



## WSBA COUNCIL ON PUBLIC DEFENSE MEETING AGENDA

March 23, 2018 | 12:15pm to 2:45pm

WSBA Office, 1326 Fourth Avenue, Suite #600, Seattle, WA 98101

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

*The Council on Public Defense was established to implement the recommendations of the WSBA Blue Ribbon Panel on Criminal Defense, which was appointed by the Board of Governors in spring 2003 as a first step in addressing concerns about the quality of indigent defense services in Washington.*

3 min	<b>Welcome and Roll Call</b>	Eileen Farley	Discussion	
2 min	<b>January Meeting Minutes</b>	Eileen Farley	Action	pp 2-3
10 min	<b>OPD Report</b>	Joanne Moore and Sophia Byrd McSherry	Report	
10 min	<b>Joint Project Between the Council and the Access to Justice Board</b>	Daryl Rodrigues	Discussion	
5 min	<b>Race Equity and Justice Initiative Update</b>	Diana Singleton	Report	
20 min	<b>WSBA Rules Committee Update</b>	Eileen Farley	Report	
50 min	<b>Committee Updates</b>		Reports	
	Pre-Trial Reform	Justin Bingham		
	LFO Reform	Nick Allen		
	Mental Health <i>* Attached materials are a draft for a first reading</i>	Eileen Farley		pp 5-12
	Standards	Bob Boruchowitz		
	Public Defense and Independence	Travis Stearns		
10 min	<b>Other Business, CPD Recruitment</b>	All	Report	



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Washington State Bar Association

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COUNCIL ON PUBLIC DEFENSE

JANUARY 26, 2018, 12:00PM TO 2:30PM AT THE WASHINGTON STATE BAR ASSOCIATION, SEATTLE, WA  
MINUTES

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**CPD members in person:** Eileen Farley (Chair), Daryl Rodrigues (Vice-Chair), Justin Bingham, Nick Allen, Judge Drew Henke, Joanne Moore, Jaime Hawk, Jason Gillmer and Rebecca Stith

**CPD voting members on the phone:** Kim Ambrose, Michael Killian, Justice Gordon McCloud, Ben Carr, Dani Casselman, Ann Christian

**CPD non-voting members:** Marc Boman, Jon Ostlund

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

**Guests:** Sophia Byrd McSherry, Juliana Roe, Chelsea Hager, Sanjay Walvekar

**Absent:** Deborah Ahrens, Ping Lau, Christie Hedman, Bob Boruchowitz, Travis Stearns, Colin Fieman, Brooks Holland, Judge Joanna Bender

**1) Introductions and Roll Call and Roster**

Members introduced themselves.

**2) Approval of November Minutes**

The November minutes were approved without edits.

**3) Office of Public Defense Report:** Joanne reported that OPD is focusing on the session and their budget request to increase contractor pay for OPD public defense attorneys. Joanne addressed questions about specific pay levels. They are also tracking on the legislation put forth by the cities and the counties.

**4) Legislative Update:** Juliana Roe with the Washington State Association of Counties reported that the Association is focusing on indigent defense funding as a top priority. She summarized the process they have gone through to request a hearing for HB 2687 and other issues they are facing. Chelsea Hager reported on the city perspective regarding the bill. Cities have been adding funding to their legislative agenda and are having similar conversations to support legislation to increase funding. Eileen asked how individual members of the Council could speak to legislators about HB 2687, and Juliana offered: sign in and/or testify at the public hearing, send emails of to members of the committee prior to a hearing, or send an email to Representative Ormsby encouraging them to hold a hearing. Juliana and Chelsea addressed other legislation that would increase funding but is not expected to survive. They addressed questions. Juliana also addressed additional measures that the counties will take to secure increased funding.

It was also note that the corrections ombudsman bill is likely to not proceed.

## **5) Committee Updates**

LFO Committee: Nick reported that the committee has met to discuss a work plan. Their six potential areas of work include: supporting comprehensive policy reform and if legislation is passed monitor implementation; seek support for an ABA resolution on LFOs and guiding principles on fees and fines in WA State; use the court rule process to support LFOs; development of standardized forms; or narrowing the focus on specific populations. They will report back at the next meeting with a finalized work plan for the committee to focus on.

Standards Committee: Eileen reported that they are monitoring a bill that relates to BECCA. The committee is also looking at third strike cases and caseload standards.

Independence and Public Defense: Eileen reported that this committee recently formed and will have more of an update at the next meeting.

