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:

November 6, 2020 | 10:00 am to 12:00 pm
VIRTUAL MEETING ONLY
For video and audio: https://wsba.zoom.us/j/94699293730?pwd=eFFnYVdSNmUzcG9PZUtUSk5TSXVmdz09
For audio only: **LOCAL OPTION:** (253) 215-8782 || **TOLL-FREE OPTION**: (888) 788-0099
Meeting ID: 946 9929 3730 || Passcode: 254585

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**	Travis Stearns	Discussion	
2 min	**October Meeting Minutes**	Travis Stearns	Action	pp 2-3
40 min	**Independence Committee Proposal**	Ann Christian	Action	pp 4-9
30 min	**History of CPD and Standards**	George Yeannakis	Discussion	pp 10-64
35 min	**CPD Culture and Norms**	Diana Singleton	Discussion	
10 min	**WSBA Committee on Professional Ethics Re Commitment Proceedings**	Travis Stearns	Action	pp 65-67

The Council will meet next on December 4, 2020.

Reasonable accommodations for people with disabilities will be provided upon request. Please email bonnies@wsba.org.

Guests who are not members of the Council are not required to state their name to join this meeting.

Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE
OCTOBER 9, 2020, 10:00AM TO 12:00AM VIRTUAL/VIDEOCONFERENCE
MINUTES

CPD voting members: Travis Stearns (Chair), Jason Schwarz (Vice-Chair), Rebecca Stith, Justice Gordon McCloud, Christie Hedman, Matt Heintz, Justin Bingham, Eric Hsu, Kathy Kyle, Jason Bragg, Judge Drew Henke, Abraham Ritter, Nick Allen, Joanne Moore, Rachel Cortez, Jaime Hawk

CPD Emeritus members (non-voting members): Ann Christian, Eileen Farley, Bob Boruchowitz

WSBA Staff: Diana Singleton, Bonnie Sterken

Guests: Rachel Gluckman, Katrin Johnson, Andrea Jarmon, Ali Hohman, Sophia Byrd McSherry, Jon Rapping, George Yeannakis, Kevin Flannery, Mackenzie Stewart, Maialisa Vanyo

Absent: Matt Anderson, Natalie Walton-Anderson, Deborah Ahrens, Judge Patricia Fassett, Louis Frantz, Christopher Swaby, Brenda Williams

Presentation on Gideon's Promise: Jon Rapping with Gideon's Promise joined as a special guest. He shared about the work of Gideon's Promise, his book, and the importance of strengthening public defense for marginalized communities.

Minutes: The September minutes were approved with corrections provided.

Priority Setting: A few of the Council's history was postponed to the November meeting. The Council members then broke up into 6 different small groups to have discussions about what the Council should focus on over the next year. After the breakouts, everyone came back together and reported out the ideas that were emerged in the conversations, including the following:

- What can we do to keep collaborating with the Bar
- Improving diversity on the Council, including racial diversity and diversity of practice areas
- What can we do to support public defenders who are on the front lines of these issues and give their voice volume
- Bring in civil lawyers into the conversation
- Reaching out to smaller jurisdictions and agencies that are having challenges
- Improving outreach to WDA and WACDL members and people who do criminal defense who are not members and to students before they leave law school
- Return to the structure committee and bring it back, which ties back into funding. People need to have adequate support to do the job properly. Find a way for the legislature or court to ask this Council to work on this issue and get buy in from the legislature from the beginning.
- Some kind of grid or tracking on what we've done and where things are in the process. On that page could update the progress of projects for all to see

- Would there be ways to centralize some public defense functions without going to a state system? Having a post-conviction resource at state OPD because there is now right to counsel on PRPs.
- Problems with getting felony certified, especially in small communitites. Could there be lawyers at OPD who could be deployed around the state to help in smaller counties that don't have experienced lawyers – helping get certified and elevate the representation? Possibly a regional effort or exchanges between offices.
- Empowering clients and educating community about their rights so that they have an understanding of what's happening and aren't a passive participant
- Importance of independence of public defenders who are not constrained by outside pressures
- Focus on contract lawyers – pay issues and limited resources

Travis shared that the Council will continue to discuss these issues and how best the Council can address them. He also noted that the Independence Committee will be presenting their proposal in November for the Council's adoption and encouraged folks to attend to achieve the needed supermajority. Travis also asked folks to join committees and will address what the committees are working on at a future meeting.

Travis acknowledged Joanne Moore for her commitment to the CPD and public defense.

