Faulk, Camilla

From: Floris Mikkelsen [floris.mikkelsen@defender.org]
Sent: Monday, October 31, 2011 4:48 PM
To: Faulk, Camilla
Subject: Comments On Standards For Indigent Defense Services

To Camilla Faulk, Washington Supreme Court

By email to Camilla.Faulk@courts.wa.gov

Re: SuggestedStandards for Indigent Defense Services

Dear Ms. Faulk:

We write to support the Standards for Indigent Defense Services as proposed by the Washington State Bar Board of Governors in their letter to the Court of October 10, 2011. The Bar-endorsed Standards are the product of more than a year of work, including several meetings of the Board of Governors at which they considered a broad spectrum of opinions.

It is appropriate for the Supreme Court to pass rules implementing these standards. The reality is that many jurisdictions continue to tolerate, and in fact encourage, caseloads that are double or in some cases more than four times the WSBA Standards. Caseloads of more than 1000 cases per attorney per year, which have been documented by the Washington Office of Public Defense in several places, will not permit effective assistance of counsel.

The City of Seattle has long maintained and observed a caseload standard comparable to that proposed by the WSBA. The standard has worked well for the City and for indigent defendants.

The courts have authority to require jurisdictions to carry out their constitutional mandates. As the Court of Appeals has written in a case concerning a trial court's decisions regarding compensation for court appointed counsel:

> To do so, courts possess inherent power, that is, authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.

State v. Perala, 132 Wn. App. 98, 118 (2006) (internal citation omitted).

The use of the phrase "quality representation" is not a new usage. The American Bar Association's Ten Principles of a Public Defense Delivery System (2002) call for "[defense counsel's workload [to be] controlled to permit the rendering of quality representation" (principle number 5). In addition, ABA Defense Function Standard 4-1.2 addresses the lawyer's obligation to provide "effective, quality representation," and the National Legal Aid and Defender Association Performance Guideline 1prescribes the duty to provide "zealous, quality representation."

The proposed standards address mixed caseloads for private practitioners.

> If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In

> jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The proposed standards are hardly anomalous. The Washington State Bar, the King County Bar Association, the City of Seattle by budget proviso in 1989 and by ordinance in 2004, and the American Council of Chief Defenders all have developed per attorney caseload limits. For example, the King County Bar set a misdemeanor caseload limit of 300cases per attorney per year in 1982. In 1973the National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards) set unconditional numerical limits per attorney per year, including a limit of 400 misdemeanor cases per year. In 2007, the American Council of Chief Defenders in their Statement on Caseloads and Workloads wrote that defenders have found the NAC standards "to be resilient and to provide a foundation from which local defenders and bar association leaders can develop local caseload standards." The Cities' letter, which says that it is "nearly impossible" to set a rational caseload limit, has ignored or misapprehended this long history.

The goal is clear that an attorney should not be doing more cases each month than the attorney can reasonably handle. An attorney should not receive 50 cases in the first six months of the year and 250 in the second six months. Otherwise, an annual caseload ceiling would be of very limited value in ensuring adequate representation.

Concerns raised, including a specified misdemeanor caseload limit and how to weight cases and consider attorney experience, are clearly addressed in the final WSBA recommendations contained in the WSBA October 10, 2011, letter.

As the Court wrote in State v. A.N.J.168 Wn.2d 91 (2010), "public contracts have imposed statistically impossible caseloads on public defenders." The Court noted that

> While the vast majority of public defenders do sterling and impressive work,in sometimes and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.

The Court noted that state law requires each county or city providing public defense to adopt defender standards,guided by standards endorsed by the Washington State Bar Association. RCW10.101.030. The Court relied on the WSBA Standards in determining that there had been ineffective assistance in the case.

Shortly after the A.N.J.opinion, the Court announced the proposed rule requiring certification of compliance with standards. These standards will go a long way towards ensuring that indigent defendants statewide will receive effective assistance of counsel.

We urge the Court to adopt the recommendations of the WSBA as outlined in the WSBA October 10, 2011 letter to the Court.

Thank you for your consideration.

Floris Mikkelsen
Director

Lisa Daugaard
Deputy Director

The Defender Association
810 3rd Avenue #800
Seattle, WA 98104

206-447-3900 #640
206-447-0479 Fax

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Floris Mikkelsen
Director
The Defender Association
810 3rd Avenue #800
Seattle, WA 98104
206-447-3900 #640
206-447-0479 Fax