



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 1, 2019 | 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	October Meeting Minutes	Daryl Rodrigues	Action	pp 3-4
10 min	Office of Public Defense Report	Joanne Moore	Discussion	
10 min	Washington Defender Association Report	Christie Hedman	Discussion	
10 min	Appellate Guidelines	Travis Stearns	Action	pp 5-11
15 min	Independence Committee: Proposed General Rule Standard 18 Standard 19	Sophia Byrd McSherry	Action	pp 12-14
10 min	Pre-Trial Reform: Defender Resource Packet	Jaime Hawk	Action	View Online
15 min	Letter to Spokane County Commission Regarding Office Model	Daryl Rodrigues	Action	
15 min	CrR 4.1/3.3 and CrRLJ 3.2.1	Daryl Rodrigues	Discussion	
20 min	Committee Reports		Discussion	
	Standards	Written Update		pp 15
	Public Defense Structure	Eileen Farley		
10 min	Announcements	Everyone		

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

OCTOBER 18, 2019, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA
MINUTES

CPD members in person: Travis Stearns (Vice-Chair), Louis Frantz, Justin Bingham, Judge Drew Henke, Debra Ahrens, Christie Hedman, Justice Sheryl Gordon McCloud

CPD voting members on the phone: Colin Fieman, Eric Hsu, Judge Patricia Fassett, Abraham Ritter, Rachel Cortez, Daryl Rodrigues, Kathy Kyle, Jaime Hawk

CPD non-voting members: Ann Christian

WSBA Staff: Diana Singleton, Bonnie Sterken, Lisa Amatangel, Szilvia Szilagyi

Guests: Matt Anderson, Bailey Russel, George Yeannakis

Absent: Commissioner Randy Johnson, Nick Allen, Kim Ambrose, Jason Bragg, Eileen Farley, Joanne Moore, Rebecca Stith, Natalie Walton-Anderson, Bob Boruchowitz

1) History of the Council on Public Defense

The meeting began with an orientation to the CPD for new members. Christie Hedman summarized the history of the CPD, including its formation and major accomplishments.

2) Recent Accomplishments and Committee Projects

As part of the orientation, Travis and various Committee members shared about the recent work of the CPD and the roles of the committees: Pre-Trial Reform, LFO, Mental Health, Independence, and Standards. Justin summarized the work of the Pre-Trial Reform Committee, noting that the BOG is reviewing Defender Resource Packet and the Committee is looking at the use of risk tools and their potential impact. Judge Henke shared about the LFO Committee, which is currently identifying new projects to tackle, and recently developed a bench card to work in conjunction with the LFO calculator. Judge Henke also shared about the LFO reconsideration day in Pierce County. Ann Christian shared about the Mental Health Committee and noted that the Court is reviewing the civil commitment performance guidelines. Travis shared about the Independence Committee, which is close to presenting a proposed court rule and amendments to Standards 18 and 19. Christie shared about the work of the Standards committee, which is currently looking at persistent offender cases. Travis also shared about the pending Appellate Guidelines, the Snohomish County discussions regarding Cr 3.3, and wrapping up work with OPD on their audit of the Standards.

3) WSBA Policies

Lisa Amatangel and Szilvia Szilagyi with the WSBA Office of General Counsel joined the meeting to share about pertinent WSBA policies. Lisa explained GR 12.2 and how it applies to the CPD. Lisa also summarized the OPMA guidelines and explained that the CPD is now subject to the OPMA. Szilvia explained WSBA's public records procedures and GR 12.4. Lisa and Szilvia addressed questions.

4) CPD Member Roundtable

Each person in attendance shared about their work as it relates to the CPD and what they would like to accomplish by working with or serving on the CPD.

5) Minutes

The September minutes were approved without edits.

5) Office of Public Defense Standards Audit

Travis reported that OPD reviewed the comments from the CPD regarding the Standards audit, and OPD's response was included in the meeting materials. Travis summarized OPD's recommendations and CPD's response. Justice Gordon McCloud asked the group to look through the recommendations and determine who is responsible for implementing which recommendations, (i.e. updating standards). The Standards committee will review the recommendations and follow up with appropriate proposals.

Bonnie will include the full audit report in the next meeting packet for new members to review.

6) Washington Defender Association Update

Christie reported on three areas that the WDA board is working on: 1) coordinating with the counties and cities on possible funding proposals; 2) looking at the ITA commitments and costs; and 3) issues that arise when there is a long delay between someone passing the bar exam and when they can serve in court. Diana agreed to put Christie in touch with someone at WSBA regarding the bar exam. Christie also reported that WDA is following the Spokane County Commissioners' potential decision to move to a nonprofit model. WDA is not taking a position on the model, but they are planning to reiterate that the Standards are applicable under any office model. Council members shared about individual conversations they have had with the Commissioners and others in Spokane. Christie asked if the CPD would be interested in also writing a letter reiterating the role of the Standards and offering their expertise. This will be on the agenda for November for potential action.

