Faulk, Camilla

From: Sophia Byrd McSherry [Sophia.ByrdMcSherry@opd.wa.gov]
Sent: Wednesday, April 30, 2008 4:31 PM
To: Faulk, Camilla
Subject: comments on proposed court rules
Attachments: 4788_001.pdf

Attached please find comments on proposed court rules. A hard copy of this document also was hand-delivered to the court earlier today.

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April 29, 2008

The Honorable Charles W. Johnson
Associate Chief Justice
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Comments on proposed amendments to CrR 3.1, CrR 4.1, CrR 4.2, CrRLJ 3.1, CrRLJ 4.1, CrRLJ 4.2, JuCR 7.15 and JuCR 9.2

Dear Justice Johnson:

This letter presents comments on proposed amendments to various criminal court rules for superior court, courts of limited jurisdiction and juvenile court. These comments reflect the position of the Advisory Committee of the Washington State Office of Public Defense (OPD).

CrR3.1, CrRLJ 3.1 and JuCR 9.2

The proposed amendatory language is the same for each of the above-referenced rules, and our comments apply equally to each.

The OPD Advisory Committee supports the intent embodied in the proposed amendments. These amendments are necessary to clarify the judiciary's role as a co-equal branch of government with certain, limited responsibilities for ensuring and implementing the right to effective counsel consistent with statutory and constitutional guarantees.

We believe these amendments will directly address some of the longstanding systemic failures highlighted by a series of reports from The Seattle Times in 2004. Those news articles pointed out that at least one Grant County judge was aware of the deficiencies of a public defense attorney later disbarred by the Supreme Court for acts of incompetence. The judge, who observed the public defense attorney countless times in court, told The Seattle Times that "legal analysis was not a strong point for (the public defender)...he has a difficult time standing in front of a jury and stating his ideas and arguments clearly."[i] The judge went on to say that after a trial of a 16-year-old juvenile represented by the attorney, he didn't feel the juvenile should have been convicted, but went on to sentence him. "And I tell you, as a judge having to sentence a kid like that, when you have that kind of a haunting feeling, that is tough."

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Later, the series noted that "The erosion of justice cannot be attributed exclusively to the defense attorneys we wrote about. Those attorneys were allowed to do such a poor job through the indifference of others in the system—including prosecutors (and)... judges...."[ii]

At the appointment stage, the judge is uniquely able to ensure that a proposed public defense attorney has at least the minimum expertise and competence necessary to represent criminal defendants. In every case to which the right to counsel attaches, the judge is ultimately responsible for resolving appointment questions and appointing counsel, as provided by RCW 10.101 and by other sections of the Rules for Superior Court, including both the Criminal Rules and the Juvenile Court Rules, and the Criminal Rules for the Courts of Limited Jurisdiction.[iii]

Sixteen Washington counties and at least two cities handle public defense needs through public defender offices that provide attorney oversight with a supervising director or indigent defense coordinator. In the remaining counties and cities, however, public defense is handled either through contracts with local attorneys or firms or court appointment from a list of attorneys. In many of the latter locations, there is usually little oversight of an attorney's work activities, which makes the judge's inquiry into whether the proposed attorney has the minimum qualifications, competence and expertise critical to determining whether appointment is merited. Adoption of the proposed amendments will help trial courts identify issues and appropriately decline to appoint unqualified counsel in public defense cases, thus exercising apt judicial supervision over appointments—preventing the kind of 'hands off' situation that is occurring in a number of jurisdictions at present. OPD's January 23, 2007 Status Report on Public Defense in Washington State noted that while a few jurisdictions (four counties at present) have implemented contract attorney indigent defense coordinators,

> The WSBA Blue Ribbon Panel on Criminal Defense reported that few justice system survey respondents—only 6.5 percent—believed that public defense attorneys were regularly evaluated or monitored. The Panel concluded, "There is currently no effective oversight by courts or administrators in some jurisdictions to ensure that indigent defendants receive constitutionally effective representation." Washington State OPD's review of county contracts confirms that, outside of defender agencies (and the new indigent defense coordinators), the Blue Ribbon Panel's findings are still painfully accurate." [iv]

In addition, there is a strong precedent for these amendments. In adopting SPRC 2, the death penalty appointment of counsel rule, the Supreme Court has previously required judges to exercise court supervisory powers to ensure proposed public defense attorneys have sufficient qualifications. These requirements were first adopted in 1997 and strengthened in 2003 due to the Court's recognition that the act of appointing counsel serves as a critical quality-control mechanism for promoting adequate public defense. Under SPRC 2, the superior court judge must not only ensure that first chair trial counsel appears on the Capital Counsel Panel list, but also that both the first chair counsel and co-counsel must have the proficiency and commitment to quality representation appropriate to such a case, and must meet experience requirements and

not be counsel on another active trial death penalty case. Adoption of the proposed amendments before the Court now is an appropriate extension of this precedent, which has been implemented without negative impact to the judiciary for more than 10 years.