Mental Health: Eileen reported that they have circulated draft performance guidelines to stakeholders for feedback. They expect to have a draft for the Council to review at the next meeting.

Pre-Trial Reform: Justin reported that the committee is developing a checklist of best practices and a summary of the law to be available as a tool for attorneys during the pre-trial phase. They are reviewing examples from other jurisdictions. They are aiming to have a draft tool by the spring for the Council to review.

## **6) Joint Meeting between the Council on Public Defense and ATJ Board**

Daryl reported on the potential joint meeting with the Access to Justice Board and asked the Council for feedback on whether to hold the meeting and what it would include. After a discussion, the Council decided to proceed with the meeting. Eileen and Daryl will connect with key people on the ATJ Board to determine the agenda. The Council will propose to focus on a general overview of who's doing what, finding one very specific issue that might be concrete enough for a partnership, but also communicate that the Council does not have the bandwidth for a broader systems change project.

## **7) Race Equity and Justice Initiative Update**

Diana reported that the Access to Justice Board is asking the BOG to join REJI. The Council does not need to do anything at this time.

## **8) WSBA Rules Committee Report**

Eileen reported that the WSBA Rules Committee is reviewing the criminal rules presented in the materials. Eileen will continue to track what the WSBA Rules Committee is doing on the criminal rules and will explore whether they should be asked to look at the juvenile rules, as well. The Council discussed the criminal rules in the materials. Ben volunteered to draft a letter summarizing concerns he identified to be shared with the WSBA Rules Committee.

## **9) Other Business**

Eileen reported that we are attempting to update the Charter and are waiting for feedback from general counsel. Eileen also reported that we are recruiting for a prosecutor and someone who works in local government or as a public defense administrator.

Meeting adjourned at 2pm

DRAFT

## GUIDELINES PREAMBLE

The following guidelines are intended to assist defense attorneys in providing vigorous and effective representation to clients responding to a civil commitment petition. The facts of each case, the circumstances of each respondent, and developments in the law and in court procedures require counsel to determine, with the client's assistance and on a case-by-case basis, the best manner to proceed.

As used in these Guidelines, "must" and "shall" are intended to describe mandatory requirements. "Should" is not mandatory but is used when providing guidance about what attorneys can and are encouraged to do in the interest of providing quality representation.

### **Guideline 1 Role of Counsel**

Counsel shall determine the client's goals and objectives in the commitment proceedings, advise the client on how to best achieve those goals, and advocate for the client at all stages of the commitment process.

Counsel shall represent the client's expressed wishes. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel shall provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider. In the end, counsel shall act in accordance with the client's expressed interests.

Counsel may not substitute counsel's view of the client's best interests for those expressed by the client. Counsel shall not substitute the interests or views of a family member or friend, a guardian or holder of a durable power of attorney for those expressed by the client.

### **Guideline 2 Role of Counsel When a Client Does Not Express His or Her Ultimate Goals**

When a client cannot express his or her ultimate goals and objectives, then counsel shall protect the client's constitutional and statutory rights.

Counsel shall abide by the Rules of Professional Conduct (RPCs) throughout the representation, particularly RPC 1.14 which provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished...the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. If counsel reasonably believes that the client has diminished capacity, is at risk of serious physical, financial or other harm unless action is taken and cannot adequately act in the client's own interests the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

In taking any protective action, counsel should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the twin goals of intruding to the least extent possible on the client's right to make independent decisions and

maximizing the client's capacities. In considering alternatives counsel should be aware of any law that requires counsel to advocate the least restrictive action on behalf of the client. *See* Comment to RPC 1.14.

### **Guideline 3 Education, Training and Experience of Counsel**

Counsel shall, at minimum, have the qualifications required by the Washington Supreme Court's Standards for Indigent Defense, Standard 14.1 and 14.2(M), for representation of a respondent in a civil commitment proceeding.

Counsel shall have a basic knowledge of the classification of mental disorders, as described in the most recent Diagnostic and Statistical Manual of Mental Disorders ("DSM") and other resources, and the ability to read and understand medical terminology related to mental disorders and treatment of persons with a mental illness, substance abuse, co-occurring disorders, and chemical dependency. Counsel shall have ready access to the most recent DSM, as well as research resources for related medical conditions. Counsel should also have basic knowledge and understanding of common personality disorders and medical conditions which may produce similar symptoms.

Counsel shall be familiar with the classes of medication prescribed to treat mental disorders and chemical dependency and the possible effect of those medications on the client's ability to interact with counsel and to participate in court proceedings.

