

WASHINGTON STATE
BAR ASSOCIATION

Board of Governors Meeting
Public Session
Late Materials

September 27-28, 2018
WSBA Conference Center
Seattle, Washington

**WASHINGTON STATE
BAR ASSOCIATION**

BOARD OF GOVERNORS' MEETING Public Session Materials September 27-28, 2018 Seattle, WA		
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3.b.2.	Approve CPD Providing Input to Washington Supreme Court Rules Committee re CrR 4.1 (action)	L-8
3.d.	Approve Keller Deduction Schedule (Updated) (action)	L-74
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7.i.	POLB Recommendation to WA Supreme Court re GR 24	L-102



**Board of Governors Meeting
 WSBA Conference Center
 Seattle, WA
 September 27-28, 2018**

UPDATED

WSBA Mission: To serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice.

PLEASE NOTE: ALL TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE

THURSDAY, SEPTEMBER 27, 2018

GENERAL INFORMATION 2

1. AGENDA 19

8:00 A.M.

2. EXECUTIVE SESSION

- a. Approve July 27-28, 2018, Executive Session Minutes **(action)** E-2
- b. Approve September 7, 2018, Emergency Executive Session Minutes **(action)**..... E-7
- c. President’s and Executive Director’s Reports
- d. Client Protection Board Gift Recommendation – Julie Shankland **(action)** E-8
- e. Report on Executive Director Annual Evaluation – Angela Hayes and Paula Littlewood.... E-13
- f. Litigation Report – Julie Shankland..... E-46

12:00 P.M. – LUNCH WITH LIAISONS AND GUESTS

1:00 P.M. – PUBLIC SESSION

- Welcome
- Report on Executive Session
- President’s Report & Executive Director’s Report
- Consideration of Consent Calendar*

MEMBER AND PUBLIC COMMENTS

This time period is for guests to raise issues of interest.

OPERATIONAL

3. FIRST READING/ACTION CALENDAR

- a. Washington State Bar Foundation (WSBF) Annual Meeting – James Armstrong, President, and Terra Nevitt, Director of Advancement/Chief Development Officer
 - 1. Appoint Members to WSBF Board of Trustees **(action)** 24

* See Consent Calendar. Any items pulled from the Consent Calendar will be scheduled at the President’s discretion.

- b. Council on Public Defense (CPD) – Eileen Farley, Chair, and Daryl Rodrigues, Vice Chair
 - 1. Approve Amendments to CPD Charter **(first reading)** 26
 - 2. Approve CPD Providing Input to Washington Supreme Court Rules Committee Re CrR 4.1 **(action)** **late materials**
- c. Approve Final WSBA FY2019 Budget – Treasurer Kim Risenmay, Chair; Ann Holmes, Chief Operations Officer; and Tiffany Lynch, Associate Director of Finance **(action)** 34
- d. Approve Keller Deduction Schedule **(action)** 113
- e. Fastcase Presentation – Phil Rosenthal, President; Steve Errick, Chief Operations Officer; and Joe Patz, Alliance Manager 120

3:30 P.M.

STRATEGIC ITEMS

- 4. **ANNUAL DISCUSSION WITH DEANS OF WASHINGTON STATE LAW SCHOOLS – Annette Clark, Dean of Seattle University School of Law, and Jacob Rooksby, Dean of Gonzaga University School of Law**

FRIDAY, SEPTEMBER 28, 2018

7:00 A.M. – EXECUTIVE SESSION

8:00 A.M. – PUBLIC SESSION

OPERATIONAL (continued)

- 5. **FIRST READING/ACTION CALENDAR (continued)**
 - f. Approve Support for Law School Transparency Report – Jordan Couch, WYLC Incoming Chair-elect, and Julianne Unite, Member Services and Engagement Specialist **(action)**..... 121
 - g. Approve Extension of Member Engagement Work Group Charter – President-elect Rajeev Majumdar **(action)** 158
 - h. Approve Recommendations from Civil Litigation Rules Drafting Task Force – Ken Masters, Chair **(action)** 162
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 - i. Approve Recommendations from Court Rules and Procedures Committee – Shannon Kilpatrick, Chair, and Julie Shankland, Interim General Counsel **(action)** 271
 - j. Approve WSBA Committee on Mission Performance and Review (CMPR) Recommendations **(action)** 339
 - k. Approve Proposed Updated Judicial Recommendation Committee (JRC) Guidelines – Sanjay Walvekar, Outreach and Legislative Affairs Manager **(action)** 406
 - l. Approve Proposed Policy Statement and Resolution re Fiscal Transparency – Governor Paul Swegle **(first reading)**..... 417
 - m. Appoint Chairs and Vice-Chairs to WSBA Committees and Boards **(action)**..... 418
 - n. Approve Technical Correction to RPC 1.12, Comment 1 **(action)** 427

GOVERNOR ROUNDTABLE

This time period is for Board members to raise new business and issues of interest.

OPERATIONAL (continued)

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1. Third Quarter Fiscal Update Memo	
2. June 30, 2018, Financial Statements	
3. July 31, 2018, Financial Statements	
4. Investment Update for June, July, and August, 2018	
i. Practice of Law Board (POLB) Recommendation to Washington Supreme Court re Amending General Rule (GR) 24 to Permit Operation of Online Self-Representation Legal Service Providers and Provide for Regulation	late materials
8. PREVIEW OF NOVEMBER 16, 2018, MEETING	673

12:00 P.M. - ADJOURN

2018-2019 Board of Governors Meeting Issues

NOVEMBER (Seattle)

Standing Agenda Items:

- Access to Justice Board Report
- Financials
- FY2017 Fourth Quarter Management Report
- BOG 2017-2018 Legislative Committee Priorities
- WSBA Legislative Committee Recommendations
- Outside Appointments (if any)
- Washington Leadership Institute (WLI) Fellows Report
- WSBA Practice Sections Annual Reports (information)
- WSBF Annual Report

JANUARY (Bellingham)

Standing Agenda Items:

- ABA Midyear Meeting Sneak Preview
- Client Protection Fund (CFP) Board Annual Report
- Financials
- FY2017 Audited Financial Statements
- FY2018 First Quarter Management Report
- Legislative Report
- Office of Disciplinary Counsel Report (Executive Session – quarterly)
- Outside Appointments (if any)
- Third-Year Governors Candidate Recruitment Report

MARCH (Olympia)

Standing Agenda Items:

- ABA Mid-Year Meeting Report
- Financials
- Legislative Report
- Outside Appointments (if any)
- Supreme Court Meeting

May (Seattle)

Standing Agenda Items:

- BOG Election Interview Time Limits (Executive Session)
- Financials
- FY2018 Second Quarter Management Report
- Interview/Selection of WSBA At-Large Governor
- Interview/Selection of the WSBA President-elect
- Legislative Report/Wrap-up
- Outside Appointments (if any)
- WSBA Awards Committee Recommendations (Executive Session)

JULY (Vancouver)

Standing Agenda Items:

- BOG Retreat
- Court Rules and Procedures Committee Report and Recommendations
- Financials
- Draft WSBA FY2019 Budget
- FY2018 Third Quarter Management Report
- WSBA Committee and Board Chair Appointments
- WSBA Mission Performance and Review (MPR) Committee Update
- WSBA Treasurer Election

SEPTEMBER (Seattle)

Standing Agenda Items:

- 2019 Keller Deduction Schedule
- ABA Annual Meeting Report
- Chief Hearing Officer Annual Report
- Professionalism Annual Report
- Report on Executive Director Evaluation (Executive Session)
- Financials
- Final FY2019 Budget
- Legal Foundation of Washington Annual Report
- Washington Law School Deans
- WSBA Annual Awards Dinner
- WSBF Annual Meeting and Trustee Election

Board of Governors – Action Timeline

Description of Matter/Issue	First Reading	Scheduled for Board Action
WSBA FY2019 Budget	July 27-28, 2018	Sept 27-28, 2018
WSBA Mission and Performance and Review Committee (CMPR) Update and Recommendations	July 27-28, 2018	Sept 27-28, 2018
Recommendations from Court Rules and Procedures Committee	July 27-28, 2018	Sept 27-28, 2018
Proposed Policy Statement and Resolution re Fiscal Transparency	Sept 27-28, 2018	Nov 16, 2018
Amendments to Council on Public Defense Charter	Sept 27-28, 2018	Nov 16, 2018

WASHINGTON STATE BAR ASSOCIATION

MEMO

To: Board of Governors

From: Diana Singleton, Staff Liaison to Council on Public Defense

Date: September 25, 2018

Re: Council on Public Defense's Proposed Amendments to CrR 3.3

Action: Approve the Council on Public Defense providing its input on CrR 4.1 in response to Justice Johnson's Request. The CPD will be providing suggested amendments to CrR 3.3 for consideration by the Supreme Court Rules Committee in response to the request.

Background

In a letter dated March 23, 2018 (attached) the Washington Supreme Court Rules Committee sought input from the WSBA and other stakeholders on a proposed amendment to CrR 4.1-Arrestment. The proposed change was submitted by a defendant from Snohomish County seeking a fix to the delay caused when a felony charge is filed in district court and subsequently refiled in superior court.

The Council on Public Defense (CPD) discussed the proposed change at its May 2018 meeting. The CPD determined that the delay caused by CrR 4.1 can be problematic for investigation and defense of cases and further identified that an amendment to the rule would reduce geographic disparity. By majority vote, the CPD expressed support for changing CrR 4.1, but not for the particular proposal they were asked to review, which the CPD did not think would resolve the problem. This feedback was communicated to Justice C. Johnson, chair of the Washington Supreme Court Rules Committee in a memo dated May 31, 2018 (attached).

In a letter dated July 6, 2018, the Washington Supreme Court Rules Committee asked the CPD to propose alternative language to address the problems caused by current CrR 4.1. The letter noted that the next regularly scheduled Supreme Court Rules Committee meeting is scheduled for October 15, 2018 (attached).

The recommendation of the CPD is summarized below and detailed in the attached memo. This recommendation has been approved by majority vote of the CPD. Note that the WSBA Legislation and Court Rule Comment Policy requires a super majority vote of the entity – and approval of the Board of Governors – prior to a WSBA entity making public comment on a proposed court rule change. The CPD did not have sufficient attendance at its September meeting to achieve a supermajority (13 people voted in favor of the recommendation, 1 person abstained, no one voted against the recommendation). However, since the CPD is not commenting on public legislation or suggested rulemaking published for comment, rather it is responding to a direct request from the Washington Supreme Court Rules

Committee, the Comment Policy's supermajority requirement does not seem to apply. In an effort to be responsive to the Court in advance of its October meeting, the CPD is seeking approval from the Board to forward the CPD's recommendations to the Supreme Court's Rules Committee.

The attached memo from CPD member Kim Ambrose outlines the concerns of CrR 4.1 and CPD's analysis of how to address the concerns. The CPD workgroup determined that a suggested amendment to CrR 3.3-Time for Trial would better address the problems identified.

MEMO TO CPD

FROM: Kim Ambrose (and working group which includes Christie Hedman, Mark Conrad, Harry Gasnick, Rob O'Neal and a handful of others)

DATE: September 12, 2018

RE: Proposed Amendment to CrR 3.3 (formerly proposed amendment to CrR 4.1)

Purpose: To address unnecessary delay in time to trial for felony cases filed in District Court.

Background:

On March 23, 2018, Justice Charles Johnson as chair of the Washington Supreme Court Rules Committee wrote a letter to the WSBA (and other stakeholders) seeking input on a proposed amendment to CrR 4.1 (Arraignment) that had been submitted by a defendant from Snohomish County concerned about the delay in his felony trial caused when it was filed originally in District Court. The CPD was asked to respond on behalf of WSBA. The CPD discussed the proposed change at its May 2018 meeting and agreed with the underlying premise, but determined that a closer look should be taken at the mechanism for addressing the problem. WSBA forwarded our memo to the Court and the Court has given CPD/WSBA time to propose language to address the issue of time to trial for felony defendants who were filed on in District Court.

CrRLJ 3.2.1(g) *Preliminary Hearing on Felony Complaint*¹ establishes the procedure for filing felony complaints in District Court. The process allows for a preliminary hearing where the

¹ CrRLJ 3.2.1(g) Preliminary Hearing on Felony Complaint.

(1) When a felony complaint is filed, the court may conduct a preliminary hearing to determine whether there is probable cause to believe that the accused has committed a felony unless an information or indictment is filed in superior court prior to the time set for the preliminary hearing. If the court finds probable cause, the court shall bind the defendant over to the superior court. If the court binds the accused over, or if the parties waive the preliminary hearing, an information shall be filed without unnecessary delay. Jurisdiction vests in the superior court at the time the information is filed.

(2) If at the time a felony complaint is filed with the district court the accused is detained in jail or subjected to conditions of release, the time from the filing of the complaint in district court to the filing of an information in superior court shall not exceed 30 days plus any time which is the subject of a stipulation under subsection (g)(3). If at the time the complaint is filed with the district court the accused is not detained in jail or subjected to conditions of release, the time from the accused's first appearance in district court which next follows the filing of the complaint to the time of the filing of an information

court determines whether there is probable cause and if it so finds, the court “shall bind the defendant over to superior court.” If the court “binds the accused over” then “an information shall be filed without unnecessary delay.”

In fact, the preliminary hearing/bind over procedure contemplated in the rule is not utilized regularly by any jurisdiction. According to the [Washington State Courts Caseload Report for 2017](#), the number of felonies filed in District Courts range from 0 (a majority of counties) to 2,765 (Snohomish County.) However, only 4 counties documented hearings to bind over defendants: Kitsap (587 cases), Skagit (3 cases), Spokane (19 cases) and Stevens (2 cases).

Snohomish County, with the highest number of felonies filed in District Court, did not hold preliminary hearings or “bind over” any cases. According to the Kitsap County Prosecutor’s Office, although the 2017 data indicates it has the highest number of cases “bound over” in the state, preliminary hearings were not actually held. Kitsap County has recently abandoned the practice of filing all felonies in District Court, a practice that was begun less than 10 years ago.

King County has the second largest number of felonies filed in District Court in 2017 (1149). A majority of these cases were reduced to misdemeanors; the King County Prosecutor’s Office uses the process to “expedite” low level felonies (as opposed to Snohomish County which files most, if not all felony cases in Superior Court.) Grays Harbor and Klickitat Counties also filed a number of felonies in District Court, without recording a preliminary or “bind over” hearing.

If a person is arrested for a felony, they may be held for 72 hours before the information is filed if probable cause for the arrest is found. If the felony is filed in Superior Court (as they are in a vast majority of jurisdictions), a defendant who is detained in jail must be arraigned within 14 days. Arraignment triggers the speedy trial expiration date. However, if a person is filed on in District Court, CrRLJ 3.2.1 allows for a complicated process for “bind over” and an additional 30 days before the case has to be filed in Superior Court, hence delaying arraignment and speedy trial timelines. It seems that the bind over process, which provides for a preliminary hearing where the District Court finds PC for a felony offense, is a holdover from grand jury-type proceedings. But, District Courts are not holding these hearings, so the delay in filing is

in superior court shall not exceed 30 days, excluding any time which is the subject of a stipulation under subsection (g)(3). If the applicable time period specified above elapses and no information has been filed in superior court, the case shall be dismissed without prejudice.

(3) Before or after the preliminary hearing or a waiver thereof, the court may delay a preliminary hearing or defer a bind-over date if the parties stipulate in writing that the case shall remain in the court of limited jurisdiction for a specified time, which may be in addition to the 30-day time limit established in subsection (g)(2).

unnecessary and prejudices defendants who may lose access to discovery (e.g. video logs, eye witnesses, etc.)

Proposed Amendment

The Working Group considered the proposed change to CrR 4.1 which would address the time for arraignment, but instead determined that a change to CrR 3.3 Time for Trial was a simpler way to address the problem. Attached is the proposed amendment to CrR 3.3 for consideration.

(c) Commencement Date.

(1) Initial Commencement Date. ~~The initial commencement date shall be the date of arraignment as determined under CrR 4.1.~~

(i) In the event the charge is initially filed into superior court the commencement date shall be the date of arraignment as determined under CrR 4.1.

(ii) In the event a felony complaint is initially filed under CrRLJ 3.2.1(g), the defendant is detained in jail, and a preliminary hearing is not held, the commencement date shall begin 14 days after the expiration of the time limits specified under CrR 3.2.1(f).

The Supreme Court
State of Washington

CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
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March 23, 2018

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Dear Attorney General and Association Directors:

I am writing as chair of the Washington State Supreme Court's Rules Committee. The Rules Committee has received proposed amendments to Superior Court Criminal Rule (CrR) 4.1—Arrest, which the proponent claims are necessary to avoid conflict with established constitutional principles and other court rules, such as CrR 3.3.

The Supreme Court Rules Committee is in the process of reviewing the proposed amendments to CrR 4.1 and would like input from various stakeholders on these proposed changes. I am enclosing a copy of the GR 9 cover sheet, the proposed amendment, and other supporting documentation received.

March 23, 2018
Page 2

We appreciate your expertise and thank you in advance for your help in the rulemaking process. If possible, please provide your comments by June 1, 2018.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charles W. Johnson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles W. Johnson, Chair
Supreme Court Rules Committee

Enclosures

RECEIVED
FEB 12 2018

Washington State
Supreme Court

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SUPREME COURT
OF THE STATE OF WASHINGTON

GENERAL RULE 9 SUPREME COURT RULEMAKING

- (A)(B) STEPHEN P. DOWDNEY JR. #971036
Proponent/Spokesperson
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Wa, 98520
- (C) The current version of CrR 4.1 necessitates amendment as it conflicts with established constitutional principals as well as other court rules (CrR 3.3).
- (D) A public hearing should only be conducted upon order of the court.
- (E) Expedited consideration should be applied as the current rule is allowing for individuals held to answer for a crime to remain separated from liberty without consideration for time for trial and for disparate periods compared to similarly situated persons.

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PROPOSED AMENDMENTS

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) Time.

(1) Defendant Detained in Jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, defendants arraignment in the adult division of the superior court after an information or indictment has been filed shall not be later than 14 days after defendant was detained in jail for the pending charge for purposes of commencement date for CrR 3.3(b)(1)(i), if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not effect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in Crr 3.3(a)(3)(iii).

(b) Objection to Arraignment Date--Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. that date shall constitute the arraignment date for purposes of CrR 3.3. a party who fails to object as required shall lose the right to object, and

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the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. waiver of counsel at arraignment shall preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name. Defendant shall be asked his or her true name . If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading. The indictment or information shall be read to the defendant, unless the reading is waived, and a copy shall be given to defendant.

Although linked, CrRLJ 4.1 does not apparently seem to need amending in proponents considerations.

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DISCUSSION

The current version of CrR 4.1 allows for individuals initially filed on in district court for prescribed conduct to ultimately be filed on in superior court for that same conduct previously held to answer for without consideration for time for trial.

Warrantless Arrest

An individual detained in jail on a warrantless arrest under CrR/CrRLJ 3.2.1. must be formally charged within 72 hours. CrR/CrRLJ 3.2.1(f).

Under CrR 3.2.1(f) an individual filed on directly in superior court by information or indictment within 72 hours will be arraigned within 14 days CrR 4.1(a). A rule based time for trial will take place within 60 days. CrR 3.3(b)(1)

An individual filed on in district court under CrRLJ 3.2.1(g) by a "felony complaint" within 72 hours may be held for 30 days in district court. CrRLJ 3.2.1(g)(2). An information then may be filed in superior court. An arraignment will then take place within 14 days per CrR 4.1(a). Thus an arraignment in superior court will be within 44 days of being held to answer. A 60 day rule based time for trial will then occur per CrR 3.3(b)(1).

