WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

NOTICE IS HEREBY GIVEN by the Washington State Bar Association, pursuant to RCW 42.30.080, that the Council on Public Defense meeting will be held on:

January 24, 2020 | 12:00pm to 2:30pm
Washington State Bar Association, 1325 4th Ave, #600, Seattle, WA
Call: 1-866-577-9294; Access: 52874#

The purpose of the meeting is for the Council to discuss, deliberate, and take potential final action regarding the following agenda items:

3 min	**Welcome and Roll Call**	Daryl Rodrigues	Discussion	
2 min	**November Meeting Minutes**	Daryl Rodrigues	Action	pp. 3-5
5 min	**Office of Public Defense Report**	Joanne Moore	Discussion	
5 min	**Washington Defender Association Report**	Christie Hedman	Discussion	
10 min	**Proposed Changes to Standards in Death Penalty Related Court Rules** • **CrR3.1** • **CrRLJ 3.1** • **JuCR 9.2**	Travis Stearns	Discussion	• CrR 3.1 • CrRLJ 3.1 • JuCR 9.2
30 min	**Recommendations from OPD Report on Standards Implementation**	Sophia Byrd McSherry	Discussion	pp. 6-35
15 min	**Independence Committee Report re:** • **Proposed General Rule** • **Standard 18** • **Standard 19**	Sophia Byrd McSherry	Discussion and Possible Action	pp. 36-45
30 min	**Standards Committee Report re: Persistent Offenders**	Bob Boruchowitz	Discussion	pp. 46-80
45 min	**Legislative Agendas**	Christine Hedman and Jaime Hawk Sophia Byrd McSherry	Report	
5 min	**CPD Committee Engagement Survey**	Travis Stearns		
5 min	**Announcements**	Everyone		

Reasonable accommodations for people with disabilities will be provided upon request. Please email carolynm@wsba.org or call 206-727-8293.

Some Council members may participate via conference call. A speaker phone will be available at the meeting location noted above for members of the public to attend and hear statements/discussion of those members participating by phone. In addition, call-in instructions are pasted below for members of the public who would like to attend telephonically.

Instructions for public call in: 866-577-9294, access code 52874#.

You are not required to state your name to join this meeting. If the conference call provider message asks that you state your name, you may press #, without stating your name, and you will be connected to the meeting.

Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE

NOVEMBER 1, 2019, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA

MINUTES

CPD members in person: Daryl Rodrigues (Chair), Travis Stearns (Vice-Chair), Louis Frantz, Judge Drew Henke, Christie Hedman, Kim Ambrose, Rebecca Stith, Jaime Hawk, Matt Anderson, Justice Sheryl Gordon McCloud
CPD voting members on the phone: Colin Fieman, Eric Hsu, Judge Patricia Fassett, Abraham Ritter, Rachel Cortez, Kathy Kyle, Justin Bingham, Debra Ahrens, Joanne Moore, Natalie Walton-Anderson
CPD non-voting members: Ann Christian, Eileen Farley, Bob Boruchowitz
WSBA Staff: Diana Singleton
Guests: Sophia Byrd McSherry, George Yeannakis, Erica Rusher, Krista van Amerongen
Absent: Commissioner Randy Johnson, Nick Allen, and Jason Bragg

October Meeting Minutes: Daryl asked to move his name to absent since he was not able to participate in most of the last meeting. Louis Frantz moved to approve the minutes with the edit Daryl suggested. Christie seconded. All were in favor. No nays or abstentions. Motion passed.

Appellate Guidelines: Travis explained he presented the proposed guidelines to the Board of Governors (BOG) a few months ago. We received feedback and propose to change the heading in 1(b) from "holistic representation" to "other related items." Christie Hedman moved to accept the changes and proposed to seek approval of the amended guidelines at the next BOG meeting. Rebecca asked about the use of the word "advise" and Travis confirmed that it was used intentionally used because of the emphasis on being client-centered attorneys. Travis explained the comprehensive process they used in reviewing these proposed guidelines, including sending the draft out to every OPD attorney for review. They have been using this for over two years already. Christie asked about the title using "Guidelines" vs. "Performance Guidelines" to make it consistent with the other performance guidelines. Travis thought that would be a good edit and moved to add this to the title. Christie made a motion to approve the guidelines with the two edits, and Rebecca seconded. All were in favor. No nays or abstentions. Motion passed.

Independence Committee: Sophia gave an overview of the work of the committee and the proposed General Rule and amendments to Standards 18 and 19. The new portion would be in Standard 19 in establishing some political independence in public defense. Christie suggested that we add equity and justice work so reform efforts are not prohibited. We are planning on sending this out for feedback to WDA and judicial associations. Travis motioned to adopt the proposals as presented. George noted that we should edit the footnotes as they do not appear accurate; we should remove the language that includes examples. Many agreed that that suggested change is reasonable. Joanne suggested that the GR 9 cover sheet should mention that there are some jurisdictions that are in accordance with this. Rebecca seconded Travis' motion as amended to take out the examples in the footnotes. The following votes were taken; 20 votes in favor; 0 votes against and 0 votes abstain.

Last Name	First Name	Yes	No	Abstain	Absent
Ahrens	Deborah	x			
Allen	Nicholas				
Ambrose	Kimberly	x			
Anderson	Matt	x			
Bingham	Justin	x			
Jason	Bragg				x
Cortez	Rachel				x
Judge Patricia	Fassett	x			
Fieman	Colin	x			
Louis	Frank	x			
Hawk	Jaime	x			
Hedman	Christie	x			
Judge Henke	Drew	x			
Johnson	Randy				x
Kyle	Kathleen	x			
Justice Gordon-McCloud	Sheryl	x			
Moore	Joanne	x			
Rodrigues (Chair)	Daryl	x			
Stearns (Vice-Chair)	Travis	x			
Stith	Rebecca	x			
Natalie	Walton-Anderson	x			

Pre-Trial Reform - Defense Resource Packet: Jaime reported that she spoke with Governor McBride about this concerns and explained the packet is for defense counsel's advocacy. He confirmed this clarification was helpful and that he didn't have any input on changing it and would support it. Jaime also spoke with Governor Clark (representing the district where Yakima County is located) about this concerns. He said he consulted with local prosecutor who told him not to support this. Jaime explained that the packet is not trying to change the pre-trial system; it's just trying to offer a resource for defenders to use the existing the laws. Krista shared her experience of working in Yakima County and their pretrial reform work that started in 201. The prosecutor initially signed on, but later pulled out. And since then, the prosecutor has started a new level system, and created more requirements for people who posted bail. Daryl suggested we get an anonymized report so people know what's going on – we can share out articles and anonymized comments. Jaime asked if the Pre-Trial Committee could

follow up with Krista to follow up on this. Jaime will present on proposed pretrial resource back at the next BOG meeting.

Letter to Spokane County Commission re: Office Model: Daryl gave a background on this issue and referenced the letter that WDA has sent which Christie had sent to the CPD listserv. Daryl spoke with Tom, the director of the Spokane public defender and he thinks the funders have the information they need. No other action or activity from CPD is needed at this point.

CrR 4.1/3.3 and CrRLJ 3.2.1: This item was not discussed and will be discussed at the next CPD meeting in January.

Standards Committee: Bob said that they will have an update at the CPD meeting in January.

Structures Committee: Eileen reported that the committee met today and reviewed the feedback they received from OPD. They will be following up and start with interviews with some set questions and work on identifying the jurisdictions to start with – they want to do small, medium and large jurisdictions. Eileen will be talking to Katrin and George on their work to survey public defense offices. They will share their work plan with CPD at the next meeting.

WDA Report: Christie Hedman reported that they are continuing to plan their CLEs for next year. They have just delivered some CLEs and plan to do a legislative advocacy training in January. They spoke with Senator Dhingra about possible funding for study and analysis on structure which can dovetail with the structures committee's work.

OPD Report: Sophia reported that they coordinated with WDA on 70.109 on sexual offender and less restrictive housing. Legislators are holding stakeholder meetings on this issue. Sophia also reported that OPD is now officially recruiting for the new role of disproportionality legal training coordinator.

Other announcements: Eileen reported that Justice Fairhurst asked Eileen to speak to the lawmakers during the Committee Days (11/21 and 11/22) to answer questions about the structures workgroup's work.

Next meeting agenda items: There was discussion about legislative agendas for the next session. Jaime reported that WDA and ACLU are working on decriminalization of bail-jumping; they are looking at gathering data to show the disparities. Jaime also shared about SB 5076 is about felony disenfranchisement which didn't get a lot of momentum last session; ACLU is working with others to bring this back at the next session. Jaime reported on SB 5819 which is a post-conviction review parole bill. Christie will send out their legislative agenda for the next session to CPD in December or January.

The Supreme Court
State of Washington

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CHIEF JUSTICE
TEMPLE OF JUSTICE
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July 16, 2019

Daryl A. Rodrigues
Chair, Council on Public Defense
King County Department of Public Defense
710 2nd Avenue, Ste. 250
Seattle, WA 98104-1765

Travis Stearns
Vice Chair, Council on Public Defense
Washington Appellate Project
1511 3rd Ave., Ste. 610
Seattle, WA 98101-3647

Re: Washington Supreme Court Standards for Indigent Defense

Dear Mr. Rodrigues and Mr. Stearns:

At our last en banc administrative conference, the Supreme Court met with Joanne Moore and staff from the Office of Public Defense. They shared an audit report on how jurisdictions and public defense attorneys were implementing the Washington Supreme Court Standards for Indigent Defense at the local level.

The court was impressed with the methodology, findings, and recommendations in OPD's audit. Before takign action, the court would like to consider any comments or recommendations from the Council on Public Defense as well.

Attached is a copy of the updated audit report we received. I am confident that Joanne Moore and her staff would be happy to assist in serving as resources to you if you have any questions.

Thank you in advance for your consideration of this request and thank you for the work of the Council on Public Defense.

Very truly yours,

Mary E. Fairhurst

MARY E. FAIRHURST
Chief Justice

Enclosure
cc: Justice Sheryl Gordon McCloud
Joanne Moore, Office of Public Defense
Sophia Byrd McSherry, Office of Public Defense
Katrin Johnson, Office of Public Defense
George Yeannakis, Office of Public Defense
Marc Boman, Perkins Coie

2019 Audit of Trial-Level Compliance with the Standards for Indigent Defense

Washington State Office of Public Defense

Final Report

June 2019 – Updated July 11, 2019

Summary of Recommendations

OPD

1. OPD should require counties and cities to submit certification forms for one certification period in their applications for Chapter 10.101 RCW funds.

2. OPD should work with the District and Municipal Court Management Association to identify a retention period for certification forms, and to have the Secretary of State include this in the statewide retention guidance provided for local governments. Currently the retention schedule for Superior Courts requires attorney certifications be retained for 75 years after the filing date.

3. OPD should update its FAQs and provide guidance for city and county public defense administrators on the following:
    a. Steps they can take to help attorneys gain sufficient experience to rise in qualification levels.
    b. Ways to award case credit to attorneys who are second-chairing trials to gain experience necessary to meet the qualifications standard.
    c. Options for counting transferred/inherited caseloads for jurisdictions that do not use case weighting.
    d. Options for counting probation violations for jurisdictions that do not use case weighting.

4. OPD should create and provide a sample form for annual reporting of caseload information (public defense and private work) to contract managers/public defense administrators.

5. OPD should review case weighting policies, notify cities/counties of provisions that are inconsistent with the Standards, and provide a checklist of components that are mandatory to ensure case weighting policies are consistent with the Standards.

6. OPD should increase training opportunities for public defense attorneys on the importance of using investigators, and how to work effectively with investigators, particularly in juvenile and misdemeanor cases.

7. OPD should encourage trial courts to assess and provide confidential meeting space for attorneys and clients.

Courts

1. The Supreme Court should require education for all new judicial officers regarding the public defense certification requirement, and other requirements of the Supreme Court Standards for Indigent Defense.

