7) Failure to substantially comply with statutory requirements for notice to pay or vacate form. *Thrower*, 155 Wn.(1d) 613 (1930)
8) Corporate entity has no attorney or no capacity to sue. *Dutch Vill. Mall v. Pelletti*, 162 Wn. App. 531, 535 (2011); *Reese Sales Co., Inc. v. Gier*, 16 Wn. App. 664, 667 (1977)
9) Landlord fails to offer reasonable repayment plan [RRP] for rent owing between March 1, 2020 and 6 months following expiration of eviction moratorium equal to three months for every one month of rent owing. *Chapter 115, laws of 2021, E2SSB 5160, section 4, p. (2)-(4)*.
10) Landlord failed to provide notice and Eviction Resolution Pilot Program [ERPP] notice to local dispute resolution center where available. *Chapter 115, laws of 2021, E2SSB 5160, section 10, p. (2)(a)*.

EQUITABLE DEFENSES

1) Waiver of right to declare a forfeiture for prior breaches by accepting rent *Wilson v. Daniels*, 31 Wn.2d 633 (1948)
2) Acceptance of rent after commencing unlawful detainer. *Hous. Auth. of Grant Cty. v. Newbigging*, 105 Wn. App. 178, 187, 19 P.3d 1081, 1086 (2001)

SUBSTANTIVE DEFENSES

1) Implied Warranty of habitability [IWH]. *Foisy v. Wyman*, 83 Wn.2d 22 (1973)
2) Relocation assistance for Landlord's Breach of IWH. *Pham v. Corbett*, 187 Wn. App. 816 (2015)
3) Discrimination and reasonable accommodation. *Josephinium Assoc.,* 111 Wn. App. 617.
4) Retaliation. *RCW 59.18.240; RCW 59.18.250*
5) Covenant of Quiet Enjoyment, *Income Properties Inv. Corp v. Trefethen,* 155 Wash. 493 (1930), *Munden, 105 Wn. 2d 39*

REINSTATEMENT UNDER RCW 59.18.410

1) After 14-day notice to pay or vacate expires and up to five court days after judgment, tenant may reinstate tenancy by paying to the court or landlord rent, late fees, costs, & attorney fees if awarded. *RCW 59.18.410(2)*
2) At Show Cause Hearing or before writ executes, tenant may seek payment plan under *.410(3)*.

ORDER OF LIMITED DISSEMINATION

1) Prohibits tenant screening company from sharing information about unlawful detainer. RCW 59.18.580(1)
2) Awarded if a) complaint had no basis in law or fact, b) tenant reinstated under *RCW 59.18.410*, or c) other good cause. The Order must set forth a basis for the "good cause" finding.

6) POST-JUDGMENT RELIEF

IN GENERAL

1) Tenants may seek post-judgment relief under the Civil Rules or *RCW 59.18.410* or *RCW 59.12.190*.
2) Tenant may seek a stay of the writ of restitution pending outcome. RCW 59.18.410(3)-(4); *Randy Reynolds & Assoc. v. Harmon*, 193 Wn.2d 143 (2019).

EX PARTE STAYS OF THE WRIT OF RESTITUTION

1) Court may issue ex parte stay. RCW 59.18.410(4); *Randy Reynolds & Assoc. v. Harmon*, 193 Wn.2d 143 (2019).
2) Bond is not required. *Randy Reynolds & Assoc. v. Harmon*, 193 Wn.2d 143 (2019).
3) Court may require service of motion by delivery, mail, fax, or other means. *RCW 59.18.410(4)*

CIVIL RULE MOTIONS

1) Court may set aside order or judgment under *CR 55(c)* and *60(b)* per Civil Rules. *Randy Reynolds & Assoc. v. Harmon*, 193 Wn.2d 143 (2019).

RCW 59.18.410(2) REINSTATEMENT BY RIGHT

1) After 14 day notice to pay or vacate expires, tenant may reinstate tenancy by paying: a) rent owed, b) late fee up to $75.00 if lease provides, c) court costs incurred at time of payment, and d) attorney's fees if court has awarded at judgment. *RCW 59.18.410(2)*
2) Tenant may reinstate before judgment or until five court days after judgment. *RCW 59.18.410(2)*
3) Tenant may extend time by using pledge letter covering full amounts. *RCW 59.18.410(2)*

RCW 59.18.410(3) REINSTATEMENT AND PAYMENT PLANS BY COURT DISCRETION

1) At Show Cause Hearing or before writ executes, tenant may ask court for reinstatement, .410(3).
2) Tenant may not have payment plan if tenant has received three or more pay or vacate notices in last 12 months, *.410(3)(d).*
3) Court weighs seven factors listed at *RCW 59.18.410(3)(a)* when deciding whether to reinstate.
4) The court shall not stay the writ of restitution for more than 90 days. *RCW 59.18.410(c)(i)*
5) If granted, court may permit payment using any of 3 methods:
    i. Out of pocket (writ is stayed, payment plan subject to a statutory schedule, max length of 90 days);
    ii. By emergency rental assistance (charity provides pledge to pay the judgment), *.410(3)(c)(iv)*; **OR**
    iii. Tenancy Preservation Program (TPP) (writ is stayed; court must find the tenant is low-income, limited resourced, or experiencing hardship; court authorizes payment of judgment from TPP account, court includes required findings in .410(3)(e), landlord applies for reimbursement).

Tenancy Preservation Program (TPP)

- TPP was created in 2019 to assist tenants facing extraordinary life events in avoiding homelessness.
- TPP payments are a loan from the Department of Commerce to the tenant, paid directly to the landlord.
- Requirements for payment are set out at *RCW 59.18.410(3)(c)-(e) and RCW 43.31.605(1)*.
- Instructions for claims and a list of required documents are available at the Department of Commerce's Tenancy Preservation Program web page.

PETITION FOR RELIEF FROM FORFEITURE

1) Separate from *RCW 59.18.410*, 30 days after court issues judgment, tenant may ask for relief from forfeiture by: a) tendering rent owed, or b) remedying breach of lease. *RCW 59.12.190*
2) Tenant may not use RCW 59.12.190 to cure where UD based on nuisance activities. *Burgess v. Crossan*, 189 Wn. App. 97 (2015)

GR 9 COVER SHEET

Suggested Adoption of New Special Proceeding Rule

SUPERIOR COURT SPECIAL PROCEEDINGS

APPOINTMENT OF ATTORNEY FOR INDIGENT TENANT IN UNLAWFUL DETAINER PROCEEDINGS

A. Proponents: Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program

B. Spokespersons: Scott Crain, Michelle Lucas

C. Purpose:

The purpose of this proposed Civil Rule is to aid in the administration of justice by providing guidance to the Superior Courts in performing their duty to appoint counsel to unrepresented tenants facing eviction. In 2021, the legislature enacted Ch. 115 Laws 2021, creating a right to appointed counsel (RTC) for residential tenants in unlawful detainer proceedings. Codified at RCW 59.18.640, a court "must appoint counsel for an indigent tenant in an unlawful detainer proceeding". RCW 59.18.640(1). This proposed rule is intended to guide access to securing judicial relief for indigent tenants and to ensure that appointed counsel in unlawful detainer cases benefits all tenants who qualify, not only those with the language, technology, and access to resources.

During the course of implementation of RCW 59.18.640, the Office of Civil Legal Aid (OCLA) and its contractors have encountered many tenant defendants who are or were unaware of their right to counsel and only seek assistance after the entry of a default judgment or the entry of a writ of restitution. Tenants are losing their homes often because they do not understand the legal process they are involved in, and are unaware of their right to representation. Tenants often do not understand their legal situation until they are served by law enforcement with a writ of restitution telling them they will be physically removed from their home. Besides being effectively deprived the right to counsel in instances where counsel could not be appointed prior to the execution of the writ of restitution, this leads to increasing pressure on tenant defense attorneys to seek appointment in last minute requests for assistance, on the eve of physical eviction. The problem is particularly acute in jurisdictions with few ex parte dockets to present emergency motions, long travel distances with no or limited remote access, or fewer contractors providing RTC services because of the difficulty in bringing emergency motions to try and keep tenants housed until the case can be heard on the merits.

