THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CrR 3.1 STDS, CrRLJ 3.1 STDS, JuCR 9.2 STDS, AND NEW MPR 2.1 STDS	)	**ORDER**
	)	NO. 25700-A-1276

The Washington State Bar Association Board of Governors, having recommended the suggested amendments to CrR 3.1 Stds, CrRLJ 3.1 Stds, JuCR 9.2 Stds, and New MPR 2.1 Stds, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment
Standard 14.1 of the Standards for Indigent Defense, the Mental Proceedings Rules (MPR), and the Standards Certification of Compliance for CrR 3.1, CrRLJ 3.1 and JuCR 9.2
Submitted by the Board of Governors of the Washington State Bar Association

A. Name of Proponent:

Washington State Bar Association

B. Spokespersons:

William Pickett, President, Washington State Bar Association, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539 (telephone 509-972-1825)

Daryl Rodrigues, Chair, Council on Public Defense, Washington State Bar Association, Seattle, WA 98101-2539 (telephone 360-701-0306)

Diana Singleton, Access to Justice Manager, Washington State Bar Association, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539 (telephone 206-727-8205)

C. Purpose:

The *Standards for Indigent Defense Services* adopted by the Washington Supreme Court set a caseload limit for appointed counsel representing clients in criminal cases and for appointed counsel representing clients in civil commitment proceedings. The *Standards* also require appointed counsel in criminal cases: 1) to be familiar with the Performance Guidelines for Criminal Defense Representation and the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and 2) to file quarterly Certifications that they are in compliance with the caseload limits included in the *Standards*.

Counsel appointed in the more than 10,000 civil commitment petitions filed each year have no uniform guidance for client representation and routinely do not file Certifications of Compliance. To address this gap, the Council formed a Mental Health Committee, which in early 2017 began drafting *Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings* (*Guidelines*). The first draft was circulated for comment on the Washington Defender Association (WDA) civil commitment practitioners' listserv. The Committee revised and circulated the Guidelines twice more in light of the feedback.

A close to final version of the Guidelines was sent, with a request for comment, in advance of the Council's September 2018 meeting to the Washington State Association of Counties, the Gender and Justice Commission and the Minority and Justice Commission, Disability Rights Washington and the National Alliance for the Mentally Ill (NAMI) Greater Seattle chapter.

The Council approved the Guidelines by a supermajority at its October 5, 2018 meeting. They were given a first reading at the November 2018 Board of Governors meeting and circulated again for comments. At their second reading in January 2019, the Board of Governors voted unanimously to recommend the Supreme Court: 1) add the Guidelines to the *Standards*; 2) include the *Standards* in the Mental Proceedings Rules; and 3) require appointed counsel representing clients in civil commitment proceedings file Certifications of Compliance as is now required of appointed counsel in criminal cases.

Specifically, the first recommendation is that the Court add the proposed *Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings* to Standard 14.1 of the *Standards for Indigent Defense* and modify the language of Standard 14.1(D) as follows:

> Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association and, when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association **when representing respondents in civil commitment proceedings, be familiar with the Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings approved by the Washington State Bar Association**; and

The second recommendation is that the Court include the *Standards* in the Mental Proceedings Rules (newly proposed MPR 2.1) and require appointed counsel representing clients in civil commitment proceedings to file Certifications of Compliance, as is already required of appointed counsel in criminal cases.

For consistency, the newly proposed *Standards* in MPR 2.1 are also being proposed for inclusion in the *Standards* in CrR 3.1, CrRLJ 3.1, and JuCR 9.2.

D. Hearing:

A hearing is not recommended.

E. Expedited Consideration:

Expedited consideration is respectfully requested. The Council worked with numerous stakeholders for 18 months to develop Guidelines for representation of some of Washington's most vulnerable residents in civil commitment proceedings.

F. Supporting Material:

Suggested rule amendments and Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings.

SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrR 3.1
PREAMBLE

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2/MPR 2.1 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in State v. A.N.J., 168 Wn.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

[Adopted effective October 1, 2012. Amended effective _____.]

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrR 3.1
STANDARD 14.1

Unchanged.

(A) – (C) Unchanged.

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; ~~and,~~ when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and when representing respondents in civil commitment proceedings, be familiar with the Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings approved by the Washington State Bar Association; and

(E) – (G) Unchanged.

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrR 3.1

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, and civil commitment proceedings under RCW 71.05, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

Washington State Bar Association
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Seattle, WA 98101-2539

SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrR 3.1

SEPARATE CERTIFICATION FORM

_____ **Court of Washington** for _____	[ ] No.: _____
State of Washington_____, Plaintiff vs. _____, Defendant	CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1 / CrRLJ 3.1 / JuCR 9.2/MPR 2.1

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads; effective _____ for civil commitment caseloads.; I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Specific Qualifications: I am familiar with the specific case qualifications in Standard 14.2, Sections B-K (criminal) and Section M (civil commitment) and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013; effective ____ for civil commitment cases]

_____ _____

Signature, WSBA# Date

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS

Washington State Bar Association
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Seattle, WA 98101-2539

SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)
CrR 3.1

REQUIRED BY CrR 3.1/CrRLJ 3.2/JuCR 9.2/MPR 2.1

[Adopted effective October 1, 2012. Amended Effective September 1, 2013; September 17, 2013; October 1, 2013;_____.]

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrRLJ 3.1
PREAMBLE

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2/MPR 2.1 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in State v. A.N.J., 168 Wn.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

[Adopted effective October 1, 2012. Amended effective _____.]

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrRLJ 3.1
STANDARD 14.1

Unchanged.

(A) – (C) Unchanged.

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; ~~and,~~ when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and when representing respondents in civil commitment proceedings, be familiar with the Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings approved by the Washington State Bar Association; and

(E) – (G) Unchanged.

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)
CrRLJ 3.1

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, and mental health proceedings under RCW 71.05, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

CrRLJ 3.1

SEPARATE CERTIFICATION FORM

_____ **Court of Washington** for _____	[ ] No.: _____
State of Washington_____, Plaintiff vs. _____, Defendant	CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1 / CrRLJ 3.1 / JuCR 9.2/MPR 2.1

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Specific Qualifications: I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

_____ _____

Signature, WSBA# Date

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS

REQUIRED BY CrR 3.1/CrRLJ 3.2/JuCR 9.2/MPR 2.1

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)
CrRLJ 3.1

[Adopted effective October 1, 2012. Amended Effective September 1, 2013; September 17, 2013; October 1, 2013.]

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

JuCR 9.2
PREAMBLE

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2/MPR 2.1 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in State v. A.N.J., 168 Wn.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

[Adopted effective October 1, 2012. Amended effective _____.]

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

JuCR 9.2
STANDARD 14.1

Unchanged.

(A) – (C) Unchanged.

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; ~~and,~~ when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and when representing respondents in civil commitment proceedings, be familiar with the Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings approved by the Washington State Bar Association; and

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)
JuCR 9.2

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, and mental health proceedings under RCW 71.05, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

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SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)

JuCR 9.2

SEPARATE CERTIFICATION FORM

_____ **Court of Washington** for _____	[ ] No.: _____
State of Washington_____, Plaintiff vs. _____, Defendant	CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1 / CrRLJ 3.1 / JuCR 9.2/MPR 2.1

The undersigned attorney hereby certifies:

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e. Specific Qualifications: I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

_____ _____

Signature, WSBA# Date

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS

REQUIRED BY CrR 3.1/CrRLJ 3.2/JuCR 9.2/MPR 2.1

Washington State Bar Association
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Seattle, WA 98101-2539

SUGGESTED AMENDMENT
STANDARDS FOR INDIGENT DEFENSE (SID)
JuCR 9.2

[Adopted effective October 1, 2012. Amended Effective September 1, 2013; September 17, 2013; October 1, 2013.]

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SUPERIOR COURT
MENTAL PROCEEDINGS RULES (MPR)

TABLE OF RULES

1. GENERAL

Unchanged.

2. PROCEEDINGS FOR INITIAL DETENTION

2.1 Summons

Standards for Indigent Defense (SID)

2.2 Authorization and Notice of Detention
2.2A Notice of Emergency Detention
2.3 Right To Copy Court Files
2.4 Probable Cause Hearing
2.5 Rescinded

3. PROCEEDINGS FOR NINETY OR ONE HUNDRED EIGHTY-DAY COMMITMENT

Unchanged.

4. PROCEEDINGS FOR CONDITIONAL RELEASE AND REVOCATION OR MODIFICATION

Unchanged.

5. VENUE

Unchanged.

6. PETITIONS

Unchanged.