Nevertheless, the OPD Advisory Committee is cognizant of concerns that these new amendments could be construed as requiring numerous individual inquiries that would be burdensome and unnecessarily inefficient for courts. To avoid any undue burden on a judge's time, we suggest that the Court direct OPD, in consultation with the Administrative Office of the Courts (AOC), to draft standardized language that judges may utilize in making attorney appointments, as well as an attorney questionnaire to help fully implement the new rule while requiring little court time.

For example, we suggest that prior to a first appointment, an attorney appearing in court as a public defender would complete the questionnaire regarding his or her qualifications, competence and expertise, and submit it for the court's review. Then, once the court deems an attorney qualified, the attorney would be presumed qualified whenever appearing in the same court on similar matters. Consistent with existing requirements of the Standards for Indigent Defense Services and the Rules of Professional Conduct, the attorney would have a duty to notify the court of any change in status that could impact his or her qualifications.

In response to comments that the proposed rule's reference to "proficiency, ability and commitment" is vague, we suggest that the Court consider replacing "proficiency" and "commitment" with "sufficient expertise" and "competence" – terms used to describe the purpose of the rule in the Court's GR 9 statement. We believe that along with "ability" these characteristics relate to basic requirements of national, state and local public defense standards, which should facilitate judicial evaluation. As a brief example, an attorney's "ability" is directly related to his or her caseload (Standard Three); "sufficient expertise" is related to training (Standard Nine); and "competence" is related to qualifications of attorneys (Standard Fourteen).

With the changes we suggest, the proposed amendments would read as follows: (1) Before appointing a lawyer for an indigent person [or in a juvenile offense proceeding], the court shall satisfy itself that proposed counsel has demonstrated sufficient expertise, ability and competence appropriate to the proceedings, pursuant to the Standards for Indigent Defense Services as endorsed by the Washington State Bar Association.

CrR4.1, CrR4.2, CrRLJ 4.1, CrRLJ 4.2 and JuCR 7.15

The OPD Advisory Committee supports these proposed amendments and the new juvenile court rule as drafted. We are satisfied that each has been fully vetted over a period of more than two years – through the Washington State Bar Association's Committee on Public Defense, the Bar's Court Rules and Procedures Committee, and the Board of Governors. Active participants throughout this process include representatives of the Washington State Office of the Attorney General, the private bar, judges from all levels of courts, local public defense agencies and contractors, elected county prosecuting attorneys and deputy prosecutors from around the state, a former

city attorney, law school faculty, as well as elected and appointed officials of the Washington State Association of Counties and the Association of Washington Cities.[v]

As was discussed in the very-inclusive drafting process, the proposed amendments requiring defense counsel at arraignment simply apply provisions of the Grant County Settlement Agreement[vi] – now widely considered a benchmark for meeting the constitutional guarantee of counsel in Washington State.

The proposed amendments also merely re-state and emphasize existing court rules and statutory requirements. For example, existing CrRLJ 3.1(2) already provides that "A lawyer shall be provided at every critical stage of the proceedings." RCW 10.101.020(3) requires that a "determination of indigency shall be made upon the defendant's *initial* contact with the court." And RCW 10.101.020(4) specifically requires that "If a determination of eligibility cannot be made before the time when the first services are to be rendered, *the court shall appoint an attorney on a provisional basis.*"

Court rules and case law recognize a right to counsel at the entry of a guilty plea, yet a considerable number of courts of limited jurisdiction routinely accept guilty pleas without counsel at arraignment.[vii] The proposed amendments do not plow new legal ground, but offer specific direction to courts that have not consistently and fully implemented existing law.

The OPD Advisory Committee is sympathetic to local governments' concerns that adoption of the proposed amendments could increase their costs for public defense. However, cost does not justify a systematic denial of the statutory and constitutional rights to counsel at critical stages of a proceeding.

Since 2005 OPD has partnered with counties and cities to seek – and for the first time in state history – obtain state funding for trial-level criminal defense programs. We ask the Court to consider that pursuant to RCW 10.101.050 through 10.101.080 the state is now distributing more than $5.6 million annually to 38 counties and more than $600,000 to 15 cities to fund public defense improvements – including counsel at arraignment. The cost of providing counsel at arraignment is relatively reasonable; for example, the grant amounts awarded to municipalities specifically for this purpose range from a low of $10,000 for the city of Centralia to a high of $73,500 to fully fund public defense services at arraignments in the city of Spokane.

In its most recent funding application submitted last November, Spokane enthusiastically endorsed arraignment counsel as an effective and efficient approach for clients, attorneys and the court system.