Since the rollout of the RTC program, approximately 10 percent of requests for assistance to the Northwest Justice Project Eviction Defense Screening Line or CLEAR[1] were matters already in default or where a writ of restitution had been issued. The urgency with which these matters must be addressed

[1] CLEAR (Coordinated Legal Education, Advice and Referral) is a toll-free legal hotline for people with low incomes housed at the Northwest Justice Project.

to prevent physical eviction and allow tenants access to appointed counsel puts a considerable strain on the RTC providers. Due to the expedited nature of unlawful detainer proceedings, RTC providers are faced with incredibly tight timelines on cases that run the normal course through the legal system. As a new program that is being implemented during a major housing crisis, there is no reliable model to ensure that an RTC attorney will be available to address emergency motions quickly enough to keep tenants housed. Although the writ of restitution is not the final decision in an unlawful detainer case, tenants face irreparable harm if forced to vacate their homes when the issue of possession was never properly litigated and they did not they receive aid of appointed counsel. Additionally, the harm faced by tenants disproportionally impacts renters by race. The 2017 University of Washington Evictions Study highlights the racial disparity in evictions. Data for King and Pierce counties show that Black adults are respectively 5.5 and 6.8 percent more likely to be evicted than White adults.

The proposed rule will address the following issues:

Section 1 is intended to ensure equitable access to attorneys for all tenants who may be eligible for appointed counsel in their eviction cases. The language of RCW 59.18.640 puts the onus on the court to raise the issue of the availability of appointed counsel. As written, the court's duty to appoint counsel inherently includes the duty to inform litigants of the availability of counsel. Access to legal counsel for tenants cannot be equitably obtained if courts rely on tenants to assert that right when many may not even be aware of it.

This section provides guidance to the courts for how to conduct this process. Although many jurisdictions have general orders that relate to the Eviction Resolution Pilot Program or RTC generally may provide that tenants be informed of their right to counsel, a majority of the orders do not include a process for how that will be accomplished resulting in disparate practices across jurisdictions. Ensuring that this colloquy is required in all unlawful detainer actions is imperative to provide legal representation to all qualified tenants. It also provides uniformity across jurisdictions so tenants and attorneys alike have reasonable expectations for how a matter will proceed before the court. This will further reduce disparate treatment of litigants in different regions.

Section 2 creates an opportunity for people to access meaningful representation when they were not afforded the benefit of an attorney before a finding was made against them. Legal processes and paperwork are confusing, and the imminent loss of a home is a highly stressful situation. The legal system is designed by and for attorneys. Unrepresented litigants face incredible barriers trying to navigate it on their own, and these barriers are compounded when taking other access issues into account such as primary language, level of education, immigration status, and access to technology and resources. In turn, these additional barriers are most often linked to race and economic status resulting in more negative outcomes for members of our community who identify as Black, Indigenous, and People of Color.

A tenant does not have the right to appointed counsel until a lawsuit is formally commenced, either by service of a summons and complaint or by the filing of the lawsuit with the court. The impact of this is that despite having received a notice terminating their tenancy, tenants do not have a right to consult with an attorney before the matter is escalated and the court can enter orders to remove them from their home. The 10-day stay of proceedings when appointed counsel appears that this rule proposes is intended to provide a reasonable amount of time for appointed counsel to review the case, confer with the tenant, and allow for meaningful representation without tenants facing the

consequence of being removed from their home *before* having the legal assistance that is contemplated in RCW 59.18.640.

Section 3: Section 3 provides limitations to the relief this rule sets forth for tenants. If a stay is issued under Section 2 of this proposed rule, that stay will lift automatically after 10 days if the tenant's attorney does not identify grounds for why it should be extended and move for an extension of the stay in order to have a substantive hearing on the matter where the tenant will be fully represented. The unprecedented nature of requests for same-day assistance to avoid physical eviction creates bottlenecks to assistance resulting in reduced capacity to provide RTC services, over-utilization of ex parte court procedures to stay writs or shorten time on motions to vacate.

In conclusion, the Supreme Court's intervention is necessary to provide administrative guidance to the Superior Courts and ensure that indigent defense in unlawful detainers is provided equitably regardless of location in the state.

D. Hearing: A hearing is not recommended.

E. Expedited Consideration: The proponents are requesting expedited consideration because since Right to Counsel services began in October 2021, providers have observed the inconsistent application of the new legislation by superior courts in unlawful detainer proceedings that is having an immediate impact on RTC-eligible tenants' opportunities to access meaningful representation, resulting in denial of representation and often homelessness, despite the legislatively recognized emergency impacting residential tenants in unlawful detainers cited in Laws 2021 ch. 115 sec. 21. The Court's expedited consideration is necessary to ensure that the right to counsel is a right to effective assistance of counsel, which cannot be guaranteed when tenants are not given a continuance and the opportunity to contact and meet with their lawyer prior to the hearing.

F. Supporting Material: Suggested rule amendments.

SPR 98.24W

UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY

[NEW]

In all unlawful detainer cases where RCW 59.18.640 applies to appoint attorneys for indigent tenants:

(1) If the tenant appears, before taking any action in the case, the court must
   (a) Inform the tenant they have a right to be represented by an attorney at public expense if they are indigent;
   (b) Ask the tenant if they want the court to appoint an attorney if they are eligible;
   (c) Appoint an attorney if the tenant is eligible; and
   (d) Continue the hearing for at least 14 days.

(2) If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may move to appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may make an ex parte motion for appointment and to stay the writ. Upon such motion, the court shall appoint the lawyer and stay the writ for 10 days.

(3) A stay issued under this rule will be set to expire 10 days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court shall lift the stay immediately.

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César E. Torres
Executive Director

Northwest Justice Project

February 27, 2023

Supreme Court Rules Committee
Temple of Justice P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov
Via email only

Dear Rules Committee,

We write to you in our capacity as proponents of the Special Proceedings Rule for Unlawful Detainer matters and in response to comments submitted by the Superior Court Judges Association. We attempted to reach agreement with SCJA regarding their opposition to this proposed rule and were unsuccessful in reaching a resolution.

The proponents suggested two changes to address SCJA's concerns. SCJA correctly pointed out that local trial courts cannot be expected to manage the appointment of lawyers for indigent renters from the bench. We have modified the proposed rule to reflect that screening and locating attorneys for indigent renters happens outside of the court process. If funding is available and the tenant is eligible, then the lawyer approaches the court to seek appointment. A redlined copy of the amended rule, as proposed to SCJA, is enclosed herein.

Second, we recognize that notice to the landlord or their attorney prior to obtaining a stay may be necessary in some instances to satisfy due process and have modified the rule accordingly.

After providing these changes to SCJA, SCJA maintained that it could not support the rule as amended due to its concerns. The remaining unresolved issue does not warrant rejection of this important rule.

SCJA's remaining contention with the rule focuses on the point that trial court judges can adequately protect the rights of indigent renters, reviewing the pleadings to see if substantive defenses are available before deciding to grant a stay of the writ of restitution. First, SCJA's example shows the problem with this objection to the proposed rule. SCJA wrote:

> Without this discretion, courts will not be able to make allowances in cases where the record indicates there is no substantive basis to oppose the action, such as proper notice under RCW 59.18.650 for selling the property.

SCJA Comments, p.1

THE ALLIANCE for Equal Justice
MEMBER
LSC America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

First, this discretion has poorly served renters for the past several decades, as the Legislature recognized when it established a right-to-counsel in evictions. Mounting evidence demonstrates that renters do worse without counsel and that evictions cause lasting trauma and perpetuate cycles of poverty for years afterward. Without access to counsel, renters are unable to understand potential defenses and advocate for them.

Second, the purpose of the stay is not related to the merits of the case. The purpose of the stay is to fulfill the mandate of the legislature that counsel be appointed in every unlawful detainer involving an indigent renter. SCJA's position—as indicated by its comments above— would allow the judiciary to short circuit this mandatory process for indigent renters by allowing the trial court to determine the issue on the merits, all before appointed counsel is permitted to investigate the matter. The proposed rule is a procedural rule intended to uphold the statutory right to counsel, not make merits-based rulings.