From the time an individual is held to answer in superior court per CrR 3.2.1(f) a time for trial will take place in 74 days, an individual held to answer in district court for the same conduct will have a time for trial period of 104 days.

Procedural History

Prior to the 1980 amendments to the time for trial rule(s) there were issues with providing a prompt trial for defendants once a prosecution had been initiated. see State v Striker, 87 wn2d 870;557 p2d 847(1976);State v. Edwards, 94 Wn2d 208;616 p2d 620(1980).

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The 1980 amendments seem to cure, at least the issue of abusing the "felony complaint" district court filing procedure, as the time spent in district court was calculated into the time for trial period. see former CrR 3.3 and the dissent of James, J. in State v Kray, 31 Wn.App.388,390-92;641 p2d 1210(1982).

Where he states:

"The judicial Council's 1979 proposed amendments to CrR 3.3 will remedy this problem. The starting point for the time for trial period is the arraignment in superior court. Arraignment must occur by a certain date. In addition time spent in district court proceedings will be included in the time for trial period. This should limit the use of district court proceedings to delay the time for trial period. Washington State Judicial Council, Twenty Eighth Annual Report at 46-47(1979)."

Also see State v Hardesty, 149 Wn2d 230,235;66 p3d 621(2003) where this court states:

"If the state files a complaint and holds the defendant on the charge or subjects him to conditions of release, he will suffer a loss of liberty due directly to the current charge, thus, justice and fairness require that time elapsed in district court commence with the filing of the complaint and that this time be included in calculating the time for trial."

In 2003 the time for trial rules were amended again. CrR/CrRLJ 3.3 & 4.1. At least the amendments to CrR 3.3 & 4.1 either allow for individuals to be held to answer and detained in jail prior to the filing of an information in superior court without consideration for time for trial or stand facially vague, to where a person of ordinary intelligence may have trouble understanding what is prescribed or lacks standards sufficiently specific to prevent arbitrary enforcement.

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Related Rules / Harmonizing all Provisions

CrR 3.3 has many provisions that relate directly to CrR 4.1.

CrR 3.3(a)(3) Definitions.

(i) "pending charge" means the charge for which the allowable time for trial is being computed.

According to CrR 3.3 "pending charge" does not specify a charge filed in superior court by information.

(ii) "related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in superior court.

CrR 3.3(a)(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

According to CrR 3.3 "related charges" and "pending charges" are to be calculated equally.

CrR 3.3(a)3(iv) "arraignment" means the date determined under CrR 4.1(b).

CrR 4.1(b) is the date of the true commencement date, reflecting the start time per CrR 3.3 after an objection is raised at the physical arraignment in superior court. (also see CrR 3.3(c)(1))

CrR 3.3(a)3(v) "detained in jail" means held in custody of a correctional facility pursuant the pending charge and that only "unrelated charges" are excluded from the time for trial period.

(note) there are instances in which periods of "related charges" are excluded CrR 3.3 (e)(4)(5).

Generally CrR 3.3 specifies a time for trial period from when an individual is held to answer for conduct even if ultimately prosecuted in superior court.

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Vagueness

Is the current version of CrR 4.1 merely vague ?

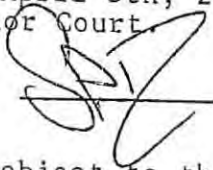
Facially, CrR 4.1(a) only specifies an end point to when an arraignment may occur and does not delineate an arraignment only after an information has been filed.

Indeed, CrR 4.1 subjects an arraignment date to objection under CrR 4.1(b) for purposes of CrR 3.3. allowing for adjustment.

However, CrR 4.1 is construed to mean an arraignment may only occur after an information has been filed in superior court.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I(1 RP 19)

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 5th, 2016 arraignment in Snohomish County Superior Court.



THE DEFENDANT: I'm actually going to object to those dates.

THE COURT: What's the objection?

THE DEFENDANT: Well, we're 21 days past filing today.

THE COURT: Right.

THE DEFENDANT: So I'm objecting to the arraignment date because I believe today is the only day I can object to it, if I'm not mistaken.

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4 And also I have, with the court's indulgence, I
5 actually have another issue that I'd like to raise.
6 THE COURT: What's that?
7 THE DEFENDANT: I actually believe that the expiration
8 date should be -- the expiration date should be May
9 13th. The commencement date should be March 15th, the
10 day of filing.
11 THE COURT: Mr. Dowdney, your case was filed April
12 1st.
13 THE DEFENDANT: It was actually filed --well-- yea,
14 from the filing from district court. This was filed
15 in district court.
16 And this brings me to another issue. At my PC
17 hearing in front of Judge Bui I objected to my case
18 being filed in district court. I filed actually a
19 motion that was timely filed and properly before the
20 court, but it was promptly ignored, to be at that
21 dismissal date. So it wasn't -- I wasn't brought to
22 that hearing. I filed a motion to docket. Filed the
23 motion. I have a service of mailing, and --
24 THE COURT: You filed in what --
25 THE DEFENDANT: I'm sorry, Your Honor?
26 THE COURT: You filed in what court, sir?

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THE DEFENDANT: District court.

THE COURT: The case is in superior court now.

THE DEFENDANT: I understand that, Your Honor. I understand that. But I didn't file the case in district court. I mean, the State filed in district court. So due to that, somewhere along the line now we're past the 14-day which -- and that kind of brings me to why I want my commencement date to start on the day of filing because that coincides with -- it would be Criminal Court Rule 3.2.1.(f)(1) where I'm charged within 72 hours if filed in district court, and so that's what I want.

According to Washington Supreme Court and all the divisional courts, they continuously said that the United States Constitutional Amendment 6, and the Washington Article I, Section 22, basically are the same. The Washington Supreme Court has said --

THE COURT: Wait. Stop. Your getting way ahead of yourself.

what's the State's position with regard to the commencement date for the 60 day rule?

MS. YAHYAVI: Your Honor, the State's position is the commencement date is today, the date of arraignment.

THE COURT: Even if it was filed in district court?

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MS. YAHYAVI: Well, I haven't done any research. I'm happy --

THE COURT: I'm asking you specifically right here, right now, I'm going to take a break, you need to take a look at the rule now. I'll be back out in a few minutes. The defendant needs to be maintained in the court room over there. We're in recess.

(Recess taken)

THE COURT: Ms Yahyavi, have you reviewed Criminal Rule 3.3?

MS. YAHYAVI: I have Your Honor. Can I go ahead and answer?

THE COURT: Sure.

MS. YAHYAVI: Under Criminal Rule 3.3, time for trial , (c), the initial commencement date. (1) The initial commencement date shall be the date of arraignment as determined under Criminal Rule 4.1.

Criminal Rule 4.1 states: The defendant detained in jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court. This information was filed April 1st.

THE COURT: All right. Mr. Dowdney, is there some

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4 theory under which that's not a correct reading of
5 the rule?

6 THE DEFENDANT: I'm sorry?

7 THE COURT: is there some theory under which that is
8 not a correct reading of the rule?

9 THE DEFENDANT: She read directly from the rule. I'm
10 reading myself. She read it directly from the rule.

11 THE COURT: All right. Well, today is your arraignment
12 date. It was properly set. 4.2 requires that you be
13 arraigned within 14 days of the day charges were
14 filed. And so today is the arraignment date. Today is
15 the commencement date.

16 MS YAHYAVI: Your Honor, I just want to clarify, it's
17 4.1.

18 THE COURT: I'm sorry, 4.1. I misspoke. It's 4.1.

19 THE DEFENDANT: Defense objects.

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23 This, first of many disputes over the
24 commencement date and misuse of the district court
25 filing process, clearly shows competing
26 interpretations of how the rule applies to time one
28 has spent held on same charge in district court that

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that is ultimately filed in superior court.

The filing of a "felony complaint" in district under CrR 3.2.1.(g) or a "criminal complaint" under CrR 3.2.1.(f) that is eventually amended up to a felony and charged by information in superior court are either "pending charges" or "related charges". Either way an individual has been held to answer in a state court, by the same prosecuting authority. Superior court has jurisdiction over both courts see RCW 2.08.010, and Article 4 § 6. also see State v Harris, 130 Wn2d 35,42;921 p2d 1052(1996).

It bears noting that although State v George, 160 Wn2d 727;158 p3d 1169(2007) states in uncertain terms that time spent in district court is no longer deducted from the superior court calculation, George was originally charged in "municipal" court and thus separate under Harris.

Held to Answer

"The standard indicates that if at the time of the filing of a charge a defendant is being held to answer --- whether in custody, or on bail or recognizanced for the same crime or a crime based on the same conduct or arising from the same episode; then the time begins running as of the date the charge is filed, charge means a written statement with the court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an indictment, information, complaint or affidavit, depending upon the circumstances and the law of the particular jurisdiction" State v Striker, 87 Wn2d at 877. (also see progeny)

United States v Marion, 404 US 307,30 L.Ed.2d 486,487,92 S.Ct. 455(1971) at 321 states:

"Under ABA standards, after a defendant is charged it is contemplated that his right to speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; There is no necessity to allege or show prejudice to the defense. Rule 2.1 *ibid*"

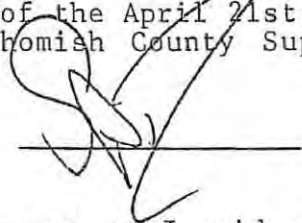
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The term "HELD TO ANSWER" is presumed not to have been merely drawn out of a hat, indeed, it has its roots dating back to The Great Charter, Magna Carta, Lord Coke and Blackstone speak of it, as well as our Founding Fathers:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment.."
Amendment 5 US Const.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I (2 RP 14-15).

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 21st, 2016 CrR 3.3(d)(3) hearing in Snohomish County Superior Court.



MR. DOWDNEY:However -- so, as I said at the beginning, Your Honor, dealing kind of with the 3.3(d)3, and I think it's fairly clear that you are not held to answer. You haven't been held to answer. I haven't been held to answer before my arraignment.

So -- and clearly the only reason ---

THE COURT: This phrase you keep using, held to answer.

MR DOWDNEY: That's correct.

THE COURT: Where is that in the rule?

MR DOWDNEY: So basically it says being held to answer, and it's discussed in Phelps (phonetic

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spelling). It's discussed in, I believe Greenwood,
and it's U.S. vs -- (Loudhawk)

MR DOWDNEY: And I have it there. It says the
defendant was never served an arrest warrant, issued
conditions of release. And the defendant and the
charges were never simultaneously before the court
that's triggering speedy trial rights. Because your
speedy trial rights actually trigger --

THE COURT: I'm going to ask you to stop at this
point.

" What counts as a commitment to
prosecute is an issue of Federal Law unaffected by
allocations of power among state officials under a
state's law...and under the federal standard, an
accusation filed with a judicial officer is
sufficiently formal and the government's commitment
to prosecute it sufficiently concrete, when an
accusation prompts arraignment and restrictions on
the accused liberty facilitate the prosecution
...from that point on, the defendant is "faced
with the prosecutorial forces of organized society,
and immersed in the intricacies of substantive and
procedural criminal law."

" [I]t would defy common sense to say
that a criminal prosecution has not commenced against
a defendant who, perhaps incarcerated and unable to
afford Judicially imposed bail, awaits preliminary
examination on the authority of a charging document
filed by the prosecutor, less typically by the police
and approved by a court of law."

Rothgery v. Gillespie County, 554 US 191,207,208,233,
128 S.Ct. 2578, 171 L.Ed. 2d 366, (2008) US lexis
5057.

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CONCLUSION

The current version of CrR 4.1 allows for individuals to sit jail for up to 44 days without any formal process.

In the case of Snohomish County, whom utilizes the district court "preliminary hearing" or preliminary examination procedures and files most if not all warrantless arrests in district court, either CrR 4.1 is being misunderstood or wantonly abused.

In Snohomish County, upon a warrantless "felony arrest" 99.999% are filed in district court as "criminal complaints". One is not present in court pursuant this "filing" ever. One is not formally served this complaint, formally read this complaint in court.

This stands contrary to Article 1 § 22 Wash. Const., Amendment 6 US. Const., CrRLJ 4.1(f).

CrR 4.1, currently allows Snohomish County to operate under the assumption that one does not have to be "held to answer" as prescribed by the 5th amendment to the US Const. by a "presentment".

In Washington State, a presentment or grand jury indictment has been replaced by an "information" Article 1 § 25 also see RCW 10.37.015 (one will not be held to answer unless by information).

Amending CrR 4.1 to reflect the total time an individual has been removed from liberty, at least equally to those initially charged in superior court, would deter the state from delaying arraignment to gain tactical advantage.

(although irrelevant to proposal, it should be noted that Snohomish County never has any intentions of holding a "preliminary hearing" per CrRLJ 3.2.1(g)(1).) see exhibit 1 & 2, 4.1 allows for this.

CrR 4.1 should also be amended as individuals filed on initially in district court

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would receive time for trial periods equal to those initially filed on in superior court in application of equal protection. see Article 1 § 12 as a time for trial under CrR 3.3 seems to be "fundamental".also see Amendment 14 US Const.

Proponent believes in Washington State the right to be held to answer and to be treated equally are Fundamental Principles essential to the security of individual rights Article 1 § 32 Wash. Const.

And Respectfully asks this court to review the validity and constitutionality of CrR 4.1. for a time for trial period under 3.3 protects a constitutional right to speedy trial, is fundamental and needs to be protected by rules that reflect as much.

I hereby certify under penalty of perjury of the laws of Washington State, that the foregoing is true and correct.

Respectfully Submitted this 6 day of Febuary, 2018.

Signed in Aberdeen, Wa, 98520,

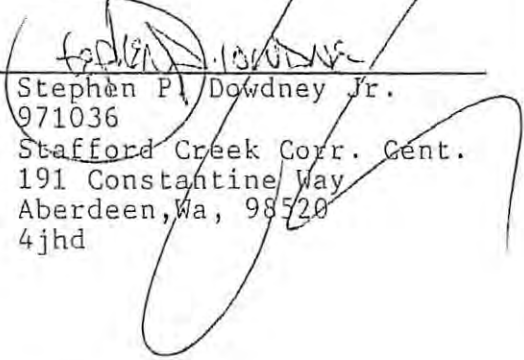

Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520
4jhd

EXHIBIT 1



Snohomish County

District Court
Everett Division

Roger M. Fisher, Judge
Tam Bul, Judge

**SNOHOMISH COUNTY DISTRICT COURT
FELONY COMPLAINT
INFORMATION SHEET**

M/S #508
3000 Rockefeller Ave.
Everett, WA 98201-4046

(425) 388-3331
FAX (425) 388-3565

The Snohomish County Prosecutor's Office has filed a complaint with the Everett Division of the Snohomish County District Court charging you with a felony. A copy of this felony complaint has been provided to you.

A District Court Judge has previously reviewed the facts and circumstances related to your arrest and found that probable cause exists to support your current detention.

YOU WILL NOT BE REQUIRED TO APPEAR BEFORE THE DISTRICT COURT UNTIL FURTHER ACTION IN YOUR CASE IS NECESSARY.

You will be held in custody on the felony complaint until it is dismissed at 5:00 PM on the felony dismissal date noted on the complaint. The following actions may result in an earlier or a later release date:

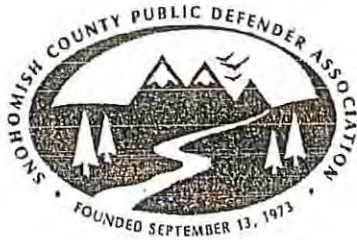
- 1) You and the prosecutor negotiate a guilty plea to a lesser charge;
- 2) The prosecutor requests that the District Court case be dismissed, but files the charge in Superior Court with another bail request;
- 3) You and the prosecutor agree to an extension of the felony dismissal date.

You may choose to negotiate with the Prosecutor or you may wait and see if the Prosecutor will file your case in Superior Court. Unless you have hired private counsel, the Snohomish County Office of Public Defense will contact you to determine if you want to negotiate with the Prosecutor.

If you decide to accept the Prosecutor's offer, you will appear in District Court to enter a plea of guilty. These calendars are held every Monday through Friday (except on Holidays) @ 1:00 PM.

If you decide you do not want to take the Prosecutor's offer, contact your attorney to inform the Prosecutor of your decision. If your case is filed in Superior Court, you will be scheduled to appear in Superior Court to be formally arraigned on the charge and to receive notice on how to have a public defender represent you.

EXHIBIT 2



Snohomish County Public Defender Association

2722 Colby Avenue, Suite 200 • Everett, WA 98201-3527

Phone: 425-339-6300 • Fax: 425-339-6363 • www.snocopda.org

PROBABLE CAUSE HEARING

The State of Washington is holding you in jail and a Judge will determine today whether there is Probable Cause (PC) to continue holding you. This can be a very frustrating stage in the process. The information contained in this handout will help you understand the process. Please read it carefully.

You are not **CHARGED** with a crime at this point, and a Judge's finding of PC does not mean that the Prosecutor will charge or convict you of this/these crime(s). It only means that there is a reasonable belief that you may have committed one or more felonies. The law allows the Prosecutor to hold you in jail for **72 hours** (not counting holidays or weekends) upon a finding of PC to give them time to decide: (1) if any charges will be filed against you, (2) what charges to file against you, and (3) in which court to file the charges. If the Prosecutor fails to file charges within 72 hours, you will be released on this hold.

IF CHARGES ARE FILED IN DISTRICT COURT

If your felony charges are filed in District Court, you will not have an arraignment hearing; you will simply receive paperwork indicating a deadline for the prosecutor to file in Superior Court. This deadline is called a Felony Dismissal Date (FDD). The FDD will be set two Fridays from the date of filing at 5:00pm (between 14 and 18 days, depending on the day of the week charges are filed). Your FDD is NOT a court date, but simply a deadline for the Prosecutor. The Prosecutor will have until the FDD to decide (1) whether the felony charges will be transferred to Superior Court for prosecution or (2) whether they will offer you a plea bargain for one or more misdemeanors. If the Prosecutor does not file charges in Superior Court and they do not offer you a plea bargain to one or more misdemeanors by the FDD, you will be released on this hold. However, this does not mean that charges will never be filed against you—the Prosecutor has time allowed by the statute of limitations, a minimum of 3 years, to file charges against you.

IF CHARGES ARE FILED IN SUPERIOR COURT

If the Prosecutor files felony charges in Superior Court, you will have an arraignment hearing where you will hear the charge(s) against you and have another opportunity to argue bail. If you qualify for a public defender, you will have an attorney assigned after the Prosecutor files in Superior Court.

RELEASE

If you are released on your personal recognizance, or if you post bail, you must keep your address updated with the Court & Prosecutor. If the Prosecutor decides to file charges, you will

THE SUPREME COURT
STATE OF WASHINGTON

DECLARATION OF SERVICE
BY MAILING GR 3.1(c)

I, Stephen P. Dowdney Jr., Proponent, in accordance with General Rule 3.1(c), do hereby declare that I have served the following documents:

Brief in accordance with General Rule 9 Rulemaking.