> Having an attorney at the arraignment hearings in 2007 was invaluable. We estimate that by the end of 2007 the assigned attorney will have resolved 1,000 cases at arraignment, most of which were by non-plea resolutions, such as dismissal, bond forfeiture, stipulated orders for continuance. In addition, the attorney offered advice in many other cases.... [I]n DWLS 3rd cases ... the attorney could advise the defendant what was holding their license and that the prosecutor would most likely dismiss the criminal case and dismiss or mitigate

> the association infractions if the defendant was able to get a valid driver's license.... The fact that the attorney was able to resolve cases at arraignment then had the effect of reducing per-attorney caseloads.... The fact that there was an attorney to talk to at arraignment was very warmly received by the public. Often our clients lose their jobs if they come to court repeated times.[viii]

As it participates in the new Judicial Branch budget process, OPD is drafting a 2009-2011 budget proposal to the Legislature that will include sufficient funding to implement attorneys at juvenile initial appearances and at district court criminal arraignments in every county. In its city grant program, which equals 10 percent of the total state funds appropriated for trial-level criminal defense, OPD will continue to encourage use of the grants to support arraignment counsel in municipal courts.

Significantly, 12 counties and seven of the 15 cities currently receiving state funds report to OPD that they already provide counsel at adult criminal arraignments or plan to do so with the most recent distribution of state funding. Twenty-one counties report always providing counsel at juvenile first appearances.[ix] As noted above regarding the city of Spokane, attorneys and elected officials in other jurisdictions have remarked to OPD staff that they observe improved court efficiencies as a result of having counsel at arraignment.

That anecdotal evidence appears to be supported by early analysis of data collected during three pilot projects established by OPD at Thurston County District Court, Bellingham Municipal Court and Grant County Juvenile Court. The pilot project phase continues through June with a formal evaluation to be completed in the fall. All three jurisdictions report that they will maintain the improvements established in the pilots, including counsel at arraignment. Prior to implementation of the pilot projects in 2006 these courts did not routinely provide counsel at arraignment and juvenile first appearances. Now each always has counsel available to consult briefly with defendants prior to or at their first contact with the court. This allows the court to appropriately resolve many matters at the first court appearance, which in the end reduces costs associated with court continuances and extended time in jail or juvenile detention while awaiting another hearing.

In summary, the Office of Public Defense appreciates the opportunity to comment on these proposed amendments and new court rules, and recommends adoption as discussed above. If there are any questions or requests for further comment, please let me know.

Sincerely,

Joanne Moore (SBM)

Joanne I. Moore, Director
On behalf of the Advisory Committee of the Office of Public Defense

[i] Ken Armstrong, Florangela Davila, Justin Mayo, *The Empty Promise of an Equal Defense, Part 1: For some free counsel comes at a high cost,* Seattle Times, Apr. 4, 2004, *available at* http://community.seattletimes.nwsource.com/archive/?date=20040404&slug=defense04.

[ii] Ken Armstrong, *Live Q& A,* http://seattletimes.nwsource.com/html/localnews/2001894433_qa_defense06.html.

[iii] RCW 10.101 charges the court with the responsibility of determining the defendant's indigency status before appointing counsel; this determination is delegated by the judge to county indigency screeners in 13 counties, and is handled directly by the judge in the remaining counties. *See* "Update on Criteria and Standards for Determining and Verifying Indigency, Oct. 2007, www.opd.wa.gov, at 3. Many court rules govern discretionary decisions that judges make pertaining to the appointment of counsel. See, for example, CrR 4.1(d), under which the judge must ascertain at arraignment that a defendant's waiver of counsel is made voluntarily, competently, and with knowledge of the consequences; CrR 4.2(4), setting out the required defendant's guilty plea statement, which must be completed to the judge's satisfaction before accepting a plea, where the defendant states that he or she has been informed and fully understands the defendant's right to representation by a lawyer and that if the defendant cannot afford a lawyer, one will be provided at no expense; JuCR 7.7(3), the juvenile's statement on plea of guilty, which states that the juvenile has been informed and understands that he or she has the right to a lawyer, and that if indigent, "the judge will provide" one at no cost; and JuCR 9.2, which establishes that "[t]he court shall provide a lawyer at public expense in a juvenile offense proceeding" when required by statute; CrRLJ 4.1(a)(3), which mandates the judge to advise the defendant on the record of the right to "be represented by a lawyer at arraignment and to have an appointed lawyer for arraignment if the defendant cannot afford one", and CrRLJ(c)(2), which establishes that the court shall determine on the record whether a defendant's waiver of counsel is made voluntarily, competently, and with knowledge of the consequences.

[iv] Washington State Office of Public Defense, *Status Report on Public Defense in Washington State, 20* (January 23, 2007).

[v] *Making Good on Gideon's Promise, Report on the Recommendations of the WSBA Committee on Public Defense,* adopted by the WSBA Board of Governors, Sept. 21, 2007.

[vi] *Best v. Grant Cy.*, No. 04-2-00189-0 (Kittitas County Superior Court, Nov. 2, 2005- Settlement Agreement).

[vii] *The Right to Counsel: Every Accused Person's Right,* Robert Boruchowitz, Washington State Bar News (Jan. 2004).

[viii] Application for state public defense funding from City of Spokane (Nov. 2007) (on file with the Washington State Office of Public Defense).

[ix] *2007 Status Report on Public Defense in Washington State,* Washington State Office of Public Defense (April 2008).