Finally, the example given by SCJA underscores the weaknesses in ensuring access to justice that this approach offers. SCJA's comment assumes that there may be circumstances where appointment of counsel is not necessary because there are no defenses to certain evictions. This is incorrect. A renter may in fact have a substantive defense to challenge a landlord's pretextual notice of intent to sell or reside under RCW 59.18.650 that can only be discovered by skilled legal advocacy. This Court recognized such a defense in *Faciszewski v. Brown*, where it evaluated a nearly identical municipal ordinance in a residential eviction. 187 Wn.2d 308 (2016). Unlawful detainer defense attorneys routinely defend on this basis. Judicial officers simply cannot be asked to advocate for the defenses of one of the parties in this complicated legal landscape, particularly when the Legislature has created a statutory right of the same tenants to be represented.

While we hoped to reach agreement with SCJA, we believe the proposed modification substantially address their concerns and would ask the committee to recommend it to the full Court's consideration.

Sincerely,

/s/Scott Crain
Scott Crain
Attorney

/s/Michelle Lucas
Michelle Lucas
Attorney

Encl.

[PROPOSED] SPR 98.___W
UNLAWFUL DETAINERS—APPOINTMENT OF ATTORNEY
[Changes proposed to SCJA underlined]

In all unlawful detainer cases where RCW 59.18.640 applies to appoint attorneys for indigent tenants:

1. If the tenant appears, before taking any action in the case, the court must
    a. Inform the tenant they have a right to be represented by an attorney at public expense if they are indigent;
    b. Ask the tenant if they want the court to appoint an attorney if they are eligible;
    c. Refer the tenant for appointment of counsel pursuant to any local order or established procedure consistent with RCW 59.18.640; and
    d. Continue the hearing for at least 14 days.

2. If the tenant is unrepresented and the court issues a writ of restitution before judgment or by default, the tenant may move to appoint an attorney at any time before law enforcement executes the writ. During this time, a lawyer seeking appointment may make an ex parte motion for appointment and to stay the writ. Upon such motion, the court shall appoint the lawyer and stay the writ for ten days. The lawyer seeking appointment shall establish by declaration that good faith efforts were made to notify the other party or, if no efforts were made, why notice could not be provided prior to the application for an ex parte stay, and describing the immediate or irreparable harm that may result if an immediate stay is not granted.

3. A stay issued under this rule will be set to expire ten days after entry without further order from the court. If new information arises and the court finds the tenant is not eligible for appointment of a lawyer, the court shall lift the stay immediately.

WASHINGTON COURTS

TO: Supreme Court Rules Committee

FROM: J Benway

DATE: February 28, 2023

RE: SUMMARY OF COMMENTS: A Consortium's (Northwest Justice Project, Access to Justice Board, Spokane Volunteer Lawyers Program, Snohomish County Legal Services, Tacoma Pro Bono, King County Bar Association Housing Justice Project, Kitsap Legal Services, Yakima Volunteer Attorney Services, Chelan-Douglas Volunteer Attorney Services, Thurston County Volunteer Lawyer Services, Skagit Volunteer Lawyers Program, Clark County Volunteer Lawyers Program) Proposed New Superior Court Special Proceeding Rule [SPR 98.24W]—Unlawful Detainers – Appointment of Attorney

The suggested amendments were published for comment by the October 2022 En Banc Conference with a comment expiration date of January 31, 2023.

Six "position" comments were received, two in support and four opposed.

AOC took no position on the proposal but stated three concerns that need to be addressed prior to implementation.

Following the comment period, the proponents presented a revised proposal, which had been provided to the SCJA for comment.

The Superior Court Judges' Association (SJCA) was granted an additional month, until February 28, 2023, to provide a comment to the proponents' revised proposal. The SCJA did not provide an additional comment, but Judge Forbes stated: "I think there may not be a version of the rule that we can get behind. I think one of the issues (but not necessarily the only issue) is that the rule doesn't conform to local circumstances and is otherwise unnecessary since there are statutes in place." Email from Judge Forbes, SCJA President, February 24, 2023.

Comments Received on Proposed New Superior Court Special Proceeding [SPR 98.24W]—Unlawful Detainers – Appointment of Attorney

1. Access to Justice Board [one of the consortium of proponents]: Supports. RCW 59.18.640, enacted in 2021, grants the right of an attorney to tenants facing eviction; the proposed rule will establish reasonable safeguards to ensure that people are able to exercise this statutory right regardless of where they live. The Board disagrees with the comments submitted by the Superior Court Judges' Association (SJCA) because the proposed rule does not abrogate the rights of plaintiffs but rather creates uniform processes.

2. Administrative Office of the Courts (AOC): Concerned [No Position]. AOC has three primary concerns: (1) AOC needs at least 90 days to develop "event codes" to successfully implement the rule; (2) the issue of confidentiality of tenant information needs to be clarified; and (3) OCLA should be responsible for development of a screening form, which the rule should clarify is public or confidential.

3. Douglas Garrison: Opposed. The proposed rule is misguided, unnecessary, and usurps the role of the legislature and the executive. The power of the state should not be used to oppose property owners who may be elderly or of limited means, and who may not be able to afford counsel. Sufficient legal safeguards already exist to protect tenants in unlawful detention proceedings; further, the rule conflicts with provisions of the Residential Landlord Tenant Act, chap. 59.18 RCW.

4. Armitage & Thompson: Opposed. The proposed rule addresses substantive matters and creates conflicts with the unlawful detainer statutes. It is OCLA's statutory duty to develop a program to provide legal assistance to indigent tenants; the legislature did not direct that an opportunity to obtain free legal counsel requires trial courts to elevate substantive rights of an indigent tenant over a non-indigent tenant. Specifically, the proposed rule conflicts with RCW 59.18.370 regarding continuances, and deprives courts from considering whether the opportunity for counsel has been waived. Pages 3-4 of the comment detail several other substantive conflicts with Washington statutes. These problems could be avoided if OCLA implements a program that provides assistance prior to the formal commencement of an action.

5. The Office of Civil Legal Aid (OCLA): Supports. The proposed rule is within the scope of the Court's rulemaking authority; addresses significant problems that result in differential justice by geography; is vital to ensuring fair treatment of BIPOC, LEP, and other defendants with limited understanding of their rights; and is fully consistent with applicable law. OCLA is tasked with implementing and administering RCW 59.18.640, a statewide program for court-appointed attorneys for indigent tenants in unlawful detainer proceedings, and is therefore informed about how to address

obstacles to effective and complete implementation of the new right to appointed counsel. A significant concern is lack of consistency across courts, and the proposed rule would establish uniform, legally enforceable norms across all judicial districts. Regarding the proposed rule's substance, most tenants first learn of the unlawful detainer proceeding when they are served so a temporary stay is the only way they can get an attorney.

6. SCJA: Opposed. The SJCA disagrees that the challenges described by the proponents are significant, and does not believe a new rule is necessary. The proposed new rule creates conflict with existing law, specifically the Residential Landlord Tenant Act; removes judicial discretion; and creates substantive policy that is most appropriately addressed by the Legislature. The statute makes clear that attorney appointment is subject to the availability of funds appropriated for that purpose, while the rule simply makes such appointment mandatory, ignoring that courts are already appointing attorneys pursuant to the law when funds are available. It also creates significant due process concerns by allowing tenants to make *ex parte* motions to stay writs of restitution without requiring notice. The proposed rule removes all opportunities for judges to address the individualized needs of tenants and landlords, and appears to contemplate an unrealistic role for the courts in screening tenants for indigency criteria.

7. Judge Tanya Thorp, Chief Civil Judge, King County Superior Court: Opposed/Concerned. Judge Thorp, and the King County Superior Court Ex Parte and Probate Department Court Commissioners, agree with the SCJA's comments. If the rule is adopted, they request two specific language changes because the 10-day limit on stays is not feasible given the volume of cases in King County.