Counsel should be familiar with treatment facilities, both in-patient and out-patient, that provide services to persons with mental illness, including the scope of those services. Counsel should be familiar with local facilities and state hospitals that may be remote from where the client lives. Counsel should be familiar with the limitations on available treatment and transportation obstacles associated with such facilities.

Counsel should attend CLEs or specialized training for further education on substantive issues, substantive law, statutes, local court rules, and local practice relating to commitment proceedings. Counsel should also develop interviewing and de-escalation skills through appropriate training opportunities.

### **Guideline 4 General Issues and Duties of Counsel for Respondents in Civil Commitment Proceedings**

Before agreeing to act as counsel or accepting appointment by a court, counsel shall determine if counsel has sufficient time, resources, and knowledge to effectively represent the client.

Counsel shall be alert to potential and actual conflicts of interest that would impair counsel's ability to represent a client. Counsel shall not represent a client in a civil commitment proceeding and act as guardian *ad litem* for that client in the same or any other proceeding. Counsel shall not reveal information relating to the representation of a client unless

- a) the client gives informed consent to the release or;

b) disclosure is impliedly authorized to carry out the representation or;

c) it is an exception to the rule of confidentiality permitted by the Rules of Professional Conduct.

Disclosures, for example to prevent reasonably certain death or substantial bodily harm, are permitted only to the extent necessary to prevent the harm.

Counsel should assess how a client's participation and position in a civil commitment proceeding may affect the client's participation in other proceedings, such as a criminal case. To the extent authorized by the client, the attorney should consult with counsel representing the client in the other proceedings.

#### **Guideline 5 Preparation for Initial Client Meeting**

Prior to the first meeting with the client, counsel shall be knowledgeable about civil commitment law, procedures, and court rules. Counsel should have obtained copies of the initial petition or petition for continued court-ordered treatment, statements in support of the petition, and other materials that will be submitted to the court in support of the petition, reviewed them, and researched any unfamiliar terms in advance of the meeting.

When first appointed counsel shall make every effort to consult with the client to determine the client's goals and to develop evidence to present to the court that will support those goals. Counsel should recognize that communication with the client may require additional efforts.

The initial client meeting shall be in private and occur enough in advance of any scheduled hearing to allow time for preparation, and reasonable efforts to contact potential witnesses on the client's behalf. If there is not sufficient time for adequate preparation between counsel's appointment and the scheduled hearing, then counsel must advise the court and make every effort to continue the hearing, even if only for a few hours, to allow sufficient time for preparation.

In most cases an attorney will be appointed to represent a client only after the client is detained pursuant to a 72-hour hold. Counsel should meet with the client within 24 hours of being notified of assignment when preparing to respond to a 14-day petition. Counsel representing a client responding to a 90-day petition, shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel previously represented the client when responding to a petition for a 14-day commitment or is newly appointed. Counsel representing a client responding to a 180-day petition shall meet with the client within 24 hours of appointment or as soon as practicable thereafter, regardless of whether counsel has previously represented the client when responding to a petition for a 14-day or 90-day commitment or is newly appointed.

#### **Guideline 6 Substance of Client Meetings**

Counsel shall communicate information to the client during the initial or subsequent meeting. Counsel shall determine the amount and kind of information the client is able to absorb

in one meeting. If necessary or as requested by the client, counsel shall repeat this information during the course of the representation.

Counsel shall explain that conversations between client and attorney are confidential, counsel's role, and the civil commitment process and the client's rights during that process.

Counsel shall obtain, when possible in light of the client's symptoms, the client's version of the facts of the case, the names and contact information of persons with knowledge of the circumstances that led to the filing of the petition, the names and contact information of persons knowledgeable about the client's current level of functioning relative to discharge to the community, information about past treatment, and information relevant to possible alternatives to commitment.

Counsel shall advise the client of the legal bases under which the Court can order the client be discharged, committed, or released conditionally, and the length of any commitment period. Counsel shall specifically advise the client of the right to remain silent and possible consequences following civil commitment, such as the loss of the right to possess a firearm.

Counsel shall explain the different consequences that may follow a voluntary agreement to enter treatment, an involuntary commitment following a contested hearing agreement to a stipulated order of commitment, and a negotiated agreement to a less restrictive order. These may include, among others, an impact on the right to possess a firearm and whether a hospital will help the client find a place to live after the client leaves the hospital or to enroll in a supplemental income program such as SSI or outpatient treatment. Counsel should inquire of the proposed provider whether a client will be billed for voluntary or outpatient treatment.