2. Trial courts should specifically track and code public defense assignments in the courts' case management systems, as a reliable statewide tool is needed to help identify public defense attorneys' caseloads.

3. The Supreme Court should consider the following edits to the certification form as described below, and as illustrated in Appendix A:
    a. Modify the wording in Line 1 to clarify that the percentage of time spent on public defense pertains to the particular jurisdiction in which the certification form is filed.
    b. For attorney with public defense caseloads in multiple courts, add a new section to indicate which courts and what percentage of time is spent on each caseload.
    c. Combine sections 2.a and 2.e regarding Qualifications.

4. The Supreme Court should consider alternative certification requirements for government and non-profit public defense agencies that regularly track attorney caseloads and comply with the Standards. For example, individual attorney certification could be limited to an annual basis, and/or agency-wide certifications that list each staff attorney could be filed as an alternative.

5. The Supreme Court should consider modifying the trial experience requirements to qualify for adult and juvenile felony representation.

    The Supreme Court should consider modifying the wording in Standard 3.4 from *should not exceed* to *shall not exceed*.

6. The development of an enforcement mechanism should be considered.

Contents

I. Background

The purpose of this audit is to evaluate how jurisdictions and public defense attorneys implement the Washington Supreme Court Standards for Indigent Defense (Standards) at the local level, and identify steps to ensure compliance. Adult and juvenile public defense services are managed at the county and city level, resulting in a wide array of public defense management approaches. Similarly, the Standards have impacted jurisdictions in varied ways, and some jurisdictions have implemented the requirements more strictly than others.

Since the mid-1980s, the Washington courts, Legislature and community stakeholders have struggled with how to effectively and efficiently deliver quality defense representation to the indigent. Beginning in 1985, the Washington State Bar Association (WSBA) endorsed the Washington Defender Association's (WDA) newly adopted Standards for Public Defense Services. The 1989 Legislature mandated cities and counties to similarly implement public defense standards based on those adopted by the WSBA. In 2004, both the American Civil Liberties Union (ACLU) and the Seattle Times published reports spotlighting the difficult state of indigent defense in some Washington counties. That same year, the WSBA's Blue Ribbon Panel on Criminal Defense reported that cities and counties were not implementing the 1989 legislative mandate to adopt enforceable standards, especially those impacting defense caseloads. The report said that inaction by the cities and counties jeopardized an attorney's ability to effectively represent clients.

The Panel's final report recommended the WSBA continue the committee's work by establishing a Committee on Public Defense. The Committee, now known as the Council on Public Defense, undertook a number of reforms to improve the access to counsel and to enhance the quality of counsel throughout the state.

The Supreme Court discussed the WSBA Standards in its 2010 decision, *State v. A.N.J.*, allowing a juvenile to withdraw his guilty plea as a result of his lawyer's ineffective assistance of counsel. The Supreme Court then adopted amendments to the criminal and juvenile court rules[1] requiring that to be appointed to represent an indigent person, counsel must certify compliance with "applicable Standards for Indigent Defense Services." The Council on Public Defense, at the request of the Supreme Court, developed standards for certification by attorneys which were adopted by the Court in June of 2012. Certification for felony and juvenile attorneys began in October 2013 and misdemeanor attorneys in 2015.

Another significant development in public defense occurred within the same timeframe. In December 2013 the U.S. District Court of the Western District of Washington held in *Wilbur, et al., v. City of Mount Vernon, et al.*, which favorably cited to the WDA and Supreme Court

[1] Superior Court Criminal Rule 3.1; Criminal Rule for Courts of Limited Jurisdiction 3.1; and Juvenile Court Rule 9.2.

Standards, that the named cities were liable under 42 USC 1983 for systemic flaws in the administration of public defense services. This decision spurred many cities to increase compensation to contract public defense counsel and reduce per-attorney caseloads.[2]

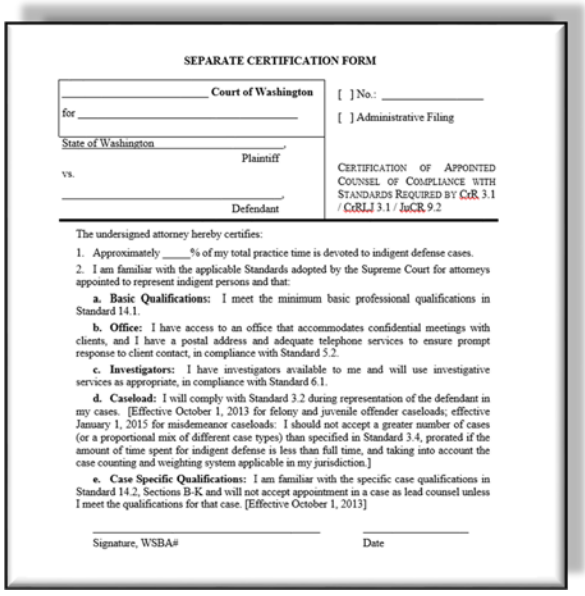
The mandatory caseload limits and other requirements established in the Supreme Court Standards are no longer new. Many jurisdictions have made staffing and budgetary adjustments to accommodate the requirements. The Standards now play a central role in public defense administration.

This report begins by describing how jurisdictions process the filing of quarterly attorney certifications, and recommends steps to better guarantee full compliance with this requirement. The report next moves into the subject matter areas addressed on the certification form – attorney qualification levels, caseload size, use of investigators, and office space, using the results of interviews, data research, and many contacts with public defense stakeholders.

II. Quarterly Filing of Certifications

A. Observations:

1. Compliance with Quarterly Filing



SEPARATE CERTIFICATION FORM

_____ Court of Washington

for _____

State of Washington _____, Plaintiff

vs.

_____, Defendant

[ ] No.: _____

[ ] Administrative Filing

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1 / CrRLJ 3.1 / JuCR 9.2

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.
2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Case Specific Qualifications: I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

_____ Signature, WSBA#

_____ Date

The Standards require, in criminal and juvenile cases, that appointed attorneys file written certifications on a quarterly basis in each court where they have been appointed as counsel. The certification form used by attorneys must be substantially similar to the sample provided in the Standards.

For this audit OPD selected eight counties – Adams, Clallam, Grays Harbor, Island, Lewis, Okanogan, Skagit, and Whitman – from which to request copies of filed certification forms. The primary goal was to determine whether the public defense attorneys in these counties filed certifications. OPD collected certifications filed in the third quarter of 2018 because it provided an opportunity to compare for completeness. Every year in August or September counties submit documentation

[2] "Aberdeen's Cost of Public Defense to Double in 2015," InsuranceNewsNet, Aug. 14, 2014; "New State Standards will Double Kelso's Public Defender Budget in 2015," The Daily News, Aug. 19, 2014; "Longview Council Approves $200,000 for Additional Public Defenders," The Daily News, Sep. 26, 2014; "Vancouver Nearly Doubles Indigent Defense Fund," The Columbian, Dec. 15, 2014; "City Doubles Amount for Indigent Defense Fees," Union-Bulletin, Feb. 11, 2016

to OPD via the application process to receive state funds pursuant to RCW 10.101.070. Those applications include a detailed list of all contract and assigned counsel attorneys who provide public defense services. Because both sets of documentation are generated within the same timeframe, the attorneys listed in the 2018 applications should match the certifications filed with their courts for the third quarter of 2018.

OPD requested all certifications from the eight counties' District and Superior Court Administrators, and Superior Court Clerks. Each county provided copies of certifications in a timely manner. In its review of the certifications, OPD found the following:

- Three counties (Adams, Lewis, and Okanogan) produced certifications for each attorney listed in the Chapter 10.101 RCW funding applications.
- Clallam County and Skagit County produced complete sets of certifications for all attorneys employed by local public defense agencies. However, not all private attorneys who contract for public defense filed their certifications.
- Grays Harbor, Island, and Whitman counties provided partially complete sets of certification forms. Grays Harbor County had certifications for the majority of their contract attorneys. Island and Whitman counties possessed certifications for only a minority of their listed public defense attorneys. Contract attorneys who primarily handle public defense cases were among those missing.

These results show that the two public defense agencies, both government and non-profit, submitted complete sets of certifications for their employee attorneys. However contract or assigned counsel attorneys, as a group, were less compliant with certification requirements.

In addition, not all county systems had a process for verifying attorney compliance with certification requirements. Beginning in 2018, applications for RCW 10.101.070 funds included a question asking whether someone in the county had "verified that all attorneys that provide public defense … filed certifications for the first and second quarters" of the current year. In 2018, 36 out of 38 counties affirmed that someone verified the certifications on file. Two counties responded in the negative: Pacific and Whatcom.

During the audit, OPD identified a common misperception regarding certification. A number of individuals from different jurisdictions believed that the certification process only applied to full-time public defense attorneys, not contract and conflict counsel with partial caseloads.

2. Process and Mechanics of Certification

OPD conducted interviews with public defense administrators from eight counties and two cities[3] about the process and mechanics for quarterly certifications. Most locations assigned someone to oversee and verify the submissions by the public defense attorneys. Several administrators commented that monitoring the certification process can be time intensive.

When asked whether anyone made a public record request for copies of certifications, almost all interviewed jurisdictions said no. In most jurisdictions, OPD was the only entity that had requested certifications. Recently, several individuals incarcerated at a county jail requested copies of their assigned counsels' certifications. All interviewees stated that there is no mention of certification during court hearings or when counsel is appointed. It is the perception of most interviewed public defense administrators that judges do not track which attorneys have or have not filed certifications.

Several court administrators from municipal and district courts requested guidance on determining an appropriate retention schedule for the certification forms. Superior Court Clerks use a statewide Records Retention Schedule that specifies a retention period of 75 years after being filed with the court, but municipal and district courts lack an official statewide retention schedule for attorney certification forms.

3. Content of the Certification Form

The audit revealed most attorneys use the same version of the certification form as found in the Standards. However, OPD found some exceptions. In one jurisdiction, attorneys representing clients in civil commitment cases modified their form for this case type. In another jurisdiction, a public defense agency supervising attorney added significant language to the form, reiterating the availability of resources and her additional time commitment as essential components for complying with the Standards. Other attorneys from the same public defense agency also used this certification model.

Attorneys who practice in multiple jurisdictions expressed some confusion regarding Line 1 of the certification form which states, "Approximately __% of my total practice time is devoted to indigent defense cases." Attorneys were unclear whether the number should correspond to the percentage of time spent on public defense in that particular court, or cumulatively in all contracted courts.

For example, among the certifications collected, were forms filed by one attorney practicing in both Grays Harbor County and Lewis County. In his certification for each county, he entered 99% for total practice time devoted to public defense. Unless administrators know cumulatively

[3] Benton, Clark, Franklin, Snohomish, Spokane, Stevens, Thurston and Walla Walla Counties, and the Cities of Olympia and Yakima.

how many public defense cases the attorney has in total, it is difficult to ascertain whether the attorney is spending the appropriate time on the public defense caseload for any given county.

4. Attitudes and Opinions about Certification

OPD asked public defense administrators about attitudes and opinions regarding the certification process. Attitudes and opinions vary, but most indicated that the attorneys appear neutral and do not mind filing quarterly certifications. A small number of attorneys felt offended by having to file certifications, since prosecutors are not held to a similar standard of accountability. Several administrators indicated that attorneys regard the certifications as a way to guard against high caseloads and to ensure availability of resources such as investigators.

The administrators valued the certification requirement as a tool to hold attorneys accountable to caseload limits, particularly private attorneys who have a mix of private/public caseloads and public defense contracts from multiple jurisdictions. They also felt that the certification process serves as a helpful reminder to attorneys about the requirements under the Standards. As one person said, "Out of sight, out of mind," to indicate how easily attorneys can forget about these requirements.

