WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

NOTICE IS HEREBY GIVEN by the Washington State Bar Association, pursuant to RCW 42.30.080, that the Council on Public Defense meeting will be held on:

September 20, 2019 | 12:00pm to 2:30pm
Washington State Bar Association, 1325 4th Ave, #600, Seattle, WA
Call: 1-866-577-9294; Access: 52874#

The purpose of the meeting is for the Council to discuss, deliberate, and take potential final action regarding the following agenda items:

3 min	**Welcome and Roll Call**	Daryl Rodrigues	Discussion	
2 min	**August Meeting Minutes**	Daryl Rodrigues	Action	pp 3-4
10 min	**Office of Public Defense Report**	Joanne Moore	Discussion	
10 min	**Washington Defender Association Report**	Christie Hedman	Discussion	
10 min	**Spokane County Public Defender's Office**	Daryl Rodrigues	Discussion	See article here
10 min	**CrR 4.1/3.3 and CrRLJ 3.2.1**	Daryl Rodrigues	Discussion	pp 5-54
30 min	**Committee Reports**		Discussion	
	Standards	Written Report		pp 55
	Independence	Travis Stearns/Sophia Byrd		
	LFO Reform	McSherry Jaime Hawk		
	Public Defense Structure	Eileen Farley		
	Pri-Trial Reform	Justin Bingham		pp 56-77
10 min	**WSBA Bar Structure Workgroup**	Eileen Farley	Discussion	pp 78 -99
5 min	**WSBA Updates**	Diana Singleton	Discussion	
10 min	**Announcements**	Everyone		

Reasonable accommodations for people with disabilities will be provided upon request. Please email bonnies@wsba.org or call 206-727-8293.

Some Council members may participate via conference call. A speaker phone will be available at the meeting location noted above for members of the public to attend and hear statements/discussion of those members participating by phone. In addition, call-in instructions are pasted below for members of the public who would like to attend telephonically.

Instructions for public call in: 866-577-9294, access code 52874#.

You are not required to state your name to join this meeting. If the conference call provider message asks that you state your name, you may press #, without stating your name, and you will be connected to the meeting.

Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE

AUGUST 16, 2019, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA

MINUTES

CPD members in person: Daryl Rodrigues (Chair), Travis Stearns (Vice-Chair), Jaime Hawk, Justin Bingham, Hon. Drew Henke, Christie Hedman

CPD voting members on the phone: Justice Sheryl Gordon McCloud, Joanne Moore, Rebecca Stith, Kathy Kyle, Jason Gilmer, Rachel Cortez

CPD non-voting members: Ann Christian, Bob Boruchowitz

WSBA Staff: Diana Singleton, Bonnie Sterken, Shanthi Raghu

Guests: Gideon Newmark, George Yeannakis, Katrin Johnson, Sophia Byrd McSherry, Jason Schwartz, Peter Barber

Absent: Commissioner Randy Johnson, Dani Casselman, Colin Fieman, Nick Allen, Deborah Ahrens, Kim Ambrose, Hon. Johanna Bender, Michael Killian, Ping Lau, Marc Boman, Eileen Farley

1) Minutes

The July minutes were approved without edits.

2) Office of Public Defense Update

Sophia reported that the final sessions for the juvenile defense academy and the criminal defense academy are soon. The parent representation conference is coming up in Wenatchee and they expect about 250 attendees, including contract attorneys and social workers. There are regional CLEs coming up soon that they will start advertising. The County and City applications for grant funding are due soon. Sophia addressed questions.

3) Washington Defender Association Update

Christie reported that since the end of the legislative session WDA has put on webinars related to legislative changes, including the Keep WA Working Act, felony scoring, and the Indian Child Welfare Act. WDA is collaborating with the National Association of Public Defense on a conference to be held 9/9-13 at the University of Washington. There is a DUI training this afternoon in King Co it is also offered as a webinar. Other upcoming CLEs will be on traffic stops, mental health, and ethics. WDA is doing research on bail jump and failure to appear issues. WDA is also working on local government fiscal notes for potential changes and a longer term analysis of the real costs of public defense. Other WDA activities include DWLS3 work, a sentencing task force, a number of Trueblood workgroups, domestic violence committees, and a 7109 practitioners and stakeholder meeting in partnership with Disability Rights of WA. Christie addressed questions.

4) Office of Public Defense Standards Audit

Daryl reported that he received a couple of written comments on OPD's report before the meeting. Sophia, George and Katrin summarized the process for developing the audit model, its initial review and the recommendations that were developed from it. The Court asked OPD to conduct the audit after CPD members discussed a need for closer oversight of the implantation of the Standards. The Court reviewed the initial OPD

report and asked the CPD to provide comments and recommendations that the Court could consider before taking any action on the report. Katrin gave an overview of how the audit was conducting and written. Katrin addressed questions. George and Katrin summarized the recommendations put forward by OPD in the audit. Justice Gordon McCloud asked for comments by August 23 or 26. The Court will review the comments by their en banc the first week of September. The Council had a robust discussion about the recommendations and provided comments. Daryl will take the comments from today's discussion and compile them with the previously submitted comments and submit a summary for the Court to review prior to their September en banc meeting.

4) Committee Updates

Standards – Bob reported that the committee continues to work on the persistent offender standards and will develop performance guidelines. They met today by phone and will meet again in a few weeks to tweak the language that has been shared with the CPD. The plan to have update standards by the September CPD meeting. CPD members were invited to send Bob feedback on the draft in the materials.

Independence Committee – Sophia reported that the committee does not yet have a substantive proposal to present to the CPD. A draft is being circulated to the committee for more review and revision.

LFO Committee – Jaime reported that Nick is on sabbatical. The Committee is planning to meet to discuss their primary purpose moving forward, which could include legislative discussions, looking at debtor practices, the issue of the 12% interest rate which remains on restitution, and juvenile restitution. There has been some discussion on court rule changes. The Committee needs to identify what active project to take on and determine whether to expand the scope of the committee beyond LFOs. Jaime addressed questions. At the next CPD meeting Jaime will report about the LFO Consortium in early September and the CPD discuss whether or not to suspend this committee.

Public Defense Structure Committee – Ann reported that the OPD included questions about support staff and investigators in their RCW 10.101 applications and OPD will provide the information that has been collected. The Committee will have a meeting in September to look at that information to start working on a survey with an end goal to come up with guidelines on support staff, investigators, experts, etc.

Pre-Trial Reform Committee – Justin reported that the CPD received the updated Defender Resource Packet with revisions from the last conversation. The Committee is finalizing cover art for the packet. Justin summarized the small edits that were made from the last meeting and the two items that were added based on CPD feedback. Jaime asked for feedback on the structural barriers list in the packet. The Committee will finalize the edits and submit the packet to the BOG for approval in September.

5) FY20 Meeting Schedule

Daryl reported that a draft schedule for the CPD was in the meeting materials and he asked CPD members to let staff know if they see any large scheduling conflicts.

6) Announcements

Shanthi joined the meeting to ask for feedback on a CLE she is planning relating to behavioral health and public defense. CPD members provided feedback.

George gave kudos to Bob on a successful completion of a case.

The meeting adjourned at 2:30pm

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Stephen P. Dowdney Jr, declare and say:

That on this 23 day of August, 2019, I deposited the following documents in the Stafford Creek Corrections Center Legal Mail system, by first class pre-paid postage under General Rule 9 Rule Making:

GENERAL RULE 9 RULE MAKING SUGGESTED AMENDMENT TO CrRLJ 3.2.1.(g) and CrR 4.1

Adressed to the following:

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

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

DATED THIS 23 day of August, 2019,

signed in Grays Harbor County, City of Aberdeen.

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

Cc: Dowdney file

Attention Supreme Court Rules Committee

Herein lies the suggested amendments to two (2) Court Rules, CrRLJ 3.2.1.(g) & CrR 4.1.

As the rule changes are inescapably connected, for the sake of brevity I have consolidated them into one document.

General Rule 9(e) states that 'a suggested rule' should not exceed 25 pages.

With accompanying appendix this document is 45 pages. Brief- 14 pages/ appendix- 31 pages.

Although 50 pages would be allowed if separately submitted, proponent requests that this proposal be accepted in accordance with GR 9(d)(1).

If unacceptable by committee standards please promptly inform me as so I may submit separate proposals. see GR 9(d)(2).

I apologize for any inconvenience,

Sincerely,

Stephen P. Dowdney Jr.

SUPREME COURT

OF THE STATE OF WASHINGTON

GENERAL RULE 9 RULE MAKING:

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

(C) The current versions of Court Rules CrRLJ 3.2.1.(g) & CrR 4.1 necessitate amendment as together they allow circumvention of constitutional rights and principles as well as conflict with related court rules (CrR 3.3)

(D) A public hearing may be in order.

(E) Expedited consideration should be applied as currently individuals are being subject to unlawful restraint of liberty and disparate conditions concerning due process and equal protection.

Table of Authorities

Table of Authorities con't.

Suggested Amendment

CrR 3.2.1.(g)

(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 the 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.~~

(1) The State may file a designated felony complaint in order to conduct a preliminary hearing pursuant subsection (g)(4) to determine whether there is probable cause to believe the accused has committed a felony. The accused shall be brought before the court within 72 hours of filing the complaint in a manner consistent with section (e) of this rule to set a date for the preliminary hearing. The date set for preliminary hearing will be within 14 days of the filing of complaint, unless preliminary hearing is waived by accused in writing. The Court, State or accused may extend time for preliminary hearing on motion for good cause subject to restrictions in subsection (g)(2). If probable cause is found, or preliminary hearing is waived, the accused will be bound over to superior court and an information filed without unnecessary delay. The State at any time may file an information directly into superior court bypassing the preliminary hearing. Jurisdiction vests in the superior court at the time the information is filed.

(2) Unchanged.
(3) Unchanged.
(4) Unchanged.
(5) Unchanged.
(6) Unchanged.

[see entire CrRLJ 3.2.1. in Appendix K]

Suggested Amendment

CrR 4.1 Arraignment Rule

(a) Time.

(1) Unchanged.

(2) Unchanged.

[*](3) Defendant detained in jail on felony complaint.

When defendant has been continuously detained in jail or bound over to superior court pursuant CrRLJ 3.2.1.(g), the commencement date for purposes of CrR 3.3(b)(1) shall be 14 days from date complaint was filed in district court, unless dismissal pursuant CrRLJ 3.2.1.(g)(5) occurs, then the period between dismissal and re-file is excluded pursuant CrR 3.3(e)(4). Anytime defendant has been physically released from confinement prior to arraignment in superior court subsection (a)(2) of this rule controls.

(b) Unchanged.

(c) Unchanged.

(d) Unchanged.

(e) Unchanged.

(f) Unchanged.

[*(Section (a)(3) as proposed is a complete addition to the section and does not overwrite any existing language.) see entire CrR 4.1 in Appendix K]

Opening Statement

In 2018, Stephen P. Dowdney Jr. proposed a rule change to the 'arraignment rule' Criminal Court Rule 4.1 (CrR 4.1) pursuant General Rule 9 (GR 9).

The Washington State Rules Committee forwarded the suggested amendment to Washington State Bar Association for further consideration. The Bar Association agreed that there was an issue, however, felt that an easier fix would be to amend the Time for Trial Rule (CrR 3.3). As a result the Washington State Supreme Court ordered the proposed rule change published for public comment. Appendix A (rule change to CrR 3.3 not CrR 4.1)

Members of the Washington State legal community weighed in on the amendment and issues at hand to include, The Washington State Bar Association Appendix B, The Snohomish County Public Defenders Association Appendix C, The Washington Defenders Association Appendix D, U of W Law Professor, Mark Conrad Appendix E, Snohomish County Prosecutors Appendix F, and (retired) Hon. Judge R. Kessler Appendix G.

The, as proposed, rule was ultimately not adopted.

Proponent, Stephen P. Dowdney Jr., now asserts and re-asserts that amendments to CrRLJ 3.2.1.(g) and CrR 4.1 are necessary and Constitutionally required.

Respectfully Submitted,

Stephen P. Dowdney Jr.

Discussion

I. CrRLJ 3.2.1.(g)(1)

The suggested amendment to CrRLJ 3.2.1.(g)(1) will eliminate confusion and arbitrary enforcement of rules concerning the initial filing of felony charges in District Court eliminating unnecessary delay.

(a) What is the purpose of filing cases in District Court under CrRLJ 3.2.1.(g) ?

The purpose of filing cases in District Court under CrRLJ 3.2.1.(g), according to the current rule is to decide in an adversarial hearing whether the conduct 'charged' is a misdemeanor or a felony, to "conduct a preliminary hearing to determine whether there is probable cause to believe the accused has committed a felony". CrRLJ 3.2.1.(g)(1)(4)

The rule also allows the State to file informations into Superior Court or stay in District Court as a misdemeanor. CrRLJ 3.2.1.(g)(3)

However, for example, in Snohomish County original charging documents proscribe felony conduct by statute. see Appendix H (criminal complaint)

The question being, why are crimes known to be felonies being filed in District Court..?

(b) The current version of CrRLJ 3.2.1.(g) lacks instruction resulting in absence of formal process.

The current version of CrRLJ 3.2.1.(g) has no instructional verbiage directing that an accused must

ever be present in District Court, thus averting notice and triggering formal due process.

