



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:

February 7, 2020 | 12:00pm to 2:30pm

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

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

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

3 min	Welcome and Roll Call	Daryl Rodrigues	Discussion	
2 min	January Meeting Minutes	Daryl Rodrigues	Action	pgs. 3-5
15 min	Proposed Changes to Standards in Death Penalty Related Court Rules <ul style="list-style-type: none">• CrR 3.1• CrRLJ 3.1• JuCR 9.2	Travis Stearns	Action	pg. 6
45 min	Not Guilty by Reason of Insanity Court Access	Darrin Hall Patient Ombudsman for DSHS	Discussion	
10 min	Washington Defender Association Report	Christie Hedman	Discussion	
10 min	Proposed Rule re: Expert Compensation	Christie Hedman	Action	pgs. 7-11
10 min	Office of Public Defense Report	Joanne Moore	Discussion	
30 min	Advisory Opinion re: Conflict Checks and Case Load Standards	Starck Follis and Maialisa Vanyo Whatcom County Public Defenders	Discussion	
15 min	Committee Priority Setting	Travis Stearns	Discussion	
10 min	Announcements	Everyone		

Next meeting will be on Friday, March 27, 2020 from 12:00 to 2:30 p.m.

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

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

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

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



Washington State Bar Association

COUNCIL ON PUBLIC DEFENSE

JANUARY 24, 2020, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA
MINUTES

CPD members in person: Daryl Rodrigues (Chair), Travis Stearns (Vice-Chair), Louis Frantz, Joanne Moore, Justin Bingham, Jason Bragg, Kathy Kyle, Jaime Hawk

CPD voting members on the phone: Judge Patricia Fassett, Christie Hedman, Matt Anderson, Judge Drew Henke, Nick Allen, Abraham Ritter, Colin Fieman, Kim Ambrose, Justice Sheryl Gordon McCloud

CPD non-voting members: Bob Boruchowitz, Ann Christian

WSBA Staff: Diana Singleton, Carolyn MacGregor

Guests: Sophia Byrd McSherry, Barbara Harris, Jason Schwartz, George Yeannakis, Maya Ramakrishnan

Absent: Commissioner Randy Johnson, Rebecca Stith, Natalie Walton-Anderson, Eric Hsu, Deborah Ahrens, Rachel Cortez, Eileen Farley

November Meeting Minutes: Justin moved to approve the minutes. Louis seconded. No nays or abstentions. Motion passed.

Office of Public Defense Report: Joanne introduced Barbara Harris as new to OPD, serving as Disproportionality Legal Training Coordinator. Barbara has an extraordinary background for this position and is helping to launch all the initiatives affecting indigent individuals.

Washington Defender Association Report: Skipped.

Proposed Changes to Standards in Death Penalty-Related Court Rules (CrR3.1, CrRLJ 3.1, JuCR 9.2): Travis referred to proposals to remove all references to death penalty in these court rules, which all affect indigent defense standards. Travis is concerned that the death penalty could be reinstituted, so asked for a discussion. Comments close in April. Justice Gordon McCloud feels able to join in discussion. She is concerned with removing these references as well and sees the standards as protective; many agreed that it would be difficult to reinstate references once removed. Bob worked on and is proud of rules in question and is very concerned, as they led to removal of the death penalty and Gregory. Frantz says only if legislature removes the death penalty, would removing the references be okay. Travis will draft comments in the next few days, and the required supermajority vote on submitting them will be held at Feb. 7 meeting. At least 17 members must participate in some portion of discussion and vote in order to submit.

Travis said that indigent appellate guidelines were approved by the WSBA Board of Governors with two edits to remove the words "zealous" and "courage and devotion" from the first section. Travis asked if there was any concern from CPD on these edits. No one objected so Travis confirmed he would move forward with working with the WSBA to submit the guidelines to the Supreme Court.

