WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

July 20, 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**	Eileen Farley	Discussion	
2 min	**June Meeting Minutes**	Eileen Farley	Action	pp 2-4
10 min	**OPD Report**	Joanne Moore and Sophia Byrd McSherry	Report	
5 min	**King County Public Defense**	Daryl Rodriguez	Report	
5 min	**Juvenile Diversion Survey Status**	Ben Carr	Report	pp 5-13
5 min	**ITA Survey Status**	Eileen Farley	Report	pp 14-23
15 min	**CPD Charter Updates**	Eileen Farley	Action	pp 24-26
15 min	**Pre-Trial Reform Checklist Feedback**	Justin Bingham	Discussion	pp 27-28
5 min	**Future Business** CrR 4.1 Ethics Opinion 18-04			pp 29-62 pp 63-69
10 min	**Committee Updates, August 24th meeting**	Everyone		
1 hr 15 min	**Committee Work Time**		Discussions	
	Pre-Trial Reform	Justin Bingham (LAP room; 52160#)		
	LFO Reform	Nick Allen (Large fishbowl; 52165#)		
	Mental Health	Eileen Farley (Adams/Rainier; 52874#)		
	Standards	Bob Boruchowitz (Small fishbowl; 52150#)		
	Public Defense and Independence	Travis Stearns (East Witness room; 52140#)		

Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE

JUNE 8, 2018, 12:00PM TO 2:30PM AT PERKINS COIE, SEATTLE, WA

MINUTES

CPD members in person: Eileen Farley (Chair), Daryl Rodrigues, Nick Allen, Justin Bingham, Ben Carr, Travis Stearns, Judge Drew Henke, Rebecca Stith, Dani Casselman
CPD voting members on the phone: Justice Gordon McCloud, Kim Ambrose
CPD non-voting members: Marc Boman,
WSBA Staff: Diana Singleton and Bonnie Sterken
Guests: Sophia Byrd McSherry, George Yeannakis, Ryan McGowan
Absent: Deborah Ahrens, Michael Killian, , Jaime Hawk, Christie Hedman, Joanne Moore, Colin Fieman, Jason Gillmer, Ann Christian, Ping Lau, Judge Joanna Bender, Weston Meyring, Rachel Cortez, Brooks Holland, Jon Ostlund, Bob Boruchowitz

1) Introductions and Roll Call and Roster

Members introduced themselves.

2) Approval of May Minutes

The May minutes were approved with one edit to reflect that Judge Henke attended by phone at the meeting.

3) Office of Public Defense Report

Sophia Byrd McSherry reported that OPD, as a judicial branch agency, is presenting its budget today to gather feedback from the legislature. Joanne was not in attendance because she was presenting the budget for OPD. The focus again is compensation for contract attorneys. Other requests include funding for defense of a lawsuit in which the plaintiffs contend OPD is responsible for the representation provided to juveniles in offender cases, increased pay for court reporters, and hiring a diversity and inclusion coordinator to manage trainings. OPD is also hosting a series of skills trainings and other CLEs. Sophia noted there is another training for the juvenile training academy in the following week at Seattle University and George elaborated on how well the academy is going. Sophia addressed questions

4) Rules Report

Travis reported on the CrR 4.1 rules discussion from the last meeting. Travis and Eileen drafted a letter summarizing the recommendation discussed by the CPD at the May meeting, and Paula Littlewood submitted the letter to Justice Johnson. The letter was included in the meeting materials. The Council had a brief discussion. George also noted that the Court adopted proposed changes to RAP 3.4, which now prohibits the use of juvenile litigants' full names on case captions in appellate courts.

5) CPD Annual Report and 2018-2019 Goals.

Eileen reported that the CPD is submitting its annual report to the BOG's Committee on Mission and Performance Review. The draft report was included in the materials and Eileen asked for feedback on the work in progress and FY19 goals. The CPD then had a robust discussion about its goals for the next year. Rather than identify specific projects, Daryl asked the Council to start with a conversation about themes that are complimentary to the current projects that the Council is continuing. The brainstormed areas included: Issues around pre-trail (bail reform, pre-trial release); public defense report cards or an auditor (fits in with the independence discussion); holistic approaches with the civil side and how we collectively define access to justice, improve tools and vocabulary to improve those collaborations; work around developing indigent defense to better involve social workers and better addressing civil needs and how to include working with the civil side as a best practice in the standards; diversion program and potentially advocating for diversion programs; institutionalizing relationship between civil and criminal sides; continue looking at implementation of the new LFO laws and getting out resources that provide guidance to public defenders; next steps on pretrial reform once the checklist finished. Eileen will update the annual report and submit it to the Board of Governors.

6) Committee Updates

Pre-Trial Justice: Justin reported on the pre-trial checklist project. They are still collecting feedback on the draft checklist from Council members and some practitioners over the next month with a July 6 deadline. The Committee's next call is in early July to review the comments. They plan to have an updated draft for the CPD to see at their July 20 meeting. Justin addressed questions.

LFO Reform: Nick reported on the bench cards project. The Minority and Justice Commission agreed to design and print bench cards for judges like they have in the past. A version was distributed at the June 6 symposium and will be distributed to judges around the state once AOC does some additional review. There is still an opportunity to design a bench card specific to public defenders, prosecutors and members of the public. Nick met with WSBA Communications staff and will continuing to work with them on another round of edits and review to design these additional versions of the card. Next steps are to meet as a committee to get more feedback on what would be most helpful and then work on developing the second bench card. There is no hard deadline on when that will be done. Nick also reported on the recent Supreme Court LFO symposium and follow-up conference,both of which went well. Nick will share his PowerPoint presentation on the LFO laws with the Council and Travis will share materials from the conference. The Council had a discussion.

Mental Health: Eileen reported that the committee has items ready to circulate for feedback. Eileen asked the Council for suggestions on who should receive the draft beyond the practitioners. The Council had a brief discussion.

Standards: Eileen noted this committee are looking at standards for third strike cases. Travis noted that members are working on an expanded survey.

Public Defense and Independence: Travis noted that it would be helpful to have another committee work time designated meeting. Travis also noted that they are coordinating with OPD and Travis has asked Sophia to co-chair the committee.

7) Vice Chair Appointments

Daryl reported on the vice-chair appointment process. He invited people to reach out to him if they have any questions about what it's like to serve as the vice-chair.

8) Other Business

Eileen reported on the new people joining the Council. Eileen reported on the updated roster included in the materials and reminded people to check their bios on the roster and update them as needed. Eileen noted that she will be asking incoming members to identify which committees they want to join. Travis noted the need to hold the orientation.

Eileen will follow up with the committee chairs on whether to repurpose the July meeting as a committee working meeting and whether to hold an August meeting.

Meeting adjourned at 1:31 pm

WSBA Council on Public Defense: Juvenile Diversion Survey

The Washington State Bar Association Council on Public Defense (CPD) wants to gather information about current juvenile diversion program successes and barriers, and tools used to assess such programs. The information will be shared with the Interpreter Commission, which has been invited to the Fall 2018 Judicial Conference to discuss how to work with limited English proficiency (LEP) juveniles or juveniles with LEP family. The CPD will also use the information to explore how both public defender and prosecutors' offices can strengthen their juvenile diversion program. Please respond to this survey about juvenile diversion in your county.

1. County

2. What juvenile diversion programs does your county currently offer?

- [ ] Community Accountability Board acting as diversion board
- [ ] Probation counselor acting as diversion unit
- [ ] Youth Court
- [ ] Seminars/Classes
- [ ] Other (please specify)

3. What do you see as the primary benefits of diversion?

- [ ] Keeps low-risk youth out of criminal justice system
- [ ] Cost savings
- [ ] Other (please specify)

4. What resources can be accessed through your diversion programs?

- [ ] Drug/alcohol evaluations or treatment
- [ ] Mental health evaluations or treatment
- [ ] Domestic violence/family counseling
- [ ] Education outreach
- [ ] Other experiences (e.g. boat building? arts programming?)

5. Can such diversion services be accessed quickly or is there a significant (e.g. 3+ weeks) wait or delay?

- ◯ Quickly
- ◯ Delayed. Please include reasons:

6. Does your county or do your community partners offer any other programs (e.g. Saturday school, mentorship, counseling, treatment, etc.) that could, with minimal modification, function as a diversion program?