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

Table of Rules

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

14.4 Legal Interns

Standards 15 to 18. [Reserved]

Certificate of Compliance

PREAMBLE

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards required by CrR 3.1/CrRLJ 3.1/JuCR 9.2/MPR 2.1 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in *State v. A.N.J.*, 168 Wn.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

[Adopted effective October 1, 2012. Amended Effective_____.]

STANDARD 1. COMPENSATION

[RESERVED.]

STANDARD 2. DUTIES AND RESPONSIBILITIES OF COUNSEL

[RESERVED.]

STANDARD 3. CASELOAD LIMITS AND TYPES OF CASES

STANDARD 3.1. The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

[Adopted effective October 1, 2012.]

STANDARD 3.2. The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the

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minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

[Adopted effective October 1, 2012.]

STANDARD 3.3. GENERAL CONSIDERATIONS. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of the case types in the attorney's caseload, but it is not a factor in adjusting the applicable numerical caseload limits except as follows: attorneys with less than six months of full time criminal defense experience as an attorney should not be assigned more than two-thirds of the applicable maximum numerical caseload limit. This provision applies whether or not the public defense system uses case weighting.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in standard 3.4 and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

Definition of case. A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

Washington State Bar Association
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Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

STANDARD 3.4. CASELOAD LIMITS. The caseload of a full-time public defense attorney or assigned counsel should not exceed the following:

150 felonies per attorney per year; or

300 misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this standard, 400 cases per year; or

250 juvenile offender cases per attorney per year; or

80 open juvenile dependency cases per attorney; or

250 civil commitment cases per attorney per year; or

1 active death penalty trial court case at a time plus a limited number of non-death-penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of standard 3.2; or

36 appeals to an appellate court hearing a case on the record and briefs per attorney per year. (The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)

Full-time rule 9 interns who have not graduated from law school may not have caseloads that exceed twenty-five percent (25%) of the caseload limits established for full-time attorneys.

In public defense systems in which attorneys are assigned to represent groups of clients at first appearance or arraignment calendars without an expectation of further or continuing representation for cases that are not resolved at the time (except by dismissal) in addition to individual case assignments, the attorneys' maximum caseloads should be reduced proportionally recognizing that preparing for and appearing at such calendars requires additional attorney time. This provision applies both to systems that employ case weighting and those that do not.

Resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case. This provision applies both to systems that employ case weighting and those that do not.

In public defense systems in which attorneys are assigned to represent groups of clients in routine review hearing calendars in which there is no potential for the imposition of

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Seattle, WA 98101-2539

sanctions, the attorneys' maximum caseloads should be reduced proportionally by the amount of time they spend preparing for and appearing at such calendars. This provision applies whether or not the public defense system uses case weighting.

[Adopted effective October 1, 2013, except paragraph 3, regarding misdemeanor caseload limits, effective January 1, 2015; amended effective January 1, 2015.]

STANDARD 3.5. CASE COUNTING AND WEIGHTING. Attorneys may not count cases using a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A weighting system must:

A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;

B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;

D. be periodically reviewed and updated to reflect current workloads; and

E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

STANDARD 3.6. CASE WEIGHTING EXAMPLES. The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.

A. **Case Weighting Upward.** Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers, and/or expenditures of time and resources should be weighted upward and counted as more than one case.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

B. **Case Weighting Downward.** Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.

i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited appearances for a specific purpose (not including representations of multiple cases on routine dockets).

ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions, representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Noncomplex sentence violations should be weighted as at least 1/3 of a case.

iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client's participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.

iv. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

Related Standards

ABA Standards for Criminal Justice: Prosecution Function and Defense Function Defense Function std. 4-1.2 (3d ed. 1993)

ABA Standards for Criminal Justice: Providing Defense Services std. 5-4.3 (3d ed. 1992)

Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)

Washington State Bar Association
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SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*)

Am. Council of Chief Defenders, *Statement on Caseloads and Workloads* (Aug. 24, 2007)

ABA House of Delegates, *Eight Guidelines of Public Defense Related to Excessive Caseloads* (Aug. 2009)

TASK FORCE ON COURTS, NAT'L ADVISORY COMM'N ON CRIMINAL STANDARDS & GOALS, COURTS std. 13.12 (1973)

MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101.

ABA House of Delegates, *The Ten Principles of a Public Defense Delivery System* (Feb. 2002)

ABA House of Delegates, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 1996)

Nat'l Legal Aid & Defender Ass'n, Am. Council of Chief Defenders, Ethical Opinion 03-01 (2003).

Nat'l Legal Aid & Defender Ass'n, *Standards for Defender Services* std. IV-1 (1976)

Nat'l Legal Aid & Defender Ass'n, *Model Contract for Public Defense Services* (2000)

Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)

Seattle Ordinance 121501 (June 14, 2004)

Indigent Defense Servs. Task Force, Seattle-King County Bar Ass'n, *Guidelines for Accreditation of Defender Agencies* Guideline 1 (1982)

Wash. State Office of Pub. Defense, *Parents Representation Program Standards of Representation* (2009)

BUREAU OF JUDICIAL ASSISTANCE, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERIES NO. 4, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (NCJ 185632)

STANDARD 4. RESPONSIBILITY OF EXPERT WITNESSES

[RESERVED.]

STANDARD 5. ADMINISTRATIVE COSTS

STANDARD 5.1. [RESERVED.]

STANDARD 5.2.

A. Contracts for public defense services should provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel; telephones; law library, including electronic legal research; financial accounting; case management systems; computers and software; office space and supplies; training; meeting the reporting requirements imposed by these standards; and other costs necessarily incurred in the day-to-day management of the contract.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

B. Public defense attorneys shall have (1) access to an office that accommodates confidential meetings with clients and (2) a postal address, and adequate telephone services to ensure prompt response to client contact.

[Adopted effective October 1, 2012.]

STANDARD 6. INVESTIGATORS

STANDARD 6.1. Public defense attorneys shall use investigation services as appropriate.

[Adopted effective October 1, 2012.]

STANDARDS 7-12

[RESERVED.]

STANDARD 13. LIMITATIONS ON PRIVATE PRACTICE

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

[Adopted effective October 1, 2012.]

STANDARD 14. QUALIFICATIONS OF ATTORNEYS

STANDARD 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

C. Be familiar with the Washington Rules of Professional Conduct; and

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association, and when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

, when representing respondents in civil commitment proceedings, be familiar with the Performance Guidelines for Attorneys Representing Respondents in Civil Commitment Proceedings approved by the Washington State Bar Association.

E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

[Adopted effective October 1, 2012; amended effective April 24, 2018.]

STANDARD 14.2. ATTORNEYS' QUALIFICATIONS ACCORDING TO SEVERITY OR TYPE OF CASE[1]:

A. Death Penalty Representation. Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. At least five years' criminal trial experience; and

iii. Have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

iv. Have served as lead or co-counsel in at least one aggravated homicide case; and

v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and

vi. Have completed at least one death penalty defense seminar within the previous two years; and

[1] Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

vii. Meet the requirements of SPRC 2.[2]

The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist, and an investigator. Psychiatrists, psychologists, and other experts and support personnel should be added as needed.

B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served two years as a prosecutor; or

b. has served two years as a public defender; or two years in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

2

SPRC 2
APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

C. **Adult Felony Cases—Class B Violent Offense.** Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.

i. The minimum requirements set forth in Section 1; and

ii. Either;

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. **Adult Sex Offense Cases.** Each attorney representing a client in an adult sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(C); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. **Adult Felony Cases—All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation.** Each attorney representing a defendant accused of a Class B felony not defined in Section 2(C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. Persistent Offender (Life Without Possibility of Release) Representation. Each attorney acting as lead counsel in a "two strikes" or "three strikes" case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:

i. The minimum requirements set forth in Section 1;[3] and

ii. Have at least:

a. four years' criminal trial experience; and

b. one year's experience as a felony defense attorney; and

c. experience as lead counsel in at least one Class A felony trial; and

d. experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and

3. Expert witnesses; and

4. One year of appellate experience or demonstrated legal writing ability.

G. Juvenile Cases—Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

[3] RCW 10.101.060(1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require "attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies."

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone of record in five Class B and C felony trials; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. Juvenile Cases—Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice, and

iii. Has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases. Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(H); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

J. Juvenile Status Offenses Cases. Each attorney representing a client in a "Becca" matter shall meet the following requirements:

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

i. The minimum requirements as outlined in Section 1; and

ii. Either:

a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to "status offense" cases; or

b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Attorneys handling termination hearings shall have six months' dependency experience or have significant experience in handling complex litigation.

iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.

iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and

iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

a. served one year as a prosecutor; or

b. served one year as a public defender; or one year in a private civil commitment practice, and

c. been trial counsel in five civil commitment initial hearings; and

iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender "Predator" Commitment Cases. Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Have at least:

a. Three years' criminal trial experience; and

b. One year's experience as a felony defense attorney or one year's experience as a criminal appeals attorney; and

c. Experience as lead counsel in at least one felony trial; and

d. Experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses; and

3. Expert witnesses; and

e. Familiarity with the Civil Rules; and

f. One year of appellate experience or demonstrated legal writing ability.