To the following parties:

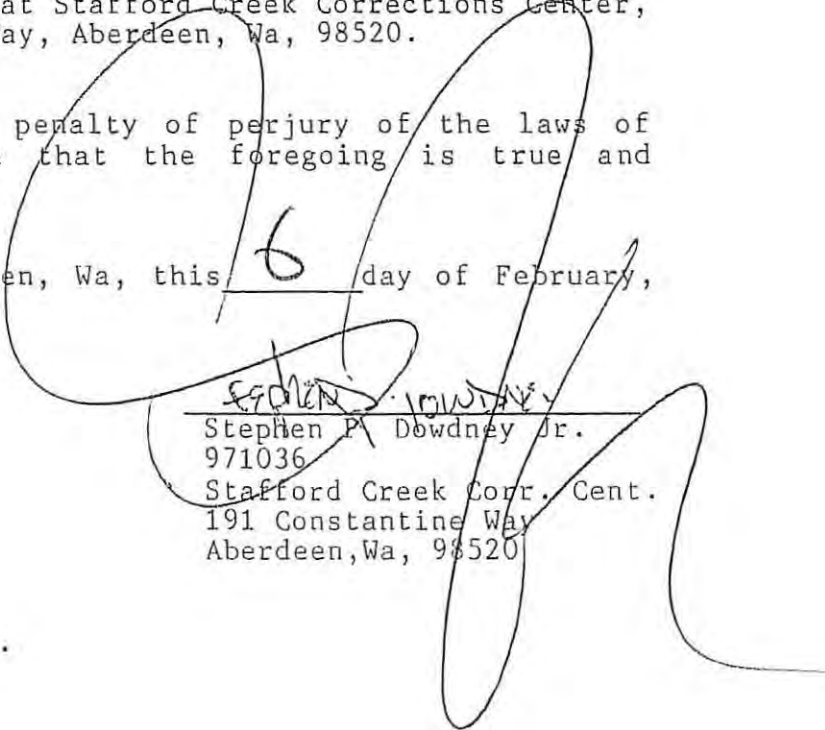
Susan L. Carlson, Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, Wa, 98504-0929

(E-Mail/Electronic Filing unavailable)

I deposited the aforementioned document in the U.S. Postal Service by of process LEGAL MAIL through an officers station at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Wa, 98520.

I declare under penalty of perjury of the laws of Washington State that the foregoing is true and correct.

Signed in Aberdeen, Wa, this 6 day of February, 2018.


Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520

Cc: Dowdney file.

**WASHINGTON STATE
BAR ASSOCIATION**

Office of the Executive Director
Paula C. Littlewood, Executive Director

May 31, 2018

Hon. Charles W. Johnson
Associate Justice
Washington Supreme Court
PO Box 40929
Olympia, WA 98501-2314

Dear Justice Johnson,

Enclosed please find the Council on Public Defense's memo in response to your March 23, 2018, request for input on the proposed amendments to CrR4.1 – Arraignment.

Please let me know if you have any questions or need additional information.

Sincerely,



Paula C. Littlewood

Encl.
05-14-18 Memo from Council on Public Defense
03-23-18 Letter from Hon. Charles W. Johnson

cc: William D. Pickett, WSBA President
Eileen Farley, Council on Public Defense Chair
Diana Singleton, WSBA Access to Justice Manager

WASHINGTON STATE
B A R A S S O C I A T I O N

TO: Paula Littlewood
FROM: Eileen Farley (CPD Chair), Daryl Rodrigues (CPD Vice Chair), and Travis Stearns (CPD Member)
DATE: May 31, 2018
RE: Council on Public Defense's Comments to CrR 4.1

At the request of Justice Charles Johnson the Council on Public Defense (CPD) at its May 4, 2018 meeting discussed whether Criminal Rule (CrR) 4.1 appropriately allows a delay between filing a felony charge in district court and subsequent refileing the same charge in superior court. Justice Johnson sent with his request a motion from a Snohomish County defendant explaining that there was a 30-day delay between filing a charge against him in district court and refileing of the charge in superior court. Justice Johnson requested comments by June 1, 2018.

After a full discussion at its May meeting the CPD recommend the rule be amended. We understand that the delay caused under the current rule can create significant problems for investigation and defense of cases. It also, as described in the letter from the Snohomish County defendant which Justice Johnson included with his request for comment, extends the time in which a case may be brought to trial. For poor defendants who are unable to post bail, particularly defendants charged with low level offenses, this additional time for trial pressures them to plead guilty to get out jail, forgoing their right to a trial.

Amending CrR4.1 will also reduce geographic disparity. An informal poll of practitioners on the CPD revealed that many jurisdictions have first appearances in superior court, meaning that they do not use this rule to extend the time a person is held before trial. An amendment to CrR 4.1 will eliminate this disparity.

The CPD, if the Court would find it of assistance, would be happy to discuss the rule further and suggest amending language. The CPD is made up of diverse interests including judges, public defenders, prosecutors, court administrators, and other interested persons, and is in an excellent position to consider the rule and propose language to solve the problems the current version of this rule creates.

There was a majority vote at the last CPD meeting in favor of changes to CrR4.1 changes and willingness, if the Court should ask to propose alternative language to address the concerns outlined above. The CPD did not feel the changes currently proposed to the rule would necessarily resolve the issue. Please let us know if you have any questions or if we can be of further assistance regarding Justice Johnson's request. Thank you for the opportunity to share our input.

The Supreme Court
State of Washington

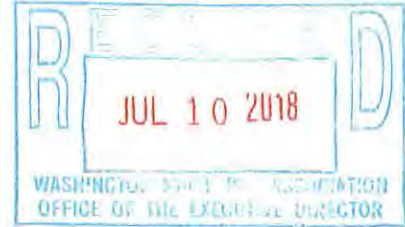
CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
98504-0929



(360) 357-2020
FACSIMILE (360) 357-2103
E-MAIL J.C.JOHNSON@COURTS.WA.GOV

July 6, 2018

Ms. Paula Littlewood, Executive Director
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539



Dear Ms. Littlewood:

Thank you for the May 31, 2018, response to the Supreme Court Rules Committee's request for feedback from the Council on Public Defense (CPD) on suggested amendments to CrR 4.1—Arrestment. In the correspondence, the CPD offered to discuss the suggested amendment further and make suggestions based on the input from its membership that includes judges, public defenders, prosecutors, court administrators, and interested persons.

The Supreme Court Rules Committee has agreed to forward the suggested amendment to the WSBA CPD to consider the rule and propose alternative suggested language after consideration, if appropriate. The next regularly scheduled Supreme Court Rules Committee meeting is scheduled for October 15, 2018.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charles W. Johnson".

Charles W. Johnson, Chair
Supreme Court Rules Committee

cc: ✓ Ms. Eileen Farley, CPD Chair

Enclosures



Snohomish County Public Defender Association

2722 Colby Avenue, Suite 200 • Everett, WA 98201-3527 • www.snocopda.org
Phone: 425-339-6300 • 1-800-961-6609 • Fax: 425-339-6363

RECEIVED
MAY 17 2018

**Washington State
Supreme Court**

May 2, 2018

Washington State Supreme Court's Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

To the Washington State Supreme Court's Rules Committee:

Thank you for the opportunity to provide input regarding amendments to CrR 4.1. I am the Managing Director at the Snohomish County Public Defender Association (SCPDA). Mr. Dowdney's description of the Snohomish County practice is accurate. The current practice is very detrimental to Snohomish County defendants.

For the purposes of this letter, I am going to use the acronym EDC-F for felony cases charged in Snohomish County District Court, Everett Division. See attached Table 1 for 2018 SCPDA data.

In Mr. Dowdney's case, he raised concerns about the speedy trial calculation, but there are also issues related to access to discovery, ability to preserve defense evidence (such as video surveillance footage which is often recycled after a limited number of days), and other issues related to ability to participate in your defense. On low level property and drug offenses, by the time a defendant is arraigned in Superior Court, the defendant has already served more than the low end of the standard range sentence and/or more than the prosecutor's plea offer which is provided at the Superior Court arraignment. For those cases, this process is coercive to extracting a guilty plea so that the defendant can get out of custody as opposed to waiting in custody for a motions hearing or trial date, even in cases with viable legal and/or factual defenses. For defendants suffering from serious mental illness, the process increases delays to RCW 10.77 competency and restoration orders.

SCPDA has strategized about how to challenge the practice, but with no success. In Snohomish County, the prosecutor's office will dismiss or file into Superior Court to avoid the preliminary

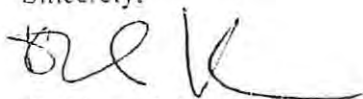
hearing process. Snohomish County District Court, Everett Division, have denied defense motions for a preliminary hearing. The court made a finding that "SCPO (Snohomish County Prosecutor's Office), as a matter of long-standing practice, does not schedule or request a preliminary hearing at the time of or after filing a criminal complaint for a felony in District Court; instead, SCPO sets a deadline two Fridays in the future (FDD) by which they will either resolve the case in District Court, continue the FDD by agreement, move to dismiss the case from District Court, or file an Information in Snohomish County Superior Court." Ultimately, the District Court ruled that SCPO's practice is not inconsistent with CrRLJ 3.2.1. SCPDA has a pending RALJ challenging this ruling.

SCPDA also represents a partial caseload in Skagit County, and in one case, our attorney's demand for a preliminary hearing pursuant to CrRLJ 3.2.1 led to the defendant's release. The client was a youthful adult charged with a serious crime. The Skagit County District Court Judge granted the defense request to schedule a preliminary hearing over the prosecutor's objection. The State dismissed the charge on the eve of the preliminary hearing. Charges have not been refiled. The demand for a preliminary hearing was transformative to that defendant.

SCPDA has also prepared cases within the time for trial period and achieved an acquittal at trial at the first trial setting. Those defendants have waited longer in custody to be arraigned, contrary to CrR 4.1, and have also waited longer for their trial dates to defend themselves from the charges.

SCPDA wholeheartedly supports Mr. Dowdney's request to the Washington State Supreme Court's Rules Committee to reconcile CrR 4.1 with CrRLJ 3.2.1 and CrR 3.3. Thank you for soliciting public defender input. Clients with wealth are more likely to post bail and are less likely to be negatively impacted by this practice. Indigent clients are disproportionately impacted as for many of our clients any amount of bail results in incarceration during the course of the case. CrR 4.1 should apply equally to the wealthy and the poor.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathleen Kyle', with a long horizontal flourish extending to the right.

Kathleen Kyle

Table 1

The Snohomish County Prosecutor's Office files a large volume of felony cases into Snohomish County District Court. The volume has shifted over the years. This table provides current information.

Month (2018)	January	February	March
EDC-F cases assigned to SCPDA	165	145	160
Preliminary Hearings on EDC-F cases	0	0	0
EDC-F cases opened this month & resulting in a misdemeanor plea offer	45	38	36
EDC-F cases filed into Superior Court prior to the Felony Dismissal Deadline (i.e., defendant arraigned in custody)	69	60	78
Felony cases assigned to SCPDA (partial credits result in decimals)	251.25	218.5	245.75
Felony cases assigned to SCPDA with a prior EDC-F hold (directly from ECD-F hold or there may have been a delay between ECD-F hold/dismissal and Superior Court filing)	112	92	89

Jennings, Cindy

From: Christie Hedman <hedman@defensenet.org>
Sent: Friday, May 25, 2018 2:41 PM
To: Johnson, Justice Charles W.
Cc: Harry Gasnick
Subject: Comments on Proposed Amendments to CrR 4.1
Attachments: WDA Comments on Proposed CrR 4.1.pdf

Dear Justice Johnson,

Thank you for contacting us on behalf of the Supreme Court Rules Committee about proposed amendments to Superior Court Criminal Rule 4.1 – Arraignment. Attached is a letter outlining our thoughts on the proposed changes.

Please let me know if you have any questions or would like further information.

Thank you for your consideration.

Christie Hedman
Executive Director
she/her/hers
Tel: 206.623.4321 | Fax: 206.623.5420
hedman@defensenet.org





May 23, 2018

Justice Charles Johnson
Temple of Justice
P.O. Box 40929
Olympia WA 98504

RE: Proposed amendments to CrR 4.1 – Arraignment

Dear Justice Johnson and Supreme Court Rules Committee:

Thank you for requesting input from the Washington Defender Association (WDA) on the proposed amendment to CrR 4.1 – Arraignment.

We appreciate the problem that has been identified and we would like to see resolved; however, remedying the problem is more complex than the fix suggested in the proposal. It appears to interact with a number of other court rules that would have to be addressed simultaneously. It also is unclear how often this practice occurs across the state and whether it makes sense for that practice to continue. We would suggest further study before adopting the proposed amendment.

Thank you for your consideration. Please let us know if you have any questions or if we can provide further information.

Sincerely,

Harry Gasnick
Chair, WDA Court Rules Committee

Christie Hedman
Executive Director

**WASHINGTON STATE
BAR ASSOCIATION**

Office of the Executive Director
Paula C. Littlewood, Executive Director

May 31, 2018

Hon. Charles W. Johnson
Associate Justice
Washington Supreme Court
PO Box 40929
Olympia, WA 98501-2314

Dear Justice Johnson,

Enclosed please find the Council on Public Defense's memo in response to your March 23, 2018, request for input on the proposed amendments to CrR4.1 – Arraignment.

Please let me know if you have any questions or need additional information.

Sincerely,



Paula C. Littlewood

Encl.
05-14-18 Memo from Council on Public Defense
03-23-18 Letter from Hon. Charles W. Johnson

cc: William D. Pickett, WSBA President
Eileen Farley, Council on Public Defense Chair
Diana Singleton, WSBA Access to Justice Manager

WASHINGTON STATE BAR ASSOCIATION

TO: Paula Littlewood
FROM: Eileen Farley (CPD Chair), Daryl Rodrigues (CPD Vice Chair), and Travis Stearns (CPD Member)
DATE: May 31, 2018
RE: Council on Public Defense's Comments to CrR 4.1

At the request of Justice Charles Johnson the Council on Public Defense (CPD) at its May 4, 2018 meeting discussed whether Criminal Rule (CrR) 4.1 appropriately allows a delay between filing a felony charge in district court and subsequent refileing the same charge in superior court. Justice Johnson sent with his request a motion from a Snohomish County defendant explaining that there was a 30-day delay between filing a charge against him in district court and refileing of the charge in superior court. Justice Johnson requested comments by June 1, 2018.

After a full discussion at its May meeting the CPD recommend the rule be amended. We understand that the delay caused under the current rule can create significant problems for investigation and defense of cases. It also, as described in the letter from the Snohomish County defendant which Justice Johnson included with his request for comment, extends the time in which a case may be brought to trial. For poor defendants who are unable to post bail, particularly defendants charged with low level offenses, this additional time for trial pressures them to plead guilty to get out jail, forgoing their right to a trial.

Amending CrR4.1 will also reduce geographic disparity. An informal poll of practitioners on the CPD revealed that many jurisdictions have first appearances in superior court, meaning that they do not use this rule to extend the time a person is held before trial. An amendment to CrR 4.1 will eliminate this disparity.

The CPD, if the Court would find it of assistance, would be happy to discuss the rule further and suggest amending language. The CPD is made up of diverse interests including judges, public defenders, prosecutors, court administrators, and other interested persons, and is in an excellent position to consider the rule and propose language to solve the problems the current version of this rule creates.

There was a majority vote at the last CPD meeting in favor of changes to CrR4.1 changes and willingness, if the Court should ask to propose alternative language to address the concerns outlined above. The CPD did not feel the changes currently proposed to the rule would necessarily resolve the issue. Please let us know if you have any questions or if we can be of further assistance regarding Justice Johnson's request. Thank you for the opportunity to share our input.

The Supreme Court
State of Washington

CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
98504-0929



(360) 357-2020
FACSIMILE (360) 357-2103
E-MAIL J.C.JOHNSON@COURTS.WA.GOV

March 23, 2018

Bob Ferguson
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Seattle, WA 98101

Christie Hedman, Executive Director
Washington Defender Association
110 Prefontaine Place S, Suite 610
Seattle, WA 98104

Dear Attorney General and Association Directors:

I am writing as chair of the Washington State Supreme Court's Rules Committee. The Rules Committee has received proposed amendments to Superior Court Criminal Rule (CrR) 4.1—Arraignment, which the proponent claims are necessary to avoid conflict with established constitutional principles and other court rules, such as CrR 3.3.

The Supreme Court Rules Committee is in the process of reviewing the proposed amendments to CrR 4.1 and would like input from various stakeholders on these proposed changes. I am enclosing a copy of the GR 9 cover sheet, the proposed amendment, and other supporting documentation received.

March 23, 2018
Page 2

We appreciate your expertise and thank you in advance for your help in the rulemaking process. If possible, please provide your comments by June 1, 2018.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charles W. Johnson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles W. Johnson, Chair
Supreme Court Rules Committee

Enclosures

RECEIVED
FEB 12 2018
Washington State
Supreme Court

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8 SUPREME COURT
9 OF THE STATE OF WASHINGTON

10 GENERAL RULE 9 SUPREME COURT RULEMAKING
11

12 (A)(B) STEPHEN P. DOWDNEY JR. #971036
13 Proponent/Spokesperson
14 Stafford Creek Corrections Center
15 191 Constantine Way
16 Aberdeen, Wa, 98520

17 (C) The current version of CrR 4.1 necessitates
18 amendment as it conflicts with established
19 constitutional principals as well as
20 other court rules (CrR 3.3).

21 (D) A public hearing should only be conducted
22 upon order of the court.

23 (E) Expedited consideration should be applied
24 as the current rule is allowing for
25 individuals held to answer for a crime
26 to remain separated from liberty without
27 consideration for time for trial and for
28 disparate periods compared to similarly
situated persons.

Table of Authority

<u>Washington State</u>	<u>page</u>
<u>State v. Edwards,</u> 94 Wn2d 208;616 p2d 620(1980)	3
<u>State v. George,</u> 160 Wn2d 727;158 p3d 1169(2007)	11
<u>State v. Greenwood,</u> 120 Wn2d 585;845 p2d 971(1993)	13
<u>State v. Hardesty,</u> 149 Wn2d 230;66 p3d 621(2003)	4
<u>State v. Harris,</u> 130 Wn2d 35;921 p2d 1052(1996)	11
<u>State v Kray,</u> 31 Wn.App 388;641 p2d 1210(1982)	4
<u>State v. Striker,</u> 87 Wn2d 870;557 p2d 847(1976)	3,11
<u>Federal</u>	
<u>Rothgery v. Gillespie County,</u> 554 US 191,207.128 S.Ct. 2578,171 L.Ed. 2d 366(2008) US lexis 5057	13
<u>United States v. LoudHawk,</u> 474 US 302,310-11,88 L.Ed 2d 640,651,106 S.Ct. 648 (1986)	13
<u>United States v. Marion,</u> 404 US 307,30 L.Ed. 2d 486, 92 S.Ct. 455 (1971)	11
<u>Constitutional</u>	
<u>Amendment 5, US Const.</u>	12

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Table of Authority (Cont.)

<u>Amendment 6, US Const.</u>	8
<u>Amendment 14, US Const.</u>	15
<u>Art. 1 § 12 Wash. Const.</u>	15
<u>Art. 1 § 22 Wash. Const.</u>	14, 8
<u>Art. 1 § 25 Wash. Const.</u>	14
<u>Art. 1 § 32 Wash. Const.</u>	15
<u>Art. 4 § 6 Wash. Const.</u>	11
<u>Revised Code of Washington</u>	
<u>RCW 2.08.010</u>	11
<u>RCW 10.37.015</u>	14
<u>Criminal Court Rules</u>	
<u>CrR 3.3</u>	1, 3, 4, 5, 6, 9, 12
<u>CrR 4.1</u>	1, 2, 3, 4, 5, 6, 9, 10, 14, 15
<u>CrR 3.2.1.</u>	3, 8, 11
<u>CrRLJ 3.3</u>	4
<u>CrRLJ 4.1</u>	2, 4, 14
<u>CrRLJ 3.2.1.</u>	3, 14

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PROPOSED AMENDMENTS

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) Time.

(1) Defendant Detained in Jail. ~~The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, defendants arraignment~~ in the adult division of the superior court after an information or indictment has been filed shall not be later than 14 days after defendant was detained in jail for the pending charge for purposes of commencement date for CrR 3.3(b)(1)(i), if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not effect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in Crr 3.3(a)(3)(iii).