- ◯ No
- ◯ Yes. Please explain:

7. Do you compile information about how many cases are diverted?

- ◯ Yes
- ◯ No

8. How many police referrals do you receive each year that are/could be diversion-eligible?

- ◯ Less than 50
- ◯ 50-100
- ◯ 100-200
- ◯ 200-300
- ◯ 300-400
- ◯ 400-500
- ◯ 500-1000
- ◯ More than 1000
- ◯ No data

9. How many diversion invitations do you extend?

- ◯ Less than 50
- ◯ 50-100
- ◯ 100-200
- ◯ 200-300
- ◯ 300-400
- ◯ 400-500
- ◯ 500-1000
- ◯ More than 1000
- ◯ No data

10. What percentage of those juveniles invited would you estimate respond to the diversion invitation?

- ◯ 0-25%
- ◯ 26-50%
- ◯ 51-75%
- ◯ 76-100%
- ◯ No data

11. Of those who respond to the invitation, how many would you estimate complete the diversion process?

- ◯ 0-25%
- ◯ 26-50%
- ◯ 51-75%
- ◯ 76-100%
- ◯ No data

12. What percentage of juveniles that *complete* diversion would you estimate re-offend?

- ◯ 0-25%
- ◯ 26-50%
- ◯ 51-75%
- ◯ 76-100%
- ◯ No data

13. What percentage of the juveniles that *fail to complete* diversion would you estimate go on to re-offend?

- ◯ 0-25%
- ◯ 26-50%
- ◯ 51-75%
- ◯ 76-100%
- ◯ No data

14. Do you compile demographic information about diversion-eligible juveniles?

- ◯ Yes
- ◯ No

15. Does the racial/ethnic breakdown of your diversion-eligible juveniles roughly approximate the racial/ethnic breakdown of your county?

- ◯ Yes, it is proportionate
- ◯ For the most part. There is some minor disproportionality
- ◯ No, there is disproportionality
- ◯ No data

16. If there is disproportionality, is there a particular racial/ethnic group that has not responded as frequently or as well to diversion?

- ◯ No data
- ◯ No
- ◯ Yes. Please explain which group:

17. Have you made any changes to your invitation process to reach this group?

- ◯ No data
- ◯ No
- ◯ Yes. Please explain which changes.

18. Have you had to make any changes to your diversion program itself to reach this group?

- ◯ No data
- ◯ No
- ◯ Yes. Please explain which changes.

19. Are there other factors that you have seen affect the likelihood of success on diversion?

- ◯ Yes
- ◯ No
- ◯ No data

20. If you answered yes to question 19, which factors?

- ☐ Economic status
- ☐ Gender
- ☐ Geographical limitations
- ☐ Language issues
- ☐ Housing stability
- ☐ Other (please specify)

21. Have you made any changes to your invitation process or program to reach those affected by the above factors?

- ◯ No data
- ◯ No
- ◯ Yes. Please explain which changes:

22. How often would you estimate that a victim (of the diverted offense) is involved in the diversion process?

- 0-25% of the time
- 26-50% of the time
- The majority of the time
- Other (please specify)

23. How often would you estimate that a defense attorney gets involved in the diversion process on behalf of a particular juvenile?

- 0-25% of the time
- 26-50% of the time
- The majority of the time
- Other (please specify)

24. If a juvenile (or their family) has limited English proficiency, are interpreters and/or translators made available to them through the diversion process?

- Yes
- No
- Other (please specify)

25. If you answered yes to question 24, would the interpreter and/or translation be available to assist both the juvenile and their family, or just the juvenile?

- Both
- Juvenile only

26. For which languages do you currently provide interpreters and/or translations?

27. How much would you estimate your county saves by diverting a juvenile case rather than prosecuting it? In other words, in terms of resources, how much would you estimate is "freed up" by diversion and able to be directed toward prosecution of more serious offenses?

28. What barriers do you see to potentially expanding diversion programs in your county?

- [ ] Lack of funding
- [ ] Lack of available community partners
- [ ] Lack of consensus among stakeholders
- [ ] Legislative limitations
- [ ] Other (please specify)

29. In light of the passage of ESSB 6550, which expands diversion eligibility, do you plan to expand diversion options in your county?

- ( ) No
- ( ) Yes. Please explain:

30. If you could develop another diversion program in your county, what would it be and what resources would be needed?

Potential program

Resources necessary

31. Would you like to receive a copy of the compiled survey responses?

- ◯ No
- ◯ Yes. Please include your email:

WASHINGTON STATE
BAR ASSOCIATION

June 13, 2018

Christie Hedman
WDA
110 Prefontaine Pl S, #610
Seattle WA, 98104
Sent by email to hedman@defensenet.org

Dear Christie,

The Council on Public Defense ("CPD") Mental Health Committee has developed the attached performance guidelines for attorneys who represent respondents in Involuntary Treatment Act (ITA) proceedings. We are asking for your comments to help inform the discussion by the full CPD as it decides what Guidelines should be forwarded to the Board of Governors for approval.

The Board of Governors established the CPD in 2004 to address issues relating to public defense in Washington. Past CPD work includes development of Criminal Defense Performance Guidelines and Standards for Indigent Services. The Criminal Defense Performance Guidelines were approved by the Board of Governors in 2011. The Standards for Indigent Defense Services were adopted by the Board that same year and several of the Standards were subsequently adopted by the Washington Supreme Court.

The Mental Health committee is particularly interested in your comments relating to the scope and duration of representation when an attorney is appointed to represent a client in an ITA hearing

We invite your organization to give your feedback in any or all the following ways:

- Provide general feedback or feedback on specific Guidelines by July 19, 2018 using this form.
- Share your feedback at our meeting on July 20, 2016 from 12:00 to 2:30 p.m. at the WSBA offices, 1325 Fourth Avenue or call in at 1-866-577-9294/Access Code 52874#. RSVP here.

If you have any questions, please contact Diana Singleton, WSBA Access to Justice Manager, who is the CPD liaison. You can reach her at 206-727-8205 or dianas@wsba.org.

Very truly yours,

Eileen Farley, Chair
WSBA Council on Public Defense

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 shall abide by the Rules of Professional Conduct (RPCs) throughout the representation, particularly RPC 1.14 which provides:

> When a client's capacity to make adequately considered decisions in connection with a representation is diminished…the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. If counsel reasonably believes that the client has diminished capacity, is at risk of serious physical, financial or other harm unless action is taken and cannot adequately act in the client's own interests, [then] the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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 the least restrictive action on behalf of the client. *See* Comment 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 abuse, 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 which 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.

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:

a) the client gives informed consent to the release; or

b) disclosure is impliedly authorized to carry out the representation; or

c) 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 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 bases under which the Court can order the client be discharged, committed, or released conditionally, and the length of any commitment period. 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 should provide the client with information regarding appropriate courtroom conduct.

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 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 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.

Guidelines 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 decides 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. If the client is transferred out of the jurisdiction, then representation continues until new counsel is appointed.

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.

Feedback Request: draft performance guidelines for attorneys who represent respondents in Involuntary Treatment Act (ITA) proceedings

The Council on Public Defense ("CPD") Mental Health Committee has developed performance guidelines for attorneys who represent respondents in Involuntary Treatment Act (ITA) proceedings. We are asking for your comments to help inform the discussion by the full CPD as it decides what Guidelines should be forwarded to the Board of Governors for approval. Please use this form to submit general feedback and/or feedback about specific guidelines by July 19, 2018.