The meeting adjourned at 12:00pm

CPD Independence Committee
Draft Proposed Amendments to Standard 18 in WSBA Standards for Indigent Defense Services
(Deletions in current Standard 18 are shown in ~~strike-through~~ text. Additions are shown in underlined text.)
(10-30-2020)

STANDARD EIGHTEEN:
Guidelines for Awarding Defense Contracts

Standard:

Recruitment for public defense contracts and assigned counsel lists should include efforts to achieve a diverse public defense workforce.

Attorneys or firms applying for contracts or placement on assigned counsel lists must demonstrate their ability to meet these Standards and the Supreme Court Standards for Indigent Defense. Their contracts must comply with Rules of Professional Conduct 1.8(m).

The county or city should award contracts for public defense services and select attorneys for assigned counsel lists only after determining that the ~~attorney or firm chosen can meet accepted professional standards~~ applicant has demonstrated professional qualifications consistent with both these Standards 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.~~

~~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.~~

Judges, judicial staff, ~~C~~city attorneys, county prosecutors, and law enforcement officers ~~should~~ shall not select the attorneys who will ~~provide indigent defense services~~ be included in a contract or an assigned counsel list.

Related Standards:

National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts, 1984, Standard IV-3.

King County Bar Association Indigent Defense Services Task Force, Guidelines for Accreditation of Defender Agencies, 1982, Statement of Purpose.

CPD Independence Committee
Draft Proposed New Standard 19 for WSBA Standards for Indigent Defense Services (10-30-2020)

STANDARD NINETEEN (NEW):
Independence and Oversight of the Public Defense Function

Standard:

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

The public defense function should be subject to judicial oversight only in the same manner and to the same extent as retained counsel.[1] Judges and judicial staff shall not select the public defense providers, or manage and oversee public defense agencies, contracts and assigned counsel lists.

Management and oversight of the public defense function should be performed by attorneys with public defense experience who are insulated from judicial and political influence.[2] The phrase "manage and oversee the public defense function" includes the following: drafting, awarding, renewing, and terminating public defense contracts; selecting and removing attorneys from assigned counsel lists; monitoring attorney caseload limits and compliance with case-level qualifications; monitoring quality; monitoring compliance with contracts, policies, procedures and standards; and determining compensation.

The organizations and individuals responsible for the public defense function shall apply these Standards, the Supreme Court Standards for Indigent Defense, and the WSBA Performance Guidelines in their management and oversight duties.

Jurisdictions unable to employ attorneys with public defense experience to manage and oversee the public defense function shall consult with established city, county, or state public defense offices, or engage experienced public defense providers as consultants regarding management and oversight duties.

[1] Commentary to Principle 1 of the ABA Ten Principles of a Public Defense Delivery System.
[2] 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.

Related Standards:

American Bar Association, *Ten Principles of a Public Defense Delivery System,* 2002, Principle 1.

National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts, The Defense,* 1973, Chapter 1.3.

American Bar Association *Standards for Criminal Justice*, *Providing Defense Services*, 1992, Standards 5-1.3, 5-1.6, 5-4.1.

National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems*, 1989, Standards 2, 3.2.1.

National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, 1984, Guidelines II-1, II-2, II-3, IV-2.

National Conference of Commissioners on State Law, *Model Public Defender Act*, 1970, Section 10(d).

Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties*, 1979, Standards 2.1(D), 3.2.

National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* 1976, Guidelines 2.8, 2.10-2.13, 2.18, 5.13.

Michigan Indigent Defense Commission, 2020, *Minimum Standard 5.*

See also,

American Legislative Exchange Council (ALEC), *Resolution in Support of Public Defense*, 2019, Independence and Equality.

https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/the-constitutional-imperative-for-defender-independence-aba-principle-1/

https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/the-preeminent-need-for-independence-of-the-defense-function-aba-principle-1/

https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/understanding-judicial-interference-with-the-defense-function-aba-principle-1/

https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/understanding-political-interference-with-the-defense-function-aba-principle-1/

https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/systemic-accountability-through-an-independent-commission-aba-principle-1/

CPD Independence Committee
Draft Proposed New General Rule
(10-30-2020)

Independence of Public Defense

(a) Policy and Purpose. Consistent with the right to counsel as provided in Article I, Sections 3 and 22 of the Washington State Constitution and Washington statutes, it is the policy of the judiciary both 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 the awarding and oversight of public defense contracts, the selection of attorneys for assigned counsel lists, and the assignment of attorneys in individual cases.

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

(c) **Award of public defense contracts and selection of attorneys for assigned counsel lists.** Judicial officers and staff shall not select public defense contractors or attorneys for assigned counsel lists. A judicial officer or judicial staff shall not manage and oversee public defense contracts or assigned counsel lists. The phrase "manage and oversee public defense contracts and assigned counsel lists" includes the following: drafting, awarding, renewing, and terminating public defense contracts; selecting and removing attorneys from assigned counsel lists; monitoring attorney caseload limits and compliance with case-level qualifications; monitoring quality; monitoring compliance with contracts, policies, procedures and standards; and determining compensation.

