Faulk, Camilla

From: Boruchowitz, Robert [boruchor@seattleu.edu]
Sent: Thursday, April 30, 2009 3:58 PM
To: Faulk, Camilla
Subject: Proposed Court Rules CrR 3.1 and CrRLJ 3.1

I write to support the proposed rules requiring the trial court to satisfy itself that proposed appointed counsel has demonstrated the proficiency, ability
and commitment to quality representation appropriate to the proceedings, pursuant to the Standards for Indigent Defense Services as endorsed by the
Washington State Bar Association.

Recent reports, including the NACDL report on "Minor Crimes, Massive Waste—The Terrible Toll of America's Misdemeanor Courts", and the report of the National Right to Counsel Committee for the Constitution Project, make clear that in many courts, including in Washington, judges either turn away from or actively participate in the denial of the right to counsel. This proposed rule would require courts to make an affirmative finding that counsel is qualified to represent the accused persons in those courts.

It would be possible for judges in high volume courts to develop a system of review for organized defender offices and assigned counsel programs, and the state Office of Public Defense could help to develop procedures. I would be pleased to participate in developing such processes.

This rule would not necessarily result in a conflict with a local executive agency that had selected the appointed counsel. It is critical that defenders be independent of judicial control in the handling of their cases just as retained counsel would be. This rule does not contemplate judicial interference, but rather judicial protection of the right to counsel. I would think that an organized defender office or contract firm could establish, perhaps on an annual basis, that its practices of recruiting, hiring, supervising, training, and evaluating its attorneys met the bar-endorsed standards. Reference to such a demonstration, in combination with a declaration from trial counsel, would allow the trial judge to meet the requirements of this rule. Such a determination would not predetermine a ruling on a challenge to effective assistance, which would be based on the ability and performance of counsel in the cases in which that challenge were raised.

As one of the other commentators noted, this rule alone will not resolve problems in courts in which judges are blind to or insensitive about the lack of qualifications and commitment to quality representation appropriate to the case. The lawyers on both sides, defenders and prosecutors, need to be attentive to the constitutional requirements and held to account when they violate their ethical obligations.

In light of the many reports on problems in public defense that have been published in the last decade, it is definitely timely for the Court to pass rules for both the Superior Court and the Courts of Limited Jurisdiction that would alert the judges to pay closer attention to their obligations to ensure that accused persons unable to hire their own lawyers have counsel who are qualified to represent them.

Thank you for your consideration.

Sincerely,

Robert C. Boruchowitz
Visiting Clinical Professor of Law
Director, The Defender Initiative
Seattle University School of Law
[Organizational affiliation for identification purposes only]