

WSR 22-01-110
RULES OF COURT
STATE SUPREME COURT
[December 6, 2021]

IN THE MATTER OF THE) ORDER
SUGGESTED NEW GENERAL RULE) NO. 25700-A-1407
[42] AND SUGGESTED)
AMENDMENTS TO CrR 3.1, JuCR 9.2,)
AND CrRLJ 3.1)

The Washington State Bar Association, having recommended the suggested new General Rule [42] and suggested amendments to CrR 3.1, JuCR 9.2, and CrRLJ 3.1, and the Court having approved the suggested new General Rule [42] and suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested new General Rule [42] and suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

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

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov.

Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of December, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendments to

GENERAL RULES; SUPERIOR COURT CRIMINAL RULES; JUVENILE COURT RULES; CRIMINAL RULES FOR COURTS OF LIMITED JURISDICTION
NEW GR 42, CrR 3.1, JuCR 9.2, CrRLJ 3.1

A. Name of Proponent: Washington State Bar Association

B. Spokespersons:

Brian Tollefson, President, Washington State Bar Association, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539 (telephone 253-389-0071)

Travis Stearns, Chair, Council on Public Defense, Washington State Bar Association, Seattle, WA 98101-2539 (telephone 206-587-2711)

Bonnie Sterken, Equity and Justice Specialist, Washington State Bar Association, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539 (telephone 206-727-8293)

C. Purpose:

The proponent recommends suggested new General Rule (GR) 42¹, which is intended to bring Washington State into alignment with the

ABA Ten Principles of a Public Defense Delivery System (2002) and to ensure the independence of the public defense system from judicial influence and control.

¹ There are currently two new suggested General Rules pending with the Court. If the Court does not adopt those pending proposals, then the new suggested GR would be GR 40 or 41.

Additionally, these amendments include several suggested technical amendments to CrR 3.1, JuCR 9.2, and CrRLJ 3.1 to reflect the Court's adoption of the Standards for Indigent Defense (SID).

D. History

For over a year, the Council on Public Defense's Independence Committee has been charged by the Council on Public Defense with developing a proposal to bring Washington State in line with the first principle of the ABA Ten Principles of a Public Defense Delivery System (2002). The Principles constitute the fundamental criteria necessary to ensure a public defense system provides effective, efficient, high quality, ethical, conflict-free representation. The first principle states that "[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent."

Washington state's system of public defense is primarily county-based, unlike the majority of states. The selection, funding, and quality of public defense attorneys and offices varies by county. The independence of each county's system — including insulation from political influence and judicial involvement — is critical to ensuring those who are constitutionally or statutorily entitled to public defense counsel receive that which they are due.

While drafting the proposal, the Independence Committee worked diligently to gather considerable feedback from public defense directors, members of the judiciary, and practitioners. The proposal before you today for action has gone through multiple revisions in an attempt to be responsive to stakeholder feedback. This feedback included surveys of interested persons and organizations. We received written feedback that we included in our drafting, along with direct contact. We incorporated that feedback into our proposal, to ensure that public defenders maintained their independence while also not ignoring the voice that the judiciary must play in overseeing their courtrooms.

E. Suggested Amendments

The following are summaries and explanations of each suggested amendment:

- NEW GR 42(a) is intended to establish and codify the purpose behind new GR 42, which is to ensure the independence of public defense services from judicial influence and control.
- NEW GR 42(b) establishes where this rule will apply
- NEW GR 42(c) states that judges and judicial staff in superior and limited jurisdiction courts shall not select public defense administrators or the attorneys who provide public defense.
- NEW GR 42(d) defines manages and oversight, including the terms "manage" and "oversee."
- NEW GR 42(e) addresses the assignment of public defense attorneys in individual cases.
- NEW GR 42(f) defines when it is appropriate for judicial officers to intervene in the assignment and substitution of counsel.
- Suggested Amendment to CrR 3.19 d)(4) reflects that superior courts shall ensure that lawyers assigned to indigent defense matters shall be in compliance with the Supreme Court's Standards for Indigent Defense.

- Suggested Amendment to CrRLJ 3.1 (d) (4) reflects that superior courts shall ensure that lawyers assigned to indigent defense matters shall be in compliance with the Supreme Court's Standards for Indigent Defense.
- Suggested Amendment to JuCR 9.2 reflects that superior courts shall ensure that lawyers assigned to indigent defense matters shall be in compliance with the Supreme Court's Standards for Indigent Defense.

F. Hearing:

A hearing is not recommended.

G. Expedited Consideration:

Expedited consideration is not requested.