Nonetheless, public defense agency directors feel that quarterly certification is too frequent and would prefer an annual or semi-annual process. The two interviewed public defense agency directors stated that they employ processes to actively monitor caseloads and compliance with other Standards requirements as part of their ongoing supervisory function. Quarterly filing of certification creates an additional administrative step that takes time and coordination. They would like to see the option of an institutional exemption for full-time public defense agencies that already engage in active monitoring practices.

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- OPD should require counties and cities to submit certification forms for one certification period in their applications for Chapter 10.101 RCW funds.
- OPD should work with the District and Municipal Court Management Association to identify a retention period for certification forms. Currently the retention schedule for Superior Courts requires certifications be retained 75 years after the filing date.
- Alternative certification requirements should be explored for government and non-profit public defense agencies that regularly track attorney caseloads and comply with the Standards. For example, individual attorney certification could be limited to an annual basis, and/or agency-wide certifications that list each staff attorney could be filed as an alternative.

- New judges should receive education regarding the certification requirement, and other requirements of the Standards.
- The Court should consider making edits to the certification form to clarify the percentage of time spent on public defense cases, add language where attorneys indicate the courts in which they have public defense and the corresponding percentage of time spent on those cases, and make administrative updates such as removing effective date references which have since passed. The recommended edits to the certification form can be found in Appendix A.

III. Case Type Qualification Requirements (Standard 14)

The purpose of Line 2.a. of the Certification Form is to verify that an attorney meets the basic professional qualifications articulated in Standard 14.1, and Line 2.e. confirms compliance with case-specific qualifications found in Standard 14.2. Prior to the implementation of the Standards, attorneys with no experience were permitted to represent clients facing felony charges. The qualification standards now establish minimum baseline requirements for all public defense counsel as well as case-level specific requirements.

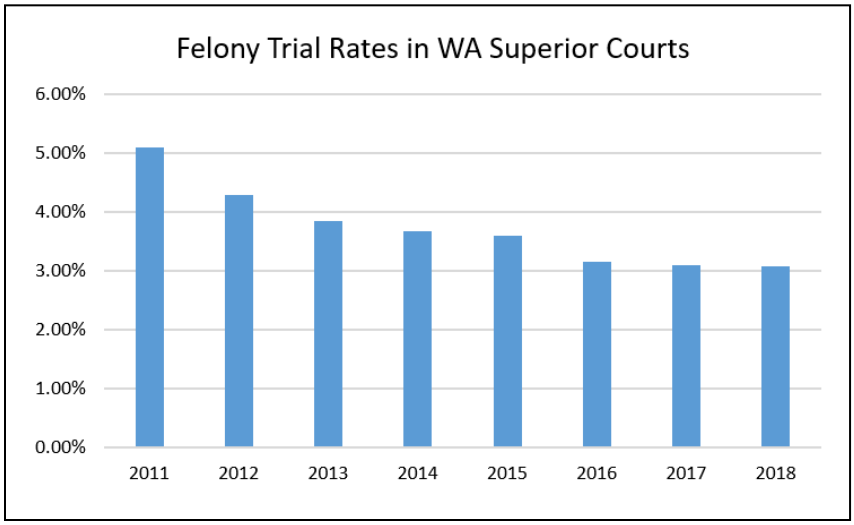
A. Observations:

The audit revealed that the vast majority of indigent defense attorneys meet their caseload type qualification levels. All counties and cities that have applied for state funds in recent years have reported that their attorneys meet the qualification requirements of Standard 14.[4] In fact, all persons interviewed for this audit agreed that the qualification requirements have improved the quality of representation, and that most requirements in Standard 14.2 are appropriate. The one exception, however, relates to the necessary qualifications to represent juveniles charged with felonies. Standard 14.2 requires that attorneys possess a higher level of trial experience to represent juveniles charged with any felony class as compared to the lower level of experience necessary to represent adults charged under the same felony categories. Interviewees expressed that these requirements should, at a minimum, be consistent.

Trial practice is a key requirement to advance in qualification levels in both adult and juvenile case types. Counties with an active trial practice report little challenge in meeting these requirements. Counties with low trial rates, however, experience obstacles in obtaining a sufficient number of attorneys qualified to represent individuals facing serious felony charges.

[4] See, however, State v. Flores, 197 Wn.App. 1 (2016). The defense attorney at trial did not have two years of criminal practice experience as was required by Standard 14.2.B. Division III of the Court of Appeals held that a violation of the Standards is not a categorical Sixth Amendment denial of counsel.

Trial rates[5] vary by county. The criminal case trial rates in Superior Courts in 2018 ranged from 19% (San Juan County) to less than one percent (Garfield, Pend Oreille, Skagit, Wahkiakum, and Yakima counties). The statewide average in 2018 was 3.07%. These rates include a combination of public defense, retained counsel, and pro se defendants, as it is currently impossible to identify trial rates specifically for public defense cases. In addition, criminal trial rates have steadily decreased in recent years. Despite increases in filings during the same timeframe, over the past eight years the statewide trial average for Superior Court criminal cases has dropped from 5.10% to 3.07%.



In many regions public defense attorneys must second-chair trials to obtain the requisite experience necessary to represent adults charged with a serious felony. However, counties tend not to include this work within the attorneys' compensation or caseload calculations. For example, in public defense agencies, attorneys sometimes second-chair felony trials to develop qualification experience *in addition to* carrying a full-time misdemeanor caseload. Similarly, counties do not regularly compensate contract defense counsel for their time and work spent second-chairing trials. Second-chairing has become a new necessary component for ensuring the continuing advancement of attorneys and sustaining a sufficient pool of qualified local attorneys.

The qualification category most difficult to sustain in public defense is Class A felony attorneys (adult and juvenile). Many attorneys who achieve this level of experience move to private practice and may not take such time-intensive cases at public defense compensation rates. Public defense agencies experience particular staffing challenges when Class A felony qualified attorneys leave on a permanent or short-term basis. Fewer attorneys are available to inherit portions of the open caseload, and as a result the few Class A felony qualified attorneys remaining on staff end up with an even greater concentration of high-stakes cases.

[5] Trial rate percentages in this report are calculated based on the number of felony filings per year (excluding non-charges and appeals from lower court) and the combined number of bench and jury trials, as reported by the Administrative Office of the Courts http://www.courts.wa.gov/caseload/. Trial data does not include filings or trials in Pierce County.

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- Because many jurisdictions have low trial rates and rely on attorneys second-chairing trials to gain sufficient experience in qualification levels, guidance should be created to help counties in awarding some amount of case credit for such trial activity.
- The trial experience requirements for adult and juvenile felony qualification levels should be reviewed.
- Guidance for city and county administrators on proactive steps they can take to help attorneys gain sufficient experience to rise in qualification levels should be provided.

IV. Compliance with Caseload Limits

Standard 3.4 addresses appropriate caseload limits for public defense attorneys. It specifies that a full-time, fully supported attorney's caseload should not exceed the following:

- 150 felonies per year; or
- 400 misdemeanors or gross misdemeanors per year, or 300 if the jurisdiction has adopted a numerical case weighting system; or
- 250 juvenile offender cases per year; or
- 250 civil commitment cases per year; or
- 36 appeals to an appellate court; or
- 80 open juvenile dependency cases.

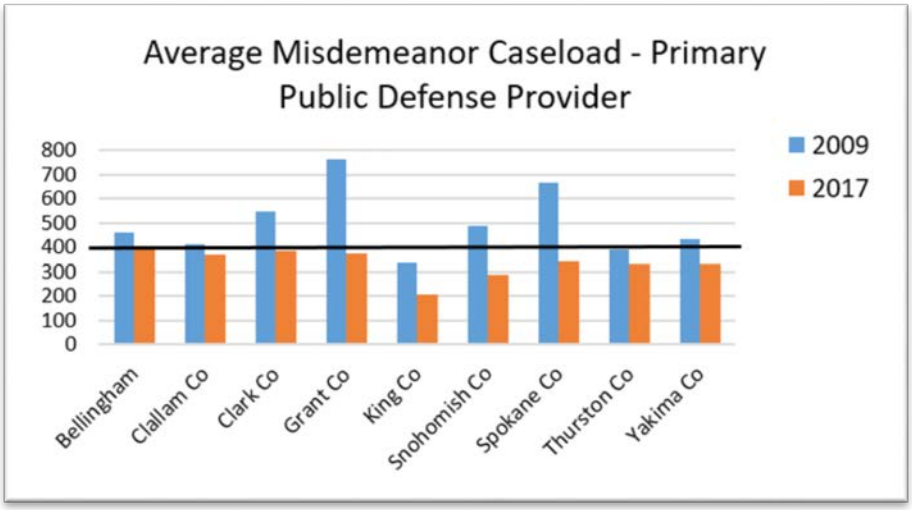
Case assignments should be reasonably distributed throughout the year, so as to avoid excess cases within any given timeframe. Contract attorneys who also maintain a private practice should spend time on their public defense cases proportionate to the size of their caseload. For example, an attorney who contracts for 75 felonies per year should spend at least, on average, 17-20 hours per week on those cases. Resolution of cases by guilty pleas at preliminary hearings or arraignment must each count as one case.

A. Observations:

1. Compliance with Caseload Limits

Caseload limits have become a fundamental component of public defense in Washington. All people interviewed for this report were well aware of the caseload limits, and each jurisdiction has some process in place to track attorneys' case assignments. All cities and counties that have applied for Chapter 10.101 RCW funds in recent years reported to OPD that their staff and contract attorneys have caseloads within the Standards' limits, and the majority of public defense contracts require adherence to the limits.

Prior to implementation of the Standards, most full-time felony and juvenile caseloads were close to or within the limits. However, most misdemeanor caseloads have experienced great reductions since implementation of the Standards. The following chart compares average misdemeanor caseloads for full-time public defense staff attorneys in 2009 and 2017:[6]



Public defense administrators agree that mandatory caseload limits have been helpful in securing the necessary funds from city/county administrators. Numeric limits lead to objectively based staffing levels. However, funders often require that staff attorneys carry full-time caseloads at the maximum levels at all times. Continuous operation at these upper limits can create difficulties when staffing changes occur, such as attorneys leaving for several months on family and medical leave, or turnover in staff. When all remaining attorneys already have maximum caseloads, they have less flexibility to take on reassignments.

There are still a variety of opinions on the impact of the caseload limitations. Most attorneys feel that the reduced caseloads provide them more time to dedicate to representing their clients. A minority of attorneys state that they have more time available, but they have not changed the way they defend their cases.

Most contract attorneys appear to have criminal and juvenile caseloads within the limits. However, there are still some attorneys who exceed the limits, particularly when combining contracts from multiple jurisdictions. Some attorneys who exceed the caseload limits rely on the wording in Standard 3.4 that caseloads *should* not exceed the listed levels. They view this as aspirational and not a strict limit.

[6] Data reported by the jurisdictions to OPD in their applications for Chapter 10.101 RCW funds.

As part of this audit, OPD obtained data from the Administrative Office of the Courts for 60 attorneys[7] who contract for public defense assignments. The data include the number and type of cases each attorney was assigned within a one-year period.

