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Washington State Bar Association

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COUNCIL ON PUBLIC DEFENSE

FEBRUARY 7, 2020, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA  
MINUTES

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**CPD members in person:** Daryl Rodrigues (Chair), Travis Stearns (Vice-Chair), Louis Frantz, Justin Bingham, Jason Bragg, Kathy Kyle, Jaime Hawk, Eric Hsu, Judge Drew Henke

**CPD voting members on the phone:** Judge Patricia Fassett (abstaining), Christie Hedman, Nick Allen, Abraham Ritter, Justice Sheryl Gordon McCloud, Joanne Moore, Commissioner Randy Johnson, Rachel Cortez, Deborah Ahrens, Matt Anderson

**CPD non-voting members:** Ann Christian

**WSBA Staff:** Diana Singleton, Carolyn MacGregor

**Guests:** Sophia Byrd McSherry, Jason Schwartz, George Yeannakis, Darrin Hall, Starck Follis, Maialisa Vanyo. Kyle Berti, Maya Ramakrishnan

**Absent:** Rebecca Stith, Natalie Walton-Anderson, Eileen Farley, Kim Ambrose, Bob Boruchowitz, Colin Fieman

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

**Proposed Changes to Standards in Death Penalty-Related Court Rules (CrR3.1, CrRLJ 3.1, JuCR 9.2):** Travis introduced the issue up for a vote: Justice Fairhurst proposed changes to court rules striking references to the death penalty. Particularly of concern are those that refer to caseloads including death penalty cases. Travis believes that the rules and standards should include what would be considered qualified representation in these cases. He proposed submitting a comment on the rule that he believes falls under CPD's purview. The vote before the Council is whether to adopt the comment.

George offered that the statute on the books is unconstitutional. Senate just passed a bill, which is heading back to the House, to eliminate the death penalty statute. These removals would go along with the bill. He is concerned that if the references are left in it would be easier to reinstate the rule and asked if the Board can wait until the legislative session is over, in case the DP statute is removed. Travis is concerned about timing; comments are due April 30, but a CPD comment needs to go in front of the BOG first. There was agreement to not submit a comment if the statute changes, or add a note to make clear that there is no need for DP-qualified lawyers if there is no Death Penalty. Joanne mentioned that the statute is unconstitutional due to way it was written, as opposed to the penalty itself (referencing Times editorial); she is in favor of adding a comment regarding the possible legislature decision. CPD could then withdraw comment before April if no longer relevant.

Diana suggested moving forward with getting onto the BOG agenda. Kathy moves to adopt the comment with proposed addendum relative to passage of the statute.

**Death Penalty 2-part vote: 1. Does the comment fall into one or more of CPD's 11 issues, within the scope of the charter? 2. Should comment with added note/clarification be sent to the BOG for review? Vote was unanimously yes for both questions.**

**Part One**

**Part Two**

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

**Not Guilty by Reason of Insanity Court Access:** Darrin Hall, Patient Ombudsman for DSHS, came to ask for support for NGRI patients trying to get representation in order to transition out of the state hospitals (treatment levels 4-6).

Darrin said that all NGRI patients are considered indigent and entitled to counsel. Court orders are needed for patients to access levels 4-6 of treatment, in which they receive greater privileges which no do involve a security presence (unescorted rounds, integration into the community, discharge). The greatest obstacle is finding representation to get before the court. Darrin has been traveling around the state educating practitioners about

responsibilities in post-adjudication process. He often sends a request to all possible parties trying to get someone to pay attention. When they don't have appointed counsel, no way to get before court and get a motion heard. Daryl asked why not file a motion for appointment. Could CPD help streamline the process?

Darrin pointed to the significance of gaining liberties within treatment. At level 4, the patient has reached maximum treatment capacity within hospital walls. Liberties are PART of treatment to reintegrate but there is extreme difficulty advancing folks through once reaching court-dependent levels. One patient waited 2 ½ years for counsel. On any given day, 210 NGRI patients are housed among the three state hospitals. There is still a need for counsel even once out in community. With NGRI patients, the goal is NOT confinement—they should be moved through confinement as soon as possible. With each delay comes a clinical treatment problem. Advocacy is required to get heard. Darrin believes that lawyers mostly don't know the situation, rather than showing willful disregard. The difficulty is figuring out to get attorneys appointed and paid. He has talked to the BOG president about this as well. He is interested in helping CPD draft rules and/or standards.

Daryl asked who pays defense costs. Darrin said that most counties have NGRI patients and the county of origin retains jurisdiction. Daryl compared to RCW 71.09 (sexual predators) where clients are supposed to be appointed counsel who specialize. Daryl also suggested creating lists of local practitioners.

Darrin spoke to this as a systemic issue. When an NGRI client doesn't get what they want, they blame their social workers and treatment team, who are helpless in the situation, and this does not advance the course of treatment.

Travis noted that CPD can't go to the legislature but could help draft standards.

Jason Schwartz mentioned that he's had cases before that were handed off numerous times. Those cases should go to appointing agency so that a letter doesn't go into a void. Darrin said that it can be difficult to locate the assigned lawyer after long passage of time. He sends the letter to the court, prosecutor, appointing agency, and court clerk. Louis said that the appointing authority needs to be worked with.

There was discussion regarding creating standards for what a caseload should be, and how much work. Daryl said guidelines would be helpful because there will be mixed load cases. These are vulnerable clients. Who is watching over follow up? The long complicated sentencing structure with numerous stages seems similar to that in juvenile cases. Should representation continue into post-adjudication stage?

