THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTAGUE, a Washington resident, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation,

Defendants.

No. 2:11-cv-01100-RSL

DEFENDANT CITIES OF MOUNT VERNON AND BURLINGTON'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

Noted for Consideration: March 29, 2012

I. INTRODUCTION

To survive summary judgment, plaintiffs make two principle arguments.

First, they claim that Mountain Law is *currently* depriving indigent defendants of their Sixth Amendment rights. A close look at the record, including plaintiffs' citations, proves otherwise. There has never been a complaint about Mountain Law (from any source), nor any evidence of "would-be complaints." It is also undisputed that the Mountain Law attorneys are carrying caseloads of 400 or less, while being monitored as

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well, or better, than plaintiffs' own expert is monitored. The broad arguments to the contrary made by plaintiffs simply do not bear scrutiny.[1]

And *second*, plaintiffs claim that even if the new system is constitutional, the case is still not moot because the Cities' secretly wish to "return to their old ways." This is not one of those "rare" instances, *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), and any fair reading of the case law confirms it. There is no evidence, nor reason to believe, that—despite new legislation, retention of numerous independent experts, several public contracts, doubled funding, and mandatory standards—the Cities nonetheless hold an unspoken desire to dismantle all of it. And there is *surely* no basis to believe that the Mountain Law attorneys secretly desire to violate mandatory court rules, endangering their bar licenses, for no economically rational reason. This case is moot; there is no basis to assume future constitutional violations.

Summary judgment should be granted.

II. CHRISTINE JACKSON'S OPINION IS A PICTURE OF SELF-SPONSORSHIP AND (INACCURATELY) EVALUATING OTHER WITNESSES' "CREDIBILITY"

Plaintiffs' defense of Christine Jackson's opinions is notable for its suspension of disbelief. Despite being confronted with one problem after the next, their response is either: "that doesn't matter" or the undisputed record is "not credible." Simply ignoring or rejecting facts is not the function of an expert. Consistent with decades of authority, Jackson's opinion should be stricken.

Jackson's treatment of the *Spielman* case file vividly illustrates the problems. Without speaking to Ms. Spielman or her attorneys, Jackson harshly criticizes Mountain Law for failing to retain an expert to pursue certain defenses. But it turned out that Ms.

[1] As discussed more fully below, the notion that monitoring is limited to "passively reviewing closed case reports" (Opp. at 4) is contradicted by reams of deposition transcript, several declarations, and records. Nor is it true that there are no "documents" showing caseload compliance. Opp. at 8. Eric Stendal provided exactly that in his declaration. *See Stendal Decl.* Ex. A. And plaintiffs continue to rely chiefly on testimony that they know to be inaccurate from Mountain Law, which its representative later corrected on the record. Plaintiffs' rampant liberties with the record serve only to underscore their lack of real evidence.

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Spielman (like several other clients) was not interested in an aggressive defense; she wanted a quick resolution, for personal reasons. She was fully informed when she did so; there is no claim to the contrary. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 337:12-339:8; 375:7-16). Accordingly, Jackson's opinion was flat-out wrong. Her rejoinder: (1) Mountain Law's files "lacked any evidence" of informing the client; and (2) Jackson remains "un-persuaded" that the client was fully advised. Opp. at 30. Evidence Rule 703 does not work this way. Experts *rely* on the factual record, they do not rewrite it.

Jackson expressed the same "disbelief" of the record with respect to Mountain Law's review of criminal records, immigration records, and factual and legal analysis. Again, there is *only* undisputed testimony in this regard. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 375:2-4, 346:17-347:3, 269:1-5). Jackson simply ignores it as "not credible" because there was a "lack of written documentation in Mountain Law's case files." Mot. at 32.