This allows individuals, although charged and detained in jail, to never set foot in District Court pursuant the 'complaint'. see Appendix I (Snohomish County Handout) which states "you will not have an arraignment hearing" and "your FDD [felony dismissal date ?] is not a court date" also see Appendix J (notice attached to complaint when SLID UNDER CELL DOOR) stating that probable cause has already been determined and that you will not be required to appear in court until your case is dismissed...? This notice is from the Judiciary.

The notion that accused individuals can be charged, held and have the case dismissed without being present, served or consult counsel seems to conflict with CrRLJ 3.2.1(g)(1)(5), CrRLJ 4.1 (reading), Wash. Const. art 1 § 3, 10, 22, U.S. Const. amend 5, 6, 14, when the ultimate intent is to file in Superior Court.

(c) The suggested amendment to CrRLJ 3.2.1.(g)(1) cures the deficiency of process.

Both CrRLJ 3.2.1.(f) and CrR 3.2.1.(f) dictate that formal charges must be filed within 72 hours of arrest. If the State chooses not to exercise the privilege of filing informations directly into Superior Court, Wash. Const. art 1 § 25 also see Hurtado v. California, (110 U.S. 516)(elected prosecutor's may file informations as opposed to grand jury indictments), also see RCW 10.37.015(held to answer by information) and U.S. Const. amend V(held to answer for infamous conduct 'felony') and instead opt to file a 'felony complaint'

into District Court in order to determine whether conduct complained of is a 'felony' CrRLJ 3.2.1.(g)(1)(4).....,

Proponent has amended the rule to reflect that it is wholly reasonable to grant an additional 72 hours for the State to bring the accused before a Magistrate/Judge in order to present the accusation and set a date for the preliminary hearing. see suggested amendment.

Additionally, the suggested amendment insures counsel at this hearing (CrRLJ 3.2.1.(e)) and dictates that the preliminary hearing will be set within 14 days of the filing, this coincides with an arraignment under 4.1 so that if bound over the State will not be inconvenienced and far behind the process if they had initially filed in Superior Court. However, if necessary the suggested rule allows the process, by motion of course, to extend up to 30 days just as the existing rule does. The suggested rule also allows the State 'at any time' to file an information in Superior Court, thus bypassing the preliminary hearing.

The rest of the rule remains unchanged, as the suggested amendment allows the other five subsections to operate as intended.

(d) History seems to be repeating itself

The rule CrRLJ 3.2.1.(g) (formally JCrR 2.03) was amended in 1980 as result of similar action now taking place in, at least, Snohomish County. see State v. Edwards, 94 Wn.2d 208,215-16;616 P2d 620 (1980)("[T]he prosecution can avoid the arrest provision

of CrR 3.3 by simply always filing in District Court first.."use of the preliminary hearing proceeding...as proposed by the State is improper.") also see State v. Alton, 89 Wn.2d 737,738;575 P2d 234 (1978)("[T]he State cannot invoke the power of the court...then ignore the process it initiated...such action makes the preliminary hearing meaningless".) and State v. Kray, 31 Wn.App. 388,390-92;641 P2d 1210 (1982)("[1980 amendments] will limit the use of the District Court proceedings to delay the time for trial period") The Washington State Supreme Court agreed in State v. Darden, 99 Wn.2d 657,678-679;663 P2d 1352 (1983)("We merely put an end to a prosectorial practice which had evolved into an abuse of the existing rule".)

As a result, the rule of filing in District Court was safeguarded by a change in CrR 3.3 indicating that the time spent in District Court on a complaint was subtracted from the time for trial period. see 1980 amendments CrR 3.3.

In 2003 the rules were amended again to what is currently applied.

The Snohomish County prosecutor's Office response to the last amendment Appendix F, seems to imply that the time for trial task force felt that being held in District Court and detained in jail is of no matter concerning restraint of liberty and equal protection.

The amendments in 2003 did not properly calibrate and harmonize CrRLJ 3.2.1.(g) with CrR 3.3 and CrR 4.1.

As the Hon. R. Kessler states in the last public comment Appendix G:

" The current time for trial rule is "vacuous". Prior to the adoption of the current rule [2003], there was meaningful process"

Dowdney's proposed rule change to CrRLJ 3.2.1.(g) in conjunction with his proposed rule change to CrR 4.1 simply cures the potential for lack of process and disparate treatment of individuals held to answer in District Court. It also cures the Constitutional prohibition against unnecessary delay. Wash. Const. art 1 § 10

II. CrR 4.1(a)(3)

In addition to amending CrRLJ 3.2.1.(g) it is imperative to amend CrR 4.1, the arraignment rule. The addition of CrR 4.1(a)(3) is a simple remedy for individuals initially filed on in District Court under CrRLJ 3.2.1.(g) to receive formal process equally to those initially filed on directly into Superior Court for the same conduct.

It should be made very clear, filing in District Court is not to determine that there is probable cause that 'a crime' has been committed it is only to determine if it is a "felony" CrRLJ 3.2.1.(g)

(a) The Suggested amendment to CrR 4.1 only harmonizes the arraignment rule with the Time for Trial Rule CrR 3.3.

The suggested amendment virtually leaves the

the arraignment rule the same save for simply adding a third option for individuals that have been continuously detained in jail as a result of CrRLJ 3.2.1.(g) prior to an information being filed on that same conduct.

The Time for Trial Rule CrR 3.3 already dictates this action.

Being detained in jail and held to answer is considered a "pending charge" CrR 3.3(a)(3)(ii)(no mention of charge by 'information')

A charge filed in District Court based on the same conduct of a charge "ultimately" filed in Superior Court is a "related charge" CrR 3.3(a)(3)(ii)

"Related charges" to charges ultimately filed in Superior Court are to be applied equally concerning Time for Trial commencement. CrR 3.3(a)(5)

If individuals are "detained in jail" and held only "unrelated charges" are excluded from the time for trial period. CrR 3.3(a)(3)(v) & (e)(2)

The current version of CrR 3.3(c) as it refers to the current version of CrR 4.1 as setting "commencement" is flawed as 4.1 ignores individuals that have been detained in jail and held to answer for up to 44 days for related conduct. (30 days in District Court and 14 days after information has been filed)

note: The amended version references dismissals and those released prior to arraignment. The period between dismissal and re-file is excluded CrR 3.3(e)(4) and release from confinement result in 4.1(a)(2) controlling.(arraignment sets commencement)

(b) If formally charged with crime by the State of Washington an individual is held to answer.

As stated earlier, preliminary hearings in District Court pursuant CrRLJ 3.2.1.(g) are not to determine whether probable cause exists that a crime has been committed as is standard practice in California for example, also see Gerstein v.Pugh,(420 U.S. 103),but to determine whether the conduct charged is a felony. CrRLJ 3.2.1.(g)

If individuals are detained in jail and held by formal charge , to mean a written statement sufficient to support a prosecution and thus faced with the prosecutorial forces of an organized society they are effectively "held to answer". Please see the criminal complaint filed in Snohomish County District Court Appendix H. This document held Dowdney to answer for infamous conduct. State v. Striker, 87 Wn.2d 870,872-77;557 P2d 847 (1976)(abrogated or are the principals still alive ?); State v. Harris, 130 Wn.2d 35,42-44;921 P2d 1052 (1996)(time for trial begins from when held to answer by the State); Rothgery v. Gillespie County,(554 U.S. 191, 207-08,223 (2008))(it would defy common sense to say that a criminal prosecution has not commenced against an incarcerated defendant awaiting preliminary hearing); U.S. v Marion,(404 U.S. 307,321 (1971)(a charged defendant should trigger statutory speedy trial); Kirby v. Illinois,(406 U.S. 682 (1972)(formal charges commence prosecution); U.S. Const. amend V(Held to answer for infamous crime).

What is now taking place with regards to CrRLJ 3.2.1(g) is precisely what the late great Justice Harland warned against in his scathing decent in Hurtado v. California, in that grand jury indictments as outlined by our founding fathers prevents arbitrary action. (110 U.S. at 538-58 (1884)) also see U.S. Const. amend V and Magna Charta.

CrR 3.3 protects the Constitutional right to a speedy trial, strict rule applies. Striker and progeny.

University of Washington Law Professor who, as the respected Mr Fine, was also on the 2003 rule task force, Mr Conrad stated in the public comment of the proposed amendment of CrR 3.3:

> " After looking at the language again, I believe it should also include language indicating what ever event occurs earlier should commence the time for trial rules." Appendix E

(c) Upon being held to answer, individuals are entitled to due process and to have that process administered equally.

Individuals formally charged by information in Superior Court within 72 hours of arrest and detained in jail CrR 3.2.1.(f), must be arraigned within 14 days thus triggering the time for trial period. CrR 4.1(a)(1), CrR 3.3(b)(1)(trial within 60 days of commencement)

Individuals initially charged with the exact same conduct and detained in jail in District Court and ultimately charged in Superior Court will not be

arraigned for up to forty four (44) days, 30 days in District Court then 14 days to arraign after information is filed, which then triggers the commencement of time for trial.

During this 44 days of stagnancy, one has no counsel, access to discovery, ability to preserve evidence, and in Dowdney's case the ability to participate in his own defence.(Dowdney was pro se upon his CrRLJ 3.2.1(d)(1) hearing and objected to the District Court filing, despite his motions was never heard in District Court) see Wash. Const art 1 § 22(right to defend in person),Wash. Const. art 1 § 10 (Unnecessary Delay)

Under Washington State and the Federal Constitutions individuals must be afforded equal protection of the laws and policies concerning Due Process and Liberty.

Wash. Const art 1 § 3:

" No person shall be deprived of life, liberty or property without due process of law. "

U.S. Const. amend. V:

" not be deprived of life, liberty or property without due process of law."

U.S. Const. amend. XIV

" nor shall any state deprive any person of life, liberty or property without due process of law "

Once liberty has been compromised due process attaches.

That Due Process needs to be administered equally.

Wash. Const. art 1 § 12:

> " No law shall be passed granting to any citizen, class of citizen, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens.."

U.S. Const. amend. XIV:

> " No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ....nor deny any person within its jurisdiction the equal protection of the laws.."

Individuals who's liberty is compromised, detained in jail are entitled to due process concerning a fair trial and to have that process administered equally . Individuals detained in jail and charged in District Court for the same conduct as those individuals charged and detained jail in Superior Court deserve equal protection.

The suggested amendment to CrR 4.1 ensures equal curtailment of liberty and a fair trial prior to trial.

Conclusion

Admittedly, the suggested amendments proposed create a fairly labor intensive process when filing a felony complaint in District Court, however, upon viewing Appendix H it is plain to see that the conduct

proscribed by statute as a 'felony' needed not a hearing to determine such, nor was going to ever be pled down to a misdemeanor. A result of filing virtually every criminal case in District Court first.

Proponent respectfully disagrees that the 2003 time for trial task force felt that time spent in District Court as a result of willful dilatory action for those held to answer was of minimal consequence.

In all fairness, Snohomish County does not utilize the entire possible 44 days the current rule allows, however, where does the line draw ?, a slippery slope indeed.

CrR/CrRLJ 3.2.1.(f) dictate formal charges within 72 hours of arrest and detention, the State could always opt to file felonies in Superior Court by Information.

" A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government. "

Wash.Const art 1 § 32

23 Respectfully Submitted this day of August, 2019.

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

General rule 9

GENERAL RULE 9

Appendix A

Published Proposed amendment to CrR 3.3

2018

(C) the service member is permanently transferred out of the jurisdiction pursuant to military orders, except that if the service member has been assigned to an unaccompanied remote assignment with no dependents authorized, the military spouse attorney may continue to practice pursuant to the provisions of this rule until the service member is assigned to a location with dependents authorized;

(D) the military spouse attorney permanently relocates to another jurisdiction for reasons other than the service member's permanent transfer outside of the jurisdiction;

(E) the military spouse attorney is admitted to the general practice of law in Washington State under any other rule;

(F) the military spouse attorney requests termination; or

(G) the military spouse attorney fails to meet annual licensing requirements as an active member of the Bar.

In the event that any of the events listed in this paragraph occur, the attorney licensed under this rule shall notify WSBA of the event in writing within 60 days of the date upon which the event occurs and upon such notification, the license shall be terminated. If the event occurs because the service member is deceased or disabled, the attorney shall notify WSBA within 180 days of the date upon which the event occurs.

(9) *Mandatory Disclosures.* Each attorney admitted to practice under this rule shall report to WSBA, within 30 days:

(A) any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the attorney has been admitted to the practice of law; or

(B) the imposition of any permanent or temporary professional disciplinary sanction by any federal or state court or agency.

(10) An attorney's authority to practice under this rule shall be suspended when the attorney is suspended or disbarred in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which the attorney has been admitted to practice.

(11) *Records.* WSBA shall maintain a record of all attorneys admitted under this rule.

Purpose

The proposed rule seeks to accommodate military spouse attorneys while supporting their spouses' military service. It achieves this purpose by modifying licensure requirements for military spouse attorneys who reside in the state due to military orders.

CrR 3.3

TIME FOR TRIAL

(a)-(b) [Unchanged.]

(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).

(2) [Unchanged.]

(d)-(h) [Unchanged.]

Purpose

The Supreme Court received a request from Mr. Stephen Dowdney to amend CrR 4.1 in order to eliminate a perceived delay that results from filing felony charges in district court and the subsequent refiling of the same charge in superior court. The Supreme Court Rules Committee referred the proposal to interested groups, including the Washington State Bar Association Council on Public Defense (CPD) to review and provide feedback.

As a result of that review, the CPD suggested an amendment to CrR 3.3 as a simpler way to address the issue of delay when felony charges are filed in district court and refiled in superior court.