Other counsel working on a sex offender commitment case should meet the minimum requirements in Section 1 and have either one year's experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

O. Contempt of Court Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.

P. Specialty Courts. Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and

iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

[Adopted effective October 1, 2012.]

STANDARD 14.3. APPELLATE REPRESENTATION. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

A. The minimum requirements as outlined in Section 1; and

B. Either:

i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or

ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing, or other comparable work.

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

RALJ Misdemeanor Appeals to Superior Court: Each attorney who is counsel alone for a case on appeal to the Superior Court from a court of limited jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing a RALJ appeal.

[Adopted effective October 1, 2012.]

STANDARD 14.4. LEGAL INTERNS.

A. Legal interns must meet the requirements set out in APR 9.

B. Legal interns shall receive training pursuant to APR 9, and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

[Adopted effective October 1, 2012.]

STANDARDS 15-18

[RESERVED]

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, and civil commitment proceedings under RCW 71.05, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

SEPARATE CERTIFICATION FORM

Court of Washington for _____	[ ] No.: _____
State of Washington _____, Plaintiff vs. _____, Defendant	CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1 / CrRLJ 3.1 / JuCR 9.2/MPR 2.1

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads; effective___ for civil commitment caseloads. I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Specific Qualifications: I am familiar with the specific case qualifications in Standard 14.2, Sections B-K (criminal) and M (civil commitment proceedings) and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013. Effective___ for civil commitment cases.]

_____

Signature, WSBA# Date

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

SUGGESTED AMENDMENT

STANDARDS FOR INDIGENT DEFENSE (SID)

MPR 2.1 – STANDARDS

REQUIRED BY CrR 3.1/CrRLJ 3.2/JuCR 9.2/MPR 2.1

[Adopted effective October 1, 2012. Amended Effective September 1, 2013; September 17, 2013; October 1, 2013; _____.]

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CR 30(b)(1)—DEPOSITIONS UPON ORAL EXAMINATION, AND CR 43(f)(1)—TAKING OF TESTIMONY

ORDER

NO. 25700-A-1277

Aderant CompuLaw, having recommended the suggested amendments to CR 30(b)(1)—Depositions Upon Oral Examination, and CR 43(f)(1)—Taking of Testimony, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ

CHIEF JUSTICE

GR 9 COVER SHEET

SUGGESTED AMENDMENTS TO SUPERIOR COURT CIVIL RULES (CR) Rules 30(b)(1) and 43(f)(1)

(A) Name of Proponent: The suggested amendments are submitted by Aderant CompuLaw. Aderant CompuLaw is a software-based court rules publisher providing deadline information to many law firms practicing in the Washington Superior Courts.

(B) Spokesperson: Cheryl Siler, Director of Operations, Aderant CompuLaw, 200 Corporate Pointe, Suite 400, Culver City, CA 90230, (310) 846-0860.

(C) Purpose: The suggested amendments are necessary to eliminate an ambiguity in the calculation of the deadlines to give notice under Washington Superior Court Civil Rules ("CR") 30(b)(1) and 43(f)(1). Under CR 30(b)(1), a party is required to give 5 days' notice for an oral deposition. CR 43(f)(1) requires a party to give 10 days' notice for the attendance of a party or managing agent at trial. Both rules specify that the time periods for notice exclude the day of service. In practice, the deadlines to give notice are generally calculated by counting backward from the date of deposition or trial. Thus, the requirement to exclude the day of service is causing confusion amongst litigators before the Washington state courts. Additionally, because CR 6(a) already provides a clear method for computation of time, the suggested amendments would eliminate some of the redundant language in CR 30(b)(1) and 43(f)(1).

(D) Hearing: A hearing is not requested.

(E) Expedited Consideration: Expedited consideration is not requested.

Argument in Support of Suggested Amendments
CR 30(b)(1) and 43(f)(1)

Washington Superior Court Civil Rule ("CR") 30(b)(1) states in part:

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. [Emphasis added.]

CR 43(f)(1) states in part:

> Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). [Emphasis added.]

CR 6(a) states:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

When calculating a deadline to act or take some proceedings after service, it is clear under CR 6(a) that the date of service is excluded, and that the computation of the time period begins on the day after service.

To determine when notice must be given under CR 30(b)(1) and 43(f)(1), it is our understanding that most practitioners simply count backward 5 court days from the date of the deposition, or 10 court days from the date of trial, respectively. Under CR 6(a), the day of the event is excluded and the last day of the period is included.

However, it is unclear whether an additional day should be added at the end of the calculation in order to accommodate the exclusion of the date of service per CR 30(b)(1) and 43(f)(1). Some practitioners interpret the rules as actually requiring calculations that are 6 court days before the date of deposition and 11 court days before the date of trial.

The requirement to exclude the date of service is also somewhat unclear given that the rules do not specify that service is required. The rules only state that notice must be "given."

Argument in Support of Suggested Amendments
CR 30(b)(1) and 43(f)(1)

Additionally, CR 6(a) already excludes Saturdays, Sundays and legal holidays for time periods less than 7 days. Thus, the parenthetical language for the 5-day deadline under CR 30(b)(1) is redundant.

We suggest that the Court eliminate the ambiguity and redundancy by amending CR 30(b)(1) to delete the parenthetical information regarding the computation of time, and by amending CR 43(f)(1) to delete the parenthetical information regarding the exclusion of the day of service. Adopting these suggested amendments will eliminate confusion and ensure that parties practicing before the Washington Superior Courts are able to generate reliable and consistent deadlines in their matters.

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULES (CR)
Rule 30(b)(1)

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording;Production of Documents and Things; Deposition of Organization; Video Tape Recording.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days ~~(exclusive of the day of service, Saturdays, Sundays and court holidays)~~ to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

SUGGESTED AMENDMENT TO
SUPERIOR COURT CIVIL RULES (CR)
Rule 43(f)(1)

(f) Adverse Party as Witness.

(1) Party or Managing Agent as Adverse Witness. A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association which is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in rule 30(b)(1) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of ~~the day of service,~~ Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in rule 26(c), the court may make orders for the protection of the party or managing agent to be examined.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED RULE AMENDMENTS TO GR 29—PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND LIMITED JURISDICTION COURT DISTRICT, AND CrRLJ 1.3—EFFECT

ORDER

NO. 25700-A-1278

The District and Municipal Court Judges' Association, having recommended the suggested rule amendments to GR 29—Presiding Judge in Superior Court District and Limited Jurisdiction Court District, and CrRLJ 1.3—Effect, and the Court having approved the suggested rule amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested rule amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment to

WASHINGTON STATE COURT RULE:

CrRLJ 1.3: EFFECT

Submitted by the District & Municipal Courts Judges Association

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A. Name of Proponent: District & Municipal Courts Judges' Association

B. Spokesperson: Judge Samuel Meyer, President
DMCJA

C. Purpose:

The proposed amendment is intended to clarify the effect of the rule and be consistent with case law. When the Criminal Rules were first enacted, subsection (a) was designed to provide continuity in procedure for cases pending on the date the rules first became effective. As that is no longer a concern, the proposed amendment would eliminate the language about what rules apply in which situation. This would make the language consistent with case law that new criminal rules apply to pending cases, regardless of when the case began, unless the court finds the interest of justice would be served by adhering to the prior formulation. *State v. Olmos*, 129 Wn. App. 750, 757, 120 P.3d 139 (2005); *State v. Matlock*, 27 Wn. App. 152, 157, 616 P.2d 684 (1980). The language of the rule still gives a court the authority to apply the prior rules of procedure "in the interests of justice."

The WSBA has proposed amendments to CrR 1.3, pertaining to the effect of court rules, to clarify the language and comport with case law. Adoption of a similar proposal would help clarify CrRLJ 1.3, and would have the added benefit of keeping the trial court rules congruent.

D. Proposed Amendments:

Current Rule 1.3:

> Except as otherwise provided elsewhere in these rules, on their effective date:
>
> (a) Any acts done before the effective date in any proceedings then pending or any action taken in any proceeding pending under rules of procedure in effect prior to the effective date of these rules are not impaired by these rules.
>
> (b) These rules also apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were

commenced, except to the extent that in the opinion of the court, the former procedure should continue to be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedures of these rules.