7) Pre-Trial Reform Committee

Jaime reported that she presented the Defender Resource Packet at the last BOG meeting. Although there was interest in approving the Packet, she also received feedback from two BOG members. The Packet was moved to the BOG's November agenda for action. Jaime is reaching out to Tom McBride for his feedback and will bring it back to the CPD for consideration. Potential edits will be on the CPD agenda in November for action, if needed.

The meeting adjourned at 2:31pm

Washington State Guidelines for Appointed Counsel in Indigent Appeals

Preface

These guidelines apply to appointed counsel handling appeals for indigent clients. These guidelines are intended to be used as a guide to professional conduct and performance. Because appellate practice is a specialized area of practice requiring distinct expertise, particularized standards apply. These guidelines are to be read in conjunction with the Revised Code of Washington (RCW), the Washington Rules of Appellate Procedure (RAP), the Washington Rules of Professional Conduct (RPC), the Washington Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), the Washington Supreme Court Standards for Indigent Defense, and the Washington State Bar Association Standards for Indigent Defense Services.

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 possible representation.

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 indigent appellate 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. Role of Appointed Counsel

- a. **Client Representation** - The paramount obligation of appointed counsel is to provide conscientious, zealous, and quality representation to their clients at all stages of the legal process. Attorneys also have an obligation to abide by ethical requirements and act in accordance with the rules of the court, including having a system in place to check for conflicts of interest.
 - i. The basic duty appointed counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.

- ii. Counsel has no duty to execute any directive of the accused that does not comport with law or such standards.
- b. **Holistic Representation** - Appellate counsel should provide comprehensive representation that also includes determining whether the client needs assistance with areas such as parole advocacy, re-entry, or unacceptable prison conditions and making appropriate referrals. Special consideration should be given to the client's immigration status, and if the client is not a U.S. citizen, counsel should determine if any immigration proceedings have occurred and the potential impact that an appeal may have on the client's immigration status.
- c. **Role & Standards** - It is the duty of counsel to know and be guided by the standards of professional conduct as defined in the codes of the legal profession applicable in Washington. Once representation has been undertaken, the functions and duties of counsel are the same whether counsel is assigned, privately retained, or serving in a legal aid or defender program.

2. Education, Training and Experience of Appellate Counsel

- a. **Familiarity with Law** - To provide quality representation, counsel must be familiar with substantive law and 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 court before which a case is pending.
- b. **Experience** - Prior to handling an appointed appeal, counsel should have sufficient experience or training to provide quality representation. Less experienced counsel should only represent clients in less complex cases and only with adequate supervision and review. More complex cases should only be assigned to more experienced counsel and with adequate resources and time afforded to provide quality representation.
- c. **Training** - Appointed appellate counsel must engage in regular training focused on appellate advocacy, both written and oral, as well as on substantive issues and other pertinent areas. Counsel should seek training on issues of racial and gender bias, especially as they pertain to appellate practice.

- 3. Appellate Counsel Caseload** - Appointed appellate counsel's caseload must not exceed the standards adopted by the Washington Supreme Court and must permit counsel to provide representation consistent with the representation afforded by counsel in non-

appointed cases. Counsel's caseload should be such as to permit the filing of an opening brief in the majority of cases without numerous extensions.

4. Duties of Appointed Counsel

- a. **Standard of Representation** - Counsel in an appointed appeal must be expected to provide representation consistent with that afforded to clients who retain counsel. Appellate procedure, as outlined below, includes responsibilities unique to appellate counsel, including the submission of an appellate brief, presentation of oral argument, and the possibility of pursuing further avenues for relief where appropriate.
- b. **Withdrawal Exception** - Appointed counsel should not withdraw as counsel until the appeal is final except with the consent of the client, upon motion establishing good cause, or pursuant to *State v. Theobald*¹ and *Anders v. California*.² Counsel should file a motion to withdraw pursuant to *Anders* only after a thorough review of the record and review of the facts and relevant law with other defenders, and after meaningful attempts to consult with the client.
- c. **Substitution of Counsel** - Counsel shall request that substitute counsel be appointed to represent the client when counsel's continued representation might violate the codes of professional responsibility or when counsel in good faith believes counsel cannot provide the client with zealous representation.
- d. **Refusal of Appointment** - Counsel shall refuse an appointment to represent a client when the appointment will violate the Washington Supreme Court Standards for Indigent Defense.
- e. **Other Proceedings** - Appointed counsel should assist trial counsel where appropriate in seeking any relief in an assigned matter short of relief on appeal.