GENERAL RULE 9

Appendix B

WASHINGTON BAR ASSOC. COMMENTS ON 2018 PROPOSED AMENDMENT TO CrR 3.3

WASHINGTON STATE
BAR ASSOCIATION
Office of the Executive Director
Paula C. Littlewood, Executive Director

October 5, 2018

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

Re: Input Regarding Suggested amendments to CrR 4.1 – Arraignment

Dear Justice Johnson,

Please find the Council on Public Defense's memo and suggested amendments in response to your March 23, 2018, request for input on the suggested amendments to CrR 4.1 – Arraignment attached. After considering the issue, the Council on Public Defense instead recommends amending CrR 3.3, which the Council believes will better address the concerns raised by the earlier proposal relating to CrR 4.1. The WSBA Board of Governors approved submitting this proposal at their September 2018 meeting. The position is solely that of the Council on Public Defense.

The WSBA Council on Public Defense unites members of the public and private defense bar, the bench, elected officials, prosecutors, and the public to address new and recurring issues impacting the public defense system and the public that depends upon it and we appreciate the request for their consultation on this matter.

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

Sincerely,

Paula C. Littlewood

cc: William D. Pickett, President
Julie Shankland, Interim General Counsel
Daryl Rodrigues, Chair, Council on Public Defense
Diana Singleton, Access to Justice Board Manager

1325 4th Avenue | Suite 600 | Seattle, WA 98101-2539 | 800-945-WSBA | 206-443-9722 | paulal@wsba.org | www.wsba.org

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

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[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 if 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.

GENERAL RULE 9

Appendix C

SNOHOMISH COUNTY PUBLIC DEFENDER ASSOC. COMMENT ON 2018 PROPOSED RULE CHANGE TO CrR 3.3

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

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 this 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,

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

GENERAL RULE 9

Appendix D

WASHINGTON DEFENDER ASSOC. COMMENT ON THE 2018 PROPOSED RULE CHANGE TO CrR 3.3

WASHINGTON DEFENDER ASSOCIATION

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

110 Prefontaine Pl S, Ste 610 Seattle, WA 98102 | Tel: 206-623-4321 | Fax: 206-623-5420 | www.defensenet.org

GENERAL RULE 9

Appendix E

UNIVERSITY OF WASHINGTON LAW PROFESSOR MARK CONRAD'S

COMMENT ON THE 2018 PROPOSED AMENDMENT TO CrR 3.3

On Tue, Jan 29, 2019 at 11:57 AM OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> wrote:

Your comments have been forwarded.

Thank you,

Receptionist

Supreme Court Clerk's Office

360-357-2077

From: Mark Conrad [mailto:mr.markconrad@gmail.com]
Sent: Tuesday, January 29, 2019 11:55 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: CrRLJ 3.3 - Time for Trial

I helped draft this amendment. After looking at the language again, I believe it should also include language indicating what ever event occurs earlier should commence the time for trial rules.

Mark R. Conrad

J.D. 2014

University of Washington School of Law

c: (206) 979-5337

GENERAL RULE 9

Appendix F

SNOHOMISH COUNTY PROSECUTOR'S COMMENTS ON THE 2018 PROPOSED AMENDMENT TO CrR 3.3

* Adam Cornell
* Seth Fine

Snohomish County
Prosecuting Attorney
Criminal Division
Laura E. Twitchell, Chief Deputy
Adam Cornell, Prosecuting Attorney

Mission Building, 1st Floor
3000 Rockefeller Ave., M/S 504 | Everett, WA 98201-4046
(425) 388-3333 | Fax (425) 388-3572

www.snoco.org

March 13, 2019

Hon. Mary Fairhurst
Supreme Court of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed amendment to CrR 3.3

Dear Chief Justice Fairhurst,

I am writing in opposition to the proposed amendment to CrR 3.3.

The existing version of CrR 3.3 was drafted by a Task Force that included judges, legislators, prosecutors, defense attorneys, and crime victim advocates. The prior version of the rule counted "time elapsed in district court" against the allowable time for trial. The Task Force unanimously recommended eliminating that provision from the rule. The Task Force explained that this amendment "ensures that cases will have adequate time to be prepared for trial in superior court and reduces the possibility of coordination problems between different court levels." (The Final Report of the Task Force is available on the Washington Court's website.) This court adopted the Task Force's recommendation.

Nothing that has happened subsequently has provided any reason for re-considering this decision. CrR 3.3 allows only 60 days for trial when a defendant is detained in jail. Many things must happen within that time, including an omnibus hearing and pre-trial motions. 60 days is at best a minimal amount of time for these pretrial proceedings. District court proceedings do not eliminate the need for them. If the allowable time is shortened, the usual result will be a continuance for necessary pre-trial proceedings.

The proposed rule also sets a procedural trap. The time for trial in Superior Court would often start running before any charges have been filed there. In particular, CrRLJ 3.2.1(g)(3) allows the parties to "stipulate in writing that the case shall remain in the

court of limited jurisdiction for a specified time." But under the proposed rule, such a stipulation would not extend the allowable time for trial in Superior Court. So a stipulated delay could result in mandatory dismissal of charges.

The proposed rule is also drafted in a way that leaves important questions unanswered. It defines a commencement date under two circumstances: (1) if "the charge is initially filed into superior court"; (2) if "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 problem is that these are not the only two possibilities. What happens if a felony complaint is filed but the defendant is *not* detained in jail? What happens if a preliminary hearing *is* held? The proposal rule does not specify a commencement date under those circumstances.

In short, the proposed rule would establish unrealistic deadlines, create a procedural trap, and create confusion in many situations. Similarly problems led this court to reject a former version of the rule that contained comparable provisions. No reason has been shown to reconsider that decision.

Very truly yours,

ADAM CORNELL
Snohomish County Prosecutor

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 8:05 AM
To: Tracy, Mary
Subject: FW: Comment on proposed amendment to CrR 3.3

From: Seth Fine [mailto:dpafine@yahoo.com]
Sent: Monday, April 29, 2019 9:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed amendment to CrR 3.3

In 2003, this court convened a broadly-based Task Force to review CrR 3.3. I had the honor of serving on that Task Force. It unanimously recommended that time elapsed in district court not be counted against the allowable time-for-trial in Superior Court. The Task Force reasoned that 60 days is a minimal amount of time to conduct necessary pre-trial proceedings. Shortening that time creates procedural traps, without genuinely shortening the time it will take to bring a case to trial. The Report is on this court's website at https://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=Consensus#A9.

Now a much narrower group has recommended reverting to the old rule. They have not, however, pointed to anything that undercuts the Task Force's reasoning. Then as now, few cases in Superior Court can be brought to trial in less than 60 days from arraignment.

The proposed amendment is also badly written. It sets a commencement date under two circumstances: (1) if the charge is initially filed into Superior Court, (2) if the charge is filed into district court, the defendant is detained in jail, and a preliminary hearing is not held. What happens if neither of these circumstances occur? What happens if a charge is filed into district court and the defendant is not detained in jail? Or if a preliminary hearing is held? The rule's failure to address these situations would lead to confusion and uncertainty.

The amendment would also establish a procedural trap. The rule places the duty on the court to schedule a timely trial. Yet under the amendment, the time for trial can be running in Superior Court even though no charges have been filed there. How can the Court perform its duty to schedule a timely trial on a charges that haven't been filed?

This amendment received very little opportunity for public comment. It was reviewed by the Council on Public Defense -- even though it has little to do with that Council's mission. The Council violated its own rules by approving it at a meeting where too few members attended. The Board of Governors then handled it as a "late item," with no advance public notice. The Board does not seem to have been aware of the Task Force report or the opposition to the amendment.

Nothing has happened to justify a change in this rule. The amendment should be rejected.

Seth Fine

GENERAL RULE 9

Appendix G

HON. JUDGE R. KESSLER'S COMMENT ON THE 2018 PROPOSED AMENDMENT TO CrR 3.3

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, November 20, 2018 8:06 AM
To: Tracy, Mary
Subject: FW: Comment on proposed amendment to CrR 3.3

From: bjorkess@gmail.com [mailto:bjorkess@gmail.com]
Sent: Monday, November 19, 2018 9:30 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed amendment to CrR 3.3

As Judge Sweeney stated in *State* v. *Lackey*, 153 Wn.App. 791, 793 (2009), the current time for trial rule is "vacuous." Prior to the adoption of the current rule, there was a meaningful process. The Supreme Court, in many cases, had held that court congestion alone was not a basis to try a case beyond the expiration date. Pierce County Superior Court paid no attention to the Supreme Court dictates. As a result, the Court of Appeals was obliged to order dismissal of a sexual assault case because the Superior Court ignored the holdings. The Superior Court and the Prosecuting Attorney expressed outrage, the media bought their outrage and the Supreme Court appointed a task force to study the rule. The current rule is the result. It provides meaningless standards such that almost any continuance granted by the court, whether requested by defense counsel or the prosecutor, results in an extension of the time for trial expiration date; all the trial court needs to do is declare that the continuance is necessary "in the administration of justice," and "and the defendant will not be prejudiced in the presentation of his or her defense," which is essentially an adoption of the constitutional speedy trial standard. Tinkering with the rule, as this proposal recommends, will do nothing to give it any grit.

Ronald Kessler
King County Superior Court Judge, ret.

GENERAL RULE 9

Appendix H

CRIMINAL COMPLAINT FILED ON DOWDNEY IN DISTRICT COURT

IN THE SNOHOMISH COUNTY DISTRICT COURT, STATE OF WASHINGTON
EVERETT DIVISION

STATE OF WASHINGTON,
Plaintiff,
v.
DOWDNEY, STEPHEN PALMER,
DOB: 10/26/1970,
Defendant

No. 2714A16F

CRIMINAL COMPLAINT

FELONY DISMISSAL DATE:
APRIL 1, 2016

Co-defendants:

Comes now MARK K. ROE, Prosecuting Attorney for Snohomish County, Washington, and by this complaint, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant with the following crime(s) committed in the County of Snohomish, State of Washington.

COUNT 1: FIRST DEGREE ROBBERY (Financial Institution - on or after 6/13/2002), committed as follows:
That the defendant, on or about the 11th day of March, 2016, with intent to commit theft, did unlawfully take personal property of another, to-wit: LAWFUL U.S. CURRENCY from the person or in the presence of [redacted] AND/OR [redacted] who had an ownership, representative, or possessory interest in THE LAWFUL U.S. CURRENCY, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to [redacted] AND/OR [redacted], [and in the commission of said crime and in immediate flight therefrom, the defendant DISPLAYED WHAT APPEARED TO BE A FIREARM OR OTHER DEADLY WEAPON and said crime was committed within and against a bank, trust company, mutual savings bank, credit union, or savings and loan association that was located within the State of Washington and was lawfully engaged in business in this state and was authorized by law to accept deposits in this state; proscribed by RCW 9A.56.200, a felony.

ORIGINAL

COUNT 2: ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE , committed as follows:
That the defendant, on or about the 11th day of March, 2016, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and siren; proscribed by RCW 46.61.024(1), a felony.

COUNT 3: POSSESSION OF STOLEN VEHICLE , committed as follows:
That the defendant, on or about the 11th day of March, 2016, did knowingly receive, retain, possess, conceal, and dispose of a stolen motor vehicle, to-wit: A JEEP CHEROKEE, knowing that this property had been stolen, and did withhold and appropriate this property to the use of a person other than the true owner or person entitled thereto; proscribed by RCW 9A.56.068, a felony.

DATED the 15th day of March, 2016

CRAIG S MATHESON, WSBA #: 18556
Deputy Prosecuting Attorney

Address(es):
21510 45TH AVE SE BOTHELL, WA 98021
4301 219 ST SW MOUNTLAKE TERRACE, WA 98043

HT: 6'0"	DOB: 10/26/1970	SID: WA14264173
WT: 145	SEX: Male	FBI: 9794KA2
EYES:Brown	RACE: White / Caucasian	DOC: 971036
HAIR: Brown	DOL:	DOL STATE: WA
DOL REPORT CODES:		
ORIGINATING AGENCY: Snohomish County Sheriff's Office		AGENCY CASE#: 16038193

GENERAL RULE 9

Appendix I

ACTUAL HANDOUT PROVIDED INDIVIDUALS IN SNOHOMISH COUNTY

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

GENERAL RULE 9

Appendix J

ACTUAL ATTACHMENT TO CRIMINAL COMPLAINT WHEN SLID UNDER CELL DOOR WHILE SLEEPING

Snohomish County

District Court
Everett Division

Roger M. Fisher, *Judge*
Tam Bui, *Judge*

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

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

SNOHOMISH COUNTY DISTRICT COURT
FELONY COMPLAINT
INFORMATION SHEET

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.

GENERAL RULE 9

Appendix K

CrRLJ 3.2.1

CrR 4.1

(Current versions)

RULE 3.2.1. PROCEDURE FOLLOWING WARRANTLESS ARREST—PRELIMINARY HEARING

(a) **Probable Cause Determination.** A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person's arrest, unless probable cause has been determined prior to such arrest.