(b) Objection to Arraignment Date--Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. that date shall constitute the arraignment date for purposes of CrR 3.3. a party who fails to object as required shall lose the right to object, and

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the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. waiver of counsel at arraignment shall preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name. Defendant shall be asked his or her true name . If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading. The indictment or information shall be read to the defendant, unless the reading is waived, and a copy shall be given to defendant.

Although linked, CrRLJ 4.1 does not apparently seem to need amending in proponents considerations.

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DISCUSSION

The current version of CrR 4.1 allows for individuals initially filed on in district court for prescribed conduct to ultimately be filed on in superior court for that same conduct previously held to answer for, without consideration for time for trial.

Warrantless Arrest

An individual detained in jail on a warrantless arrest under CrR/CrRLJ 3.2.1. must be formally charged within 72 hours. CrR/CrRLJ 3.2.1(f).

Under CrR 3.2.1(f) an individual filed on directly in superior court by information or indictment within 72 hours will be arraigned within 14 days CrR 4.1(a). A rule based time for trial will take place within 60 days. CrR 3.3(b)(1)

An individual filed on in district court under CrRLJ 3.2.1(g) by a "felony complaint" within 72 hours may be held for 30 days in district court. CrRLJ 3.2.1(g)(2). An information then may be filed in superior court. An arraignment will then take place within 14 days per CrR 4.1(a). Thus an arraignment in superior court will be within 44 days of being held to answer. A 60 day rule based time for trial will then occur per CrR 3.3(b)(1).

From the time an individual is held to answer in superior court per CrR 3.2.1(f) a time for trial will take place in 74 days, an individual held to answer in district court for the same conduct will have a time for trial period of 104 days.

Procedural History

Prior to the 1980 amendments to the time for trial rule(s) there were issues with providing a prompt trial for defendants once a prosecution had been initiated. see State v Striker, 87 wn2d 870;557 p2d 847(1976);State v. Edwards, 94 Wn2d 208;616 p2d 620(1980).

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The 1980 amendments seem to cure, at least the issue of abusing the "felony complaint" district court filing procedure, as the time spent in district court was calculated into the time for trial period. see former CrR 3.3 and the dissent of James, J. in State v Kray, 31 Wn.App.388,390-92;641 p2d 1210(1982).

Where he states:

"The judicial Council's 1979 proposed amendments to CrR 3.3 will remedy this problem. The starting point for the time for trial period is the arraignment in superior court. Arraignment must occur by a certain date. In addition time spent in district court proceedings will be included in the time for trial period. This should limit the use of district court proceedings to delay the time for trial period. Washington State Judicial Council, Twenty Eighth Annual Report at 46-47(1979)."

Also see State v Hardesty, 149 Wn2d 230,235;66 p3d 621(2003) where this court states:

"If the state files a complaint and holds the defendant on the charge or subjects him to conditions of release, he will suffer a loss of liberty due directly to the current charge, thus, justice and fairness require that time elapsed in district court commence with the filing of the complaint and that this time be included in calculating the time for trial."

In 2003 the time for trial rules were amended again. CrR/CrRLJ 3.3 & 4.1. At least the amendments to CrR 3.3 & 4.1 either allow for individuals to be held to answer and detained in jail prior to the filing of an information in superior court without consideration for time for trial or stand facially vague, to where a person of ordinary intelligence may have trouble understanding what is prescribed or lacks standards sufficiently specific to prevent arbitrary enforcement.

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Related Rules / Harmonizing all Provisions

CrR 3.3 has many provisions that relate directly to CrR 4.1.

CrR 3.3(a)(3) Definitions.

(i) "pending charge" means the charge for which the allowable time for trial is being computed.

According to CrR 3.3 "pending charge" does not specify a charge filed in superior court by information.

(ii) "related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in superior court.

CrR 3.3(a)(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

According to CrR 3.3 "related charges" and "pending charges" are to be calculated equally.

CrR 3.3(a)(3)(iv) "arraignment" means the date determined under CrR 4.1(b).

CrR 4.1(b) is the date of the true commencement date, reflecting the start time per CrR 3.3 after an objection is raised at the physical arraignment in superior court. (also see CrR 3.3(c)(1))

CrR 3.3(a)(3)(v) "detained in jail" means held in custody of a correctional facility pursuant the pending charge and that only "unrelated charges" are excluded from the time for trial period.

(note) there are instances in which periods of "related charges" are excluded CrR 3.3 (e)(4)(5).

Generally CrR 3.3 specifies a time for trial period from when an individual is held to answer for conduct even if ultimately prosecuted in superior court.

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Vagueness

Is the current version of CrR 4.1 merely vague ?

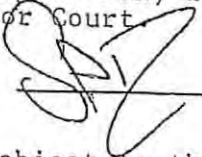
Facially, CrR 4.1(a) only specifies an end point to when an arraignment may occur and does not delineate an arraignment only after an information has been filed.

Indeed, CrR 4.1 subjects an arraignment date to objection under CrR 4.1(b) for purposes of CrR 3.3. allowing for adjustment.

However, CrR 4.1 is construed to mean an arraignment may only occur after an information has been filed in superior court.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I(1 RP 19)

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 5th, 2016 arraignment in Snohomish County Superior Court



THE DEFENDANT: I'm actually going to object to those dates.

THE COURT: What's the objection?

THE DEFENDANT: Well, we're 21 days past filing today.

THE COURT: Right.

THE DEFENDANT: So I'm objecting to the arraignment date because I believe today is the only day I can object to it, if I'm not mistaken.

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And also I have, with the court's indulgence, I actually have another issue that I'd like to raise.

THE COURT: What's that?

THE DEFENDANT: I actually believe that the expiration date should be -- the expiration date should be May 13th. The commencement date should be March 15th, the day of filing.

THE COURT: Mr. Dowdney, your case was filed April 1st.

THE DEFENDANT: It was actually filed --well-- yea, from the filing from district court. This was filed in district court.

And this brings me to another issue. At my PC hearing in front of Judge Bui I objected to my case being filed in district court. I filed actually a motion that was timely filed and properly before the court, but it was promptly ignored, to be at that dismissal date. So it wasn't -- I wasn't brought to that hearing. I filed a motion to docket. Filed the motion. I have a service of mailing, and --

THE COURT: You filed in what --

THE DEFENDANT: I'm sorry, Your Honor?

THE COURT: You filed in what court, sir?

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THE DEFENDANT: District court.

THE COURT: The case is in superior court now.

THE DEFENDANT: I understand that, Your Honor. I understand that. But I didn't file the case in district court. I mean, the State filed in district court. So due to that, somewhere along the line now we're past the 14-day which -- and that kind of brings me to why I want my commencement date to start on the day of filing because that coincides with -- it would be Criminal Court Rule 3.2.1.(f)(1) where I'm charged within 72 hours if filed in district court, and so that's what I want.

According to Washington Supreme Court and all the divisional courts, they continuously said that the United States Constitutional Amendment 6, and the Washington Article I, Section 22, basically are the same. The Washington Supreme Court has said --

THE COURT: Wait. Stop. Your getting way ahead of yourself.

what's the State's position with regard to the commencement date for the 60 day rule?

MS. YAHYAVI: Your Honor, the State's position is the commencement date is today, the date of arraignment.

THE COURT: Even if it was filed in district court?

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4 MS. YAHYAVI: Well, I haven't done any research. I'm
5 happy --
6 THE COURT: I'm asking you specifically right here,
7 right now, I'm going to take a break, you need to
8 take a look at the rule now. I'll be back out in a
9 few minutes. The defendant needs to be maintained in
10 the court room over there. We're in recess.

11 (Recess taken)

12 THE COURT: Ms Yahyavi, have you reviewed Criminal
13 Rule 3.3?

14 MS. YAHYAVI: I have Your Honor. Can I go ahead and
15 answer?

16 THE COURT: Sure.

17 MS. YAHYAVI: Under Criminal Rule 3.3, time for trial
18 , (c), the initial commencement date. (1) The initial
19 commencement date shall be the date of arraignment as
20 determined under Criminal Rule 4.1.

21 Criminal Rule 4.1 states: The defendant detained
22 in jail. The defendant shall be arraigned not later
23 than 14 days after the date the information or
24 indictment is filed in the adult division of the
25 superior court. This information was filed April 1st.

26 THE COURT: All right. Mr. Dowdney, is there some
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4 theory under which that's not a correct reading of
5 the rule?

6 THE DEFENDANT: I'm sorry?

7 THE COURT: is there some theory under which that is
8 not a correct reading of the rule?

9 THE DEFENDANT: She read directly from the rule. I'm
10 reading myself. She read it directly from the rule.

11 THE COURT: All right. Well, today is your arraignment
12 date. It was properly set. 4.2 requires that you be
13 arraigned within 14 days of the day charges were
14 filed. And so today is the arraignment date. Today is
15 the commencement date.

16 MS YAHYAVI: Your Honor, I just want to clarify, it's
17 4.1.

18 THE COURT: I'm sorry, 4.1. I misspoke. It's 4.1.

19 THE DEFENDANT: Defense objects.

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23 This, first of many disputes over the
24 commencement date and misuse of the district court
25 filing process, clearly shows competing
26 interpretations of how the rule applies to time one
28 has spent held on same charge in district court that

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that is ultimately filed in superior court.

The filing of a "felony complaint" in district under CrR 3.2.1.(g) or a "criminal complaint" under CrR 3.2.1.(f) that is eventually amended up to a felony and charged by information in superior court are either "pending charges" or "related charges". Either way an individual has been held to answer in a state court, by the same prosecuting authority. Superior court has jurisdiction over both courts see RCW 2.08.010, and Article 4 § 6. also see State v Harris, 130 Wn2d 35,42;921 p2d 1052(1996).

It bears noting that although State v George, 160 Wn2d 727;158 p3d 1169(2007) states in uncertain terms that time spent in district court is no longer deducted from the superior court calculation, George was originally charged in "municipal" court and thus separate under Harris.

Held to Answer

"The standard indicates that if at the time of the filing of a charge a defendant is being held to answer --- whether in custody, or on bail or recognizanced for the same crime or a crime based on the same conduct or arising from the same episode; then the time begins running as of the date the charge is filed, charge means a written statement with the court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an indictment, information, complaint or affidavit, depending upon the circumstances and the law of the particular jurisdiction" State v Striker, 87 Wn2d at 877. (also see progeny)

United States v Marion, 404 US 307,30 L.Ed.2d 486,487,92 S.Ct. 455(1971) at 321 states:

"Under ABA standards, after a defendant is charged it is contemplated that his right to speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; There is no necessity to allege or show prejudice to the defense. Rule 2.1 ibid"

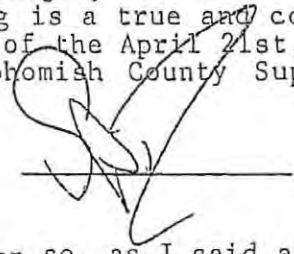
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The term "HELD TO ANSWER" is presumed not to have been merely drawn out of a hat, indeed, it has its roots dating back to The Great Charter, Magna Carta, Lord Coke and Blackstone speak of it, as well as our Founding Fathers:

"No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment.."
Amendment 5 US Const.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I (2 RP 14-15).

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 21st, 2016 CrR 3.3(d)(3) hearing in Snohomish County Superior Court.



MR. DOWDNEY:However -- so, as I said at the beginning, Your Honor, dealing kind of with the 3.3(d)3, and I think it's fairly clear that you are not held to answer. You haven't been held to answer. I haven't been held to answer before my arraignment.

So -- and clearly the only reason ---

THE COURT: This phrase you keep using, held to answer.

MR DOWDNEY: That's correct.

THE COURT: Where is that in the rule?

MR DOWDNEY: So basically it says being held to answer, and it's discussed in phelps (phonetic

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spelling). It's discussed in, I believe Greenwood,
and it's U.S. vs -- (Loudhawk)

MR DOWDNEY: And I have it there. It says the
defendant was never served an arrest warrant, issued
conditions of release. And the defendant and the
charges were never simultaneously before the court
that's triggering speedy trial rights. Because your
speedy trial rights actually trigger --

THE COURT: I'm going to ask you to stop at this
point.

" What counts as a commitment to
prosecute is an issue of Federal Law unaffected by
allocations of power among state officials under a
state's law...and under the federal standard, an
accusation filed with a judicial officer is
sufficiently formal and the government's commitment
to prosecute it sufficiently concrete, when an
accusation prompts arraignment and restrictions on
the accused liberty facilitate the prosecution
...from that point on, the defendant is "faced
with the prosecutorial forces of organized society,
and immersed in the intricacies of substantive and
procedural criminal law."

" [I]t would defy common sense to say
that a criminal prosecution has not commenced against
a defendant who, perhaps incarcerated and unable to
afford Judicially imposed bail, awaits preliminary
examination on the authority of a charging document
filed by the prosecutor, less typically by the police
and approved by a court of law."

Rothgery v. Gillespie County, 554 US 191,207,208,233,
128 S.Ct. 2578, 171 L.Ed. 2d 366, (2008) US lexis
5057.

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CONCLUSION

The current version of CrR 4.1 allows for individuals to sit jail for up to 44 days without any formal process.

In the case of Snohomish County, whom utilizes the district court "preliminary hearing" or preliminary examination procedures and files most if not all warrantless arrests in district court, either CrR 4.1 is being misunderstood or wantonly abused.

In Snohomish County, upon a warrantless "felony arrest" 99.999% are filed in district court as "criminal complaints". One is not present in court pursuant this "filing" ever. One is not formally served this complaint, formally read this complaint in court.

This stands contrary to Article 1 § 22 Wash. Const., Amendment 6 US. Const., CrRLJ 4.1(f).

CrR 4.1, currently allows Snohomish County to operate under the assumption that one does not have to be "held to answer" as prescribed by the 5th amendment to the US Const. by a "presentment".

In Washington State, a presentment or grand jury indictment has been replaced by an "information" Article 1 § 25 also see RCW 10.37.015 (one will not be held to answer unless by information).

Amending CrR 4.1 to reflect the total time an individual has been removed from liberty, at least equally to those initially charged in superior court, would deter the state from delaying arraignment to gain tactical advantage.

(although irrelevant to proposal, it should be noted that Snohomish County never has any intentions of holding a "preliminary hearing" per CrRLJ 3.2.1(g)(1).) see exhibit 1 & 2, 4.1 allows for this.

CrR 4.1 should also be amended as individuals filed on initially in district court

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would receive time for trial periods equal to those initially filed on in superior court in application of equal protection. see Article 1 § 12 as a time for trial under CrR 3.3 seems to be "Fundamental".also see Amendment 14 US Const.

Proponent believes in Washington State the right to be held to answer and to be treated equally are Fundamental Principles essential to the security of individual rights Article 1 § 32 Wash. Const.

And Respectfully asks this court to review the validity and constitutionality of CrR 4.1. for a time for trial period under 3.3 protects a constitutional right to speedy trial, is fundamental and needs to be protected by rules that reflect as much.

I hereby certify under penalty of perjury of the laws of Washington State, that the foregoing is true and correct.

Respectfully Submitted this 6 day of Febuary, 2018.

Signed in Aberdeen, Wa, 98520,

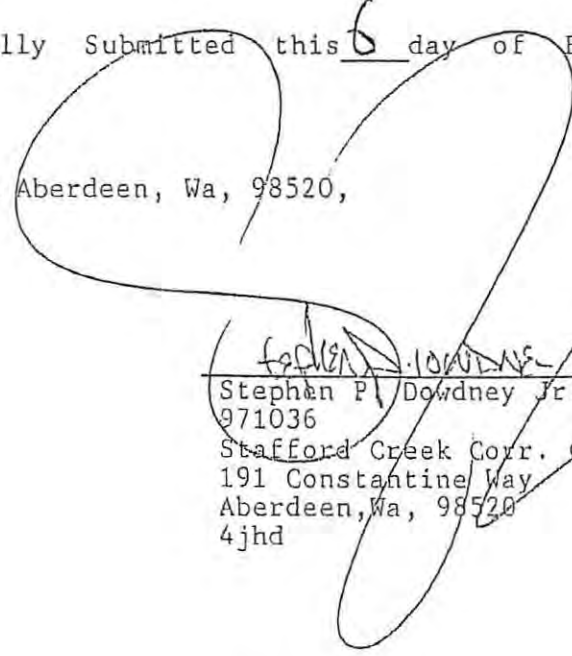

Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520
4jhd

EXHIBIT 1



Snohomish County

District Court
Everett Division

Roger M. Fisher, Judge
Tara Bul, Judge

**SNOHOMISH COUNTY DISTRICT COURT
FELONY COMPLAINT
INFORMATION SHEET**

M/S #508
3000 Rockefeller Ave.
Everett, WA 98201-4046

(425) 388-3331
FAX (425) 388-3565

The Snohomish County Prosecutor's Office has filed a complaint with the Everett Division of the Snohomish County District Court charging you with a felony. A copy of this felony complaint has been provided to you.

A District Court Judge has previously reviewed the facts and circumstances related to your arrest and found that probable cause exists to support your current detention.

YOU WILL NOT BE REQUIRED TO APPEAR BEFORE THE DISTRICT COURT UNTIL FURTHER ACTION IN YOUR CASE IS NECESSARY.

You will be held in custody on the felony complaint until it is dismissed at 5:00 PM on the felony dismissal date noted on the complaint. The following actions may result in an earlier or a later release date:

- 1) You and the prosecutor negotiate a guilty plea to a lesser charge;
- 2) The prosecutor requests that the District Court case be dismissed, but files the charge in Superior Court with another bail request.
- 3) You and the prosecutor agree to an extension of the felony dismissal date.

You may choose to negotiate with the Prosecutor or you may wait and see if the Prosecutor will file your case in Superior Court. Unless you have hired private counsel, the Snohomish County Office of Public Defense will contact you to determine if you want to negotiate with the Prosecutor.

If you decide to accept the Prosecutor's offer, you will appear in District Court to enter a plea of guilty. These calendars are held every Monday through Friday (except on Holidays) @ 1:00 PM.

If you decide you do not want to take the Prosecutor's offer, contact your attorney to inform the Prosecutor of your decision. If your case is filed in Superior Court, you will be scheduled to appear in Superior Court to be formally arraigned on the charge and to receive notice on how to have a public defender represent you.

EXHIBIT 2



Snohomish County Public Defender Association

2722 Colby Avenue, Suite 200 • Everett, WA 98201-3527

Phone: 425-339-6300 • Fax: 425-339-6363 • www.snocopda.org

PROBABLE CAUSE HEARING

The State of Washington is holding you in jail and a Judge will determine today whether there is Probable Cause (PC) to continue holding you. This can be a very frustrating stage in the process. The information contained in this handout will help you understand the process. Please read it carefully.

You are not **CHARGED** with a crime at this point, and a Judge's finding of PC does not mean that the Prosecutor will charge or convict you of this/these crime(s). It only means that there is a reasonable belief that you may have committed one or more felonies. The law allows the Prosecutor to hold you in jail for 72 hours (not counting holidays or weekends) upon a finding of PC to give them time to decide: (1) if any charges will be filed against you, (2) what charges to file against you, and (3) in which court to file the charges. If the Prosecutor fails to file charges within 72 hours, you will be released on this hold.

IF CHARGES ARE FILED IN DISTRICT COURT

If your felony charges are filed in District Court, you will not have an arraignment hearing; you will simply receive paperwork indicating a deadline for the prosecutor to file in Superior Court. This deadline is called a Felony Dismissal Date (FDD). The FDD will be set two Fridays from the date of filing at 5:00pm (between 14 and 18 days, depending on the day of the week charges are filed). Your FDD is NOT a court date, but simply a deadline for the Prosecutor. The Prosecutor will have until the FDD to decide (1) whether the felony charges will be transferred to Superior Court for prosecution or (2) whether they will offer you a plea bargain for one or more misdemeanors. If the Prosecutor does not file charges in Superior Court and they do not offer you a plea bargain to one or more misdemeanors by the FDD, you will be released on this hold. However, this does not mean that charges will never be filed against you—the Prosecutor has time allowed by the statute of limitations, a minimum of 3 years, to file charges against you.