Some attorneys focused their practice on specific case types and within a certain jurisdiction. However, most attorneys handled a combination of criminal and civil cases, and worked in multiple courts (the range of courts per attorney spanned from one to 24, with an average of 5.2). As attorneys' caseloads become more diverse, it is increasingly challenging to gauge compliance with the Standards. To illustrate this, below is a sampling of three attorneys' case assignments for 2018:

Example Attorney A

Type	Cases	Court
Misdemeanors (6)	1	Camas/Washougal Municipal Court
	5	Clark County District Court
Felony (106)	106	Clark County Superior Court

Example Attorney B

Type	Cases	Court
Misdemeanors (125)	3	Anacortes Municipal Court
	1	Island County District Court
	2	Mount Vernon Municipal Court
	118	Skagit County District Court
	1	Snohomish County District Court
Felonies (82)	5	Island County Superior Court
	1	San Juan County Superior Court
	76	Skagit County Superior Court
Juvenile (5)	5	Skagit County Superior Court
Civil (4)	4	Skagit County District and Superior Court
Domestic (3)	3	Skagit County Superior Court
Infractions (7)	1	Anacortes Municipal Court – Traffic
	1	Clark County District County – Traffic
	1	Island County District Court – Traffic
	4	Skagit County District Court – Traffic
Probate (1)	1	Skagit County Superior Court

[7] Forty of the attorneys were selected because they contract with counties for public defense services – two of each from the twenty counties with the highest case counts. Half contracted for Superior Court cases, and half for District Court cases. Twenty additional attorneys were selected because they contract with cities for indigent defense services. The names of attorneys were randomly selected from each county or city. These attorneys' names were made available to OPD through the counties' and cities' Chapter 10.101 RCW applications for state funding.

Example Attorney C

Type	Cases	Court
Misdemeanors (226)	146	Yakima District Court
	1	E. Klickitat District Court
	1	Granger Municipal Court
	1	Lower Kittitas District Court
	3	Selah Municipal Court
	3	Sunnyside Municipal Court
	8	Wapato Municipal Court
	33	Yakima Municipal Court
	30	Zillah Municipal Court
Felony (28)	28	Yakima Superior Court
Juvenile (3)	3	Yakima Superior Court
Civil (24)	24	Yakima District Court and Superior Court
Adoption (2)	2	Yakima Superior Court
Domestic (21)	21	Yakima Superior Court
Infractions (43)	43	Yakima District and Yakima Municipal
Parking (1)	1	Yakima Municipal Court
Probate (1)	1	Yakima Superior Court

JIS attorney caseload data can be a helpful tool for better understanding attorneys' caseloads. However, this data does have limitations. JIS does not distinguish between public defense and private pay cases; is unable to identify if attorneys have withdrawn early due to conflict or retention of private counsel; and does not reflect transactional work outside of court such as drafting contracts or wills.

2. Mechanics of Tracking Caseloads

Attorneys and public defense administrators use varying approaches for tracking and reporting caseloads. While some used advanced case management software, some still track case assignments by hand. Regardless, interviews showed that at least someone at the county or city level takes responsibility for monitoring attorneys' new case assignments on a monthly or quarterly basis.

Some jurisdictions track attorneys' "outside" work – private cases and public defense contract work in other jurisdictions -- but many jurisdictions focus exclusively on case assignments within that city/county. In jurisdictions without public defense directors/administrators, court administrators are typically assigned the task of tracking caseloads. They often are responsible for assigning cases to contract counsel, and use the assignment process as a way to track the cumulative number of cases a contract attorney has received in that court.

3. Case Weighting

The Standards give jurisdictions the option of using case weighting to calculate public defense caseloads. Per Standard 3.5, case weighting systems should include the following components:

- Include policies and procedures that have been adopted and published by the local government;
- Recognize the greater or lesser workload required for cases compared to an average case based on an assessment that documents the workload involved;
- Adhere to the Standards, professional performance guidelines, and the Rules of Professional Conduct;
- Undergo periodic review and updating;
- Be filed with OPD; and
- Weigh noncomplex sentence violations and early resolutions with non-criminal dispositions as at least one-third of a case.

Ten cities and 15 counties have filed case weighting policies with OPD. In 2014 OPD conducted a misdemeanor time study and used its results to develop a model case weighting policy. Only six jurisdictions have used all or portions of OPD's misdemeanor model policy. None of the other policies appear to be based on a time study.

Each of the 25 case weighting policies includes case types that are weighted at *less than* an average case. Common examples include low-level misdemeanor offenses and early case resolutions. However, six of those policies lack any increased weights which would value certain case types as *more than* an average case. Thus all case categories in the six policies are valued at one case weight or less. Exclusive down-weighting of cases can result in caseloads that are greater than those permitted by Standard 3.4.

Most local case weighting policies include language replicating the Standards' provision that guilty pleas at arraignment must be counted as one case, but others are silent on that issue. The majority count probation violations as one-third of a case, a few count them as less. Most county case weighting policies include felony and juvenile cases. The policy used in Pierce County is a hybrid model – case weights are dependent on both the type of charges and the number of hearings that occur during the life of a case.

4. Requests for Clarifications on Case Counts

During interviews, attorneys and public defense administrators identified situations where the Standards lack specificity for case counting, most frequently regarding probation violations. Standard 3.3 makes a short reference that sentence violations should be "taken into account when assessing an attorney's numerical caseload," and jurisdictions have implemented this in a variety of ways. The counting of probation violations tends to fall within the following four scenarios:

1. Count each new probation violation as a new case.
2. Count probation violations as one-third of a case per a case weighting policy.
3. Count probation violations as one-third of a case, even in the absence of a case weighting policy.
4. Count probation violations as part of the original case. With this approach, attorneys do not withdraw from representation at sentencing, but instead keep the cases open during the probation period. If probation violation hearings occur, no additional count or weight is given.

This fourth approach is not necessarily a maneuver to avoid counting cases. Rather, some jurisdictions systematically assign fewer cases to the attorneys to make up for the "extra" probation work. They prefer to keep attorneys assigned to the cases to guarantee vertical representation and ongoing representation of clients during the probationary period.

Additionally, there are other substantive and procedural case types for which administrators have requested guidance:

- Misdemeanor appeals to Superior Courts
- Contempt of court – child support enforcement
- Expedited felonies
- Cases returning on warrant
- Therapeutic court cases – drug court, mental health court, community court, etc.
- Transferred or inherited open cases to accommodate an attorney's Family and Medical Leave Act leave
- Second-chairing trials

B. Recommendations

Based on these findings and observations, OPD makes the following recommendations:

- Given that jurisdictions have had several years to secure funding and staffing levels to meet the caseload limits in Standard 3.4, the language *should not exceed* should be changed to *shall not exceed*.

- Public defense appointments should be specifically tracked and coded in the trial courts' case management systems, as a reliable statewide tool is needed to help identify public defense attorneys' caseloads.

- OPD should create and provide a sample form for annual reporting of caseload information (public defense and private work) to contract managers/public defense administrators.

- OPD should develop a checklist of components that are mandatory to ensure case weighting policies are consistent with the Standards.

- OPD should actively review case weighting policies, and notify cities/counties of provisions that are inconsistent with the Standards.
- Written guidance on counting transferred/inherited caseloads should be developed for jurisdictions that do not use case weighting.
- Written guidance should be developed on counting probation violations for jurisdictions that do not use case weighting.

V. Use of Investigators

Investigation plays a valuable role in public defense services.[8] Consequently item 2.c of the certification form requires that all indigent defense attorneys have access to investigators, and use investigators when appropriate.

A. Observations:

OPD receives data on the use of investigators in counties' and cities' applications for Chapter 10.101 RCW funds. In their most recent applications, all jurisdictions reported that funding is available for public defense attorneys to use investigators. Thirty counties specifically track investigator costs, and cumulatively reported spending $7,545,840 on staff and contract investigator expenses in 2017.

The frequency of investigator usage varies by jurisdiction and case type. Among the 38 counties that submitted applications in 2018, 35 reported that public defense counsel used investigators in felonies during 2017; 29 reported that they used investigators in misdemeanor cases; and 30 reported that they used investigators in juvenile cases.

In interviews conducted with counties and cities for this audit, OPD inquired about investigation. All persons responded that, overall, attorneys have access to investigators when requested, and the request process is well streamlined. Each also stated that the frequency of investigator usage is appropriate. Attorneys employed in governmental and non-profit public defense agencies usually have access to in-house investigators, and make requests through an intra-agency process. Alternatively most contract attorneys are required to submit ex-parte motions for investigation to the court. In some counties, such as Snohomish and Thurston, administrators who oversee public defense contracts have discretion to approve requests for investigator funds. Most interviewees stated that they had a sufficient number of local investigators available to defense counsel, and that most investigators were retired law

[8] "The degree and extent of investigation required will vary depending up on the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." State v. A.N.J., 168 Wash.2d 91 (2010).

enforcement officers. Some private attorneys who contract for misdemeanor public defense stated that they often handle investigation themselves, feeling it is more efficient.

B. Recommendation

- Increase training opportunities for public defense attorneys on the importance of using investigators, and how to work effectively with investigators, particularly in juvenile and misdemeanor cases.

VI. Offices for Confidential Meetings, Postal Address, Telephone

Client confidentiality is a cornerstone of any attorney-client relationship,[9] and Standard 5.2.B and item 2.b of the certification form require all public defense counsel to have access to an office that accommodates confidential meetings with clients, a postal address, and adequate telephone service to ensure prompt response to clients.

A. Observations:

Almost all persons interviewed for this audit reported that public defense attorneys have offices for confidential meetings. All reported that staff and contract attorneys have postal addresses and telephone services. Two jurisdictions reported that a small number of attorneys lacked offices, but the counties provide private meeting space that the attorneys may use. Even in some rural areas where attorneys work only part time, some contracts require maintaining local "office hours" so that clients need not travel long distances to meet their attorneys.[10] In an increasing number of locations, contract public defense attorneys use "virtual offices" – shared office space that is rented on an hourly or daily basis.

Each year OPD trial-level managers conduct site visits to many municipal and county courts. Most courts provide conference rooms for private meetings between attorneys and clients, but many do not. For example, historic county courthouses often lack conference rooms, and most municipal courts use city council chambers which lack such amenities. OPD managers have overheard countless confidential conversations between attorneys and clients in various open settings - hallways, the back of courtrooms, and at counsel table in front of spectators. However, some jurisdictions have invested in the construction of confidential meeting rooms for defense counsel, such as the Cities of Sunnyside, Bremerton, and Selah. The City of Tukwila used Chapter 10.101 RCW grant funds to purchase portable sound-absorbing partitions to create make-shift office space for public defense counsel on court days.

[9] Rules of Professional Conduct 1.6.

[10] For example, the contract for public defense services in Ferry County states, "If the Attorney does not have an office in Ferry County, Attorney shall hold office hours at least one day a week at a centrally-located fixed location that is generally accessible to the public and which accommodates confidential meetings with clients."

B. Recommendation:

- Encourage trial courts to assess and provide confidential meeting space for attorneys and clients.

Appendix A – Proposed Revisions to Certification Form

[ ] Superior Court [ ] Juvenile Department **[ ] District Court [ ] Municipal court** **For** **[ ] City of [ ] County of _____,** **State of Washington** **CERTIFICATION BY:** [NAME], [WSBA#] FOR THE: [1ST,2ND, 3RD, 4TH] CALENDAR QUARTER OF [YEAR]	[ ] No.: _____ [ ] Administrative Filing CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CRR 3.1 / CRRLJ 3.1 / JUCR 9.2

The undersigned attorney hereby certifies:

1. My current public defense caseload is comprised of the following:
   a. Approximately _____% of my total practice time is devoted to indigent defense cases in this court.
   b. I am appointed by courts in other jurisdictions to provide public defense representation. My practice time in each is approximately as follows: ___ Not Applicable

Court: _____ % of total practice: _____

Court: _____ % of total practice: _____

Court: _____ % of total practice: _____

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that :

   a. **Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1. I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case.
   b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
   c. **Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
   d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. I will not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.

_____ _____

Signature, WSBA# Date

WASHINGTON STATE
BAR ASSOCIATION

COUNCIL ON PUBLIC DEFENSE

August 28, 2019

Mary E. Fairhurst, Chief Justice
The Supreme Court of Washington
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

RE: WSBA Council on Public Defense Comments/Recommendations

Dear Chief Justice Fairhurst:

The Court asked the State Office of Public Defense (OPD) the status of trial level compliance with the Court's adopted Standards for Indigent Defense. In response OPD designed and conducted a study. OPD published a final report along with conclusions and recommendations in June 2019.