H. Supporting Material:

- New Suggested General Rule 42: Independence of Public Defense
- Suggested Amendments to CrRLJ 3.1 (d) (4), CrR 3.1 (d) (4), JuCR 9.2 (d)

Redlined Version

Proposed New General Rule 42

Independence of Public Defense Services

(a) **Purpose and policy.** The purpose of this rule is to safeguard the independence of public defense services from judicial influence or control. Consistent with the right to counsel as provided in Article I, Sections 3 and 22 of the Washington State Constitution and Washington statutes, it is the policy of the judiciary to develop rules that further the fair and efficient administration of justice. In promulgating this Rule, the Washington Supreme Court seeks to prevent conflicts of interest that may arise if judges control the selection of public defense administrators or the attorneys who provide public defense services, the management and oversight of public defense services, and the assignment of attorneys in individual cases.

(b) **Scope.** This rule applies to superior courts and courts of limited jurisdiction.

(c) **Selection of the public defense administrator and public defense attorneys.** Judges and judicial staff in superior courts and courts of limited jurisdiction shall not select public defense administrators or the attorneys who provide public defense services.

(d) **Management and oversight of public defense services.**

(1) Judges and judicial staff in superior courts and courts of limited jurisdiction shall neither manage nor oversee public defense services, including public defense contracts and assigned counsel lists. Judges should encourage local governments to have attorneys with public defense experience manage and oversee public defense services.

(2) The terms "manage" and "oversee" include: drafting, awarding, renewing, and terminating public defense contracts; adding attorneys or removing them from assigned counsel lists; developing or issuing case weighting policies; monitoring attorney caseload limits and case-level qualifications; monitoring compliance with contracts, policies, procedures and standards; and recommending compensation.

(e) **Assignment of public defense attorneys in individual cases.**

(1) Consistent with federal and state constitutions, applicable statutes and rules of court, the role of judges and their staff in the assignment of a specific attorney in an individual case is to: a) determine whether a party is eligible for appointment of counsel by mak-

ing a finding of indigency or other finding that a party is entitled to counsel; or b) refer the party for an indigency determination; and c) refer the party to a public defense agency or a public defense administrator to designate a qualified attorney. Alternatively, a public defense administrator may, prior to a court hearing where eligibility is determined, designate a qualified attorney to be appointed if the court finds the party is eligible.

(2) If there is no public defense agency or administrator, a judicial officer should appoint a qualified attorney, on a rotating basis, from an independently established list of assigned counsel or contractors.

(3) If no qualified attorney on the list is available, a judicial officer shall appoint an attorney who meets the qualifications in the Supreme Court Standards for Indigent Defense.

(f) **Necessary services and substitution of counsel.** This rule does not limit a judicial officer's authority to grant a motion for necessary investigative, expert, or other services, or to appoint counsel in individual cases when substitution of counsel is required or requested. Substitution of counsel should be made as provided in (e) above.

(g) **Effective Date of Rule.** This rule will go into effect ___ days after its adoption by the Supreme Court.

Comment

(1) This rule does not alter judges' obligation to ensure that public defense attorneys have certified their compliance with the Supreme Court's Standards for Indigent Defense.

(2) This rule does not preclude judges from communicating information about a public defense attorney's performance to the public defense agency or administrator. Following such communication, judges shall have no role in determining what actions, if any, the public defense agency or administrator takes in response to that communication.

(3) This rule does not preclude judges from providing information on an attorney's performance, in response to requests from public defense agencies or administrators, requests from the Washington State Bar Association, and for example, requests for information made by a judicial candidate evaluation committee.

Reviser's note: The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

Proposed Amendments to CrRLJ 3.1 (d) (4)

RIGHT TO AND ASSIGNMENT OF LAWYER

CrRLJ 3.1

- (a) - (c) [Unchanged]
- (d) Assignment of Lawyer.
- (1) - (3) [Unchanged]

(4) Before appointing a lawyer for the indigent person, or at the first appearance of the lawyer in the case, the court shall ~~require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court ensure the lawyer is in compliance with the Certification of Compliance requirement in the Supreme Court's Standards for Indigent Defense.~~

- (e) - (f) [Unchanged].

Proposed Amendments to CrR 3.1 (d) (4)

RIGHT TO AND ASSIGNMENT OF LAWYER

CrR 3.1

(a) - (c) [Unchanged]

(d) Assignment of Lawyer.

(1) - (3) [Unchanged]

(4) Before appointing a lawyer for the indigent person, or at the first appearance of the lawyer in the case, the court shall ~~require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court~~ ensure the lawyer is in compliance with the Certification of Compliance requirement in the Supreme Court's Standards for Indigent Defense.

(e) - (f) [Unchanged]

Proposed Amendments to JuCR 9.2

ADDITIONAL RIGHT TO REPRESENTATION BY LAWYER

JuCR 9.2

(a) - (c) [Unchanged]

(d) Juvenile Offense Proceedings. The court shall provide a lawyer at public expense in a juvenile offense proceeding when required by RCW 13.40.080(10), RCW 13.40.140(2), or rule 6.2.

Before appointing a lawyer for the indigent person, or at the first appearance of the lawyer in the case, the court shall ~~require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court~~ ensure the lawyer is in compliance with the Certification of Compliance requirement in the Supreme Court's Standards for Indigent Defense.