5. Relationship with Client

- a. **Establishment of the Relationship** - Defense counsel should seek to establish a relationship of trust and confidence with the client.
- b. **Barriers to Communication** - Counsel should ensure that communication with the client accounts for differences in language, literacy or other barriers to communication. Counsel should use the means of communication best suited to meet the client's needs and best suited to an attorney's obligations to consult, counsel, and advise the client. Such means include written communication, personal visits,

¹ *State v. Theobald*, 78 Wn.2d 184 (1970).

² *Anders v. California*, 386 U.S. 738 (1967).

- telephone, and electronic communication. Counsel should use interpreter, translation, or other services necessary to overcome any language barriers.
- c. **Consultation with the Client** - Counsel must make reasonable efforts to consult with the client to determine potential issues and identify the client's objectives on appeal. An initial consultation should occur prior to preparation of the initial substantive pleading in any review.
 - d. **Client Notification** - Counsel shall keep the client apprised of the status of the appeal. Counsel shall promptly notify the client of all substantive filings and rulings in the course of the appeal.

6. Appellate Procedure – Preparation of the Record

- a. **Duty of Appellate Counsel** - Counsel should promptly review the record to determine which portions are necessary for review. Counsel should make reasonable efforts to consult with the client and trial attorney to determine which portions of the record are necessary for review. All missing documents should be obtained as expeditiously as possible, filed with the trial court, and designated as clerk's papers if relevant.
- b. **Record Documents** - The record may consist of more than the documents that are regularly provided, such as jury questionnaires, power point presentations, or transcripts of exhibits presented to the jury.

7. Appellate Procedure – Issue Selection

- a. **Issue Selection – Review of Record** - Counsel should review the entire record in order to determine the viable issues that could be raised on review.
- b. **Issue Selection – Communication with Client** - The client, not the attorney decides whether to proceed with the appeal. Strategic decisions regarding the issues to be pursued on appeal should be made only after reasonable efforts to consult with the client. Counsel should raise those issues which diligent counsel would raise based upon current research. Counsel should seek and consider the advice of the client on those issues which should be presented. Counsel should advise the client of issues that are proper for review in collateral review proceedings and pursue those avenues where appropriate.
- c. **Issue Selection – Communication with Trial Counsel** - Counsel should make reasonable efforts to consult with trial counsel to determine the issues to be presented.
- d. **Issue Selection – Additional Considerations**

- i. To promote the goal of finality in judgments, counsel is encouraged to raise those claims that have arguable potential for success on the direct appeal.
- ii. The determination of which issues will be presented on appeal should be made only after reasonable efforts to engage in consultation with other defenders aware of the facts of the case and potential legal claims. Counsel should also be aware of issues already pending in State and Federal Court.
- iii. Prior to filing, all substantive pleadings should be peer-reviewed by a defender equally qualified to represent the client and familiar with the relevant law.
- iv. It is very important that counsel understand federal habeas corpus law and procedure in order to anticipate the possibility that the client may need to pursue federal court remedies to obtain relief for a serious constitutional error.
- v. Counsel should be aware of the client's racial and gender identity and should review the record for any potential instances of bias or prejudice. Counsel should raise issues related to racial or gender bias when appropriate.

8. Appellate Procedure – Drafting of Brief & Other Pleadings

- a. **Drafting of Document** - All pleadings and other materials submitted to the court should be clear, concise, and well organized in order to provide the court with the facts and law necessary to make a well-reasoned decision. They should be professional in appearance, free of errors, consistent with court rules and citation requirements and accurate in citation to appellate record and legal authority. The brief should also be well reasoned and persuasive.
- b. **Reply Brief** - Unless it is unnecessary to advance the goals of representation, appellate counsel should file a reply brief that responds to arguments in the respondent's brief by pointing out misstatements, weaknesses, and new issues raised.
- c. **Other Pleadings** - Counsel should file any additional motions or pleadings if it is in the interest of the client or furthers the interest of litigation. This can include additional motions, objections or supplemental briefs.

9. Appellate Procedure – Oral Argument

- a. **Obligation – Oral argument should not be waived, with rare exceptions.** Where counsel is afforded oral argument by the court it should not be waived except upon reasonable efforts to secure consultation with the client and with colleagues made

- familiar with the facts and claims of the case. After efforts to consult, waiver should only occur upon the conclusion that the client's rights will be more fully advanced by submission of the appeal on the briefs alone. Where a matter is set without argument, argument should be requested where counsel believes it is likely to advance the client's interest and the goals of representation.
- b. **Preparation** - Oral argument can be a critical opportunity to advocate for the client and thorough preparation is essential. This should include development of an outline or notes that set forth key points, cites to key record pages and appellate decisions, and answers to anticipated questions. Counsel should prepare with and consult with other attorneys.
 - c. **Knowledge of Rules** - Counsel should be familiar with the relevant appellate court's rules regarding cases in which argument is permitted, how to make requests for argument, how notification of argument is provided, and whether rebuttal and post-argument submissions are permitted.