Jackson was equally cavalier about the time-keeping variable. She acknowledges that Mountain Law under-reports its time, like her own agency (Opp. at 30-31)—again, an undisputed fact (*Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 360:3-361:19))—but flippantly replies that the time reported was "pretty darn short." Opp. at 31. This is non-sequitur. Jackson's opinions assume that 2 hours or .7 hours are being spent on a given case, *id.*, when that is not true. This is exactly the problem, which Jackson does nothing to resolve.[2]

Plaintiffs do not even bother to address the variable of the jurisdiction's size. They instead skirt the question as "nonsensical," citing the "same constitutional standard" applying everywhere. Opp. at 32. The Cities agree, but that is not the issue. The issue is:

[2] Plaintiffs claim that Mountain Law is actually "over-reporting" the time they spend, citing testimony about Jeremiah Moon having "four cases" that Mountain Law spent a total of 4.2. hours working on. Opp. at 29 n.21. Plaintiffs are being misleading. Michael Laws testified that this was likely a single case, which was accidently copied three times in their system. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 297:10-299:15). What's more, that single case was artificially cut short when Mountain Law withdrew from the representation after learning that Moon was a plaintiff in this case. *Id.*

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(1) whether prosecutors regularly dismiss charges without motions (in the Cities, they do[3]); (2) whether sentences are light (in the Cities, they are[4]); (3) whether cases can be resolved by phone call (in the Cities, they can[5]); and (4) whether the attorneys already know most of the clients, witnesses, and locations from prior experience (in the Cities, they do[6]). Under these circumstances, an attorney can bring about the same result for a client more quickly. Jackson ignores this, relying upon only her own experiences in the *very* different jurisdiction of Seattle. *Supp. Rosenberg Decl.* Ex. B (Ladenburg Dep. Tr. 98:6-99:6).

Plaintiffs also offer a half-hearted defense of Jackson's "methodology"—*i.e.*, reviewing cold files—as a "method by which the City of Seattle evaluates its public defenders." Opp. at 29. Not true. Seattle, as Jackson testified, has a process in which, on advance notice, the agency *speaks* with the public defenders about their files, in conjunction with the public court files, and learns about the attorneys' work. Seattle does *not* review case records, in isolation, and make assumptions. *Supp. Rosenberg Decl.* Ex. C (Jackson Dep. Tr. 78:6-82:14). Indeed, Jackson's misguided claims about *Spielman*, *Phillips*, *Bromels*, and *Crawford* (Mot. at 29-30) perfectly illustrate the difference between her approach and Seattle's.

In closing, plaintiffs declare that the Cities' expert "confirmed [Jackson's] qualification" and "agreed with many of her opinions," and go on to string-cite deposition transcript. Mot. at 35. The Cities would encourage the Court to review the testimony. John Ladenburg stated that Jackson appears knowledgeable about misdemeanors, and he agrees with her about the necessity of speaking to a client and rendering advice. *See Williams Decl.* Ex. CC. Mr. Ladenburg *never* endorsed Jackson's belief that she could

[3] Dkt. 120 (Sybrandy Decl. ¶¶ 13; 15); *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 335:19-336:7).
[4] Dkt. 117 (Cammock Decl. ¶¶ 5-6); Dkt. 119 (Eason Decl. ¶ 10)
[5] Dkt. 117 (Cammock Decl. ¶ 6); Dkt. 120 (Sybrandy Decl. ¶¶ 13; 15); *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 335:19-336:7).
[6] Dkt. 120 (Sybrandy Decl. ¶¶ 2-6); Dkt. 117 (Cammock Decl. ¶ 4); *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 324:7-9).

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make broad value judgments about several attorneys, based solely upon 50 of their files. No jurisdiction does that, nor does any known expert.

Jackson's opinions should be rejected as uncorroborated speculation, unsupported by any discernible methodology. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (court is entitled to conclude that there is too great an analytical gap between the data and the opinion); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (requires "good grounds" which is "more than subjective belief and unsupported speculation"); *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825, 830 (9th Cir. 2001) (expert who assumed facts supporting his opinion was disallowed).