* Required

1. **Name** *

2. **Email** *

3. **Organization** *

4. **Comments**

Charter: WSBA Council on Public Defense

(Revised May, 2015; Edits June 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 ~~has~~ becaome apparent that maintaining and improving constitutionally effective public defense services in Washington requireds an ongoing committee with a mandate ~~that is~~ 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, ~~prosecutors, private and public criminal defense counsel~~criminal ~~justice~~ attorneys, the bench, elected officials and the public, the WSBA Board of Governors ~~hereby~~ establisheds 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 ~~non-voting~~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 ~~committee~~ Ceouncil shall be appointed for two-~~-~~year terms ~~but with~~ and ~~the ability to renew their membership on the CPD for up to four years~~be ~~eligibile~~eligible~~ity~~ for~~to be~~ reappointment~~ed~~ for two additional two-year terms, totaling six years of service. The Chair may nominate up to five former Council~~PD~~ members whose eligibility for voting membership has expired, to serve as non-voting emeritus members for one year terms up to a maximum of three years[1]. 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 Defenders 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

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

- Three current or former prosecutors/city attorneys, recommended by the by the Council~~PD~~ chair, vice chair and BOG Liaisons
- Six at-large members, at least one of whom~~ich~~ has a contract for or provides public defense services and at least one of whom~~ich~~ is a public member, recommended by the Council~~PD~~ chair, vice chair ~~and BOG~~and BOG Liaisons
- Two representatives from local government or public defense administrators, recommended by the Council~~PD~~ 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.

Client Name: _____ Alternate person: _____
Address: _____ Address: _____
Phone #: _____ Phone: _____
Cause #: _____ **PC for:** _____
_____ **CW:** _____

CrR 3.2 & CrRLJ 3.2 PRESUMPTION OF RELEASE without conditions	
(1) Client is not a flight risk – court required to impose least restrictive (3.2(b)) Relevant factors include:	
Community Ties (family, people who support you, how long in this community)?	
Alternate housing options for DV or violent crime?	
Work, school, volunteer? Student: athletics, clubs, other extracurricular?	
Financial situation & inability to pay bail (TANF/SNAP, food assistance, cash assistance, SSI/SSD)?	3.2 requires court to consider financial circumstances of client; money bail is the last resort. Make record that client is indigent and has no ability to pay bail.
Health and social welfare issues (community support services)?	
Medical/dental/psych appointments, treatment or medications? Diagnoses (physical/mental)?	
Family responsibilities (minor children, special needs child, care for elderly)?	
Transportation plan? Community/Social engagement?	
Who can help you with release conditions/appearances? (get address and phone number)	
Court Appearance history? Current PC relevant to flight risk? Minimal conviction history, *de minimus*?	
Other holds? (probation, DOC, other courts/jurisdictions, extradition, etc.)	
FTA/Warrant Explanation? (summons – not receive/mail returned; i/c somewhere else; in-patient; not just LFOs)	

Client: _____ **Cause #:** _____

(2) No *substantial* danger client will interfere with witnesses or commit violent crime	
STATE ARGUES "COMMUNITY SAFETY"	*CONSIDER OFFERING/AGREEING TO CONDITIONS OF RELEASE:*
State argues violent criminal history: ☐Class A ☐Assault ☐Manslaughter ☐Extortion ☐Indecent w/forcible ☐Robbery ☐kidnapping ☐Drive-by ☐Arson ☐ Veh. Hom/Asslt.	Client agrees to report regularly and remain under supervision of: ☐ officer of the court (PTS); ☐ other person (family member or employer [#7]); or ☐ agency (private EHM/GPS company); AND/OR ☐Client agrees not to possess dangerous weapons/firearms
State argues length criminal history	Is the conviction history relevant? (i.e., similar) Is the conviction history OLD?
State argues past <u>threats to</u> and/or <u>interference with</u> CW/Witnesses	Client agrees to: ☐ Stay at least 1,000 feet away from person/location; ☐ Not contact (person/business); ☐ Not possess dangerous weapons/firearms
State argues present threat and/or intimidation of witnesses?	Client agrees to: ☐ not approach, contact, or communicate in any way with [CW/witness/business owner]; ☐ stay at least 1,000 feet away from [person/business/school]
State argues client will commit new crimes while on PTR/probation/DOC?	Client agrees to: ☐ Maintain law abiding behavior ☐ Report to PTS/probation/DOC w/in 48 business hrs. of release ☐ Update her contact information with PTS/probation/DOC w/in 48 business hours of release
State argues past and/or present use <u>*or*</u> threat to use deadly weapon/firearm?	Client agrees not to possess dangerous weapons and/or firearms. * How *old* is the past use/threat? *
State argues client is on Probation or DOC at the time of alleged offense – already supervised and cannot follow the rules.	Client agrees to: ☐ Not consume alcohol or non-Rx drugs; ☐ Report within 48 business hours of release; ☐ Update her contact information with probation/DOC w/in 48 business hours of release
Current PC for Violent or Sex offense (9.94A.030) YES NO **and** Conviction for Violent or Sex offense in last 10 years? YES NO	"YES" to **both** means client is NOT eligible for pretrial release on his/her own recognizance – the court is required to impose bail (RCW 10.21.015) Shift focus to obtaining a bail client has the ability to pay (or, reserve bail for trial attorney if circumstances warrant)

3.2 (b) FTA – LEAST RESTRICTIVE CONDITIONS	**3.2(d)** SUBSTANTIAL DANGER – LEAST RESTRICTIVE CONDITIONS
1. ∆ in 'custody' of person/org who will supervise	1. Prohibit ∆ from approaching/communicating w/specific persons or classes of persons
2. Restrict ∆'s travel, association, residence	2. Prohibit ∆ from certain areas (i.e., w/in 1,000 feet of CW's house, workplace, school …)
6. ∆ i/c at night or on GPS/SCRAM	3. Prohibit ∆ from possession dangerous weapons/firearms; no alcohol or drugs not Rx
7. Any other condition deemed reasonably necessary to assure appearance	4. Require ∆ to report regularly to and remain under supervision of an officer of the court (PTS) or other person or agency
	5. Prohibit ∆ from committing violation of criminal law
	7. ∆ in 'custody' of person/org who will supervise
	8. Restrict ∆'s travel, association, residence
	9. ∆ i/c at night or on GPS/SCRAM
	10. Any other condition deemed reasonably necessary to assure appearance

The Supreme Court
State of Washington

CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
98504-0929

(360) 357-2020
FACSIMILE (360) 357-2103
E-MAIL J_C.JOHNSON@COURTS.WA.GOV

July 6, 2018

Ms. Paula Littlewood, Executive Director
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Dear Ms. Littlewood:

Thank you for the May 31, 2018, response to the Supreme Court Rules Committee's request for feedback from the Council on Public Defense (CPD) on suggested amendments to CrR 4.1—Arraignment. In the correspondence, the CPD offered to discuss the suggested amendment further and make suggestions based on the input from its membership that includes judges, public defenders, prosecutors, court administrators, and interested persons.

The Supreme Court Rules Committee has agreed to forward the suggested amendment to the WSBA CPD to consider the rule and propose alternative suggested language after consideration, if appropriate. The next regularly scheduled Supreme Court Rules Committee meeting is scheduled for October 15, 2018.

Very truly yours,

Charles W. Johnson, Chair
Supreme Court Rules Committee

cc: Ms. Eileen Farley, CPD Chair

Enclosures

Snohomish County Public Defender Association
2722 Colby Avenue, Suite 200 • Everett, WA 98201-3527 • www.snocopda.org
Phone: 425-339-6300 • 1-800-961-6609 • Fax: 425-339-6363

May 2, 2018

Washington State Supreme Court's Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

To the Washington State Supreme Court's Rules Committee:

Thank you for the opportunity to provide input regarding amendments to CrR 4.1. I am the Managing Director at the Snohomish County Public Defender Association (SCPDA). Mr. Dowdney's description of the Snohomish County practice is accurate. The current practice is very detrimental to Snohomish County defendants.

For the purposes of this letter, I am going to use the acronym EDC-F for felony cases charged in Snohomish County District Court, Everett Division. See attached Table 1 for 2018 SCPDA data.

In Mr. Dowdney's case, he raised concerns about the speedy trial calculation, but there are also issues related to access to discovery, ability to preserve defense evidence (such as video surveillance footage which is often recycled after a limited number of days), and other issues related to ability to participate in your defense. On low level property and drug offenses, by the time a defendant is arraigned in Superior Court, the defendant has already served more than the low end of the standard range sentence and/or more than the prosecutor's plea offer which is provided at the Superior Court arraignment. For those cases, this process is coercive to extracting a guilty plea so that the defendant can get out of custody as opposed to waiting in custody for a motions hearing or trial date, even in cases with viable legal and/or factual defenses. For defendants suffering from serious mental illness, the process increases delays to RCW 10.77 competency and restoration orders.