IF CHARGES ARE FILED IN SUPERIOR COURT

If the Prosecutor files felony charges in Superior Court, you will have an arraignment hearing where you will hear the charge(s) against you and have another opportunity to argue bail. If you qualify for a public defender, you will have an attorney assigned after the Prosecutor files in Superior Court.

RELEASE

If you are released on your personal recognizance, or if you post bail, you must keep your address updated with the Court & Prosecutor. If the Prosecutor decides to file charges, you will

THE SUPREME COURT
STATE OF WASHINGTON

DECLARATION OF SERVICE
BY MAILING GR 3.1(c)

I, Stephen P. Dowdney Jr., Proponent, in accordance with General Rule 3.1(c), do hereby declare that I have served the following documents:

Brief in accordance with General Rule 9 Rulemaking.

To the following parties:

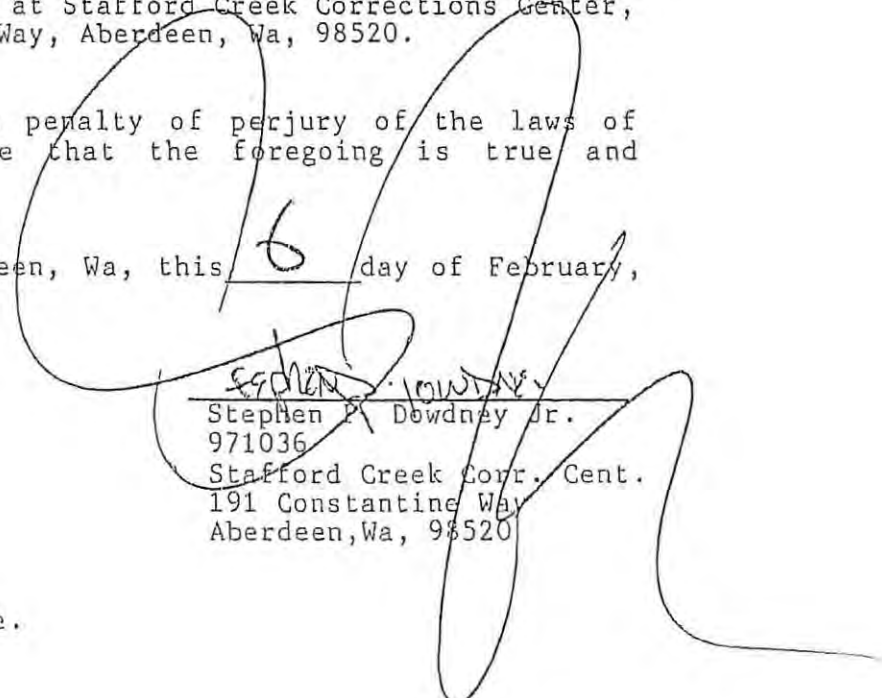
Susan L. Carlson, Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, Wa, 98504-0929

(E-Mail/Electronic Filing unavailable)

I deposited the aforementioned document in the U.S. Postal Service by of process LEGAL MAIL through an officers station at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Wa, 98520.

I declare under penalty of perjury of the laws of Washington State that the foregoing is true and correct.

Signed in Aberdeen, Wa, this 6 day of February, 2018.


Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520

Cc: Dowdney file.

WASHINGTON STATE BAR ASSOCIATION

UPDATED

OFFICE OF THE GENERAL COUNSEL

Julie Shankland
Interim General Counsel

direct line: 206-727-8280
fax: 206-727-8314
e-mail: julies@wsba.org

To: The President, President-elect, Immediate Past President, and
The Board of Governors

From: Julie Shankland, Interim General Counsel
Tiffany Lynch, Associate Director of Finance

Date: September 23, 2018

Re: FY 2019 License Fee Deduction)

<p>ACTION: Approve 2019 Keller deduction schedule (updated with added information).</p>
--

Each year the annual license fee form provides for an “optional Keller deduction” as approved by the Board of Governors. This is in response to the U. S. Supreme Court 1990 decision in *Keller v. State Bar of California* holding that state bar mandatory fees may not be used over a member’s objection for activities that are *political or ideological in nature and which are not reasonably related to (1) regulating the practice of law, or (2) improving the quality of legal services.*

WSBA uses the following procedure to determine which are “chargeable” and which are “non-chargeable” activities:

- 1. Legislative Expenses:** We start by including the entire Legislative function budget as potentially political or ideological activity. For FY 2019, that is \$154,066, which includes BOG Legislative Committee conference calls. That amount (as is true for all other amounts described in this memo) is divided by the estimated total number of license fee paying members for 2019 (40,420) to arrive at each member’s pro rata share (\$3.81). The WSBA Legislative Liaison details the WSBA Legislative staff’s activity for the past year (FY 2018), and a determination is made of the proportion of the legislative budget that was spent on “non-chargeable” activities. For FY 2018, that percentage was 24.45% of the total Legislative budget. (See the attached breakdown of activities and details of the calculation.) The pro rata legislative expense of \$3.81 per member is multiplied by the percentage of non-chargeable activities (24.45%) to arrive at a per member amount of \$0.93.

Working Together to Champion Justice

2. **ABA Delegation Expenses:** The ABA takes political positions as well; therefore, we also treat the total ABA delegation budget (\$4,500) as non-chargeable. $\$4,500 \div 40,420 = \underline{\$0.11}$.

3. **Other Non-chargeable Expenses - General Staff Time:** Staff time (including salaries, benefits, and overhead), BOG meeting time (overhead), and conference calls, not otherwise accounted for above, spent on meetings where legislative or political matters were discussed: $\$6,742.06$ divided by 40,420 license-fee paying members = \$0.17 per member.

4. **Final Calculation:** Adding together the amounts in #1, #2, and #3 above results in a deduction of \$1.21 ($\$0.93 + \$0.11 + \0.17). We recommend rounding this number up for simplicity and ease in calculations. Therefore, we recommend that the base Keller deduction for FY 2019 be set at \$1.25.

Based on these calculations, we recommend the following Keller deduction schedule for 2019 prorated by the amount of license fee paid by various categories of WSBA membership:

	2019 License Fee	Keller Deduction
• Active Lawyer Admitted to any Bar before 2017	\$453.00	\$1.25
• Active Lawyer Admitted to any Bar in 2017 or 2018	\$226.50	\$.63
• Inactive/Emeritus Lawyer	\$200.00	\$.55
• New Active Admittee (Jan 1-Jun 30)	\$226.50	\$.63
• New Active Admittee (July 1-Dec 31)	\$113.25	\$.31
• Limited Legal License Technician	\$200.00	\$.55
• Limited Practice Officer	\$200.00	\$.55
• Judicial	\$50.00	\$.14

WASHINGTON STATE BAR ASSOCIATION

FY18 Keller Table: 10/01/17 - 09/30/18

WSBA LEGISLATIVE ACTIVITY

BILL # or TOPIC	DESCRIPTION	OLAM HRS	OLAC HRS	CCOO HRS	CONTRACT LOBBYIST HRS	CHARGE/NO CHARGE	IN/DIRECT LOBBYING
GENERAL LEGISLATION (LEG.) UPDATE							
Leg. Review - OLAM & CCOO		3		3		N/C	I
Leg. Review - OLAM & OLAC		10	10			N/C	I
Leg. Review - OLAC & CL			0.25		0.25	N/C	I
Leg. Review - CCOO & OLAC			3	2		N/C	I
Leg. Admin. Work		65	243	3		N/C	I
Student Loan Debt	Stakeholder meeting w/ Rep. Orwell		2			N/C	I
Call with Rep. Goodman	re: potential ADR request bill	1	1.5	1		N/C	D
Meeting with Sen. Padden	(1/4) re: SB 6040, WSBA legislative priorities	1				N/C	D
Meeting with Rep. Goodman	(1/5) re: ADR legislative activity, WSBA legislative priorities	1.5				N/C	D
Meeting with Sen. Pedersen	(1/9) re: SB 6040, WSBA legislative priorities	1				N/C	D
Meeting with Sen. Pedersen	(1/16) re: SB 6040, WSBA legislative priorities	1				N/C	D
Meeting with Rep. Jinkins	(1/17) re: HB 2308, SB 6040, WSBA legislative priorities	1				N/C	D
Meeting with Rep. Kilduff	(1/16) re: HB 1128, SB 6040, WSBA legislative priorities	1				N/C	D
Call with Penka Culevski (LA to Sen. Pedersen)	(1/23) re: SB 6040	0.5				N/C	D
Meeting with Ann Dasch (LA to Rep. Kilduff)	(2/22) re: WSBA legislative priorities	0.5				N/C	D
Meeting with Rep. Goodman	(9/10) re: WSBA legislative priorities	1				N/C	D
Meeting with Sen. Pedersen	(9/11) re: WSBA legislative priorities	0.5				N/C	D
Meeting with Sen. Fain	(9/12) re: WSBA legislative priorities	0.5				N/C	D
Meeting with Sen. Dhingra	(8/10) re: WSBA legislative priorities	0.5				N/C	D
HB 1501	Protecting law enforcement and the public from persons who illegally attempt to obtain firearms.		0.5			N/C	I
HB 1614	Concerning impaired driving.		0.5			N/C	I
SB 5037	Making a fourth driving under the influence offense a felony.		0.5			N/C	I

SB 6040	Addressing meetings under the business corporations act	12	10	1		N/C	D
HB 1896	Expanding civics education in public schools	1	1	5		N/C	D
SB 6002	Enacting the Washington voting rights act of 2018	1	1			N/C	D
SB 6052	Reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder	2	2	1		N/C	D
HB 1169	Enacting the student opportunity, assistance, and relief act	0.5	0.5			N/C	I
HB 1298	Prohibiting employers from asking about arrests or convictions before an applicant is determined otherwise qualified for a position	0.5				N/C	I
HB 1022	Enhancing crime victim participation in the criminal justice system process	0.5				N/C	I
HB 1783	Concerning legal financial obligations	0.5				N/C	I
SB 5598	Granting relatives, including grandparents, the right to seek visitation with a child through the courts	0.5				N/C	I
SB 6560	Ensuring that no youth is discharged from a public system of care into homelessness	0.5				N/C	I
SB 6015	Concerning actions for wrongful injury or death	0.5				N/C	I
SB 6012	Allowing the federal veteran identification card to be used to obtain a veteran designation on a driver's license	0.5				N/C	I
HB 1630	Allowing minors to consent to share their personally identifying information in the Washington homeless client management information system	0.5				N/C	I
HB 2253	Concerning the right to control disposition of the remains of a deceased minor child	1	0.5			N/C	I
HB 2371	Implementing child support pass-through payments	2	0.5			N/C	I
SUBTOTAL HOURS:		112.50	276.75	16.00		0.25 N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		112.50	276.75	16.00		0.25	405.50 N/A
SUBTOTAL DIRECT LOBBYING		27.00	15.50	8.00		0.00 N/A	50.50
BOARD OF GOVERNORS (BOG)							
BOG Meeting Prep.	Staff prep.		8	1		N/C	I
BOG Meeting	re: (11/15-11/16)		4			N/C	I
Special BOG Meeting	re: (2/15)		1.5	1		N/C	I

BOG Leg. Committee (BLC) Meeting Prep.	Staff prep.	10	15	2		N/C	I
BLC Meeting	re: 1/5	1	1	1		N/C	I
BLC Meeting	re: 1/12	2	2	2		N/C	I
BLC Meeting	re: 1/26	2	2	2		N/C	I
BLC Meeting	re: 2/2		1	0.5		N/C	I
BLC Meeting	re: 2/16		1	0.5		N/C	I
BLC Meeting	re: 3/2	0.5	0.5			N/C	I
BLC Primer	re: 12/6		3	2		N/C	I
SUBTOTAL HOURS:		15.50	39.00	12.00		0.00 N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		15.50	39.00	12.00		0.00	66.50 N/A
SUBTOTAL DIRECT LOBBYING		0.00	0.00	0.00		0.00 N/A	0.00
WSBA LEGISLATIVE REVIEW COMMITTEE (WLRC)							
WLRC Meeting Prep.	Staff prep.		21			N/C	I
WLRC Meeting	re: Legislature Overview and WSBA-request bill proposal: CARC		1.5			N/C	D
SUBTOTAL HOURS:		0	22.5	0		0 N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		0	23	0		0	22.50 N/A
SUBTOTAL DIRECT LOBBYING		0	1.5	0		0 N/A	1.50
WSBA ENTITIES							
WSBA Committee Chairs/Liaisons Meeting Prep.	Staff prep.		16.5			N/C	I
WSBA Committee Chairs/Liaisons Meeting			4.5			N/C	I
WSBA Stakeholders Roundtable Meeting Prep.	Staff prep.		25.5	2		N/C	I
WSBA Stakeholders Roundtable			3	2		N/C	I
WSBA Section Leaders Fall Meeting			8			N/C	I
Sections Leg. Primer Prep.	Staff prep.		21	1.5		N/C	I
Sections Leg. Primer			3	3		N/C	I
Elder Law Section Meeting	re: 5/18 discussion of legislative priorities	1				N/C	I
RPPT Section Meeting	re: 5/24 discussion of legislative priorities	1.5				N/C	I
Family Law Executive Committee Legislative Discussion	re: 7/30 discussion of legislative priorities	0.5				N/C	I

Environmental Law and Land Use Section Legislative Discussion	re: 8/2 discussion of legislative priorities	0.5				N/C	I
Administrative Law Section Legislative Discussion	re: 8/2 discussion of legislative priorities	0.5				N/C	I
Civil Rights Section Legislative Discussion	re: 8/9 discussion of legislative priorities	0.5				N/C	I
SUBTOTAL HOURS:		4.50	81.50	8.50	0.00	N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		4.50	81.50	8.50	0.00	94.50	N/A
SUBTOTAL DIRECT LOBBYING		0.00	0.00	0.00	0.00	N/A	0.00
COUNCIL ON PUBLIC DEFENSE (CPD)							
SUBTOTAL HOURS:		0	0	0	0	N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		0	0	0	0	0	N/A
SUBTOTAL DIRECT LOBBYING		0	0	0	0	N/A	0
ACCESS TO JUSTICE BOARD (ATJ)							
SUBTOTAL HOURS:		0	0	0	0	N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		0	0	0	0	0	N/A
SUBTOTAL DIRECT LOBBYING		0	0	0	0	N/A	0
FEDERAL LEGISLATIVE ACTIVITY							
SUBTOTAL HOURS:		0	0	0	0	N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		0	0	0	0	0	N/A
SUBTOTAL DIRECT LOBBYING		0	0	0	0	N/A	0
NATIONAL ASSOCIATION OF BAR EXECUTIVES							
SUBTOTAL HOURS:		0	0	0	0	N/A	N/A
SUBTOTAL NON-CHARGABLE HRS		0	0	0	0	0	N/A
SUBTOTAL DIRECT LOBBYING		0	0	0	0	N/A	0

TOTALS							
ALL Total Hours		132.50	419.75	36.50	0.25	N/A	N/A
Total Non-Chargeable Time on Direct Lobbying		27.00	17.00	8.00	0.00	N/A	N/A
Total Chargeable Time on Direct Lobbying		0.00	0.00	0.00	0.00	0.00	N/A
Total ALL Non-Chargeable		132.50	419.75	36.50	0.25	589.00	N/A
GENERAL ADMINISTRATION* TOTALS							

Non-Chargeable Portion of Indirect Lobbying ^o	105.50	402.75	28.50	0.25	N/A
OTHER					
Average of three staff:					
Number of Staff Hours Allocated to Legislative Budget	1040	1040	208	121	2,409.00
Non-Chargeable % for each Staff Person	12.74%	40.36%	17.55%	0.21%	24.45%

Notes:

- "N/C" indicates activities that are nonchargeable against mandatory member license fees.
 - "C" indicates activities that are chargeable against mandatory member license fees.
 - "D" indicates activities that are considered direct lobbying
 - "I" indicates activities that are considered indirect lobbying
 - "%" indicates that a percentage of monitoring and referral activities and of general administration is added to the non-chargeable activities for the purpose of
- * General Administration = Legislative Administrative Work, and all meeting prep.
- ^o Direct or Indirect lobbying comes from the definition as provided by the Public Disclosure Commission.
<https://www.pdc.wa.gov/learn/publications/public-agency-lobbying-instructions/reporting-agency-lobbying-activity/lobbying>

**PRESIDENT**

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September 24, 2018

WSBA Board of Governors
Washington State Bar Association
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539
Via Email: margarets@wsba.org

Dear Board of Governors:

I write on behalf of the Board of Trustees of the Washington Defense Trial Lawyers (“WDTL”). As you know, WDTL is a membership of approximately 700 defense attorneys who practice from Vancouver to Bellingham, and from Sequim to Spokane.

We have received word through one of our members that the WSBA is considering recommending changes to the Civil Rules that will fundamentally change the posture of litigation in cases. The member received this response from a WSBA Governor. Quoting directly from that Governor’s summary:

Recently you received an email from WSBA implying there is substantial time for input as these have to be passed to the Supreme Court for approval. That is not entirely correct.

This is coming to the Board of Governors for a FINAL VOTE at our September 28 meeting in Seattle.

WDTL’s Board of Trustees met on September 18, 2018. Of the more than 10 Washington attorneys present for the meeting, none had received any information about the proposed rule changes or the September 28, 2018 vote. After our member alerted us to this proposed change, we began to review the proposals and develop a comment for the Board of Governors. We were dismayed to discover 107 pages of materials had been presented. Several proposed changes were immediately controversial and divisive among our ranks. There is no way to thoughtfully review the proposed changes and prepare a response on behalf of our organization before September 28.

In sifting through the pages of information relating to these proposed rules, we note WDTL is specifically named as a stakeholder relating to the proposed changes.¹ We also noticed 110 other stakeholder organizations identified.² We are concerned that if none of the more than 10 attorneys on the

¹ BOG Meeting Materials, July 2018, p. 315.

² BOG Meeting Materials, July 2018, p. 315-22.



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WDTL Board were informed of the proposed changes, it stands to reason other stakeholders were likewise not given the opportunity to review and comment.

Civil Rules (and related rules facing proposed changes) are vital to daily litigation practice and any changes to them will affect our clients. If the WSBA recommends changes to the Supreme Court, it suggests the recommendation is made on behalf of all its members. Before doing so, however, the WSBA should accept meaningful input from the breadth of stakeholders it specifically identified, as well as the general population of Washington Attorneys.

We respectfully request that the Board of Governors 1) delay the Final Vote on the Proposed Changes of the Civil Rules for at least 60 days, and 2) widely publicize the current draft of Proposed Changes and Request Comment from the identified Stakeholders as well as the general WSBA membership.

This will further the WSBA values of:

- “Trust and respect between and among the Board..., Members, and the Public”
- “Open and effective communication”
- “Teamwork and cooperation,” and
- “Open exchanges of information”³

Thank you for your time and attention to this matter.

Sincerely,

Peter M. Ritchie
WDTL President

cc: **James E. Macpherson**, WDTL WSBA Liaison

³ BOG Meeting Materials, July 2018, p. 18.

