



WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

October 5, 2018 | 12:00pm to 2:30pm

Washington State Bar Association, 1325 4th Ave, #600, Seattle, WA

Call: 1-866-577-9294; Access: 52874#

The Council on Public Defense was established to implement the recommendations of the WSBA Blue Ribbon Panel on Criminal Defense, which was appointed by the Board of Governors in spring 2003 as a first step in addressing concerns about the quality of indigent defense services in Washington.

3 min	Welcome and Roll Call	Daryl Rodrigues		
	Orientation for New Members			
10 min	<i>Brief History of CPD</i>	Marc Boman		Orientation materials
10 min	<i>Overview of CPD's Recent Accomplishments and Work</i>	Eileen Farley		Orientation materials and 10 ABA Principles
10 min	<i>CPD's New Charter</i>	Daryl Rodrigues and Eileen Farley		Pages 2-4
10 min	<i>WSBA Policies</i>	Nicole Gustine and Sarah Kolpacoff of WSBA and Daryl Rodrigues		WSBA policies and volunteer toolbox
20 min	<i>Council Roundtable: Why do you serve on the CPD and what are your personal goals?</i>	All Council Members, new and returning		Pages 5-7
2 min	September Meeting Minutes	Daryl Rodrigues	Action	Pages 8-10
10 min	OPD Report	Joanne Moore and Sophia Byrd McSherry	Report	
10 min	Support for OPD Budget Request	Travis Stearns	Action	
10 min	Mental Health Guidelines	Eileen Farley	Action	Pages 11-20
5 min	CrR 3.3 Update	Eileen Farley	Report	Pages 21-26
	Other Committee and Workgroup Reports			
10 min	Standards	Bob Boruchowitz	Report	
10 min	Pre-Trial Reform	Justin Bingham	Report	
10 min	LFO Reform	Nick Allen	Report	
10 min	Public Defense and Independence	Travis Stearns	Report	
10 min	Juvenile Diversion	Ben Carr	Report	
5 min	Other Business	Everyone		

The next Council on Public Defense meeting is Friday, November 2, 2018 from 12:00 to 2:30 p.m. at WSBA.

Charter: WSBA Council on Public Defense

(Revised September 27, 2018)

Purpose and Mission

A WSBA Committee on Public Defense ("CPD") was established in 2004 to implement recommendations of the WSBA's Blue Ribbon Panel on Criminal Defense. Original membership was appointed by the President and confirmed by the Board of Governors. The CPD's recommendations were acted upon by the Board of Governors during FY 2007. One of these recommendations was that the CPD be extended through December, 2008 to study, focus and follow-up on unfinished public criminal defense, dependency and civil commitment issues.

While the extended CPD made significant progress on the issues identified in its charter, it became apparent that maintaining and improving constitutionally effective public defense services in Washington required an ongoing committee with a mandate broad enough to address both new and recurring public defense issues. Having found that the CPD provides a unique and valuable forum for bringing together representatives of the bar, private and public criminal defense attorneys, current and former prosecutors, attorneys, the bench, elected officials and the public, the WSBA Board of Governors established the Council on Public Defense as an advisory committee of the WSBA.

The Council on Public Defense is charged with the following tasks:

1. Recommend mechanisms to assure compliance with "Standards for Public Defense Services" endorsed by the WSBA.
2. Promulgate "Right to Counsel" educational materials and programs for the public, bench and bar concerning the constitutional right to counsel.
3. Develop "Best Practices" guidelines for public defense services contracts.
4. Address current issues relating to the provision of constitutional public defense services in Washington, including supporting efforts to ensure adequate funding is available.
5. Seek, review and recommend possible improvements in the criminal justice system which might impact public defense or the ability to provide public defense services.
6. Examine experience with Washington Office of Public Defense pilot projects and other programs and public defense systems to improve the delivery of defense services in Washington.
7. Develop recommendations concerning the most effective and appropriate statewide structure for the delivery and accountability for defense services.
8. Continue to study and develop system improvement recommendations for the civil commitments process.
9. Develop further recommendations for indigent juvenile public defense.

10. Evaluate and make recommendations regarding the implementation of the death penalty in Washington.
11. Develop performance standards for attorneys providing public defense services in criminal, juvenile offender, dependency, civil commitment, Becca and other cases to which counsel may be appointed.

MEMBERSHIP:

The Council on Public Defense is comprised of 23 voting members and up to 5 emeritus members. Nominations are made by the entities listed below, with all appointments confirmed by the WSBA's Board of Governors. These members do not serve as official representatives of these entities, but rather are appointed based on their knowledge, expertise and a commitment to providing constitutional public defense services in Washington.