You asked the Council on Public Defense (CPD) to submit comments or recommendations so the Court could consider them before taking further action.

The only OPD recommendation that was objected to was agency certification.

OPD recommended that alternative certification requirements be created for government and non-profit public defense agencies. OPD suggested the court could permit agencies to submit certifications for associated lawyers rather than continuing to require lawyers to report individually. OPD also recommended increasing the length of the reporting period from quarterly to annually.

There was significant concern raised about shifting the responsibility for reporting from the individual lawyer to the agency. This shift may give rise to abuse and incentivize agencies to report and assign cases in ways which defeat the intent of the certification requirements. There was strong support for individual certification.

There was also support for continuing quarterly certification. The indigent defense workforce is dynamic, with lawyers practicing in multiple jurisdictions under various contracts. Many also change employers. Annual reporting would hamper the ability of administrators to appropriately manage contractors over multiple jurisdictions and could encourage agencies to take advantage of turnover to increase caseload.

Education and training for judicial officers is required.

Members raised a concern that judicial officers need to be trained on enforcing the standards. OPD recommended the Supreme Court require education for all new judicial officers on the indigent defense standards and reporting requirements. Training should be included in judicial educational programs and be offered at least every three to four years.

Certification forms should be standardized, and compliance noted in the WSBA licensing process.

OPD recommended standardization of the certification forms, which members of the CPD agreed with. At least one member WSBA license renewal forms be modified to ask the questions:

1. Were you appointed to represent an indigent client in the past year; and
2. Did you timely file certifications attesting to your compliance with the standards?

Standards should be mandatory rather than aspirational.

Standard 3.4 must be changed from "should not" exceed to "SHALL not" exceed. There is unanimous agreement about this change. Concerns were also raised about how this Standard is enforced, as there is no current enforcement mechanism.

Caseload caps must come to be viewed as the point of predictable failure and not as a performance target.

Public defense funding entities have, since the introduction of caseload caps, come to view the numeric limits in the Standards as a performance target rather than as the point at which defenders can no longer credibly provide constitutionally sufficient assistance of counsel.

Across the state, public defense budgets are set with a funding expectation that defense lawyers must work at maximum capacity. This creates a huge burden on lawyers practicing indigent defense because it only permits one type of caseload, one that is "maxed out."

Broad education needs to occur, which may require changes to the language contained in the standards to clarify that the caseload cap is "the point of predicable failure" and is in not an appropriate workload target.

There was also a discussion of how to determine an open caseload, as is the standard for dependency and termination cases. This may be a more viable method of evaluating workload than the caseload cap.

A defender's subjective experience of workload and the objective count of cases assignments are not the same.

There is strong support for the creation of consistent approach to case weighting. In some jurisdictions, partial credits are assigned to more finite or simple representation and supplemental credits are given for cases that take more time than a case credit presumes. Other jurisdictions have only weighed cases as less than a complete case with no increased weighting for lengthy and complicated cases.

Council members identified this as an urgent and unaddressed issue. Representation for probation violations, exceptionally complex cases, and transferred and inherited caseloads present significant issues for defense managers. Currently, there is no standardized guidance on how to assign case weights for these activities. Providing lawyers the ability to receive additional credit based on actual time spent better ties the standards to workload than focusing on the number of assigned cases alone.

Indigent defense standards need to include alternative pathways for lawyers to qualify to represent clients charged with higher classes or crime. The current method, which ties qualifications solely to trial experience is increasingly unworkable, particularly in smaller counties.

Nationally, trials are conducted in approximately three percent of all criminal cases, which is similar to trial rates in Washington. Accordingly, a felony lawyer with 150 new cases will try less than five cases a year. The number of cases a lawyer will try is also impacted by case volume and local factors, such as progressive prosecutors offering better pre-trial resolutions. Larger counties see fewer trial because of diversionary opportunities and greater staffing. Rural jurisdictions can expect even fewer cases to proceed to trial because of the costs associated with them.

OPD suggested an FAQ to assist jurisdictions in qualifying their defenders to higher classes of crime. CPD members felt an FAQ would be inadequate and multiple suggestions were made:

1. Encourage formation of Public Defender Districts (RCW 36.26.020) to enable smaller counties to cost share the expense of implementing supervisory, quality control, and training structures; all of which are acknowledged as hallmarks of quality PD delivery systems. As resources allow, State OPD can publish a FAQ which outlines the components, capacities and staff attributes needed reasonably ensure compliance with the standards. Public Defense districts would also enable lawyers to cross county boundaries to co-counsel cases with fewer barriers as they would be moving within the same administrative and financial systems.
2. Modify the standards so that participation in an OPD sponsored or endorsed trial training program could substitute for trial experience, so long as the lawyer also had the other requisite qualifications to represent persons accused of felonies.
3. Modify the standards so that co-counsel in cases in which lawyers are training is a creditable activity for the lawyer trying the case and the lawyer gaining the trial experience.

Enforcement of case weighting and standards is necessary.

The lack of consequences for violation of the standards defeats the intent of the standards – that the court's refusal to assign a case for non-compliance was not sufficient. One of the solutions to this problem would be to include in the WSBA licensing form questions about compliance.

There was also discussion of establishing and funding a Statewide Public Defense Ombuds Office which could be responsible for periodic audits of certification, compliance, and investigation of complaints.

Alternatively, amending the RPCs to specifically reference the Standards and require attorney compliance would clearly establish enforcement of the Standards and subject attorneys who violate the rules to discipline.

Further education is needed regarding the requirement for confidential meeting space for client communications.

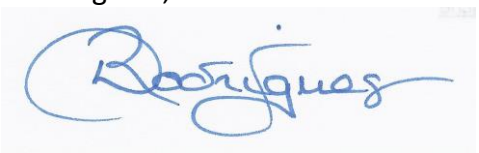
The Court must stress that jurisdictions take seriously the physical plant requirements necessary to permit defenders to have confidential communication with their clients and to appropriately prioritize this need.

At the trial court level, there is little attention paid and little priority assigned to defenders' need to comply with the standard for confidential meeting space. For example, a local in-custody courtroom is sometimes conducted with the prosecutor seated to the defender's right and the client to the defender's left. The defender can mute the microphone to communicate so the court cannot hear – but the prosecutor is literally within earshot and arms reach.

Many courts also have policies that actively hamper both access to justice for customers and attorney client communications. In one large Western Washington County all the district courthouses are closed for lunch, which prohibits hourly workers from conducting business during their lunch hour without suffering wage loss and also deprives defenders of a venue to meet clients before court.

Thank you for the opportunity to provide these comments and recommendations.

Best regards,



Daryl A. Rodrigues
Chair, WSBA Council on Public Defense

COPY

Internet Email: opd@opd.wa.gov

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

(360) 586-3164
FAX (360) 586-8165

September 23, 2019

The Honorable Mary Fairhurst
Chief Justice
Washington Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Dear Chief Justice Fairhurst:

This letter is in response to your letter of September 13, asking the Office of Public Defense (OPD) to respond to comments submitted by the Washington State Bar Association's Council on Public Defense (CPD) regarding the 2019 Audit of Trial-Level Compliance With The Standards For Indigent Defense. As you requested, the table below presents OPD's response to each CPD comment and identifies a recommended action and responsible entity.

In addition, in the process of discussing the CPD comments, OPD managing attorneys recommend two priorities: Make the Standards for Indigent Defense mandatory; and establish an enforcement process. Implementation of these two recommendations will effectively address several of the issues identified in the Audit and in the CPD comments.

CPD Comment (8/28/19 letter)	OPD Response	Action Required / Responsible Entity
CPD opposes alternative certification for public defense agencies	OPD believes the CPD makes good points about retaining individual attorney certification on a quarterly basis, regardless of the local public defense structure in place. OPD withdraws its previous recommendation to	No action needed

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	allow annual agency certification	
CPD supports judicial education	OPD agrees	OPD has submitted proposals to the SCJA and DMCJA for a session at the 2020 Spring Conference, regarding the trial court's role in implementing the Standards for Indigent Defense
CPD supports the editing of certification forms	OPD agrees – Audit recommendation Courts # 3	CPD drafts proposed amendment for the Court's consideration
CPD recommends that Standard 3.4 should be changed from "should not exceed" to "shall not exceed"	OPD agrees – Audit recommendation Courts #6	CPD drafts proposed amendment for the Court's consideration
CPD recommends that there be statewide education clarifying the meaning of the caseload limits	OPD agrees	OPD implements webinar education for jurisdictions on the caseload limits
CPD recommends that a consistent guideline for case weighting be developed	OPD agrees – Audit recommendations OPD #3(d) and #5	OPD drafts checklist based on OPD Model Case Weighting Study
CPD recommends that alternative pathways be developed for attorneys to gain requisite qualifications under Standard 14 for more difficult cases:		
• Modify Standard 14 to allow trial practice training by OPD/other purveyor to substitute for trial experience, in part or in full	OPD agrees	CPD drafts proposed amendment for Court consideration and OPD provides comprehensive training if sufficient additional resources
• Standards should allow case credit for co-counsel	OPD agrees – such credit is now available	OPD addresses this in education for jurisdictions webinar
• Public Defender Districts should be encouraged		OPD acknowledges availability in education for jurisdictions webinar
• CPD recommends that enforcement of Standards should be addressed, and recommends possible enforcement methods be considered, including WSBA licensing	OPD agrees – Audit recommendation Courts #7 – especially adding questions about	WSBA edits licensing form and Court considers RPC amendment

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form, creation of an Ombudsman position, and amending the RPCs	public defense representation on the licensing form and possible RPC amendment	
CPD recommends that all courts must provide confidential meeting space	OPD agrees – Audit recommendation OPD #7	OPD includes in trial court education

Thank you for offering us the opportunity to refine the recommendations. Please let me know if other questions arise or there is further discussion.

Best regards,

Joanne

Joanne Moore
Director

cc: Daryl A. Rodrigues, Chair, WSBA Council on Public Defense

July 18, 2019
CPD Subcommittee on Independence
Discussion Draft

Proposed General Rule related to independence of public defense administration

(a) Policy and Purpose. Consistent with right to counsel as provided in Article I, Section 22 of the Washington State Constitution, it is the policy of the judiciary to develop rules that further the fair and efficient administration of justice and to prevent conflicts of interest that may arise if judicial officers control public defense contracts.
(b) Scope. This rule applies to superior courts and courts of limited jurisdiction.
(c) Effective Date of Rule. This rule will go into effect ___ days after its adoption by the Supreme Court.
(d) A judicial officer should not control the drafting, awarding, and renewal of public defense contracts or serve as the public defense contract administrator. This does not limit a court's authority to grant a motion for necessary legal services, including experts and investigators, in individual cases.

WSBA Standards for Indigent Defense Services
Proposed amendment to Standard 18 and proposed new Standard 19

STANDARD EIGHTEEN:
Guidelines for Awarding Defense Contracts

Standard:
The county or city should award contracts for public defense services only after determining the ~~attorney or firm~~ ~~chosen can meet accepted professional standards~~ applicant demonstrates professional qualifications consistent with the WSBA Standards for Indigent Defense Services and the Supreme Court Standards for Indigent Defense. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Recruitment for public defense contracts should include efforts aimed at achieving a diverse public defense workforce.

Under no circumstance should prosecutors or law enforcement engage in the recruitment, selection, or administration of contracts for public defense attorneys, investigators, experts, or other defense services.
~~Contracts should only be awarded to a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract. (i.e. City and District Courts, Superior Court or Juvenile Court, or b) to a firm where at least one attorney has one year's trial experience.~~
~~City attorneys, county Criminal prosecutors, and law enforcement, and judicial officers should not engage in the selection or supervision of attorneys who will provide indigent defense services.~~

STANDARD NINETEEN:
Independence of Public Defense Function

Standard:
Without regard to structure (e.g. government agency, contracts, assigned counsel), the public defense function should be insulated from political influence[1] and should be subject to judicial oversight only in the same manner and to the same extent as retained counsel.