III. PLAINTIFFS ARE SIMPLY WRONG ABOUT THE CITIES' MONITORING

Plaintiffs continue to claim that the Cities' oversight of Mountain Law is "limited to passively receiving closed case reports and processing any complaints that are made." Opp. at 4 (citing *Williams Decl.* Ex. I (Stendal Dep. Tr. 12:11-13:17)). It is odd that plaintiffs got this proposition from the transcript excerpt they cite, which states:

> Q. … Tell us, for example, what you might do in the course of your job of enforcing the public defender contract or terms within it.
>
> A. Well, if I get a complaint, for example, I have to deal with the complaint as laid out and specified in our contract. That would mean I would accept the complaint, I would send a letter to the public defender, along with a copy of the complaint, and ask them to respond within three days as required by the contract. Other things are there are certain reporting requirements within our contract we have. So I get those. I review them, see that they're in compliance. I would check on public defenders in the courtroom, serve them, generally discuss the performance with attorneys, public de -- my public prosecutor, judges, ask how they're doing, if there's any issues they're aware of, things like that.

Williams Decl. Ex. I (Stendal Dep. Tr. 12:11-13:17). More importantly, when asked squarely about *monitoring*, Mr. Stendal filled up three pages of transcript detailing the Cities' collaborative relationship with Mountain Law, the court staff's involvement, the

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complaint system, and the role of the Supreme Court certifications. *See* Cities Opp. to Summ. J. at 21-22 (citing *Cooley Decl.* Ex.13 (Stendal Dep. Tr. 80:20-83:19)).

Unfortunately, plaintiffs take similar liberties with the Mountain Law deposition transcript, relying upon a portion they know to be incorrect. Initially, Mountain Law's Rule 30(b)(6) was unprepared to discuss monitoring, and testified that he was "unaware" of the Cities' efforts. Opp. at 23 (citing Laws Dep. Tr. 179:180, 190-196). But what plaintiffs omit is that, at the beginning of the second day of the deposition, Mountain Law's attorney interjected that "some of the answers last time that Mike [Laws] couldn't answer on behalf of Mountain Law, he has gone back and checked with all of his colleagues and he's prepared to supplement any of those answers if you want to go back over them. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 238:13-18). Mr. Laws then explained that he "hadn't been aware of all the conversations that took place… about [the Cities] monitoring of caseloads and questions about the reports that had been filed, those kinds of… I know that in talking to Jon [Lewis] he did have conversations with both Eric [Stendal] and Brian [Harrison] about -- they would call him and they do call him apparently fairly regularly to ask him questions about the reports and follow up with him." *Id.* at 239:2-12. He also confirmed that the Cities observed them in court, and visited them at their office to observe their facilities. *Id.* at 239:22-240:24.

Mountain Law later summarized:

> Q. With respect to monitoring and supervision, the Cities are having you produce case reports?
>
> A. Correct.
>
> Q. You were producing closed case reports and now open case reports?
>
> A. Right.
>
> Q. Do you have any reason to believe that the Cities are ignoring the case reports?
>
> A. No.

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Q. The Cities were actually directed to speak to Mr. Lewis about them?

A. Correct.

… [Objection]

Q. And the Cities have been speaking to Mr. Lewis?

A. Correct.[7]

Q. And discussing the substance of the case reports?

A. Yes.

Q. And how Mountain Law is doing generally?

A. Yes.

Id. at 350:24-351:18. Mountain Law went on to confirm that the Cities *are* observing him in court, maintaining a comprehensive complaint system, and requiring a certification of hours below Supreme Court-approved limits as part of the contract. *Id.* at 351:19-354:8.

Plaintiffs' reliance on testimony that they know to be uninformed—and supplemented by *informed* testimony—only betrays their lack of competent evidence. There is no real dispute about the Cities' monitoring.

IV. CONFIDENTIAL MEETINGS ARE HAPPENING: THIS IS UNDISPUTED

It is also beyond dispute that Mountain Law is meeting with clients at its office. This is confirmed and corroborated by the prosecutor, judge, and Mountain Law itself. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 325:16-327:22); *Eason Decl.* ¶ 10 (noting large poster in courtroom, with attorneys' pictures, prominently inviting clients to speak with them); *Judge Svaren Decl.* ¶ 5 (noting poster and legal assistant scheduling meetings). As Michael Laws testified:

[7] This is where the confusion was created. The Rule 30(b)(6) representative for Mountain Law, Mr. Laws, was not aware that the Cities had been directed to discuss case reports and monitoring matters with Mr. Lewis, his law partner.