SCPDA has strategized about how to challenge the practice, but with no success. In Snohomish County, the prosecutor's office will dismiss or file into Superior Court to avoid the preliminary

hearing process. Snohomish County District Court, Everett Division, have denied defense motions for a preliminary hearing. The court made a finding that "SCPO (Snohomish County Prosecutor's Office), as a matter of long-standing practice, does not schedule or request a preliminary hearing at the time of or after filing a criminal complaint for a felony in District Court; instead, SCPO sets a deadline two Fridays in the future (FDD) by which they will either resolve the case in District Court, continue the FDD by agreement, move to dismiss the case from District Court, or file an Information in Snohomish County Superior Court." Ultimately, the District Court ruled that SCPO's practice is not inconsistent with CrRLJ 3.2.1. SCPDA has a pending RALJ challenging this ruling.

SCPDA also represents a partial caseload in Skagit County, and in one case, our attorney's demand for a preliminary hearing pursuant to CrRLJ 3.2.1 led to the defendant's release. The client was a youthful adult charged with a serious crime. The Skagit County District Court Judge granted the defense request to schedule a preliminary hearing over the prosecutor's objection. The State dismissed the charge on the eve of the preliminary hearing. Charges have not been refiled. The demand for a preliminary hearing was transformative to that defendant.

SCPDA has also prepared cases within the time for trial period and achieved an acquittal at trial at the first trial setting. Those defendants have waited longer in custody to be arraigned, contrary to CrR 4.1, and have also waited longer for their trial dates to defend themselves from the charges.

SCPDA wholeheartedly supports Mr. Dowdney's request to the Washington State Supreme Court's Rules Committee to reconcile CrR 4.1 with CrRLJ 3.2.1 and CrR 3.3. Thank you for soliciting public defender input. Clients with wealth are more likely to post bail and are less likely to be negatively impacted by this practice. Indigent clients are disproportionately impacted as for many of our clients any amount of bail results in incarceration during the course of the case. CrR 4.1 should apply equally to the wealthy and the poor.

Sincerely,

Kathleen Kyle

Table 1

The Snohomish County Prosecutor's Office files a large volume of felony cases into Snohomish County District Court. The volume has shifted over the years. This table provides current information.

Month (2018)	January	February	March
EDC-F cases assigned to SCPDA	165	145	160
Preliminary Hearings on EDC-F cases	0	0	0
EDC-F cases opened this month & resulting in a misdemeanor plea offer	45	38	36
EDC-F cases filed into Superior Court prior to the Felony Dismissal Deadline (i.e., defendant arraigned in custody)	69	60	78
Felony cases assigned to SCPDA (partial credits result in decimals)	251.25	218.5	245.75
Felony cases assigned to SCPDA with a prior EDC-F hold (directly from ECD-F hold or there may have been a delay between ECD-F hold/dismissal and Superior Court filing)	112	92	89

Jennings, Cindy

From: Christie Hedman <hedman@defensenet.org>
Sent: Friday, May 25, 2018 2:41 PM
To: Johnson, Justice Charles W.
Cc: Harry Gasnick
Subject: Comments on Proposed Amendments to CrR 4.1
Attachments: WDA Comments on Proposed CrR 4.1.pdf

Dear Justice Johnson,

Thank you for contacting us on behalf of the Supreme Court Rules Committee about proposed amendments to Superior Court Criminal Rule 4.1 – Arraignment. Attached is a letter outlining our thoughts on the proposed changes.

Please let me know if you have any questions or would like further information.

Thank you for your consideration.

Christie Hedman
Executive Director
she/her/hers
Tel: 206.623.4321 | Fax: 206.623.5420
hedman@defensenet.org

WASHINGTON DEFENDER ASSOCIATION

May 23, 2018

Justice Charles Johnson
Temple of Justice
P.O. Box 40929
Olympia WA 98504

RE: Proposed amendments to CrR 4.1 – Arraignment

Dear Justice Johnson and Supreme Court Rules Committee:

Thank you for requesting input from the Washington Defender Association (WDA) on the proposed amendment to CrR 4.1 – Arraignment.

We appreciate the problem that has been identified and we would like to see resolved; however, remedying the problem is more complex than the fix suggested in the proposal. It appears to interact with a number of other court rules that would have to be addressed simultaneously. It also is unclear how often this practice occurs across the state and whether it makes sense for that practice to continue. We would suggest further study before adopting the proposed amendment.

Thank you for your consideration. Please let us know if you have any questions or if we can provide further information.

Sincerely,

Harry Gasnick
Chair, WDA Court Rules Committee

Christie Hedman
Executive Director

WASHINGTON STATE
BAR ASSOCIATION

Office of the Executive Director
Paula C. Littlewood, Executive Director

May 31, 2018

Hon. Charles W. Johnson
Associate Justice
Washington Supreme Court
PO Box 40929
Olympia, WA 98501-2314

Dear Justice Johnson,

Enclosed please find the Council on Public Defense's memo in response to your March 23, 2018, request for input on the proposed amendments to CrR4.1 – Arraignment.

Please let me know if you have any questions or need additional information.

Sincerely,

Paula C. Littlewood

Encl.
05-14-18 Memo from Council on Public Defense
03-23-18 Letter from Hon. Charles W. Johnson

cc: William D. Pickett, WSBA President
Eileen Farley, Council on Public Defense Chair
Diana Singleton, WSBA Access to Justice Manager

1325 4th Avenue | Suite 600 | Seattle, WA 98101-2539 | 800-945-WSBA | 206-443-9722 | paulal@wsba.org | www.wsba.org

WASHINGTON STATE
BAR ASSOCIATION

TO: Paula Littlewood

FROM: Eileen Farley (CPD Chair), Daryl Rodrigues (CPD Vice Chair), and Travis Stearns (CPD Member)

DATE: May 31, 2018

RE: Council on Public Defense's Comments to CrR 4.1

At the request of Justice Charles Johnson the Council on Public Defense (CPD) at its May 4, 2018 meeting discussed whether Criminal Rule (CrR) 4.1 appropriately allows a delay between filing a felony charge in district court and subsequent refiling the same charge in superior court. Justice Johnson sent with his request a motion from a Snohomish County defendant explaining that there was a 30-day delay between filing a charge against him in district court and refiling of the charge in superior court. Justice Johnson requested comments by June 1, 2018.

After a full discussion at its May meeting the CPD recommend the rule be amended. We understand that the delay caused under the current rule can create significant problems for investigation and defense of cases. It also, as described in the letter from the Snohomish County defendant which Justice Johnson included with his request for comment, extends the time in which a case may be brought to trial. For poor defendants who are unable to post bail, particularly defendants charged with low level offenses, this additional time for trial pressures them to plead guilty to get out jail, forgoing their right to a trial.

Amending CrR4.1 will also reduce geographic disparity. An informal poll of practitioners on the CPD revealed that many jurisdictions have first appearances in superior court, meaning that they do not use this rule to extend the time a person is held before trial. An amendment to CrR 4.1 will eliminate this disparity.

The CPD, if the Court would find it of assistance, would be happy to discuss the rule further and suggest amending language. The CPD is made up of diverse interests including judges, public defenders, prosecutors, court administrators, and other interested persons, and is in an excellent position to consider the rule and propose language to solve the problems the current version of this rule creates.

There was a majority vote at the last CPD meeting in favor of changes to CrR4.1 changes and willingness, if the Court should ask to propose alternative language to address the concerns outlined above. The CPD did not feel the changes currently proposed to the rule would necessarily resolve the issue. Please let us know if you have any questions or if we can be of further assistance regarding Justice Johnson's request. Thank you for the opportunity to share our input.