(d) **Appointment of counsel in individual cases.** The role of judicial officers and their staff in the appointment of counsel in individual cases is limited to: 1) making a finding of indigency or other finding that a party is entitled to counsel; and 2) referring the case to a public defense agency or a public defense administrator to designate a qualified attorney. If there is no public defense agency or administrator, a judicial officer or their staff may appoint an attorney from an independently established assigned counsel list on a rotating basis. If no qualified attorney on the assigned counsel list is available, a judicial officer may appoint an attorney who meets the qualifications in the Supreme Court Standards for Indigent Defense.

(e) **Necessary services and substitution of counsel.** This rule does not limit a court's authority to grant a motion for necessary investigative, expert, or other services, or to appoint counsel in individual cases when substitution of counsel is requested. Substitution of counsel should be made as provided in (d) above.

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

More Harris County judges accused of favoritism in defense appointments

Houston Chronicle, Samantha Ketterer Oct. 27, 2020

Civil rights groups have formally filed complaints against two more state district judges in Harris County, adding to the list of jurists who are accused of violating state law in their case appointment practices.

The Texas Fair Defense Project and Texas Civil Rights Project now contend that four judges favor certain private defense attorneys and overlook the Harris County Public Defender when appointing lawyers to indigent defendants' cases. The groups on Thursday filed the new complaints against district Judges Frank Aguilar and Randy Roll, just one week after submitting two similar grievances against Judges Robert Johnson and Amy Martin.

"This conduct harms indigent people charged with crimes and creates the appearance of cronyism, further undermining public faith in the courts," the groups' leaders wrote in the complaints to the State Commission on Judicial Conduct.

This year to date, Aguilar and Roll have each appointed only .99 and 1.61 percent of their cases, respectively, to the Harris County Public Defender's Office, according to the filing. The public defender's office's leaders say they can reasonably take on 20 percent of case appointments in each district court.

Neither Aguilar nor Roll responded to requests for comment Monday evening. Judges do not typically speak publicly about complaints, citing judicial rules that prevent them from doing so.

The complaint largely stems from the Sixth Amendment, which guarantees indigent peoples' right to a quality defense. The Fair Defense Act in 2001 strengthened that right, and the state code was later amended to require that courts give priority appointments to public defenders, who already receive a budget from the county.

Each criminal district court makes more than 1,600 appointments a year, so the defender's office should average 320 case appointments from each of the 22 district courts, according to the filing.

In reality, they take on much less. Aguilar appointed the public defender in 14 out of 1,418 total cases in 2020, and 36 out of 1,508 cases in 2019.

Roll appointed 29 out of 1,802 total felony cases to the public defender in 2020. In 2019, when he appointed 52 out of 1,953 cases to the public defender, the groups alleged, citing county data.

Overall, 93.62 percent of appointed felony district court cases in 2020 went to private attorneys, and 6.38 percent went to the Harris County Public Defender's Office, according to data collected by the Harris County Justice Administration Department.

Advocates say the problem is far from isolated to the four judges currently facing complaints. Only five district judges have utilized the defender's office for more than 10 percent of their case appointments this year, the data shows.

Both Johnson and Martin's case appointment rates rose slightly since receiving their complaints earlier in the month.

Harris County's criminal courts largely operate their own separate systems for appointing lawyers, but they must adhere to overarching guidelines. Felony judges make appointments by choosing from a list of qualified attorneys, and they implement the procedures through a Central Appointment Coordinator that they select, according to Harris County standards. Attorneys can also submit requests for appointments.

None of the four judges have ever stated a reason for failing to appoint the public defender's office to more cases, the complaint alleges. Bunin said he informed Martin, Johnson, Roll and Aguilar of the priority appointment law each at least once once.

The Texas Fair Defense Project and Texas Civil Rights Project argued that the judges' behaviors were problematic beyond violating state law: When attorneys become overburdened with cases, the defendant tends not to have a relationship with assigned counsel and often feel pressured to plead guilty.

In the 2019-2020 fiscal year, Aguilar's appointments contributed to those massive caseloads, according to the filing. The Democrat, who has served on the bench for almost two years, approved close to $2 million in funds for private lawyers appointed to his cases.

He appointed one capital case and 52 felonies to Cary Lynn Higginbotham while she represented 165 felonies, 209 misdemeanors and one capital case in other courtrooms, the complaint alleges. Defense attorney Jimmy Joe Ortiz received 59 of his 294 court appointed felonies from Aguilar that year.