The Chair and Vice-Chair shall be appointed by the WSBA President-elect. Each shall serve a two-year term, with the Vice-Chair becoming Chair at the end of the second year and a new Vice-Chair appointed. Except as noted, the members of the Council shall be appointed for two-year terms and be eligible for reappointment for two additional two-year terms, totaling six years of service. The Chair may nominate up to five former Council members whose eligibility for voting membership has expired, to serve as non-voting emeritus members for one year terms¹. The voting membership is as follows:

Core Members (Core Members have no term limits)

- The Director of the State Office of Public Defense (a core member)
- The Director of the Washington Defender Association (a core member)

Nominated by Outside Parties

- One Washington Supreme Court justice or Court of Appeals judge, recommended by the Chief Justice
- One Superior Court judge, recommended by the Superior Court Judges Association
- One District or Municipal Court judge, recommended by the District and Municipal Court Judges Association
- Three public defenders, recommended by the Washington Defender Association
- One representative from each of the three Washington law schools, recommended by the Dean of the school
- One representative from civil legal services, recommended by the Access to Justice Board

Considered Through WSBA Application Process

- Three current or former prosecutors/city attorneys, recommended by the Council

¹ Non-voting emeritus members are not eligible for WSBA expense reimbursements.

chair, vice chair and BOG Liaisons

- Six at-large members, at least one of whom has a contract for or provides public defense services and at least one of whom is a public member, recommended by the Council chair, vice chair and BOG LiaisonsTwo representatives from local government or public defense administrators, recommended by the Council Chair, Vice-Chair and BOG Liaisons

VOTING PROCEDURES

All Council members, other than emeritus members, are eligible to vote. Judicial members may choose to recuse themselves from voting relating to any matters. If judicial members choose to recuse themselves from votes relating to court rules or legislation, on those occasions, and only on those occasions, the membership of the Council, for purposes of determining whether a supermajority have voted in favor or against a proposition, shall be reduced by the number of judges who have recused themselves. This provision does not apply if a judicial member is merely absent.

ATTENDANCE REQUIREMENTS

Council members who have three consecutive unexcused absences in any 12 month period will be considered to have resigned from the Council. The Council may seek a replacement member through the regular WSBA volunteer process, unless the absent member was nominated by an outside party. In that case the outside party will be asked to appoint a replacement.

Council members may be excused for good cause by the Chair. Such an excuse should be sought prior to the meeting.



WSBA COUNCIL ON PUBLIC DEFENSE FY18 ROSTER

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Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE

SEPTEMBER 14, 2018, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA
MINUTES

CPD members in person: Eileen Farley (chair), Daryl Rodrigues (vice-chair) Justice Gordon McCloud, Judge Drew Henke, Justin Bingham, Christie Hedman, Travis Stearns

CPD voting members on the phone: Colin Fieman, Rachel Cortez, Weston Meyring, Dani Casselman, Ann Christian, Jaime Hawk, Kim Ambrose

CPD non-voting members: Bob Boruchowitz

WSBA Staff: Diana Singleton and Bonnie Sterken

Guests: Kathy Kyle, Sophia Byrd McSherry, Rick Lichtenstadter

Absent: Nick Allen, Ben Carr, Jason Gillmer, Deborah Ahrens, Judge Johanna Bender, Marc Boman, Brooks Holland, Michael Killian, Ping Lau, Joanne Moore, Rebecca Stith

1) Introductions and Roll Call and Roster

Members introduced themselves.

2) Approval of August Minutes

The August minutes were approved. Christie corrected the minutes to say that the WDA Anniversary lunch will be in December, not in November.

3) Standards Committee Report

Bob reported on the status of the persistent offender survey. They are aiming to have a proposal for the Council to review by the end of the year. Bob also provided a summary of the issues and considerations that they are working through in terms of reviewing the standards holistically and broadly. The Council had a discussion about a process to ensure engagement with a variety of stakeholders. There was agreement to respond to immediate concerns that are brought to the Council's attention, rather than take on a full review due to time and capacity constraints. Bob noted that there is a need for more people to join the standards committee.

4) OPD Report

Sophia reported that they are doing the 4th of the 4 Juvenile Academy trainings at a juvenile facility today. They have additional CLEs coming up for different topics but one common element will be a demonstration of the new LFO calculator. OPD is also working on the budget request. The funding requests include continuing the WDA incarcerated parents program once the grant has ended and increasing contracting compensation for contract attorneys. Eileen noted that the CPD can again consider sending a letter in support of the OPD budget as we've done in the past, and Sophia noted this would be a good item to address after the election in November. This will

be put on the October agenda to vote on approving a letter of support. There was also a discussion about bringing this to the BOG Legislative Committee to encourage adding it to their priorities.

5) CrR 3.3 Proposal

Kim had sent a memo the day before the meeting explaining the workgroup's proposal to suggest amendments to CrR 3.3. Kim explained the reasoning behind the proposal and the practices counties are following. The Council had a discussion and workgroup members addressed questions. The Council discussed whether this should go to court administrators or judicial officers for further feedback. The Council discussed a need to have a supermajority to proceed with the GR 9 process to propose the amendment but not enough Council members were in attendance to hold the vote. The Council agreed to have this on the agenda for the next meeting. Eileen asked the Council to take a preliminary vote today. Christie moved to approve and support the court rule as drafted, Travis seconded, and all in attendance approved with the exception of Justice Sheryl Gordon McCloud who abstained.