Proposed Amendment:

On their effective date these rules apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were commenced, except to the extent that in the opinion of the court, the former procedure should continue to be made applicable in a particular case in the interest of justice.

E. **Hearing:** A hearing is not recommended.

F. **Expedited Consideration:** Expedited consideration is not requested.

PROPOSED AMENDMENT:

CrRLJ 1.3

EFFECT

~~Except as otherwise provided elsewhere in these rules, o~~On their effective date~~:~~

~~(a) Any acts done before the effective date in any proceedings then pending or any action taken in any proceeding pending under rules of procedure in effect prior to the effective date of these rules are not impaired by these rules.~~

~~(b) T~~these rules ~~also~~ apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were commenced, except to the extent that in the opinion of the court, the former procedure should continue to be made applicable in a particular case in the interest of justice ~~or because of infeasibility of application of the procedures of these rules~~.

GR 9 COVER SHEET

Suggested Amendments to

WASHINGTON STATE COURT RULES:

GR 29: PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND LIMITED JURISDICTION COURT DISTRICT

Submitted by the District & Municipal Courts Judges Association

---

A. Name of Proponent: District & Municipal Courts Judges' Association

B. Spokesperson: Judge Samuel Meyer, President
DMCJA

C. Purpose:

The District and Municipal Court Judges' Association (DMCJA) asserts that an amendment to General Rule (GR) 29 is necessary to preserve judicial independence for municipal court judges regarding (a) term of office and salary, (b) judicial duties, (c) judicial independence and administration of the court, and (d) termination and discipline. The amendment would mandate essential content for part-time municipal court judicial services contracts. Currently, GR 29(k) prohibits judicial service contracts with provisions that conflict with the rule, and requires that any judicial service contract acknowledge that the court is a part of an independent branch of government, and that the judicial officer and court employees are required to act in accord with the Code of Judicial Conduct and court rules.

Part-time municipal court judges, who are appointed by either the mayor with confirmation by city council, or the city manager, are often provided with employment contracts that infringe on judicial independence by misstating the authority of the judge. GR 29 provides guidance regarding the authority of presiding judges in district and municipal courts. However, the DMCJA affirms that the proposed amendments are necessary to ensure an encroachment on judicial independence does not occur at the local level.

D. Proposed Amendments:

[GR 29 Subsections (a)-(j) remain unchanged.]

(k) Employment Contracts. A part-time judicial officer may contract with a municipal or county authority for salary and benefits. The employment contract shall not contain provisions which conflict with this rule, the Code of Judicial Conduct or statutory judicial authority, or which would create an impropriety or the appearance of impropriety concerning the judge's activities.

The employment contract should acknowledge the court is a part of an independent branch of government and that the judicial officer or court employees are bound to act in accordance with the provisions of the Code of Judicial Conduct and Washington State Court rules. A part-time judicial officer's employment contract shall comply with GR 29(k) and contain the following provisions, which shall not be contradicted or abrogated by other provisions within the contract.

[NEW SECTION]

(l) Required Provisions of a Part-Time Judicial Officer Employment Contract.

(1) Term of Office and Salary

The judge's term of office shall be four years as provided in RCW 3.50.050. The judge's salary shall be fixed by ordinance in accordance with RCW 3.50.080 and the salary shall not be diminished during the term of office.

(2) Judicial Duties

The judge shall perform all duties legally prescribed for a judicial officer according to state law, the requirements of the Code of Judicial Conduct, and Washington State court rules.

(3) Judicial Independence and Administration of the Court

The court is an independent branch of government. The judge shall supervise the daily operations of the court and all personnel assigned to perform court functions in accordance with the provisions of GR 29(e), GR 29(f), and RCW 3.50.080. Under no circumstances should judicial retention decisions be made on the basis of a judge's or a court's performance relative to generating revenue from the imposition of legal financial obligations.

(4) Termination and Discipline

The judge may only be admonished, reprimanded, censured, suspended, removed, or retired during the judge's term of office only upon action of the Washington State Supreme Court as provided in Article IV, section 31 of the Washington State Constitution.

E. **Hearing**: A hearing is not recommended.

F. **Expedited Consideration**: Expedited consideration is not requested.

PROPOSED AMENDMENT:

General Rule 29

PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND

LIMITED JURISDICTION COURT DISTRICT

(a) – (j) Unchanged

(k) Employment Contracts. A part-time judicial officer may contract with a municipal or county authority for salary and benefits. The employment contract shall not contain provisions which conflict with this rule, the Code of Judicial Conduct or statutory judicial authority, or which would create an impropriety or the appearance of impropriety concerning the judge's activities.
The employment contract should acknowledge the court is a part of an independent branch of government and that the judicial officer or court employees are bound to act in accordance with the provisions of the Code of Judicial Conduct and Washington State Court rules. A part-time judicial officer's employment contract shall comply with GR 29(k) and contain the following provisions, which shall not be contradicted or abrogated by other provisions within the contract.

(l) Required Provisions of a Part-Time Judicial Officer Employment Contract.

(1) Term of Office and Salary

The judge's term of office shall be four years as provided in RCW 3.50.050. The judge's salary shall be fixed by ordinance in accordance with RCW 3.50.080 and the salary shall not be diminished during the term of office.

(2) Judicial Duties

The judge shall perform all duties legally prescribed for a judicial officer according to state law, the requirements of the Code of Judicial Conduct, and Washington State court rules.

(3) Judicial Independence and Administration of the Court

The court is an independent branch of government. The judge shall supervise the daily operations of the court and all personnel assigned to perform court functions in accordance with the provisions of GR 29(e), GR 29(f), and RCW 3.50.080. Under no circumstances should judicial retention decisions be made on the basis of a judge's or a court's performance relative to generating revenue from the imposition of legal financial obligations.

(4) Termination and Discipline

The judge may only be admonished, reprimanded, censured, suspended, removed, or retired during the judge's term of office only upon action of the Washington State Supreme Court as provided in Article IV, section 31 of the Washington State Constitution.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED CHANGES TO CR 30—DEPOSITIONS UPON ORAL EXAMINATION

ORDER

NO. 25700-A-1279

The Washington Court Reporters Association, having recommended the suggested changes to CR 30—Depositions Upon Oral Examination, and the Court having approved the suggested changes for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested changes as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Changes to
CIVIL RULE 30

A. **Name of Proponent:** Washington Court Reporters Association

B. **Spokespersons:**

Elizabeth Patterson Harvey, CCR, RPR
WCRA Member
PO Box 16009
Seattle, Washington 98116
206-300-5324
lizharveyccrrpr@gmail.com

Phyllis Craver Lykken, RPR, CLR, CCR
WCRA Co-President
917 Triple Crown Way, Suite 200
Yakima, Washington 98908
206-482-2352
pclykken@gmail.com

C. **Purpose:**

Amending CR 30 as proposed will allow court reporters and other officers to place a deposition witness under oath remotely. Under this new rule, parties may take full advantage of CR 30(b)(7) telephonic or videoconference depositions. Currently, Washington Court Rules do not allow a court reporter to administer an oath remotely. As a result, litigants in Washington wishing to conduct a remote deposition must arrange for a court reporter or notary to place the deponent under oath in the deponent's physical presence. This cumbersome arrangement limits the flexibility that CR 30(b)(7) should promote. Our proposal is a minor change that will allow litigants to realize the time and cost-saving promise of remote depositions.

All participants in the legal system are increasingly sensitive to the environmental, personal, and financial costs of deposition travel. CR 30(b)(7) provides a mechanism to reduce these costs. But in order to make remote depositions less logistically burdensome, we seek to clarify CR 30(c) to allow a court reporter to perform his or her duties remotely from the deponent. With improvements in technology, the use of telephonic and videoconference depositions is on the rise. This proposed amendment allows court reporting to adapt to technological changes because court reporters continue to play a crucial role

safeguarding the discovery process. Amending CR 30(c) grants the flexibility of a fully remote deposition with the safeguards of a court reporter.

This change has the added benefit of reducing travel time for court reporters, and should help ameliorate Washington's shortage of court reporter services. *Exhibit A.* By relieving travel demands on court reporters, the costs of deposition should go down and the availability of court reporting to underserved areas should rise.

Other jurisdictions already allow remote oath and recording. When Oregon amended its court rules in 1992 to permit telephonic deposition by stipulation, it simultaneously allowed court reporters to administer an oath by telephone. *Exhibit B.* And in Washington, a court reporter may swear in a deponent telephonically for Board of Industrial Insurance Appeals perpetuation depositions. *Exhibit C.*

Our proposal avoids a conflict with other provisions by also amending CR 30(b)(7) to remove reference to CR 28(a). This maintains the default structure of Court Rules and statutes that links governing law with the place of the deponent. *See* CR 37; 45; RCW 5.51. This amendment preserves that structure for every purpose except for requiring that a deposition be taken before a person authorized to administer oaths in the deponent's jurisdiction.