MEMBERS
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THE ALLIANCE
for Equal Justice
MEMBER

January 26, 2023

Honorable Charles W. Johnson, Chair
Honorable Mary I. Yu, Chair
Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Re: Proposed Superior Court Special Proceedings Rule 98.24W

Dear Justice Johnson and Justice Yu:

I write to express the Access to Justice Board's support of SPR 98.24W related to appointment of counsel in unlawful detainer actions.

In 2021, the Washington State Legislature passed SB 5160 and became the first state in the nation to pass a law granting the right to an attorney to tenants facing eviction. Codified under RCW 59.18.640, the law creates a civil *Gideon* for those at risk of losing their housing. The swift implementation of the law marked a tremendous expansion of access to justice in the civil legal system by entitling low-income renters facing eviction the right to representation through appointed counsel. Although a statutory right to appointed counsel is a huge step in and of itself to improve equity in the legal system, the statute alone does not confer the fair and consistent application of the law across the state.

As we strive to build equitable access to the judicial system, we must consider how people become involved in the process and what happens when they get there. SPR 98.24W puts forth reasonable safeguards to ensure that those who are seeking legal representation are able to exercise their statutory right regardless of what jurisdiction they reside in and how their court operations are handled.

The scope of statewide right to counsel makes Supreme Court intervention appropriate and necessary. In Washington, thirty seven percent of residents are renters and twenty one percent of those rental households are considered "severely burdened," meaning that they spend more than half of their income on housing costs.[1] In 2017, there were 17,551 filed eviction cases in Washington State.[2] As stated on the GR 9 cover sheet for SPR 98.24W, the limited data available that compares race of tenants with those

[1] *Congressional District Housing Profile*, National Low Income Housing Coalition, https://nlihc.org/sites/default/files/Housing-Profiles/Congressional-District-Housing-Profile-WA.pdf, last accessed January 26, 2023.
[2] Thomas, Toomet, Kennedy, and Ramiller, *The State of Evictions: Results from the University of Washington Evictions Project*, https://evictionresearch.net/washington/index.html, last accessed January 26, 2023.

who experience eviction shows that evictions, and the consequent loss of housing, disproportionately impact non-white members of our community.[3]

The comments put forth by the Superior Court Judges' Association are disheartening to those of us who strive to transform our "legal system" into a true "justice system." The proposed rule does not abrogate the rights of plaintiffs in unlawful detainer actions and the framework it lays out only seeks to create uniform processes for each court to follow so that tenants, regardless of jurisdiction, have an equal opportunity to obtain representation. To the extent that the proposed rule mandates appointment of counsel before an action can proceed, the ATJ Board would support any modifications to the proposed rule that better harmonize the mandate for appointment with RCW 59.18.640. The Board would also support revisions that adds a notice provision to the automatic order to stay proposed in Section 2; the ultimate goal of the proposed order is to build consistency and uniformity in the unlawful detainer process. Thus, it makes sense that the process of obtaining a stay of a writ of restitution would track with the existing guidelines under the Residential Landlord Tenant Act. Other concerns cited by the SCJA, such as the 14-day return period, could also be resolved with minor modifications to the proposal that this Board would support. **For these and other concerns posed by the SCJA, the ATJ Board requests an extension of the public comment period so the proponents of the rule may work with the SCJA to discuss further and try to reach a more mutually agreeable resolution.**

The right to appointed counsel in eviction cases is new and courts, legal providers, landlord representatives, and countless other stakeholders have been diligently working to build a sustainable system to implement this new law. Because of the enormous change that this law represents, changes in how eviction cases are handled is inevitable but creating a baseline level of uniformity through the adoption of this court rule benefits courts, tenants, and counsel for both parties by establishing standard guidelines for unlawful detainer actions.

In its 2020 Letter to Members of the Judiciary and the Legal Community, this Court recognized how pervasive systemic inequity continues to manifest itself through legal processes, and the responsibility of the legal profession to address these harms. One year into Washington's law mandating appointed counsel for indigent tenants, we ask the Court to support a rule that builds an administrative infrastructure into this groundbreaking program that changes court operations in a way that better effectuates a tenant's ability to exercise their statutory right to appointed counsel.

Sincerely,

Terry Price, Chair
Access to Justice Board

[3] See *id.*

Cc: Terra Nevitt, Executive Director, Washington State Bar Association

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: Access to Justice Board Comment Regarding Proposed Superior Court Special Proceedings Rule 98.24W
Date:	Thursday, January 26, 2023 4:15:22 PM
Attachments:	image001.png 2023.1.26.ATJ Board Comment.Rule 98.24W.pdf

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From: Bonnie Sterken <bonnies@wsba.org>
Sent: Thursday, January 26, 2023 3:27 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Terry J. Price <tprice@uw.edu>; Michelle Lucas <michelle.lucas@nwjustice.org>; Terra Nevitt <terran@wsba.org>; Diana Singleton <dianas@wsba.org>
Subject: Access to Justice Board Comment Regarding Proposed Superior Court Special Proceedings Rule 98.24W

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Good afternoon,

Attached, please find a comment from the Access to Justice Board regarding the proposed Superior Court Special Proceedings Rule 98.24W.

Thank you,

Bonnie Middleton Sterken | Equity and Justice Specialist
Washington State Bar Association | bonnies@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org
Pronouns: She/Her

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact bonnies@wsba.org.

ADMINISTRATIVE OFFICE OF THE COURTS

Dawn Marie Rubio, J.D.
State Court Administrator
Administrative Services Division Director

Vonnie Diseth
Chief Information Officer
Information Services Division Director

Dirk Marler
Chief Legal Counsel
Court Services Division Director

Chris Stanley
Chief Financial and Management Officer
Management Services Division Director

WASHINGTON COURTS

January 26, 2023

Honorable Charles W. Johnson, Co-Chair
Honorable Mary I. Yu, Co-Chair
Washington State Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

RE: Proposed New SPR 98.24W

Dear Justices Johnson and Yu:

The Administrative Office of the Courts (AOC) takes no position on the merits of the Proposed New SPR 98.24W but wishes to bring some implementation issues to the Court's attention.

1. Event Codes: The Judicial Information System (JIS) utilizes unique event codes to accurately categorize and track various court proceedings. The codes are developed and approved through the JIS Codes Committee. If this rule is adopted, the AOC would need sufficient time to create new codes in order to successfully implement the rule

2. Confidentiality: For a court to determine indigency, a tenant would need to submit information demonstrating that they meet the standard set forth in RCW 59.18.640(2). The proposed rule is silent as to whether this information is sealed, confidential or open to public view. Clarification on whether the information is sealed, confidential, or public would aid the consistent and successful implementation of the rule.

3. Forms: If it is assumed the court will determine eligibility for appointment of counsel, a screening form should be developed. Because RCW 59.18.640(1) provides that OLCA is responsible for implementation, we request that the court rule clarify that OCLA should create any screening form for this purpose and work with the AOC to include appropriate coding.

In summary, we respectfully request the following:

1. A period of at least 90 days following adoption to develop and implement necessary JIS codes.

2. If an eligibility screening form is required, the rule should direct OCLA to create the screening form, including the relevant factors for the court to make its indigency determination, and work with the AOC to include necessary coding. If, instead, the Court expects that Pattern Forms Committee to create a screening form, we request at least six months following adoption of the rule to develop and publish a new form.

3. The rule (or other relevant rule) should state whether the screening form may be provided to the public or has a confidential status.

Thank you for your consideration; and please contact me if you have questions or concerns.

