Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 23, 2019 4:40 PM
To: Tracy, Mary
Subject: FW: Comment on November 2018 - Proposed Rules Published for Comment

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Subject: Comment on November 2018 - Proposed Rules Published for Comment

Comment -- In response to **CrRLJ 3.1 – Right To and Assignment of Lawyer Proposed Rule:** http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2702
Comment Period Expires April 30, 2019

The proposed rule allows the defense to seek public funds for expert assistance ex parte, and seals the request and Order. While this proposal stresses its importance to public defenders, current law allows any defendant who cannot afford expert services to seek such services through the court. *State v. Punsalan*, 156 Wn.2d 875 (2006). Accordingly, this proposal cloaks the funding requests of anyone who seeks public funds for expert services.

The proposal stresses the importance of a fair trial for the defendant, then links that right to secrecy. While the court in *Hickman v. Taylor* agreed "a certain degree of privacy" is necessary, they did so within the context of the broad discovery available to civil litigants under CR 26. The criminal rules for defense counsel are not so onerous as to be unreasonable. This proposal does little to explain why expenditure of public funds and the decision-making by the court should now become a permanent defense secret.

Both parties are entitled to a fair trial. While the proposal highlights secrecy in seeking experts, it ignores the importance of notice, advocacy, and public oversight in misdemeanor cases.

In misdemeanor courts, outside expert assistance is not commonplace. When such issues arise, the need may be plain (as in the need to pursue an evaluation for substance abuse, or a diminished capacity defense) or it may be exotic (as with a demand to analyze and test the software for a breath test device). If the need is plain, seeking an expert does not require secrecy. Their use will be obvious from the facts and it will be a source of discussion between the parties in plea negotiations and with the court to accommodate the need through continuances. If the demand for an expert is an outlier, the potential for mischief is high. The court rarely has as much information as the parties to the litigation. A debate about whether the requested funds are material to any issue and necessary to this litigation will always be an intensely fact driven inquiry. Zealous advocacy by some of our profession's most inexperienced, unchecked by a contrary view and permanently excluded from public review or legal appeal raise serious policy issues. "Broad access to discovery is the centerpiece of a fair trial. 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' " *In re Detention of West*, 171 Wn.2d 383, FN 3 (2001) citing *Hickman v.*

Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). This policy shift in misdemeanor courts should be supported by more than a secrecy-is-good argument. If pursuing public funds for an expert is a valid strategy in a particular case, it should withstand the scrutiny of the public and opposing counsel.

Is this rule change is even needed as a practical matter? In those rare cases where public scrutiny is unwelcome, existing rules authorize sealing records in limited circumstances. To the extent the choice to consult an expert in secret is desirable, the annual defense budget should include allocations for expert assistance. (The 2019-20 defense budget for King County includes such an allocation). When the defense can fund experts from its own allocated funds, no court funds are necessary (or appropriate). In that rare case where public funds are needed and the defense has exhausted its own, the tug-and-pull of advocacy by both parties is the best method for apprising the court as to the legal merits of the proposal, the practical implications for the case, and for guiding the case to a just resolution.

Because 98% of all criminal cases are resolved by agreement, our focus should be upon methods that encourage communication—not tactics based on surprise. Currently, a request for public funds in open court provides the prosecution notice an expert is involved and may be used at trial. Under our discovery rules, the defense is required to provide notice of their intent to use an expert at trial. If there is any value in seeking an expert prior to disclosure of that expert for trial—that value is not apparent here. Ultimately, the decision to consult with an expert either resolves into a valid strategy for resolving the case or it does not. If the strategy is sound, keeping the expert a secret does nothing to advance the strategy. Its value is in its revelation to the opposing counsel to resolve the case though the strength of the evidence. If the purpose of the secrecy it to merely surprise the prosecution, that is not a valid strategy. Conversely, if retaining the expert does not resolve itself into a useful strategy—the secrecy of retaining the expert also serves no purpose. In short, whether the expert consult is useful or useless, cloaking it in secrecy advances no judicial goal.

For the above reasons, I recommend the court decline the proposed rule change.

Regards,

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