There is no conflict between this proposal and WAC 308-14, which relates to licensing of court reporters. Nor does it conflict with the Court Reporting Practice Act, Chapter 18.145 RCW.

D. **Hearing:** WCRA requests a hearing

E. **Expedited Consideration:** WCRA does not request expedited consideration

F. **Supporting Materials:**

- **Exhibit A** - Wall Street Journal Article from July 28, 2019 reporting on the national court reporter shortage and its impacts on our justice system.

- **Exhibit B** - Excerpts from Oregon's Council on Court Procedures 1992 Amendments to Oregon Rules of Civil Procedure, in which Oregon amended its Civil Rules 38 and 39 to allow for telephonic depositions and remote administration of oaths.

- **Exhibit C** - Washington Administrative Code 263-12-117, allowing remote oaths by court reporters taking perpetuation depositions in Board of Industrial Appeals matters.

SUGGESTED CHANGE TO CIVIL RULE 30

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Video Recording.

...

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules ~~28(a)~~, 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer the propounded questions.

...

(c) Examination and Cross Examination; Record of Examination; Oath; Objections. Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken under rule 28(a) shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. However, such oath and recording may be administered by the officer from a location remote from the deponent, provided that the officer is located within this state. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CrR 3.1—RIGHT TO AND ASSIGNMENT OF LAWYER, CrRLJ 3.1—RIGHT TO AND ASSIGNMENT OF LAWYER, AND JuCR 9.3—RIGHT TO APPOINTMENT OF EXPERTS IN JUVENILE OFFENSE PROCEEDINGS AND ASSIGNMENT OF LAWYER

ORDER

NO. 25700-A- 1280

The Washington Defender Association, having recommended the suggested amendments to CrR 3.1—Right to and Assignment of Lawyer, CrRLJ 3.1—Right to and Assignment of Lawyer, and JuCR 9.3—Right to Appointment of Experts in Juvenile Offense Proceedings and Assignment of Lawyer, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ

CHIEF JUSTICE

GR 9 Cover Sheet

Suggested Changes to CrR 3.1, CrRLJ 3.1 and JuCR 9.3

(A) Name of Proponent: Washington Defender Association

(B) Spokesperson: Magda Baker, Misdemeanor Resource Attorney, Washington Defender Association

(C) Purpose: The Washington Defender Association (WDA) suggests changes to CrR 3.1(f), CrRLJ 3.1(f) and JuCR 9.3(a) that would ensure that criminal defense attorneys who request funds for experts on behalf of indigent clients in superior courts, courts of limited jurisdiction and juvenile courts do so *ex parte.* WDA has heard from defenders who have requested expert funds *ex parte* only to have judges invite prosecutors to weigh in on their requests, which allows opposing counsel a preview of the defense's trial strategy. The changes we propose would eliminate that practice and any chilling effect it may have on defenders considering requests for expert funds. Such changes would also lead to a more uniform administration of justice throughout the state, since currently some judges seek prosecutorial input on defense requests for expert funding while others do not. Finally, the changes would promote a more level playing field for defenders and prosecutors, since prosecutors can often consult with law enforcement employees as experts or get expert funding from their offices without court approval.

(D) Hearing: None recommended.

(E) Expedited Consideration: Expedited consideration is not requested.

[Suggested changes to CrR 3.1(f)]

CrR 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

(a) – (e) [*unchanged*]

(f) Services Other Than Lawyer.

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding that the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services. The motion ~~may~~ shall be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

[Suggested changes to CrRLJ 3.1(f)]

CrRLJ 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

(a) – (e) [*unchanged*]

(f) Services Other Than Lawyer.

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding that the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services. The motion ~~may~~ shall be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

[Suggested changes to JuCR 9.3(a)]

JuCR 9.3 RIGHT TO APPOINTMENT OF EXPERTS IN JUVENILE OFFENSE PROCEEDINGS AND ASSIGNMENT OF LAWYER

(a) Appointment. A juvenile who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense may request that these services be provided at public expense by a motion. The motion shall be made *ex parte* and, upon a showing of good cause, the moving papers may be ordered sealed by the court and shall remain sealed until further order of the court. Upon finding that the services are necessary and that the juvenile is financially unable to obtain them without substantial hardship to himself or herself or the juvenile's family, the court shall authorize counsel to obtain the services on the behalf of the juvenile. The ability to pay part of the cost of the services shall not preclude the provision of those services by the court. A juvenile shall not be deprived of necessary services because a parent, guardian, or custodian refuses to pay for those services. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, may ratify services after they have been obtained.

(b) [*unchanged*]

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENT TO APR 26—INSURANCE ~~DISCLOSURE~~

ORDER

NO. 25700-A- 1281

Equal Justice Washington, having recommended the suggested amendment to APR 26—Insurance ~~Disclosure~~, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as attached hereto is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ.

CHIEF JUSTICE

GR 9 COVER SHEET DRAFT

Suggested Amendment

Admission and Practice Rule 26

Submitted by Equal Justice Washington

A. Name of Proponent:

Equal Justice Washington
P.O. Box 25061
Federal Way, WA 98093 (Email: equaljusticewa@gmail.com)

B. Spokespersons:

Kevin Whatley

C. Purpose:

In Washington State, it's not a requirement to carry malpractice insurance to be a licensed attorney representing the public. Although the majority of attorneys are responsible and carry malpractice insurance, approximately 14% or 2,752 attorneys in private practice do not. Solo and small firm practitioners represent the largest group, with an astonishing 28% of solo practitioners choosing not to carry malpractice insurance, and yet they pose the greatest risk to the public, the legal system and access-to-justice. According to the Office of Dispensary Council, solo and small firm practitioners represent the largest group of disciplined attorneys and the highest rate of complaints to the ODC.

To put it into perspective, with so many uninsured attorneys, the sheer number of clients exposed without basic public protection is staggering. In a 12 month period, at just one client a month or 12 clients a year, that number is 33,024 clients exposed to potential harm. These numbers are conservative at best; most attorneys handle more than one client a month, and with just two or three a month that number rapidly approaches 60,000-100,000.

Currently, only two states in the union have been progressive and strong enough to protect the public and make mandatory malpractice insurance a requirement to practice law. Oregon was the first in 1977, and just recently Idaho in 2018. Traditionally the American legal and judiciary system has always been one of the world's leaders, but in this area the rest of the world has surpassed us. The vast majority of all common and civil law countries require malpractice insurance. All Australian States, Canada, the majority of the European Union, and several countries in Asia require malpractice insurance. It should also be noted the minimums in these countries range from one to two million dollars, far more than what is being proposed here today. In this area it is clear: the rest of the world is far more progressive than we are when it comes to basic public protection systems.

What we know about the nature of malpractice and its victims:

On September 28th, 2017, the Board of Governors adopted a charter for the Mandatory Malpractice Insurance Task Force. Its mandate was to focus on the nature and consequences of uninsured lawyers, examine current malpractice insurance systems, and gather information and comments from the WSBA members and other interested parties. In addition, it was to develop a working model for how to move forward in Washington State with a basic protection system – a draft rule, the same rule that is before you today. So why is the Mandatory Malpractice Insurance Task Force draft rule not being proposed by the WSBA Board of Governors even though the Task Force unanimously decided to recommend, adopt and propose the draft rule to the Supreme Court?