Sincerely,

Dawn Marie Rubio, JD
State Court Administrator

Cc: Ms. Vonnie Diseth, Director/CIO, AOC Information Services Division
Mr. Dirk Marler, Director, AOC Court Services Division
Mr. Stanley, Director, AOC Management Services Division

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: AOC Comments New SPR 98.24W
Date:	Thursday, January 26, 2023 4:14:51 PM
Attachments:	2023-01-26 AOC SPR 98.24W Comment.pdf image001.png

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From: Rubio, Dawn Marie <DawnMarie.Rubio@courts.wa.gov>
Sent: Thursday, January 26, 2023 3:58 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Marler, Dirk <Dirk.Marler@courts.wa.gov>; Diseth, Veronica <Vonnie.Diseth@courts.wa.gov>; Stanley, Christopher <Christopher.Stanley@courts.wa.gov>
Subject: AOC Comments New SPR 98.24W

Good afternoon.

Please see attached.

Thanks. DMR

Dawn Marie Rubio, J.D.
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Douglas K. Garrison
Attorney at Law

January 31, 2023

Justices of The
Washington Supreme Court
supreme@courts.wa.gov

Dear Justices of The Supreme Court:

The proposed rule creating a "right" to Counsel in unlawful detainer cases is misguided, unnecessary and by enacting such a rule circumvents the law-making process that is wholly the province of the State Legislature.

Additionally, such a rule requires the Judicial branch of Government to cross over into an executive function and make essentially, executive decisions.

Judges make daily decisions on matters of indigency in cases in which the result is the potential loss of liberty for an accused person. Such is as it should be as an unrepresented defendant in a criminal case stands no chance against the power of the State in a criminal prosecution. Such practice is woven into the fabric of the legal system dating back to the inception of the Constitution of the United States and occasionally articulated in such cases as Gideon V Wainright, and its progeny.

Proponents of this new rule created it as a response to the Covid-19 Pandemic, which resulted in mass economic disruption and the loss of employment to some persons. Loss of employment potentially leads to a loss of housing. Such is the very nature of life. It is a powerful temptation to let emotion turn into overreach. The Pandemic has receded and now appears to be on the wane and on its way to full control and eradication. Thus the "emergency" if it ever existed in the first place, is over.

The adoption of the proposed rule grants the power of the State, with its unlimited resources, to oppose property owners who frequently are retired, elderly, or of small means, who use rentals and leases as a source of supplemental income. They seldom can afford private counsel. They frequently appear pro se and are usually dismissed and excoriated by frustrated and impatient

judicial officers, who view them as vexations, when they are simply trying to get rid of miscreants and nonpaying holdovers.

The rule, even as it exists now has been perverted form its original inception and used as an unjustified haven for drug addicted miscreants destroying property and cause untold havoc, the majority of which is invisible to the Courts. To now provide taxpayer funds for lengthy court battles to ensure nonpaying tenants, most of whom were never employed in the first place, the means to continue their activities, is unjustified.

Compassion is warranted to those honest, gainfully employed people who have lost employment as a direct and continuing result of a health crisis. The proposed rule eradicates judicial discretion, assuming any existed in the first place, by using such language as "The court *must*" rather than the traditional long-standing language of "may" or "shall" that permeates our laws.

Proponents cite a 2017 "study" by the University of Washington. It is questionable how a 2017 "study" serves as justification for maintaining an army of publicly funded lawyers to aid in the consequences of a pandemic, when no one on the planet ever heard of Covid-19 prior to 2019. Diligent search of the cited "research" reveals no peer reviewed validation of the "study." The "study" when it can be located seems to center its focus on Counties West of the Cascades. Proponents of this rule cite 11 advocacy groups from 11 Counties, with no apparent input from the other 28 counties, despite obscure notice given to a minority of the legal community which already itself is a minority.

The issue must be taken with proponent's assertion that: "Unaware of their right to counsel and only seek assistance after the entry of a default judgment or the entry of a writ of restitution. Tenants often lose their homes because they do not understand the legal process they are involved in and are unaware of their right to representation. Tenants often do not understand their legal situation until they are served by law enforcement with a writ of restitution telling them they will be physically removed from their home." This is wholly untrue. The process requires a notice to quit or pay rent, a summons informing them of the consequences of not responding, the suggestion that they seek legal advice, and a complaint detailing the defalcation, and notice of hearing. To suggest in a highly patriarchal manner that adult citizens require essentially legal day care to maintain society in good order, should be discouraged, not institutionalized. I also note the near subliminal insertion into the proponents statement the foredrawn conclusion of a "right to counsel" in civil matters. No such right exists in the Federal or State Constitution outside the context of criminal law and procedure.

In that same vein, lawyers attending court sessions and soliciting claims against property owners, and hence against the taxpayers, who ultimately foot the bill should also be discouraged. Such antics which regularly occur, curiously lend themselves to their continued employment at taxpayer expense.

It cannot go entirely unnoticed that the overall carom of the proposed rule has at its core an anti-personal property tone. The ownership of personal property seems to be in some manner undesirable and therefore public policy, through expenditure of taxpayer funds, should be opposed.

Without any changes to RCW 59.18, the task of removing nonpaying holdover persons from living quarters is daunting, expensive and fraught with peril under the best of circumstances. Such mundane occurrences such as a Sherriff knocking on the wrong door, or a refusal to travel in inclement weather, or serve a friend or relative, can bring 250 years of jurisprudence to its knees with the property owner footing the bill.

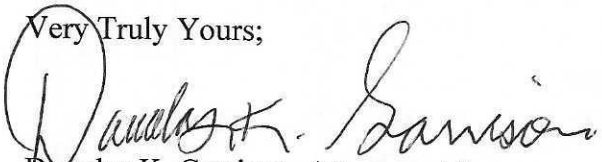
There are several sections of the proposed rule that cannot be reconciled with RCW 59.18 otherwise known as the Residential Landlord-Tenant Act. Section 1 of the proposed rule conflicts with RCW 59.18.640, which states, "Subject to the availability of amounts appropriated for this specific purpose, the court must appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters 59.12 and 59.20 RCW. Contrary to this, SPR 98.24W simply states the appointment is mandatory. Where funds are available, courts are already appointing attorneys pursuant to the law. In jurisdictions where funds are not available, implementation of SPR 98.24W would be ineffective and court orders could not be meaningful.

I also note that the ability of a pro-se defendant to be able to stay a Writ of Restitution without notice to anyone is beyond the proper scope of the judiciary. Any such grant of power should be brought through the State Legislature, using the legislative process, rather than granting such power to the Judicial branch through a Court Rule.

Forcing courts to expend publics funds, a legislative function, through the adoption of a court rule, without debate, review, and an opportunity to vote on such an expenditure circumvents the legislature's preeminence and proper role.

Any such sweeping change and grant of power and expenditure of funds which is wholly the province of the State Legislature should not be accomplished as an incognito Judicial fiat. I urge the Court to not adopt this rule, and further repeal to the extent that can be done the current status, which no longer has any foundation or justification to remain.

Very Truly Yours;



Douglas K. Garrison, Attorney at Law
Garrison Law Office, P.S.

ARMITAGE & THOMPSON PLLC

January 31, 2023

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Re: Proposed new Superior Court Special Proceedings Rule 98.24W

Dear Honorable Justices of the Washington Supreme Court:

We write to express opposition to adopting the proposed SPR 98.24W because it attempts to resolve substantive matters and creates conflicts in the law for litigants who are operating within the intricate special proceedings statutes governing unlawful detainer actions as further explained herein.

In 2021, the Office of Civil Legal Aid ("OCLA") became responsible for implementing a program to provide an opportunity for indigent tenants to obtain free legal counsel in unlawful detainer matters. RCW 59.18.640; *see also* RCW 2.53.060(2) ("The legislature recognizes that the office of civil legal aid needs time to properly implement the right to attorney legal representation for indigent tenants under and consistent with RCW 59.18.640. Within 90 days after April 22, 2021, the office of civil legal aid must submit to the appropriate legislative committees a plan to fully implement the tenant representation program under and consistent with RCW 59.18.640 within 12 months of April 22, 2021.") Within its statutory responsibilities, OCLA is further directed by the legislature to prioritize resources for purposes of administering the statutorily created opportunity for counsel. *See* RCW 59.18.640(1) ("[OCLA] shall assign priority to providing legal representation to indigent tenants in those counties in which the most evictions occur and to indigent tenants who are disproportionately at risk of eviction.). Thus, OCLA owes a duty to all indigent tenants that face eviction to provide a workable program for obtaining the assistance of legal counsel, subject to prioritization considerations and variable funding limits that may impact the ability to provide free legal services to tenants.