During the same fiscal year, Roll approved more than $1.2 million to private lawyers, including more than $400,000 to Ricardo Gonzalez. He was assigned to represent 518 people in Roll's court alone. Roll, a Democrat, lost his primary and will leave his office this fall after four years in his current seat.

In their complaints, Johnson and Martin faced similar allegations of favoritism benifitting certain attorneys. Johnson is up for re-election this year.

A 2014 Texas A&M University study found that on average, an attorney can only competently represent 128 clients in felony cases per year. Higginbotham, Ortiz and Gonzalez were not available for comment Monday night.

samantha.ketterer@chron.com

Charter: WSBA Council on Public Defense

(Revised June 2020)

Purpose and Mission

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

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

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

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

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

MEMBERSHIP:

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

The Chair and Vice-Chair shall be appointed by the WSBA President-elect. Each shall serve a two-year term, with the Vice-Chair becoming Chair at the end of the second year and a new Vice-Chair appointed. Except as noted, the members of the Council shall be appointed for two-year terms and be eligible for reappointment for two additional two-year terms, totaling six years of service. The Chair may nominate up to five former Council members whose eligibility for voting membership has expired, to serve as non-voting emeritus members for one year terms[1]. The voting membership is as follows:

Core Members (Core Members have no term limits)

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

Nominated by Outside Parties

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

Considered Through WSBA Application Process

- Three current or former prosecutors/city attorneys, recommended by the Council chair, vice chair and BOG Liaisons

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

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

VOTING PROCEDURES

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

ATTENDANCE REQUIREMENTS

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

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

CrR 3.1 CrRLJ 3.1 JuCR 9.2
STANDARDS FOR INDIGENT DEFENSE

Preamble

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in *State v. A.N.J.*, 168 Wash.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

[Adopted effective October 1, 2012.]

Standard 1. Compensation

[Reserved.]

Standard 2. Duties and Responsibilities of Counsel

[Reserved.]

Standard 3. Caseload Limits and Types of Cases

Standard 3.1. The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

[Adopted effective October 1, 2012.]

Standard 3.2. The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

[Adopted effective October 1, 2012.]

Standard 3.3. General Considerations. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of the case types in the attorney's caseload, but it is not a factor in adjusting the applicable numerical caseload limits except as follows: attorneys with less than six months of full time criminal defense experience as an attorney should not be assigned more than two thirds of the applicable maximum numerical caseload limit. This provision applies whether or not the public defense system uses case weighting.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in standard 3.4 and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

Definition of case. A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

Standard 3.4. Caseload Limits. The caseload of a full-time public defense attorney or assigned counsel should not exceed the following:

150 felonies per attorney per year; or

300 misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this standard, 400 cases per year; or

250 juvenile offender cases per attorney per year; or

80 open juvenile dependency cases per attorney; or

250 civil commitment cases per attorney per year; or

1 active death penalty trial court case at a time plus a limited number of non-death-penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of standard 3.2; or

36 appeals to an appellate court hearing a case on the record and briefs per attorney per year. (The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)

Full-time rule 9 interns who have not graduated from law school may not have caseloads that exceed twenty-five percent (25%) of the caseload limits established for full-time attorneys.

In public defense systems in which attorneys are assigned to represent groups of clients at first appearance or arraignment calendars without an expectation of further or continuing representation for cases that are not resolved at the time (except by dismissal) in addition to individual case assignments, the attorneys' maximum caseloads should be reduced proportionally recognizing that preparing for and appearing at such calendars requires additional attorney time. This provision applies both to systems that employ case weighting and those that do not.

Resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case. This provision applies both to systems that employ case weighting and those that do not.

In public defense systems in which attorneys are assigned to represent groups of clients in routine review hearing calendars in which there is no potential for the imposition of sanctions, the attorneys' maximum caseloads should be reduced proportionally by the amount of time they spend preparing for and appearing at such calendars. This provision applies whether or not the public defense system uses case weighting.

[Adopted effective October 1, 2013, except paragraph 3, regarding misdemeanor caseload limits, effective January 1, 2015; amended effective January 1, 2015.]

Standard 3.5. Case Counting and Weighting. Attorneys may not count cases using a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A weighting system must:

A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;

B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;

D. be periodically reviewed and updated to reflect current workloads; and

E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

Standard 3.6. Case Weighting Examples. The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.

A. Case Weighting Upward. Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers, and/or expenditures of time and resources should be weighted upward and counted as more than one case.

B. Case Weighting Downward. Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.

i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited appearances for a specific purpose (not including representations of multiple cases on routine dockets).

ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions,

representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Noncomplex sentence violations should be weighted as at least 1/3 of a case.

iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client's participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.

iv. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

[Adopted effective October 1, 2012; amended effective January 1, 2015.]

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Defense Function std. 4-1.2 (3d ed. 1993)

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES std. 5-4.3 (3d ed. 1992)

AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003)

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*)

Am. Council of Chief Defenders, *Statement on Caseloads and Workloads* (Aug. 24, 2007)

ABA House of Delegates, *Eight Guidelines of Public Defense Related to Excessive Caseloads* (Aug. 2009)

TASK FORCE ON COURTS, NAT'L ADVISORY COMM'N ON CRIMINAL STANDARDS & GOALS, COURTS std. 13.12 (1973)

MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101.

ABA House of Delegates, *The Ten Principles of a Public Defense Delivery System* (Feb. 2002)

ABA House of Delegates, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 1996)

Nat'l Legal Aid & Defender Ass'n, Am. Council of Chief Defenders, Ethical Opinion 03-01 (2003).

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Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)

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Wash. State Office of Pub. Defense, *Parents Representation Program Standards of Representation* (2009)

BUREAU OF JUDICIAL ASSISTANCE, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERIES NO. 4, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (NCJ 185632)

Standard 4. Responsibility of Expert Witnesses

[Reserved.]

Standard 5. Administrative Costs

Standard 5.1. [Reserved.]

Standard 5.2.

A. Contracts for public defense services should provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel; telephones; law library, including electronic legal research; financial accounting; case management systems; computers and software; office space and supplies; training; meeting the reporting requirements imposed by these standards; and other costs necessarily incurred in the day-to-day management of the contract.

B. Public defense attorneys shall have (1) access to an office that accommodates confidential meetings with clients and (2) a postal address, and adequate telephone services to ensure prompt response to client contact.

[Adopted effective October 1, 2012.]

Standard 6. Investigators

Standard 6.1. Public defense attorneys shall use investigation services as appropriate.

[Adopted effective October 1, 2012.]

Standards 7-12

[Reserved.]

Standard 13. Limitations on Private Practice

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

[Adopted effective October 1, 2012.]

Standard 14. Qualifications of Attorneys

Standard 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

C. Be familiar with the Washington Rules of Professional Conduct; and

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association and when representing youth, be familiar with the Performance Guidelines for Juvenile Defense Representation approved by the Washington State Bar Association; and

E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

[Adopted effective October 1, 2012; amended effective April 24, 2018.]

Standard 14.2. Attorneys' qualifications according to severity or type of case[1]:

A. Death Penalty Representation. Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:

[1] Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.

i. The minimum requirements set forth in Section 1; and

ii. At least five years' criminal trial experience; and

iii. Have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

iv. Have served as lead or co-counsel in at least one aggravated homicide case; and

v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and

vi. Have completed at least one death penalty defense seminar within the previous two years; and

vii. Meet the requirements of SPRC 2.[2]

The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist, and an investigator. Psychiatrists, psychologists, and other experts and support personnel should be added as needed.

B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served two years as a prosecutor; or

2

SPRC 2
APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

b. has served two years as a public defender; or two years in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

C. Adult Felony Cases—Class B Violent Offense. Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.

i. The minimum requirements set forth in Section 1; and

ii. Either;

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. Adult Sex Offense Cases. Each attorney representing a client in an adult sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(C); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. Adult Felony Cases—All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each attorney representing a defendant accused of a Class B felony not defined in Section 2(C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. Persistent Offender (Life Without Possibility of Release) Representation. Each attorney acting as lead counsel in a "two strikes" or "three strikes" case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:

i. The minimum requirements set forth in Section 1;[3] and

ii. Have at least:

a. four years' criminal trial experience; and

b. one year's experience as a felony defense attorney; and

c. experience as lead counsel in at least one Class A felony trial; and

d. experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and

3. Expert witnesses; and

4. One year of appellate experience or demonstrated legal writing ability.

G. Juvenile Cases—Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

[3] RCW 10.101.060(1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require "attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies."

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone of record in five Class B and C felony trials; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. Juvenile Cases—Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice, and

iii. Has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases. Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(H); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

J. Juvenile Status Offenses Cases. Each attorney representing a client in a "Becca" matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Either:

a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to "status offense" cases; or

b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Attorneys handling termination hearings shall have six months' dependency experience or have significant experience in handling complex litigation.

iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.

iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and

iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:

a. served one year as a prosecutor; or

b. served one year as a public defender; or one year in a private civil commitment practice, and

c. been trial counsel in five civil commitment initial hearings; and

iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender "Predator" Commitment Cases. Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Have at least:

a. Three years' criminal trial experience; and

b. One year's experience as a felony defense attorney or one year's experience as a criminal appeals attorney; and

c. Experience as lead counsel in at least one felony trial; and

d. Experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses; and

3. Expert witnesses; and

e. Familiarity with the Civil Rules; and

f. One year of appellate experience or demonstrated legal writing ability.

