

Faulk, Camilla

From: Todd Dowell [TDowell@co.kitsap.wa.us]
Sent: Wednesday, April 30, 2008 4:08 PM
To: Faulk, Camilla
Cc: Greg Hubbard
Subject: Comments to Proposed Rule of Court (268): JuCR 7.15 "Waiver of Right to Counsel"
Attachments: Comments to Proposed Rule of Court.doc

Please find comments to the Clerk of the Supreme Court as to the proposed rule (268) attached as a Word document. Please let me know if there are any problems.

Thanks,

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Comments to Proposed Rule of Court (268): JuCR 7.15 "Waiver of Right to Counsel"

In 2008 the Supreme Court shall consider a juvenile court rule that basically requires a juvenile to have a lawyer in order to waive a lawyer in any juvenile offender case that is not diverted. Proposed Rule #268 reads in pertinent part:

JuCR 7.15
WAIVER OF RIGHT TO COUNSEL

(a) A juvenile who is entitled to representation of counsel in a juvenile court proceeding may waive his or her right to counsel in the proceeding only after:

- (1) the juvenile has been advised regarding the right to counsel by a lawyer who has been appointed by the court or retained;
- (2) a written waiver in the form prescribed in section (c), signed by both the juvenile and the juvenile's lawyer, is filed with the court; and
- (3) a hearing is held on the record where the advising lawyer appears and the court, after engaging the juvenile in a colloquy, finds the waiver was knowingly, intelligently, and voluntarily made and not unduly influenced by the interests of others including the parent(s) or guardian(s) of the juvenile.

Proposed-268 [remaining sections and forms omitted].

The proponents of this rule list its purpose as addressing "the significant problem of juveniles appearing in court without representation", citing a report done by the *Washington State Assessment of Access to Counsel and Quality of Representation in Juvenile Offender matters*.¹ Yet, no concrete examples are presented showing actual cases where juveniles experienced a "significant problem" in waiving the right to counsel. It appears this is an answer to a question that no one is asking except perhaps those involved with public defense.

Waiver of counsel in juvenile proceedings is currently governed by court rule CrR 4.1(d).² That rule already requires the juvenile court to ascertain whether a waiver of counsel is "made voluntarily, competently and with the knowledge of the consequences."³ A record of the waiver is required.⁴ Unless the court finds the waiver

¹ *Washington State Assessment of Access to Counsel and Quality of Representation in Juvenile Offender matters* (American Bar Association Juvenile Justice Center, National Juvenile Defender Center, Northwest Juvenile Defender Center, 2003).

² JuCR 7.6(a) provides: "The procedure for the arraignment of an alleged juvenile offender is governed by CrR 4.1." JuCR 7.6(a).

³ CrR 4.1(d)

⁴ Id.

valid, the court may not proceed with the arraignment until counsel is provided.⁵

We presume the juvenile courts in this State are competent to provide the proper colloquy necessary to ascertain whether or not a juvenile's waiver of counsel is knowingly and voluntarily made, especially in light of the juvenile's age and education. We presume the juvenile courts in this State have used and will continue to use proper discretion in whether or not to grant a waiver of counsel. If this has not been the case, then show us a specific example where a juvenile court abused its discretion in finding a waiver to be valid.

The new court rule will not absolve the fundamental responsibility of juvenile courts to make an independent decision regarding the right to counsel, even assuming independent counsel approves the waiver. Is this proposed rule really necessary? Are we preventing any problems by appointing counsel to waive counsel? Isn't the juvenile court in the best position to make any assessment of the waiver?

To the extent that juveniles need protection from the serious consequences, which flow from proceeding in juvenile court matters, this proposed rule provides only minimal protection while potentially adding layer upon layer of bureaucracy to an already burdened court system. Rest assured the new rule will result in increased hearings and attendance for all parties involved, especially juveniles and their parents. Hearings to appoint counsel for the waiver, hearings to assess the waiver and make findings, hearings to address conflicts between counsel and the juvenile over whether it is proper for the juvenile to waive counsel. Not to mention the continuances and delays that will inevitably result.

Many questions are left unanswered by this new rule. For instance, the rule does not address the timing of the waiver, which could happen as early as the arraignment. It does not address standards for competent counsel. What is the attorney's duty in advising the juvenile? How can an attorney properly assess a waiver without first taking time to review discovery and investigate the case? To the extent the consequences are significant at every stage of a proceeding, is any lawyer going to agree early on that a juvenile is making an intelligent decision by proceeding without counsel?

In the final assessment, the rule fails to be intellectually honest. If the consequences in juvenile court are so serious that counsel should be provided in order to effectuate a proper waiver of counsel, then all juveniles should be mandated to have counsel at all stages of the proceedings and all appointments should be properly funded by the State of Washington.

We agree that juveniles should make a knowing, intelligent, and voluntary waiver of counsel. The current rules provide protection through the juvenile court's independent assessment of the need for counsel. The Supreme Court should acknowledge the ability of our courts to properly make that assessment and should reject this proposed rule.

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⁵ Id.

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