**WASHINGTON STATE
BAR ASSOCIATION**

Board of Governors
Dan W. Bridges, Governor District 9
WSBA Treasurer, 2018-2019

September 24, 2018

Mr. Kenneth Masters
Masters Law Group, PLLC
241 Madison Ave North
Bainbridge Island, WA 98110-1811
By email only to ken@appeal-law.com

Re : Proposed Civil Rule Amendments

Dear Mr. Masters:

Words are insufficient for me to adequately thank you and your workgroup for the time and effort given to this project. WSBA cannot perform its work without the contributions of members such as yourself and the workgroup. And as words are insufficient, I will say that only here but ask that you bear my thanks in mind below. That I have disagreements or concerns does not diminish my gratitude for your effort. We are all striving toward the same goal: the service of the profession, our clients, and the public. I rely you and your workgroup will take my comments in that spirit; not personally, but as observations in an effort that will ultimately be the work product of all involved.

I have serious concerns over core aspects of the proposed Civil Rule amendments both as to substance and timing that I will describe below. However, much if not most of this letter is directed to the Board of Governors. I do take issue on two counts of actual drafting but the majority of my concern is directed toward timing and larger policy values.

To the Board: there are some who will say you have no role of input or even place to comment on these proposals. They will say your role is only to say thank you and pass these Rules along to the Court. That is patently incorrect. If that was correct, these Rules would not be coming to us at all. Matters come to us because we have a duty to evaluate, exercise independent judgment, and make a decision.

The Board's role at this point in the process is three-fold; it is our duty to evaluate: (1) Do the proposed rules effectuate the policy values the prior Board previously affirmed and asked the workgroup to prepare Rules on; (2) now that proposed Rules have been prepared, do we see that the policy desired is even obtainable by a Rule; and (3) is there a need for improvement or change in the draft – not for us to make but to send back to a workgroup to address.

Those who will argue you have no role will suggest that if you do anything other than pass the proposals along to the Court you will be paying a disrespect to the members that spent many hours preparing them. We pay no disrespect to others by our doing our job. We do an injustice to both the



process and our members when we abdicate our role. Unless those who make this argument are willing to say feelings are more important than preparing a proper rule, this argument is without weight.

This Board is not a rubber stamp.

The workgroup in good faith asked for two continuances of the deadline to deliver these Rules. It did so because it acknowledged getting the Rules "right" was more important than getting them done quickly to meet an arbitrary deadline. But having asked for two continuances, we have no time to make our own evaluation or take member input.

These rules are being rushed to meet a Court deadline for submission. We should pass these rules to the Court when they are ready to be passed. Not before. WSBA must stop making the same mistake repeatedly by not giving our members a meaningful time for input. A response that the ECCL took years and this workgroup has been working for months is no response. We know our members see their time to respond as being after a final draft is prepared. That is exactly why we present things for a "first read." Here, our first read was five minutes at our last meeting and neither this Board or the members were allowed to ask a single question.

I am not suggesting rejection of these proposed Rules. Instead, I urge that we table this as an action item, create a small Board of Governors oriented workgroup to take direct member input, report that back to the Board, and then this Board may make an informed decision to either approve, reject, or send these proposals back with guidance for changes. We are drafting Rules to last 50 years. It makes no sense to rush over a period of months. We pay more disrespect to the work of members who have spent hundreds if not thousands of hours working on the ECCL Task Force and now preparing these draft Rules by rushing this at the very end versus paying their work the respect it is due by taking the time necessary to perfect these proposals before sending them to the Court.

Some Proposed Amendments Will Increase The Cost of Litigation And Harm Already Injured Members Of The Public

A. IMPOSING A COOPERATION REQUIREMENT WHILE NOT DEFINING THE TERM WILL INCREASE THE COST OF LITIGATION, CHILL ZEALOUS REPRESENTATION, AND CAUSE UNCERTAINTY IN THE PROCESS

This Board asked your workgroup to draft a cooperation Rule. However, your proposed Rule provides no definition or guidance as to what cooperation is. In our phone conversation this week you explained it is not appropriate in the context of a drafting a rule to define this type of term; you said that we all know what the word cooperation means.

After our call I gave that more thought and consulted our current Rules. I suggest our present Civil Rules demonstrate the error of not defining the term and an inconsistency in the reason given for not doing so.

CR 11 imposes a duty that closely mirrors the proposed cooperation Rule. Yet, CR 11 provides a detailed definition of what constitutes a violation. Indeed, it could be said the entire Rule is one very long definition of what CR 11 is. I do not want to quibble over semantics. Perhaps you need not provide a “definition” of what cooperation is and call it a “definition,” if that is the friction point. However, throughout our Civil Rules there is detailed explanation of what is in and out of bounds in terms of the language used. CR 11 provides substantial context within the language of the Rule as to what it actually means to not comply with CR 11. CR 37, our discovery sanction Rule, does the same thing. The proposal on cooperation does not. Thus, I suggest the notion that not defining what is a critical term and will no doubt be the source of many motions is not consistent with our current Rules and is problematic even if that was not true.

The decision to draft a Rule requiring cooperation but not defining (or otherwise providing substance) what it means does not mean the term will go undefined. It will be defined: by the Court of Appeals and the Supreme Court after many appeals and many different cases. Far from decreasing the cost of litigation, not defining the term will increase it substantially for many parties.

In terms of the Rule as drafted, and ignoring the lack of definition, I suggest it would benefit from greater refinement. I also question that, now drafted, the Board should appreciate it may not be the proper subject of a Rule at all. The latter concern is clearly no issue with your workgroup. I will address it below.

However, on the issue of further refinement, I asked you in our phone call if there were other states’ rules we could look at for an example. If I understood you correctly, you conceded there were none. No other state has codified a “cooperation” requirement. I ask whether we should consider the fact that out of 49 other states, the reason not a single one has adopted it is because while a laudable goal it does not work as Rule carrying sanctions as the draft Rule does.

You pointed to the Federal Rules as a model. However, a word search of FRCP 26 does not reveal the word cooperation. The Local Rule for the Western District uses the term “cooperation” in the context of following the other more specific Civil Rules to “reasonably limit discovery requests, to facilitate the exchange of discoverable information, and to reduce the costs of discovery.” See LR 26(f). However, nowhere in either the Federal or Local Rules for the Western District can I find an unattached “cooperation” requirement much less one that could lead to sanctions as the draft allows. Federal Rule 37 uses the word “cooperate” in its title but it does not appear in the actual Rule. Sanctions are issued for failing to follow the Rules.

Thus, under the Federal Rules “cooperation” is only an adjunct to the more specific requirements of the Rules. Parties must “cooperate” in following the Rules.

If the draft Rule mirrored the Federal Rule I might have no concern. However, this proposal is materially broader. As drafted, the parties must both follow the Rules and follow some type of undefined concept of “cooperation” which ostensibly would be decided after the fact; and if they do not, they can be sanctioned. Thus, the draft is: follow the Rules plus cooperate or be sanctioned rule. Under the Federal model, it is cooperate in following the Rules.

A wide variety of litigation discovery is intensely rule driven; for example: multiparty construction defect, employment law, toxic torts, class action, etc., all have unique customs and practices that are accepted within that subject area but would be deeply offensive and uncooperative if attempted in others. As only one example, it is de rigor in large, multi-party construction defect litigation to unilaterally send depositions notices. Doing that in a basic personal injury case would be the height of failing to cooperate.

Not defining what cooperation is, or again if the word “definition” is a friction point not providing any context as to what it means within the Rule, will put well meaning jurists who may have no experience in a given subject matter area as either judge or attorney in the position of imposing their own subjectivity on the parties. Both the bench and parties need clarity in the Rules. They must be able to rely on what is in, and what is out, of bounds. The Civil Rules provide clear boundaries. CR 11 and CR 37 provides clear boundaries. A cooperation requirement must as well.

Creating uncertainty will chill zealous representation. An undefined notion of cooperation, even if limited to discovery, will chill creative and energetic representation even within the Rules if an attorney staying within them can still be sanctioned. I understand you believe the Rule will not tolerate a sanction if a party follows the Rules. I am grateful you said that. But your draft Rule does not say that and you will not be present at every discovery motion to explain that. Respectfully, divorced from pride of authorship, I do not read the proposed Rule in the manner you explained to me it was intended. That is another reason why it is critical to provide guidance on what cooperation means in this context consistent with CR 11 and CR 37.

Those are the issues, as I see them, with the rule as drafted

To the Board: a cooperation requirement is a great idea. I am enthusiastically in favor of cooperation. But it is poorly placed in a Rule. To be blunt, it is an attempt to legislate good behavior. We should not ignore that no other State has such a rule.

We all wish litigation was more civil and more cooperative. I do not fault the policy value being sought. However, at the end of the day we must understand and accept litigation is by its nature an adversarial process. Indeed, it is only by an adversarial process may we rely that the final output of any one case will be justice.

This was an excellent policy value for a prior Board to ask that a Rule be attempted on. Perhaps there is still a sufficient turn of phrase available to accomplish it. This proposal however does not.

I urge this Board to give very heavy weight and consideration of our subject matter experts. Our members of the Bar who only practice litigation – in trial. I urge you to consider closely the input of WSTLA, WDTL, and our litigation section which have material concerns over this proposal not merely as an original policy value adopted by a Board whose litigation experience does not appear to be as broad as the current Board’s but also in terms of how this Rule implements that policy value.

If a requirement of “cooperation” is to be retained, I strongly urge that we return this to the workgroup to provide the same type of context as to what cooperation means as CR 11 and CR 37 do. To not provide the Courts and litigants the same level of guidance as CR 11 and CR 37 is not well taken for the reasons described above.

B. THE CONCEPT OF COMPELLED, EARLY MEDIATION IS BASED ON A FALSE PREMISE

THE WORKGROUP DEPARTED FROM THE DIRECTION OF THE BOARD BY DRAFTING A DEADLINE TOO EARLY

THE PROPOSED RULE WILL INCREASE THE COST OF LITIGATION AND LEAVE INJURED MEMBERS OF THE PUBLIC UNDERCOMPENSATED

This Board approved the ECCL report’s recommendation of early mediation. That report defined “early” as mediation after party depositions are completed. That had some elegance. Given the facts of any one case, when “early” ADR takes place will be different. In simpler cases it will be sooner and more complex cases later. In that respect each case would determine its own unique deadline based on the specifics of its own facts.

Despite that, the workgroup drafted a hard ADR deadline of 6 months before trial which is difficult to read as not being contrary to this Board’s direction. For context it should be noted the current standardized ADR deadline, referring to the King County Local Rule, is 4 weeks before trial.

The workgroup provided some exceptions to extend that deadline – all of which require a motion to prove up and then left to the discretion of the Court to grant. That will increase to cost of litigation; not decrease it.

I have many concerns. But let me be clear: my concern is not directed to your work group at all (other than drafting a deadline earlier than what the Board directed). You did your level best to draft a rule as requested. Thank you for that. I cannot say that strongly enough: this is not directed toward your workgroup. This is instead an example of what I identified above: a reasonable policy objective desired by a prior Board but once reduced to actual Rule language should be acknowledged as unattainable. Or at best, a Rule that should be sent back for further refinement.

First, I respect that “early” is difficult to reduce to a Rule but this Board already directed what “early” should be: not before party depositions. But ignoring that, 6 months is too early even if the Board provided no guidance. To paraphrase the great Justice Stewart of the U.S. Supreme Court, I may have personal difficulty describing what too “early” is but I know it when I see it and 6 months before trial is far too early. That is both my visceral reaction as an active litigator and the amalgamation of the issues identified below.

Second, a six month deadline with an opt out process requiring a motion has the opposite effect

of reducing the escalating cost of litigation. I submit many if not the vast majority of cases will pursue that opt out procedure and be put to new motion practice never before required. That is a burden on both the litigants and the Court. A response the parties can jointly move is not responsive. That may happen in some cases but will not in all and even an agreed motion is time taken by the litigants and Court to resolve.

Perhaps the solution is as simple as requiring a certified disclosure statement, exactly as we already do in MAR, where the plaintiff must certify the value of the case either does or does not exceed a given threshold to subject it to mandatory ADR. We accept that in MAR and it has worked for years. Not motion is required. Perhaps this entire issue is resolved by imposing that as a gateway. Did your workgroup consider that. This is another excellent illustration of why this process should not be rushed.

Third, a six month deadline will indeed make some cases settle earlier. But it will do so at the cost of injured members of the public. It is routine that complex injuries such as latent brain injuries, disc injuries, etc., only manifest themselves after an extended period of time. It is not unusual for health care providers to miss those issues. What might at first by all indication be a basic injury is at times a lurking disc problem, treated as a soft tissue injury until it persists. Head injuries and subtle cognitive dysfunction are written off as headaches or job stress; that can be true for a year or more. Experience attorneys often spot those issues before clients' doctors but that is typically not until well into the case. That is even more true when a client finds their attorney quickly after an accident.

Forced, early ADR will result in settlements of only what is known at the time while the greater injury is yet unknown. As an example, I have a complex injury case right now where my client retained me very quickly after the loss. His cognitive problems, which are now understood to be profound and life altering, were not appreciated for more than a year after his accident and 1.5 years after we filed suit because it took that long to get him past his back injuries. Early mediation might have resulted in a settlement based on his back injury known at the time but he would have suffered uncompensated, unable to afford treatment for his cognitive problems which will be life long but were appreciated only much later.

In that context, forced early ADR is a gift to the insurance industry paid for by injured members of the public.

Fourth, it is folly to believe 'that if we can only get the parties to mediation, the case will settle.' I heard that stated repeatedly when the Board adopted portions of the ECCL report and at your workgroup meetings. This is the false premise I alluded to earlier and after speaking to many, many attorneys who only actively practice civil litigation to a person it gives rise to rejection.

I assure you having represented insurance carriers for over 20 years and essentially only plaintiffs for the last 5 years, carriers have as much of an incentive as plaintiffs to settle as soon as possible. Adjusters are often rated negatively on how long claims are open and positively for closing files. There is the rare exception but contrary to what some believe there is no insurance industry conspiracy to drag out litigation a day longer than necessary; carriers want to decrease the cost of litigation as much or more than the plaintiff's bar. Plaintiffs' counsel are already highly incentivized to

settle as soon as possible; for a case that only has a given value the more they litigate the less they make.

What is generally either not known or otherwise minimized unless you actively practice insurance defense is insurance carriers simply cannot, as a matter of auditing by both internal auditors and state insurance commissioners, settle cases before certain discovery is complete. Even an adjuster and defense attorney who “know” what the case is worth and want to pay it the day after service of the summons and complaint cannot do so until the claim file can justify it. That is compelled by strict claim file audit requirements imposed both by State insurance regulators and internal claims controls. An audit of a file where an adjuster paid without proper documentation in the file is viewed as an “overpayment” and can have serious negative consequences for both the adjuster personally and regulatory for the carrier leading to fines for failure to maintain proper reserves. Forced, early ADR will not result in cases settling any earlier than they are ready to settle. What the ECCL and the prior Board gave no or insufficient weight to is desire and opportunity alone do not settle cases.

Fifth, often the litigation process itself adds value and cutting it short will result in injured members of the public going undercompensated. And when I say value, I mean that both ways: for the plaintiff increasing value and the defense lessening it. It is often true that additional depositions, beyond party depositions, reveal critical evidence. A case may have a fair value one day but after non-party depositions the value changes. I will not take your time with war stories but on the plaintiff’s side, in a case several years ago my client would have gladly accepted a settlement in a bad faith case for \$2 million if offered early on but later obtained a settlement close to \$13 million after substantial discovery. While those are large numbers, the percentages hold true for smaller cases. Plaintiffs may take early, easy money but we force that on them at the expense of losing full compensation. Premature mediation is a false lure dangled in front of both the client who may be cash strapped and an attorney willing to cash out.

Sixth, of the cases that do not settle at mediation, it is rare a second mediation is held. Particularly as to small’ish cases, say under \$200,000, the parties simply will not spend the money on a second mediation. I would not in either my defense or plaintiffs’ cases. And frankly, I suggest this is the most perilous issue arising out of this rule which should have been identified first but logically falls here: **Cases that may well have settled with an appropriately timed mediation but did not with a premature early one will not mediate a second time and that will compel even more cases to trial.** Again, this will increase the cost of litigation not reduce it.

Seventh, the rule is paternalistic. Again, this is not directed at your workgroup. This is a comment addressed to the Board as a larger policy issue. As discussed above, parties are already incentivized to settle cases at the earliest opportunity. By imposing a six month ADR deadline without regard to the facts of any one case, we are saying to parties and their attorneys that we know their cases better than they do. With the current 4 week pretrial ADR deadline parties can and routinely do settle cases well before that. Forcing ADR before the litigants who know their cases have determined is the best timing to reach settlement says we who know nothing of their case know more than they do. We say we do not trust either the attorneys or the clients.

Without question some cases will settle earlier. Some, properly so. However, medium’ish cases

(say under \$300,000 but more than \$100,000) will not settle “early” and will always seek to opt out by motion which again moots the purpose of the rule and increases the cost of litigation by draining party and judicial resources by requiring a new motion. Clearly larger cases will always opt out. Thus, this Rule might benefit only a very small subsection of litigation while imposing its burdens on all cases.

The more likely result of the Rule will be cases settling before their full value is realized (either because the client’s injuries were not fully manifested or the litigation process had not yet run its course to bring full value to the claim) or failed mediations because the parties although willing to try it, simply were not ready and the case does not merit a second mediation. **We will either (1) trade perceived expediency for full compensation and the most vulnerable will pay the price or (2) force more cases to trial because of early, failed mediations.**

I suggest that assuming some form of “early mediation” rule can be achieved, more work needs to be done. Indeed, I respectfully suggest that mandating a certification of ADR value like we already do in MAR as I suggest above could well moot most all of my concerns. But if the current draft is the best rule possible, we should realize forced early mediation is not tenable. The proposed rule will increase the cost of litigation and any savings will be borne by injured members of the public. In either event, the currently proposed rule should not be adopted.

C. IMPOSING A STATEWIDE CASE SCHEDULE WHILE NOT PROTECTING AGAINST ITS ABUSE WILL INCREASE THE COST OF LITIGATION AND SLOW THE RESOLUTION OF CASES

Consistent with the Board’s direction you drafted a statewide case schedule requirement. It is excellent. Great work. Thank you. I do identify one issue however.

As only one or two times I substantively weighed in as your liaison on the substance of a rule, I explained the dynamic present in King and Pierce Counties, where there has long been a case schedule, of parties hiding behind case schedule deadlines to not disclose discovery – most notably on expert witnesses. I think I may have only one case in my entire inventory where I did not receive the response to an expert witness question that “experts will be disclosed in accordance with the case schedule.” I have received that type of response from both plaintiffs’ and defense attorneys.

As one example, in a recent and more substantial case I filed a motion to compel having received as a discovery response that experts would be disclosed “in accordance with” the case schedule. The defense protested in our discovery conference it had no duty to disclose until then. In response to the motion to compel the defense protested it supposedly had not “decided” yet whether to use the expert. The Court denied my motion. After the case schedule deadline passed I was given the expert’s report, written months earlier, that was so powerfully defense oriented on the core issue in the case that clearly defense counsel “knew” they were going to use that expert the day the report was received but used the case schedule as a weapon to delay discovery. Its being withheld slowed discovery, increased our costs, and delayed resolution of the case. In smaller cases, a motion is generally not justified due to costs although the same game playing takes place.

That does not happen in counties with no case schedule. When you take away the shield of a deadline to hide behind, generally speaking you get an answer.

To address that I asked your group to include one simple line in the Rule to the effect of: case schedule deadlines are not safe harbor and all discovery must be answered as propounded. Your final draft does not address this issue. I remain unclear why the workgroup declined to give this issue any weight.