6) Performance Guidelines for Mental Illness

Ann reported on the committee's final work product, which was included in the meeting materials. The current version was also sent to other stakeholders for final feedback. Ann summarized the additional feedback that was received. Rick Lichtenstadter presented the comments received from KCDPD regarding the proposed performance guidelines. The comments submitted also introduced another concern related to misdemeanor caseload standards – that issue was referred to Bob Boruchowitz and the subcommittee on standards. His feedback was included in the meeting materials. The Council had a discussion about the proposal and feedback. After a discussion, the Council took a series of votes to approve amendments to the proposal based on Rick's feedback and other feedback received. Justice Sheryl Gordon McCloud abstained from voting on the amendments. Again, there was not a supermajority in attendance to approve the proposal to submit to the BOG and so the Council will put the proposal on the October agenda for a vote.

7) Pre-Trial Reform Committee

Justin presented the most recent updates to the checklist. They continue to aim to have a final checklist by the end of calendar year.

8) Independence Committee

Travis reported that this committee will meet the 45 minutes before each Council meeting going forward.

9) Juvenile Diversion Committee

Eileen reported that they continue to collect survey responses and are grappling with what to do with the information.

10) Other Items

Christie noted WDA and others are looking at the standards as they relate to counties having difficulty getting attorneys qualified to represent defendants charged with felonies.

Eileen noted articles included in the materials.

The Council agreed to move forward with the proposed schedule in the materials.

Travis and Daryl acknowledged and thanked Eileen for her leadership as CPD chair for the past two years and her continued dedication to public defense in Washington State.

Meeting adjourned at 2:13pm

DRAFT

MEMO

To: Council on Public Defense
From: Mental Health Workgroup
Date: September 28, 2018
Re: Mental Health Committee Request for Action

At its September 14, 2018 meeting the Council on Public Defense approved, with minor modifications, the Performance Guidelines for attorneys representing respondents in civil commitment proceedings. The Council did not have enough members present for a supermajority vote so the matter is before the Council at its October meeting.

At the October meeting, the Mental Health Committee will ask the Council, by a supermajority vote, to ask that the Board of Governors:

- 1-Recommend to the Washington Supreme Court that the Performance Guidelines for Attorneys Representing Respondents in Involuntary Commitment Proceedings be added to the *Standards for Indigent Defense*.
- 2-Recommend to the Supreme Court that the *Standards* be added to the Mental Proceeding Rules (MPR).
- 3-Require that mental health practitioners, if the *Standards* are added to the MPR, to file Certifications of Compliance, as is currently required by the Standards.

The MH Committee has done a final review of the Guidelines to make sure they completely incorporate the changes approved at the September meeting. The Guidelines also include other changes suggested by Rick Lichtenstadter which were not discussed at the meeting but which the Committee is willing to accept. Both are highlighted in the Guidelines. The Committee did not accept one proposed change to Guideline 5. That Guideline as drafted by the Committee said an attorney should contact a client within 24 hours of appointment. Mr. Lichtenstadter proposed that time for initial contact be one working day. The Committee did not accept that recommendation.

The MH Committee is no longer asking that there be a separate definition of a “case” for civil commitment proceedings. A survey of directors in jurisdictions that provide representation in ITA proceedings made clear that ITA “cases” were being defined differently across the state. Some jurisdictions essentially use the current *Standards*, which defines a case as “the filing of a document with the court naming a person as a defendant or respondent, to which an attorney is appointed in order to provide representation.” Others essentially case weight to determine caseload. Still others did not count cases at all or count all cases as less than a full credit.

The existing definition contained in the *Standards* will not change caseload in some counties. In others, it will not change caseload, if a satisfactory case weighting system is adopted and

published as required by Standard 3.5. In some jurisdictions it will require an increase in attorneys. In all jurisdictions, but particularly in those that will be required to hire additional attorneys if the case definition is adopted, the CPD should encourage and support public defenders and county funders to seek reimbursement for costs, including defense costs, as authorized by RCW 71.05.730.

GUIDELINES PREAMBLE

The following guidelines are intended to assist defense attorneys in providing vigorous and effective representation to clients responding to a civil commitment petition. The facts of each case, the circumstances of each respondent, and developments in the law and in court procedures require counsel to determine, with the client's assistance and on a case-by-case basis, the best manner to proceed.

As used in these Guidelines, "must" and "shall" are intended to describe mandatory requirements. "Should" is not mandatory but is used when providing guidance about what attorneys can and are encouraged to do in the interest of providing quality representation.

Guideline 1. Role of Counsel

Counsel shall assist the client in determining the client's goals and objectives in the commitment proceedings, shall explain to the client how best to achieve those goals, and advocate for the client at all stages of the commitment process.