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> Q. What is Mountain Law's policy, if there is one, on meeting with clients?
>
> A. We will meet with a client that wants to meet with us. Every client that we have has every opportunity to schedule an appointment and keep it with their attorney.

Supp. Rosenberg Decl. Ex. A (Laws Dep. Tr. 325:16-20). In contrast, plaintiffs cite: (1) zero evidence of anybody in the last six months who wanted, but did not get, a meeting[8]; (2) zero evidence of anybody who pled without a satisfactory discussion of their rights; and (3) zero evidence of anybody who was refused a meeting prior to receipt of the police report.[9] At best, plaintiffs are speculating in derogation of an undisputed record.

Plaintiffs' complaints about jail visits are equally unfounded. They chide Mountain Law for what they perceive to be too few jail visits. It is true that Mountain Law places priority on meeting with clients who they have not yet seen, who are held on charges for their jurisdiction, and who have an upcoming hearing. Opp. at 7. Nowhere, however, do they *refuse* to meet with clients *outside* of these circumstances. Indeed, Mr. Laws testified that they visit the jail on Mondays, "at a minimum," to see the priority group, but as a general matter, will meet with any client—"both at the jail and in my office"—that reaches out to them. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 330:8-19, 381:24-382:5). This comports with the record, which includes not a single complaint about jail visits in over six months.

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[8] Plaintiffs cite to the declarations of Mr. Norman, Mr. Reyna, Mr. Delacruz, and Mr. Osborne—all of whom raised grievances for the first and only time in the form of lawyer-drafted declarations six months ago (when Mountain Law was less staffed and in transition). *Harrison Decl.* ¶ 41. Tellingly, none of them accepted a different attorney when one was offered. *Id*. And even more tellingly, all of them declined the Cities' invitation to investigate their grievances. *Id.* Ex. L.

[9] As Mountain Law explained on the issue of pre-police report meetings:

> Q. If you have a client that reaches out to you and wants to meet before you have that information, are you willing to meet with them?
>
> A. Yeah. That's not actually an unusual occurrence at all. I know that there was some testimony before where I think I said it was basically pointless to meet with somebody unless I had the police reports. I guess that's an overgeneralization on my part. It's not really pointless to meet with them. It's preferable to sit down with all the discovery and all the police reports and an offer and have complete information when I meet with them. I frequently do that both at the jail and in my office.

Supp. Rosenberg Decl. Ex. A (Laws Dep. Tr. 330:8-19) (emphasis added).

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V. SPECULATION ABOUT "WOULD-BE COMPLAINTS" DOES NOT CREATE AN ISSUE OF FACT

Plaintiffs' arguments about "complaints" are no different. They tacitly concede that there has not been a single complaint about Mountain Law, but counter that it is only because there are too many hurdles. This attorney-sponsored claim does not bear scrutiny.

First of all, the assertion that the Cities will "only" address "two types of complaints" is inconsistent with the form itself, which clearly states:

> You can file a written complaint with the City. ***In addition to general complaints***, the City has a special process in two areas.

Van De Grift Decl. Ex. B (emphasis added). The Cities will gladly receive general complaints, both directly from indigent defendants and from other stakeholders.[10] But there is a "special process in two areas." *Id.*

By virtue of its nature and purpose, that "special process" requires some limitations. The entire premise is that the defendants receive the form the moment they are assigned an attorney (*Van De Grift Decl.*), and if needed, can use it to secure immediate relief—in the form of a meeting or re-opening a plea.[11] This does not work if the representation is over; waiting too long would lead to confusion over what the client wants, whether a meeting can ethically take place, and if so, with whom. Plaintiffs also complain that the process requires the defendant to "complete the complaint form" and deliver it to the appropriate person. Opp. at 5. Because the process involves a potential motion to undo a plea—which has real

[10] In addition to accepting general complaints outside of the special process, the Cities regularly secure feedback from Mountain Law, prosecutors, court staff, and judges about client concerns. *Svaren Decl.* ¶¶ 3, 9; *Harrison Decl.* ¶ 34(e); *Stendal Decl.* (citing *Harrison Decl.*); *Cooley Decl.* Ex. 7 (Skelton Dep. Tr. 25:20-26:15, 28:11-13); Dkt. 118 (*Eason Decl.* ¶ 11)