A public defense system should not be restrained from independently advocating for the resources and reforms necessary to provide high quality defense-related services for all clients. This includes efforts to foster system improvements, efficiencies, access to justice, and equity in the justice system.

[1]Principle 1 of the ABA Ten Principles of a Public Defense Delivery System recommends a nonpartisan commission or advisory board to oversee the public defense function, thus safeguarding against undue political pressure while also promoting efficiency and accountability for a publicly funded service.

From: Jackie Shea-Brown [mailto:Jackie.SheaBrown@co.benton.wa.us]
Sent: Wednesday, December 4, 2019 10:38 AM
To: Fassett, Patricia
Cc: Jackie Shea-Brown
Subject: RE: [EXTERNAL] [PUBLICSUPERIORJUDGES] Your Feedback is requested -- Counsel on Public Defense

Thank you Judge Fassett.

The proposed edits look appropriate. Thank you for your work on this project.

Kind regards,
Jacqueline Shea-Brown
Benton & Franklin Counties Superior Court Judge
7122 W. Okanogan Place, Building A
Kennewick, WA 99336
(509)736-3071
Jackie.SheaBrown@co.benton.wa.us

I understand that the WSBA Counsel on Public Defense Independence Committee has asked for comments on the proposed amendments to Standards 18 and 19 for Indigent Defense Services, as well as the proposed general rule related to independence of public defense administration. I commend you all for the time that you have devoted to these important matters. I have the following comments for your consideration.

Standard 18

One of the proposed amendments to Standard 18 is the following: "Under no circumstances should prosecutors or law enforcement engage in the recruitment, selection, or administration of contracts for public defense attorneys, investigators, experts, or other defense services."

I fully support this proposed amendment, but suggest that it doesn't go far enough.

As background, I note that my judicial colleague, Judge Vickie Churchill, and I were successful in the early 1990's in having the Board of Island County Commissioners adopt the WSBA caseload standards for use in Island County, one of the first counties to do so. Some years later, when the public defense contract came up for consideration before the Board of Island County Commissioners, the elected Island County prosecutor advocated, in effect, that the public defender's budget should be cut. He argued against following the WSBA caseload standards. He incorrectly argued for an interpretation of the public defense contract that would have changed the way that cases handled by the public defender are counted, thereby "watering down" the caseload standards. Fortunately, the Board rejected his arguments after we provided our input into these matters.

The amendment to Standard 18 quoted above prevents the prosecutor from engaging in the recruitment, selection, or administration of public defense contracts, but does not explicitly prohibit the prosecutor from advocating against caseload standards, advocating that public defense budgets be cut, or otherwise attempting to "water down" public defense. I suggest that the language of the rule in this regard be strengthened to not only prohibit prosecutors from engaging in the recruiting, selecting, or administering contracts for public defense services, and but also from participating in the processes by which public defenders are recruited and retained and by which public defense contracts are established and administered.

General Rule

Section (a) of the proposed General Rule related to independence of public defense administration provides, in part, that "it is the policy of the judiciary to develop rules that further the fair and efficient administration of justice and to prevent conflicts of interest that may arise if judicial officers control public defense contracts." Section (d) provides, in part, "A judicial officer should not control the drafting, awarding, and renewal of public defense contracts or serve as the public defense contract administrator." While, as a judge, I have no desire to be involved in these processes, the fact is that this provision is not consistent with the state Constitution. Furthermore, it is sometimes necessary for judges to become actively involved in public defense contracts.

The court is actually the branch of government that has ultimate authority for public defense under the doctrine of separation of powers. The legislative authority of a county has the authority to appropriate public funds. However, judges are in charge of what happens in the courtroom. The matter of who is to provide public defense is fundamentally a judicial function. As a matter of comity, judges typically

acquiesce in the legislative branch entering into contracts for public defense, but if judges chose to, judges could select the public defender. *State v. Perala,* 132 Wn. App. 98, 130 P.3d 852 (2006). The *Perala* case involved the authority of Grant County Superior Court to appoint counsel to indigent criminal defendants from the bench and then to determine and to award reasonable compensation out of the county's appropriation for public defenders. The *Perala* case affirms that "***The appointment of counsel to indigent criminal defendants is a constitutional duty that the courts are charged with upholding***." *Perala*, 132 Wn. App. at 119; emphasis added. By contrast, the prosecuting attorney is a part of the executive branch of government.

Thus, I respectfully suggest that the proposed general rule is inconsistent with the Constitution and should not be adopted.

There are also *practical* reasons why it would be bad policy to prohibit the courts from becoming involved in public defense contracts. As the *Perala* case exemplifies, it is sometimes necessary for the courts to become involved in providing public defense services when the executive branch of government fails to make proper provision for public defense. Let us not forget, also, that the appropriation of public funds for public defense services can be an easy mark for demagogues. As between the executive branch of government and the judicial branch of government, I suggest that it would be far more likely that the executive branch would fail to properly provide for public defense than would the courts.

As I said before, I as a judge have no desire to become involved in the selection of public defenders or in developing contracts for public defense. But I also believe that it is my duty to become involved in these matters when the executive branch fails to do what is required. I ask that the bar not strip the courts of their ability to deal with these matters when it is necessary to do so.

Standard 19

The first paragraph of proposed Standard 19 states, in part, that the public defense function "should be subject to judicial oversight only in the same manner and to the same extent as retained counsel." For the reasons outlined above, I believe that this provision is not consistent with the Constitution and is also bad policy. I recommend that it not be adopted.

Alan R. Hancock
Island County Superior Court Judge
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From: Sophia Byrd McSherry <Sophia.ByrdMcSherry@opd.wa.gov>
Sent: Friday, December 6, 2019 3:58 PM
To: Diana Singleton <dianas@wsba.org>
Cc: Carolyn MacGregor <Carolynm@wsba.org>
Subject: RE: Soliciting feedback from DMCJA, SCJA, WDA, and WACDL

Hi again. I hit send too quickly. I'm not trying to weasel out of answering the question, but I can't definitively answer it on behalf of everyone who drafted the proposal.

-----Original Message-----
From: Sophia Byrd McSherry
Sent: Friday, December 6, 2019 3:55 PM
To: 'Diana Singleton' <dianas@wsba.org>
Cc: Carolyn MacGregor <Carolynm@wsba.org>
Subject: RE: Soliciting feedback from DMCJA, SCJA, WDA, and WACDL

Hi Diana --
Good question.
I think Judge Henke should include that question as part of her comments, because it raises issues that the subcommittee or full CPD might want to discuss.

-----Original Message-----
From: Diana Singleton [mailto:dianas@wsba.org]
Sent: Friday, December 6, 2019 3:33 PM
To: Sophia Byrd McSherry <Sophia.ByrdMcSherry@opd.wa.gov>
Cc: Carolyn MacGregor <Carolynm@wsba.org>
Subject: FW: Soliciting feedback from DMCJA, SCJA, WDA, and WACDL

Hi Sophia,

We are asking for feedback on the draft rule but did get a question from Judge Henke which I copied and pasted here:

I only have one comment on the draft rule: Is the rule intended to limit only the judicial officers, or is it intended to include court administrators or other staff?

Do you have an answer we can pass on to her?

Thanks!

Diana

-----Original Message-----
From: Henke, Drew <DHenke@cityoftacoma.org>
Sent: Friday, December 6, 2019 12:58 PM
To: Carolyn MacGregor <Carolynm@wsba.org>; Diana Singleton <dianas@wsba.org>
Subject: FW: Soliciting feedback from DMCJA, SCJA, WDA, and WACDL

Hi Carolyn and Diana -
Sorry that I am so late in responding to Bonnie's request for input.
I only have one comment on the draft rule: Is the rule intended to limit only the judicial officers, or is it intended to include court administrators or other staff?

Again, sorry for the late response,
Judge Henke

From: Patrick O'Connor <patrick.oconnor@co.thurston.wa.us>
Sent: Thursday, January 9, 2020 3:20 PM
To: Christie Hedman <hedman@defensenet.org>
Subject: 2019.10.21.Independence Subcommittee draft rule prohibiting judicial con._.pdf

Hi Christie, my only recommendation would be to change the "should" language to "shall" in the attached. Thanks!

Patrick

July 18, 2019
CPD Subcommittee on Independence
Discussion Draft
Proposed General Rule related to independence of public defense administration

(a)Policy and Purpose. Consistent with right to counsel as provided in Article I, Section 22of the Washington State Constitution, it is the policy of the judiciary to develop rules that further the fair and efficient administration of justice and to prevent conflicts of interest that may arise if judicial officers control public defense contracts.

(b)Scope. This rule applies to superior courts and courts of limited jurisdiction.

(c)Effective Date of Rule. This rule will go into effect ___ days after its adoption by the Supreme Court.

shall

(d)A judicial officer ~~should~~ not control the drafting, awarding, and renewal of public defense contracts or serve as the public defense contract administrator. This does not limit a court's authority to grant a motion for necessary legal services, including experts and investigators, in individual cases.

From: Peter Jones <PeterJ@co.mason.wa.us>
Sent: Wednesday, December 4, 2019 1:49 PM
To: Christie Hedman <hedman@defensenet.org>
Subject: Re: Feedback on Independence standards/revisions to professional standards

Oversight and funding. Statewide oversight without funding means we still won't get what we need to do our job, but it'll be our fault when we fail to do it. The two need to be tied together.

From: Peter Jones <PeterJ@co.mason.wa.us>
Sent: Wednesday, December 4, 2019 1:32 PM
To: Christie Hedman <hedman@defensenet.org>; cpd@wsba.org
Subject: Feedback on Independence standards/revisions to professional standards

So, I've read the updates, and I note that they are focused on separating the indigent defense functions from the elected judiciary. That makes sense, I support it, two thumbs up.

However, there's another problem. Because if you want something insulated from the political process, then it's the funding source of a public defender's office that is the problem. Right now, I am a Director of Indigent Defense in Mason County - and I serve at the pleasure of the County Commission.

The same people who I have to pester and pressure to provide adequate funding for indigent defense are the ones that can fire me at a moment's notice. And that makes me *extraordinarily* attached to a political process--even though the judiciary doesn't have anything to do with my position.

I would love this kind of independence. But indigent defense needs to either be funded at a state level, or run by an independent commission, in order to make it truly independent from the political process.

Peter Jones
Chief Public Defender
Mason County
360-427-9670 x 598
peterj@co.mason.wa.us

Re: Draft of proposed amended Performance Guidelines

Dear CPD members:
Attached is the current draft of proposed amended Performance Guidelines that the Standards Committee has prepared. The amendments are intended to address Persistent Offender cases, about which the Guidelines are basically silent.
We anticipate asking the CPD to approve them at a future meeting.
There is one point we are reviewing with practitioners to see whether we want to add a sentence or two about the trial in persistent offender cases. I have highlighted in the draft the areas we propose to amend.

The other matter we want to raise with you is our plan to develop a memorandum on case weighting. We have heard from defenders that developments with police cameras and the increasing amount of digital discovery have added significantly to case preparation time. The other significant development since we did the Standards is that the ABA and other groups have done major caseload/workload studies that could inform our practice.

The committee has determined that rather than review caseload numbers, it would be more effective to provide additional guidance on how to do case weighting. We tentatively plan to meet by phone on March 13 to discuss this further, but we welcome your thoughts now.

Finally, we plan to nominate the WSBA for an ABA award for WSBA's support of public defense reform.

Thank you for your consideration.
Best wishes,
Bob Boruchowitz
Chair, Standards Committee

Washington State Bar Association

PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION

APPROVED JUNE 3, 2011
Proposed Amendments Under Consideration 2020

PREFACE

These guidelines are intended to be used as a guide to professional conduct and performance.

The object of these guidelines is to alert the attorney to the courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.