Counsel shall represent the client's expressed wishes. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel shall provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider. In the end, counsel shall act in accordance with the client's expressed interests.

Counsel shall not substitute counsel's view of the client's best interests for those expressed by the client. Counsel shall not substitute the interests or views of a family member or friend, a guardian or holder of a durable power of attorney for those expressed by the client.

Guideline 2. Role of Counsel When a Client Does Not Express His or Her Ultimate Goals

When a client cannot express his or her ultimate goals and objectives, then counsel shall protect the client's constitutional and statutory rights. **Counsel should assume that the client does not wish to be involuntarily detained or treated.** Counsel shall abide by the Rules of Professional Conduct (RPCs) throughout the representation, **including** RPC 1.14.

In taking any protective action, counsel should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the twin goals of intruding to the least extent possible on the client's right to make independent decisions and maximizing the client's capacities. In considering alternatives, counsel should be aware of any law that requires counsel to advocate for the least restrictive action on behalf of the client. *See* Comment 5 to RPC 1.14.

Guideline 3. Education, Training and Experience of Counsel

Counsel shall, at minimum, have the qualifications required by the Washington Supreme Court's *Standards for Indigent Defense*, Standard 14.1 and 14.2(M), for representation of a respondent in a civil commitment proceeding.

Counsel shall have a basic knowledge of the classification of mental disorders, as described in the most recent Diagnostic and Statistical Manual of Mental Disorders (“DSM”) and other resources, and the ability to read and understand medical terminology related to mental disorders and treatment of persons with a mental illness, substance use disorder, co-occurring disorders, and chemical dependency. Counsel shall have ready access to the most recent DSM, as well as research resources for related medical conditions. Counsel should also have basic knowledge and understanding of common personality disorders and medical conditions that may produce similar symptoms.

Counsel shall be familiar with the classes of medication prescribed to treat mental disorders and chemical dependency and the possible effect of those medications on the client’s ability to interact with counsel and to participate in court proceedings.

Counsel should be familiar with treatment facilities, both in-patient and out-patient, that provide services to persons with mental illness, including the scope of those services. Counsel should be familiar with local facilities and state hospitals that may be remote from where the client lives. Counsel should be familiar with the limitations on available treatment and transportation obstacles associated with such facilities.

Counsel should attend CLEs or specialized training for further education on substantive issues, substantive law, statutes, local court rules, and local practice relating to commitment proceedings. Counsel should also develop interviewing and de-escalation skills through appropriate training opportunities. Counsel should develop a resource list of local mental and behavioral health experts who may be consulted or used as testifying experts on available resources for the client and other matters.

Counsel should know where socio-economic disparities and racial, gender, and age biases exist in the civil commitment system, and how they might affect a client and might influence counsel’s perspective. For example, gender bias might influence a mental health provider’s treatment recommendations or a court’s treatment requirements. Counsel also should know about the potential effects of past sexual assault or trauma on a client.

Guideline 4. General Issues and Duties of Counsel for Respondents in Civil Commitment Proceedings

Before agreeing to act as counsel or accepting appointment by a court, counsel shall determine if counsel has sufficient time, resources, and knowledge to effectively represent the client.

Counsel shall be alert to potential and actual conflicts of interest that would impair counsel’s ability to represent a client. Counsel shall not represent a client in a civil commitment proceeding and act as guardian ad litem for that client in the same or any other proceeding. Counsel shall not reveal information relating to the representation of a client unless:

- the client gives informed consent to the release; or
- disclosure is impliedly authorized to carry out the representation; or

- disclosure is an exception to the rule of confidentiality permitted by the Rules of Professional Conduct.

Disclosures, for example to prevent reasonably certain death or substantial bodily harm, are permitted only to the extent necessary to prevent the harm.

Counsel should assess **and advise** how a client's participation and position in a civil commitment proceeding may affect the client's participation in other proceedings, such as a criminal case. To the extent authorized by the client, the attorney should consult with counsel representing the client in the other proceedings.

Guideline 5. Preparation for Initial Client Meeting

Prior to the first meeting with the client, counsel shall be knowledgeable about civil commitment law, procedures, and court rules. Counsel should have obtained copies of the initial petition or petition for continued court-ordered treatment, statements in support of the petition, and other materials that will be submitted to the court in support of the petition, reviewed them, and researched any unfamiliar terms in advance of the meeting.

When first appointed, counsel shall make every effort to consult with the client to determine the client's goals and to develop evidence to present to the court that will support those goals. Counsel should recognize that communication with the client may require additional efforts.

The initial client meeting shall be in private and occur enough in advance of any scheduled hearing to allow time for preparation and reasonable efforts to contact potential witnesses on the client's behalf. If there is not sufficient time for adequate preparation between counsel's appointment and the scheduled hearing, then counsel must advise the court and make every effort to continue the hearing, even if only for a few hours, to allow sufficient time for preparation.