(b) **How Determined.** The court shall determine probable cause on evidence presented by a peace officer or prosecuting authority in the same manner as provided for a warrant of arrest in CrRLJ 2.2. In making the probable cause determination, the court may consider an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony, and further, may examine under oath the affiant and any witnesses the affiant may produce. Sworn testimony, including telephonic statements, shall be recorded electronically, stenographically, or by any reliable method. The written or recorded evidence considered by the court may be hearsay in whole or part. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations. The court's probable cause determination may be recorded through any reliable method. If the court finds that release without bail should be denied or that conditions should attach to the release on personal recognizance, other than the promise to appear for a court hearing, the court shall proceed to determine whether probable cause exists to believe that the accused committed the crime alleged, unless this determination has previously been made by a court.

(c) **Court Days.** For the purpose of section (a), Saturday, Sunday and holidays may be considered judicial days.

(d) **Preliminary Appearance.**

(1) *Adult.* Unless an accused has appeared or will appear before the superior court for a preliminary appearance, any accused detained in jail must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day.

(2) *Juveniles.* Unless an accused has appeared or will appear before the superior court for a preliminary appearance, any accused in whose case the juvenile court has entered a written order declining jurisdiction and who is detained in custody, must be brought before a court of limited jurisdiction as soon as practicable after the juvenile court order is entered, but in any event before the close of business on the next court day.

(3) *Unavailability.* If an accused is unavailable for preliminary appearance because of physical or mental disability, the court may, for good cause shown and recorded by the court, enlarge the time prior to preliminary appearance.

(e) **Procedure at Preliminary Appearance.**

(1) At the preliminary appearance, the court shall provide for a lawyer pursuant to rule 3.1 and for pretrial release pursuant to rule 3.2, and the court shall orally inform the accused:

(i) of the nature of the charge against the accused;

(ii) of the right to be assisted by a lawyer at every stage of the proceedings; and

(iii) of the right to remain silent, and that anything the accused says may be used against him or her.

(2) If the court finds that release should be denied or that conditions should attach to release on personal recognizance, other than the promise to appear in court at subsequent hearings, the court shall proceed to determine whether probable cause exists to believe that the accused committed the offense charged, unless this determination has previously been made by a court. Before making the determination, the court may consider affidavits filed or sworn testimony and further may examine under oath the affiant and any witnesses he or she may produce. Subject to constitutional limitations, the finding of probable cause may be based on evidence which is hearsay in whole or in part.

(f) **Time Limits.**

(1) Unless a written complaint is filed or the accused consents in writing or on the record in open court, an accused, following a preliminary appearance, shall not be detained in jail or subjected to conditions of release for more than 72 hours after the accused's detention in jail or release on conditions, whichever occurs first. Computation of the 72–hour period shall not include any part of Saturdays, Sundays, or holidays.

(2) If no complaint, information or indictment has been filed at the time of the preliminary appearance, and the accused has not otherwise consented, the court shall either:

(i) order in writing that the accused be released from jail or exonerated from the conditions of release at a time certain which is within the period described in subsection (f)(1); or

(ii) set a time at which the accused shall reappear before the court. The time set for reappearance must also be within the period described in subsection (f)(1). If no complaint, information or indictment has been filed by the time set for release or reappearance, the accused shall be immediately released from jail or deemed exonerated from all conditions of release.

(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 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).

(4) A preliminary hearing shall be conducted as follows:

(i) the defendant may as a matter of right be present at such hearing;

(ii) the court shall inform the defendant of the charge unless the defendant waives such reading;

(iii) witnesses shall be examined under oath and may be cross-examined;

(iv) the defendant may testify and call witnesses in the defendant's behalf.

(5) If a preliminary hearing on the felony complaint is held and the court finds that probable cause does not exist, the charge shall be dismissed, and may be refiled only if a motion to set aside the finding is granted by the superior court. The superior court shall determine whether, at the time of the hearing on such motion, there is probable cause to believe that the defendant has committed a felony.

(6) If a preliminary hearing is held, the court shall file the record in superior court promptly after notice that the information has been filed. The record shall include, but not be limited to, all written pleadings, docket entries, the bond, and any exhibits filed in the court of limited jurisdiction. Upon written request of any party, the court shall file the recording of any testimony.

[Amended effective July 1, 1992; September 1, 1995; September 1, 2002; September 1, 2014.]

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, 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 affect 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 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 not 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 defendant, unless the reading is waived, and a copy shall be given to defendant.

[Amended effective September 1, 2003.]

Comment

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

From: Bob Boruchowitz <rcboru@gmail.com>
Sent: Friday, September 13, 2019 12:54 PM
To: Bonnie Sterken <bonnies@wsba.org>
Cc: Stearns Travis <travisdstearns@gmail.com>; Sophia.ByrdMcSherry@opd.wa.gov; Eileen Farley <Eileen.Farley@nwaj.org>; Justin Bingham <jbingham@spokanecity.org>; Rodrigues Daryl <daryl.rodrigues@outlook.com>
Subject: Re: CPD meeting September 20

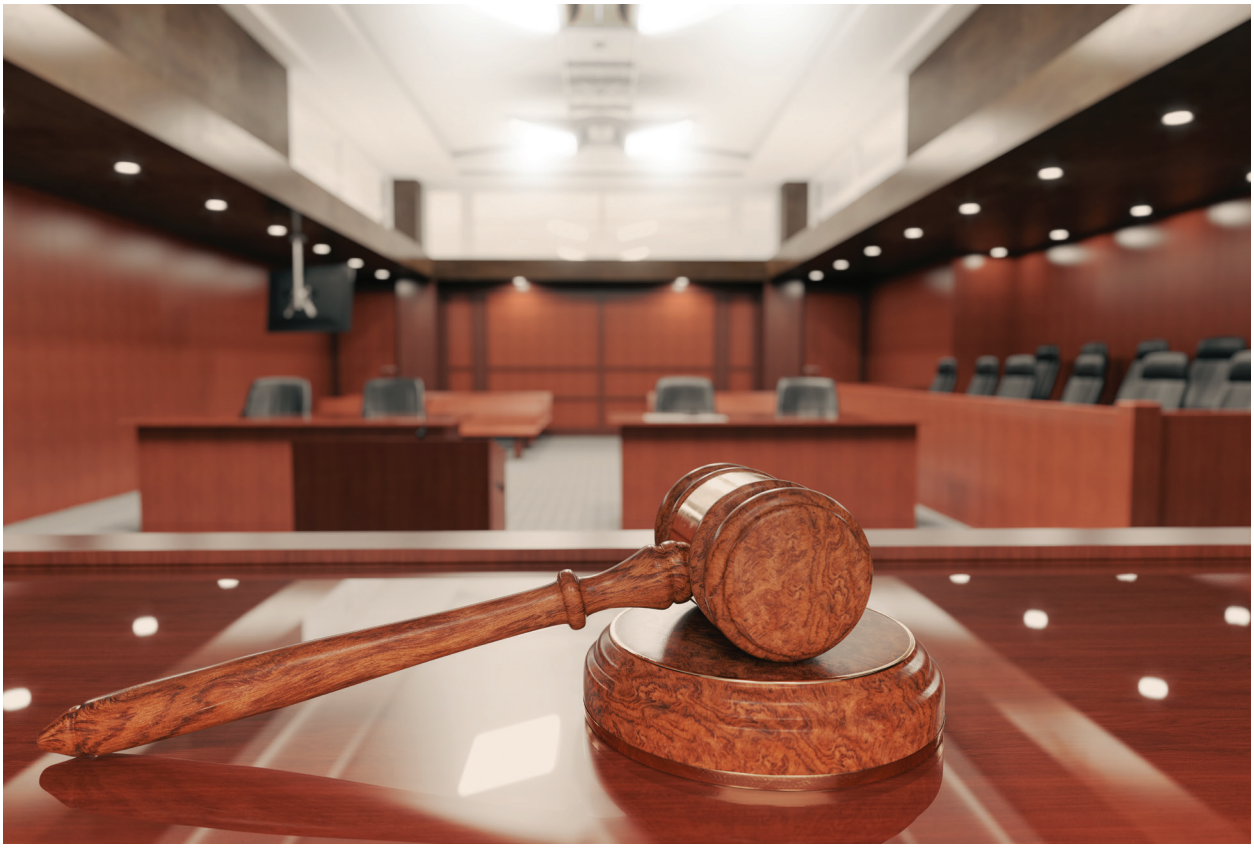
Bonnie
The standards committee had a good meeting yesterday and we may have something for action in December but no Sept 20
I expect to be on a plane Sept 20, but here is the report:

The Standards Committee had a good meeting in person (with some members on the phone) on September 12. We are developing Performance Guidelines for Persistent Offender cases to go with the draft Workload Standard we have developed. We have been seeking input from practitioners. We also are reviewing whether to address similar guidelines and a standard for sex offenses that have ISRB sentences. We plan to meet November 6 in person and by phone to see if we can finalize the Guidelines and Standard for Persistent Offender cases. I anticipate that we will need one more meeting at least to do that.

Thank you
Best wishes
Bob Boruchowitz

DEFENDER RESOURCE PACKET

Defender Advocacy for Pretrial Release



August 2019 | Contact: CPD@wsba.org

WASHINGTON STATE
BAR ASSOCIATION
Council on Public Defense

August 30, 2019

Defenders,

The Pretrial Reform Committee of the WSBA Council on Public Defense ("committee") is working to support bail reform in Washington. The committee has drafted the attached client interview form and compiled packet as a resource for defenders preparing for initial appearance and detention hearings. The form identifies categories of relevant client information pursuant to CrR 3.2 to be presented to the court in support of arguments for a client's release. A comprehensive knowledge of the client and her background is the most important tool a lawyer possesses when litigating for release.

The pretrial detention population is approximately **60-70%** of the jail population in counties across Washington. Thousands of clients who have not been convicted of a crime are locked in jail because they cannot afford to pay the bail set by the judge. Racial disparities are significant and clients of color are disproportionately in jail before trial at a higher rate, and often assigned higher bail amounts, than white clients.

A movement for pretrial and bail reform has been building across Washington. Significant work is underway to reform bail practices, significantly reduce pretrial detention rates and the use of money bail, and to improve case outcomes for clients. Defenders have a critical role in these reforms and the necessary culture changes. The CPD is working to support defenders in these efforts.

As defenders know best, the pretrial detention decision is one of the most important made in a case. When a client is detained pretrial, they are pressured to plead guilty to get out of jail and avoid losing their jobs, housing, child custody, medications, among other consequences. Many clients detained pretrial are also more likely to be sentenced to jail and to face longer sentences. Lawyers make a significant difference at bail hearings. Litigating pretrial release is important because it affects both short-term and long-term outcomes for the client.

We have a strong court rule in Washington that generally *mandates the release of people accused of crimes before trial without financial conditions*, but it is routinely not followed or implemented consistently in courts around the state. CrR 3.2 and CrR(LJ) 3.2 start with a **presumption of release** for all clients and require that money bail only be imposed as a last resort *after* a court finds no less restrictive conditions can be imposed to assure court appearance, prevent the likely commission of a violent crime, and/or noninterference with justice. The rule also requires the court to consider a client's financial resources and ability to pay when setting any bail amount. The use of money bail is supposed to be the last resort, not the first and only resort, as is common practice in many courts. Statewide advocacy efforts are underway to enforce the rule and change court practices to guarantee a meaningful presumption of release.

The committee is also working to support defenders' efforts to tackle the structural barriers that often prevent defenders from meeting with clients and being prepared for court before the docket begins. These barriers such as having sufficient access to clients and case information, as well as adequate time to meet with clients and prepare structured release plans are widespread throughout the state.

This defender resource packet includes the following documents: 1) client interview form to prepare for the First Appearance hearing; 2) CrR(LJ) 3.2 defender advocacy sheet; 3) sample CrR(LJ) 3.2 release order to request the judge to issue in every case; 4) list of structural barriers identified by defenders in some jurisdictions around the state; and 5) a recent CrR(LJ) 3.2 bench card that was distributed to judges statewide.

If you have feedback or suggestions to improve these resources or would like to be involved in this pretrial reform work, please contact the committee at CPD@wsba.org. We would love to hear from you.

Onward!