Other counsel working on a sex offender commitment case should meet the minimum requirements in Section 1 and have either one year's experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

O. Contempt of Court Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.

P. Specialty Courts. Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and

iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

[Adopted effective October 1, 2012.]

Standard 14.3. Appellate Representation. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

A. The minimum requirements as outlined in Section 1; and

B. Either:

i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or

ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing, or other comparable work.

C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

RALJ Misdemeanor Appeals to Superior Court: Each attorney who is counsel alone for a case on appeal to the Superior Court from a court of limited jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing a RALJ appeal.

[Adopted effective October 1, 2012.]

Standard 14.4. Legal Interns.

A. Legal interns must meet the requirements set out in APR 9.

B. Legal interns shall receive training pursuant to APR 9, and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

[Adopted effective October 1, 2012.]

Standards 15-18

[Reserved.]

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

SEPARATE CERTIFICATION FORM

_____ Court of Washington for _____	[ ] No.: _____ [ ] Administrative Filing
State of Washington_____, Plaintiff vs. _____, Defendant	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

Washington State Bar Association

PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION

APPROVED JUNE 3, 2011
As Amended by Board of Governors September 18, 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.

[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 client'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 client 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.

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.

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

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 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.

Counsel must be alert to all potential and actual conflicts of interest that would impair their ability to represent a client. Where appropriate, counsel should seek an advisory opinion on any potential conflicts.

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, as outlined below in Section 1.4, to build and maintain a relationship of trust and confidence with the client and experts in order to fully develop mitigation evidence.

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

a. Counsel should respond promptly to client complaints.

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

c. Counsel has a duty to cooperate with successor counsel.

d. Counsel has a duty to identify and address systemic and individual race bias that may affect the client. Counsel should be informed about racial disproportionality in the criminal legal system and affirmatively represent the client to prevent adverse consequences of institutional bias. Counsel should identify when other personal factors presented by a client, such as gender identity and/or sexual orientation, risk triggering institutional and/or individual biases and affirmatively represent the client to prevent adverse consequences associated with them. Counsel should consider using empirical data to advocate for clients in pre-trial release hearings, motion practice, trial, and sentencing and any other hearings. Counsel should also be aware of their personal and implicit biases and the potential impact these may have on the representation and the discharge of ethical duties to the client.

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 client 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, builds trust needed to share often-traumatic social history, and 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 client.

e. **Prompt Action to Protect the Client.** Many important rights of the client can be protected and preserved only by prompt legal action. Defense counsel should inform the client 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 client, obtaining psychiatric examination of the client 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. Early in the representation, counsel should evaluate whether the client may be sentenced as a persistent offender if convicted. Counsel 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.

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 Client.**

1. After informing himself or herself fully on the facts and the law, defense counsel should advise the client 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 client'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 client and others are ultimately for defense counsel. The decisions which are to be made by the client 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 client'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 client. The relevant statutes and precedents should be examined to identify:

(a) the elements of the offense(s) with which the client 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. Criminal history.

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

3. The client

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 client. 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 client, and the details of the circumstances under which the statements were made;

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

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 records, police videos, bank videos, commercial establishment videos, or other digital records 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 client 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 client;

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 client'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 client because of his or her indigence;

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

11. the client'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 client'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 client'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. Counsel should discuss possible alternative charges with the client before beginning plea negotiations.

b. Counsel should learn the client's social history. 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 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).

c. Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a client 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.

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

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

f. 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.

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 client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(d) That the client 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 client will receive, or the prosecution will recommend, specific benefits concerning the client's place and/or manner of confinement and/or release on supervision and the information concerning the client's offense and alleged behavior that may be considered in determining the client'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.

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

(1) 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) The advantages and disadvantages of each available plea according to the circumstances of the case;

(3) Whether the plea agreement is binding on the court and prison and parole supervision authorities.

(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 limited to those listed in Guideline 8.2, the client 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

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, including whether and how the jury can be advised of the possible sentence, 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, including court rules relating to discrimination in exercising peremptory challenges.

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 client 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 client'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 defendants' rights in that process;

5. The access to the presentence report by counsel and the client; 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 client'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 client;

(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 client 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 client, 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 client.

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

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 client.