All of the steps covered in these guidelines are not meant to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The guidelines recognize that representation in criminal and juvenile offender cases is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically "fits" the case, the client and the court proceeding.

These guidelines may or may not be relevant in judicial evaluation about alleged misconduct of defense counsel to determine the validity of a conviction. They may be considered with other evidence concerning the effective assistance of counsel.[1]

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.

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[1] *See State v. A.N.J.*, 168 Wn.2d 91,110 (2010).

Guideline 1.

1.1 Role of Defense Counsel

a. The paramount obligation of criminal defense counsel is to provide conscientious, ardent, and quality representation to their clients at all stages of the criminal[2] process. Attorneys also have an obligation to abide by ethical requirements and act in accordance with the rules of the court.

The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation. Defense counsel, in common with all members of the bar, are subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards.

b. It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes of the legal profession applicable in Washington. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.

c. [In] "two strikes" and "three strikes" cases, counsel must defend a client against not only the current charge, but also against prior "strike" convictions that expose the client to a life sentence as a persistent offender. Counsel must also contest the potential life sentence through factual investigation, legal research and development of mitigation information.

Commented [MB1]: This should be subparagraph "c."

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1.2 Education, Training and Experience of Defense Counsel

a. To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the practices of the specific judge before whom a case is pending.

b. Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

1.3 General Duties of Defense Counsel

Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that they have available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. It is useful for counsel to keep time records

[2] These Performance Guidelines also apply to the juvenile offender adjudication process.

to assess the number and types of other public defense or private cases counsel may accept and to support requests for additional compensation or appointment of mental health and other experts.

In complex cases or in types of cases in which counsel is not experienced, counsel should consider requesting appointment of co-counsel. If it appears that counsel is unable to offer quality representation in any case, counsel shall move to withdraw.

Persistent offender cases, for example, require an assessment of the time, resources and expertise to not only challenge predicate "strike" convictions but also to build trusting relationships with the client and experts in order to fully develop mitigation evidence. Counsel must be alert to all potential and actual conflicts of interest that would impair their ability to represent a client. Where appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

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a. Counsel has the obligation to keep the client informed of the progress of the case.

b. Counsel should respond promptly to client complaints.

c. Counsel should continue representation of the client until replaced.

d. Counsel has a duty to cooperate with successor counsel

1.4 Relationship with Client

a. **Early Contact.** The attorney shall make contact with the client at the earliest possible time. If the client is in custody, contact should be within 24 hours of appointment and shall be within no more than 48 hours unless there is an unavoidable extenuating circumstance**.** The lawyer should send a representative to see the client within 24 hours if the lawyer is not able to see the client within 24 hours.

b. **Barriers to Communication.** Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. Counsel should ensure access to and use of appropriate interpreter services when necessary for client communication.

c. **Establishment of the Relationship.** Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation. Defense counsel should explain counsel's obligation of confidentiality, the attorney-client privilege and the limits of the privilege. In cases where a client may be facing a mandatory life sentence, such as persistent offender cases, counsel and appropriate team members, such as social workers, shall meet regularly with clients. A strong attorney-client relationship supports a client facing a mandatory life sentence, ~~and~~ builds trust

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needed to share often-traumatic social history, and ~~provide~~ gives a client confidence in counsel's recommendation about how to resolve the case.

d. **Interviewing the Client.** As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused

e. **Prompt Action to Protect the Accused.** Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges. ~~When first appointed or retained~~Early in the representation, counsel should ~~must~~ evaluate whether the client may be sentenced as a persistent offender~~,~~ if convicted. Counsel ~~should~~must not wait for the State to give notice it will seek a life sentence or to provide a client's criminal history in such cases.

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f. **Duty to Keep Client Informed.** Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information. Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

g. **Advising the Accused.**

1. After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid evaluation of the probable outcome.

2. Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

h. **Control and Direction of the Case.**

1. Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(a) what pleas to enter;

(b) whether to accept a plea agreement;

(c) whether to waive jury trial;

(d) whether to testify in his or her own behalf; and

(e) whether to appeal.

2. Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

Guideline 2.

2.1 General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

2.2 Pretrial Release Interview

a. Preparation:

Prior to conducting the interview the attorney, should, where possible:

1. Be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

2. Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

3. Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

4. Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

5. Be familiar with any procedures available for reviewing the trial judge's setting of bail.

b. The Interview:

1. The purpose of the interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case, including diversion and alternative court options.

2. Information that should be acquired includes, but is not limited to:

   (a) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status, employment history;

   (b) the client's citizenship status; for clients who are not United States citizens, identify necessary information to determine immigration consequences of possible resolutions (e.g. plea agreement, trial), including, but not limited to country of origin, date and manner of entry into U.S., and current immigration status; when the client is not a citizen the lawyer should obtain information that will permit counsel to determine the immigration consequences of the conviction and sentence, not limited to country of origin, and date and manner of entry into the United States.

   (c) the client's physical and mental health, education, and military service;

   (d) the client's immediate medical needs;

   (e) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

   (f) the ability of the client to meet any financial conditions of release;

   (g) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

3. Information to be provided the client includes, but is not limited to:

   (a) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

   (b) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(c) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(d) the charges and the potential penalties and consequences of conviction or adjudication;

(e) a general procedural overview of the progression of the case, where possible.

c. Supplemental Information

Whenever possible, counsel should use the interview to gather additional information relevant to preparation of the defense. Such information may include exculpatory and mitigating factors, and is not limited to:

1. the facts surrounding the charges against the client;

2. any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

3. any possible witnesses who should be located;

4. any evidence that should be preserved;

5. where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

2.3 Pretrial Release Proceedings

a. Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and where appropriate, to make a proposal concerning conditions of release. Counsel should be familiar with the criminal rules of release of a client, CrR 3.2 and CrRLJ 3.2 and discuss issues likely to be argued at pretrial release motions with the client prior to the hearing. Counsel should be prepared where appropriate to present evidence to the judicial officer at the pretrial release hearing.

b. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

c. If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should

advise the client and others acting in his or her behalf how to properly post such assets.

d. Where the client is incarcerated and unable to obtain pretrial release, counsel should, consistent with confidentiality requirements, alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

Guideline 3.

3.1 Presentment and Arraignment

The attorney should preserve the client's rights at the initial appearance on the charges by:

a. Entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;

b. Requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;

c. Seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges;

d. Preserving the client's rights to diversion and/or alternative court processing.

3.2 Preliminary Hearing

a. Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

b. In preparing for the preliminary hearing, the attorney should become familiar with:

1. the elements of each of the offenses alleged;

2. the law of the jurisdiction for establishing probable cause;

3. factual information which is available concerning probable cause.

3.3 Prosecution Requests for Non-Testimonial Evidence

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained. Counsel shall address issues of probable

cause where applicable prior to the prosecution's obtaining of non-testimonial evidence.

Guideline 4.

4.1 Investigation

a. Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.

In all cases, appointed counsel shall inquire into and analyze evidence relevant to the case including the prosecutor's evidence relevant to the legal elements of the charges and additional evidence that might support possible defenses, and counsel shall obtain investigator and/or expert services when necessary for an adequate defense.

b. Sources of investigative information may include the following:

1. Charging documents

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(a) the elements of the offense(s) with which the accused is charged;

(b) the defenses, ordinary and affirmative, that may be available;

(c) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

2. Counsel should research the client's prior criminal history. In persistent offender cases, counsel must thoroughly investigate challenges to each potential "strike" before plea negotiations. Counsel should obtain original court documents and other evidence for all possible prior "strike" convictions, including probable cause statements, complaints/indictments and any amendments, verdict forms, statements on plea of guilty, judgments and sentences. Review of these documents is necessary to determine if there were constitutional deficiencies, such as absence of counsel, ineffective assistance of counsel, misidentification issues in a prior conviction, whether a prior conviction followed an inappropriate decline from juvenile court, or whether the prior convictions should have been vacated after a pre-Sentencing Reform Act conviction was dismissed upon completion of probation. Reviewing documents from out-of-state convictions the prosecution contends are comparable to Washington offenses is critical to the comparability analysis counsel must conduct. Obtaining these

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documents can be time-consuming but counsel should not rely solely upon criminal history information drawn from state and federal databases.

3. The accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(a) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct which affects the client's rights;

(b) explore the existence of other potential sources of information relating to the offense;

(c) collect information relevant to sentencing and the consequences of conviction and adjudication.

4. Potential witnesses

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews or consider recording the interview.

5. The police and prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

6. Physical evidence

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

7. The scene

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as

possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

8. Expert assistance

Counsel should secure the assistance of experts where it is necessary or appropriate to:

(a) the preparation of the defense;

(b) adequate understanding of the prosecution's case;

(c) rebut the prosecution's case.

4.2 Formal and Informal Discovery

a. Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

b. Counsel should consider seeking discovery of the following items including, but not limited to:

1. Potential exculpatory information;

2. The names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

3. All oral and/ or written statements by the accused, and the details of the circumstances under which the statements were made;

4. The prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

5. Electronic posts;

6. Books, papers, documents, photographs, tangible objects, access to buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

7. All results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

8. Statements of co-defendants;

9. All 911 recordstapes, police videos, bank videos, commercial establishment videos, — or other digital records relevant to the

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case;~~books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case:~~

10. Statements and reports of experts, including data and documents upon which they are based;

11. Inspection of physical evidence;

12. Reports of notes of searches or seizures and the circumstances of any searches or seizures;

13. Law enforcement notes (field notes), investigation notes, and when relevant internal affairs files and investigation records;

14. Client, victim, or witness records, such as school, mental health, and drug and alcohol and criminal records.

4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Guideline 5.

5.1 The Decision to File Pretrial Motions

a. Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief.

b. The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

1. The pretrial custody of the accused;

2. the constitutionality of the implicated statute or statutes;

3. the potential defects in the charging process;

4. the sufficiency of the charging document;

5. the propriety and prejudice of any joinder of charges or defendants in the charging document;

6. the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;

7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States

   Constitution, or corresponding or additional state constitutional provisions, including;

   i. the fruits of illegal searches or seizures;

   ii. involuntary statements or confessions;

   iii. statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;

   iv. unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

8. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

9. access to resources which or experts who may be denied to an accused because of his or her indigence;

10. the defendant's right to a speedy trial;

11. the defendant's right to a continuance in order to adequately prepare his or her case;

12. matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

13. matters of trial or courtroom procedure.

c. Counsel should withdraw the motion or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

   1. The time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

   2. changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;

   3. later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

5.2 Filing and Arguing Pretrial Motions

a. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

b. When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

1. Investigation, discovery and research relevant to the claim advanced;

2. The subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;

3. Full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

5.3 Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

5.4 Responding to Prosecution Motion

Counsel should respond to the prosecution's motions as appropriate.

Guideline 6.

6.1 The Plea Negotiation Process and the Duties of Counsel

a. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not to proceed to trial.

b. Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

c. Counsel shall keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.

d. Counsel shall not accept any plea agreement without the client's express authorization.

e. The existence of ongoing plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

6.2 The Contents of the Negotiations

a. In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:

1. The maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system and parole or sentencing review process and any registration requirements and;

2. the possibility of forfeiture of assets;

3. other consequences of conviction such as the impact of the conviction on non-citizen rights, including deportation and ineligibility for avenues to immigration relief and future immigration benefits, civil disabilities including loss of the right to vote, family rights, firearm rights and the right to serve in the military;

4. any possible and likely sentence enhancements or parole supervision consequences;

5. the possible and likely place and manner of confinement;

6. the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.

7. Counsel should learn the client's social history and discuss possible alternative charges with the client before beginning plea negotiations.