#### **Guideline 7 Preparation for Commitment Hearing**

Counsel shall obtain and review the court file, investigation report, medical records, police reports, if any, and all other evidence offered by the petitioners or opposing counsel. In advance of the hearing, counsel should attempt to interview witnesses who will be called by opposing counsel. Counsel also should attempt to contact persons the client has identified as possible witnesses and who, in counsel's assessment, may provide relevant information. Counsel shall make any appropriate request for expenses to pay for the services of expert witnesses.

Counsel shall determine whether the petition and/or request for commitment should be challenged because it does not satisfy the statutory criteria required for civil commitment and/or constitutional protections. Counsel shall determine whether the client was given a timely opportunity to refuse psychotropic medications for the 24 hours before a potential hearing. If the treatment team has failed in this regard, counsel must advise the client of the options available to address such failure. Counsel shall be familiar with the rules of evidence, particularly those that apply to civil commitment hearings and govern the admissibility of documentary and testimonial evidence.



### **Guideline 8 Planning for Release Following Commitment**

Counsel should evaluate whether it would be helpful to consult with an independent social worker or mental health professional to aid in planning for the client's release or a less restrictive commitment order and, if so, apply to the court for funds. Counsel should contact persons whom the client has identified as willing to assist in arranging an alternative to hospitalization or otherwise support discharge at the hearing.

If counsel learns of persons who may be willing to assist with an alternative to hospitalization or otherwise support discharge from a source other than the client, then with the client's permission counsel should contact those persons. Counsel should evaluate whether release planning is adequately provided by the hospital staff and, if so, with the client's permission provide information supporting an alternative to hospitalization or discharge to hospital or other personnel involved in discharge planning.

### **Guideline 9 Commitment Hearing**

Counsel shall assert and seek to protect the client's right to actively participate in the civil commitment proceeding. If at the time of the hearing the client is under the influence of prescribed medication, counsel shall consider introducing evidence regarding the nature of the medication and its likely effects on the client's demeanor.

Counsel should make an opening statement describing the client's goal and the facts that support that goal, cross-examine expert and lay witnesses as is appropriate to the case, and present alternatives to confinement as approved by the client.

At the hearing, counsel should be prepared to: raise procedural motions including exclusion of witnesses; assert privileges, including physician/patient, psychotherapist/patient, spouse/domestic partner, Fifth Amendment, social worker/patient and other privileges; and, as appropriate, introduce evidence on the client's behalf.

Counsel should make a closing argument that includes the evidence presented, the burden of proof, and the statutory requirements for commitment.

### **Guidelines 10 Limited Basis for Waiver of Client's Presence at the Hearing and Alternatives to Waiver**

Counsel shall be familiar with the practice of the local jurisdiction regarding waiver of presence and inform the client about local practice. Some jurisdictions will not permit a client to waive presence at a hearing. Others will allow the client to waive presence only after the court has advised the client about the possible loss of the right to possess firearms.

Counsel shall not waive the client's presence at the hearing except when the client elects to waive or unequivocally refuses to attend, despite encouragement to attend.

If the court is considering whether the client's behavior constitutes a constructive waiver of presence, then counsel shall, after consultation with the client, offer alternatives to removing the client from the hearing. Possible alternatives may include: offering the client a paper and

pencil to write down questions rather than orally responding; taking frequent breaks; asking the judge to give the client a “roadmap” regarding who will be testifying and when; offering to mute client and counsel’s microphone during witness testimony during video proceedings other than when making an objection or responding to an objection; and/or offering the client the option to observe video proceedings from a separate room.

### **Guideline 11 Post-Commitment Proceedings When the Client Is Committed**

If the court orders the client committed for up to 14 days, then counsel has a continuing obligation to maintain contact with the client and prepare to represent the client if the State seeks a 90-day commitment. Such representation shall include consulting with the client to determine the client’s goals and to develop evidence to present to the court that will support those goals. Such evidence may include, for example, proposals for less restrictive treatment, housing alternatives, or an individualized treatment plan appropriate to the client’s needs. Counsel shall, to the extent the client agrees, argue against all provisions that are unnecessarily restrictive or unsupported by the record.

If the State seeks a 180-day commitment, then counsel should seek to provide continuity of representation and to represent the client in the 180-day commitment hearing. If the client is transferred to another hospital outside the jurisdiction in which counsel works, then counsel when feasible work to ensure a smooth transition to the new counsel who will represent the client at the 180-day hearing.

