



## 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:

**August 7, 2020 | 10:00 am to 11:00 am**

**VIRTUAL MEETING ONLY**

**For video and audio: <https://wsba.zoom.us/j/91816657538?pwd=NVFheHVueG5VaCtKK0hrY05JbGZ5Zz09>**

**Zoom Conference Call Lines: LOCAL OPTION: (253) 215-8782 || TOLL-FREE OPTION: (888) 788-0099**

**Meeting ID: 918 1665 7538 || Password: 128467**

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

3 min	<b>Welcome and Roll Call</b>	Daryl Rodrigues	Discussion	
2 min	<b>July Meeting Minutes</b>	Daryl Rodrigues	Action	pp 2-3
30 min	<b>Covid Guidance for Public Defense Offices</b>	Travis Stearns	Action	pp 4-7
5 min	<b>Announcements</b>	Everyone		

**The Council will meet next on September 11, 2020.**

Reasonable accommodations for people with disabilities will be provided upon request. Please email [bonnies@wsba.org](mailto:bonnies@wsba.org).

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



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Washington State Bar Association

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COUNCIL ON PUBLIC DEFENSE  
JULY 17, 2020, 10:00AM TO 12:00AM VIRTUAL/CONFERENCE CALL MEETING  
MINUTES

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**CPD voting members:** Travis Stearns (Vice-Chair), Louis Frantz, Justice Gordon McCloud, Abraham Ritter, Justin Bingham, Joanne Moore, Kathy Kyle, Nick Allen, Judge Drew Henke, Christie Hedman, Jaime Hawk, Kim Ambrose

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

**WSBA Staff:** Diana Singleton, Bonnie Sterken

**Guests:** Mynor Lopez, Kevin Flannery, Sam Sueoka, Sophia Byrd McSherry, Matt Heintz, Dontay Proctor-Mills, George Yeannakis, Carsen Nies, Eileen Farley

**Absent:** Judge Patricia Fassett, Deborah Ahrens, Jason Bragg, Eric Hsu, Colin Fieman, Commissioner Randy Johnson, Matt Anderson, Daryl Rodrigues (Chair), Rebecca Stith, Rachel Cortez, Natalie Walton-Anderson

**Office of Public Defense Update:** Joanne reported on the status of Davidson v State of WA. She also shared about an OPD training on Antiracism for Appellate Defenders. They are also getting ready for the Criminal Defense Academy, which is a training opportunity for new defenders and will be conducted via zoom.

**Washington Defender Association Update:** Christie reported that they have also switched to zoom trainings. They have a webinar a week scheduled on different topics. Some were repurposed from the defender conference, which was cancelled in April. They are moving forward on a leadership program to provide mentorship and connecting folks and will include a race equity focus. They continue to respond to the COVID world and are seeing defenders on the front line right now. There is movement to reinstitute trials, which is having an impact on jury pools, issues of wearing masks, proximity to communicate with people, limits on technology, and other health concerns. Christie asked if there is a way to get all the different players participating in court functions and other representatives to talk about creating guidelines, making sure funds are being used appropriately, not bringing people into unsafe situations, and how to address these issues as a system. She asked if WSBA or CPD could call together people from across the system to have these conversations.

**Persistent Offender Discussion and Proposal:** Bob reported on the draft persistent offender amendments to the performance guidelines that were in the materials. He shared that he has a small edit to incorporate in the guidelines that were circulated which he will provide via emailed after the meeting. Bob summarized the efforts of the committee. He would like the CPD to adopt the amendments at the next available time. Bob asked for feedback on the process and whether the Court needs to approve the guidelines since they are referenced in the standards. Bob also invited questions. After getting BOG approval, the CPD will send a formal notice to the Court in order to update the standards. Travis recommended that the CPD share the guidelines with other stakeholders for review prior to sending to the BOG. They will circulate the updated guidelines after the CPD votes to approve them first.

**Charter:** Travis announced that the Charter update was approved. Justice Gordon McCloud has been moved to a Core member.