10. Appellate Procedure – Actions Upon Decision of the Court

- a. **Communication with Client** - Counsel should timely inform the client of the decision of the court and shall advise the client of any further proceedings in which the client may seek further relief.
- b. **Remand** - If the client's case has been remanded to a lower court where counsel will no longer represent the client, counsel should ensure new counsel is appointed to the matter.
- c. **Further Proceedings** - Counsel shall seek further review, including motions to modify, motion for reconsideration, or discretionary review of any decision where appropriate and necessary. In determining whether further review is appropriate and necessary, counsel must consider: whether the client, having been timely advised, so requests; whether doing so will advance the client's interests; whether further review is necessary to preserve issues for collateral attack; and whether issues then pending in state or federal court may affect the client's case. Counsel should seek additional review in state or federal court where appropriate.
- d. **Case File Maintenance** - Although the case file is maintained by counsel, it belongs to the client. Counsel should retain the file in reasonably secure conditions for a period of time consistent with appropriate professional guidelines. Counsel should advise the client of counsel's retention policy and should inform the client that the client is entitled to receive the file on request after conclusion of the

representation. Counsel should promptly furnish a client's file to successor counsel if requested. However, counsel may not disclose confidential information to successor counsel unless the client gives permission.

Proposed General Rule related to independence of public defense administration

- (a) Policy and Purpose. Consistent with right to counsel as provided in Article I, Section 22 of the Washington State Constitution, it is the policy of the judiciary 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 public defense contracts.
- (b) Scope. This rule applies to superior courts and courts of limited jurisdiction.
- (c) Effective Date of Rule. This rule will go into effect ___ days after its adoption by the Supreme Court.
- (d) A judicial officer should not control the drafting, awarding, and renewal of public defense contracts or serve as the public defense contract administrator. This does not limit a court's authority to grant a motion for necessary legal services, including experts and investigators, in individual cases.

WSBA Standards for Indigent Defense Services
Proposed amendment to Standard 18 and proposed new Standard 19

STANDARD EIGHTEEN:
Guidelines for Awarding Defense Contracts

Standard:

The county or city should award contracts for public defense services only after determining the ~~attorney or firm chosen can meet accepted professional standards~~ applicant demonstrates professional qualifications consistent with the WSBA Standards for Indigent Defense Services 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.

Recruitment for public defense contracts should include efforts aimed at achieving a diverse public defense workforce.

Under no circumstance should prosecutors or law enforcement engage in the recruitment, selection, or administration of contracts for public defense attorneys, investigators, experts, or other defense services.

~~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.~~

~~City attorneys, county Criminal prosecutors, and law enforcement, and judicial officers should not engage in the selection or supervision of attorneys who will provide indigent defense services.~~

STANDARD NINETEEN:
Independence of Public Defense Function

Standard:

Without regard to structure (e.g. government agency, contracts, assigned counsel), the public defense function should be insulated from political influence¹ and should be subject to judicial oversight only in the same manner and to the same extent as retained counsel.

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

July 30, 2019

CPD Subcommittee on Independence

Discussion Draft

¹Principle 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. Examples of such entities include the Washington State Office of Public Defense Advisory Committee and the King County Public Defense Advisory Board. Where public defense is provided by a nonprofit entity, the nonprofit's board of directors serves a similar role. Examples include the Snohomish County Public Defender Association, Counsel for the Defense in Chelan County, Clallam Public Defender, and Jefferson Associated Counsel.

Alternatively, a small number of jurisdictions that rely exclusively on contract attorneys and assigned counsel employ or contract with a public defense coordinator – an attorney with public defense experience – to manage case assignments, contract compliance, investigate complaints, and provide meaningful oversight independent of the local judiciary. Examples include Clark, Franklin and Lewis counties.

DRAFT

From: Boruchowitz, Robert <boruchor@seattleu.edu>
Sent: Thursday, October 24, 2019 1:10 PM
To: Bonnie Sterken <bonnies@wsba.org>
Cc: Eileen Farley <Eileen.Farley@nwaj.org>
Subject: Re: CPD meeting Nov 1

Greetings

I regret that I will be away Friday doing a site visit in Chicago.

The current plan for the Standards Committee is that I will send a memo to the committee by this weekend and we will meet by phone or video on November 6 at 2 pm and hope to have something for the full CPD on November 15.

We are working on Persistent Offender guidelines and standards.

I do not anticipate anything for action until after November.

Thank you.

Bob