

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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October 31, 2011

**Via E-Mail (Camilla.Faulk@courts.wa.gov)**

Justice Charles Johnson  
Rules Committee Chair  
Washington Supreme Court  
c/o Camilla Faulk, Clerk of the Court  
P.O. Box 40929  
Olympia, WA 98504-0929

**Re: Proposed Standards to Indigent Defense Services Amending  
CrR3.1, CrRLJ 3.1 and JuCR 9.2**

Dear Justice Johnson:

I write on behalf of The Constitution Project (TCP) in response to the invitation to submit comments regarding the Suggested Standards for Indigent Defense Services (“Suggested Standards”). TCP commends the Washington Supreme Court for amending CrR 3.1, CrRLJ 3.1 and JuCR 9.2 in July 2010 to require compliance with the forthcoming Standards for Indigent Defense, and appreciates the opportunity to comment on the Suggested Standards being considered by the Supreme Court pursuant to that amendment. We write to express our strong support of the Suggested Standards.

TCP is a constitutional watchdog that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. In 2004, TCP established the National Right to Counsel Committee—comprising former judges, prosecutors, defense lawyers, law enforcement officials, and scholars—to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers. In 2009, the Committee published *Justice Denied: The Continuing Neglect of the Constitutional Right to Counsel*,<sup>1</sup> the most comprehensive examination of our country’s system of indigent defense in 30 years.

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<sup>1</sup> Nat’l Right to Counsel Comm., The Constitution Project, *Justice Denied: America’s Continuing Neglect of Constitutional Right to Counsel* (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>. *Justice Denied* has been praised by Attorney General Eric Holder in speeches to the American Council of Chief Defenders and the Brennan Center for Justice; the *Washington Post* has called it an “excellent report”; and it has been cited and relied upon by numerous state supreme courts, policymakers and news outlets around the country.

*Justice Denied* contains 22 consensus recommendations of the philosophically and professionally diverse National Right to Counsel Committee. In addition to recommending generally that states “adhere to their obligation to guarantee fair criminal and juvenile proceedings in compliance with constitutional requirements”<sup>2</sup> and “appropriate adequate funds so that quality indigent defense services can be provided,”<sup>3</sup> the Committee made specific recommendations about how to achieve the goal of implementing the right to counsel. The Suggested Standards comport with these recommendations.

### **Qualification Standards**

Recommendation 5 in *Justice Denied* encourages states to “establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel.” Specifically, the Committee recommends a “tiered system of qualifications for appointment to different levels of cases, depending on the training and experience of the lawyers.” The Committee also recommends that qualification standards go beyond mere objective quantitative measures, like years of experience, so that the standards include subjective measures such as observations and peer assessments.

The National Right to Counsel Committee also closely studied the well-respected ABA Ten Principles of a Public Defense Delivery System<sup>4</sup> (“Ten Principles”) before issuing its own recommendations in *Justice Denied*. Similar to *Justice Denied*, one of the ABA Ten Principles requires: “Defense counsel’s ability, training, and experience match the complexity of the case.”<sup>5</sup> Further, the tenth of the Ten Principles requires: “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.”<sup>6</sup>

If implemented, Suggested Standard 14 would be a major step toward implementing qualification standards for defense attorneys in accordance with *Justice Denied* Recommendation 5 and the ABA Ten Principles. The Suggested Standard appropriately requires increasing experience and years of practice for increasingly complex cases. Additionally, the Suggested Standard provides baseline competencies required of all attorneys who represent the indigent in criminal cases, like familiarity with all relevant statutes, rules, and case law, as well as the consequences (including collateral consequences) of a conviction. TCP encourages the Supreme Court to adopt this Suggested Standard.

### **Workload Limits**

The Sixth Recommendation of *Justice Denied* expressly recommends the establishment and enforcement of workload limits for defense attorneys representing the indigent.<sup>7</sup> The ABA Ten Principles similarly require: “Defense counsel’s workload is controlled to permit the rendering of

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<sup>2</sup> *Id.* at 183.