Recommendations from OPD Report on Standards Implementation: Sophia has collected comments. There is consensus to amend the certification form, requiring attorneys to be certified in every court they practice in. There is agreement to change “should” to “shall” with regard to caseload limits. The question of creating an enforcement mechanism came up—perhaps add a new paragraph stating that courts shall require attys. to certify compliance with applicable standards. Also question of which entity should do enforcing? Travis wants the end user to have an entity that would help clients to determine if they are appropriately represented. Bob suggested that for those with mixed practices it’s important to make sure that the percentage of time the public defense attorney spends matches the number of cases assigned. Travis is concerned that anything put in comments section of certification form will not be read. Bob says to indicate at top of form that this applies to all public defense. Travis notes the goal is making it as easy as possible to ensure compliance.

There was discussion of how to enforce without creating undue fear and worry for those in the position of taking on these jobs without sufficient resources. Can focus be on persuasion and encouragement? Joanne suggested adding the term “in good faith” to the form. Bob suggested the sentence: “timely and truly file a certificate of compliance in conformance with the form,” which could address folks not filing or lying on forms. Daryl said that there’s no entity to help those working within larger agencies with compliance.

Sophia noted that forms are submitted one quarter per year with applications for grant funding and reviewed for anything concerning. Travis noted that OPD is not an enforcement agency but still has influence. Bob asked if OPD can share information of concern with CPD to follow up on, if communities are used to certain practices. Travis suggests carrot approach with offering more funding.

Sophia’s committee will discuss further and present two options for another discussion. She will also will draft comments re certification issues.

Independence Committee Report: Sophia said that comments were generally favorable to Standards 18 and 19 re public defense contracts. There was discussion as to whether a judicial member should be involved, even if not controlling the process—that it’s helpful to hear judges’ views but it should not be part of decision making. Judge Fassett pointed to comment from Judge Hancock regarding a conflict with constitution. Bob doesn’t think this precludes the Perala case and is aware of a judge misusing appointments. Ann suggests that there be more discussion with the Independence committee around Judge Hancock’s concerns.

Standards Committee Report re Persistent Offenders: Bob said that the committee asked for a lot of input from practitioners around state regarding 7.1. He would like CPD to vote on March 27 and asked for questions from council members in advance to help expedite the vote during the meeting. Kim asked if there are other areas to address now as well, such as cooperation post-conviction. Bob said that the next priority after persistent offender is re-examining misdemeanor standards. Travis asked Bob to recruit someone with experience in misdemeanor court to join the committee.

Legislative Agendas: Christie reported that this is a short 60-day session and they are working fast and furious. There is more positive legislation this year due to being an election bill. Hard-on-crime bills are not likely to move. Rep. Irwin agreed to sponsor and a county bill to have the state take over public defense completely and is committed to work on it further and reintroduce in place of his current bill. Christie is looking at language and funding (possibly WA State Institute for Public Policy) by early next week and would welcome CPD comments. WDA does not take position on what the model should look like as long as there is appropriate accountability—50% state and 50% local keeps both sides honest and provides flexibility at the local level. A workgroup with a

model similar to CPD will convene in March and present recommendations in Sept. 2021. Sophia said that OPD would want to be part of the task force.

Others legislative items:

- Christie also shared about a bill re indigent defense funding would expand the number of people who can be with their children and get early release. Prosecutors are neutral on it. Hoping the bill will move but may need to start over next year.
- Three strikes bill—if it's removed, would be retroactive, but it's not clear whether it's likely to go through.
- Bill 2231 is expected to be voted out of committee next Thursday. The standard ranges are greater than that of original charges.
- Regarding sexual violence cases, they are trying to get more folks out into the community. Bills in the past have been costly and restrictive to clients. There are changes that the AG and others all agree on in favor of more releases and safe housing in the community.
- Death penalty bill is expected to take three hours of floor time, so it's not a priority this session with so many other bills active.
- Bill 2277 is trying to end juvenile solitary confinement. There are many bills sponsored by this one legislator, so it's not clear which will have enough votes to get through the House.
- Bill 1814 re Involuntary Treatment Act would extend allowable time period to detain someone from 72 hours to 5 days. Jaime noted that the additional time is not necessary and detrimental to clients.
- Jaime spoke about the bill on voting rights restoration. She said there was a great hearing, but Senator Kuderer wants to delay implementation for a year. There is a lot of Republican pushback, asking for carve outs. This bill would restore voting rights as soon as a person is let out of custody.
- Sophia spoke about Bill 6215, sponsored by Senator Braun, which would amend indigent statute to require DSHS to establish whether someone is receiving public assistance to determine whether they would get public defense. An electronic verification system already exists.
- Jason Bragg has been really active in child welfare reform and commented on Bill 5533 regarding a certificate of parental improvement which is critical for parents seeking restoration. A finding of abuse and neglect can stick forever.

