



## WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

February 18, 2022 | 9:30am – 12:00pm

VIRTUAL MEETING ONLY

For video and audio: <https://wsba.zoom.us/j/82386036539?pwd=c3pkc0ZhRlFUSWcyMmpjZTJ3SnNGdz09>

For audio only: LOCAL OPTION: (253) 215-8782 || TOLL-FREE OPTION: (888) 788-0099

Meeting ID: 823 8603 6539 || Passcode: 998804

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 Introductions</b>	Jason Schwarz, Travis Stearns	Discussion	
2 min	<b>January Meeting Minutes</b>	Jason Schwarz, Travis Stearns	Action	<i>pp 2-3</i>
45 min	<b>Oregon Project Report</b>	Malia Brink	Discussion	<a href="#">See Report Here</a>
10 min	<b>Office of Public Defense Report</b>	Larry Jefferson and Sophia Byrd McSherry	Discussion	
10 min	<b>Washington Defender Association Report</b>	Christie Hedman	Discussion	
5 min	<b>CrRLJ 3.3 and 3.4 Rules Comment Updated</b>	Jason Schwarz	Discussion	<i>pp 5-10</i>
10 min	<b>WSBA Equity &amp; Disparity Workgroup</b>	Rebecca Stith	Discussion	
15 min	<b>Standards Committee Update</b>	Bob Boruchowitz	Discussion	
10 min	<b>Recruitment Updates</b>	Jason Schwarz, Travis Stearns	Discussion	
5 min	<b>Announcements</b>	Everyone	Discussion	

**The next regular CPD meeting will be March 25, 2022.**

Find Council on Public Defense guiding documents and initiatives online at <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/council-public-defense>.

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



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Washington State Bar Association

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COUNCIL ON PUBLIC DEFENSE  
JANUARY 28, 2022, 1:00PM TO 3:30PM VIRTUAL/VIDEOCONFERENCE  
MINUTES

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**CPD voting members:** Travis Stearns (Chair), Jason Schwarz (Vice-Chair), Larry Jefferson, Louis Frantz, Justice Sheryl Gordon McCloud, Kathy Kyle, Paul Holland, Abe Ritter, Anita Khandelwal, Christie Hedman, Judge Drew Henke, Rachel Cortez, Jonathan Nomamiukor, Rebecca Stith, Leandra Craft, Chris Swaby

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

**WSBA Staff:** Bonnie Sterken

**Guests:** Sapida Barmaki, Lindsey Townsend, Sophia Byrd McSherry, Katrin Johnson, Shoshana Kehoe, Liz Mustin, George Yeannakis, Andrea Jarmon, Jaime Hawk, Magda Baker

**Absent:** Brenda Williams, Judge Patricia Fassett, Jason Bragg, Matt Heintz, Matt Anderson, Arian Noma, Mohammad Hamoudi, Bob Boruchowitz

**Minutes:** The December minutes were approved without edits.

**Office of Public Defense Report:** Larry Jefferson reported that they are focused on the legislative session at OPD. They have been working with colleagues at OCLA and have been coordinating conversations regarding Blake. They have been able to address conflicts that have come out of the Blake related SB 5663. There are still some issues that need to be addressed. They are also tracking SB 5772 regarding post-conviction. There was no opposition during the testimony and the bill has passed out of committee. Larry addressed questions.

Larry also reported that are backlogs in courts and they are having discussions about other restorative justice processes to learn from. Larry asked folks to share with him if they are aware of restorative justice programs. They might have funds to contribute through grants. Larry noted continuing concerns over caseloads and the stress of Covid.

**Washington Defender Association Report:** Christie Hedman reported that WDA will not be holding their defender conference this year in person and are holding a virtual event in April. They are considering an in person event later in the year if possible. The post-conviction project is getting a later start and they are beginning the hiring process and finalizing the contract. They have also been tracking on the Blake related SB 5663 and participating in those discussions. They are trying to build a bill that addresses the concerns that folks have. Christie shared that the SB 5772 regarding post-conviction is exciting and is moving forward. WDA is again supporting OPD funding. Christie shared about the sentencing reform HB 1169 dealing with enhancements and is moving forward. HB 1413 deals with juvenile points and is still moving but there are politics with it. Police accountability bills are moving,

and WDA is collaborating with other group like the ACLU. HB 1507 regarding an independent prosecutors office is not moving forward. Christie addressed questions and the Council had a discussion about ongoing bills.

**Youth Consultation Program:** Liz Mustin reported that this new program started on January 1, 2022. The program is the implementation of HB 1140, which created requirements that police ensure that youth contact an attorney any time they are questioned. Liz provided an overview of the history and implementation of the new law. The right to counsel is critical to young people to be protected from coercion, etc. California is the only other state with a law like this and is not as strong as Washington's. Some other states are considering a version of this legislation. OPD is the body charged with creating a statewide program to make sure these consultations can occur. They had an extension process to determine how to establish the program and the metrics they are tracking. Liz addressed questions.