This is a great question, and the answer is completely germane to the Task Force findings and what we know about the nature of malpractice and its victims. Let's examine its key takeaways:

1. *"The Board of Governors should recommend, and the Washington Supreme Court should adopt, a rule mandating continuous, uninterrupted malpractice insurance for actively-licensed lawyers engaged in the private practice of law, with specified exemptions."*

2. *"Lack of malpractice insurance is, fundamentally, an access-to-justice issue, and the Task Force has concluded that it is more than appropriate for lawyers to ensure their own financial accountability."*

3. *"The Board of Governors' decision whether to recommend action on uninsured lawyers, and the Court's ultimate decision on this matter, must be approached overwhelmingly from the perspective of what is good for the public and what is good for clients - not what might be convenient or desirable for lawyers themselves."*

4. *"A license to practice law is a privilege, and no lawyer is immune from mistakes. The members emphasized that a key goal of the Task Force is to recommend effective ways to ensure the clients are compensated when lawyers make mistakes. Because 14% of Washington lawyers are in private practice and do not carry malpractice insurance, the Task Force members determine that those lawyers pose a significant risk to their clients."*

5. *"Protection of the public is the overriding public duty of lawyers, the WSBA and the Washington Supreme Court. The WSBA's mission statement list four core missions: to serve the public, to serve the members of the Bar, to ensure the integrity of the legal profession, and to champion justice. 3 out of those four goals emphasize the public mission of the organized Bar."*

6. *"Equally if not more important is the language of the Washington Supreme Court's GR 12. GR 12.1 begins: 'Legal services providers must be regulated in the public interest." GR 12.1 Then list 10 specific objectives, leading off with "protection of the public" and proceeded to list nine other regulatory objectives, all of which are orientated toward the protection of clients and access to justice."*

7. *"Ultimately, the task force concluded that when one weighs the apprehensions of those who resist malpractice insurance against the large number of clients who are exposed to harm by uninsured lawyers, the balance tips in favor of client protection."*

8. *"Uninsured lawyers create an access-to-justice problem: their clients are typically unable to pursue legitimate malpractice claims against them because plaintiffs' lawyers cannot afford to bring action against uninsured practitioners."*

In answering the question as to why the mandatory malpractice draft rule is not being proposed by the WSBA Board of Governors and instead being advanced by victims of malpractice, let's examine Professor Susan Sabb Fortney from Texas A&M University and the conclusions from her legal research paper, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots.*

> *"Given the compelling arguments in favor of insurance and the fact that the majority of lawyers in private practice carry insurance, the question is why more states have not mandated insurance for lawyers in private practice have. One explanation may be that lawyers and decision makers may be suffering from ethical blind spots on both the individual and organizational levels. Findings from the burgeoning field of behavioral ethics provide insights on how the lawyers and judges may not clearly see the ethical dimensions of conduct and decisions related to malpractice insurance."*
>
> *"We all make mistakes. We are distinguished as professionals by the manner in which we handle mistakes and treat those we injure. If members of the bar refuse to see or recognize their responsibility to injured persons and the profession, it is the role of the insured lawyers to advocate for malpractice insurance to help uphold the high standards of the legal profession. If lawyers refuse to deal with their blind spots and see the ethical dimensions of financial accountability, we do not deserve to be members of a protected profession."*
>
> *"Ethical blindness also comes into play at the organizational level, when peers and organizational leaders fail to accurately assess the unethical behavior of individuals. In the context of lawyering this can occur within firms and bar groups when other lawyers ignore unethical conduct of individuals."*

These ethical blind spots were clearly on display at the BOG's meeting in Yakima in May 2019. When they voted not to recommend the draft rule to the Supreme Court, one governor stated, "I oppose anything that's mandatory," while another said, "We should drop this issue entirely. I think we do our members a huge, huge disservice by continuing this dialogue in the face of the overwhelming opposition we have heard." While another governor publicly tweeted, "Access to justice concerns convinced me to vote no." This is the complete opposite of the Task Force findings.

Still more troubling, a day after receiving OPMA training from the Office of The Attorney General, a governor lobbied the president of the WSBA BOG and tried to stop the only member of the public, and a victim of malpractice, from speaking to advocate for public protection, saying it was "inappropriate."

The findings of the Task Force are unanimous, crystal, and unambiguous. This is the most important public protection issue that has most likely ever come before the BOG, protecting all the people of Washington equally and affecting all attorneys equally. It's fair and responsible. The Supreme Court has already suspended the BOG from making any WSBA bylaw changes. The BOG has now demonstrated it is simply incapable of discharging its prima facie duty to protect and serve the public first and uphold the missions of both the WSBA and the Supreme Court. Full suspension should be considered with the executive leadership of the WSBA reporting directly to the Supreme Court until the Court can thoroughly review the governance structure and be inclusive of multiple public members on the BOG. This action is warranted and justified for the administration of justice, public protection, and promulgating the missions of the WSBA and the Supreme Court.

Conflicts Resolved:

1. **Antitrust exposure:** Currently, there are just over 850 Limited Practice Officers and Limited Licensed Legal Technicians practicing in the state of Washington. As their name states, they are limited in the practice area of the law and are limited in legal services afforded to clients. They are deemed legal professionals of a lesser degree, and yet by APR rules 12 (F)(2) and 28 (I)(2) they are compelled to be financially responsible and carry professional liability insurance as a requirement to practice compared to attorneys, who are legal professionals of a higher degree, and are not required to carry insurance and be financially responsible.

   Clearly this actively creates an enormous anti-competitive environment and opens the WSBA and the Supreme Court to a high degree of antitrust exposure. This of course is easily resolved by requiring all licensed professionals and providers to carry insurance, which allows for a level playing field while fostering marketplace competition, consumer confidence and most importantly public protection.

2. **Access-to-justice issue:** As the Task Force has repeatedly stated, the lack of malpractice insurance is fundamentally an access-to-justice issue. When clients seek attorneys for help, they have already been harmed and look to the courts for relief. When that same attorney victimizes their clients, they are harmed a second time, and when they are unable to pursue legitimate malpractice claims, they are harmed for the third time. Additionally, we know that access-to-justice issues disproportionately affect low-income households and people of color. Seven in ten low-income households face legal issues, and the number of issues per household has tripled from 3 to 9 since 2003.

3. **Ethical blind spot, a GR-12 problem:** As Professor Susan Sabb Fortney has concluded and the actions and comments from the BOG have confirmed, ethical blind spots do exist and are dangerous to the public, administration and access-to-justice. Failure to recognize these ethical blind spots puts the Supreme Court in direct conflict with GR-12. GR 12.1, legal professionals must be regulated and it must be for the protection of the public.

Rationale, a Clear Argument for Protection:

There are two options: **A.** Adopt the draft rule, a proactive approach; or **B.** Reject the draft rule, a do-nothing approach.

The clean solution is one that resolves all three conflicts and upholds GR-12. GR 12.1 promotes the administration and access-to-justice so everyone can be seen equally under the law.

To arrive at a conclusion, one needs only to take a simple utilitarian approach: the greatest amount of good for the greatest number of people. Option **A.** favors the over 7.5 million people of Washington State. Option **B.** favors the over 2,752 uninsured attorneys in Washington State. We can now make this logical substitution with the following statement:

Option A. resolves all three conflicts, upholds GR-12. GR 12.1 promotes the administration and access-to-justice so everyone can be seen equally under the law.

Option B. resolves all three conflicts, upholds GR-12. GR 12.1 promotes the administration and access-to-justice so everyone can be seen equally under the law.

It's clear that Option **A.** offers a true premise and a true conclusion while Option **B.** is simply false.

D. Hearing:

A hearing is not recommended.

E. Expedited Consideration:

Given the fact that there are over 2,752 attorneys uninsured, knowing that there are tens of thousands of exposed clients, and that there is a legal blind spot when it comes to malpractice insurance, having plenary authority and being plainly responsible, expedited consideration is requested and fully warranted. The Supreme Court has the power to act and the power to protect and that is precisely why GR-9 Clause E is relevant and should be fully exercised. On behalf of the 7.5 million people of Washington State, victims of malpractice and Equal Justice Washington, we pray for relief.

F. Supporting Material:

Amended APR-26 Draft Rule

Pages 1-10 Arguments for malpractice insurance from Professor Susan Sabb Fortney's legal research paper, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots.*

Pages 11-13 Conclusions for malpractice insurance from Professor Susan Sabb Fortney's legal research paper, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots.*

Pages 13-24 WSBA Mandatory Malpractice Insurance Task Force Recommendations and Conclusions.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENT TO GR 7—LOCAL RULES—FILING AND EFFECTIVE DATE

ORDER

NO. 25700-A- 1282

The Washington State Association of County Clerks, having recommended the suggested amendment to GR 7—Local Rules—Filing and Effective Date, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as attached hereto is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst. CJ.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment to GR 7—Local Court Rulemaking ~~Rules—Filing and Effective Date~~

Submitted by the Washington State Association of County Clerks

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A. Name of Proponent: Washington State Association of County Clerks

Spokesperson: Tim Fitzgerald, Spokane County Clerk, 1116 W Broadway Ave, Room 300, Spokane, WA 99260, (509) 477-3901, tfitzgerald@spokanecounty.org; Barbara Miner, King County Clerk, 516 Third Avenue, RM E609, Seattle, WA 98104, 206-477-0777 barbara.miner@kingcounty.gov

B. Purpose: These suggested edits to GR 7, the rule on local rules, are modeled after GR 9, the rule on state court rule making. This suggested language is intended to improve communication and transparency and help avoid situations that happen from time to time where an involved local court stakeholder is caught off guard by a new or changed local rule.