DEFENDER RESOURCE PACKET

Defender Advocacy for Pretrial Release

> "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."
>
> **United States v. Salerno**
> 481 U.S. 739, 755 (1987)

CONTENTS

August 2019 | Contact: CPD@wsba.org

ATTACHMENT A

Client Interview Form

Client Name: _____ Alternate person: _____

Address: _____ Address: _____

Phone #: _____ Phone: _____

Cause #: _____ **PC for:** _____

_____ **CW:** _____

CrR 3.2 & CrRLJ 3.2 PRESUMPTION OF RELEASE without conditions

1 – CLIENT IS NOT A FLIGHT RISK – court required to impose least restrictive (3.2(b))

RELEVANT FACTORS INCLUDE:	
Community Ties (family, people who support you, how long in this community)?	
Alternate housing options for DV or violent crime?	
Work, school, volunteer? Student: athletics, clubs, other extracurricular?	
Financial situation & inability to pay bail (TANF/SNAP, food assistance, cash assistance, SSI/SSD)?	
Health and social welfare issues (community support services)?	
Medical/dental/psych appointments, treatment or medications? Diagnoses (physical/mental)?	
Family responsibilities (minor children, special needs child, care for elderly)?	
Transportation plan? Community/Social engagement?	
Who can help you with release conditions/appearances? (get address and phone number)	
Court Appearance history? Current PC relevant to flight risk? Minimal conviction history, *de minimus*?	
Other holds? (probation, DOC, other courts/jurisdictions, extradition, etc.)	
FTA/Warrant Explanation? (summons – not receive/mail returned; i/c somewhere else; in-patient; not just LFOs)	

Client: _____ **Cause #:** _____

2 – No *substantial* danger client will interfere with witnesses or commit violent crime

State argues "COMMUNITY SAFETY"	*Consider offering/agreeing to conditions of release:*
State argues violent criminal history: ☐ Class A ☐ Assault ☐ Manslaughter ☐ Extortion ☐ Indecent w/forcible ☐ Robbery ☐ Kidnapping ☐ Drive-by ☐ Arson ☐ Veh. Hom/Asslt.	Client agrees to report regularly and remain under supervision of: ☐ officer of the court (PTS); ☐ other person (family member or employer [#7]); or ☐ agency (private EHM/GPS company); AND/OR ☐ Client agrees not to possess dangerous weapons/firearms
State argues lengthy criminal history	Is the conviction history relevant? (i.e., similar) Is the conviction history OLD?
State argues past and present *threats to* and/or *interference with* CW/Witnesses	Client agrees to: ☐ Stay at least 1,000 feet away from person/location; ☐ Not contact (person/business); ☐ Not possess dangerous weapons/firearms
State argues client will commit new crimes while on PTR/probation/DOC?	Client agrees to: ☐ Maintain law abiding behavior ☐ Report to PTS/probation/DOC w/in 48 business hrs. of release ☐ Update her contact information with PTS/probation/DOC w/in 48 business hours of release
State argues past and/or present use *or* threat to use deadly weapon/firearm?	Client agrees not to possess dangerous weapons and/or firearms. • How *old* is the past use/threat? •
State argues client is on Probation or DOC at the time of alleged offense – already supervised and cannot follow the rules.	Client agrees to: ☐ Not consume alcohol or non-Rx drugs; ☐ Report within 48 business hours of release; ☐ Update her contact information with probation/DOC w/in 48 business hours of release

Client: _____ **Cause #:** _____

3.2 (b) FTA – Least Restrictive Conditions	3.2 (d) Substantial Danger – Least Restrictive Conditions
1. Δ in 'custody' of person/org who will supervise	1. Prohibit Δ from approaching/communicating w/specific persons or classes of persons
2. Restrict Δ's travel, association, residence	2. Prohibit Δ from certain areas (i.e., w/in 1,000 feet of CW's house, workplace, school …)
6. Δ i/c at night or on GPS/SCRAM	3. Prohibit Δ from possession dangerous weapons/firearms; no alcohol or drugs not Rx
7. Any other condition deemed reasonably necessary to assure appearance	4. Require Δ to report regularly to and remain under supervision of an officer of the court (PTS) or other person or agency
	5. Prohibit Δ from committing violation of criminal law
	7. Δ in 'custody' of person/org who will supervise
	8. Restrict Δ's travel, association, residence
	9. Δ i/c at night or on GPS/SCRAM
	10. Any other condition deemed reasonably necessary to assure appearance

Notes For Trial Counsel:

ATTACHMENT B

Using CrR(LJ) 3.2 in Practice

Using CrR(LJ) 3.2 in Practice

The Presumption of Innocence means a Presumption of Pretrial Release

CrR(LJ) 3.2 provides that "[a]ny person, other than a person charged with a capital offense, ***shall... be ordered released*** on the accused's personal recognizance pending trial..."

This presumption can only be defeated if the Court finds either

(1) the accused's personal recognizance will not "reasonably assure" their appearance at future court dates,

or

(2) "there is shown" by the Prosecutor "a likely danger* that the accused

(a) will commit a **violent** crime+, or
(b) will seek to intimidate witnesses, or... unlawfully interfere with the administration of justice."

While the Prosecutor bears the burden of presenting evidence to overcome the presumption of pretrial release, CrRLJ 3.2 *requires the Court to consider all relevant factors,* most of which are mitigating:

Mitigating Factors for Future Appearance:

- History of response to legal process, particularly court orders to appear;
- Community ties, especially:
  - Length of residence;
  - Family ties and relationships;
  - Employment status and history;
  - Enrollment in school or job training;
  - Participation in counseling program;
  - Participation in cultural activities;
  - Receipt of government assistance;
- Reputation, character, and mental condition;
- Willingness of responsible community members to vouch for the accused's reliability and assist the accused in complying with any conditions of release;
- Any other factors indicating the accused's ties to the community.

Other Factors for Future Appearance:

- Criminal record, if any;
- Nature of the charge, if relevant to the risk of nonappearance.

Mitigating Factors for Showing of Substantial Danger:

- Reputation, character, and mental condition;
- Willingness of responsible community members to vouch for the accused's reliability and assist the accused in complying with any conditions of release;
- History of compliance with pretrial conditions, probation, or parole;
- Nature of the charge (if nonviolent);
- Nonviolent criminal record.

Other Factors for Showing of Substantial Danger:

- History of committing offenses while on pretrial release, probation, or parole;
- Nature of the charge (if violent);
- Violent criminal record;
- Any evidence of threats to victims or witnesses, either past or present;
- Record of using deadly weapons or firearms, especially to victims or witnesses.

*A likely danger means the accused is more likely than not to commit a violent crime or interfere with the administration of justice. The mere possibility they will do so is not enough for the judge to impose conditions on pretrial release.

+Any likelihood the accused will commit a nonviolent crime—other than witness intimidation—is irrelevant.

Using CrR(LJ) 3.2 in Practice

Defense attorneys can and should use every mitigating factor to demonstrate their client does not pose either a risk or nonappearance or a risk of committing a violent crime, intimidating witnesses, or otherwise interfering with the administration of justice. The Court should consider each of these factors on the record before setting any conditions of pretrial release.

If the Court—upon full consideration of all relevant factors—finds that pretrial release on the accused's personal recognizance will be insufficient, the Court may impose conditions on pretrial release.

If the accused poses a flight risk, the Court **must impose the least restrictive** of the following conditions (or combination of conditions) necessary to reasonably assure their future appearance:

- Place the accused in the custody of a designated person or organization agreeing to supervise the accused pretrial;
- Place restrictions on the travel, association, or living arrangements of the accused pretrial;
- Require the accused to return to custody during specified hours (day release);
- Require the accused to be placed on electronic monitoring, if available;
- Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

If the accused poses a likely danger of committing violent crime or interfering with the administration of justice, the **Court may impose any or all** of the following conditions necessary to mitigate that risk:

- Place the accused in the custody of a designated person or organization agreeing to supervise the accused pretrial;
- Place restrictions on the travel, association, or living arrangements of the accused pretrial;
- Require the accused to return to custody during specified hours (day release);
- Require the accused to be placed on electronic monitoring, if available;
- Prohibit the accused from:
  - approaching or communicating with particular persons or classes of persons (no contact);
  - going to certain geographical areas or premises (no entry);
  - possessing any dangerous weapons or firearms, or engaging in certain described activities (no weapons);
  - possessing or consuming any intoxicating liquors or drugs not prescribed to the accused (no drugs/alcohol);
  - committing any violations of criminal law;
- Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;
- Impose any condition other than detention deemed reasonably necessary to assure noninterference with the administration of justice and reduce danger to others or the community.

MONEY BAIL IS A CONDITION OF LAST RESORT.

The Court may impose bail **ONLY IF** the Court finds no less restrictive condition or combination of conditions are sufficient to reasonably assure the accused's appearance or mitigate the likelihood the accused will commit a violent crime or otherwise interfere with the administration of justice.

Bail should be determined by the accused's ability to pay, not by the nature of the charge.

The Court **MUST consider the accused's financial resources** for the purposes of setting a bail amount that will reasonably assure future appearance and the safety of the community. No one is supposed to be held on bail they cannot afford. For indigent defendants, this may mean any amount of bail is inappropriate.

Bail is not a punishment and is not meant to keep the accused detained pretrial.

The purpose of bail is to guarantee the accused will comply with all other conditions of their pretrial release and ensure their future appearance when required by the Court. **The accused remain innocent until proven guilty.**

ATTACHMENT C

Model Pretrial Release Order

IN THE MUNICIPAL COURT OF THE CITY OF _____

CITY OF _____, PLAINTIFF)
)
v.)
)
_____ , DEFENDANT)

Case # _____

ORDER ON RELEASE

Under CrRLJ 3.2(a), any person, other than a person charged with a capital offense, shall... be ordered released on the accused's personal recognizance pending trial unless the court makes at least one of three findings: a) personal recognizance will not reasonably assure the accused's appearance when required, b) there is a likely danger the accused will commit a violent crime, or c) there is a likely danger the accused will seek to intimidate witnesses or will unlawfully interfere with the administration of justice.

1. Will recognizance reasonably assure the accused's appearance when required? ☐ Yes ☐ No
   - Does the accused have ties to the community? ☐ Yes ☐ No
   - Is the accused connected with social services, treatment, or counseling? ☐ Yes ☐ No
   - Is the accused employed, enrolled in school, or engaged in treatment or social services? ☐ Yes ☐ No
   - Is there someone who will assist the accused in complying with conditions? ☐ Yes ☐ No
   - Other: _____

2. Has there been shown a likely danger the accused will commit a *violent* crime, will seek to intimidate witnesses, or will unlawfully interfere with the administration of justice? ☐ Yes ☐ No
   - Does the accused have a record of threats to victims or witnesses? ☐ Yes ☐ No
   - Does the accused have a record of interference with the administration of justice? ☐ Yes ☐ No
   - Is there evidence of present threats to or intimidation of witnesses? ☐ Yes ☐ No
   - Other: _____

The accused is to be released: ☐ without conditions upon promise to appear ☐ with conditions.
Under CrRLJ 3.2(b), if conditions are to be imposed, the "least restrictive" conditions shall be imposed.

Are financial conditions more restrictive for this accused than non-financial conditions?
☐ Yes – The Court will impose non-financial conditions. ☐ No – The Court will impose financial conditions.

Non-Financial Conditions (listed in order of restrictiveness)

☐ No criminal law violations
☐ Possess of no weapons
☐ Surrender of weapons
☐ Restrictions on travel, association, or place of abode
☐ Placement of accused in the custody of a person or organization
☐ No driving without a valid operator license and insurance
☐ No blood or BAC refusal if requested by a law enforcement officer
☐ Abstain from alcohol
☐ Abstain from marijuana
☐ Abstain from non-prescribed drugs
☐ Day reporting:
☐ telephone – 1, 3, or 5 times/week
☐ in person – 1, 3, or 5 times/week
☐ Detention by electronic home monitoring
☐ Random breathalyzers or urinalysis
☐ Scram or BA/RT
☐ Other conditions reasonably necessary: _____

Financial Conditions (listed in order of restrictiveness)

☐ $500 bail for a misdemeanor:	☐ unsecured bond	☐ appearance bond	☐ secured bond
☐ $1000 bail for a gross misdemeanor:	☐ unsecured bond	☐ appearance bond	☐ secured bond
☐ $ _____ bail:	☐ unsecured bond	☐ appearance bond	☐ secured bond

Good cause for amount exceeding $500/$1000: _____

Date: _____ _____
Judge

ATTACHMENT D

List of Structural Barriers

Structural Barriers

1) Lack of defense counsel present at initial appearance hearings

2) Inadequate access to clients and insufficient time for defenders to prepare for hearings

3) Inconsistent implementation and enforcement of CrR(LJ) 3.2 statewide

4) No access to police reports or pre-trial services reports

5) Early morning scheduling of initial appearance dockets (schedule hearings in the afternoon to allow for more preparation and time to meet with clients)

6) Defender offices not being promptly notified of new arrests and provided client names so defenders can meet clients in custody and prepare for court sooner

7) Lack of least restrictive and money bail alternatives offered

8) Failure of court to make ability to pay determination to post bail or to impose unsecured or appearance bonds that don't require collateral or the loss of money to bail agents

9) Lack of pre-trial and community-based services offered

10) Limited resources and staff support for defenders to interview clients and gather relevant information to support release arguments to the court

11) Assigning new and less experienced attorneys to initial appearance dockets (best practice is having skilled/highly trained attorneys handling these hearings)

12) Lack of automated text messaging systems that remind clients of their court dates and reduce FTAs and warrants

13) Use of pretrial risk assessment tools

ATTACHMENT E

CrR(LJ) 3.2 Bench Card Distributed to Judges

Washington Bail Law

Washington is a right to bail state. Article I, section 20: criminal defendants "shall be bailable by sufficient sureties." Except if:

- **charge is a capital crime ("when the proof is evident or the presumption great") OR:**
- **crime punishable by possibility of life (if "clear and convincing evidence of a propensity for violence")**

Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2 were amended in 2002, due to concerns that the prior court rule had disparate racial and economic impacts.