In some cases, an attorney will be appointed to represent a client only after the client is detained pursuant to a 72-hour hold. Counsel should meet with the client within 24 hours of being notified of assignment when preparing to respond to a 14-day petition. Counsel representing a client responding to a 90-day petition, shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel previously represented the client when responding to a petition for a 14-day commitment or is newly appointed. Counsel representing a client responding to a 180-day petition shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel has previously represented the client when responding to a petition for a 14-day or 90-day commitment or is newly appointed.

Guideline 6. Substance of Client Meetings

Counsel shall communicate information to the client during the initial or subsequent meeting. Counsel shall determine the amount and kind of information the client is able to absorb in one meeting. If necessary or as requested by the client, counsel shall repeat this information during the course of the representation.

Counsel shall explain that conversations between client and attorney are confidential, counsel's role, the civil commitment process and the client's rights during that process.

Counsel shall obtain, when possible in light of the client's symptoms, the client's version of the facts of the case, the names and contact information of persons with knowledge of the circumstances that led to the filing of the petition, the names and contact information of persons knowledgeable about the client's current level of functioning relative to discharge to the community, information about past treatment, and information relevant to possible alternatives to commitment.

Counsel shall advise the client of the legal basis under which the Court can order the client be discharged, committed, or released conditionally, and the length of any commitment period. Counsel shall advise the client of the right to request experts to complete an independent evaluation and assist in defending the case, and if a 90-day petition is filed, the right to request a mental health professional to seek less restrictive alternatives. Counsel shall specifically advise the client of the right to remain silent and possible consequences following civil commitment, such as the loss of the right to possess a firearm.

Counsel shall explain the different consequences that could follow from a voluntary agreement to enter treatment, an involuntary commitment following a contested hearing, an agreement to a stipulated order of commitment, and a negotiated agreement to a less restrictive order. These may include, among others, an impact on the right to possess a firearm and whether a hospital will help the client find a place to live after the client leaves the hospital or to enroll in a supplemental income program such as SSI or outpatient treatment. Counsel should inquire of any proposed provider whether a client will be billed for voluntary or outpatient treatment.

Guideline 7. Preparation for Commitment Hearing

Counsel shall obtain and review the court file, investigation report, medical records, police reports, if any, and all other evidence offered by the petitioner(s) or opposing counsel. In advance of the hearing, counsel should attempt to interview witnesses who will be called by opposing counsel. Counsel also should attempt to contact persons the client has identified as possible witnesses and who, in counsel's assessment, may provide relevant information. Counsel shall make any appropriate request for expenses to pay for the services of expert witnesses.

Counsel shall determine whether the petition and/or request for commitment should be challenged because it does not satisfy the statutory criteria required for civil commitment and/or constitutional protections. Counsel shall determine whether the client was given a timely opportunity to refuse psychotropic medications for the 24 hours before a potential hearing. If the treatment team has failed in this regard, counsel must advise the client of the options available to address such failure. Counsel shall be familiar with the rules of evidence, particularly those that apply to civil commitment hearings and govern the admissibility of documentary and testimonial evidence.

Guideline 8. Planning for Release Following Commitment

Counsel should evaluate whether it would be helpful to consult with an independent social worker or mental health professional to aid in planning for the client's release or a less restrictive commitment order and, if so, apply for funds. Counsel should contact persons whom the client has identified as willing to assist in arranging an alternative to hospitalization or otherwise support discharge at the hearing.

If counsel learns of persons who may be willing to assist with an alternative to hospitalization or otherwise support discharge from a source other than the client, then, with the client's permission, counsel should contact those persons. Counsel should evaluate whether release planning is adequately provided by the hospital staff and, if so, with the client's permission, provide information supporting an alternative to hospitalization or discharge to hospital or other personnel involved in discharge planning.

Guideline 9. Commitment Hearing

Counsel shall, prior to the commitment hearing, communicate to the client what is expected to happen before, during, and after the hearing. **Counsel shall continue to consult with the client during the hearing.**

Counsel should provide the client with information regarding appropriate courtroom conduct. **Counsel shall apply for accommodations that will assist the client in participating in the hearing, including accommodations for physical disability, interpreter services or, transportation assistance.**

If the hearing is scheduled to be conducted by video, then counsel shall advise the client of the process and ask whether the client wishes to object to proceeding by video. If the client objects to proceeding by video, then counsel shall make that objection on the client's behalf.

Counsel shall be familiar with the legal and technological requirements for video proceedings. If the hearing will proceed by video, whether or not the client objects, counsel shall make every effort to ensure those requirements are satisfied and make objections, if needed.

Counsel shall assert and seek to protect the client's right to actively participate in the civil commitment proceeding. If at the time of the hearing the client is under the influence of prescribed medication, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects on the client's demeanor. Counsel shall contest whether a client will be hospitalized and, to the extent feasible, whether appropriate placement and resources are available.