[11] The problem with belated complaints, when the public defenders have already withdrawn, is illustrated by plaintiffs' citation to the Jorge Martinez complaint. *Marshall Decl.* Ex. 32 at 1163 – 1173. While in jail, Martinez sent *two and three kites per day* about the length of his sentence, *id.* at 1163-67, while all the while, he was not even represented by the public defender. *Cooley Decl.* Ex. 3 (Witt Decl. 325:16 – 22). Martinez had already pled guilty, been sentenced, and his case was closed—and there was nothing the Cities were able to do for him. *Id*. Nor was the subject matter of his complaints—*i.e.*, the length of his sentence—something the Cities could effect. *Cooley Decl.* Ex.3 (Witt Dep. Tr. 329:12 – 21). "Good time credit" and "jail infractions" are known only by the jail, not the public defender. *Id.*; *see also* Witt Dep. Tr. 326:20 – 327:15.

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consequences—a written record of the request makes sense. Tellingly, the *only* criticism of this process comes from counsel, who offer only naked rhetoric. This is not competent evidence. If the complaint form were as insurmountable as plaintiffs claim, one would expect at least *one person*—of the over 200 who received it (*Van De Grift Decl.* ¶ 6-7)—to explain how he or she was "thwarted." No such evidence is forthcoming.

Plaintiffs also seem to criticize the Cities for encouraging indigent defendants to reach out to the State Bar Association and the Judge handling [their] case if they have concerns involving "strategy." *Van De Grift Decl.* Ex. A. This criticism is unfounded and undercut by the WSBA and Rules of Professional Conduct. As the Bar Association indicates, "[i]neffective assistance of counsel issues are best raised ***in court proceedings***…" *Cooley Decl.* Ex.12 (emphasis added). This is presumably because of how problematic it would be for the Cities—who are doing the prosecuting—to engage in discussions about whether the public defender "asked his client if he was guilty" (Mot. at 14:5), or had a chance to "tell his story" (Mot. at 10:16); *see also* Dkt. #119 (*Ladenburg Decl.* ¶ 13) (this approach would be "dead wrong").

The Cities pragmatically ensure that such grievances are investigated by the Court or WSBA, both of which are identified in an easy-to-read form. That is not to say that the Cities will not learn of it—they will—but by its nature, the substance of those complaints is properly addressed elsewhere. Again, nobody opines that this process is wrong, other than counsel.

VI. CASELOADS ARE UNDISPUTEDLY LOWER, AS ILLUSTRATED BY DOCUMENTS IN THE RECORD

Plaintiffs suggest that the Cities "fail… to provide any documentary evidence that the current caseload is and whether it has actually decreased." Opp. at 8. This is either an oversight or a willful refusal to look at the evidence. Mr. Stendal provided exactly such documentation:

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Last Name	First Name		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Collins	Jesse		23	17										
DeMass	Stacy		0	0										
Laws	Michael		15	18										
Smith	Sada		44	18										
Total >			82	53	0	0	0	0	0	0	0	0	0	0
CITY OF BURLINGTON														
Collins	Jesse		19	15										
DeMass	Stacy		0	15										
Laws	Michael		14	20										
Smith	Sada		14	18										
Total >			47	68	0	0	0	0	0	0	0	0	0	0
Monthly Total Both Cities >			129	121	0	0	0	0	0	0	0	0	0	0
Grand Total Both Cities >			129	250	250	250	250	250	250	250	250	250	250	250
Remaining from contract >		1,600	1,471	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350

Stendal Decl. Ex. A. He specifically testified that Mountain Law is "on target to handle 1600 cases, which, shared between four attorneys, is consistent with the newly-promulgated Supreme Court standard." *Stendal Decl.* ¶ 5. The numbers support this. It is therefore hard to know what math supports plaintiffs' belief that, "at [this] rate, Mountain Law attorneys will grossly exceed the annual 400 caseload limit..." Opp. at 10.

