## Faulk, Camilla

**From:** Rubén García Fernández [rgfernandez@hq.aclu-wa.org]
**Sent:** Wednesday, April 30, 2008 11:20 AM
**To:** Faulk, Camilla
**Cc:** Nancy Talner
**Subject:** ACLU Proposed Court Rules
**Attachments:** 2008-04-30--ACLU ltr re Proposed Court Rules.pdf

Dear Camilla,

Enclosed please find a letter containing the ACLU's proposed changes to the Court Rules.

Best wishes,

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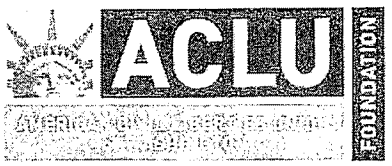


April 30, 2008

Mr. Ronald R. Carpenter
Clerk, Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

SENT VIA EMAIL to **Camilla.Faulk@courts.wa.gov**

Re: **Support for Proposed JuCR 7.15; CrR 4.1 and 4.2; and CrRLJ 4.1 and 4.2 (all pertaining to the right to counsel)**

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
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BOARD PRESIDENT

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EXECUTIVE DIRECTOR

Dear Mr. Carpenter,

I am writing on behalf of the American Civil Liberties Union of Washington (ACLU) to urge the Court to adopt the proposed court rules listed above. All of the rules will aid in protecting the fundamental constitutional right to counsel of juveniles and adults. Please submit these comments to the Court for its consideration as part of the official record.

JuCR 7.15

Unrepresented juveniles in court proceedings are a particularly vulnerable population in great need of adequate legal representation. Every day without this rule, juveniles in some parts of our state give up their rights without any assurance that their constitutional rights have been protected.

Adoption of this proposed rule would guarantee consistent procedures for waivers of counsel in juvenile cases in all counties in Washington. Providing counsel to all juveniles, prior to acceptance of any waiver of that right, is already the existing practice in many counties, where it works well. The practice should be required in every county.

Proposed JuCR 7.15 remedies the problem of inconsistent practices by requiring an opportunity for consultation with defense counsel before a waiver of the right to counsel will be accepted. Such consultation is essential to give the juvenile accurate information about his or her rights and determine if there are any barriers to the particular juvenile's ability to understand the waiver. The proposed rule also includes a waiver form for the advising attorney to use, to assure that the juvenile is made aware of the consequences of the proceedings and the consequences of waiving counsel. Finally, the proposal requires that the advising attorney appear at a hearing on the record so that the court can determine whether any waiver was intelligently, knowingly and voluntarily made and not unduly influenced by others. Given the significance of the right to counsel in juvenile

cases, it is appropriate that waiver of that right occur, if at all, only after the safeguards described in the proposed rule have been utilized in every case.

Adoption of the proposed rule would bring Washington into compliance with national standards. A majority of states make it difficult, if not impossible, for juveniles to waive their right to counsel. A 2003 study of Washington's juvenile courts found that over half of Washington's counties did not comply with ABA standards.[1] The study confirms the critical need for adoption of proposed JuCR 7.15. We urge the Court to expeditiously adopt proposed JuCR 7.15.

CrR 4.1 and 4.2; CrRLJ 4.1 and 4.2

Defendants' access to counsel at criminal arraignment is standard practice in most superior courts and many courts of limited jurisdiction. Unfortunately, a minority of courts do not ensure this important component of the criminal justice system. This means that every day, in those courts that do not yet provide access to defense counsel at arraignment, unrepresented defendants make significant decisions about their legal rights without a full understanding of those rights or the consequences of their decisions. Defendants at arraignment may waive their right to a jury trial or waive virtually all of their rights by pleading guilty, without understanding that those decisions may have life-altering consequences. Some are led to believe they must choose between proceeding unrepresented or remaining in custody for days until access to counsel is provided.

It violates basic fairness for defendants in some counties to face this dilemma, while others have ready access to counsel at arraignment. The proposed CrR 4.1 and 4.2 and CrRLJ 4.1 and 4.2 would require access to defense counsel at arraignment in all Superior Courts and courts of limited jurisdiction in Washington. They would also assure that there is an adequate colloquy and record whenever a defendant chooses to waive counsel. The ACLU urges the Court to approve these rules and end the inconsistent practices that invite violation of too many defendants' rights.

A court rule that explicitly commands the presence of counsel at arraignment can avoid the serious abuses described in cases such as In re Disciplinary Proceeding Against Michels, 150 Wn.2d 159, 75 P.3d 950 (2003) (municipal court judge accepted guilty pleas from defendants he had represented as a public defender and used defective guilty plea forms) and In re Disciplinary Proceeding Against Hammermaster, 139 Wn.2d 211, 985 P.2d 924 (1999) (municipal court judge threatened unrepresented defendants with indefinite jail sentences or life imprisonment until fines or costs were paid, and had defendants sign a form at arraignment agreeing that trial could be conducted in absentia.) Requiring access to defense counsel in all courts of limited jurisdiction at arraignment, as well as Superior Court, assures protection of defendants' right to counsel and promotes the public view of courts as places of justice. See, Hammermaster, 139 Wn.2d at 235.

An "attorney-of-the-day" system for arraignment counsel has proven very effective in many counties. It ensures that those defendants who wish to resolve their charges with a

[1] "Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters", done by the ABA Juvenile Justice Center and National Juvenile Defender Center.

guilty plea are able to do so with advice of counsel. Courts have confidence that any waivers of constitutional rights are more likely to be knowing, intelligent, and voluntary when defendants have had an opportunity to consult with arraignment counsel who is present in the courtroom. And judges are not placed in the awkward situation of answering questions from unrepresented defendants that would be better directed to counsel.

For all of the reasons that access to defense counsel at arraignment is essential, the same reasons support safeguards for waiving interpreters at arraignment. There is too great a risk that defendants may not understand the important rights and decisions at stake in an arraignment, if they need assistance in understanding English and the court does not engage in a colloquy regarding the waiver each and every time. The applicable statute already requires this, and the appearance of fairness demands no less.

In addition to access to defense counsel, the Court should adopt the provisions of CrR 4.1 and CrRLJ 4.1 requiring the presence of the prosecutor at arraignment. In the absence of a prosecutor, the judge must inevitably take on the role of the prosecutor.Absence of the prosecutor may also make it difficult to complete plea bargains or other resolutions on a first appearance, resulting in greater costs and lengthier periods of costly incarceration over the course of a case.

We urge the prompt adoption of CrR 4.1 and 4.2 and CrRLJ 4.1 and 4.2.

Sincerely,

Nancy L Talner

NANCY L. TALNER
Staff Attorney