**Draft Comments to Proposed Amendments to CrRLJ 3.3 and 3.4:** Jason Schwarz shared the proposed changes that were submitted by the DMCJA. There was a change to this rule last year as well that was helpful. This new proposal would change the rule again. A draft comment was circulated to the Council. Some concerns that were included the possibility of increased bench warrants and creating ethical problems for attorneys. The Council had a conversation about the drafted comment in the materials. Jason moved that the Council support a simplified version of the draft letter while maintaining all the points that are already in the original draft. Kathy Kyle seconded the motion. The Council had a conversation. The Council collected a supermajority vote confirming that the comment is permissible within GR 12. The vote on the substance of the comment did not pass with two judicial abstentions, two no, the remaining yes. The Council continued to discuss the scope of the comment. Jason moved to submit a narrower comment that only focuses on the ethical violation of not becoming a witness against one's own client. This second motion passed with a supermajority, including two judicial abstentions and 15 in favor.

**Standards Committee Report:** Travis Stearns shared that the workloads statement was approved by the Board of Governors. The Council discussed the need to spread the word on the statement in the community.

**Race Equity Committee:** Abe Ritter reported that we have received 15 out of 23 responses on the Committee's survey that was sent on the listserv. Abe and Rebecca are not privy to results of the specific results of the survey. They can report that 15 out of 15 did say they want trainings and are willing to stay engaged. They have met with Barbara Harris to discuss next steps, who will be developing a training in the spring or summer. Barbara is working with Barbara Nahouraii at WSBA to discuss training opportunities. The training will be focused on action-oriented goals. He also noted that recruitment for the CPD will be beginning soon.

Travis noted that there are number of reappointments and new seats to be filled this year. The Council had a conversation about recruitment for this year, including increasing diversity and bringing in community voices. They discussed that the Council might need to change its cadence of how it works to be inclusive and pay people for their time.

**Meeting Schedule:** Travis noted that there are still scheduling conflicts with the March, May and July meetings. It is likely that we will move the March date to the afternoon and will confirm soon.

The meeting adjourned at 3:10pm

DRAFT

**IMPORTANT:**  
Please refer to the  
**BOG Action Item Guide**  
when completing this template.

**TO:** WSBA Board of Governors Legislative and Court Rule Committee  
**CC:** Terra Nevitt, Executive Director  
**FROM:** Travis Stearns, Chair, and Jason Schwarz, Vice-Chair, Council on Public Defense  
**DATE:** January 31, 2022  
**RE:** Council on Public Defense Comments to Proposed Amendments to CrRLJ 3.3 and 3.4

**ACTION:** Approve submitting the attached comments to the proposed amendments to CrRLJ 3.3 and 3.4

The Districted and Municipal Courts Judges Association (DMCJA) has submitted proposed changes to CrRLJ 3.3 and 3.4 regarding time for trial and the presence of the defendant. After extensive deliberation, the Council on Public Defense (CPD) drafted the attached comment to these amendments raising concerns regarding conflicts with applicable Rules of Professional Conduct.

On January 28, 2022, a supermajority of the Council on Public Defense voted that commenting on the proposed amendments is allowable within the parameters of GR 12. A supermajority of the Council then voted to approve submitting comments that are attached.

Jason Schwarz, Vice-Chair of the Council, will attend the Legislative and Court Rule Committee meeting by Zoom and present information about the Council’s proposed comment. The deadline to submit the comments to the Court is February 28, 2022.

The Council greatly appreciates your consideration of the request.

*WSBA RISK ANALYSIS: This section is to be completed by the Office of General Counsel, with input from the proposing entity or individual.*

*WSBA FISCAL ANALYSIS: This section is to be completed by the Finance Department, with input from the proposing entity or individual.*

Attachments

- Council on Public Defense Comments
- Proposed Amendments to CrRLJ 3.3 and 3.4

The Washington State Bar Association Council on Public Defense (CPD) is concerned that the District and Municipal Judges' Association (DCMJA) proposals to amend CrRLJ 3.3 and CrRLJ 3.4 would create conflicts with the Rules of Professional Conduct (RPCs). We write solely to express those concerns.

The proposed changes would require defense counsel to violate RPC 1.6. Proposed CrRLJ 3.4(b)(3) would require defense counsel to disclose, in violation of RPC 1.6, whether they have had recent contact with their clients,. The Washington State Bar Association Committee on Professional Ethics found RPC 1.6 protects such information. *See* WSBA Advisory Op. 1311 (1989).<sup>1</sup>

Proposed CrLJ 3.3(f) would require defense counsel to tell clients about future court dates, making counsel potential witnesses against their clients in two common situations:

- Hearings on Compliance with Pretrial Conditions – Courts routinely require people accused of misdemeanors to appear at future hearings as a condition of pretrial release. At a subsequent hearing,<sup>2</sup> the client may claim no notice of a missed court date, making defense counsel a witness to whether their client had notice of the missed hearing.
- Bail Jump and Failure to Appear Charges – Prosecutors sometimes charge bail jump<sup>3</sup> or failure to appear<sup>4</sup> after missed court dates, again making defense counsel a witness to whether a client had notice of the missed hearing.