Travis suggesting sticking to clients not getting representation. Jason Schwartz is wanting to talk with Darrin and mentioned 71.05 similarity. Christie offered to help as well. All agreed to start addressing this issue with a small workgroup.

**Washington Defender Association Report:** Christie Hedman reminded everyone of Bob Boruchowitz's upcoming Defender Initiative Conference, which she is pleased to co-sponsor. The WDA conference is at the end of April. They are holding a leadership training just ahead of the conference, and hoping for at least 65 attendees.

**Legislative activities: language, budget proviso. Hope it will move forward.** (Carolyn – I had a lot of difficulty hearing her)

**Proposed Rule re: Expert Compensation:** Christie spoke on behalf of Magda and Hillary at WDA who would like support for comment on proposed changes to CR3.1F. Request for expert funds not being treated in ex parte

manner. Defense attorney may request expert funds. Changes to CR 3.1F. Travis asked if that would make it not possible to ask for expert funding that is non ex parte? Christie said that has been discussed and it was decided that in the balance it would be better to be required, but is certainly an issue. Eric thought to include "it shall be made and reviewed by the Court as ex parte," hoping that language will clearly state this if the court delegates by local rule. Sophia asked if it would get in the way of processes currently working well, such as experts funded through an agency. Could you go to court if an agency is denying funds? Daryl asked if this was a fair reading of the issue. The question of "may" and "shall" in the 2<sup>nd</sup> paragraph were found to be confusing.

Christie said that they are not trying to interfere with existing processes, but she has only been involved at a high level, so she will take these concerns back to Magda and Hillary. The vote was postponed to the next meeting.

**Office of Public Defense Report:** Sophia reported that regional CLEs are scheduled for March 27 (Yakima) and March 13 (Moses Lake).

Regarding Senate Bill 6215 and the DSHS online screening tool, it was amended to be more neutral, such that courts *may* use it and share information about its availability.

7109, less restrictive alternatives are dead.

OPD will offer its 2<sup>nd</sup> summer criminal defense training academy in Spokane, as well as a Juvenile track at the WDA conference in which they'll work through one hypothetical case.

**Advisory Opinion re: Conflict Checks and Case Load Standards:** Starck Follis and Maialisa Vanyo visited from the Whatcom County Public Defender Office. Starck is in his 3<sup>rd</sup> year as director of the office, and has realized that none of the counties treat conflict cases the same, and this is problematic when trying to determine funding needed. Most offices have fewer conflict cases and don't accept co-defendant cases, although it's not prohibited, just inadvisable.

He's not sure if CPD can help. He went to WSBA Ethics for some guidance and Jeanne Cleveare suggested CPD offer an opinion re: position on whether agencies should handle co-defendants (public defender agencies in WA), Starck doesn't feel he should be deciding about co-defendant cases. The question is whether potential representation of one defendant will limit representation of the other, and if in accepting co-defendant cases, the office will need more lawyers.

Travis –said that CPD guidelines don't have anything that speak to this issue.

Joanne and OPD have not been able to figure this out either. Daryl wants to put it before the Guidelines committee, and possibly address before misdemeanors. He will speak with Bob.

To take before the WSBA Ethics Council, these criteria must apply: wide ranging application, the issue is largely unresolved, and no other body could provide the answer.

Travis says would like to discuss it as group and return in March with a response. The issue was moved to the Guidelines committee and Starck will be invited to participate by phone. Ask Patrick O'Connor to attend. Kathy Kyle was interested, along with Eric Hsu. Cassie Trueblood was mentioned as well.

**CPD Committee Priority Setting:** Travis began a discussion about reviewing priority setting after the change in membership structure that brought in a number of new members. He'd like to hear about what the group would like to be and what would be most useful.

Travis read through some of the responses (12 total) to his subcommittee interest survey. Members agree that the funding and quality of the public defense system needs to get better. The chairs will keep bringing issues to the council, for example, rural public defense in March. Committee interest: 37% public defense, 37% standards and guidelines. 12.5% LFO and reentry (they may separate these two topics). 12.5% in pre-trial reform. They are also open to creating special subcommittees and would like to know what they can do better to make the experience more engaging?

Joanne noted that it's difficult for her to attend in person, and a discussion about meeting times ensued, considering time and day, and frequency of meetings. Travis said that with the BOG schedule and structure, fewer meetings would make it difficult to accomplish much.

A Friday morning meeting time and occasional meetings outside of Seattle, possibly in a rural locale, were suggested. Diana said deciding on that soon would be helpful so she could request the additional travel expense in the budget. Daryl said she should go ahead with that.

There was a question as to whether committees should be institutional or more ad hoc, and Justin said that task-based could be more valuable/effective. A focus on rural issues was also suggested. Diana mentioned that WSBA is currently looking at the issue of legal deserts in rural areas, and they could include CPD's perspective. Dependency law was also mentioned, in connection with Jason's expertise.

The last topic mentioned was the role of race in cases and how many folks working in PD offices do not look like the clients. The possibility of creating guidelines for training on race was mentioned. Daryl offered that social science supports better outcomes when clients placed with providers of like ethnicity.

**Announcements:**

Jaime is asking CPD to comment on CR 3.4 that would allow counsel to submit a waiver. Comment accepted until April 30.

Christie brought up House Bill 2231 re bail jumping and said that action alerts are available to sign onto. Proposed change gives the defendant 30 days to quash warrant before being charged with felony bail jump. She is hoping that Pettigrew will pull it out of Rules.

Meeting adjourned at 2:23 pm.