CPD Committee Engagement Survey: Travis is waiting for approval on survey so he can circulate soon. He is hoping for thoughtfulness in responses for improving council.

Announcements: There is a conflict with April meeting, so it was decided that March 27 will be a full council meeting at WSBA and that committees would meet in April sometime during the week of April 20. Committee chairs will send out information about planning the committee meetings.

Bob mentioned his upcoming conference: [The Defender Initiative 10th Annual Conference on Public Defense](#), on Feb. 28, focusing on race.

Meeting adjourned at 2:37 pm.

Comment on an amendment to the Indigent Defense Standards to remove references to capital defense by the Council on Public Defense

Until the death penalty is no longer statutorily permitted, the Council on Public Defense believes the Indigent Defense Standards should not be amended to remove the requirements to be a capital defender.¹ Should the death penalty ever be reinstated, the training, experience, and caseload requirements for lawyers who handle capital cases are essential. Because there is no guarantee the legislature will not find a way to reinstitute the death penalty, the standards for those representing persons charged with capital offenses must remain intact.

State v. Gregory was not the first time the Supreme Court found the death penalty unconstitutional.² The past three times the Supreme Court struck the death penalty, the legislature revived it. While it seems unlikely that this will happen again, it cannot be dismissed as impossible until the statute is no longer part of Washington's laws.

Until that time, the standards and guidelines for capital defenders must remain part of the indigent defense standards. These standards enabled all persons charged with capital offenses to be sure they would receive adequate legal representation. Removing those protections from the standards before the death penalty is abolished is premature.

The Council on Public Defense recognizes Justice Fairhurst's intention in removing references to the death penalty from the rules is well-meaning. It is certainly the hope of the Council that no future public defender will be called on to represent a person accused of a capital offense. But until the legislature strikes the statute, the standards for capital representation should remain intact.

¹ RCW 10.95 authorizes capital punishment for aggravated first degree murder.

² *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981); *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979); *State v. Baker*, 81 Wn.2d 281, 501 P.2d 284 (1972).



October 14, 2019

The Honorable Charles Johnson, Chair
Supreme Court Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929
VIA U.S. MAIL AND EMAIL

Re: Suggested Changes to Superior Court Criminal Rule 3.1(f), Criminal Rule for Courts of Limited Jurisdiction 3.1(f) and Juvenile Court Rule 9.3(a)

Dear Justice Johnson:

The Washington Defender Association (WDA) is submitting for the Washington Supreme Court's consideration the enclosed suggested changes to CrR 3.1(f), CrRLJ 3.1(f) and JuCR 9.3(a). These suggested changes mirror those we proposed in our March 2019 comment on our October 2018 rule proposal. We greatly appreciate the Court's willingness to reconsider our suggestions.

Under CrR 3.1(f) and CrRLJ 3.1(f) as currently written, a defense attorney "may" request expert funds *ex parte*. We suggest substituting the word "may" with "shall." We seek similar changes to JuCR 9.3(a). Under that rule, an attorney who represents a juvenile client may request expert funding, but the rule does not currently specify that the attorney may do so *ex parte*. We suggest language that would clarify that juvenile defenders shall ask for expert funds *ex parte* and that, as in superior courts and courts of limited jurisdiction, juvenile courts may seal those requests upon a showing of good cause.

We are available to answer any questions. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Magda Baker', with a long horizontal flourish extending to the right.