As to OCLA's duty to create a workable program, when RCW 59.18.640 was adopted, the legislature was fully aware of the existing law mandating expedited resolution of the question of possession in unlawful detainer cases. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 370–71, 173 P.3d 228, 231 (2007). In adopting RCW 59.18.640, however, the legislature chose not to disrupt the existing statutory framework, including an expedited resolution of the right to possession. The legislature did not direct that an opportunity to obtain free legal counsel required trial courts to elevate substantive rights of an indigent tenant over a non-indigent tenant; stated another way, a landlord's due process protections afforded under the RLTA are the same

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NIK ARMITAGE*
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*Admitted in Washington and Idaho

regardless of whether a tenant qualifies for an opportunity to have appointed counsel or not. Thus, it must logically follow that the legislature envisioned its charge to OCLA as one to develop a program consistent with the current state of the law, i.e., a program that functions with the expediency at which unlawful detainer actions are to be resolved by the courts. To the extent OCLA is not fulfilling its statutory duties to indigent tenants[1], the court should not adopt policies and rules that serve only to mitigate these failures, particularly when doing so conflicts with special proceedings statutes concerning substantive matters and elevates one litigant's access to justice rights over that of another.

As recently articulated by the Court of Appeals, Division 1:

> [T]he temporary deprivation of access to one's real estate in the landlord-tenant context is a significant one. The purpose of an unlawful detainer action is to provide "an expedited method of resolving the right to possession of property." *Christensen v. Ellsworth*, 162 Wash.2d 365, 370-71, 173 P.3d 228 (2007). This statute recognizes that a tenant who cannot pay rent may be judgment proof and expediting the tenant's departure allows the landlord to recover possession of the property before incurring extensive damages. Without the ability to exercise their rights under the RLTA and unlawful detainer statutes, the Landlords face the risk of never being able to recover the unpaid rent, even after they are eventually able to evict the defaulting tenant.

Rental Hous. Ass'n v. City of Seattle, 22 Wn. App. 2d 426, 455, 512 P.3d 545, 561 (2022) (analyzing the expediency of which unlawful detainer actions provide for a resolution of the right to possession of real property relative to balancing the interests involved, including the constitutionally protected interests of landowners); *see also Randy Reynolds & Assoc., Inv. V. Harmon*, 193 Wn.2d 143, 161-162, 437 P.3d 677, 686-687 (2019) (noting in the context of a court's inherent authority to grant a stay that "a trial court judge or commissioner must keep in mind that purpose underlying the RLTA and unlawful detainer actions—that these provisions were designed to hasten the recovery of possession and craft relief that properly and efficiently balances both the landlord's and the tenant's competing interests.") We should also not ignore the interests of neighboring families who are harmed when their landlord cannot remove disruptive or violent tenants without delay.

Proposed SPR 98.24W creates irreconcilable conflicts with the existing statutes that create, define, and regulate primary rights arising in the residential landlord-tenant relationship. "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374, 377 (2009); *see also City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776, 781 (2006) ("Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary

[1] Without reservation, the concerns raised by the proponents of SPR 98.24W clearly shows OCLA is not meeting its obligations.

rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.").

The proposed SPR 98.24W directly conflicts with RCW 59.18.370. In pertinent part, RCW 59.18.370 mandates show cause hearings "shall not be less than seven nor more than thirty days from the date of service of the order upon defendant." In contrast, the proposed SPR 98.24W(1)(d) mandates that the trial court "[c]ontinue the hearing for at least 14 days" without regard to the limits mandated by RCW 59.18.370. An automatic continuance of "at least 14 days" will result in automatically continuing hearings past the limit provided in RCW 59.18.370 for all hearings initially set between the 16th and 30th days. The automatic continuance will also preclude resolving the right to possession prior to 21 days following service of the show cause order, despite the statute permitting such hearings being set as quickly as 7 days following service of the order.

The purported justifications for an automatic continuance are called into doubt in considering the automatic continuance in application. For example, the proposal requires courts automatically continue an initial hearing by at least 14 days regardless of whether the initial hearing afforded the minimum 7 days or the maximum 30 days. Under the proposed SPR 98.24W, a hearing pending for 30 days would thus be afforded the same minimum continuance of 14 days as a hearing pending for the minimum 7 days.

The proposed SPR 98.24W would further deprive courts from considering whether there has been a waiver of an opportunity for counsel under RCW 59.18.640. Notably, the legislature mandated that any summons served in an unlawful detainer action expressly instruct tenants that the right to counsel is waivable: "**GET HELP: If you do not respond by the deadline above, <u>you will lose your right to</u> defend yourself or <u>be represented by a lawyer</u> if you cannot afford one in court and could be evicted.**" RCW 59.18.365(3) (bolded emphasis in original, underline added). Additionally, tenants must be served a form notice to pay or vacate 14 days prior to even serving a summons, and the mandated notice must expressly provide, in relevant part: **"State law provides you the right to legal representation and the court may be able to appoint a lawyer to represent you without cost to you if you are a qualifying low-income renter."** RCW 59.18.057 (bolded emphases in original). The proposed SPR 98.24W effectively mandates a continuance and precludes courts from even considering whether the opportunity to obtain counsel had been waived based on the facts and circumstances.

Several other statutes stand in conflict with the proposed SPR 98.24W relative to substantive matters. Without limitation, the following exemplify additional substantive conflicts:

- RCW 59.12.120 mandates: "If on the date appointed in the summons the defendant does not appear or answer, the court shall render judgment in favor of the plaintiff as prayed for in the complaint."
- RCW 59.18.410(2) provides: "When the tenant is liable for unlawful detainer after a default in the payment of rent, execution upon the judgment shall not occur until the expiration of five court days after the entry of the judgment." This statute goes on to state: "If payment of the amount specified in this subsection is not made within five court

days after the entry of the judgment, the judgment may be enforced for its full amount and for the possession of the premises."

- RCW 59.18.390 directs that the sheriff shall not execute a writ of restitution until 3 days after the sheriff properly serves it.
- RCW 59.18.410(3)(c)(iii)(A) provides in the context of repayment plans that: "Upon service of the notice of default, the tenant shall have three calendar days from the date of service to vacate the premises before the sheriff may execute the writ of restitution." *See also,* RCW 59.18.410(3)(c)(iii)(B) (setting forth notice requirements following breach of repayment plan: "THE LANDLORD MAY SCHEDULE YOUR PHYSICAL EVICTION WITHIN THREE CALENDAR DAYS OF SERVICE OF THIS NOTICE." (capitalization in original)).
- The stay of writ of restitution under RCW 59.18.410(3) is not available to: "A tenant who has been served with three or more notices to pay or vacate for failure to pay rent as set forth in RCW 59.12.040 within twelve months prior to the notice to pay or vacate upon which the proceeding is based[.]" RCW 59.18.410(3)(d).
- The proposed SPR 98.24W does not account for when an indigent tenant is not able to obtain appointed counsel as a result of OCLA's program fulfilling the legislative directive of prioritization or the impact of limited funding. *See* RCW 59.18.640(1). The statute contemplates the possibility that some indigent tenants will not be able to obtain free legal counsel, but the proposed SPR 98.24W would still require the court continue and stay proceedings.
- The proposed SPR 98.24W mandates a stay of a writ of restitution for any tenant that files a motion prior to execution of a writ. Currently, trial judges are to consider the facts and circumstances that are offered in support of a request for a stay of a writ of restitution, including the interest of justice, post judgment reinstatement statutes, and other statutorily created processes depending on the basis for the motion to stay. CR 60; CR 62; RCW 59.18.410. In restricting the trial court judge's discretion to consider whether or not to grant a stay, the proposed SPR 98.24W also conflicts with CR 62, which expressly provides judges with discretion to grant a stay "on such conditions for the security of the adverse party as are proper." CR 62(b).
- RCW 59.18.290(3)(b) precludes courts from entering judgment for attorneys' fees "[i]f the total amount of rent awarded in the judgment for rent is equal to or less than two months of the tenant's monthly contract rent or one thousand two hundred dollars, whichever is greater." The consequence of automatic continuances of the duration proposed, relative to the duration of pre-suit notices and conditions following a breach, all but guarantees possession without payment of rent will span more than two months, such that an automatic continuance directly subjects a tenant to attorneys' fees despite RCW 59.18.290(3)(b).