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 client 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 client's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the client'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 client 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 client 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 client's right to appeal.

b. Counsel's advice to the client 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 client takes an appeal, trial counsel must cooperate in providing information to the client's appellate counsel concerning the proceedings in the trial court and their work on behalf of the client.

d. When there is a post-conviction challenge brought on behalf of the client, trial and appellate counsel must cooperate in providing information to the client's post-conviction counsel concerning proceedings in the trial and appellate courts and their work on behalf of the client.

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.

Response by the Washington State Bar Association's Council on Public Defense to the Supreme Court's Call to Action after the Death of George Floyd

On June 4, 2020, Washington's Supreme Court called on the legal community to recognize that we all bear responsibility for the continuing injustices faced by Black Americans. The Council on Public Defense stands with the Supreme Court and acknowledges the unique role public defenders play in eradicating injustice. We agree with the Supreme Court that it is our moral imperative to join in the efforts to eliminate systemic racism from our courts. We also recognize all the public defenders who took collective action on June 8, 2020, who stated that "Black Lives Matter to Public Defenders."

Public defenders have the honor and the obligation to provide representation to those accused of crimes, at risk of losing their families, or otherwise held against their will. Like the Supreme Court, we believe unambiguously "the systemic oppression of Black Americans is not merely incorrect and harmful; it is shameful and deadly." We recognize that our clients are disproportionately persons of color. And while injustice may happen on the street when our clients are wrongfully or unnecessarily arrested or when children are unjustly taken from their parents, it is amplified in the courtroom when judges, public defenders, and prosecutors fail to recognize the role race plays in the prosecution of Black and Brown people.

Public defenders must work to change these wrongs. Our offices must be committed to diversity, equity, and inclusion. Persons of color must be recruited, retained, and elevated to leadership positions. Justice cannot happen until our offices reflect our communities and those we represent.

As the Supreme Court stated, all those involved in the courts must recognize their role in devaluing Black lives. All members of the legal community, including public defenders, have been complicit in where the legal system is today. Defenders have led efforts to challenge racial bias but must continue to commit to embracing anti-racism, eliminating explicit and implicit biases, and advocating to dismantle white supremacy in the legal system. We must examine our own biases and blind spots and create opportunities for others to do the same. As the Supreme Court held in *State v. Berhe*, "racial bias is a common and pervasive evil that causes systemic harm to the administration of justice." As defenders, we must face those biases and declare that enough is enough. Change is long past due.

This call is collective and individual. Public defense must recognize the role it plays in perpetuating a system of injustice but also embrace its ability to provide the leadership necessary to make change, not only in this moment but also in establishing sustained and meaningful progress toward equality and humanity.

From: Holland, Brooks <hollandb@gonzaga.edu>
Sent: Wednesday, October 7, 2020 2:19 PM
To: travis@washapp.org
Cc: Bonnie Sterken <bonnies@wsba.org>; Darlene Neumann <darlenen@wsba.org>
Subject: Referral from WSBA Committee on Professional Ethics

Dear Travis,

Attached please find a draft ethics opinion from the WSBA Committee on Professional Ethics addressing a defense attorney's responsibilities with a client who is or may become involved in commitment proceedings. We are soliciting stakeholder input on this draft opinion prior to referring it to the WSBA Board of Governors, and we are hopeful the Council on Public Defense will share feedback. Please let me know if I can assist the Council in its review, such as by communicating with the Council at a future meeting.

Many thanks, and looking forward to hearing back from you!

Best,
Brooks

BROOKS HOLLAND
J. Donald and Va Lena Scarpelli Curran
Professor of Legal Ethics and Professionalism
Director of Global Legal Education
Gonzaga University School of Law
+1 509-313-6120 | hollandb@gonzaga.edu

DISCUSSION DRAFT
Considerations in representing a criminal defendant who is or may become involved in civil commitment proceedings

A lawyer representing a criminal defendant faces a dilemma if the client fails to appear in court due to civil commitment in a hospital under RCW Ch. 71.05. If the lawyer fails to disclose the commitment, the court may issue a warrant for the client's arrest or take other action detrimental to the client's interests. However, disclosure of the commitment risks violating RPC 1.6. Advisory Opinions 2099 (2005) and 2190 (2009) address a similar issue – whether or how to disclose to the court a concern about the client's competence to stand trial – but they do not address disclosure of a civil commitment proceeding. This opinion reviews ethical considerations presented by that dilemma, which is particularly acute when the lawyer does not learn of the civil commitment in advance of the hearing.

RPC 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Paragraph (b) of the rule describes eight scenarios in which a lawyer may reveal information relating to the representation without the client's informed or implied consent. Of these, subparagraph (b)(6), authorizing disclosure to comply with a court order, is relevant to this discussion.