The Supreme Court
State of Washington

CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
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March 23, 2018

Bob Ferguson
Washington State Attorney General
PO Box 40100
Olympia, WA 98504-0100

Paula Littlewood, Executive Director
Washington State Bar Association
1325 Fourth Avenue, Suite 600
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Tom McBride, Executive Secretary
Washington Association of
Prosecuting Attorneys
206 10th Avenue SE
Olympia, WA 98501

Teresa Mathis, Executive Director
Washington Association of Criminal
Defense Lawyers
1511 Third Ave, Suite 503
Seattle, WA 98101

Maggie Sweeney, Executive Director
Washington Defense Trial Lawyers
701 Pike Street, Suite 1400
Seattle, WA 98101

Christie Hedman, Executive Director
Washington Defender Association
110 Prefontaine Place S, Suite 610
Seattle, WA 98104

Dear Attorney General and Association Directors:

I am writing as chair of the Washington State Supreme Court's Rules Committee. The Rules Committee has received proposed amendments to Superior Court Criminal Rule (CrR) 4.1—Arraignment, which the proponent claims are necessary to avoid conflict with established constitutional principles and other court rules, such as CrR 3.3.

The Supreme Court Rules Committee is in the process of reviewing the proposed amendments to CrR 4.1 and would like input from various stakeholders on these proposed changes. I am enclosing a copy of the GR 9 cover sheet, the proposed amendment, and other supporting documentation received.

We appreciate your expertise and thank you in advance for your help in the rulemaking process. If possible, please provide your comments by June 1, 2018.

Very truly yours,

Charles W. Johnson, Chair
Supreme Court Rules Committee

Enclosures

SUPREME COURT

OF THE STATE OF WASHINGTON

GENERAL RULE 9 SUPREME COURT RULEMAKING

(A)(B) STEPHEN P. DOWDNEY JR. #971036
Proponent/Spokesperson
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen,Wa,98520

(C) The current version of CrR 4.1 necessitates amendment as it conflicts with established constitutional principals as well as other court rules (CrR 3.3).

(D) A public hearing should only be conducted upon order of the court.

(E) Expedited consideration should be applied as the current rule is allowing for individuals held to answer for a crime to remain separated from liberty without consideration for time for trial and for disparate periods compared to similarly situated persons.

Table of Authority

Table of Authority (Cont.)

PROPOSED AMENDMENTS

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) Time.
(1) Defendant Detained in Jail. The ~~defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court,~~ defendants arraignment in the adult division of the superior court after an information or indictment has been filed shall not be later than 14 days after defendant was detained in jail for the pending charge for purposes of commencement date for CrR 3.3(b)(1)(i), if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not effect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in Crr 3.3(a)(3)(iii).

(b) Objection to Arraignment Date--Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. that date shall constitute the arraignment date for purposes of CrR 3.3. a party who fails to object as required shall lose the right to object, and

the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. waiver of counsel at arraignment shall preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name. Defendant shall be asked his or her true name . If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading. The indictment or information shall be read to the defendant, unless the reading is waived, and a copy shall be given to defendant.

Although linked, CrRLJ 4.1 does not apparently seem to need amending in proponents considerations.

DISCUSSION

The current version of CrR 4.1 allows for individuals initially filed on in district court for prescribed conduct to ultimately be filed on in superior court for that same conduct previously held to answer for, without consideration for time for trial.

Warrantless Arrest

An individual detained in jail on a warrantless arrest under CrR/CrRLJ 3.2.1. must be formally charged within 72 hours. CrR/CrRLJ 3.2.1(f).

Under CrR 3.2.1(f) an individual filed on directly in superior court by information or indictment within 72 hours will be arraigned within 14 days CrR 4.1(a). A rule based time for trial will take place within 60 days. CrR 3.3(b)(1)

An individual filed on in district court under CrRLJ 3.2.1(g) by a "felony complaint" within 72 hours may be held for 30 days in district court. CrRLJ 3.2.1(g)(2). An information then may be filed in superior court. An arraignment will then take place within 14 days per CrR 4.1(a). Thus an arraignment in superior court will be within 44 days of being held to answer. A 60 day rule based time for trial will then occur per CrR 3.3(b)(1).

From the time an individual is held to answer in superior court per CrR 3.2.1(f) a time for trial will take place in 74 days, an individual held to answer in district court for the same conduct will have a time for trial period of 104 days.

Procedural History

Prior to the 1980 amendments to the time for trial rule(s) there were issues with providing a prompt trial for defendants once a prosecution had been initiated. see State v Striker, 87 wn2d 870;557 p2d 847(1976);State v. Edwards, 94 Wn2d 208;616 p2d 620(1980).

The 1980 amendments seem to cure, at least the issue of abusing the "felony complaint" district court filing procedure, as the time spent in district court was calculated into the time for trial period. see former CrR 3.3 and the dissent of James, J. in State v Kray, 31 Wn.App.388,390-92;641 p2d 1210(1982).

Where he states:

"'"The judicial Council's 1979 proposed amendments to CrR 3.3 will remedy this problem. The starting point for the time for trial period is the arraignment in superior court. Arraignment must occur by a certain date. In addition time spent in district court proceedings will be included in the time for trial period. This should limit the use of district court proceedings to delay the time for trial period. Washington State Judicial Council, Twenty Eighth Annual Report at 46-47(1979)."

Also see State v Hardesty, 149 Wn2d 230,235;66 p3d 621(2003) where this court states:

"'"If the state files a complaint and holds the defendant on the charge or subjects him to conditions of release, he will suffer a loss of liberty due directly to the current charge, thus, justice and fairness require that time elapsed in district court commence with the filing of the complaint and that this time be included in calculating the time for trial."

In 2003 the time for trial rules were amended again. CrR/CrRLJ 3.3 & 4.1. At least the amendments to CrR 3.3 & 4.1 either allow for individuals to be held to answer and detained in jail prior to the filing of an information in superior court without consideration for time for trial or stand facially vague, to where a person of ordinary intelligence may have trouble understanding what is prescibed or lacks standards sufficiently specific to prevent arbitrary enforcement.

Related Rules /Harmonizing all Provisions

CrR 3.3 has many provisions that relate directly to CrR 4.1.

CrR 3.3(a)(3) Definitions.

(i) "pending charge" means the charge for which the allowable time for trial is being computed.

According to CrR 3.3 "pending charge" does not specify a charge filed in superior court by information.

(ii) "related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in superior court.
CrR 3.3(a)(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

According to CrR 3.3 "related charges" and "pending charges" are to be calculated equally.

CrR 3.3(a)3(iv) "arraignment" means the date determined under CrR 4.1(b).

CrR 4.1(b) is the date of the true commencement date, reflecting the start time per CrR 3.3 after an objection is raised at the physical arraignment in superior court. (also see CrR 3.3(c)(1))

CrR 3.3(a)3(v) "detained in jail" means held in custody of a correctional facility pursuant the pending charge and that only "unrelated charges" are excluded from the time for trial period.

(note) there are instances in which periods of "related charges" are excluded CrR 3.3 (e)(4)(5).

Generally CrR 3.3 specifies a time for trial period from when an individual is held to answer for conduct even if ultimately prosecuted in superior court.

Vagueness

Is the current version of CrR 4.1 merely vague ?

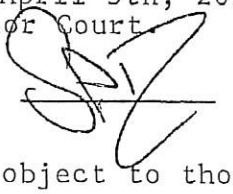
Facially, CrR 4.1(a) only specifies an end point to when an arraignment may occur and does not delineate an arraignment only after an information has been filed.

Indeed, CrR 4.1 subjects an arraignment date to objection under CrR 4.1(b) for purposes of CrR 3.3. allowing for adjustment.

However, CrR 4.1 is construed to mean an arraignment may only occur after an information has been filed in superior court.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I(1 RP 19)

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 5th, 2016 arraignment in Snohomish County Superior Court.



THE DEFENDANT: I'm actually going to object to those dates.

THE COURT: What's the objection?

THE DEFENDANT: Well, we're 21 days past filing today.

THE COURT: Right.

THE DEFENDANT: So I'm objecting to the arraignment date because I believe today is the only day I can object to it, if I'm not mistaken.

And also I have, with the court's indulgence, I actually have another issue that I'd like to raise.

THE COURT: What's that?

THE DEFENDANT: I actually believe that the expiration date should be -- the expiration date should be May 13th. The commencement date should be March 15th, the day of filing.

THE COURT: Mr. Dowdney, your case was filed April 1st.

THE DEFENDANT: It was actually filed --well-- yea, from the filing from district court. This was filed in district court.