The proponents of proposed SPR 98.24W stated:

> A tenant does not have the right to appointed counsel until a lawsuit is formally commenced, either by service of a summons and complaint or by the filing of the lawsuit with the court. The impact of this is that despite having received a notice terminating their tenancy, tenants do not have a right to consult with an attorney

> before the matter is escalated and the court can enter orders to remove them from their home."

(Proponents GR 9 Cover Sheet at C. Purpose, re: Section 2.) It is not clear what precludes OCLA from implementing a program that provides indigent tenants access to counsel *prior* to the formal commencement of an action. While RCW 59.18.640 directs *courts* to appoint counsel in unlawful detainer proceedings, the legislature did not restrict OCLA from adopting a program that provides legal services as soon as possible. *See* RCW 59.18.640; RCW 2.53.050. Ostensibly, the legislature designated standards of qualification that allow for a prompt threshold determination of qualification. RCW 59.18.640(2).

As previously noted, the legislative directive to OCLA necessarily requires it implement a program that comports with the expediency at which unlawful detainer cases proceed. Automatic continuances and stays will increase a landlord's damages without regard to justifications by increasing periods of loss of use, increasing rent arrears without security, and increasing attorneys' fees.[2] Given that notices are a necessary precondition to formal commencement of an unlawful detainer action and given that the content of the notice is statutorily required to inform a tenant of the right to counsel program (including specific contact information and instructions on how to engage the program), it seems the program ought to be implemented in a way that provides acess to legal counsel after service of the first notice. In this regard, there does not need to be a new special proceedings rule; rather, there needs to be a change in the program and administration to allow for indigent tenants to get the help when they call for assistance. The feasibility of prompt appointments is supported by Spokane County's use of a single case file (Case No. 21-2-88888-32) for appointment of counsel in all unfiled cases. If appointments can occur in unfiled cases, the same system can accommodate appointments after service of a notice.

For the foregoing reasons, we respectfully submit that the Washington Supreme Court should not adopt the proposed SPR 98.24W.

Respectfully submitted,

Nik Armitage JJ Thompson

[2] OCLA's failure to comply with its statutory mandate and any duties owed to an indigent tenant should not serve as the basis for imposing further financial harm to landlords. Any remedies occasioning such failures should be pursued by aggrieved tenants in actions against OCLA. *See Nw. Envtl. Advocates v. U.S. Dep't of Commerce*, 283 F. Supp. 3d 982, 986 (W.D. Wash. 2017) (explaining agencies may be liable for failure to comply with their statutory mandate where they "unlawfully withhold or unreasonably delay actions required by law, or take actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); RCW 34.05.570(4)(c); *see also* RCW 4.92.090 (waiving State's sovereign immunity).

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment on Proposed SPR 98.24W
Date: Tuesday, January 31, 2023 3:55:00 PM
Attachments: Comment on Proposed SPR 98.24W.pdf

From: JJ Thompson <JJT@law-wa.com>
Sent: Tuesday, January 31, 2023 2:02 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Nikalous Armitage <noa@law-wa.com>
Subject: Comment on Proposed SPR 98.24W

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Please find attached hereto our comment on proposed SPR 98.24W.

Thank you,

JJ THOMPSON

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Washington State Office of Civil Legal Aid

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James A. Bamberger, Director
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January 27, 2022

Honorable Charles W. Johnson, Co-Chair
Honorable Mary I. Yu, Co-Chair
Supreme Court Rules Committee
Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Re: Proposed new Superior Court Special Proceedings Rule 98.24W

Dear Justice Johnson and Justice Yu,

Thank you for the opportunity to provide feedback on proposed Superior Court Special Proceedings Rule 98.24W. The Office of Civil Legal Aid (OCLA) encourages favorable consideration and adoption of the proposed rule.

RCW 59.18.640 tasked OCLA with implementing, administering, and overseeing a statewide program for court-appointed attorneys for indigent tenants in unlawful detainer proceedings. In that role, OCLA has regularly met with stakeholders, observed court hearings, monitored court processes and landlord attorney practices, and tracked tenant outcomes. These efforts helped inform us about and work to address obstacles to effective and complete implementation of the new right to appointed counsel consistent with legislative intent.

An early lesson has been the lack of consistency across the 37 judicial districts in both the interpretation and implementation of the newly established tenant right to appointed counsel. Despite the guidance outlined in a bench card developed by the Superior Court Judges' Association in consultation with rental housing industry representatives and OCLA, judicial officers frequently fail to advise unrepresented tenants of their right to appointed counsel, provide them with information about where and how to be screened for eligibility, and upon appearance and appointment of counsel, fail to provide sufficient time for the tenant's attorney to prepare for and effectively represent the tenant. The proposed rule would establish uniform, legally enforceable norms across all judicial districts. In so doing it will eliminate the current "justice by geography" that often results in the effective denial of the right to timely appointment and effective assistance of counsel required by the Legislature.

Adoption of the proposed rule is a necessary and proper exercise of the Court's inherent authority to regulate practice and procedure in our state's courts. During the early days of the COVID-19 pandemic, the Court required uniform practices across all courts in several areas of practice and procedure. The Court's most recent rule continues many of these. Adoption of this proposed rule is consistent with the Court's recent actions.

The right to appointed counsel and the effective assistance of same cuts to the core of a fair and just judicial system. Regulation of the procedure by which the right is recognized and administered by judicial officers falls squarely within the reach of the Court's inherent authority. Recognizing the fundamental interest in protecting tenant housing stability, the Legislature directed that courts appoint attorneys in all unlawful detainer proceedings. Given the lack of consistency in judicial understanding and practice, it is appropriate – and necessary -- that the Court establish minimal uniform procedural safeguards and practices to ensure the proper and effective exercise of this right.

Regarding the proposed rule's substance, it is important to recognize that most tenants first learn of the unlawful detainer proceeding when they are served. For these tenants, regardless of merit, a temporary stay is the only way they can get an attorney. Tenants residing in jurisdictions where courts, despite SCJA encouragement and its bench card, have not formalize those processes by local rule or administrative order will be denied access to a court appointed attorney. Requiring a 10 day pause to allow for the assessment and administration of the appointed counsel program, is a measured and necessary procedural protection. OCLA also agrees with the proponents' analysis and rationale for uniform standards for providing temporary relief in post-writ matters.

In sum, OCLA believes that the proposed rule is within the scope of the Court's rulemaking authority, addresses significant problems that result in disproportionate and differential justice by geography in the handling of unlawful detainer cases, is vital to ensuring fair treatment of disproportionately BIPOC, LEP, and other defendants with limited understanding of their rights, and is fully consistent with applicable law.

For the foregoing reasons, OCLA respectfully requests that the Rules Committee recommend adoption of the proposed special proceedings rule.

Sincerely,

OFFICE OF CIVIL LEGAL AID

James A. Bamberger
Director

C: Philippe Knab, OCLA ED Program Manager

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Proposed Special Proceedings Rule 98.24W
Date: Friday, January 27, 2023 4:22:21 PM
Attachments: SC Rule Letter Draft 1-27-23 Final signed.pdf

From: Bamberger, James (OCLA) <jim.bamberger@ocla.wa.gov>
Sent: Friday, January 27, 2023 4:21 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Bamberger, James (OCLA) <jim.bamberger@ocla.wa.gov>; Knab, Philippe (OCLA) <philippe.knab@ocla.wa.gov>
Subject: Proposed Special Proceedings Rule 98.24W

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Greetings,

Please find attached the comments submitted by the Office of Civil Legal Aid on proposed Special Proceedings Rule 98.24W.