PRESUMPTION OF RELEASE under CrR 3.2(a) and CrRLJ 3.2(a) unless:

- **Likelihood of court nonappearance(FTA); OR**
- **Likely interference with witnesses, administration of justice; OR**
- **Likely commission of a violent crime**
  - **"violent crime" not limited to SRA definition, RCW 9.94A.030**
  - **but see Blomstrom v. Tripp, 189 Wn.2d 379 (2017) – DUI is not a "violent crime"**

Showing of likely failure to appear (FTA)

Relevant factors under CrR 3.2(c) and CrRLJ 3.2(c) for assessing likely FTA:

- **Prior bench warrants**

NOTE: The number could include warrants unrelated to court FTA, i.e., DOC warrants for noncompliance, warrants issued to ensure transport from another jurisdiction, arrest warrants for new charge when defendant is already in custody

- **Employment, family/community ties**
- **Enrollment in school, counseling, treatment, or volunteer activities**
- **Reputation, character, mental condition**
- **Length of residency**
- **Criminal record**
- **Willingness of responsible community member to vouch for reliability and assist in compliance with release conditions**
- **Nature of the charge if relevant to risk of nonappearance**

If FTA risk found, CrR 3.2(b) and CrRLJ 3.2(b) require least restrictive conditions:

- **Placement with designated person or organization agreeing to supervise accused**
- **No contact orders with persons, places, geographical areas**
- **Restrictions on travel or place of abode**
- **Pretrial supervision- e.g., day reporting, work release, electronic monitoring, etc.**
- **Any condition other than detention to reasonably assure appearance**
- **Bond with sufficient solvent sureties or cash in lieu thereof**
  - **But no "cash only" bail – State v. Barton, 181 Wn.2d 148 (2014)**
  - **NOTE: Bond can be forfeited only for FTA - State v. Darwin, 70 Wn. App. 875 (1993)**
  - **Bonding company keeps fee**
- **Appearance bond - bond in specified amount, and deposit in the court registry in cash or other security. Deposit:**
  - **not to exceed 10% of bond amount**
  - **can be forfeited for noncompliance with any condition, i.e., a new crime**
  - **returned upon performance of conditions**
- **Unsecured bond - basically a written promise to appear, without any security**

NOTE ON MONEY BAIL: Court must consider accused's financial resources in setting a bond that will reasonably assure appearance. CrR 3.2(b)(6), CrRLJ 3.2(b)(6)

Showing of substantial danger

Relevant factors under CrR 3.2(e), CrRLJ 3.2(e) for assessing substantial risk of violent reoffense or interference with administration of justice:

- **Nature of charge**
- **Criminal record**
- **Past or present threats or interference with witnesses, victims, administration of justice**
- **Past or present use or threatened use of deadly weapon, firearms**
- **Record of committing offenses while on pre-trial release, probation or parole**
- **Reputation, character and mental condition**
- **Willingness of responsible community member to vouch for reliability and will assist in compliance with conditions**

WASHINGTON COURTS

This Benchcard was created by Washington's Pretrial Reform Task Force, a group led by the Minority and Justice Commission, the Superior Court Judges' Association, and the District and Municipal Court Judges' Association. May 2018.

Accord RCW 10.21.050

If court finds substantial risk of violent re-offense or interference with justice, CrR 3.2(d), CrRLJ 3.2(d) allow:

- Placement with designated person or organization agreeing to supervise accused
- No contact order with persons, places, geographical areas
- Restrictions on travel or place of abode
- No weapons or firearms, abstain from alcohol or non-prescribed drugs
- Pretrial supervision- e.g., day reporting work release, electronic monitoring, etc.
- No criminal law violations
- Any condition other than detention that will assure justice noninterference, reduce danger
- Unsecured bond – basically a written promise to appear, without security
- Bond with sufficient solvent sureties or cash in lieu thereof
  - No "cash only" bail – State v. Barton, supra
  - NOTE: Bond be forfeited only for FTA - State v. Darwin, supra
  - Bonding company keeps fee
- Appearance bond – bond in a specified amount, and deposit in court registry cash or other security. Deposit:
  - not to exceed 10% of bond amount
  - can be forfeited for noncompliance with any condition, i.e., a new crime
  - returned upon performance of conditions

NOTE ON MONEY BAIL: Court must consider accused's financial resources in setting bond that will reasonably assure community safety, prevent justice interference. CrR 3.2(d)(6), CrRLJ 3.2(d)(6); accord RCW 10.21.050(3)(a)

The court must find no less restrictive condition(s) than money bail will assure public safety and/or noninterference with justice. CrR 3.2(d)(6), CrRLJ 3.2(d)(6).

Delay of release authorized when:

- Person is intoxicated and release will jeopardize safety or public safety.
- Person has mental condition warranting possible commitment. CrR 3.2(f), CrRLJ 3.2(f)

Review of Conditions

Right to reconsideration after preliminary appearance if unable to post bail. CrR 3.2(j)
NOTE: There is no parallel CrRLJ to CrR 3.2(j).

Revoking or Amending Release Order

Change of circumstances or new information or good cause. CrR 3.2(j)(k), CrRLJ 3.2(j)(k); accord RCW 10.21.030

- Revocation requires clear and convincing evidence. CrR 3.2(k)(2), CrRLJ 3.2(k)(2)

Cases and Statutes

- Individualized determination; no blanket conditions - State v. Rose, 146 Wn. App. 439 (2008); accord RCW 10.19.055 (individualized basis for class A, B felonies)
- Condition must relate to CrR 3.2, CrRLJ 3.2 goals, preventing FTA or violent crime or justice interference - State v. Rose, supra (random UAs not causally connected to court appearance); cf.,"Blomstrom "fix" below
- Condition must not authorize unlawful search - Blomstrom v. Tripp, 189 Wn.2d 379 (2017)-random UAs as a first-time DUI condition is unlawful search; not authorized by CrRLJ 3.2 or statute. But see "Blomstrom "fix"- RCW 10.21.030 authorizes UAs as pretrial condition for misdemeanors, gross misdemeanors (DUI), felonies.
- Condition must be least restrictive condition - Butler v. Kato, 137 Wn. App. 515 (2007) (alcohol treatment and sobriety meetings not least restrictive condition to assure court appearance and hence violate CrRLJ 3.2; also unconstitutional search and violated Fifth Amendment)
- RCW 10.21.015 – no work release, electronic monitoring, day monitoring or other pretrial supervision program if violent or sex offense and violent or sex offense in last 10 years, unless person has posted bail
- RCW 10.21.055 – ignition interlock or SCRAM required where charge is DUI, physical control, vehicular homicide or vehicular assault and prior conviction that involved alcohol

ATTACHMENT F

Considering the Possible Effects of Pleading Guilty

Before you enter your plea

Consider the Possible Effects of Pleading Guilty

You have a right to see a defense attorney, even if you can't pay for one. Your attorney will explain what can happen because of your plea and help you decide what to do.

In addition to possible penalties such as jail time and fines, examples of issues you may want to discuss with an attorney include:

If You Plead Guilty:

IMMIGRATION
If you are a non-citizen, you may:
- Be DEPORTED, or removed, from the United States
- Be denied entry to the United States
- Lose certain benefits

EMPLOYMENT
You may be unable to:
- Work with children or vulnerable adults
- Work in airport security, the state patrol, and certain jobs involving transportation
- Obtain work that requires a driver's license

HOUSING
You may be subject to:
- Private landlord screening
- Denial of public housing and subsidies
- Evictions

PUBLIC BENEFITS
You may lose eligibility for:
- Food stamps
- Social Security/disability
- Other welfare benefits

PROBATION AND OTHER ISSUES
A guilty plea — even for a minor offense — may result in having probation revoked, and there are many other possible effects of a guilty plea. Only an attorney can identify all the consequences for you.

STUDENT LOANS, VOTING, DRIVING
You may lose your ability to:
- Obtain eligibility for federal education assistance
- Vote and serve on jury duty
- Hold a driver's license

MILITARY SERVICE
You may:
- Be disqualified from serving in the military
- Lose certain privileges

FAMILY ISSUES
You may be affected with regard to:
- Proceedings involving your children
- Attempts to adopt
- Foster care proceedings

REMEMBER

- You have a RIGHT to an attorney right now.
- An attorney can explain the potential consequences of your plea.
- If you cannot afford an attorney, an attorney will be provided at NO COST to you.
- If you don't have an attorney, you can ask for one to be appointed and for a continuance until you have one appointed.

Antes de que usted se declare

Considere las consecuencias de admitir culpabilidad.

Usted tiene el derecho de consultar a un abogado, incluso si no tiene los recursos para pagar sus servicios. Su abogado le explicará lo que puede suceder a consecuencia de su declaración y le aconsejará a decidir lo que puede hacer.

Además de posibles condenas tales como encarcelamiento y multas, ejemplos de asuntos a discutir con un abogado incluyen los siguientes:

Si usted admite culpabilidad:

INMIGRACIÓN
Si no es ciudadano, usted puede ser deportado, o removido, de los Estados Unidos. Se le puede negar la entrada a los Estados Unidos y puede perder ciertos beneficios.

EMPLEO
- Tal vez usted no pueda trabajar con niños o adultos vulnerables o indefensos.
- No podrá trabajar en ocupaciones como seguridad aeropuertaria, la patrulla estatal y ciertos trabajos relacionados con el transporte.
- Usted tampoco podrá obtener trabajos que requieran una licencia de manejar.

EDICTOS DE FAMILIA
Usted se puede ver afectado son respecto a:
- Procedimientos que impliquen a sus hijos.
- Tramites de adopción.
- Procedimientos de custodia temporal.

RENTA DE VIVIENDA
Usted puede ser sujeto a:
- Investigación privada del propietario.
- Negación de vivienda pública y de subsidios.
- Desahucios y evicciones.

SERVICIO MILITAR
Usted puede ser descalificado de dar servicio militar y de perder ciertos privilegios.

SERVICIOS SOCIALES
Usted puede dejar de sel elegible para:
- Bonos de racionamiento.
- Seguro Social/Incapacidad.
- Otros servicios sociales.

PRESTAMOS ESTUDIANTILES, DERECHO AL VOTO, MANEJO DE VEHÍCULOS
Usted puede perder el derecho de:
- Ser elegible de recibir ayuda federal para costear su educación.
- Votar en elecciones y de servir como miembro de un jurado.
- Obtener y portar una licencia de manejar.

LIBERTAD CONDICIONAL Y ASUNTOS RELACIONADOS CON ESTA
Una admisión de culpabilidad — incluso de un delito menor — puede dar lugar a que la libertad condicional sea revocada, incluyendo otros efectos posibles debido a una admisión de culpabilidad. Solamente un abogado puede identificar y explicar todas las consecuencias posibles para usted.

RECUERDE:

- Usted tiene derecho a los servicios de un abogado inmediatamente.
- Un abogado le puede explicar las consecuencias potenciales de su admisión.
- Si usted no puede pagar a un abogado, se le proporcionarán los servicios de uno.
- Si aún no tiene un abogado, puede pedir que se le asigne uno y que se le otorgue una "continuación" hasta que usted pueda contar con los servicios de un abogado.

A work group convened by the Washington Supreme Court reports its recommendations regarding the structure of the Washington State Bar in light of recent constitutional and antitrust cases.

Report and Recommendations

by the Washington Supreme Court Work Group on Bar Structure

September 2019

Contents

Executive Summary

In November 2018, the Washington Supreme Court (Court) convened a work group to review and assess the structure of the Washington State Bar Association (WSBA) in light of recent case law with First Amendment and antitrust implications, recent reorganizations by other state bar associations, and the additional responsibilities of the WSBA due to its administration of Court appointed boards. The work group completed a detailed review consistent with its charter, and a majority of the work group recommends to the Court as follows:

- Retain an integrated bar structure;
- Make no fundamental changes to the six Court appointed boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board;
- Consider amending court rules to specify that the prohibitions in General Rule (GR) 12.2(c) apply to Court appointed boards;
- Consider ordering the WSBA Board of Governors (BOG) and staff to adopt and execute a thorough *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990) interpretation when calculating all future *Keller* deductions;
- Reexamine the *Report and Recommendations* from the WSBA Governance Task Force dated June 24, 2014; and
- Consider adding public member(s) to the WSBA BOG.

Background

State Bar Structures

States vary widely in their structure for regulating the practice of law. Typically, the highest court in the state issues a license to practice law, and a bar association exists that legal practitioners are either permitted or required to join. In a state with a voluntary bar association, legal practitioners choose whether to join the association and the association does not administer regulatory functions. In a state with a mandatory bar association, legal practitioners are required to join the association and the association may or may not administer regulatory functions. In a state with an integrated or unified bar association, legal practitioners are required to join the association, and the association administers regulatory functions as well as professional association services. Most states have adopted some variation of these three primary structures, adjusted to suit local interest.

History of the Washington State Bar Association

The WSBA began as a voluntary organization formed by a group of attorneys in 1888, the last year of the Washington Territory. Its original name, the Washington Bar Association, changed to the Washington State Bar Association in 1890. In 1933, the Washington State Legislature codified chapter 2.48 RCW, known as the State Bar Act, which established the WSBA as a state agency, made membership in the WSBA mandatory for legal practitioners in Washington, and addressed a BOG for the WSBA.

Current Structure

The WSBA operates as an integrated bar pursuant to the delegated authority of the Court. The Court adopted GR 12.2 to prescribe the general purposes and activities of the WSBA, and GR 12.3 to delegate to the WSBA the authority and responsibility for administering certain Court appointed boards. In addition to administering many regulatory functions for the Court, the WSBA coordinates activities to benefit WSBA members. Legal practitioners in Washington must be members of the WSBA and pay an annual license fee that funds the WSBA and Court appointed boards administered by the WSBA. The WSBA facilitates practice area-specific sections, which legal practitioners may choose to join by paying an additional amount.

Legal Developments Precipitating the Work Group

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782 (1977), the United States Supreme Court upheld an agency shop provision in a public sector union context to the extent that the service charges are used to finance collective bargaining expenditures. Under *Abood*, an agency shop provision did not violate the First Amendment to the United States Constitution as long as dues collected are used for collective bargaining, contract administration, and grievances. While acknowledging distinctions between public unions and state bars, many cases regarding government regulation of legal practitioners and the amount that may be charged as a requirement to practice law, cite *Abood*. In another public sector union case, *Janus v. American Federation of State, County, and Municipal, Employees*, *Council 31*, 585 U.S. __, 138, S. Ct. 2448 (2018), the United States Supreme Court overruled *Abood*. The *Janus* decision has caused speculation about the implications to state bar related cases that cite *Abood*.

