# Criminal Law



Published by the Criminal Law Section of the Washington State Bar Association

Volume 13 December 2011 Number 1

### From the Chair

Jennifer Grant - Criminal Law Section Chair

It has been a pleasure to serve as the 2011 chair of the Executive Committee for the Criminal Law Section. I would like to thank the Criminal Law Section – both the Executive Committee and the membership - for a successful and memorable year!

The Executive Committee has worked diligently throughout the year on your behalf. We started out the 2011 term with a member benefit CLE. On January 7, 2011, attendees were treated to a beautiful view from the Seattle Justice Center and an engaging discussion with Seattle University Professor Dave Boerner who presented "Ethics for Prosecutors and Defense." Criminal Law Section members earned 3 ethics credits at this no-cost, well-attended event.

Additionally, the Section sponsored the annual Criminal Justice Institute (CJI) on September 16-17, 2011, at the Washington State Convention Center in Seattle. Many thanks go to event co-chairs Hugh Birgenheier and Leesa Manion for their hard work on making the CJI such a success. They coordinated an interesting and informative program and secured great speakers. The CJI concluded with a memorable presentation from the "If Project." The project is a collection of answers from inmates at the Washington Corrections Center for Women who answered Seattle Police Detective Kim Bogucki's question, "If there was something someone could have said or done that would have changed the path that led you here, what would it have been?" All-in-all, it was a great event which offered a year's worth of CLE credits. Next year's CJI planning is already underway and the final product promises to be just as exciting.

The Executive Committee reviews pending legislation that will impact our practice area. Per our bylaws, action on legislation requires a 75% vote of the Executive Committee, which is composed equally of prosecution and defense members of the bar. The Executive Committee reached a super majority consensus on three bills pending before the legislature. The Criminal Law Section signed on in support of Senate Bill (SB) 5452 and 5482 and in opposition to SB 5114. Pursuant to our recommendation, as your Chair, I testified in Olympia this winter in opposition to SB 5114. Taking positions on multiple complex bills was a noteworthy accomplishment for our Section. A big thank you to Edwin

Aralica, Jimmy Hung, and Professor John Strait for heading the Legislative Action Committee and reviewing the 148 legislative bills referred to the Criminal Law Section.

I encourage you to be an active member of the Section. If you have an article that you would like published in the newsletter, please contact Chris Maryatt, the newsletter editor. If you have any topics or issues that impact the practice of criminal law in Washington, I encourage you to contact a member of the Criminal Law Section Executive Committee or to join the Executive Committee at our next board meeting. The Committee meets every 6 -8 weeks on Saturdays, starting at 9:15 am. You may contact the Section's Secretary/Treasurer to confirm meeting dates and get on the agenda.

Now that the year is almost over, I would be remiss if I did not take this opportunity to remind everyone to renew your Criminal Law Section membership.

If you have any questions of me, please do not hesitate to ask. It has been an honor and a privilege to serve as your Chair this year, and I look forward to the work we will do in 2012.

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### Understanding Procedures and Assisting Defense: The Current State of Competency Proceedings

By Kirsten Longaker and Abbey Perkins – Associate Attorneys, Associated Counsel for the Accused

#### A Problem Years in the Making

Citizens of Washington are unlikely to be sympathetic toward pouring more money into the criminal justice system, but the effects of budget cuts on the community can be seen far and wide. Budget cuts have forced the virtual elimination of Washington's Disability Lifeline program. Funding for chemical dependency treatment for adults, derived from the Alcoholism and Drug Addiction Treatment Support Act (ADATSA), is also on the chopping block.

As defense attorneys, we see the results of these cuts every day. We have more clients unable to meet their legal financial obligations. More clients are finding it increasingly difficult to access benefits, food, and shelter – basic aspects of stability that undoubtedly decrease recidivism and increase compliance with court directives. Clients with addiction issues and mental illness are unable to get treatment. People in the jail are more acutely mentally ill than in the past, due in part to the underfunding of community-based mental health agencies and the civil mental health system. The State's largest psychiatric hospital, Western State Hospital (Western), is not exempt from these budgetary constraints.

Western has continued to do the vast majority of the forensic work for courts in western Washington. Referrals to Western are up; an increasingly mentally ill criminal justice population leads to increased referrals to Western for competency evaluations, competency restoration, diminished capacity and insanity evaluations, and the resulting civil commitment referrals when a defendant is deemed incompetent. Meanwhile, over the past few years, Western has seen a mass exodus of personnel. Psychiatrists and psychologists have been leaving by the dozens to pursue more lucrative careers in private practice and in the surrounding federal system at Joint Base Lewis-McCord and Madigan Medical Center. The Department of Social and Health Services (DSHS), which runs Western, has closed wards to save money on doctors and support staff. This has resulted in an increase in wait times and inefficiencies in the competency evaluation process.

In response to pressures from the courts, including show cause orders addressing delays in transport to the hospital, Western opened a North Regional Office (NRO) branch in downtown Seattle in 2006. The NRO was established to focus on in-custody competency evaluations in local jails. This resulted in a significant decrease in delays in getting evaluations. The problem seemed solved, but

DSHS continued to make cuts to Western's services. DSHS has discussed closing up to five additional civil commitment wards at Western State in the coming years. Most of these wards will be those serving older populations with dementia as well as people with traumatic brain injuries. DSHS says it will focus on getting displaced individuals into community-based mental health agencies at a projected savings of more than \$5 million. As wards close and staff gets laid off, Western State faces a mathematical problem: More people are coming in, but there are fewer places to put them. Federal guidelines require a minimum staff-to-patient ratio, which means that some beds have to remain empty in order to comply with these ratios. Eastern State Hospital is subject to the same laws and budget cuts, and they have the same numbers problem as Western. The criminal justice system is at the wide end of the funnel; Western is at the spout. We keep pouring more people in, but the funnel is becoming clogged at the other end.