Counsel should make an opening statement describing the client's goal and the facts that support that goal, cross-examine expert and lay witnesses as is appropriate to the case, and present alternatives to confinement as approved by the client.

At the hearing, counsel should be prepared to:

- raise procedural motions, including exclusion of witnesses;

- assert privileges, including physician/patient, psychotherapist/patient, spouse/domestic partner, Fifth Amendment, social worker/patient and other privileges; and
- as appropriate, introduce evidence on the client's behalf.

Counsel representing a client in a jury trial contesting the State's commitment petition shall be familiar with the laws and procedures governing the selection of a jury and jury instructions.

Counsel shall, to the extent feasible, include as an issue not just whether a client will be hospitalized or housed, but how a client shall be hospitalized or housed.

Counsel shall communicate the advantages and disadvantages of the client testifying. The decision to testify ultimately rests with the client. Counsel shall be familiar with state law regarding examination of the client and what information may be admissible for purposes of the hearing.

Counsel should make a closing argument that includes the evidence presented, the burden of proof, and the statutory requirements for commitment.

Counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by opposing counsel and should ensure that any proposed findings and objections are included in the record for appeal.

Guideline 10. Limited Basis for Waiver of Client's Presence at the Hearing and Alternatives to Waiver

Counsel shall be familiar with the practice of the local jurisdiction regarding waiver of presence and inform the client about local practice. Some jurisdictions will not permit a client to waive presence at a hearing. Others will allow the client to waive presence only after the court has advised the client about the possible loss of the right to possess firearms.

Counsel shall not waive the client's presence at the hearing, except when the client elects to waive or unequivocally refuses to attend, despite encouragement to attend.

If the court is considering whether the client's behavior constitutes a constructive waiver of presence, then counsel shall, after consultation with the client, offer alternatives to removing the client from the hearing. Possible alternatives may include:

- offering the client a paper and pencil to write down questions rather than orally responding;
- taking frequent breaks;
- asking the judge to give the client a "roadmap" regarding who will be testifying and when;
- offering to mute client and counsel's microphone during witness testimony during video proceedings other than when making an objection or responding to an objection; and/or
- offering the client, if available, the option to observe video proceedings from a separate room.

Guideline 11. Post-Commitment Proceedings When the Client Is Committed

If the court orders the client committed for up to 14 days, then counsel has a continuing obligation to maintain contact with the client and prepare to represent the client if the State seeks a 90-day commitment. Such representation shall include consulting with the client to determine the client's goals and to develop evidence to present to the court that will support those goals. Such evidence may include, for example, proposals for less restrictive treatment, housing alternatives, or an individualized treatment plan appropriate to the client's needs. Counsel shall, to the extent the client agrees, argue against all provisions that are unnecessarily restrictive or unsupported by the record.

If the State seeks a 180-day commitment, then counsel should seek to provide continuity of representation and to represent the client in the 180-day commitment hearing. If the client is transferred to another hospital outside the jurisdiction in which counsel works then, when feasible, counsel shall work to ensure a smooth transition to the new counsel who will represent the client at the 180-day hearing.

Mental Proceeding Rules (MPR) 2.4 and 3.4 provide that commitment hearings "shall be proceeded with as in any other civil action." Counsel should be familiar with Civil Rule (CR) 71(b), which provides "A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place of the motion to be heard."

The Rules "govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or equity...". The limited exceptions to CR 71 are found in CR 81 and do not, on their face, include civil commitment proceedings.

Guideline 12. Post-Commitment Proceedings When the Client Is Not Committed

If a petition is dismissed or if the court does not order a client committed, then counsel should, where appropriate, inform the client of social services or direct the client to appropriate hospital or treatment staff who can assist the client. Such services may include housing and food available in the community, the existence and location of mental health providers, and the existence of medical treatment available upon discharge from a hospital.

Guideline 13. Advising the Client about Revisions and Appeals

Counsel shall advise the client of the right to seek revision of a commissioner's ruling or to appeal, and the process for each. Counsel shall explain to the client the consequences of any decision to waive the right to seek revision or to appeal. The decision whether to seek revision or to appeal belongs to the client. If the client is not able to absorb the information immediately following a hearing, then counsel shall consult with the client in person or by phone to explain the revision or appeal process and the client's choices.

Counsel shall take the necessary steps to seek revision of a commissioner's ruling or to perfect an appeal if the client requests it.

Counsel should consider developing a short advisory sheet to give clients outlining the right to appeal and deadlines by which an appeal must be filed. The advisory should include information about how to contact counsel to discuss an appeal and, in appropriate cases, counsel's recommendation about whether to appeal. Such an advisory may be helpful when counsel must immediately appear in another hearing or leave for another hospital to represent another client.

Guideline 14. Perfecting an Appeal

When the client chooses to appeal, counsel shall file a notice of appeal and preserve the client's right to appeal, including presenting a motion to proceed *in forma pauperis*. Counsel shall assist the client in obtaining appellate representation.

