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October 31, 2011

Supreme Court of Washington
PO Box 40929
Olympia, WA 98504-0929
VIA email only: Camilla.Faulk@courts.wa.gov

Re: Comments on Proposed Standards for Indigent Defense

Dear Supreme Court Justices:

Thank you for the extraordinary efforts you have facilitated in the development and consideration of the proposed standards for indigent defense. I am one of two county prosecutors on the WSBA Council on Public Defense (CPD) that developed the rules.

I commend my colleagues on the CPD for the substantial work they have done in drafting and modifying these rules. I was pleased to be a part of the revision of the Qualifications of Attorneys, Standard 14, and feel they are a beneficial and workable rule.

However, I remain opposed to the proposed caseload limits of Standard 3.3 for two fundamental reasons: (1) There is scant evidence showing that this standard is the most effective way to decrease the incidence of incompetent representation; and (2) Standard 3.3 is not clear and definite in its application, as required by GR 9.

I have some trepidation about commenting on this Standard. It would be easy to dismiss or discount my opposition as the strategic efforts of a prosecutor trying to hamstring opposing counsel. But that is not my goal. I believe strongly in the adversarial system. A well-functioning system, with equally-matched advocates, produces the most reliably just results. The perpetuation of the system requires a high degree of public confidence, which is achieved only when the justice system actually dispenses justice. Justice happens when competent and effective counsel are on both sides of a case.

In response to complaints of over-worked public defenders, the 2005 Legislature amended RCW 10.101.030. That statute requires counties and cities to enact standards, with reference to WSBA indigent defense standards, and provided funding to assist local governments in doing so. The legislature did not impose mandatory caseload limits. That legislative fix may have been good medicine to cure the patient, but no effort has been made to assess its effectiveness.

Nevertheless, the well-intentioned CPD has sought additional treatment of the workload complaints through mandatory court-required caseload limits. In my view, they are over treating the patient.

The first step in solving any complex problem is to make an objective determination of the scope and causes of the problem. I feel that step was not given the rigor it deserved, and that the proposed solution will do little to solve the problem. Moreover, it is unclear that there are metrics defined or plans to assess how this rule will have impacted the quality of representation after it is adopted. Such a monumental change as this calls for no less.

In an era when trial courts across the state are carefully vetting criminal justice programs to ensure they are "evidence based,"[1] this proposed rule runs against that positive current. The repetition of slogans like "public defense crisis" and the existence of a small number of cases, such as *State v. A.N.J.*, have resulted in an indictment of every public defender across the State. That indictment, and the legislature's failure to enact mandatory caseload limits, has instigated the full court press to have this legislative package adopted as a court rule.

I have prosecuted cases against highly effective defense counsel who carried tremendous caseloads. Because of their skill and experience, they far more ably represented their clients than their colleagues who had a fraction of the work load. The Court need not rely on my anecdotal experiences. Consider the relative abilities of an attorney a year or two out of law school versus a seasoned litigator with 15 to 20 years of experience. Adjusting the caseload downward of the experienced attorney does nothing to improve the overall quality of representation, let alone to protect indigent defendants' Sixth Amendment rights.

While there may be instances where Standard 3.3 will have a salutatory effect on the quality of representation, I believe in the aggregate the effect will be negligible, while costs and disruption will be great. Better solutions, in my view, would involve the bar association and law schools engaging in more focused recruiting, financial incentives for careers in public defense, mentoring programs, higher admission standards, increased bar discipline for incompetent counsel, and more rigorous CLE training.

The second focus of my opposition to this rule is the fact that it is not a clear and definite rule. I urge the court to consider how these rules will function in practice. Will the general practitioner who accepts court appointments know if she is in compliance? Will an associate in a large public defense agency simply stop working in October or November, when he hits his limit? Will the attorney who makes effective use of paralegals and office automation be penalized relative to the "Lincoln Lawyer" who works out of her car?

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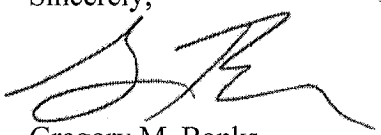
[1] Evidence based programs are those that are proven both cost-effective and that genuinely further policy goals through rigorous study. Examples include drug courts, and juvenile programs like functional family therapy (FFT) and aggression replacement training (ART). The same studies have led to the rational discarding of intuitively seductive programs like "scared straight" and prison "boot camps."

I fear that this rule will diminish respect for the Court's rules, because compliance will be so convoluted. It will require defense attorneys to certify that they are in compliance with a "case counting and weighting system" every time they appear. The certifications will become so much boilerplate, because the attorneys in the trenches must assume that their supervisors are on top of the counting and weighing. Requiring attorneys to certify to facts about which they have no personal knowledge will surely lead to disrespect for court rules, and discount the worth of an attorney's certification. This concerns me greatly.

Ultimately, there are better ways to raise the quality of indigent representation without the heavy hammer of legislation masquerading as a court rule. I recognize that, after so much work by the Court's Rules Committee, and the CPD, it would be difficult to reject Standard 3.3 of the proposed rule. I sincerely believe it is, nevertheless, the right decision to make, and will do more to further the cause trumpeted by the Supreme Court in *Gideon v. Wainwright*.

Thank you for your consideration of my comments.

Sincerely,



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