And this brings me to another issue. At my PC hearing in front of Judge Bui I objected to my case being filed in district court. I filed actually a motion that was timely filed and properly before the court, but it was promptly ignored, to be at that dismissal date. So it wasn't -- I wasn't brought to that hearing. I filed a motion to docket. Filed the motion. I have a service of mailing, and --

THE COURT: You filed in what --

THE DEFENDANT: I'm sorry, Your Honor?

THE COURT: You filed in what court, sir?

THE DEFENDANT: District court.
THE COURT: The case is in superior court now.
THE DEFENDANT: I understand that, Your Honor. I understand that. But I didn't file the case in district court. I mean, the State filed in district court. So due to that, somewhere along the line now we're past the 14-day which -- and that kind of brings me to why I want my commencement date to start on the day of filing because that coincides with -- it would be Criminal Court Rule 3.2.1.(f)(1) where I'm charged within 72 hours if filed in district court, and so that's what I want.

According to Washington Supreme Court and all the divisional courts, they continuously said that the United States Constitutional Amendment 6, and the Washington Article I, Section 22, basically are the same. The Washington Supreme Court has said --

THE COURT: Wait. Stop. Your getting way ahead of yourself.

what's the State's position with regard to the commencement date for the 60 day rule?

MS. YAHYAVI: Your Honor, the State's position is the commencement date is today, the date of arraignment.

THE COURT: Even if it was filed in district court?

MS. YAHYAVI: Well, I haven't done any research. I'm happy --

THE COURT: I'm asking you specifically right here, right now, I'm going to take a break, you need to take a look at the rule now. I'll be back out in a few minutes. The defendant needs to be maintained in the court room over there. We're in recess.

(Recess taken)

THE COURT: Ms Yahyavi, have you reviewed Criminal Rule 3.3?

MS. YAHYAVI: I have Your Honor. Can I go ahead and answer?

THE COURT: Sure.

MS. YAHYAVI: Under Criminal Rule 3.3, time for trial , (c), the initial commencement date. (1) The initial commencement date shall be the date of arraignment as determined under Criminal Rule 4.1.

Criminal Rule 4.1 states: The defendant detained in jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court. This information was filed April 1st.

THE COURT: All right. Mr. Dowdney, is there some

theory under which that's not a correct reading of the rule?

THE DEFENDANT: I'm sorry?

THE COURT: is there some theory under which that is not a correct reading of the rule?

THE DEFENDANT: She read directly from the rule. I'm reading myself. She read it directly from the rule.

THE COURT: All right. Well, today is your arraignment date. It was properly set. 4.2 requires that you be arraigned within 14 days of the day charges were filed. And so today is the arraignment date. Today is the commencement date.

MS YAHYAVI: Your Honor, I just want to clarify, it's 4.1.

THE COURT: I'm sorry, 4.1. I misspoke. It's 4.1.

THE DEFENDANT: Defense objects.

This, first of many disputes over the commencement date and misuse of the district court filing process, clearly shows competing interpretations of how the rule applies to time one has spent held on same charge in district court that

that is ultimately filed in superior court.

The filing of a "felony complaint" in district under CrR 3.2.1.(g) or a "criminal complaint" under CrR 3.2.1.(f) that is eventually amended up to a felony and charged by information in superior court are either "pending charges" or "related charges". Either way an individual has been held to answer in a state court, by the same prosecuting authority. Superior court has jurisdiction over both courts see RCW 2.08.010, and Article 4 § 6. also see State v Harris, 130 Wn2d 35,42;921 p2d 1052(1996).

It bears noting that although State v George, 160 Wn2d 727;158 p3d 1169(2007) states in uncertain terms that time spent in district court is no longer deducted from the superior court calculation, George was originally charged in "municipal" court and thus seperate under Harris.

Held to Answer

"The standard indicates that if at the time of the filing of a charge a defendant is being held to answer --- whether in custody, or on bail or recognizanced for the same crime or a crime based on the same conduct or arising from the same episode; then the time begins running as of the date the charge is filed, charge means a written statement with the court which accuses a person of an offense and which is sufficient to support a prosecution; it may be an indictment, information, complaint or affidavit, depending upon the circumstances and the law of the particular jurisdiction" State v Striker, 87 Wn2d at 877. (also see progeny)

United States v Marion, 404 US 307,30 L.Ed.2d 486,487,92 S.Ct. 455(1971) at 321 states:

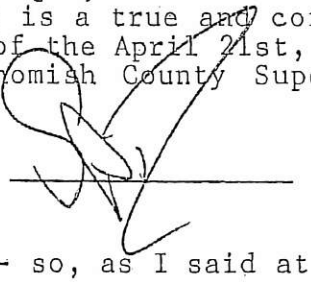
"Under ABA standards, after a defendant is charged it is contemplated that his right to speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; There is no necessity to allege or show prejudice to the defense. Rule 2.1 ibid"

The term "HELD TO ANSWER" is presumed not to have been merely drawn out of a hat, indeed, it has its roots dating back to The Great Charter, Magna Carta, Lord Coke and Blackstone speak of it, as well as our Founding Fathers:

> "No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment.." Amendment 5 US Const.

The following is an excerpt from the verbatim reports of State v. Dowdney, COA 75416-5-I (2 RP 14-15).

I declare under penalty of perjury of the laws of Washington State the following is a true and correct reproduction in relevant part of the April 21st, 2016 CrR 3.3(d)(3) hearing in Snohomish County Superior Court.



MR. DOWDNEY: .....However -- so, as I said at the beginning, Your Honor, dealing kind of with the 3.3(d)3, and I think it's fairly clear that you are not held to answer. You haven't been held to answer. I haven't been held to answer before my arraignment.

So -- and clearly the only reason ---

THE COURT: This phrase you keep using, held to answer.

MR DOWDNEY: That's correct.

THE COURT: Where is that in the rule?

MR DOWDNEY: So basically it says being held to answer, and it's discussed in phelps (phonetic

spelling). It's discussed in, I believe Greenwood, and it's U.S. vs -- (Loudhawk)

MR DOWDNEY: And I have it there. It says the defendant was never served an arrest warrant, issued conditions of release. And the defendant and the charges were never simultaneously before the court that's triggering speedy trial rights. Because your speedy trial rights actually trigger --

THE COURT: I'm going to ask you to stop at this point.

" What counts as a commitment to prosecute is an issue of Federal Law unaffected by allocations of power among state officials under a state's law...and under the federal standard, an accusation filed with a judicial officer is sufficiently formal and the government's commitment to prosecute it sufficiently concrete, when an accusation prompts arraignment and restrictions on the accused liberty facilitate the prosecution ...from that point . . on, the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

" [I]t would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford Judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police and approved by a court of law."

Rothgery v. Gillespie County, 554 US 191,207,208,233, 128 S.Ct. 2578, 171 L.Ed. 2d 366, (2008) US lexis 5057.

CONCLUSION

The current version of CrR 4.1 allows for individuals to sit jail for up to 44 days without any formal process.

In the case of Snohomish County, whom utilizes the district court "preliminary hearing" or preliminary examination procedures and files most if not all warrantless arrests in district court, either CrR 4.1 is being misunderstood or wantonly abused.

In Snohomish County, upon a warrantless "felony arrest" 99.999% are filed in district court as "criminal complaints". One is not present in court pursuant this "filing" ever. One is not formally served this complaint, formally read this complaint in court.

This stands contrary to Article 1 § 22 Wash. Const., Amendment 6 US. Const.,CrRLJ 4.1(f).

CrR 4.1, currently allows Snohomish County to operate under the assumption that one does not have to be "held to answer" as prescribed by the 5th amendment to the US Const. by a "presentment".

In Washington State, a presentment or grand jury indictment has been replaced by an "information" Article 1 § 25 also see RCW 10.37.015 (one will not be held to answer unless by information).

Amending CrR 4.1 to reflect the total time an individual has been removed from liberty, at least equally to those initially charged in superior court, would deter the state from delaying arraignment to gain tactical advantage.

(although irrelevant to proposal, it should be noted that Snohomish County never has any intentions of holding a "preliminary hearing" per CrRLJ 3.2.1(g)(1).) see exhibit 1 & 2, 4.1 allows for this.