C. Hearing. A hearing is not requested.

D. Expedited Consideration: Expedited consideration is not requested.

E. Supporting Material:

GR 7

LOCAL COURT RULEMAKING ~~RULES—FILING AND EFFECTIVE DATE~~

(a) Generally. One copy of rules of court authorized by law to be adopted or amended by courts other than the Supreme Court must be filed with the state Administrative Office of the Courts. New proposed rules and amendments must be filed on or before July 1, to be effective September 1 of the same year. Promulgation or amendment of rules that describe only the structure, internal management and organization of the court but do not affect courtroom procedures are not governed by the time limitations above.

(b) Proposed Rules Published for Comment.

(1) A proposed new or amended local rule shall be submitted for comment to the local bar, the county prosecutor, the county clerk, the county public defender representative and published for at least a 30 day period on the court's Internet site and other sites as the court may determine. The court shall ask the local bar to publish the proposal to its members.

(2) The court shall direct that all comments on a proposed rule be submitted in writing to the court by the deadline set by the court. Comments received shall be publicly accessible and posted on the court's website.

(3) After considering a suggested rule, or after considering any comments received regarding a proposed rule, the Court may adopt, amend, or reject the rule change or take such other action as the Court deems appropriate.

(~~b~~c) Form. All local rules shall be consistent with rules adopted by the Supreme Court, and shall conform in numbering system and in format to these rules to facilitate their use. Each rule and amendment filed shall state its effective date in brackets following the rule. Prior to adopting a local rule, the court may informally submit a copy of its local rule to the Administrative Office of the Courts for comments as to its conformity in number and format to the Official Rules of Court, and suggestions with reference thereto.

(~~c~~d) Distribution. On or before September 1 of each year, the Administrator for the Courts shall distribute all local rules, and amendments thereto, to the state law library, the libraries of the three divisions of the Court of Appeals, all county law libraries, Washington law school libraries, and to such other places as are deemed appropriate by the Administrative Office of the Courts.

(~~d~~e) Availability of Local Rules. The clerk of the court adopting the rules shall maintain a complete set of current local rules, which shall be available for inspection and copying.

(~~e~~f) Emergency Rules.

(1) In the event a court other than the Supreme Court deems that an emergency exists which requires a change in its rules, such court shall, in addition to filing the rules or amendments as provided in section (a), distribute them to all county law libraries.

(2) A rule or amendment adopted on an emergency basis shall become effective immediately on filing with the Administrative Office of the Courts. The rule or amendment shall remain effective for a period of 90 days after

filing, unless readopted in accordance with section (e)(1) or submitted as a permanent rule or amendment under section (a) within the 90-day period.

(~~f~~g) Filing Local Rules Electronically. The Administrative Office of the Courts shall establish the specifications necessary for a court to file its local court rules electronically.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CrRLJ 3.4—PRESENCE OF THE DEFENDANT AND CrR 3.4—PRESENCE OF THE DEFENDANT

ORDER

NO. 25700-A- 1283

The Washington Defender Association, having recommended the suggested amendments to CrRLJ 3.4—Presence of the Defendant and CrR 3.4—Presence of the Defendant, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ.

CHIEF JUSTICE

GR 9 Cover Sheet

Suggested Changes to CrR 3.4 and CrRLJ 3.4

(A) Name of Proponent: Washington Defender Association

(B) Spokesperson: Magda Baker, Misdemeanor Resource Attorney, Washington Defender Association

(C) Purpose: The Washington Defender Association (WDA) suggests changes to CrR 3.4 and CrRLJ 3.4 that would allow criminal defendants to appear through their attorneys for some of the hearings they are currently required to attend in person. These changes would allow the court system to function more efficiently and minimize some of the disruptive impacts participating in the court process has on many defendants. Fewer required physical appearances for defendants would lead to fewer missed court dates that require costly bench warrants and delay resolution of cases. For many low and moderate income defendants, attending multiple court hearings may cause them to miss work or school or to struggle to provide care for children or elderly family members. Travel and transportation to some courts may also be difficult or impossible for defendants without drivers licenses, cars or financial resources. Individuals who miss court dates are at risk for new criminal charges arising from missed court appearances. These proposed changes will help prevent indigent defendants from being unnecessarily pulled deeper into the criminal justice system. The proposed changes will help make the court process more effective and efficient for the court and all parties involved.

(D) Hearing: None recommended.

(E) Expedited Consideration: Expedited consideration is not requested.

[Suggested changes to CrR 3.4]

CrR 3.4 PRESENCE OF THE DEFENDANT

(a) Presence Defined. Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear through counsel. Appearance through counsel requires that counsel present a waiver the defendant has signed indicating the defendant wishes to appear through counsel.

~~(a)~~ **(b) When Necessary.** ~~The defendant shall be~~ The court shall not proceed unless the defendant is physically present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

~~(b)~~ **(c) Effect of Voluntary Absence.** The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

~~(c)~~ **(d) Defendant Not Present.** The court shall require the defendant's appearance at arraignment, at every stage of trial from the empaneling of the jury to the return of the verdict, and at the imposition of sentence. In order to require the defendant's physical presence at any other hearing, the court must find good cause as explained in a written order. If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

~~(d)~~ **(e)** [*unchanged*]

~~(e)~~ **(f)** [*unchanged*]

[Suggested changes to CrRLJ 3.4]

CrRLJ 3.4 PRESENCE OF THE DEFENDANT

(a) Presence Defined. Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear through counsel. Appearance through counsel requires that counsel present a waiver the defendant has signed indicating the defendant wishes to appear through counsel.

~~(a)~~ **(b) When Necessary.** ~~The defendant shall be~~ The court shall not proceed unless the defendant is physically present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

~~(b)~~ **(c) Effect of Voluntary Absence.** The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

~~(c)~~ **(d) Defendant Not Present.** The court shall require the defendant's appearance at arraignment, at every stage of trial from the empaneling of the jury to the return of the verdict, and at the imposition of sentence. In order to require the defendant's physical presence at any other hearing, the court must find good cause as explained in a written order. If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

~~(d)~~ **(e)** [*unchanged*]

~~(e)~~ **(f)** [*unchanged*]

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CrR 8.2—MOTIONS, CrRLJ 8.2—MOTIONS

ORDER

NO. 25700-A-1284

The Washington State Bar Association Board of Governors, having recommended the suggested amendments to CrR 8.2—Motions, CrRLJ 8.2—Motions, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendments

SUPERIOR COURT CRIMINAL RULES (CrR)

Rule 8.2 - MOTIONS

A. Name of Proponent:

William D. Pickett, President, Washington State Bar Association

B. Spokesperson:

Jefferson Coulter
Chair of Court Rules and Procedures Committee
NW Justice Project
1702 W. Broadway Ave.
Spokane, WA 99201 (Phone: 509-324-9128)

Staff Liaison/Contact:
Nicole Gustine, Assistant General Counsel
Washington State Bar Association (WSBA)
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539 (Phone: 206-727-8237)

C. Purpose:

There is currently a conflict in the case law as to whether the criminal rules allow a motion for reconsideration. State v. Batsell, 198 Wn.App. 1066, unpublished (issued May 2, 2017), illustrates that there is some confusion as to whether a motion for reconsideration is allowed under the criminal rules. The Batsell court noted that State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925 (1988), noted that civil rules are instructive as to matters of procedure on which the criminal rules are silent. However, State v. Keller, 32 Wn.App. 135, 647 P.2d 35 (1982), held that CR 59 did not apply in criminal cases. In contrast, as the Batsell court noted, "at least two reported decisions in criminal appeals have involved motions for reconsideration without questioning CR 59's application in criminal cases." (citing State v. Englund, 186 Wn.App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011, 352 P.3d 188 (2015); State v. Chaussee, 77 Wn.App. 803, 806-07, 895 P.2d 414 (1995)).

This confusion results in inconsistency across courts. It also presents a problem when a party in a criminal case wishes to move for discretionary review, as the time for filing a notice of discretionary review runs from the entry of an order deciding a timely motion for reconsideration pursuant to RAP 5.2(b).

The district court criminal rules do not have an express provision for motions for reconsideration. To be consistent with the superior court rule it is also recommended that District Court Criminal Rule 8.2 also be amended.

D. Hearing: A hearing is not recommended.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendments.

SUGGESTED AMENDMENT
SUPERIOR COURT CRIMINAL RULES (CrR)
RULE 8.2 MOTIONS

Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases. A motion for reconsideration shall be governed by CR 59(b), (e) and (j).