To preserve issues for appeal, counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor or entered by the court, and should ensure that counsel's proposed findings, conclusions, and/or objections are included in the record.

When the client, at the time that commitment is ordered, is unable to decide whether to appeal, counsel shall make clear to the client the deadline for filing an appeal, seek a decision from the client in time to meet the deadline, and be prepared to file the appeal should the client decide to appeal. If a guardian or person holding a durable power of attorney believes the client should not pursue an appeal, counsel should advise the court in writing that counsel assumes the client has the authority to make the decision to appeal and proceed as the client wishes.

Guideline 15. Obligations of Counsel to Appellate Attorney

Counsel should be available to appellate counsel to answer questions and issues regarding the appeal and provide privileged information and documents requested by appellate counsel, to the extent authorized by the client.

Guideline 16. Continuity of Representation

Counsel should make every effort to represent the client for the duration of the commitment process. Even if the client is transferred out of the jurisdiction, CR 71 provides the attorney may not withdraw without an order from the court.

If counsel is not able to continue to represent the client, then counsel shall work to ensure a smooth transition to new counsel when possible. Steps to provide a smooth transition shall include:

- advising the client about the process for the client's transfer to a different hospital;
- move the court pursuant to CR 71 for an order allowing counsel to withdraw and appointment of new counsel;
- advise the client how to contact substituted counsel; and
- to the extent permitted by the client, providing the substituted counsel with privileged information and documents counsel received when representing the client.

MEMO

To: Board of Governors

From: Diana Singleton, Staff Liaison to Council on Public Defense

Date: September 25, 2018

Re: Council on Public Defense's Proposed Amendments to CrR 3.3

Action Requested: Approve the Council on Public Defense's input on CrR 4.1 in response to Justice Johnson's request by providing suggested amendments to CrR 3.3 for consideration by the Supreme Court Rules Committee.

Background

In a letter dated March 23, 2018 (attached) the Washington Supreme Court Rules Committee sought input from the WSBA and other stakeholders on a proposed amendment to CrR 4.1-Arrestment. The proposed change was submitted by a defendant from Snohomish County seeking a fix to the delay caused when a felony charge is filed in district court and subsequently refiled in superior court.

The Council on Public Defense (CPD) discussed the proposed change at its May 2018 meeting. The CPD determined that the delay caused by CrR 4.1 can be problematic for investigation and defense of cases and further identified that an amendment to the rule would reduce geographic disparity. By majority vote, the CPD expressed support for changing CrR 4.1, but not for the particular proposal they were asked to review, which the CPD did not think would resolve the problem. This feedback was communicated to Justice C. Johnson, chair of the Washington Supreme Court Rules Committee in a memo dated May 31, 2018.

In a letter dated July 6, 2018, the Washington Supreme Court Rules Committee asked the CPD to propose alternative language to address the problems caused by current CrR 4.1. The letter noted that the next regularly scheduled Supreme Court Rules Committee meeting is scheduled for October 15, 2018.

The recommendation of the CPD is summarized below and detailed in the attached memo. This recommendation has been approved by majority vote of the CPD. Note that the WSBA Legislation and Court Rule Comment Policy requires a super majority vote of the entity – and approval of the Board of Governors – prior to a WSBA entity making public comment on a proposed court rule change. The CPD did not have sufficient attendance at its September meeting to achieve a supermajority (13 people voted in favor of the recommendation, 1 person abstained, no one voted against the recommendation). Because the CPD is not commenting on public legislation or suggested rulemaking published for comment, rather it is responding to a direct request from the Washington Supreme Court Rules Committee, the Comment Policy's supermajority requirement does not seem to apply. In an effort to be

responsive to the Court in advance of its October meeting, the CPD is seeking approval from the Board to forward the CPD's recommendations to the Supreme Court's Rules Committee.

Recommendation

The attached memo from CPD member Kim Ambrose outlines the concerns of CrR 4.1 and CPD's analysis of how to address the concerns. The CPD workgroup determined that a suggested amendment to CrR 3.3-Time for Trial would better address the problems identified.

The CPD respectfully requests that the BOG approve submitting the suggested amendments to CrR 3.3 in response to Justice Johnson's request.

MEMO TO CPD

FROM: Kim Ambrose (and working group which includes Christie Hedman, Mark Conrad, Harry Gasnick, Rob O'Neal and a handful of others)

DATE: September 12, 2018

RE: Proposed Amendment to CrR 3.3 (formerly proposed amendment to CrR 4.1)

Purpose: To address unnecessary delay in time to trial for felony cases filed in District Court.