<sup>3</sup> *Id.*

<sup>4</sup> ABA Ten Principles of a Public Defense Delivery System (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Justice Denied* at 192.

quality representation.”<sup>8</sup> The National Right to Counsel Committee noted even the “most well trained and highly qualified lawyers cannot provide ‘quality defense services’ when . . . their ‘caseload’ is excessively high.”<sup>9</sup> Thus, the Committee encouraged “workload” limits, which take into account caseload as well as other obligations like training, administrative matters, etc. Along with recommending workload limits, the Committee encouraged jurisdictions to develop uniform definitions of a “case” in order to accurately collect data about indigent defense workloads and how many attorneys are needed.<sup>10</sup> Finally, the Committee noted that, in the case of attorneys who also maintain a private practice in addition to representing indigent defendants, the workload associated with their private practice must be taken into account to “ensure that they have adequate time to devote to their indigent cases.”<sup>11</sup>

Collectively, Suggested Standards 3.2, 3.3., 3.4 and 13 take a significant step towards compliance with *Justice Denied*'s recommendations and the Ten Principles. The Suggested Standards clearly define a “case” and then limit the number of cases annually for felonies, juvenile delinquency and dependency proceedings, civil commitments and appeals. We encourage the adoption of a caseload limit for misdemeanors as well, which has already been proposed pursuant to an October 10<sup>th</sup> letter of the Washington State Bar Association to Chief Justice Barbara A. Madsen.

We appreciate the fact that the Suggested Standards do not presume that an attorney is able to handle the maximum caseload; the limits are established only as a ceiling or “maximum” pursuant to the language of Suggested Standard 3.3. The Suggested Standards acknowledge that some complex caseloads will require attorneys to take fewer cases than the ceiling. Further, Suggested Standard 3.2 emphasizes that the caseload of an attorney must allow for effective representation of each defendant. Finally, Proposed Standard 13 reminds attorneys that their private practice obligations should naturally be considered when assessing their workload.

Taken together, these limitations and recommendations in the Suggested Standards appropriately place limits on indigent defense attorneys’ caseloads, while also calling upon the attorneys to ensure that they are only accepting a workload that will allow them to fulfill their obligations to each individual client. We encourage the adoption of these Suggested Standards, along with a misdemeanor caseload limit.

### ***Investigation Support Services***

The Eighth Recommendation of *Justice Denied* states that “[s]ufficient support services and resources,” including access to investigators, “should be provided to enable all defense attorneys to deliver quality indigent defense representation.”<sup>12</sup> In addition to investigators, defense attorneys also ought to have access to experts, social workers, paralegals and support staff, technology, research and training. Providing defense attorneys with such resources levels the playing field while also maximizing the efficiency of the criminal justice system. Investigators are particularly important to efficiency, as they are able to “conduct factual investigations at lower expense than

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<sup>8</sup> *Ten Principles* at 2.

<sup>9</sup> *Justice Denied* at 192.

<sup>10</sup> *Justice Denied* at 199.

<sup>11</sup> *Id.* at 194.

<sup>12</sup> *Id.* at 196.

attorneys, while freeing attorneys to devote their time to other important tasks, such as filing motions, communicating with their clients and preparing for court appearances.”<sup>13</sup> In light of this recommendation, we support Suggested Standard 6.1, which directs public defense attorneys to rely on the services of investigators as appropriate.

**Conclusion**

In closing, TCP supports the Suggested Standards, as we believe to be in accordance with the recommendations of TCP’s National Right to Counsel Committee in *Justice Denied*, as well as the ABA Ten Principles for a Public Defense Delivery System. We respectfully encourage their adoption and implementation, and also encourage the Court to adopt a misdemeanor caseload limit.

Sincerely,

A handwritten signature in black ink that reads "Mary Schmid Mergler". The signature is written in a cursive, flowing style.

Mary Schmid Mergler  
Senior Counsel, Criminal Justice Program

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<sup>13</sup> *Id.*