The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38 (Sherman Act), prohibits certain anticompetitive practices. In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), the United States Supreme Court ruled that state governments were exempt from the Sherman Act, noting that the Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ____, 135 S. Ct. 1101 (2015), the United States Supreme Court held that a state occupational licensing board primarily composed of persons active in the market it regulates has immunity from the Sherman Act only when it is actively supervised by the state. This case has caused speculation about potential antitrust liability, or the scope of immunity from it, in states where market actors, such as the attorneys serving on the governing boards, participate in the regulation of the legal profession.

Charter

In a charter dated November 9, 2018, the Court announced that it was convening a work group chaired by Chief Justice Mary E. Fairhurst. The charter specified the work group's composition and selection, the scope of work contemplated, the expected manner and duration of work group deliberations, and the process for applying to work group positions that the Court selects. The charter specifies a work group size of 11 members, including the Chief Justice. The Court subsequently added a work group member from a tribal perspective, for a total of 12 participants.

Scope of Work

The charter requires the work group "[t]o review and assess WSBA structure in light of (1) recent case law with First Amendment and antitrust implications; (2) recent reorganizations by other state bar associations and/or groups and their reasoning; and (3) the additional responsibilities of the WSBA due to its administration of Supreme Court appointed boards." The charter contemplates that the work group will review information, including from subject matter experts. Based on its review and assessment, the work group must make recommendations to the Court as to the future structure of Washington's bar.

Members of the Work Group

The Court invited the BOG to select three work group members who are BOG officers or members. The Court consulted with the BOG to select three work group members from the WSBA sections. The Court selected three members from Court appointed boards, a public member, and a tribal member.

At the first meeting of the work group, the members included Industrial Insurance Appeals Judge Dominique Jinhong as a Court appointed board representative from the Practice of Law Board. After the first meeting, Judge Jinhong resigned from the work group for personal reasons. Effective April 2, 2019, the Court appointed Andre L. Lang, a private attorney, as a Court appointed board representative from the Practice of Law Board to replace Judge Jinhong. So, for seven of the eight work group meetings, the members were:

- Hunter M. Abell, a private attorney, as a WSBA section representative (small size);
- Esperanza Borboa, a legal assistance program director, as the public member;
- Daniel D. Clark, a senior deputy prosecuting attorney, as a BOG representative (District 4 Governor);
- Frederick P. Corbit, a federal bankruptcy judge, as a Court appointed board representative (Access to Justice Board);
- Mary E. Fairhurst, Chief Justice of the Court as chair of the work group;
- Eileen Farley, a private attorney, as a WSBA section representative (medium size);
- Andrea Jarmon, a private attorney, as a Court appointed board representative (Limited Legal License Technician Board);

- Mark Johnson, a private attorney, as a WSBA section representative (large size);
- Andre L. Lang, a private attorney, as a Court appointed board representative (Practice of Law Board);
- Kyle D. Sciuchetti, a private attorney, as a BOG representative (District 3 Governor);
- Jane M. Smith, administrator at the Colville Tribes, as the tribal member; and
- Paul A. Swegle, a private attorney, as a BOG representative (District 7-North Governor).

Meetings

The work group met at the WSBA headquarters located at 1325 Fourth Avenue, in Seattle, Washington, eight times between March 28, 2019 and July 17, 2019, for three hours per meeting. As the work group chair, Chief Justice Fairhurst managed each meeting. Staff posted and regularly updated information about work group meetings on the Court's website and the WSBA's website, and WSBA staff communicated work group updates to WSBA members.

Public Access

The work group invited the public to attend work group meetings telephonically, in person, or via live webcast. Staff posted the agenda and meeting materials on the internet before each meeting, and added a link to a recording of each meeting's webcast shortly after each meeting.

Public Comment Opportunities

Consistent with the charter, all work group meetings were open to the public. At its first meeting, the work group prioritized creating opportunities for public comment. Staff disseminated messaging to the public and to WSBA members about the opportunity to submit written comments to the work group, and the WSBA posted comments received on its website. During multiple meetings, the chair invited comment from members of the public attending in person, telephonically, or via the internet.

Solicitation of Input from Leaders within Washington's Legal Community

At the work group's behest, the chair wrote to many leaders within Washington's legal community to invite their input. The chair's memorandum explained the scope of the work group's undertaking and offered links to the information posted on the

internet about it. It encouraged recipients to send advice or recommendations to the work group. The recipients included WSBA section leaders, specialty and local bar association leaders, prosecuting attorneys, tribal judges, advocacy community leaders, law school deans, past WSBA leaders, United States attorneys, and more. Correspondence received in response to the memorandum was posted on the internet.

Phases

When the work group convened on March 28, 2019, the chair reviewed the charter, and explained that she anticipated that the group would approach its work in three primary phases: 1) information gathering and analysis; 2) discussion of options and concerns; and 3) recommendation development. During the information gathering and analysis phase, the work group received materials to analyze and presentations from subject matter experts. The materials and presentations related to compelled or subsidized speech and compelled association issues under the First Amendment, anticompetitive practices and antitrust case law developments, pending state bar litigation across the nation, changes in other jurisdictions' approach to regulating the practice of law, and the WSBA's responsibilities to administer Court appointed boards. Following the information gathering and analysis phase, the work group discussed Washington's needs and the options available to meet those needs. Finally, the work group developed recommendations for the Court's consideration.

Information Gathering and Analysis

Presenters

The work group hosted several presenters in person and two presenters telephonically. They covered the following topics:

Presenter(s)	**Topic(s)**
Professor Hugh Spitzer, University of Washington School of Law	Washington State History and Constitution ○ WSBA's Inception ○ State Constitutional Limitations ▪ Article XII, Section 1 ▪ Article VIII, Section 4 ▪ Article VIII, Section 5
WSBA Executive Team	WSBA Current Structure and Functions

Julie Shankland, WSBA General Counsel	*Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. __, 138 S. Ct. 2448 (2018). *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. __, 135 S. Ct. 1101 (2015). *Mentele v. Inslee*, 2019 U.S. App. LEXIS 5613 *Crowe v. Oregon State Bar* [Complaint]
Associate Dean Charlotte Garden, Seattle University School of Law	Janus Walked Into a Bar . . . ○ Detailed Case Analysis ○ State Bar Litigation Post-*Janus* ○ State Bar Reorganizations Post-*Janus*
Jean McElroy, WSBA Chief Regulatory Counsel	"Germane" to the Regulation of the Practice of Law and Computing of the *Keller* Deduction
Carole McMahon-Boies, Attorney Services Administrator for the Nebraska State Bar Association	Nebraska Model and Lessons Learned
Paula Littlewood, Former WSBA Executive Director	Trends Among Integrated Bars
Geoffrey Green, Assistant Director, Anticompetitive Practices, Federal Trade Commission	Antitrust Considerations for Regulating the Practice of Law
Emily Chiang, Legal Director, American Civil Liberties Union Foundation Washington	Compelled Speech, Compelled Association and the First Amendment ○ ACLU Letter to Bar Structure Work Group

Reading Materials

In addition to the presentations and written materials supplied by presenting subject matter experts, the work group reviewed Washington historical narratives and legal authorities, additional cases decided by the United States Supreme Court related to First Amendment and antitrust issues, cases pending against state bar associations around the nation, reorganizations of bar structures in other states, trade and academic publications, and documentation about the WSBA. Complete materials may be accessed here, but they included:

Washington Historical Narratives and Legal Authorities

- History of the WSBA
- Washington State Constitution
- Selected Law Regarding the WSBA
- Court Rules related to the WSBA

United States Supreme Court Cases

- *Janus v. AFSCME, Council 31*, 585 U.S. __, 138 S. Ct. 2448 (2018).
- *Lathrop v. Donohue*, 367 U.S. 820, 81 S. Ct. 1826 (1961).
- *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 97 S. Ct. 1782 (1977).
- *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228 (1990).
- *North Carolina State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 574 U.S. __, 135 S. Ct. 1101 (2015).
- *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980).
- *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943).
- *Fleck v. Wetch*, [Supreme Court 2018], and *Fleck v. Wetch*, 868 F.3d 652 (2017).

Cases Pending Against State Bar Associations

- *Mentele v. Inslee*, 2019 U.S. App. LEXIS 5613.
- *Crowe v. Oregon State Bar* [Case 3:18-cv-02139-AC] Complaint.
- *Gruber v. Oregon State Bar* [Case 3:18-cv-01591-MO] Complaint.
- *Schell v. Williams* (Oklahoma Bar Association) Complaint.
- *McDonald v. Longley* (Texas State Bar) Complaint and Plaintiffs' Motion for Partial Summary Judgment on Liability.

[Re]organizations of Bar Structures in Other States

- NABE Presentation Regarding Bar Structures
- Nebraska Supreme Court Opinion and Nebraska Court Rule
- Comparative Analysis: Bar Association Memorandum

- Bar Functions Nationally

Trade, Media, Regulatory, Academic and Other Publications

- *"Exaggerating the Effects of Janus,"* 132 Harv. L. Rev. 42, November 2018.
- *"After Janus, Free the Lawyers,"* Wall Street Journal Editorial, April 26, 2019.
- *"Lawyers Look for Lessons in Dental Examiners Debacle,"* Antitrust & Trade Regulation Daily (BNA), June 8, 2016.
- FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.
- *"The Winds of Change are Definitely (Probably, Possibly) Blowing -- Pending First Amendment Challenges to Mandatory Bar Association Membership and Attorney Professional Licensing Fees,"* submitted by Mark Johnson for publication in King County Bar Association Bar Bulletin.
- *"Application of North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015), to the WSBA Structure,"* a memorandum prepared by Fred Corbit and Hayley Dean for consideration by the work group.

Documentation about the WSBA

Staff from the WSBA provided extensive documentation about the organizational structure, programs, activities, publications, cost and revenue centers, sections, facilities, new BOG member orientation, and membership of the WSBA. All materials, including those supplied by the WSBA staff, are located here.

Public Comments Submitted to the Work Group

With assistance from the WSBA staff and work group chair, the work group received and reviewed comments from the public, members of the WSBA, and leaders within Washington's legal community, which are posted here.

Discussion

The work group discussed the history and programs of the WSBA, the State Bar Act (chapter 2.48 RCW), and the Court appointed boards that are administered by the WSBA and funded through license fees, and assessed whether recent United States Supreme Court cases require changes to the WSBA structure or Washington's regulation of the practice of law. The work group determined that an integrated bar structure remains constitutional under current law. However, the work group identified opportunities to limit liability through relatively minor adjustments to particular operations of the WSBA.

Constitutional Issues (First and Fourteenth Amendments)

The work group members and presenters reiterated that *Janus* addresses compelled speech in the context of service fees (dues) imposed to support a public sector union pursuant to an agency shop provision.[1] Cases related to state bars often focus on charges imposed on legal practitioners and the activities such charges may be used to support. These cases cite many public sector union cases, but differ from union cases in significant ways. In *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228 (1990), members of an integrated bar sued claiming that the bar violated the First and Fourteenth Amendments when it used membership dues to advance political and ideological causes to which the petitioners did not subscribe. The court in *Keller* referenced the justification for compelled association and an integrated bar as "the State's interest in regulating the legal profession and improving the quality of legal services" and stated, "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 496 U.S. 13-14.

To comply with *Keller*, the WSBA computes what is referred to as a "*Keller* deduction," which is an amount that a WSBA member may elect to pay to support political or ideological activities of the WSBA. WSBA members are not required to pay the amount identified as the *Keller* deduction for the privilege of being licensed to practice law in Washington. The WSBA's current invoicing practice for annually assessing a member's license fee allows members to "opt-out" of paying the amount of the *Keller* deduction by subtracting it from their remittance to the WSBA.

The work group and presenters spoke about the inability to predict whether or how the *Janus* decision overruling *Abood* may impact the holding of *Keller*. The work group discussed at length: the importance of computing accurately the cost of activities of an ideological or political nature and including those costs in the *Keller* deduction; that careful scrutiny of the *Keller* deduction and its calculation is important to maintaining its defensibility but should not be understood as a criticism of the particular amount of deduction or the WSBA staff computing it; the advisability of prescribing an audit of the WSBA's *Keller* deduction determinations; the Court's policy regard of the vital relationship between improvement of the quality of legal services in Washington and access to justice and diversity and inclusion programs administered by the WSBA; the prudence of clarifying that

[1] Some of the complaints pending against state bars raise compelled association claims. But neither *Janus* nor any other case decided since *Janus* found compelled association to be unconstitutional in a public sector union or state bar context.

limitations on the WSBA's activities of an ideological or political nature also apply to the WSBA's administration of Court appointed boards; and the merit of requiring the WSBA to convert from an "opt-out" invoicing practice for the *Keller* deduction to an "opt-in" protocol whereby a member would be invoiced for the mandatory license fees and presented the option to pay an additional amount to fund WSBA's political or ideological activities.

Antitrust Issues

The legal profession has long been a "self-regulated" profession in that attorneys assist and advise the state entity that prescribes the standards for licensure, competence, ethical practice, and imposition of discipline. In Washington, as in many states, the Court has plenary authority over the bar and the regulation of the practice of law. The Court relies on the WSBA to administer many of the functions related to the licensure of legal practitioners, drafting of proposed rules of professional responsibility (ethical practice), investigation of allegations of misconduct, and recommendations for disciplinary sanctions.