Challenging this from another angle, plaintiffs confuse the timing of the now-nonexistent "case credit system," suggesting that there are "still questions regarding what qualifies as a case." Opp. at 9-10. In support, they cite a portion of transcript in which Mr. Laws expresses confusion about "credits." Mr. Laws was testifying about the *old* contract, which *was* confusing. And for that exact reason, it was modified to reflect the Supreme Court definition of "case" and disregard "credits" entirely. Mountain Law subsequently confirmed that its existing contract was much more workable and easier to track:

> Q. Is it your understanding that Mount Vernon and Burlington have a 400-case-per-year limit?
>
> A. Yes.
>
> Q. They don't use numerical weighting anymore?

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A. Correct.

Q. So there is not 0.6 of a case or 0.2 of a case?

A. Correct.

Q. Has it been your experience that's easier to apply and keep track of?

A. Very much so.

Supp. Rosenberg Decl. Ex. A (Laws Dep. Tr. 318:16-319:1). There is no dispute or evidence of any "questions" involving the current system or contract.

And lastly, plaintiffs throw stones at the Cities' diversion programs, citing Mountain Law's lack of knowledge about them. Opp. at 9. By definition, a diversion program "diverts" would-be clients away from the public defender before they are assigned. There would be no reason for Mountain Law to have detailed knowledge of these programs—indeed, that is their beauty. Neither the programs, nor their users, occupy the resources of the public defender. There is no dispute that the programs exist, *see Harrison Decl.* ¶¶ 10-12, Ex. E-F, and given the reduced case numbers, no real dispute regarding their effect.

In short, plaintiffs' claims about Mountain Law "grossly exceeding" the Supreme Court standards are false. To the extent caseloads were ever a problem, they no longer are.

VII. PLAINTIFFS ARE SIMPLY WRONG ABOUT THE APPLICABILITY OF PUBLIC DEFENSE STANDARDS

Plaintiffs go on to confuse the standards. They characterize the pre-existing WSBA standards as "mandatory," and the new Supreme Court standards as "discretionary." Opp. at 18. Again, this is wrong. The WSBA standards have never been "mandatory," as even the State Office of Public Defense made clear:

> **RCW 10.101.060 requires** counties and cities that receive state funding for criminal indigent defense address a number of issues in indigent defense contracts. RCW 10.101.030 mandates that local governments adopt standards for indigent defense services, and recommends the Washington State Bar Association (WSBA) Standards for Indigent Defense Services as

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> guidelines for local standards. **The WSBA Standards, while not mandatory, reflect "best practices."**

Supp. Rosenberg Decl. Ex. D (emphasis in original). By contrast, the Supreme Court standards are specifically incorporated into the Court Rules. *See* CrRLJ 3.1. *See* Washington Courts, http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted (last visited March 29, 2013).

Whether the Cities like or agree with the mandatory rules is not the issue for two reasons. One, as the Ninth Circuit recognizes, the government's "feelings" about a change in the law do not inform the question of whether it will violate the law. In *Smith v. University of Washington*, 233 F.3d 1188, 1195 (9th Cir. 2000), the plaintiff made precisely this argument, *i.e.*, "the Law School insisted, and still insists, that its race-conscious selection program was perfectly legal before the people of the State of Washington declared otherwise." The court responded:

> Assuming that is so, it does not suggest that the Law School is ready to violate state law. It has not done so as far as this record shows, and we will not assume that it will. Similarly, we will not assume that it will act in bad faith. Rather, the fact, if it is a fact, that the Law School bridles at the harness placed upon it by the people of the state may go to show that its actions are not voluntary, but it does not go to show that the Law School will break that harness.

Id. at 1195. Some of the individuals in this case have a personal opinion about the need for mandatory caseloads in the misdemeanor context. They are entitled to those opinions, but, as the Ninth Circuit observed, it does not follow that they will violate the rules.