Background:

On March 23, 2018, Justice Charles Johnson as chair of the Washington Supreme Court Rules Committee wrote a letter to the WSBA (and other stakeholders) seeking input on a proposed amendment to CrR 4.1 (Arraignment) that had been submitted by a defendant from Snohomish County concerned about the delay in his felony trial caused when it was filed originally in District Court. The CPD was asked to respond on behalf of WSBA. The CPD discussed the proposed change at its May 2018 meeting and agreed with the underlying premise, but determined that a closer look should be taken at the mechanism for addressing the problem. WSBA forwarded our memo to the Court and the Court has given CPD/WSBA time to propose language to address the issue of time to trial for felony defendants who were filed on in District Court.

CrRLJ 3.2.1(g) *Preliminary Hearing on Felony Complaint*¹ establishes the procedure for filing felony complaints in District Court. The process allows for a preliminary hearing where the

¹CrRLJ 3.2.1(g) Preliminary Hearing on Felony Complaint.

(1) When a felony complaint is filed, the court may conduct a preliminary hearing to determine whether there is probable cause to believe that the accused has committed a felony unless an information or indictment is filed in superior court prior to the time set for the preliminary hearing. If the court finds probable cause, the court shall bind the defendant over to the superior court. If the court binds the accused over, or if the parties waive the preliminary hearing, an information shall be filed without unnecessary delay. Jurisdiction vests in the superior court at the time the information is filed.

(2) If at the time a felony complaint is filed with the district court the accused is detained in jail or subjected to conditions of release, the time from the filing of the complaint in district court to the filing of an information in superior court shall not exceed 30 days plus any time which is the subject of a stipulation under subsection (g)(3). If at the time the complaint is filed with the district court the accused is not detained in jail or subjected to conditions of release, the time from the accused's first appearance in district court which next follows the filing of the complaint to the time of the filing of an information

court determines whether there is probable cause and if it so finds, the court “shall bind the defendant over to superior court.” If the court “binds the accused over” then “an information shall be filed without unnecessary delay.”

In fact, the preliminary hearing/bind over procedure contemplated in the rule is not utilized regularly by any jurisdiction. According to the [Washington State Courts Caseload Report for 2017](#), the number of felonies filed in District Courts range from 0 (a majority of counties) to 2,765 (Snohomish County.) However, only 4 counties documented hearings to bind over defendants: Kitsap (587 cases), Skagit (3 cases), Spokane (19 cases) and Stevens (2 cases).

Snohomish County, with the highest number of felonies filed in District Court, did not hold preliminary hearings or “bind over” any cases. According to the Kitsap County Prosecutor’s Office, although the 2017 data indicates it has the highest number of cases “bound over” in the state, preliminary hearings were not actually held. Kitsap County has recently abandoned the practice of filing all felonies in District Court, a practice that was begun less than 10 years ago.

King County has the second largest number of felonies filed in District Court in 2017 (1149). A majority of these cases were reduced to misdemeanors; the King County Prosecutor’s Office uses the process to “expedite” low level felonies (as opposed to Snohomish County which files most, if not all felony cases in Superior Court.) Grays Harbor and Klickitat Counties also filed a number of felonies in District Court, without recording a preliminary or “bind over” hearing.

If a person is arrested for a felony, they may be held for 72 hours before the information is filed if probable cause for the arrest is found. If the felony is filed in Superior Court (as they are in a vast majority of jurisdictions), a defendant who is detained in jail must be arraigned within 14 days. Arraignment triggers the speedy trial expiration date. However, if a person is filed on in District Court, CrRLJ 3.2.1 allows for a complicated process for “bind over” and an additional 30 days before the case has to be filed in Superior Court, hence delaying arraignment and speedy trial timelines. It seems that the bind over process, which provides for a preliminary hearing where the District Court finds PC for a felony offense, is a holdover from grand jury-type proceedings. But, District Courts are not holding these hearings, so the delay in filing is

in superior court shall not exceed 30 days, excluding any time which is the subject of a stipulation under subsection (g)(3). If the applicable time period specified above elapses and no information has been filed in superior court, the case shall be dismissed without prejudice.

(3) Before or after the preliminary hearing or a waiver thereof, the court may delay a preliminary hearing or defer a bind-over date if the parties stipulate in writing that the case shall remain in the court of limited jurisdiction for a specified time, which may be in addition to the 30-day time limit established in subsection (g)(2).

unnecessary and prejudices defendants who may lose access to discovery (e.g. video logs, eye witnesses, etc.)

Proposed Amendment

The Working Group considered the proposed change to CrR 4.1 which would address the time for arraignment, but instead determined that a change to CrR 3.3 Time for Trial was a simpler way to address the problem. Attached is the proposed amendment to CrR 3.3 for consideration.

(c) Commencement Date.

(1) Initial Commencement Date. ~~The initial commencement date shall be the date of arraignment as determined under CrR 4.1.~~

(i) In the event the charge is initially filed into superior court the commencement date shall be the date of arraignment as determined under CrR 4.1.

(ii) In the event a felony complaint is initially filed under CrRLJ 3.2.1(g), the defendant is detained in jail, and a preliminary hearing is not held, the commencement date shall begin 14 days after the expiration of the time limits specified under CrR 3.2.1(f).