

# **WASHINGTON STATE BAR ASSOCIATION**

## **Board of Governors**

**BOARD OF GOVERNORS MEETING  
Supplemental Materials  
March 3-4, 2023  
Heritage Room, Olympia, WA  
Zoom and Teleconference**

Description	Page Number
CPD Revised Materials (disregard page 55)	SM-2
FLEC Comment – TAXICAB	SM-8
FLEC Comment – Diversity Council Proposal	SM-9

# WASHINGTON STATE BAR ASSOCIATION

**TO:** WSBA Board of Governors  
**CC:** Terra Nevitt, Executive Director  
**FROM:** Bob Boruchowitz, Chair, Standards Committee, Council on Public Defense  
**DATE:** February 6, 2023  
**RE:** Proposed amendment to public defense certification form in court rules.

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**Action:** Approve submitting the revised Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JUCR 9.2/MPR 2.1 to the Washington Supreme Court for adoption.

The Washington Supreme Court requires public defense counsel to file periodically a CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CRR 3.1 / CRRLJ 3.1 / JUCR 9.2 / MPR 2.1. The existing form has been interpreted inconsistently by practitioners who are not always clear on what they are to report. As a result, the information provided can be incomplete or inaccurate.

After several months of drafting and discussion, the CPD Standards Committee and the full CPD have approved a proposed revised form that simplifies and clarifies what lawyers are to report. When lawyers submit their certifications using the revised form, we will be able to measure how successful the revision is in part by comparing to previously filed forms and in the state OPD's review of information provided by local jurisdictions. We are asking the Board of Governors to approve this proposed revised form and send it to the Washington Supreme Court asking them to amend the court rules accordingly.

## Background

The issue came to the CPD's attention because of Washington OPD's concern about inconsistent compliance with the certification rule and because of individual examples of lawyers who failed to file or filed incomplete certification forms. The Board previously approved a complete set of proposed Standards that included a certification procedure. The Standards Committee has discussed a variety of alternative drafts and concluded that the current proposal is the most effective approach.

The Standards Committee and the CPD review all proposals through an equity lens. Because public defense clients are disproportionately of color and all are poor, improving the information provided by public defense counsel is important to efforts to improve public defense services to disproportionately affected persons.

## Community Input

The CPD Standards Committee and the CPD have both practitioners and former chief Defenders as members and the members reflect a variety of sizes and types of public defense offices as well as individual appointed counsel.

The Standards Committee also has a member who is formerly incarcerated and who currently works with public defense clients and who periodically participated in discussions on this topic.

#### Information for Fiscal Analysis

There should be no fiscal impact for either WSBA or members.

#### Information for Equity Analysis

Please see above answers. Making the certification form easier to use and more helpful to those receiving it will improve equity as it will help strengthen information used to support improved public defense services. The CPD has not identified any unintended consequences of revising the form beyond create a form that more accurately reflects caseload data.

In areas of the state with rural and small jurisdictions, defense attorneys often engage in both public defense and privately retained work. Moreover, their public defense work is often comprised of assigned cases from multiple jurisdictions. Such “stacking” of cases can (and does) result in attorneys exceeding caseload limits. Certification forms are received and reviewed on an individual jurisdiction basis. The currently used form makes it very ambiguous as to what an attorney’s full caseload looks like. In result, there are attorneys who exceed caseload standards, but certification forms don’t reflect that. Less time per case results in less time with client communication, investigation, case preparation, and litigation.

In Washington’s decentralized public defense system, the CPD seeks to ensure certain minimal standards for public defense in all jurisdictions. It is inequitable for people to receive disparate representation based on geographic jurisdiction. Higher caseloads not only result in less attorney time and focus per case, but they also create a danger that defense attorneys will triage cases, prioritizing their time and effort for some clients over others. This triage approach coupled with unconscious bias, can result in disparate representation based on clients’ race or ethnicity.  
(Reference: [https://www.yalelawjournal.org/pdf/1199\\_pzeey4t1.pdf](https://www.yalelawjournal.org/pdf/1199_pzeey4t1.pdf))

#### WSBA RISK ANALYSIS

The Board is asked to approve sending the revised Certification of Appointed Counsel of Compliance with Standards to the Court. The changes appear to be focused on gathering information relating to providing public defense services in multiple courts. The revised form includes the addition of the following three data points:

- Certification forms filed in each court in which the lawyer provides indigent defense representation;
- The specific percentage of total practice time the lawyer devotes to indigent cases in the specific court;
- A list of other courts and the percentage of total practice time devoted to indigent defense representation.

There is no apparent legal risk in amending the certification form to collect data on indigent defense representation provided in multiple courts.

#### WSBA FISCAL ANALYSIS

No fiscal impact is anticipated.