In persistent offender and other complex cases, felony or misdemeanor, counsel must learn the client's social history. Thorough investigation of mental health issues, victims' attitudes about punishment and a comprehensive understanding of the client's medical, social and family histories are extremely valuable. Counsel should consider whether to seek additional resources, including those of a social worker/mitigation specialist, to assist with review of court files and other records and the client's family for mitigating evidence. Counsel should evaluate mitigation evidence to determine whether it provides a possible defense, such as insanity, to the

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current charge. Counsel should evaluate mitigation evidence to determine whether and how best to present the evidence to the prosecutor for purposes of negotiation to alternative charge(s).

b. In developing a negotiation strategy, counsel should be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

(a) Not to proceed to trial on the merits of the charges;

(b) To decline from asserting or litigating any particular pretrial motions;

(c) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.

(d) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

(a) That the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(b) To dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(c) That the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(d) That the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(e) That the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court.

(f) That the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place

and/or manner of confinement and/or release on supervision and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.

(g) That the negotiated settlement MAY minimize the impact of the conviction on consequences that are an integral part of the penalty, including immigration, military service, registration, housing, employment, driving rights and familial rights.

~~c.~~ (h) In conducting plea negotiations, counsel should be familiar with:

~~1.~~ a. The various types of pleas that may be agreed to, including a plea of guilty, a conditional plea of guilty, and a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea);

~~2.~~ b. The advantages and disadvantages of each available plea according to the circumstances of the case;

~~3.~~ c. Whether the plea agreement is binding on the court and prison and parole supervision authorities.

~~d.~~ 4. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

6.3 The Decision to Enter a Plea of Guilty

a. Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.

b. The decision to enter a plea of guilty rests solely with the client, and counsel shall not attempt to unduly influence that decision.

6.4 Entry of the Plea Before the Court

a. Prior to the entry of the plea, counsel should:

1. Make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

2. Make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences, including but not

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limited to those listed in Guideline 8.2, the accused will be exposed to by entering a plea;

3. Explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

b. When entering the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

c. After entry of the plea, counsel should be prepared to address the issue of release pending sentencing.

d. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate.

e. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Guideline 7.

7.1 General Trial Preparation

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a. The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

b. Where appropriate, counsel should have the following materials available at the time of trial:

1. Copies of all relevant documents filed in the case;

2. Relevant documents prepared by investigators;

3. Voir dire questions;

4. Outline or draft of opening statement;

5. Cross-examination plans for all possible prosecution witnesses;

6. Direct examination plans for all prospective defense witnesses;

7. Copies of defense subpoenas;

8. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);

9. Prior statements of all defense witnesses;

10. Reports from defense experts;

11. A list of all defense exhibits, and the witnesses through whom they will be introduced;

12. Originals and copies of all documentary exhibits;

13. Proposed jury instructions with supporting case citations;

14. Copies of all relevant statutes and cases;

15. Outline or draft of closing argument.

16. Copies of investigator notes, if prepared, or transcripts and copies of recordings, interviews with the state's witnesses, if interviews are recorded.

c. Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

d. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

e. Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing or in shackles or restraints.

f. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

g. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

7.2 Voir Dire and Jury Selection

a. Preparation

1. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

2. Counsel should be familiar with the local practices and the individual trial court procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

3. Prior to jury selection, counsel should seek to obtain a prospective juror list.

4. Where appropriate, counsel may develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. This includes confidential questionnaires.

5. The primary purpose of voir dire is to obtain information for the intelligent exercise of challenges. Voir dire questions may be designed to accomplish the following:

   (a) To elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

   (b) To outline and expose the panel to certain legal principles which are relevant to the defense case;

   (c) To preview the case so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

   (d) To present the client and the defense in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

   (e) To establish credibility with the jury

6. Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

7. Counsel should be familiar with the law concerning challenges for cause and peremptory strikes.

8. Counsel should also be aware of the law concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

9. Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

b. Examining the Prospective Jurors

1. Counsel should personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.

2. Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.

c. Challenges

Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

7.3 Opening Statement

a. Prior to delivering an opening statement, counsel should ask for exclusion of witnesses from the courtroom, unless a strategic reason exists for not doing so.

b. Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

c. Counsel should not waive or defer opening statement and should provide the jury with the defense theory of the case, so the jury is able to view the evidence from the defense viewpoint. Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement. In rare instances, counsel may consider a strategic advantage of deferring the opening statement until the beginning of the defense case, but this should be weighed against the significant disadvantage of the jury viewing the prosecution evidence without benefit of the defense theory.

d. Counsel's objective in making an opening statement is to inform the jury of the defense theory of the case and to provide an overview of the expected evidence. Opening statement may be designed to accomplish the following:

1. to identify the weaknesses of the prosecution's case;

2. to emphasize the prosecution's burden of proof;

3. to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

4. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

5. to clarify the jurors' responsibilities;

6. to state the ultimate inferences which counsel wishes the jury to draw.

e. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

f. Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

1. The significance of the prosecutor's error;

2. The possibility that an objection might enhance the significance of the information in the jury's mind;

3. Whether there are any rules made by the judge against objecting during the other attorney's opening argument.

7.4 Confronting the Prosecution's Case

a. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

c. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

d. In preparing for cross-examination, counsel should:

1. Consider the need to integrate cross-examination, the theory of the defense and closing argument;

2. Consider whether cross-examination of each individual witness is likely to generate helpful information;

3. Anticipate those witnesses the prosecutor might call in its case-in- chief or in rebuttal;

4. Consider a cross-examination plan for each of the anticipated witnesses;

5. Be alert to inconsistencies in a witness' testimony;

6. Be alert to possible variations in witnesses' testimony;

7. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

8. Where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

9. Be alert to issues relating to witness credibility, including bias and motive for testifying.

e. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

f. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

g. Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

7.5 Presenting the Defense Case

a. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

b. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. As with choosing whether to go forward with a jury,

the decision to testify is solely that of the client. Counsel's obligation is to provide the client with all of the advice necessary for the client to make an informed decision on whether to testify.

c. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

d. In preparing for presentation of a defense case, counsel should, where appropriate:

1. Develop a plan for direct examination of each potential defense witness;

2. Determine the implications that the order of witnesses may have on the defense case;

3. Consider the possible benefits and risks of use of character witnesses;

4. Consider the need for expert witnesses.

e. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

f. Counsel should prepare all witnesses for direct and possible cross- examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

g. Counsel should conduct redirect examination as appropriate.

h. At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

7.6 Closing Argument

a. Counsel should be familiar with the substantive limits on both prosecution and defense summation.

b. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

c. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

1. Highlighting weaknesses in the prosecution's case;

2. Describing favorable inferences to be drawn from the evidence;

3. Incorporating into the argument:

   (a) helpful testimony from direct and cross-examinations;

   (b) verbatim instructions drawn from the jury charge;

   (c) responses to anticipated prosecution arguments;

   (d) the effects of the defense argument on the prosecutor's rebuttal argument.

4. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

   (a) Whether counsel believes that the case will result in a favorable verdict for the client;

   (b) The need to preserve the objection for a double jeopardy motion;

   (c) The possibility that an objection might enhance the significance of the information in the jury's mind.

   (d) The need to preserve the objection for appeal.

7.7 Jury Instructions

a. Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

b. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions.

c. Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

d. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.

e. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

f. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

Guideline 8.

8.1 Obligations of Counsel in Sentencing

Among counsel's obligations in the sentencing process are:

a. Where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications and other consequences of the conviction, including the impact upon citizenship and residency rights, civil rights including the loss of the right to vote, and familial rights;

b. To ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

c. To provide affirmative advice with respect to the consequences of the conviction on the citizenship and or residency status of the client;

d. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;

e. To develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

f. To ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;

g. To consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

8.2 Sentencing Options, Consequences and Procedures

a. Counsel should be familiar with the sentencing provisions and options applicable to the case, including:

1. Any sentencing guideline structure;

2. Deferred sentence, judgment without a finding, and diversionary programs or the availability of alternative resolutions, including suspended sentences and specialty courts;

3. Vacation of conviction and sealing of records;

4. Probation or suspension of sentence and permissible conditions of probation;

5. Restitution;

6. Fines;

7. Court costs;

8. Imprisonment including any mandatory minimum requirements;

9. Confinement in mental institution;

10. Forfeiture.

b. Counsel should be familiar with the consequences of the sentence and judgment, including:

1. credit for pre-trial detention;

2. post confinement supervision;

3. effect of good-time credits on the client's release date and how those credits are earned and calculated;

4. place of confinement and level of security and classification;

5. self-surrender to place of custody;

6. eligibility for correctional programs and furloughs;

7. available drug rehabilitation programs, psychiatric treatment, and health care;

8. deportation;

9. use of the conviction for sentence enhancement in future proceedings;

10. loss of civil rights and the right to possess a firearm;

11. impact of a fine or restitution and any resulting civil liability;

12. restrictions on or loss of license;

13. the impact of the conviction on the rights of a non-citizen;

14. other consequences of the conviction, such as immigration rights, military service, registration, housing, employment, driving, and familial rights.

c. Counsel should be familiar with the sentencing procedures, including:

1. The effect that plea negotiations may have upon the sentencing discretion of the court;

2. The procedural operation of any sentencing guideline system;

3. Sentencing structure to preserve the rights of non-citizen clients;

4. The practices of the officials who prepare the presentence report and the defendant's rights in that process;

5. The access to the presentence report by counsel and the defendant; the prosecution's or probation department's practice in preparing a memorandum on punishment;

6. The use of a sentencing memorandum by the defense;

7. The opportunity to challenge information presented to the court for sentencing purposes;

8. The availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

9. The participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

8.3 Preparation for Sentencing

a. In preparing for sentencing, counsel should consider the need to:

1. Inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

2. Maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

3. Obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, citizenship and immigration status if the client is not a

citizen of the United States, and financial status, and obtain from the client sources through which the information provided can be corroborated;

4. Ensure the client has adequate time to examine the presentence report;

5. Inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;

6. Prepare the client to be interviewed by the official preparing the presentence report;

7. Inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial or immigration or citizenship proceedings, including forfeiture or restitution proceedings;

8. Inform the client of the sentence or range of sentences and options available under the law and confer with the client about the sentencing plan and advocate for the client's position;

9. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

8.4 The Official Presentence Report

a. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

1. Determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;

2. Provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;

3. Review the completed report;

4. Take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

5. Take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and:

(a) the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

(b) the prosecution fails to prove an allegation;

(c) the court finds an allegation not proved.

b. Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to correctional officials.

c. Counsel should review the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

8.5 The Prosecution's Sentencing Position

a. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.

b. If a written sentencing memorandum is submitted by the prosecution, counsel should review the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

c. If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to correctional officials.

8.6 The Defense Sentencing Memorandum

a. Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

1. Challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;

2. Challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;

3. Information contrary to that before the court which is supported by affidavits, letters, and public records;

4. Information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;

5. Information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

6. Information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

7. Presentation of a sentencing proposal;

8. Where appropriate, counsel should engage an expert to assist in preparing the sentence memorandum;

9. A complete memorandum may require counsel to conduct an independent investigation regarding mitigating evidence and why particular proposals are appropriate.

8.7 The Sentencing Process

a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

e. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, eligibility for supervised release, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against deportation of the defendant.

f. Where appropriate, counsel should prepare the client to personally address the court.

Guideline 9.

9.1 Motion for a New Trial

a. Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

b. When a judgment of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider to include:

1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;

2. The effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

9.2 Right to Appeal

a. Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal the attorney shall file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's right to appeal.

b. Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and the right to appeal the sentence imposed by the court and have counsel appointed at state expense, and that the substantially prevailing party may be entitled to recover the costs of appeal pursuant to statute or court rule.

c. Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

9.3 Bail Pending Appeal

a. Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

b. Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

9.4 Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

9.5 Sentence Reduction

Counsel should inform the client of procedures available for requesting a discretionary review of, or reduction in, the sentence imposed by the trial court, including any time limitations that apply to such a request.

9.6 Vacation or Sealing of Record of Conviction

Counsel should inform the client of any procedures available for requesting that the record of conviction be vacated or sealed.