The RPCs<sup>5</sup> require a lawyer who becomes a witness against a client to withdraw. Such a conflict also potentially violates the client's Sixth Amendment right to counsel. *See State v. Regan*, 143 Wn.App. 419, 177 P.3d 783 (2008) (conflict of interest violated client's right to counsel when lawyer testified against him at bail jump trial).

Requiring defense counsel to disclose information relating to the representation of their clients violates counsel's ethical responsibilities. Resulting withdrawals and substitutions of defense counsel adversely impact client representation and create further court delays.

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<sup>1</sup> On the internet at [Opinion 1311 \(wsba.org\)](http://wsba.org).

<sup>2</sup> CrRLJ 3.2(j)(2) and CrRLJ (k)(1) authorize such hearings.

<sup>3</sup> RCW 9A.76.170.

<sup>4</sup> RCW 9A.76.190.

<sup>5</sup> RPC 1.7(a)(2); RPC 3.7.

**CrRLJ 3.3**  
**TIME FOR TRIAL**

**(a)-(e)** [Unchanged.]

**(f) Continuances.** Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by defense counsel or the defendant or all defendants, the court may continue the trial to a specified date. Defense counsel's signature constitutes a representation that the defendant has been consulted and agrees to the continuance. The Court's notice to defense counsel of new hearing dates constitutes notice to the defendant.

(2) [Unchanged.]

**(g)-(h)** [Unchanged.]

### CrRLJ 3.4 PRESENCE APPEARANCE OF THE DEFENDANT

~~(a) **Presence Defined.** Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear remotely or through counsel. Appearance through counsel requires that counsel either (i) present a waiver the defendant has signed indicating the defendant wishes to appear through counsel or (ii) affirm, in writing or in open court, that this is the defendant's preference.~~ **Appearance Required.** The appearance of the defendant is required at all hearings set by the Court.

**(b) Definitions.** For purposes of this rule, "appear" or "appearance" means the defendant's physical appearance, remote appearance, or appearance through counsel.

(1) "Physical appearance" means the defendant's appearance pursuant to the CrRLJ 3.3(a) definition of appearance.

(2) "Remote appearance" means the defendant appears through a telephonic or videoconference platform approved by the Court.

(3) "Appearance through counsel" means that counsel appears on behalf of the defendant. Appearance through counsel requires that counsel affirm, in writing or in open court, that they have consulted with the defendant since the last appearance and that the defendant waives the right to be present at the instant hearing.

~~(b) (c) **When Physical Appearance Is Required Necessary.** The defendant's physical appearance shall be present physically or remotely (in the court's discretion) is required at arraignment (if one is held), at every stage of the trial including the empanelling of the jury, and the returning of the verdict, and at the imposition of imposing the sentence, and at hearings set by the Court upon a finding of good cause, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.~~

~~(e) (d) **Effect of Voluntary Absence.** The defendant's voluntary absence after the trial has commenced in their presence shall not prevent continuing with the trial to and including the return of the verdict. A corporation may appear by its lawyer through counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the defendant's written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.~~

~~(d) (e) **Defendant Not Present. Failure To Appear.** If in any case the defendant fails to appear is not present when their personal attendance appearance is necessary required, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.~~

#### ~~(e) **Videoconference Proceedings.**~~

~~(1) *Authorization.* Preliminary appearances held pursuant to CrRLJ 3.2.1(d), arraignments held pursuant to this rule and CrRLJ 4.1, bail hearings held pursuant to CrRLJ 3.2,~~



and trial settings held pursuant to CrRLJ 3.3(f), may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrRLJ 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Videoconference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. The video and audio should be of sufficient quality to ensure participants are easily seen and understood. Videoconference facilities must provide for confidential communications between attorney and client, including a means during the hearing for the attorney and the client to read and review all documents executed therein, and security sufficient to protect the safety of all participants and observers. For purposes of videoconference proceedings, the electronic or facsimile signatures of the defendant, counsel, interested parties and the court shall be treated as if they were original signatures. This includes all orders on judgment and sentence, no contact orders, statements of defendant on pleas of guilty, and other documents or pleadings as the court shall determine are appropriate or necessary. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

#### **(f) ~~Videoconference Proceedings under Chapter 10.77 RCW.~~**

(1) *Authorization.* Proceedings held pursuant to chapter 10.77 RCW, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other except as otherwise directed by the trial court judge. When these proceedings are conducted via video conference, it is presumed that all participants will be physically present in the courtroom except for the forensic evaluator unless as otherwise provided by these rules, or as excused or excluded by the court for good cause shown. Good cause may include circumstances where at the time of the hearing, the court does not have the technological capability or equipment to conduct the conference by video as provided in this rule. Such video proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule, or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Five days prior to the hearing date, any party may request the forensic evaluator be physically present in the courtroom, which may in the trial court judge's discretion be granted.

(2) *Standards for Video Conference Proceedings under Chapter 10.77 RCW.* The judge, counsel, all parties, and the public must be able to see and hear each other during the

proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.