Although it is important to discuss a client's objectives early in any engagement[1] and to review them periodically during the engagement, it can be particularly helpful to do so when the lawyer anticipates that mental health issues could complicate the client's defense. If the client's condition subsequently deteriorates, it may become difficult for the client to make informed decisions about significant issues or, if the client is hospitalized, it may become difficult to communicate with the client at all.

Early discussions could allow the lawyer and client to discuss the relative importance of confidentiality and liberty under foreseeable scenarios before circumstances become exigent. If the client gives the lawyer express, informed consent to disclose to the court and/or the prosecutor information protected by RPC 1.6, the dilemma may be resolved.

"Informed consent" means the client's "agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the propose course of conduct." RPC 1.0A(e). Although RPC 1.6(a) does not require that informed consent be confirmed in writing, it may be advisable for the lawyer to provide the client a written description of the information that the client has authorized to be disclosed and the circumstances under which disclosure is authorized, together with the information that the client may revoke consent at any time. To avoid misunderstanding, the lawyer may ask the client to sign the authorization and may note that any revocation should be provided in writing. The scope of a disclosure pursuant to informed consent should be limited to the scope of the authorization.[2]

If early discussions do not progress to the point where the client makes a decision to give or refuse informed consent, the discussions may nevertheless progress to the point where the lawyer reasonably believes that the client has impliedly authorized disclosure of information in some circumstances to avoid adverse consequences to the client's liberty. When making a disclosure pursuant to implied authorization, the lawyer

[1] RPC 1.2(a) requires a lawyer to abide by a client's decisions concerning the objectives of the representation and notes that RPC 1.4 requires the lawyer to consult as to the means by which the objectives are to be pursued.

[2] If a client lacks capacity to give informed consent at the outset of an engagement, there may be an issue as to whether the client is competent to stand trial. See Advisory Opinions 2099 and 2190 for guidance regarding disclosure.

should disclose no more information than is reasonably necessary to accomplish the client's objective in preserving personal liberty. See RPC 1.6(b) and Comment [5].

In some cases a court may order a lawyer to reveal information relating to the representation of a client. For example, if an issue has arisen concerning the competence of the client to stand trial, the court may order the lawyer to disclose information protected by RPC 1.6 related to that issue. Subparagraph (b)(6) authorizes a lawyer to disclose otherwise confidential information pursuant to court order. However, the introductory language of paragraph (b) cautions that the lawyer's disclosure should be limited in scope to information that the lawyer reasonably believes is necessary to disclose under the circumstances. Comment [15] provides this guidance regarding court-ordered disclosure: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order." When complying with such an order, the lawyer may consider disclosure to the court in camera or in chambers and a request that the record be sealed.

RPC 1.14 may come into play if the lawyer does not have informed or implied consent and is not subject to a court order. This rule governs representation of a client with diminished capacity. Paragraph (b) authorizes a lawyer to take reasonably necessary protective action "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."

A client who is at risk of being arrested and jailed for failing to appear in court might conceivably face substantial physical harm in some circumstances. For example, mental health issues can sometimes cause an encounter with law enforcement to escalate quickly and unexpectedly, and confinement in jail during a pandemic can create increased risk of infection. In addition, a client who accumulates a series of arrest warrants has an increased risk of adverse rulings in court. The comments to RPC 1.14 do not discuss what types of harm might qualify as "other harm," meaning harm not considered physical or financial that could nevertheless merit protective action. Advisory Opinion 2190 observes: "Because [of] the broad language of [RPC 1.14(b)], it would not be unreasonable to assume that 'other harm' did constitute harm to a client's constitutionally protected interest [in being competent to stand trial]." The same observation applies regarding a criminal defendant's liberty interest.

Comment [6] provides guidance for making a determination whether the client has diminished capacity. If the lawyer concludes that the other requirements of RPC 1.14(b) are also satisfied, the next question is whether disclosure to the court is "reasonably necessary protective action." Although such disclosure is not listed among the examples in Comment [5], the comment states: "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known [and] the client's best interests . . ." Discussion about the client's objectives early in the engagement may provide a basis for concluding that disclosure to the court is an appropriate protective action under RPC 1.14. Comment [8] states: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary."

If the lawyer discloses information to the court, whether pursuant to RPC 1.6(a), RPC 1.6(b)(6) or RPC 1.14, the lawyer must comply with RPC 3.3 governing candor toward the tribunal.

It is a separate question whether disclosure of the information that a client is in civil commitment may be prohibited by statute. The Committee does not opine on questions of law.