Magda Baker, Misdemeanor Resource Attorney

Enclosures
cc: Shannon Hinchcliffe, AOC

1 **GR 9 Cover Sheet**

2

3 **Suggested Changes to CrR 3.1, CrRLJ 3.1 and JuCR 9.3**

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5 **(A) Name of Proponent:** Washington Defender Association

6 **(B) Spokesperson:** Magda Baker, Misdemeanor Resource Attorney, Washington Defender
7 Association

8 **(C) Purpose:** The Washington Defender Association (WDA) suggests changes to CrR 3.1(f),
9 CrRLJ 3.1(f) and JuCR 9.3(a) that would ensure that criminal defense attorneys who
10 request funds for experts on behalf of indigent clients in superior courts, courts of limited
11 jurisdiction and juvenile courts do so *ex parte*. WDA has heard from defenders who have
12 requested expert funds *ex parte* only to have judges invite prosecutors to weigh in on
13 their requests, which allows opposing counsel a preview of the defense's trial strategy.
14 The changes we propose would eliminate that practice and any chilling effect it may have
15 on defenders considering requests for expert funds. Such changes would also lead to a
16 more uniform administration of justice throughout the state, since currently some judges
17 seek prosecutorial input on defense requests for expert funding while others do not.
18 Finally, the changes would promote a more level playing field for defenders and
19 prosecutors, since prosecutors can often consult with law enforcement employees as
20 experts or get expert funding from their offices without court approval.

21 **(D) Hearing:** None recommended.

22 **(E) Expedited Consideration:** Expedited consideration is not requested.

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1 *[Suggested changes to CrR 3.1(f)]*

2 **CrR 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER**

3 **(a) – (e)** *[unchanged]*

4 **(f) Services Other Than Lawyer.**

5 (1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other
6 services necessary to an adequate defense in the case may request them by a motion to the court.

7 (2) Upon finding that the services are necessary and that the defendant is financially unable to
8 obtain them, the court, or a person or agency to whom the administration of the program may
9 have been delegated by local court rule, shall authorize the services. The motion ~~may~~ shall be
10 made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by
11 the court, and shall remain sealed until further order of the court. The court, in the interest of
12 justice and on a finding that timely procurement of necessary services could not await prior
13 authorization, shall ratify such services after they have been obtained.

14 (3) Reasonable compensation for the services shall be determined and payment directed to the
15 organization or person who rendered them upon the filing of a claim for compensation supported
16 by affidavit specifying the time expended and the services and expenses incurred on behalf of the
17 defendant, and the compensation received in the same case or for the same services from any
18 other source.

1 *[Suggested changes to CrRLJ 3.1(f)]*

2 **CrRLJ 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER**

3 **(a) – (e)** *[unchanged]*

4 **(f) Services Other Than Lawyer.**

5 (1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other
6 services necessary to an adequate defense in the case may request them by a motion to the court.

7 (2) Upon finding that the services are necessary and that the defendant is financially unable to
8 obtain them, the court, or a person or agency to whom the administration of the program may
9 have been delegated by local court rule, shall authorize the services. The motion ~~may~~ shall be
10 made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by
11 the court, and shall remain sealed until further order of the court. The court, in the interest of
12 justice and on a finding that timely procurement of necessary services could not await prior
13 authorization, shall ratify such services after they have been obtained.

14 (3) Reasonable compensation for the services shall be determined and payment directed to the
15 organization or person who rendered them upon the filing of a claim for compensation supported
16 by affidavit specifying the time expended and the services and expenses incurred on behalf of the
17 defendant, and the compensation received in the same case or for the same services from any
18 other source.

2 **JuCR 9.3 RIGHT TO APPOINTMENT OF EXPERTS IN JUVENILE OFFENSE**
3 **PROCEEDINGS AND ASSIGNMENT OF LAWYER**

4 **(a) Appointment.** A juvenile who is financially unable to obtain investigative, expert, or other
5 services necessary to an adequate defense may request that these services be provided at public
6 expense by a motion. The motion shall be made *ex parte* and, upon a showing of good cause, the
7 moving papers may be ordered sealed by the court and shall remain sealed until further order of
8 the court. Upon finding that the services are necessary and that the juvenile is financially unable
9 to obtain them without substantial hardship to himself or herself or the juvenile's family, the
10 court shall authorize counsel to obtain the services on the behalf of the juvenile. The ability to
11 pay part of the cost of the services shall not preclude the provision of those services by the court.
12 A juvenile shall not be deprived of necessary services because a parent, guardian, or custodian
13 refuses to pay for those services. The court, in the interest of justice and on a finding that timely
14 procurement of necessary services could not await prior authorization, may ratify services after
15 they have been obtained.

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17 **(b)** *[unchanged]*
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