Granted, no Rule language will deter someone determined to act poorly – which is yet another reason why a “cooperation” requirement will not cure any ills. But if we are to impose case schedules statewide, we must do so in a manner best calculated to minimize negative effects. Not doing so will delay discovery and increase the cost of litigation. Worse, this has a synergistic effect in a negative way with a Rule mandating ADR 6 months before trial. Parties will be forced to early ADR while discovery is being tactically hidden by the case schedule with an expert witness disclosure deadline after forced, early ADR.

2. More Time Is Required For The Board And Members To Provide Input On The Proposed Amendments

As outlined above these proposed amendments were presented only in July. The Board had no time to ask questions, raise concerns, or even discuss them as a Board much less take member input. Now the amendments are being presented for final approval at our next meeting in September.

As I understand it, the reason for this rush is to make the Supreme Court’s rule submission deadline. If the proposals are not approved by the Board in September, the Rules will have to wait until the next Rule submission deadline to forward them to the Court.

This Board imposed a deadline for these drafts of approximately four months ago. That was done knowingly, with consideration of the Court’s rule making deadline, because it is was necessary to build in time for the Board to consider the impact of the proposals among itself and more importantly to take comment directly from the members. Your group asked for two continuances of that deadline. I asked this Board as your liaison to grant those extensions. They were granted for good reason: it is critical we get these amendments right – not fast.

However, the calendar is what it is and having asked for two continuances there is insufficient time for the process to be completed as it should be before the Court’s rule making deadline.

The answer to that is not to push ahead anyway and approve Rules before their time. The answer is to continue this process.

I appreciate your group sought the input of what is euphemistically referred to as “stakeholders.” Thank you for that. That was wise and appreciated.

However, your workgroup's outreach is no substitute for the work of this Board both internally and directly with the members.

For instance, it is my understanding the litigation section raised a variety of objections and concerns with your workgroup over both how certain amendments have been framed and taking issue with the original policy decisions of the Board in its partial adoption of the ECCL report. I understand you considered their input but you candidly admit your workgroup made changes to address some but not all of their concerns.

Your group concluded it could not consider input (such as from the litigation section) that directly criticizes the Board's original vote partially adopting the ECCL report – you believe your marching orders were to draft rules as directed. I understand that. That is perfectly reasonable.

However, this Board can reconsider the merit of the previous policy decisions now that rules have been proposed. Indeed, this Board is duty bound to do so: if after having seeing rules drafted to implement those policy goals the Board determines the proposed rule is not workable, does not achieve the stated goal, or perhaps makes the original problem worse, this current Board is required to act. That is what the Board's role in this process is. If it were not, your report would be being delivered directly to the Court and not this Board.

I say the following more to Board than your workgroup: the Washington State Bar Association's rule making process does not merely contemplate – it compels as an aspect of our Rule making process – that the Board make the final decision on whether to approve and forward proposed Rule amendments to the Court. Pursuit of a time line that reduces this Board to nothing more than a rubber stamp disregards the process. It effectively abdicates the Board's role and duty to the Workgroup. It is no Board process at all.

This Bar works and considers matters on the order of tens of years – if not longer. Rushing over a period of months makes no sense. I want this workgroup's efforts to be remembered fifty years from now as a giant leap forward. I do not want this process remembered as the bearer of unintended consequences.

For those reasons Mr. Masters I urge you to join me in asking the Board to continue its consideration and not take a final vote in September. We should be able to jointly present these proposals to the Court with the ability to say everyone, your workgroup, this Board, and the members honed them to their very best condition. I respect your pride of authorship and that your workgroup already believes these are the best Rules possible. If not, I anticipate you would not be presenting them. But I ask you to consider the larger picture and process as well.

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Mr. Kenneth Masters
September 26, 2018
Page 11

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Again, words are inadequate to describe my sincere thanks for your service and that of your workgroup. The members, the public, and dare I say the Court all owe you an enormous debt of thanks.

Thank you.

Sincerely,

WASHINGTON STATE BAR ASSOCIATION
BOARD OF GOVERNORS

A handwritten signature in blue ink, appearing to read "Dan W. Bridges", with a stylized flourish at the end.

Dan W. Bridges
Governor, 9th Congressional District
WSBA Treasurer 2018-2019

cc: WSBA Board of Governors
WSBA Litigation Section

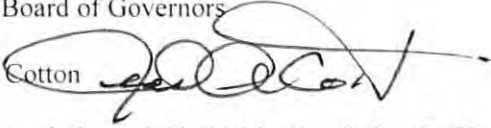
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Office 360-482-6100
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Date: September 26, 2018
To: WSBA Board of Governors
From: Jean A. Cotton 
Re: Recommendations of Civil Litigation Rules Drafting Task Force

While I may have others, I write regarding only two very specific concerns regarding the proposed Civil Rule amendments currently up for discussion. These two concerns are related to the impact of such rules, if approved, on smaller jurisdictions and on family law cases.

First, creating a one-size-fits-all set of rules purportedly designed to decrease the costs of litigation based on a model for larger counties such as King, Snohomish, Pierce, or Spokane simply does nothing to improve practices or reduce costs in smaller, poorer counties such as Grays Harbor where a huge percentage of our population is at or below the poverty level or where cases are routinely scheduled on a much shorter timeline than experienced in larger counties. Implementation of such rules in the smaller counties would, in fact, delay litigation and greatly increase litigation costs.

As to family law, I served as a member of the Discovery Subcommittee for the Task Force on the ECCL project. Early on in the discussions a consensus was reached that, while a form of civil litigation, family law (aka domestic relations), is a very unique creature that is almost a separate form of practice all together. It was recognized that when referring to "civil litigation" practices, policies, and procedures, the general nature of that discussion does not include family law nor should it as both are so totally different from one another. As such, the Task Force made a point of making it clear that the recommendations flowing from its reports were not intended to apply to family law. In fact, in its final report in June 2015, at the bottom of page 2 of 45 is the following statement:

These recommendations come with a significant caveat: they do not specifically take up family law issues. During its fact-finding, the Task Force came to the conclusion that family law and its distinct constellation of concerns were beyond the Task Force's ability to fully consider without unreasonably extending its charter. Therefore, the Task Force's recommendations only reach family law to the extent they affect all other areas of civil litigation.

It is greatly appreciated that a list of certain excluded actions is provided at the end of proposed rule CR 3.1, that list, however, is far from complete and requires expansion. For example, RCW 26.09 (Dissolutions and Legal Separations) is listed but RCW 26.10 (Nonparental Custody), RCW 26.11 (Nonparental Visitation), RCW 26.26 (Uniform Parentage Act) and a host of other applicable actions are not but should be. More important, however, is that this list of excluded actions should apply to many of the other proposed CR amendments and requires a much more in depth analysis to determine the extent such exclusions should be included.

One significant distinction between family law cases and other civil law cases such as personal injury litigation is that in family law a huge percentage of cases involve one or more self-represented parties i.e. pro se litigants. While not all such persons are poor, many are.

In my county, our local Bar Association was recently asked to consider a proposal for a local rule mandating mediation in every family law case. As President of the Grays Harbor Bar Association I was tasked with submitting this proposal for comment to our local bar members. The vast majority of the attorneys who provided comments supported the concept of *voluntary* mediation but not the imposition of mandatory mediation. The majority of those in opposition to the proposed rule cited, among other reasons for their position, that such mandated activities posed an access to justice barrier particularly for those unable to afford the process.

Whenever a court imposes mandatory services that require a financial outlay for parties, questions begin to arise that include (1) how those requirements can be fulfilled by the financially challenged members of our community, (2) whether such required services serve any meaningful purpose if required of all litigants rather than a more select group, and (3) what are the consequences for failing to comply with the mandated requirements. Such mandatory obligations fall into the dreaded unfunded mandates category and may trigger Due Process concerns.

Even those who supported the concept of voluntary mediation quickly pointed out that mediation in family law is not appropriate unless the mediator is a skilled family law attorney and the case does not involve mental health issues, domestic violence, abuse or neglect of children or CPS involvement such as a dependency action, or in paternity cases particularly where one parent either has no relationship with the child and desires none or is simply unknown or refuses to participate.

Most also agreed that in most difficult cases involving custody of minors, a guardian ad litem has been involved and will have a greater sense of whether participation in any form mediation might benefit the parties and their children. Such GALs – particularly attorney GALs - often recommend alternative forms of dispute resolution if they feel it would be beneficial and after taking into consideration the unique nature of the relationships and the financial abilities of the parties.

In short, the court already clearly has the authority to order mediation when it deems such to be appropriate or when a party requests it. A new, complicated rule is not necessary.

Having also served on the WSBA Local Court Rules Task Force, I understand the difficulty and the frustration of drafting rules that will be appropriate across the board. After more than seven years of in depth work to create a set of proposed family law civil rules because of the recognition of the uniqueness of family law, the project died not for lack of broad support but rather because a vocal few rejected the idea of a set of separate rules.

I respectfully urge the Board of Governors to send the drafters back to the work table to incorporate the comments so many have provided, including me, and to seriously consider the difference not only between family law and other forms of civil practice but also the impact on small counties of rules designed on large county practices.

Bethany C. Allen, Esq.
Douglas R. Shepherd, Esq.
Kyle S. Mitchell, Esq.
Heather C. Shepherd, Esq.



SHEPHERD AND ALLEN
ATTORNEYS AT LAW

Jen Petersen, LLLT

VIA EMAIL ONLY (carla@higginsonbeyer.com)

September 24, 2018

Carla Higginson, Esq.
Governor, District 2
Higginson Beyer, P.S.
175 Second Street North
Friday Harbor, WA 98250

Re: Justice Fairhurst Letter and Your Response

Dear Ms. Higginson:

I write to you today in response to your e-mail this morning to our district. I understand you were recently appointed a Board of Governor (BOG) member, and that some of the BOG actions or proposals were done prior to your appointment. I am one of your constituents, and you have asked for thoughts. I read Justice Fairhurst's letter earlier this weekend, prior to your e-mail. I was relieved to read the correspondence from the Supreme Court, and saddened at the same time that the behavior of our BOG has come to such a point that the Supreme Court felt the need to become involved.

You state in your email that the letter is "unprecedented action and the members need to know what the court is attempting to do." You next attach the "chain of command," which is actually an "Organizational Chart." Contrary to what appears to be your position that the Court has somehow overstepped, your "chain of command" clearly demonstrates that the Washington Supreme Court holds the ultimate authority. Further, your comments ignore the bylaws, which state: "Subject to the plenary authority and **supervision of the Washington Supreme Court...**" Bylaw IV. Governance.

I have attended the BOG meetings remotely, and spoken to many attorneys and colleagues regarding the actions taken and/or proposed by the Board of Governors. I write out of concern that as a District Governor, you and the Board are not representing my interests or position(s) with regard to the actions taken and/or proposed. It appears from your e-mail, and many of the proposed changes, the BOG is continually trying to exert more control over the bar association, which makes me deeply uncomfortable. I have served on many boards of various agencies, and never have I witnessed a board attempt to control and/or divide an organization (much to its detriment) as much as the BOG is presently.

I am particularly concerned with the proposed amendments to Article IV.B.5, in that the BOG's comments or reasoning under the proposed amendments, are unrepresentative of my dealings with bar discipline. The BOG's statements characterizing the disciplinary branch of the bar as intimidating, vindictive or retaliatory are inconsistent with my experiences. Having worked in a law office for nearly 20 years, I have been involved in several bar discipline matters, both involving myself as well as other attorneys around the state. In all of them, I found the disciplinary branch to be receptive to relevant information, take appropriate actions against attorneys where discipline was proper, and dismiss false or inactionable claims where appropriate. I have never once seen the disciplinary staff act intimidating, vindictive or retaliatory towards myself or another attorney. The BOG's comments regarding the reputation of the disciplinary branch of the WSBA seem to be combative and defensive, and not impartial. I do not believe your proposed changes, to allow the Board of Governors to hold hiring and firing authority over the Bar's General or Chief Disciplinary Counsel, are in the best interest of our association.

The BOG's second proposed change to Article IV.B.5 appears to address the salary of the Executive Director with no basis or comparison other than it should not exceed the Associate Supreme Court Justice. I imagine these two positions encompass substantially different roles and responsibilities, as well as hours and job duties. The Board's comments do not address any comparison of Executive Director salaries with other regulatory agencies, or provide any framework for constituents to make an informed opinion. For example, the highest position at the Department of Health, the State Health Officer, was compensated \$185,650 in 2013. In the same year, the Executive Director of the State Investment Board was compensated \$298,700; the Executive Director of the State Board for Comm. and Technical Colleges was compensated \$195,028; the Director for the Office of Financial Management was compensated \$164,618; the Chief Executive Officer (non-medical) for the Department of Social and Health Services was compensated \$168,300. The BOG's comments that it is illogical to pay an Executive Director more than a Supreme Court justice do not address the hours or job duties required for each job. Having served on personnel committees in the past, including those which determine salaries, I am confused by the blanket comparison of two positions. I am not advocating one way or another with regard to compensation, however an informed decision to cap a salary, regardless of whose it is, should take into account similarly situated positions, hours, and job requirements, and not be arbitrarily capped based upon an entirely different position.

The remainder of your proposed amendments appear to take on the Executive Director personally, and increase the authority of the Board of Governors. None of these proposed amendments appear to deal, in any way, with serving the public or access to justice, which should be paramount to the present issues before the bar.

The recent actions of the Board of Governors (especially with regard to public interest and LLLTs), as well as the proposed amendments, are juvenile at best, and draining at worst.

Honestly, it's exhausting that the BOG has dragged the bar association, its membership, and now the Supreme Court, into what appears to be little more than a "pissing contest."

Bylaws, section IV(A)(2)(c), state that "each Governor will act in the best interest of **all members of the Bar and the public.**" I cannot see where the recent actions or proposed amendments of the BOG in the past few months have done anything for the best interest of the public, and to the contrary appear to place the members of the bar before service to the public.

As your constituent, I request that the Board of Governors exercise maturity, and move on to more pressing and important matters before the bar association, including access to justice and serving our public. Pursuant to Bylaw IV(A)(2)(d), I request that you convey my member viewpoint to the BOG at the upcoming meeting, and bring my perspective and values to the members in our district.

As my representative, I would invite you to discuss these matters in person, as I cannot put all viewpoints regarding the last few months of actions into a letter. Should you wish to discuss these matters further, please do not hesitate to contact me.

Respectfully,
SHEPHERD AND ALLEN



Heather C. Shepherd

/HCS

CC: William Pickett, WSBA President (bill@wdpickett-law.com)
Rajeev Majumdar, WSBA President-Elect (rajeev@northwhatcomlaw.com)

Bethany C. Allen, Esq.
Kyle S. Mitchell, Esq.
Heather C. Shepherd, Esq.
Douglas R. Shepherd, Esq.



Jen Petersen, LLLT

E-mail: rajeev@northwhatcomlaw.com

September 26, 2018

Rajeev D. Majumdar, Esq.
Attorney at Law
President Elect of the Washington State Bar Association
289 H. Street
Blaine, WA 98230

Re: WSBA Board of Governors (BOG)

Dear President Elect Majumdar:

It was very disturbing to receive, from Carla Higginson, Esq., a copy of the Washington State Supreme Court's letter to the BOG. I understand she is your replacement on the BOG. It was also disturbing to read her "argument" that the Washington Supreme Court is out of line. The Washington State Supreme Court is not out of line. Therefore, Ms. Higginson is copied on this letter, so that she might also understand my position. I was provided the Washington State Supreme Court's letter with the following message from Ms. Higginson: "This is an unprecedented action and the members need to know what the court is attempting to do." Herein, I ignore the fact Ms. Higginson, for reasons known only to her, referred to the Washington State Supreme Court simply as "the court." The Washington State Supreme Court appears to be appropriately attempting to direct a group, with power, to act as responsible professionals, with power. Apparently, the action (letter) is believed to be "unprecedented" because this is the first BOG that does not understand where it gets its authority and to whom it answers.

I believed the BOG understood my position when I placed my name for consideration as President Elect. If not, I accept responsibility for not being clear. I speak too much. I seldom write. I offered myself for the position of President Elect after a personal conversation with you regarding my concerns about the direction of the BOG. I appreciated the time given me, and that you listened with apparent concern. I appreciated your honesty, as a friend and as my BOG representative, when you advised me that you were not persuaded the changes being considered by the BOG, were inappropriate or divisive, as I suggested. I differed with you then and continue to differ with the BOG today. However, suggesting the Washington State Supreme Court's concern or letter is "out of line" or beyond its power, is beyond the pale.

I am unwilling to enter my fourth decade of service to the citizens of Washington and the justice systems of our nation by watching the Washington State Bar Association implode, without these strong written comment(s). When you won the election, I shared with you that I was happy for you and the Washington State Bar Association, if the activities the BOG was involved in that concerned me ended. Obviously, my objectivity was misplaced. From day one, I have never understood how the BOG, or any of its members, believe they can ignore an existing Court order regarding our LLLT members. I previously believed most lawyers, and especially those who serve the bar association on the BOG, understood ours is a profession of service! We serve to serve, not for power. The BOG appears to continue on a journey which unfortunately demonstrates that "power corrupts."

Admittedly, I may be reading more into the Supreme Court's letter than was intended. Accordingly, the remainder of this letter is intended as a continuation of our discussions, before, during and after the BOG presidential election. I remain deeply concerned. How can anyone on the BOG believe that what the BOG is attempting to do is appropriate? The misconduct of the BOG puts the independence of lawyers at risk. When the independence of lawyers is lost, justice is lost. Presently, the Washington State Bar Association, and the BOG answer to no legislative body, they answer to THE WASHINGTON STATE SUPREME COURT. Publishing a letter which suggests the BOG's power and the BOG's authority comes from statute (the legislature), and therefore, can be defined, controlled by or taken away by the legislature is folly at best. The BOG's power comes from and is controlled by the Constitution of the United States and the Constitution of the State of Washington. The separation of powers places our activities and our powers outside the control of any legislature. Any member of the BOG who writes to the contrary, fails to understand what lawyers do and why they need their independence. Any member of the BOG who writes or speaks to the contrary, suggesting that the judicial branch of the State of Washington is not controlled by and subject to the wisdom of the Washington State Supreme Court, should reflect seriously on their error. Any member of the BOG, who wants to give authority for what attorneys do, to any legislature does not know what it means to serve justice.

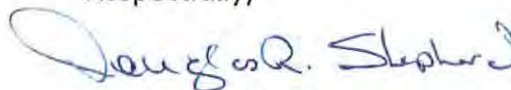
I am sorry if, during our private conversations before the election or my brief comments to the BOG at the time of the election, I did not appropriately educate or convince others of my position. I know I could have better and perhaps more thoughtfully, expressed my concerns about the BOG's oral and written attacks on the LLLT members and legal profession. I clearly now know I should have better and more thoughtfully expressed my frustration at the BOG's oral and written attacks upon the thoughtful actions of previous Boards, and oral and written attacks upon the bar staff who serve the profession and our clients. I write, at length, because my prior oral statements appear to have fallen on deaf ears. So, I write to you, hoping you might share with the BOG, my continued concerns.

I fear and could not serve a profession where our words and conduct, on behalf of our clients, are controlled by sentences and paragraphs written by elected men and women in Olympia or Washington D.C. To avoid that, I choose to listen to our Washington State Supreme Court. I accept the ultimate authority of the Washington State Supreme Court over me and all members of the BOG. I understand the bar has professionals in Olympia work for our profession and our clients, at the direction and supervision of the Washington State Supreme Court, not the BOG. I would ask the BOG, to please stop and reflect appropriately on the journey undertaken. With proper reflection, I believe, the members of the BOG will choose to follow the examples set by and walk in the shadows of Abraham Lincoln, Clarence Darrow, Martin Luther King and the best of our past bar presidents, including Alfred McBee, Mary Fairhurst, and Tom Chambers.