**Opening and Return to Courts:** Travis asked for updates on how courts are approaching the reopening and the pandemic. Judge Henke noted they are doing work by videoconference currently, and they don't anticipate starting trials until the fall. She shared how the process is going. Sophia noted observations where there are disagreement and disconnects between people's understanding of the risks. PPE is not accessible enough. Kathy shared her experience with trials in Snohomish County. She noted a struggle to get everyone to wear masks. Some elements of reopening are working. Matt Heinz shared his perspective in King Co as a line attorney and concerns with safety and a need to readdress procedures that need to be changed. Kevin shared about Yakima, where they are seeing an outbreak. Justin shared about Spokane and noted positive efforts and some limitations. Travis asked if there are needs to reevaluate the standards in the current climate. The CPD discussed possibly drafting a standard regarding emergent situations. Bob will take up this conversation with the standards committee. They also discussed coming out with statements and guidelines that the existing Covid response committees can address. Travis asked to launch a task force on preparing a statement on how public defense should respond to Covid situations. The CPD will aim to have a statement ready for approval at the August meeting. Bob volunteered to lead the effort to draft a statement. The statement will include the health of people and the quality of defense being effected by the pandemic, and ideas on how to address these as emergent issues come up. Addressing the standards will be done on a longer timeframe. Christie, Bob, Nick, Joanne, Travis, Kathy, Jaime, Sheryl, Kevin, and Joanne all volunteered for the effort. Discussed getting together for a long meeting to map out a strategy for the work. They will meet Saturday, July 25.

**Racial Justice Discussion:** Travis opened up the conversation on how racial justice exists in public defense. He noted a need for more intentional diversity on the CPD. The CPD discussed a need for sharing trainings on the topic making diversity a bigger factor on recruitment. Bob noted that SU students are putting together a presentation for the Minority and Justice Commission about reparations. It's something the CPD could get behind. Joanne reported that Barbara Harris is doing a number of webinars on anti-racism in the legal system, and she has put together resources for trial attorneys on the website.

**Committee Structure:** Travis asked for discussions on the current committee structure. Independence is almost done with its work. Standards should remain. Travis asked about structuring into task forces with specific goals (i.e., improving diversity on the Council, addressing issues of race in the guidelines or adopted separately). The CPD will discuss this plan in September in more details. Travis will share suggested priorities for the next year.

The CPD agreed to leave the August meeting on the schedule in case they need a vote. If a vote isn't needed, will consider cancelling the meeting.

The meeting adjourned 11:56

## Advisory Notice by WSBA Council on Public Defense

### Implementation of the Standards for Indigent Defense During the Coronavirus Emergency

- **Coronavirus impact on public defense attorney workloads.**

COVID-19 and the restrictions imposed to limit exposure to the virus have dramatically altered how public defense attorneys can hold confidential meetings with clients, go to court safely, investigate, and prepare cases. Attorneys must ensure that their clients' due process rights are protected, but also must protect their clients, themselves, their staff, and their families from exposure to the novel Coronavirus.

As courts begin to resume hearings and trials, and as prosecutors start to file a backlog of cases, public defense attorneys face an increased volume of cases and an increased complexity in their work. For example, the public defense workload becomes more complicated when attorneys must utilize time-consuming telephone/video conferences for client meetings and court appearances, or when social distancing requirements hamper an attorney-client communication during in-person court activities.

These new conditions require courts and public defense attorneys to pay close attention to the Standards for Indigent Defense adopted by the Washington Supreme Court, which establish minimum requirements for public defense representation. *See* CrR 3.1 Stds, CrRLJ 3.1 Stds, and JuCR 9.2 Stds.

The purpose of this notice is to assist public defense agencies, contract and list appointed attorneys, courts, and local contracting authorities in interpreting and applying the Standards for Indigent Defense during the Coronavirus emergency and ongoing recovery efforts.

- **Applying the standards during the coronavirus emergency and recovery.**

The Standards for Indigent Defense identify numeric caseload limits and require that caseloads must be reduced to accommodate unusual circumstances or increased workload.

Consistent with obligations under these Standards, public defense agencies, courts, and contracting authorities, in consultation with public defense attorneys, should reconsider the number of cases assigned to ensure adequate time to work on each case during this emergency.

- **Reduced caseloads may be necessary to maintain compliance with the standards**

**Standard 3.2** establishes that public defense attorneys may not accept cases beyond their ability to provide quality representation to all of their clients.

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.