Thank you.

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360-280-1477 (mobile)
Jim.bamberger@ocla.wa.gov
Notice: All email sent to this address will be received by the Office of Civil Legal Aid's email system and may be subject to public disclosure under GR 31.1 and to archiving and review.

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December 5, 2022

Honorable Charles W. Johnson, Chair
Honorable Mary I. Yu, Chair
Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Dear Justice Johnson and Justice Yu:

Re: Proposed new Superior Court Special Proceedings Rule 98.24W

On behalf of the Superior Court Judges' Association (SCJA), I thank you for the opportunity to review and provide comments on proposed new Superior Court Special Proceedings Rule (SPR) 98.24W. This rule contemplates specific actions from superior courts in unlawful detainer proceedings. The SCJA appreciates the intention behind the rule to ensure access to justice. Indeed, SCJA has worked closely with stakeholders to stand up and support the Eviction Resolution Pilot Program (ERPP) over the past two years, which has successfully been diverting unlawful detainer cases based on nonpayment of rent away from the courts and toward amiable resolution.

The ERPP Judicial Leadership Team and SCJA Civil Law and Rules Committee have both reviewed the proposed rule and GR 9 cover sheet, and arrived at the same conclusion. In the experience of judicial officers implementing unlawful detainer proceedings, the challenges described by the proponents of the rule are not found to be significant, and the SCJA does not believe a new rule is necessary and does not support its adoption. As written, SPR 98.24W creates conflict with existing law, removes judicial discretion to address the individualized needs of tenants and landlords, and creates substantive policy that is most appropriately addressed by the Legislature.

Conflict with Existing Law and Legal Protections

There are several sections in SPR 98.24W that conflict with the plain language of Chapter 59.18 RCW, otherwise known as the Residential Landlord-Tenant Act. Section 1 of the proposed rule is in conflict with RCW 59.18.640, which states, "*Subject to the availability of amounts appropriated for this specific purpose*, the court must appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters 59.12 and 59.20 RCW [emphasis added]." Contrary to this, SPR 98.24W simply states the appointment is mandatory. Where funds are available, courts are already appointing attorneys pursuant to the law. In jurisdictions where funds are not available, implementation of SPR 98.24W would result in the entry of court orders that court not be enforced. Additionally, the mandatory ten day stay period contemplated by the proposed rule is outside the

existing provisions for the appointment of counsel process outlined in RCW 59.18.640. Any guidance specific to the process of appointing lawyers for indigent tenants should be made in coordination with the Legislature.

SPR 98.24W also creates significant due process concerns. Section 2 allows a tenant to make an *ex parte* motion to stay a writ of restitution without requiring notice. It is silent on requirements of the Residential Landlord-Tenant Act and existing case law on notice to the landlord, the landlord's attorney, or the law enforcement charged with enforcing the original writ. As a consequence, the landlord has no opportunity to be heard on the issue of the stay and law enforcement may enforce the writ before being advised of the stay.

Judicial Discretion

SPR 98.24W removes all opportunities for judicial discretion currently afforded by the law, including those instances in which relief should be appropriately tailored to the relevant case circumstances. For example, Section 1(d) sets a mandatory continuance of fourteen days. The courts are given no discretion to order a continuance for any other length of time. In counties with large unlawful detainer caseloads, the court is able to set a return hearing within seven days. In courts such as these, continuing the hearing for fourteen days is not only unnecessary, it may be prejudicial to landlords seeking relief pursuant to the law. This section also does not recognize local court authority to promulgate rules to ensure the orderly conduct of the proceedings before them (see RCW 2.28.010).

RCW 59.18.410(3) and (4) provides the factors judicial officers can use in making the discretionary decision to stay a writ of restitution. As written, Section 2 of SPR 98.24W removes all judicial discretion to craft a remedy fitting the individual circumstances of the case, and advances requirements not found in the law. Without this discretion, courts will not be able to make allowances in cases where the record indicates there is no substantive basis to oppose the action, such as proper notice under RCW 59.18.650 for selling the property. Nor does this section recognize local court rules currently in place regarding emergency motions and presentation of *ex parte* matters, and may be in direct conflict with those rules.

Role of the Courts

Finally, Section 3 appears to contemplate a role for the courts in screening tenants for indigency criteria. These screenings are conducted by the agencies assigned in each jurisdiction to provide indigent representation. In many counties, these agencies are not able to assist the tenant within ten days, and the proposed rule does not adequately address next steps.

The SCJA is keenly aware of the challenges facing unrepresented litigants. In fact, increasing access to justice for litigants without legal representation has been a major priority under my leadership as SCJA President, and I serve as Chair of the SCJA Unrepresented Litigant Ad Hoc Workgroup. While we appreciate the position of those advancing this proposed rule, the state court rules are not the appropriate venue to advance policy objectives to supersede the Residential Landlord Tenant Act and existing case law.

The SCJA respectfully asks the Court not to adopt the proposed rule SPR 98.24W. We will provide additional feedback during the public comment process.

Sincerely,

Judge Jennifer Forbes, President
Superior Court Judges' Association

cc: SCJA Board of Trustees
Ms. Allison Lee Muller

From: Linford, Tera
To: Martinez, Jacquelynn
Cc: Tracy, Mary
Subject: FW: Public Comment to SPR 98.24W
Date: Monday, December 5, 2022 9:59:07 AM
Attachments: SCJA Public Comment to SPR 98.24W.pdf

From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Monday, December 5, 2022 9:56 AM
To: Linford, Tera <Tera.Linford@courts.wa.gov>
Subject: FW: Public Comment to SPR 98.24W

From: Valdez, Andrea <Andrea.Valdez@courts.wa.gov>
Sent: Monday, December 5, 2022 9:51 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Jennifer Forbes' <jforbes@kitsap.gov>; Lee Muller, Allison <Allison.LeeMuller@courts.wa.gov>
Subject: Public Comment to SPR 98.24W

Good morning,

On behalf of the Superior Court Judges' Association, I respectfully submit the attached public comment to SPR 98.24W. Please contact Judge Jennifer Forbes if you have any questions.

Thank you,

Andrea Valdez, MPA (she/her/hers)
Senior Policy Analyst
Superior Court Judges' Association
Administrative Office of the Courts
Andrea.valdez@courts.wa.gov

Superior Court for the State of Washington
in and for the County of King

JUDGE TANYA L. THORP
Department 27

King County Courthouse
Seattle, Washington 98104-2312

January 31, 2023

Honorable Charles W. Johnson, Chair
Honorable Mary I. Yu, Chair
Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Dear Justice Johnson and Justice Yu:

Re: Proposed new Superior Court Special Proceedings Rule 98.24W

Thank you for the opportunity to provide comments on this proposed rule. I submit this comment in consultation with the King County Superior Ex Parte and Probate Department Court Commissioners that hear unlawful detainer matters. We concur with the Superior Court Judges' Association (SCJA) comments submitted on December 5, 2022. We write separately only to suggest that if the rule should proceed that the following edits be considered:

1) That the last sentence of Section 2 be revised to state: "Upon such motion, the court shall appoint the lawyer and stay the writ for no less than 10 days."
2) That the first sentence of Section 3 state: "A stay issued under this rule will expire on the expiration date without further order from the court."

The above suggested edits are not intended and do not address any of the concerns outlined in the SCJA comments. The edits are proposed only because the 10-day limit on stays is not feasible with the volume of cases in King County.

Thank you for your time and consideration.

Sincerely,

Tanya L. Thorp
Chief Civil Judge
King County Superior Court

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Public Comment to SPR 98.24W
Date: Tuesday, January 31, 2023 11:17:25 AM
Attachments: Comment to SPR 98.24W.pdf

From: Thorp, Tanya <Tanya.Thorp@kingcounty.gov>
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Public Comment to SPR 98.24W

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Good morning,

Attached please find the public comment so SPR 98.24W. Please feel free to contact me if you have any questions.

Sincerely,

Tanya L. Thorp
Superior Court Judge (she/her)
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