I return briefly to the Washington State Supreme Court letter. As you and the BOG undertake all future thoughtful discussions and decisions required of the BOG, I urge you to listen to and hear what the Washington Supreme Court has said and will be saying.

I close with something I hope I previously shared with you. My first two trials, in 1980, were against Al McBee, a past president of the Washington State Bar Association, and Lester Stritmatter, the father of a past president of the Washington State Bar Association. It was a remarkable gift these men gave me as I observed the way they carried the privilege of independence and obligation of advocacy into the Whatcom County and the Grays Harbor Superior courts on behalf of their clients. I write asking that you use your wisdom and position to avoid placing at risk our Constitutional forms of government, our independence and our clients' access to justice.

Respectfully,



Douglas R. Shepherd

Cc: William D. Pickett, Esq.: bill@wdpickett-law.com
Carla J. Higginson, Esq.: carla@higginsonbeyer.com
Mary E. Fairhurst, Chief Judge: mary.fairhurst@courts.wa.gov

September 25, 2018

Practice of Law Board Recommendation to Washington Supreme Court Regarding Amending General Rule (GR) 24 to Permit Operation of Online Self-Representation Legal Service Providers and Provide for Regulation

Synopsis

Consumers are, in the context of self-representation, increasingly going online to seek legal information, generate legal documents, and seek assistance from unlicensed entities. The public interest is served by protecting consumers from incompetent, unfair, and deceptive online self-representation legal service providers (OLSRLSPs). In addition, online legal service providers want guidance on where the boundaries are in providing self-representation legal services and avoiding the unauthorized practice of law (UPL). Finally, Washington consumers need to have clarity on where to go with concerns related to OLSRLSPs. This memo proposes a policy by which the Court may facilitate a market for OLSRLSPs that enhances consumer protection and expands access to justice for consumers.

Issues

- a. Whether the Supreme Court should amend General Rule 24 (GR 24) to permit OLSRLSPs, including those which generate legal forms and legal documents in any format and provide legal information in response to specific questions and circumstances.
- b. Whether the Supreme Court should authorize the Practice of Law Board (POLB) to propose for the Washington State Bar Association (WSBA) Board of Governors' consideration, as bar-sponsored legislation, a bill providing that the Unauthorized Practice of Law be declared a *per se* Consumer Protection Act violation.

Recommendation

The POLB recommends that the Washington Supreme Court (1) amend the definition of "the practice of law" to explicitly authorize OLSRLSPs' information and document preparation services under clear limitations with registration of such provider entities with the WSBA, and (2) authorize the POLB to recommend to the WSBA Board of Governors that it facilitate passage of Bar request legislation making UPL a *per se* CPA violation to promote protection of the public.



Background in Support of Amending GR 24 to Permit OLSRLSPs

A. Emergence of Online Self-Help Legal Service Providers

What does “practicing law” mean in the age of information technology, globalization, and market disruptions that are transforming everything from health care and transportation to the music industry?

The lines separating unauthorized from authorized practice of law have blurred. Online legal information, generation of legal documents, online dispute resolution, and direct representation are not just an inevitable part of the future—they are here and growing at an exponential rate. The concept of a law office being an entity owned and run exclusively by lawyers is changing. Multi-jurisdictional practice is an inescapable consequence of technology. The traditional idea of the lawyer-client relationship is changing as disciplines start to merge and innovate to find more effective and efficient ways to solve complex problems that have a legal component.

Like it or not, the culture is rapidly and continually producing innovative business models that promise more competitive services and products. The practice of law, as defined by the judiciary and regulated by the state bar association, must thoughtfully and incrementally adjust to changing conditions by exploring ways to expand access to justice while protecting the public from the risk of harm. As technology marches forward and people look for cheaper and more efficient legal services, the organized bar should be a central player.

The court, the bar association, and individual lawyers can play a leading role or sit back and watch an under-regulated potpourri of technological innovators, predators, lay people, and legislative partisans define the new world of legal services.¹

B. Sources of Existing Washington Law Regulating OLSRLSPs

¹ Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2588 (2014); Joshua Kubick, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECHCo (Feb.14, 2015), available at <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>; Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALBANY L. REV. (2014); Roger Smith, *Ten Ways in Which Technology Can Expand Access to Justice* (Feb. 12, 2018), available at <https://law-techa2j.org/digital>; John McGinnis and Russell Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014), available at <http://ir.lawnet.fordham.edu/flr/vol82/iss6/16>.



The current sources of regulation of OLSRLSPs are RCW 2.48 (Unauthorized Practice of Law (UPL)); the Consumer Protection Act, chapter 19.86 RCW, which regulates all matters in trade or commerce; and GR 24, which defines the practice of law and identifies otherwise permitted exceptions to the definition of the practice of law.

C. Rationale for Permitting Online Self-Representation Legal Service Entities

The rationale in support of a significant revision to GR 24 flows from the recognition that the internet is inexorably a marketplace where people seek information and assistance in every aspect of life, including legal matters.² Many consumers in need of legal information and assistance believe they cannot afford to hire a lawyer and have limited access to free or low-cost traditional legal services. It is estimated that 80% of consumers with legal matters do not seek the assistance of a licensed attorney. Often, consumers seek information and assistance online because it is accessible, affordable, and efficient.

As online self-help legal services expand, providers who are currently operating in Washington are largely doing so without effective regulation or oversight, albeit they are subject to the criminal prohibition of the unauthorized practice of law and the Consumer Protection Act (CPA) and held accountable through contract and tort law to the professional standard of care. *Perkins v CTX*, 137 Wn.2d 93, 106, 969 P.2d 93 (1999). The rationale for regulating this marketplace and displacing competition is that consumers of OLSRLSPs are at risk of harm by under-regulated online providers that knowingly, deceptively, or negligently create the misperception that licensed lawyers are assisting consumers or that the particular provider is legally authorized to provide the legal assistance adapted to individual needs.³

Existing practice of law rules in Washington do not expressly address or allow for the provision of *interactive* online legal assistance outside the scope of the conventional lawyer-client relationship. Once a legal service is personalized for an individual's situation, it crosses over from lawful provision of generic legal information (or a mere form/scrivener service) to particularized legal advice subject to the rules and regulations governing the practice of law. Thus, only individuals authorized to practice law may lawfully provide web-based legal assistance adapted to individuals' needs. OLSRLSPs may wish to introduce innovative interactive software and helpful online services in

² Examples of websites offering internet-based legal services include: <https://www.legalzoom.com/>; <https://www.rocketlawyer.com/>; <https://www.lawdepot.com/>; <https://www.nolo.com/>; <https://www.legalshield.com/>; <https://www.bizfilings.com/>.

³ See Letter from Marina Lao, Director of Office of Policy Planning, Federal Trade Commission, and Robert Potter, Chief of Legal Policy Section, Antitrust Division, U.S. Dep't of Justice (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-



Washington, but the legitimate prospective players will only do so if the Washington practice of law rules clearly provide permission for the services.

To address the regulatory gap, emerging OLSRLSPs could be fairly characterized as “*pro se*” assistance businesses that are an exception to the lawyer-centric practice of law. And, if the providers have attributes of the traditional “practice of law,” they could nonetheless be expressly “authorized” within the qualified *pro se* exception. This authorization would be justified because these providers deliver critical information and guidance to consumers who are seeking non-lawyer assistance to assess and respond to legal issues that routinely arise in their lives. Whatever mechanism for regulation and accountability is put forward, it should be narrowly tailored to protect consumers’ expectations; promote competition and access to justice; and adhere to the tenets contained in ABA Resolution 105⁴, “ABA Model Regulatory Objectives for the Provision of Legal Services.”

D. North Carolina Approach

The North Carolina Statute (NCS) § 84-2.2⁵ is an example of state regulation of online legal assistance involving software that generates legal documents based on information inputted by a consumer. However, rapidly evolving technology and artificial intelligence inevitably will enable entrepreneurs to offer consumers particularized legal advice and opinions (not just documents) based on consumer input and needs. These technological developments in online legal services should be considered by the court as it considers amending GR 24.

E. Competition: The FTC Perspective

The Practice of Law Board recognizes that this proposal could be viewed as impacting competition in the legal services marketplace. This proposal attempts to narrowly tailor the proposed regulations to protect consumers while avoiding unnecessary inhibitions on competition and innovation. In a June 2016 letter to the North Carolina legislature, DOJ and FTC Anti-Trust Division staff offered support for the proposed North Carolina statute. The letter stated, in part:

[S]taff believe that “the practice of law” should mean activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. Overbroad scope-of-practice and unauthorized-practice-of-law policies can restrict competition between licensed

⁴ The Regulatory Objectives (GR 12.1) are Attachment C

⁵ NCS 84-2-2 is Attachment A



attorneys and non-attorney providers of legal services, increasing the prices consumers must pay for legal services, and reducing consumers' choices.

Accordingly, the Agencies recommend that the North Carolina General Assembly consider the benefits of interactive websites for consumers and competition in evaluating HB 436. Interactive software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.

The Agencies also recognize that such interactive software products may raise legitimate consumer protection issues. The Agencies recommend that any consumer protections, such as requiring disclosures, be narrowly tailored to avoid unnecessarily inhibiting competition and new ways of delivering legal services that may benefit consumers.⁶

The approach the POLB proposes here would expand competition in the legal services marketplace while establishing the minimum regulation necessary to protect consumers

Rationale for Additional Regulation of Online Self-Help Legal Service Providers

To protect consumers from entities operating outside the scope of the authorized practice of law (including outside the amended GR 24), the POLB has recommended to the WSBA and Attorney Generals Office that they consider a bill providing that the Unauthorized Practice of Law is a *per se* Consumer Protection Act violation. See Attachment A for rationale and details of this approach.

Criteria for Evaluating Potential Regulatory Approaches

The threshold question in evaluating potential regulatory approaches is, "Which branch of government should regulate online legal services activity?" If it is deemed "permitted activity" under GR 24 *within* the definition of the practice of law, the Court may prefer to maintain control over such entities in order to fulfill its traditional constitutional role to regulate the practice of law in Washington. If it is deemed an exception to the

⁶ Letter from Marina Lao, Director of Office of Policy Planning, Federal Trade Commission, and Robert Potter, Chief of Legal Policy Section, Antitrust Division, U.S. Dep't of Justice, supra note 3.



definition of the practice of law, it could be regulated as “mere” commercial activity by the legislature and executive branches of government.

Our recommendation is that the Court structure the “permission” so as to retain control of the scope of the exception and who is authorized to engage in the restricted activities. Consumer protection could be strengthened by having the legislature make the unauthorized practice of law a *per se* violation of the CPA. This will empower consumers, who suffer *actual* damages caused by UPL, to obtain recovery and deter unfair and deceptive practices in this emerging online self-representation legal services marketplace, while keeping authority over the practice of law with the judicial branch. This advances the public interest in access to justice and promoting a fair and non-deceptive market place.

Benefits and Drawbacks of Potential Regulatory Approaches

The POLB’s recommendation focuses on the Court retaining regulatory authority over of online self-help legal service providers. This is based on our anticipation of the Court’s potential concerns that legislative/executive branch oversight may violate separation of powers. That said, Attachment B identifies other possible regulatory alternatives and considerations.

Recommended Amendment to GR 24:

“(b) Exceptions and Exclusions: Whether or not they constitute the practice of law, including the definition of legal advice in GR 24(a)(1), the following are permitted:

(***) The operation of a hosted site or service, including but not limited to a web site, hosted service, mobile app, or cloud-based application that offers self-represented consumers access to interactive software, including software that gives legal information related to civil law matters or generates a legal document based on the consumer's input and responses to questions presented by the software, under the following conditions:

(1) Providers must:

(a) Provide consumers a means to view the blank template and the final document before finalizing a purchase of that document;

(b) Have an attorney licensed to practice law in the State of Washington review all blank templates and legal operative language offered to Washington consumers, and that may appear in the completed document;

(c) Maintain the name and address of each reviewing attorney and provide this information to any Washington State regulatory authority or agency,



including but not limited to the Washington State Bar Association, or the Washington State Attorney General upon request;

(d) Provide consumers a written itemization of the services and documents provided and the total cost of each, including all fees when the final document is viewed;

(e) Communicate clearly and conspicuously that the services provided are not a substitute for the advice or services of an attorney. This disclosure shall be separately and expressly acknowledged by the consumer;

(f) Disclose to consumer the entity name, entity type, state of entity formation, and physical address of the provider's main place of business;

(g) Disclose clearly and conspicuously to the consumer that personal information provided by the consumer and other communications through the service are not subject to the attorney client evidentiary privilege and the provider or consumer may be compelled to testify about the information in a court action. This disclosure shall be separately and expressly acknowledged by the consumer;

(h) Consent to service of process on a registered agent in Washington;

(i) Have a voluntary consumer satisfaction process clearly and conspicuously documented and displayed on the provider's website, service or application;

(j) Refer all consumer concerns involving the unauthorized practice of law to the Practice of Law Board;

(k) Register with the Washington State Bar Association, pursuant to fees and conditions approved by the Court, prior to commencing operation in the State and renew the registration annually. The Washington State Bar Association shall have the authority to recommend denial or revocation of registration or renewal to the Supreme Court, pursuant to regulations adopted by the court;

(l) Pay an initial registration fee and an annual renewal fee in an amount set by the Supreme Court.

(2) Providers may not:

(a) Directly or indirectly offer or sell any financial or investment products or financial or investment services to a consumers who purchase completed forms or services;



(b) Use the consumer's information for any purpose other than preparing the purchased documents or providing the services;

(c) Misrepresent, directly or by implication its products or services;

(d) Disclaim any warranties or liability or limit the recovery of damages or other remedies by the consumer;

(e) Require the consumer to agree to jurisdiction or venue in any state other than Washington for the resolution of disputes between the provider and the consumer.

(f) Act as the appointed power of attorney for the consumer or any beneficiary;

(g) Appear in any proceeding nor take on the role of representative for any consumer or beneficiary in any context, forum, communication or proceeding.

(h) Accept compensation for services from anyone other than the consumer.

Conclusion:

The POLB makes its recommendation in light of the Supreme Court Order Reconstituting the POLB dated July 8, 2015, which directs that the POLB focus on "educating the public about how to receive competent legal assistance and consider new avenues for nonlawyers to provide legal and law related services." Our recommendation is fully aligned with that charge.



ATTACHMENT A

in real property, or to abstract or pass upon title to any real property, which is located in this State.

- (3) The completion of or assisting a consumer in the completion of various agreements, contracts, forms, and other documents related to the sale or lease of a motor vehicle as defined in G.S. 20-286(10), or of products or services ancillary or related to the sale or lease of a motor vehicle, by a motor vehicle dealer licensed under Article 12 of Chapter 20 of the General Statutes. (C.C.P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C.S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468; 1995, c. 431, s. 3; 1999-354, s. 2; 2004-154, s. 2; 2013-410, s. 32; 2016-60, s. 1.)

§ 84-2.2. Exemption and additional requirements for Web site providers.

(a) The practice of law, including the giving of legal advice, as defined by G.S. 84-2.1 does not include the operation of a Web site by a provider that offers consumers access to interactive software that generates a legal document based on the consumer's answers to questions presented by the software, provided that all of the following are satisfied:

- (1) The consumer is provided a means to see the blank template or the final, completed document before finalizing a purchase of that document.
- (2) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina consumers, including each and every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by the provider and provided to the consumer upon written request.
- (3) The provider must communicate to the consumer that the forms or templates are not a substitute for the advice or services of an attorney.
- (4) The provider discloses its legal name and physical location and address to the consumer.
- (5) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.
- (6) The provider does not require the consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between the provider and the consumer.
- (7) The provider must have a consumer satisfaction process. All consumer concerns involving the unauthorized practice of law made to the provider shall be referred to the North Carolina State Bar. The consumer satisfaction process must be conspicuously displayed on the provider's Web site.

(b) A Web site provider subject to this section shall register with the North Carolina State Bar prior to commencing operation in the State and shall renew its registration with the State Bar annually. The State Bar may not refuse registration.

(c) Each Web site provider subject to this section shall pay an initial registration fee in an amount not to exceed one hundred dollars (\$100.00) and an annual renewal fee in an amount not to exceed fifty dollars (\$50.00). (2016-60, s. 2.)

§ 84-3. Repealed by Session Laws 1973, c. 108, s. 37.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another

ATTACHMENT B

Possible Regulatory Options for Discussion

(Board Considered, but did not recommend these options)

Option#1 [Adopt North Carolina scheme]

- A. Supreme Court amends GR 24 to align with NCS § 84-2.2 § 84-2.2.¹
- B. Have complying entities **register with the WSBA** and pay a fee with annual renewal. No substantive role for WSBA other than to maintain registry.
- C. Noncomplying entities, including those that fail to maintain current registration, would be subject to criminal and injunctive actions (by prosecutors and the AGO) under **existing** RCW 2.48 as UPL and CPA (non per se) violations under **existing** RCW 19.86.020 by the AGO and private actions (although there would be no *per se* violation).
- D. Entities would also be subject to contract law and the standard of care.
- E. Legislature could create an on-line self-help legal service providers entity dispute resolution unit within the AGO (Consumer Protection Division), which is authorized to mediate (or engaged in informal reconciliation as they currently do) disputes between online self-help legal service providers and consumers.

Option #2 [Court Amends GR 24 in conjunction with legislatively created executive oversight of registrants and violators]

- A. Supreme Court amends GR 24 to expressly **exclude** on-line self-help legal service providers from the definition of the practice of law under articulated limitations.
- B. Legislature treats the entities as non-lawyer commercial activity, not the practice of law, and requires registration with **executive branch entity** (e.g., Dept. of Licensing, AGO, Dept. of Commerce) and payment of a fee with annual renewal.
- C. Failure to be registered would be subject to: a. administrative action by registration entity under Administrative Procedures Act, b. criminal and injunctive actions (by prosecutors and the AGO) under RCW 2.48 as UPL, and c. Select unfair and deceptive practices could be made a *per se* CPA violation under RCW 19.86.020. See for example RCW 46.71.045.
- D. Consumer concerns regarding UPL could be referred to the executive branch regulator, prosecutor or AGO.
- E. An informal dispute resolution component could be administered by the regulating executive branch entity, which would have rule making authority. See, e.g. Mobile Home Dispute Resolution in MHLLTA.
- F. Entities would also be subject to contract law, standard of care.

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- A. Supreme Court amends GR 24 to exclude on-line self-help legal service providers as not constituting the practice of law under articulated limitations.
- B. Legislature creates chapter that adopts the Supreme Court's express limitations on the entities; identifies registration requirement (or not) and expressly identifies specific unfair and deceptive trade practices (UDAPs) making the violation of each a per se CPA violation. See, for example, chapter 46.71 RCW Automotive Repair. Such UDAPs could include: failure to register; misrepresenting the offered/authorized services; failing to make mandatory disclosures; failing to operate a dispute resolution mechanism; failure to have all offered document templates vetted by an identified and licensed Washington attorney; prohibiting conflicts of interest, defining the privacy interests of consumers, etc.

ATTACHMENT C

General Rules

GR 12.1
REGULATORY OBJECTIVES

Legal services providers must be regulated in the public interest. In regulating the practice of law in Washington, the Washington Supreme Court's objectives include:

- (a) protection of the public;
- (b) advancement of the administration of justice and the rule of law;
- (c) meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems;
- (d) transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections;
- (e) delivery of affordable and accessible legal services;
- (f) efficient, competent, and ethical delivery of legal services;
- (g) protection of privileged and confidential information;
- (h) independence of professional judgment;
- (i) Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs;
- (j) Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

[Adopted effective September 1, 2017.]