**Standard 3.3** limits the number of cases lawyers can handle and recognizes that if there is a “surge” of cases beyond normal expectations or if the cases assigned become more complex, the caseload must be reduced. The standards state that:

Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort.

Caseload limits assume a reasonably even distribution of cases throughout the year.

Reasonably even distribution of cases throughout the year means that lawyers will not be assigned more than 1/12 of their annual maximum caseload in any given month. For felonies, this is 12 cases per month. For misdemeanors, it should be no more than 33 misdemeanor cases per month.

Standard 3.3 also requires that when the public defense workload becomes more difficult or time-consuming due to work circumstances, per-attorney caseloads should be reduced.

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.

- **Attorneys should determine ability to handle caseload**

Each attorney should evaluate and determine their capacity to provide quality representation to all clients within the typical numeric caseload limits. If an attorney determines that they are not able to provide quality representation within

the typical caseload, they should be presumed to be correct, and the caseload should be adjusted.

In 2019, the Washington Supreme Court upheld an appellate public defense attorney's request for a time extension because of a heavy workload:

...where counsel needs an extension of time to fulfill his obligations of representation, it is appropriate to grant an extension without the imposition of sanctions. Recent cases have highlighted the constitutional importance of maintaining proper caseloads in indigent defense cases. *See, e.g., Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013); *State v. A.N.J.*, 168 Wn.2d 91, 102, 225 P.3d 956 (2010).

*State v. Graham*, 194 Wn.2d 965, 970, 454 P.3d 114 (2019).

The Court emphasized the importance of adhering to the Standards:

The Standards for Indigent Defense provide that the caseload of public defenders must allow each lawyer to give each client the time and effort necessary to ensure effective representation.

*Graham*, 194 Wn.2d at 969.

Options to address increased workload may include adjusting case assignments as well as other systemic approaches, presented in the appendix.

Some attorney contracts pay based on each case assigned or pay a flat monthly fee for a specific number of cases. In these situations, as courts resume hearings and trials, the contracted number of cases may exceed a reasonable workload due to increased complexity. Basic contract principles require that when circumstances change significantly, the parties should be open to renegotiation and amendment of contracts

and public defense providers either should be required to accept fewer cases or be compensated additionally so that they can hire more staff.

to adjust case assignments and to address increased workload presented by the Coronavirus.

- **Coronavirus funding and resources should be directed to public defense**

Many local governments are receiving significant emergency funding from federal and state Coronavirus mitigation sources. These emergency resources can and should be used to support public defense services.

For example, CARES Act funding may be used to increase the number of public defense attorneys and staff to address surging workloads, as well as to provide personal protective equipment for public defense attorneys, staff, and clients. Emergency funding may also be used to provide new technology to public defense attorneys, their clients, and jails to facilitate effective participation in court-conducted hearings, permit confidential attorney-client communications and to allow for timely electronic filing of pleadings.

## **Appendix 1**

In considering how to address the emergency, the American Bar Association's *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009) should guide public defense providers, local governments, and the courts.

### **Possible Systemic Options to Address Coronavirus Impacts on Public Defense Workload**

- Contract with additional attorneys to spread out new case assignments more equitably;
- Charge low level, non-violent adult felony offenses as gross misdemeanors (approximately 2.5 gross misdemeanors count as the equivalent as one felony);
- Charge low level, non-violent misdemeanor and gross misdemeanor offenses as infractions, eliminating the requirement of counsel;
- Increase the use of pre-filing diversion for adult criminal and juvenile offender cases;
- Prosecutorial review of cases filed by law enforcement officers, to minimize the number of cases that might otherwise result in early dismissal;
- Continue to minimize the number of in-custody defendants, to reduce the number of speedy trial demands;
- Reduce the issuance of warrants for failures to appear, and allow defendants and youth to appear for hearings remotely;
- Explore opportunities for reducing show cause and probation review cases, reserving those hearings for the most serious allegations;
- Encourage courts to accept ex parte orders with electronic signatures in all non-testimonial matters
- If the court has not initiated remote hearings, begin doing so to reduce the backlog; and
- If the indigent defense attorneys currently have uncharacteristically low open caseloads, negotiate temporary, reasonable, agreed-upon increases to new assignments in the early months of court re-opening that do exceed a typical open caseload and otherwise comply with the Standards.