Given that the WSBA BOG includes legal practitioners, Washington's regulation of the legal profession is subject to antitrust scrutiny unless the Court establishes clear state policy and actively supervises its implementation. *See California Retail Liquor Dealers Ass'n.*, 445 U.S. 97. The work group reviewed the detail in existing court rules, the process by which the Court adopts or amends Rules of Professional Conduct, and the Court's reservation of authority regarding imposition of discipline on legal practitioners. The work group discussed the advisability of the Court reserving certain WSBA personnel-related decisions to itself. Specifically, the work group debated whether the Court, and not the BOG, should make employment decisions for the WSBA's Executive Director and Chief Disciplinary Counsel positions. The work group did not adopt specific recommendations related to these considerations, but a majority of the work group did support a recommendation that the Court reexamine the *Report and Recommendations* produced by the WSBA Governance Task Force in June 2014.

Other Topics (Out of Scope)

The work group discussed several other topics before concluding they were outside the scope of the work group's charter. Such topics included:

- Whether the current WSBA structure is the structure preferred by a majority of WSBA members;

- Governance practices of the BOG, except those governance practices that are related to BOG members' roles as market actors participating in the regulation of the legal profession;
- Whether the current WSBA structure best protects the public, including through regulation of the legal profession and imposition of discipline;
- The duties, fiduciary obligations, or loyalties of BOG members, or their compliance with employment law or any allegations related thereto;
- Whether the current WSBA structure is "optimal" or strategic;
- The number of BOG members or their terms of office; and
- Whether the current WSBA structure meets the needs of current and future WSBA members.

Recommendation Development

After the information gathering and discussion phases, the work group focused its efforts on whether the Court should consider changes in light of recent constitutional and antitrust case law. Members of the work group offered motions for consideration to articulate proposed recommendations to the Court. The chair invited members to submit motions in writing or orally. Staff included written motions in the meeting materials; oral motions were captured in the meeting notes. The chair invited debate on motions made and seconded. Only work group members present in person or on the telephone participated in votes. The chair abstained from all votes.

The work group discussed many potential motions, including written motions included in the reading materials. Not every potential motion discussed was advanced by a work group member; sometimes a work group member would articulate a rationale associated with a potential motion or recommendation, but would not proceed to introduce the motion. Work group members introduced motions regarding recommendations to the Court as follows:

- Retain an integrated bar structure. (Motion passed 10-1.)
- Make no fundamental changes to the six Court created boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board. (A motion to table this motion failed 4-6, then this motion passed 10-1.)

- Consider a more robust supervision of the bar by the Court, including active supervision by the Court of the discipline process. (Motion did not receive a second.)
- Require that the WSBA funded boards, committees, and activities be systematically reviewed by experts outside the WSBA who would perform both a legal analysis of the bar's activities and a financial analysis of the bar's activities and report to the Court as soon as possible to determine whether: 1) any WSBA funded boards, committees, or other activities identified by the experts use compulsory dues to finance political and ideological speech when the expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services, and 2) the formula used by the WSBA to set the *Keller* deduction is not accurate and, if not, what the correct deduction should be. Through friendly amendment, this motion was changed to: Determine whether the *Keller* deduction and its calculation is accurate then, if necessary, review and amend GR 12, the State Bar Act, and the WSBA Bylaws before requiring a review by an outside expert and representatives from the Court, the BOG, and the WSBA Structure Work Group. (Motion failed 4-6.)
- Consider amending GR 12.2(c) as follows: "(c) Activities Not Authorized. The Washington State Bar Association will not: . . . (2) Take positions on political or social issues which do not directly relate to or affect the practice of law or the administration of justice." (Motion was withdrawn.)
- Consider reviewing GR 12.2 broadly and more specifically clarify under GR 12.2(c)(2) that there must be a heightened relationship between the political or social issues under consideration and the practice of law or the administration of justice. Through friendly amendment, this motion was amended, and then trifurcated for votes, as follows:
    - Consider reviewing GR 12 broadly. (Motion failed 4-5.)
    - Consider clarifying under GR 12.2(c)(2) that there is a heightened relationship between the political or social issues under consideration and the practice of law or the administration of justice. (Motion failed 3-6.)
    - Consider clarifying that the prohibitions of GR 12.2(c) apply to Court created boards. (Motion passed 5-4.)
- Consider retaining veto power over the BOG's personnel decisions. (Motion was withdrawn.)
- Reconsider prior requests to have public members on the BOG, and examine the size of the BOG. (Motion was withdrawn.)

- Consider ordering the WSBA board and staff to adopt and execute a thorough *Keller* interpretation when calculating all future *Keller* deductions. (Motion passed 10-0.)
- Reexamine the [WSBA] Governance Task Force *Report and Recommendations* dated June 2014. (Motion passed 8-2.)
- Consider including public member(s) on the BOG. (When initially introduced, this motion did not receive a second. Following further discussion, the motion was reintroduced, seconded, and passed 6-4.)
- Consider ordering the WSBA BOG to design, establish, and support an oversight body of no more than five individuals to oversee the *Keller* calculation and deduction process. (Motion failed 3-7.)

Recommendations to the Court

After detailed analysis and discussion consistent with the scope of inquiry specified in its charter, the work group felt that the current state of constitutional or antitrust law does not demand a major structural change to the Washington bar or WSBA. The work group identified opportunities to limit liability through specific adjustments. A majority of the work group voted in support of the following recommendations to the Court:

- Retain an integrated bar structure.
- Make no fundamental changes to the six Court created boards administered and funded by the WSBA: the Access to Justice Board; the Disciplinary Board; the Limited License Legal Technician Board; the Limited Practice Board; the Mandatory Continuing Legal Education Board; and the Practice of Law Board.
- Consider clarifying that the prohibitions of GR 12.2(c) apply to Court created boards.
- Consider ordering the WSBA BOG and staff to adopt and execute a thorough *Keller* interpretation when calculating all future *Keller* deductions.
- Reexamine the [WSBA] Governance Task Force Report and Recommendations dated June 2014.
- Consider including public member(s) on the BOG.

Closing Comments by the Work Group Chair, Chief Justice Mary E. Fairhurst

The residents and Supreme Court of Washington have the good fortune to be served by a dedicated and thriving community of legal practitioners and advocates who tirelessly give their time and talents to improve legal services in Washington. They serve clients, boards, commissions, advocacy groups, WSBA sections, specialty bars, local communities, and the legal profession with an extraordinary commitment to the law and the legal system, and an unrivaled fidelity to ensuring that everyone has access to justice in Washington. The willingness to serve on the Supreme Court Bar Structure Work Group and spend countless hours analyzing complex legal issues and promulgating recommendations to the Court exemplifies remarkable devotion to legal practitioners and the public they serve. The bench, the bar, and all residents of Washington are fortunate and I am profoundly grateful for the participation of work group members Hunter M. Abell, Esperanza Borboa, Daniel D. Clark, Frederick P. Corbit, Eileen Farley, Andrea Jarmon, Mark Johnson, Andre L. Lang, Kyle D. Sciuchetti, Jane M. Smith, and Paul A. Swegle, and the staff supporting the work group's work: Dory Nicpon, Margaret Shane, Rex Nolte, Clay Peters, and Cindy Phillips. Thank you to all of the presenters and to the WSBA for hosting our meetings at their facilities.

August 28, 2019

Chief Justice Mary Fairhurst
Washington State Supreme Court
Temple of Justice
Olympia, WA

Re: Washington Supreme Court
Bar Structure Work Group - Minority Report

Dear Chief Justice Fairhurst:

Thank you for the opportunity to serve on the Washington Supreme Court Bar Structure Work Group ("Work Group"). It was an honor to serve with you and other Work Group members to address important questions about the structure of the Washington State Bar Association ("WSBA") raised by recent United States Supreme Court cases.

The Majority Report accurately summarizes the Work Group's process and the information it reviewed. We feel, however, that the Majority Report does not fully capture the strong disquiet felt by some members about the recommendation to maintain, without further discussion, the current WSBA structure. Consequently, we submit this Minority Report for your consideration. The comments below are solely those of the signatories acting in their individual capacities, and do not reflect the opinions of any other outside organizations or entities.

The Court should seriously evaluate whether a voluntary bar association would be more vibrant and engage more members than the existing mandatory association. The information presented by WSBA staff and comments sent by WSBA members raise significant questions about the WSBA's member engagement, finances, and calculation of the licensing fee deduction for WSBA political activity ("*Keller* deduction"). Each issue is addressed below. Additionally, at minimum, we recommend the Court also address the concerns raised in the June 2014 Governance Task Force Report.

1-Member Engagement.

Emily Chiang, Legal Director for ACLU-Washington, advised the Work Group that the United States Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ____ (2018) did not require bifurcating the WSBA. This is only part of the analysis. The other part, and the question for the Court, is whether the WSBA should be bifurcated. Past WSBA President Anthony Gipe notes that

less than 20% of WSBA members vote in elections for the Board of Governors ("BOG"). (Comment 11, Anthony Gipe, Past WSBA President April 30, 2019 Letter). Of the 34 Comments submitted to the Work Group, at least one-third said they wanted the WSBA to become a voluntary bar association. Reasons for this ranged from the amount of bar licensing fees to complaints that the WSBA is too "Seattle-centric" and irrelevant to much of the rest of the State, particularly eastern Washington. This latter opinion reflects the geographic distribution of active lawyers throughout the state. In 2018, of the 26,313 active Washington lawyers, slightly more than 80% were in the seven counties that border I-5. Fewer than 19% of active lawyers are found in the remaining 32 counties. (*See* Mandatory Insurance Task Force Report, Exhibit B.) If the WSBA cannot meaningfully engage with a majority of its members and develop and maintain the trust necessary to secure broader member support, the Court should consider whether a voluntary association might be more vibrant and responsive.

2-Financial Stability.

In 2014 WSBA's General Fund was "in the red" $1.57million; in 2015 $2.7 million; in 2016 $1.84 million; and in 2017 $554,000. In 2018 the WSBA General Fund had net positive revenue of $430,000 but the 2019 adopted budget assumed a General Fund loss of $101,600, and the proposed 2020 budget assumed a General Fund loss of $560,000.

The WSBA accumulated these deficits even as revenue increased from $14.56 million in 2014 to $16.9 million in 2017 and a projected $20.8 million in 2020. This is not a sustainable path.

3-*Keller* Deduction.

Ms. Chiang advised the Work Group that *Janus* did not require splitting the WSBA, but reminded members that *Keller v. State Bar of California*, 496 U.S.1 (1990), requires bar associations to allow members to deduct from mandatory dues money spent on activities not related to regulation of the profession and improvement of the quality of legal services.

In 2019 the WSBA *Keller* deduction was $1.25 for lawyers admitted before 2017, and $.63 for lawyers admitted in 2017 or later. To many members, this is not credible, particularly in light of *Keller* deductions in other states and the WSBA's wide-ranging activities. The *Keller* deduction is calculated by bar staff who, while honorable, well intentioned, and experienced, are placed in the untenable position of calculating a *Keller* deduction that may reduce funding of various WSBA activities directed by the Board of Governors and the Court, and employing their colleagues.

The Work Group agreed that the formula used to calculate the deduction needs to be more transparent. Governor P.J. Grabicki, who was not a member of the Work Group but regularly attended the meetings, recommended that an outside accounting firm review the deduction. (Comment 23, P.J. Grabicki, District 5 Board of Governors representative). He noted that, while the deduction survived a challenge brought by a Washington attorney, that attorney did not have the assistance of an accounting expert. Governor Grabicki advised the Work Group that if the Goldwater Institute, which is challenging at least three other mandatory state bar associations, challenges the WSBA's *Keller* deduction, it could bring in significant accounting "firepower."

The Work Group ultimately rejected, by a vote of 6-4, a motion to recommend that an outside accounting firm review the *Keller* deduction. Instead, Work Group members agreed they would offer to review the deduction themselves. Chief Justice Fairhurst reported at a subsequent meeting that members of the Supreme Court were not supportive of this idea. As such, the Majority Report defaults to a recommendation that the Board of Governors and staff "adopt and execute a thorough *Keller* interpretation" when calculating the deduction. *See* Majority Report, at 15. To promote transparency and considering litigation around the country challenging mandatory bar associations, the *Keller* deduction should be examined by an outside expert like the one proposed by Governor Grabicki.

4-Current Board Governance.

In the first eight months of 2019, the WSBA Board of Governors has been sued by a WSBA employee, one of its own members, and by two attorneys alleging that the WSBA must comply with public disclosure requests. The attorneys prosecuting the public records litigation prevailed at the trial level, and WSBA has been ordered to provide Board communications relating to the firing of the former Executive Director. Should the trial court ruling be affirmed, it is probable that the resulting release of emails and other WSBA communications will provoke another uproar from WSBA membership, further undermining institutional trust and stability.

Insisting that there be no changes to the WSBA structure and its relationship to the Court will not re-engage members, resolve financial issues, or provide a transparent and credible explanation of the *Keller* deduction. Instead, it merely postpones important structural reforms that can and should happen now.

One of us has been a member of WSBA for 40 years. It is painful to recommend that the Court consider whether the WSBA should continue in its current form. However, the issues raised during the Work Group and the recommendations of the

2014 Governance Report demonstrate the need for serious consideration of a voluntary bar or other changes to the current structure.

Very truly yours,

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