## WSBA EQUITY ANALYSIS

The proposed action appears to promote equity because the proposed clearer certification form is designed to improve and make public defense representation fairer. Hopefully, CPD and the public defense community can track data to determine how the new certification form is impacting representation.

### Attachments

- *Draft amended Certification of Appointed Counsel*
- *Current Certification of Appointed Counsel*

Standards 15-18

[Reserved.]

CERTIFICATION OF COMPLIANCE

For criminal and juvenile offender cases, and civil commitment proceedings under Chapter 71.05 RCW, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

DRAFT

<input type="checkbox"/> <b>SUPERIOR COURT</b>	<input type="checkbox"/> <b>JUVENILE DEPARTMENT</b>
<input type="checkbox"/> <b>DISTRICT COURT</b>	<input type="checkbox"/> <b>MUNICIPAL COURT</b>
<b>FOR</b>	
<input type="checkbox"/> <b>CITY OF</b> <input type="checkbox"/> <b>COUNTY OF</b> _____,	
<b>STATE OF WASHINGTON</b>	
<b>CERTIFICATION BY:</b>	
[NAME], [WSBA#]	
<b>FOR THE:</b>	
<input type="checkbox"/> <b>[1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup>] CALENDAR QUARTER OF [YEAR]</b>	

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**Administrative Filing**

**CERTIFICATION OF APPOINTED  
COUNSEL OF COMPLIANCE WITH  
STANDARDS REQUIRED BY  
CRR 3.1 / CrRLJ 3.1 / JuCR 9.2 /  
MPR 2.1**

The undersigned attorney hereby certifies:

1. I am familiar with the Standards for Indigent Defense adopted by the Supreme Court which apply to attorneys appointed to represent indigent clients.
2. I file certification forms in each court in which I provide indigent defense representation.
3. Approximately \_\_\_\_% of my total practice time is devoted to indigent defense.  
Approximately \_\_\_\_% of my total practice time is devoted to indigent defense cases in this court.
4. I am appointed in other courts to provide indigent defense representation. My practice time in each is approximately as follows: \_\_\_\_ Not Applicable

Court: \_\_\_\_\_ % of total practice: \_\_\_\_\_

Court: \_\_\_\_\_ % of total practice: \_\_\_\_\_

Court: \_\_\_\_\_ % of total practice: \_\_\_\_\_

5. **Caseload:** I limit the number of cases and mix of case types to the caseload limits required by Standards 3.2, 3.3 and 3.4. My caseload is prorated to the percentage of my practice devoted to indigent defense.
6. **Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1. I am familiar with the specific case qualifications in Standard 14.2 and accept appointment as lead counsel only when I meet the qualifications for that case.
7. **Office:** I have access to an office that accommodates confidential meetings, a postal address, and adequate telephone and communication services as required by Standard 5.2.
8. **Investigators:** I have investigators available to me and use investigative services as appropriate, as required by Standard 6.1.

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Signature, WSBA#

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Date

[ ] **SUPERIOR COURT**    [ ] **JUVENILE DEPARTMENT**  
[ ] **DISTRICT COURT**    [ ] **MUNICIPAL COURT**  
**FOR**  
[ ] **CITY OF**    [ ] **COUNTY OF** \_\_\_\_\_,  
**STATE OF WASHINGTON**

**CERTIFICATION BY:**

[NAME], [WSBA#]

FOR THE:

[1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup>] CALENDAR QUARTER OF [YEAR]

[ ] No.: \_\_\_\_\_

[ ] Administrative Filing

CERTIFICATION OF APPOINTED  
COUNSEL OF COMPLIANCE WITH  
STANDARDS REQUIRED BY CRR 3.1  
/ CrRLJ 3.1 / JuCR 9.2

The undersigned attorney hereby certifies:

1. Approximately \_\_\_\_% of my total practice time is devoted to indigent defense cases.
2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that :
  - a. **Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
  - b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
  - c. **Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
  - d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]
  - e. **Case Specific Qualifications:** I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

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Signature, WSBA#

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Date

To: WSBA Board of Governors

From: WSBA Family Law Section Executive Committee

Date: February 26, 2023

Re: Diversity Council Proposal

The WSBA Family Law Section Executive Committee has considered the proposal by the Diversity Council and supports its recommendations. FLEC specifically discussed the removal of geographic diversity as part of the criteria to be considered in the selection of at-large representatives.

1. Providing a list of historically under-represented groups of people appropriately focuses attention on the importance of diversity in WSBA leadership on the BOG.
2. Focusing attention on under-represented groups is one tool to be used in overcoming that under-representation.
3. FLEC is supportive of geographic diversity on the BOG.
4. Having representation from each Congressional district is a tool to achieve a measure of geographic diversity.
5. While smaller communities within each Congressional district may have difficulty electing a Governor due to higher population in the larger communities within that Congressional district, that issue can be addressed by other means such as an individual from the smaller community developing a higher profile through WSBA committee and/or CLE involvement.
6. While Congressional districts may be oddly shaped and geographically difficult for a Governor to cover as a result of redistricting or gerrymandering, redistricting and/or gerrymandering issues are outside the purview of the WSBA.
7. The historically under-represented groups do not have tools such as (4) to obtain improvement in their level of representation on the BOG.
8. Using the valuable diversity analysis to achieve a higher level of geographical diversity would reduce the focus on the historically under-represented groups.