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

GR 9 COVER SHEET

Suggested Amendments

CRIMINAL RULES FOR COURTS OF LIMITED JURISDICTION (CrRLJ)

Rule 8.2 - MOTIONS

A. Name of Proponent:

William D. Pickett, President, Washington State Bar Association

B. Spokesperson:

Jefferson Coulter
Chair of Court Rules and Procedures Committee
NW Justice Project
1702 W. Broadway Ave.
Spokane, WA 99201 (Phone: 509-324-9128)

Staff Liaison/Contact:
Nicole Gustine, Assistant General Counsel
Washington State Bar Association (WSBA)
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539 (Phone: 206-727-8237)

C. Purpose:

There is currently a conflict in the case law as to whether the criminal rules allow a motion for reconsideration. State v. Batsell, 198 Wn.App. 1066, unpublished (issued May 2, 2017), illustrates that there is some confusion as to whether a motion for reconsideration is allowed under the criminal rules. The Batsell court noted that State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925 (1988), noted that civil rules are instructive as to matters of procedure on which the criminal rules are silent. However, State v. Keller, 32 Wn.App. 135, 647 P.2d 35 (1982), held that CR 59 did not apply in criminal cases. In contrast, as the Batsell court noted, "at least two reported decisions in criminal appeals have involved motions for reconsideration without questioning CR 59's application in criminal cases." (citing State v. Englund, 186 Wn.App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011, 352 P.3d 188 (2015); State v. Chaussee, 77 Wn.App. 803, 806-07, 895 P.2d 414 (1995)).

This confusion results in inconsistency across courts. It also presents a problem when a party in a criminal case wishes to move for discretionary review, as the time for filing a notice of discretionary review runs from the entry of an order deciding a timely motion for reconsideration pursuant to RAP 5.2(b).

The district court criminal rules do not have an express provision for motions for reconsideration. To be consistent with the superior court rule it is also recommended that District Court Criminal Rule 8.2 also be amended.

D. Hearing: A hearing is not recommended.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: Suggested rule amendments.

SUGGESTED AMENDMENT

CRIMINAL RULES FOR COURTS OF LIMITED JURISDICTION (CrRLJ)

RULE 8.2 MOTIONS

Rules 3.5 and 3.6 and CRLJ 7(b) shall govern motions in criminal cases. A motion for reconsideration shall be governed by CRLJ 59(b), (e) and (j).

Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED RULE AMENDMENT TO GR 31—ACCESS TO COURT RECORDS

ORDER

NO. 25700-A-1285

The District and Municipal Court Judges' Association, having recommended the suggested rule amendment to GR 31—Access to Court Records, and the Court having approved the suggested rule amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested rule amendment as attached hereto is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2020.

(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 April 30, 2020. 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 4th day of December, 2019.

For the Court

Fairhurst, CJ.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendments to

WASHINGTON STATE COURT RULES:

GR 31: ACCESS TO COURT RECORDS

Submitted by the District & Municipal Courts Judges' Association

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A. **Name of Proponent:** District & Municipal Courts Judges' Association

B. **Spokesperson:** Judge Samuel Meyer, President
DMCJA

C. **Purpose:** The DMCJA recommends amending GR 31 to add a new paragraph (l) (after (k)) to address therapeutic court records. This amendment would further the goal of therapeutic courts, which are defined under RCW 2.30.010, to provide individualized treatment intervention. Limited public access to assessments and treatment reports would help encourage defendants to cooperate more honestly with risk/needs assessments, mental health and chemical dependency evaluations, and treatment.

In RCW 2.30.010, the Legislature recognized the unique ability of therapeutic courts to help defendants address their individual treatment needs:

> (1) The legislature finds that judges in the trial courts throughout the state effectively utilize what are known as therapeutic courts to remove a defendant's or respondent's case from the criminal and civil court traditional trial track and allow those defendants or respondents the opportunity to obtain treatment services to address particular issues that may have contributed to the conduct that led to their arrest or other issues before the court. Trial courts have proved adept at creative approaches in fashioning a wide variety of therapeutic courts addressing the spectrum of social issues that can contribute to criminal activity and engagement with the child welfare system.
>
> (2) The legislature further finds that by focusing on the specific individual's needs, providing treatment for the issues presented, and ensuring rapid and appropriate accountability for program violations, therapeutic courts may decrease recidivism, improve the safety of the community, and improve the life of the program participant and the lives of the participant's family members by decreasing the severity and frequency of the specific behavior addressed by the therapeutic court.

(3) The legislature recognizes the inherent authority of the judiciary under Article IV, section 1 of the state Constitution to establish therapeutic courts, and the outstanding contribution to the state and local communities made by the establishment of therapeutic courts and desires to provide a general provision in statute acknowledging and encouraging the judiciary to provide for therapeutic court programs to address the particular needs within a given judicial jurisdiction.

Successful program completion by a therapeutic court defendant is dependent on the defendant being honest throughout the entire process. Initial evaluations require defendants to be honest about their personal history, their addiction issues, their mental health issues, and other sensitive topics. Restricting access to such evaluations and treatment reports will help facilitate the goals of therapeutic courts because defendants can speak freely to evaluators, treatment providers and probation counselors without fear that their personal and private information will be released to the general public.

To further this end, the DMCJA proposes an amendment to GR 31 that would restrict access to certain critical records used in therapeutic courts. This amendment would be consistent with how family law and guardianship records are handled under GR 22, and would similarly facilitate public access to court records while also protecting personal privacy and not unduly burdening the ongoing business of the courts.

The DMCJA considered a proposal to amend GR 22 to add therapeutic court records but has chosen to propose an addition to GR 31. The proposed language is modeled after GR 22(c) and (h). An alternative proposal amending GR 22 instead of GR 31 is available upon request.

D. Proposed Amendments:

The following subsection is proposed to be added to GR 31. The rest of the rule would remain unchanged.

(l) Restricted Access to Therapeutic Court Records.

(1) Unless otherwise provided by statute, court rule, court order, or subsection (1)(A) below, all court records shall be open to the public for inspection and copying upon request. The Clerk of the court may assess fees, as may be authorized by law, for production of such records.

(A) Restricted Access. Risk/needs assessments, chemical dependency assessments, domestic violence assessments, mental health and sexual deviancy assessments, treatment provider reports and compliance reports, presentence reports, probation compliance reports, self-help support group attendance (e.g., AA or NA), and any other compliance reports used in therapeutic courts shall only be accessible as provided in (2) herein.

(2) Unless otherwise provided by statute, court rule or court order, the following persons shall have access to the Restricted Access records listed in (1)(A) above:

(A) Judges, commissioners, magistrates, other court personnel, probation counselors, defendants, defendant's attorney of record, and the prosecuting attorney.

(3) Upon receipt of a written motion requesting access to these types of records by some other person, the court may allow access to court records restricted under this rule, or relevant portions of court records restricted under this rule, if the court finds no statute or other court rule prohibits access, and the public interest in granting access or the personal interest of the petitioner seeking access, outweighs the privacy and safety interests of the defendant or other persons mentioned in the records.

(A) If the court grants access to court records restricted under this rule, the court may enter such orders necessary to balance the personal privacy and safety interests of the defendant or other persons with the public interest in access.

E. **Hearing:** A hearing is not recommended.

F. **Expedited Consideration:** Expedited consideration is not requested.

PROPOSED AMENDMENT:

GR 31

ACCESS TO COURT RECORDS

[a] – [k] Unchanged

(l) Restricted Access to Therapeutic Court Records.

(1) Unless otherwise provided by statute, court rule, court order, or subsection (1)(A) below, all court records shall be open to the public for inspection and copying upon request. The Clerk of the court may assess fees, as may be authorized by law, for production of such records.

(A) Restricted Access. Risk/needs assessments, chemical dependency assessments, domestic violence assessments, mental health and sexual deviancy assessments, treatment provider reports and compliance reports, presentence reports, probation compliance reports, self-help support group attendance (e.g., AA or NA), and any other compliance reports used in therapeutic courts shall only be accessible as provided in (2) herein.

(2) Unless otherwise provided by statute, court rule or court order, the following persons shall have access to the Restricted Access records listed in (1)(A) above:

(A) Judges, commissioners, magistrates, other court personnel, probation counselors, defendants, defendant's attorney of record, and the prosecuting attorney.

(3) Upon receipt of a written motion requesting access to these types of records by some other person, the court may allow access to court records restricted under this rule, or relevant portions of court records restricted under this rule, if the court finds no statute or other court rule prohibits access, and the public interest in granting access or the personal interest of the petitioner seeking access, outweighs the privacy and safety interests of the defendant or other persons mentioned in the records.

(A) If the court grants access to court records restricted under this rule, the court may enter such orders necessary to balance the personal privacy and safety interests of the defendant or other persons with the public interest in access.