CrR 4.1 should also be amended as individulals filed on initially in district court

would receive time for trial periods equal to those initially filed on in superior court in application of equal protection. see Article 1 § 12 as a time for trial under CrR 3.3 seems to be "fundamental".also see Amendment 14 US Const.

Proponent believes in Washington State the right to be held to answer and to be treated equally are Fundamental Principals essential to the security of individual rights Article 1 § 32 Wash. Const.

And Respectfully asks this court to review the validity and constitutionality of CrR 4.1. for a time for trial period under 3.3 protects a constitutional right to speedy trial, is fundamental and needs to be protected by rules that reflect as much.

I hereby certify under penalty of perjury of the laws of Washington State, that the foregoing is true and correct.

Respectfully Submitted this 6 day of Febuary, 2018.

Signed in Aberdeen, Wa, 98520,

Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520
4jhd

EXHIBIT 1

Snohomish County

District Court
Everett Division

Roger M. Fisher, *Judge*
Tam Bui, *Judge*

M/S #508
3000 Rockefeller Ave.
Everett, WA 98201-4046

(425) 388-3331
FAX (425) 388-3565

SNOHOMISH COUNTY DISTRICT COURT
FELONY COMPLAINT
INFORMATION SHEET

The Snohomish County Prosecutor's Office has filed a complaint with the Everett Division of the Snohomish County District Court charging you with a felony. A copy of this felony complaint has been provided to you.

A District Court Judge has previously reviewed the facts and circumstances related to your arrest and found that probable cause exists to support your current detention.

YOU WILL NOT BE REQUIRED TO APPEAR BEFORE THE DISTRICT COURT UNTIL FURTHER ACTION IN YOUR CASE IS NECESSARY.

You will be held in custody on the felony complaint until it is dismissed at 5:00 PM on the felony dismissal date noted on the complaint. The following actions may result in an earlier or a later release date:

1) You and the prosecutor negotiate a guilty plea to a lesser charge;
2) The prosecutor requests that the District Court case be dismissed, but files the charge in Superior Court with another bail request.
3) You and the prosecutor agree to an extension of the felony dismissal date.

You may choose to negotiate with the Prosecutor or you may wait and see if the Prosecutor will file your case in Superior Court. Unless you have hired private counsel, the Snohomish County Office of Public Defense will contact you to determine if you want to negotiate with the Prosecutor.

If you decide to accept the Prosecutor's offer, you will appear in District Court to enter a plea of guilty. These calendars are held every Monday through Friday (except on Holidays) @ 1:00 PM.

If you decide you do not want to take the Prosecutor's offer, contact your attorney to inform the Prosecutor of your decision. If your case is filed in Superior Court, you will be scheduled to appear in Superior Court to be formally arraigned on the charge and to receive notice on how to have a public defender represent you.

EXHIBIT 2

Snohomish County Public Defender Association
2722 Colby Avenue, Suite 200 • Everett, WA 98201-3527
Phone: 425-339-6300 • Fax: 425-339-6363 • www.snocopda.org

PROBABLE CAUSE HEARING

The State of Washington is holding you in jail and a Judge will determine today whether there is Probable Cause (PC) to continue holding you. This can be a very frustrating stage in the process. The information contained in this handout will help you understand the process. Please read it carefully.

You are not CHARGED with a crime at this point, and a Judge's finding of PC does not mean that the Prosecutor will charge or convict you of this/these crime(s). It only means that there is a reasonable belief that you may have committed one or more felonies. The law allows the Prosecutor to hold you in jail for **72 hours** (not counting holidays or weekends) upon a finding of PC to give them time to decide: (1) if any charges will be filed against you, (2) what charges to file against you, and (3) in which court to file the charges. If the Prosecutor fails to file charges within 72 hours, you will be released on this hold.

IF CHARGES ARE FILED IN DISTRICT COURT

If your felony charges are filed in District Court, you will not have an arraignment hearing; you will simply receive paperwork indicating a deadline for the prosecutor to file in Superior Court. This deadline is called a Felony Dismissal Date (FDD). The FDD will be set two Fridays from the date of filing at 5:00pm (between 14 and 18 days, depending on the day of the week charges are filed). Your FDD is NOT a court date, but simply a deadline for the Prosecutor. The Prosecutor will have until the FDD to decide (1) whether the felony charges will be transferred to Superior Court for prosecution or (2) whether they will offer you a plea bargain for one or more misdemeanors. If the Prosecutor does not file charges in Superior Court and they do not offer you a plea bargain to one or more misdemeanors by the FDD, you will be released on this hold. However, this does not mean that charges will never be filed against you—the Prosecutor has time allowed by the statute of limitations, a minimum of 3 years, to file charges against you.

IF CHARGES ARE FILED IN SUPERIOR COURT

If the Prosecutor files felony charges in Superior Court, you will have an arraignment hearing where you will hear the charge(s) against you and have another opportunity to argue bail. If you qualify for a public defender, you will have an attorney assigned after the Prosecutor files in Superior Court.

RELEASE

If you are released on your personal recognizance, or if you post bail, you must keep your address updated with the Court & Prosecutor. If the Prosecutor decides to file charges, you will

THE SUPREME COURT

STATE OF WASHINGTON

DECLARATION OF SERVICE
BY MAILING GR 3.1(c)

I, Stephen P. Dowdney Jr., Proponent, in accordance with General Rule 3.1(c), do hereby declare that I have served the following documents:

Brief in accordance with General Rule 9 Rulemaking.

To the following parties:

Susan L. Carlson, Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, Wa, 98504-0929

(E-Mail/Electronic Filing unavailable)

I deposited the aforementioned document in the U.S. Postal Service by of process LEGAL MAIL through an officers station at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Wa, 98520.

I declare under penalty of perjury of the laws of Washington State that the foregoing is true and correct.

Signed in Aberdeen, Wa, this 6 day of February, 2018.

Stephen P. Dowdney Jr.
971036
Stafford Creek Corr. Cent.
191 Constantine Way
Aberdeen, Wa, 98520

Cc: Dowdney file.

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
ETHICS OPINION 18-04

Question

May a court allow court staff to conduct pre-trial dynamic risk assessments which includes an interview of the defendant prior to their first appearance?

The interview includes questions to ascertain the defendant's employment status, residential stability, and whether he or she has a history of drug abuse, and if so, whether they have been using any illegal drugs during the past six months and whether that usage has caused them family, social, or work issues. The defendant may or may not yet be represented by an attorney when the interview takes place due to logistical challenges inherent in conducting a prehearing interview with a defendant in custody.

Once the interviewer obtains the information, the staff person reviews the defendant's criminal history and data on pending charges, as well as previous records of failure to appear, and uses the statistically based risk assessment tool to categorize the defendant's likelihood of reappearing and complying with pretrial release conditions. Each defendant is assigned, by the assessment tool, a category of low, medium, or high risk to violate pretrial supervision.

The judge may look at the questions and answers gathered by the interviewer which provided the basis for the categorical risk score. The public defender's office appears, on a limited basis, at first appearance for everyone on a felony charge, and is also present in court to assist those with misdemeanor charges. The categorical result (low, medium, or high) of the assessment will be presented on the record to the court and the parties at the defendant's first appearance.

The interviewer's notes and conclusions are retained for a period of time and are subject to GR 31.1; however, the notes would not be made a part of the record or court file.

1) Does the prehearing interview process outlined above, conducted without the assistance of counsel, violate a defendant's rights, such as the right to counsel and the right to remain silent, and thereby violate CJC 2.2?

2) Would the risk assessment interview, which is conducted off the record and outside the courtroom, violate our state (Art. 1 Sec. 22) and federal (6th Amend.) constitutional guarantees and thereby breach a judge's ethical obligations under CJC 1.2 or 2.2?

3) Since the risk assessment process includes interviews of the defendant prior to their first appearance, might not this collection of information be considered ex parte communications in violation of the Code? Would the answer be different if the interview and assessment were conducted by a municipal or county employee who is not subject to the judge's direction and control?

Answer

1) This is a legal question that is beyond the scope of this committee. The requestor should consult with their legal counsel; if their counsel opines that the process violates the defendant's legal rights, then such conduct would violate CJC 2.2.