And two, any *fair* reading of those "opinions" do not bespeak "disrespect and disdain" in any event. Opp. at 22. Contract administrator, Mr. Stendal, when asked for his personal opinion, indicated that "300 DWLS cases" was a "ridiculously small number." *Supp. Rosenberg Decl.* Ex. E (Stendal Dep. Tr. 49:10-50:16). Plaintiffs omit the next section, where counsel followed up with the question, "You understand, sir, that this is the number that the state Supreme Court recently said is mandatory," *id.*, to which Mr. Stendal responded:

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> Yes, I do… and that's a whole different subject, sir. These are standards, and the Washington state Supreme Court order is very clear, which we, at the City of Mount Vernon and City of Burlington, are implementing at this time. And before January 1, 2013 we'll have a new contract that incorporates all of the Supreme Court order. So we'll be in complete compliance with that order.

Id. The Mountain Law testimony, read fairly, is no different. Mr. Laws merely expressed his belief that they could "meet the needs of their indigent defense clients without such a rule being in place," his impression that "the prosecution community is not happy," and a philosophical belief that such sweeping changes by fiat might create a separation of powers issue. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 126:24-127:12, 127:14-17, 128:22-129:10). At no point does he ever express "disrespect or disdain," and certainly never any intention to violate the rules. *Id.*

The Supreme Court has spoken, and everyone will comply with the new rules. There is no evidence otherwise.

VIII. THERE IS NO EVIDENCE OF ANY CAUSAL CONNECTION BETWEEN CITY CONDUCT AND ATTORNEY MALFEASANCE

As the Court emphasized in its prior summary judgment Order, the issue is whether a "funding, contracting, and monitoring" policy by the Cities operated to deprive indigent criminal defendants of their Sixth Amendment right to counsel, "regardless of any individualized error" on the part of the public defender. *See* Dkt. 142 (Order at 10). Here, there is none.

First and foremost, Mountain Law emphatically rejects this whole idea, offering unequivocal testimony that their decisions as public defenders are a function of *only* client wishes and legal judgment. *Supp. Rosenberg Decl.* Ex. A (Laws Dep. Tr. 324:24-325:7) (witness interviews); *id.* at 340:10-13 (motions practice); *id.* at 342:18-343:4 (retention of experts); *id.* at 343:5-344:15 (trial practice). They also confirmed that they are not "too busy" to spend time on their cases:

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Q. Do you believe Mountain Law attorneys spend enough time on their cases?

A. Yes.

Q. If a client could benefit from more time spent on their case, would the attorney be willing to do so?

A. Yes.

Q. Do attorneys not spend time on cases because they are too busy or disinterested?

A. Not at all.

Id. at 360:20-361:3.[12]

Plaintiffs concede that they have no contrary opinions with respect to funding or contracting. *Supp. Rosenberg Decl.* Ex. C (Jackson Dep. Tr. 231:23-232:5). And on the question of "monitoring," as discussed above, the Cities are operating at or above the standard of care—and nothing about it will cause a "direct and predictable" Sixth Amendment violation. In fact, the Supreme Court specifically observed that absent "obvious" information to the contrary, it is fair to presume that lawyers will operate within constitutional bounds. *See Connick v. Thompson*, 131 S.Ct. 1350, 1363 (2011) (because of their training, education, and ethical standards, "constitutional violations are not the 'obvious consequence' of failing to provide [attorneys] with in-house training about how to obey the law."); *United States v. Cronic*, 466 U.S. 648 (1984) (a novice real estate attorney was not presumptively incompetent to handle a complex financial felony trial).

There is no basis to infer liability on the Cities' part with respect to the current public defense system. Plaintiffs offer nothing to the contrary.

[12] If the Mountain Law attorneys are actually *lying* about this—contrary to their contract, economic interest, and mandatory standard—it would, at best, be a *respondeat superior* issue. Four attorneys going completely "rogue," for no discernible reason, is neither "direct and predictable" under *Monell*, nor so obvious that the Cities can be called deliberately indifferent. *See City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989) (requires "rigorous causal showing"); *Connick*, 131 S. Ct. at 1360 ("stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action").

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IX. THE FACT THAT THE CITIES STAND BEHIND THE WORK DONE BY SYBRANDY AND WITT DOES NOT DEFEAT MOOTNESS

Plaintiffs also claim fear that absent an injunction, the Cities will dismantle all of their legislation, regulations, contracts, investigative findings, and begin ignoring mandatory court rules—citing the Cities' defense of Sybrandy and Witt and the role of this litigation. Both premises are untenable.