Counsel should be familiar with Civil Rule (CR) 71, which provides “A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place of the motion to be heard. CR71 (b).” The Rules “govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or equity....” (The limited exceptions to CR 71 are found in CR 81 and do not, on their face, include civil commitment proceedings.)

### **Guideline 12 Post-Commitment Proceedings When the Client Is Not Committed**

If a petition is dismissed or if the court does not order a client committed, then counsel should, where appropriate, inform the client of social services or direct the client to appropriate hospital or treatment staff who can assist the client. Such services may include housing and food available in the community, the existence and location of mental health providers, and the existence of medical treatment available upon discharge from a hospital.

### **Guideline 13 Advising the Client about Revisions and Appeals**

Counsel shall advise the client of the right to seek revision of a commissioner’s ruling or to appeal and the process for each. Counsel shall explain to the client the consequences of any decision to waive the right to seek revision or to appeal. The decision regarding whether to seek revision or to appeal belongs to the client. If the client is not able to absorb the information immediately following a hearing, then counsel shall consult with the client in person or by phone to explain the revision or appeal process and the client’s choices.

**Commented [DFM1]:** After an adult is put on a 90 commitment many PD’s close the case. There are times the original attorney would not even learn the client was moved out of county. Also, working with a PD in another county is problematic as it requires a ROI by client for original attorney to talk with new attorney. Getting a ROI once a client moves can be difficult as the new facility cannot give any information on client without an ROI for the old attorney. I suggest the following for the final sentence of this paragraph. “If a client is transferred to another hospital outside the jurisdiction in which counsel works, counsel, when possible, should work to ensure a smooth transition to the new counsel who will represent the client at the 180-day hearing.”

**Commented [E2]:** For discussion by the full CPD.

Counsel shall take the necessary steps to seek revision of a commissioner’s ruling or to perfect an appeal if the client requests it.

Counsel should consider developing a short advisory sheet to give clients outlining the right to appeal and deadlines by which an appeal must be filed. The advisory should include information about how to contact the counsel to discuss an appeal and, in appropriate cases, counsel’s recommendation about whether or not to appeal. Such an advisory may be helpful when counsel must immediately appear in another hearing or leave for another hospital to represent another client.

#### **Guideline 14 Perfecting an Appeal**

When the client chooses to appeal, counsel shall file a notice of appeal and preserve the client’s right to appeal, including presenting a motion to proceed *in forma pauperis*. Counsel shall assist the client in obtaining appellate representation.

To preserve issues for appeal, counsel should consider proposing findings of fact and conclusions of law and/or making objections to findings and conclusions proposed by the prosecutor or entered by the court, and should ensure that counsel’s proposed findings, conclusions, and/or objections are included in the record.

When the client at the time that commitment is ordered is unable to decide whether to appeal, counsel shall make clear to the client the deadline for filing the appeal, seek a decision from the client in time to meet the deadline, and be prepared to file the appeal should the client decide to appeal. If a guardian or person holding a durable power of attorney decides the client should not pursue an appeal, counsel should advise the court in writing that counsel assumes the client has the authority to make the decision to appeal and proceed as the client wishes.

#### **Guideline 15 Obligations of Counsel to Appellate Attorney**

Counsel should be available to appellate counsel to answer questions and issues regarding the appeal and provide privileged information and documents requested by appellate counsel, to the extent authorized by the client.

#### **Guideline 16 Continuity of Representation**

Counsel should make every effort to represent the client for the duration of the commitment process. If the client is transferred out of the jurisdiction, then representation continues until new counsel is appointed.

If counsel is not able to continue to represent the client then counsel shall work to ensure a smooth transition to new counsel when possible. Steps to provide a smooth transition shall include: advising the client about the process for the client’s transfer to a different hospital; move the court pursuant to CR 71 for an order allowing counsel to withdraw and appointment of new counsel; advise the client how to contact substituted counsel; and, to the extent permitted by the client, providing the substituted counsel with privileged information and documents counsel received when representing the client.

**Commented [DFM3]:** In King Cty once the client is moved out of county the case ends as does representation. Presumably, most PD’s are not authorized or funded to work out of county.

**Commented [E4]:** For discussion by the full CPD.

**Commented [DFM5]:** I don’t believe a court in one county can order an out of county agency to take a case, thus the court would not be able to appoint new counsel.

**Commented [E6]:** For discussion by the full CPD.