To: WSBA Board of Governors

From: WSBA Family Law Section Executive Committee

Date: February 28, 2023

Re: Taxicab Proposal

The WSBA Family Law Section Executive Committee has considered the proposal by the TAXICAB Workgroup and does not support its recommendations.

1. The Family Law Section Executive Committee (FLEC) recognizes the Washington Supreme Court's authority to establish Boards.
2. FLEC does not discount the value of the Boards established by the WSC but has at times disagree with positions taken by such Boards. The proposed policy does not provide a mechanism for resolving such disagreements.
3. The proposed TAXICAB policy was developed without section involvement although it can have an adverse impact on sections, other WSBA entities and individual members. The financial issues described below are one example of such a potential adverse impact.
4. The WSC Boards are dependent on member license fees to fund its work. The important work of the WSBA is also dependent on member license fees. Members reasonably assume that the BOG is responsible for managing the expenditures of their license fees in accordance with the work determined by the member-elected Board of Governors. Members may reasonably object to those mandatory fees being spent by "independent" Boards without such BOG decision-making as well as substantial WSBA oversight. This proposed TAXICAB policy does not address this potential issue.
5. The TAXICAB policy provides that the WSC Boards must be funded by the WSBA. The policy does not provide a financial limit. It does not give the WSBA a well defined, reasonable and substantial basis to challenge the amount requested/demanded by a Board. It does not guarantee that the financial needs of other aspects of the WSBA will be met. This proposed TAXICAB policy does not sufficiently address these issues.
6. The materials submitted to the BOG in support of the proposed TAXICAB policy refer to the present expenditures of approximately \$500,000-\$600,000 per year. The proposed TAXICAB policy would allow the Boards to demand more funds and more staff and, perhaps, leave the WSBA no practical choice but to provide the requested funds and staff. This could easily lead to important WSBA programs being eliminated due to insufficient available funds and staff. It seems unlikely that this was one of the intents of the WSC when the Boards were created. To avoid this unintended result, at a minimum, there must be limits to the amount of member fees spent on Boards so the other work of the WSBA will not be significantly and adversely impacted.

7. The contrast between policies applicable to sections and the proposed policy applicable to WSC Boards adversely affects sections. Paragraph 3.4, for example, provides that Boards can take positions on “matters of public interest” and “communicate with federal, state and local governmental leaders”. Sections are not allowed to some of these things at all and are not allowed to do others as broadly as the Boards. Furthermore, WSBA requires that some section actions are subject to review and, generally, pre-approval. No such requirements apply to actions by the Boards under this proposed policy.
8. Despite the “independence” of the Boards, the lines are blurred and confusing. Paragraph 3.3 says Boards cannot use WSBA letterhead but it also states that it can use WSBA letterhead for “regulatory matters.” The terms “regulatory matters” appears to be limited on its face but actually covers a number of issues as set forth in GR 12.1 (assuming GR 12.1 is the definition intended by the reference to “regulatory matters” in the proposed Taxicab policy.)
9. Paragraphs 3.5 and 3.6 are not in balance. Under the proposed policy, Boards must receive notice from the WSBA before WSBA considers any action that would “affect” a Board. By contrast, Boards need only give WSBA notice if a Board’s action “may expose the WSBA to liability.” There are no definitions provided and no basis for the differing standard.
10. The TAXICAB policy does not require financial self-sufficiency for the Boards while WSBA requires self-sufficiency for other WSBA programs, such as CLE and Sections.
11. WSBA is required to provide substantial staff support to each Board. In addition to the liaison, the Executive Director is required to allocate additional staff to each Board sufficient to “carry out its duties and functions”. WSBA is required to pay such staff and manage such staff. By contract, sections are required to reimburse the WSBA overall for staff use and funding while Boards are not so required. Significantly, sections were informed that such reimbursement was essential for the structural analysis done over the past several years (Justice Fairhurst work group and, more recently, ETHOS.) There is no explanation as to why such requirements are required for sections but not for Boards.

### Conclusion.

The Taxicab process did not include sections, as stated above. If we had been included in the process, we may have been able to suggest other terms or provide suggested definitions to assist in drafting a comprehensive policy for the Board of Governors to consider. At this point, FLEC believes that more time should be taken to revise the proposed policy before it is submitted to the WSC for its consideration. If the BOG chooses that route, we would like to be part of that process.