First, the Cities' decision to stand behind Mr. Sybrandy and Mr. Witt has little bearing on mootness. The defense of prior conduct is far less relevant when change is brought about in a mandatory way. As in *Smith v. University of Washington*, 233 F.3d 1188, 1195 (9th Cir. 2000), intervening legislation—not unlike the mandatory Supreme Court standards, ordinances, and binding contracts—rendered the case moot, irrespective of the defendant's ongoing defense of prior conduct. *See also White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (change in HUD's policy with respect to Fair Housing Act investigations was sufficient to render case moot); *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1245-46 & n. 4 (9th Cir.1980) ("the city attorney has now announced an official policy… given the change in policy, there is not a strong possibility of a recurrence of the behavior of which the appellant complains"); *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627 (11th Cir. 1998) (restrictive airport policy lifted one month after lawsuit brought; case mooted because "the old policy was a purely academic point");; *see also* 13C Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 3533.5, at 311 (3d ed. 2008) ("[m]ost cases that deny mootness rely on clear showings of reluctant submission [by governmental actors] and a desire to return to the old ways.").

In contrast, the cases cited by plaintiff involve only superficial change, which would have been exceedingly easy to undo. *Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007), presents a good example. There, the entire basis for mootness was an "informal letter" by the secretary of state, indicating that he would "not seek to prevent the operation of [certain] websites." *Id.* at 1016. Similarly, in *DeJohn v. Temple Univ.*, 537 F.3d 301, 306 (3d Cir. 2008), the university rewrote a policy, and in *United States v. Gov't of Virgin*

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Islands, 363 F.3d 276, 285 (3d Cir. 2004), the defendant ended a contract with no explanation but "[it] was in the best interest of the Government."[13] Certainly, none of these cases involved intervening, mandatory court rules and legislation, use of independent counsel, independent fact-finding, diversion programs, doubled funding, doubled hiring of professionals, and documented proof of effect. No case has denied mootness under comparable facts.

Plaintiffs then attempt to paint these sweeping changes as "a result of the litigation." The argument is equally unavailing. Mot. at 19. By definition, changes that moot a case happen during a case. A plaintiff can therefore always make a pitch for "strategic mootness." But it has to be predicated upon something factual. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (change of agency interpretation mooted case; "[plaintiff]'s effort to forestall [it] by characterizing the government's action as 'strategic mootness' does not save the day."). Here, it is undisputed that the Cities made sweeping changes in anticipation of the forthcoming standards, and had the opportunity because Sybrandy and Witt chose to terminate their contract. *Harrison Decl.* ¶¶ 2-5. The fact that the Cities looked to this case as a source of information was only logical; it would have been foolish not to. As independent counsel, Patrick Hayden, explained, "the goal" of the process was to "meet those statewide requirements," but "the interviews weren't done in a vacuum. I mean, this case was pending at the time." *Supp. Rosenberg Decl.* Ex. F (Hayden Dep. Tr. 90:10-91-1).

There is, conversely, *zero* evidence that any of these changes were "strategic" or implemented as part of a broad conspiracy—involving two city councils, numerous attorneys, fact finding, and several public contracts—all to moot this litigation. Plaintiffs are entitled to the presumption of veracity under Fed. R. Civ. P. 56, but they are not entitled

[13] Plaintiffs also cite *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 751 (9th Cir. 1991), which was not even a voluntary cessation case. Mootness was addressed in a footnote, and denied because the question was broader than the existing consent decree. *See id.* at 751 n.5.

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to speculate. The Cities have explained why the changes were made, and plaintiffs present no reason to doubt it.

X. CONCLUSION

For the foregoing reasons, plaintiffs have failed to articulate why a public defense system, which is the culmination of input by numerous independent experts, and comports with every applicable standard, still requires injunctive relief. It does not. Summary judgment should be granted.

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DECLARATION OF SERVICE

I, Joan Hadley, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action, and that on the 29th day of March, 2013, I caused a copy of the ***Cities' Reply in Support Summary Judgment*** and ***Supplemental Declaration of Adam Rosenberg*** to be filed and served on the following parties of record using the USDC CM/ECF filing system:

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