2) Same as answer #1.

3) The committee assumes, from how the question is posed, that the risk assessment interview by court staff under the judge's direction and control takes place off the record, without counsel, and without any signed waiver to counsel from the defendant. The committee also assumes that the purpose of the risk assessment interview is to collect information that the judge will use in making decisions in the defendant's pending case, including setting conditions of release.

The Code of Judicial Conduct prohibits judicial officers from investigating facts in a pending matter and does not contain an exception for off-the-record interviews of unrepresented defendants with pending matters for the purpose of conducting pre-trial risk assessments. This prohibition extends to court staff, who are under the judge's direction and control. Current law and court rules do not expressly authorize judges or court staff to conduct off-the-record interviews of unrepresented defendants with pending matters to gather information for use in a pre-trial risk assessment.

Thus, under the Code of Judicial Conduct, neither a judge nor court staff under the judge's direction and control may conduct off-the-record pre-trial risk assessment interviews. Such interviews conducted by persons who are not under the direction and control of judicial officers would fall outside the purview of the Code of Judicial Conduct.[1]

The overarching framework for this opinion is underscored by Canon 1 which requires judges to uphold and promote the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety, and Canon 2 which requires judges to perform the duties of judicial office impartially, competently, and diligently.

The goal of implementing vigorous, dynamic pre-trial risk assessment services to assist judges with performing their duties as required by CrR 3.2 and CrRLJ 3.2 is laudable. However, doing so must not come at the cost of the underpinnings of a fair and impartial justice system.

A. Judges Are Prohibited From Investigating Facts In A Pending Matter

Under CJC 2.9(C), judges are prohibited from investigating facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law. The committee has previously issued opinions regarding the judge's review of information prior to making a decision. See 04-07, and 13-07.

In 04-07, the opinion recognized that CrR 3.2 and CrRLJ 3.2 requires a judge to consider a variety of factors based "on available information" in setting conditions of release, including criminal history. Therefore, because CrR 3.2 and CrRLJ 3.2 authorized a judge to make a decision on conditions of release based "on available information," the opinion concluded that a judge may consider the Judicial Information System (JIS) screen when setting the conditions of release. However, the opinion

[1] The Committee acknowledges the value of the information that can be gained through a dynamic pre-trial risk assessment as described in this query. However, until and unless there is an amendment to the CJC or court rules, the pre-trial risk assessment conducted by court employees described in the question posed is prohibited by the CJC.

stated that the judge should advise the defendant that he or she is looking at the JIS screen and recite the criminal history or other relevant information displayed on the screen so the defendant may respond to or dispute the information if the defendant indicates it is not correct.

Similarly, 13-07 recognized the prohibition against judges investigating facts in a pending matter, unless expressly authorized by law. CJC 2.9(C). The opinion stated that a judge's review of juvenile files maintained in the Judicial Access Browser System (JABS) in a pending matter must be limited to reviews authorized by law. If a party requests that the judge review JABS records and such a review is not authorized by law, then the judge must allow all other parties to be heard on the request before deciding if a review of the JABS records is appropriate, and if so, specifically describe on the record the records it will review, or has reviewed, and the substance of those records.

Here, the described off-the-record risk assessment, which includes an interview with an unrepresented criminal defendant about his or her drug use, history of drug use, family, social, and work issues, is an investigation of facts in a matter pending or impending before the judge, and there is no law or court rule the Committee is aware of that authorizes a judge to conduct such an off-the-record interview with an unrepresented criminal defendant.

The described off-the-record risk assessment is distinguished from the circumstances in 04-07 and 13-07 because those opinions address a judge reviewing an electronic database for criminal history. The described off-the-record risk assessment is not a situation where the judge is simply reviewing existing information in an electronic database. The described off-the-record risk assessment involves actively engaging an unrepresented criminal defendant to procure substantive information that will be used by the judge in making a decision on conditions of release. Thus CJC 2.9(C) prohibits a judge from engaging in the described off-the-record risk assessment.

B. Ex Parte Communications Generally Prohibited

CJC 2.9(A) prohibits a judge from initiating, permitting, or considering ex parte communication, or considering other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, with few exceptions.

When circumstances require it, ex parte communication may occur for scheduling, administrative, or emergency purposes, which do not address substantive matters. CJC 2.9(A)(1). Ex parte communication may also occur pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court. CJC 2.9(A)(1). For any ex parte communication that is excepted from the general prohibition, the judge must reasonably believe that no party will gain a procedural, substantive, or tactical advantage as a result of the communication, and the judge must promptly notify all other parties of the substance of the ex parte communication and give the parties an opportunity to respond. CJC 2.9(A)(1)(a) and (b).

Under CJC 2.9(A)(1), an off-the-record risk assessment interview that asks questions of an unrepresented criminal defendant about drug use, history of drug abuse, family, social, or work issues and reports the answers to the court cannot be considered necessary communication for scheduling, administrative, or emergency purposes exception and addresses substantive information. Therefore, CJC 2.9 does not contain an exception for a judge to conduct an off-the-record risk assessment as described in this question.

C. Judges' Obligations Under The CJC Extend To All Subject To The Judges' Direction And Control

Under CJC 2.12, a judge shall require court staff, court officials, and others subject to the judge's direction and control to act with fidelity and in a diligent manner consistent with the judge's obligations under the Code of Judicial Conduct, and a judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the CJC if undertaken by the judge. Thus, court personnel are prohibited from engaging in activities that a judge is otherwise prohibited from doing him or herself, including not investigating, gathering information, or having unauthorized communications, unless authorized by law. This, in turn, helps to protect and promote the independence and neutrality of the court as a fair arbiter of the information provided to the court, not as an independent fact-finder or researcher.

A judge is allowed to consult with court staff and officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter. CJC 2.9(A)(3). The committee previously issued an opinion on actions by court staff related to pre-trial supervision in pending and impending cases.

In 08-06, the opinion discussed whether a probation department in a court of limited jurisdiction could engage in pre-trial contact with alleged victims in connection with the pre-trial monitoring of a defendant's compliance with conditions of release. The opinion advised that ARLJ 11.1 authorized the court to establish a probation department and that ARLJ 11.2 specified the core services of the probation department to include conducting pre/post-sentence investigations with face-to-face interviews; researching criminal history, social and economic needs, community resource needs, counseling/treatment needs, work history, family and employer support, and completing written pre/post-sentence reports. Thus, because the court was allowed to establish a probation department and the core services of the probation department under the ARLJ included interviews, the court was allowed to establish a probation department and permit contact between the probation department employees and the alleged victims of the defendant's crime. However, probation staff should be counseled that their behavior should not create an appearance of partiality, and contacts with alleged victims should be limited to contacts intended to facilitate the enforcement of the court's orders.

The circumstance addressed in 08-06 is inapplicable here as the described off-the-record risk assessment interview is not being conducted by a probation department established under ARLJ 11.1. Therefore, because a judge is prohibited from conducting an off-the-record risk assessment interview that asks a defendant questions about employment status, residential stability, history of drug abuse, and illegal drugs during the past six months, the judge would also be prohibited from having a court staff person conduct such an interview.

D. Interview And Assessment Conducted By A Municipal Or County Employee Who Is Not Subject To The Judge's Direction And Control

The CJC applies to all judges, except when otherwise noted in the CJC. CJC Application, I(B). Thus, this opinion applies to conduct engaged in by a judge and, under CJC 2.12, by court personnel under the judge's direction and control. To the extent the described off-the-record risk assessment interview is not conducted by a judge, court staff, or someone under the judge's direction and control, the circumstance would fall outside the purview of the CJC.[2]

[2] The committee was not asked to opine on, and provides no opinion, on the legal status or appropriate retention of the records related to any pre-trial interviews and risk assessment calculations. However, the committee cautions that the retention of any such records should be conducted pursuant to appropriate court rule or statute depending on the employee or agency that creates them. The committee also notes that this opinion does not consider such records as simply administrative records under the Code of Judicial Conduct. Also, any material relevant to a court decision is presumptively public under article 1, section 10 of the Washington State Constitution. *Bennett v. Smith Bundy Berman Britton, PS,* 176 Wn.2d 303, 312, 291 P.3d 886 (2013).