The impact on the criminal justice system has been coming to a head for about a year and a half. As bed space becomes more limited, the amount of time that clients have to wait to be transported to Western for competency restoration treatment and evaluations that could not be completed in the jail has ballooned. In-custody evaluations performed by the NRO, which at times were taking only three or four days, have started to take closer to three or four weeks. Western struggles to train enough doctors to fill vacated positions. With civil commitments resulting from incompetency findings ("forensic flips") taking precedence over competency cases because of short statutory timelines, the wait for clients in the jail has skyrocketed. Out of custody evaluations, which are done by doctors stationed at Western, are seeing wait times upwards of a year.

As a defense attorney, there is no more helpless a feeling than having to wait for a government agency to decide when it is your client's turn to be transported. All agree that the jail is not a proper psychiatric facility, yet clients are forced to wait weeks and months to go to the hospital to get the treatment they need. The mental health courts in Seattle Municipal and King County District Courts handle the bulk of the competency cases in King County.

The problem became evident in our courts early on. We have worked with our courts and Western on potential solutions to the problem. But, with increased budget cuts looming, the problems continue to worsen. It is important that defense and prosecuting attorneys understand the laws surrounding competency and the timelines that Western is expected to adhere to. It is equally important that defense and prosecution present a united front to advocate against the disastrous budget cuts slated for Western and to advocate for the courts to hold Western and DSHS to their responsibilities to our clients and the community.

## Understanding Procedures and Assisting

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#### **Statutes Surrounding Competency & Timelines**

RCW 10.77.050 states that "no incompetent person shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity continues." When any party has concerns about a client's competency, an initial order for competency evaluation should be signed. Traditionally, state hospital evaluators are involved in virtually every competency proceeding, because the statute requires that at least one evaluator be approved by the prosecutor's office. State doctors are essentially prosecutors' in-house experts. RCW 10.77.060(1)(a).

When a competency evaluation is ordered, the court must decide where the evaluation will occur. The location of the initial competency evaluation will impact how quickly the evaluation will be completed. Competency evaluations conducted in the jail tend to be done the quickest. While there is no set timeframe for conducting an in-custody evaluation in the jail, there is general agreement that the fifteen (15)-day timeframe for inpatient evaluations at the hospital applies to in-custody evaluations as well. Since evaluations in the King County Correctional Facility are conducted by Western evaluators from the NRO, these evaluations are currently being completed within fifteen (15) days of receipt of the order for initial examination for competency. Although this method is quick, it should be used with caution, because being in jail is problematic for clients suffering from mental illness. The jail does not provide mental health treatment, medications may be disrupted during incarceration, and the jail is ill-equipped to deal with the unique problems facing the mentally ill.

A competency evaluation can also be completed on an inpatient basis at Western. In these cases, an evaluation must be completed within fifteen (15) days from the time of admission to the facility. RCW 10.77.060 (1)(a). It is rare for Seattle courts to refer clients to the hospital for an evaluation due to significant delays in transport. However, sometimes a court will order an inpatient evaluation if a defendant refuses to participate in the in-custody evaluation and the evaluator is unable to form an opinion based on observations and collateral sources.

Finally, a competency evaluation can occur in the community if the client is released on personal recognizance or is able to post bond. There is no timeframe listed in the statute for out of custody cases, but they should be completed within a "reasonable" timeframe or due process concerns are implicated. Once a case is on the out of custody competency waitlist, the client and attorney will have to wait until contacted by a Western evaluator to set up an evaluation. If a client fails to appear at the out of custody competency evaluation, the order will be retracted and that client loses her spot on the waitlist. Currently, out-of-custody compe

tency evaluations are taking many months to complete. This lengthy wait period is problematic, because while the case is pending speedy trial is tolled and case preparation is limited.

Another way Western becomes involved in criminal cases is through the competency restoration process. In felony cases, defendants may be sent to Western for up to ninety (90) days for evaluation and treatment to restore competency. RCW 10.77.086. That period may be extended by the court if the defendant does not restore within that timeframe. <u>Id</u>. In misdemeanor cases where the charge is determined to be a "serious offense," restoration shall not exceed fourteen days in addition to any unused time of the evaluation. RCW 10.77.088. If a client stays in the jail to await the evaluation, the entire fifteen (15) days of evaluation time is considered unused and will be added to the amount of restoration, for a total of twenty-nine (29) days. Transport time to the hospital is not included in the restoration time.

#### **Case Law Surrounding Timelines**

Recently there have been significant delays in transporting clients to Western for competency restoration. RCW 10.77.088 allows for a "reasonable time for transport" and RCW 10.77.220 states that no person committed to DSHS custody waiting in jail for placement in a treatment program should have to wait longer than seven (7) days. Unfortunately, clients are currently waiting in custody for months before being transported to Western. This delay in transport raises significant due process concerns.

The Ninth Circuit Court of Appeals has noted that incapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment and upheld an injunction requiring an Oregon state hospital to admit incapacitated criminal defendants within seven (7) days of a judicial finding of incapacitation. Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1123 (9th Cir. 2003). In Washington, similar delays were challenged years ago, but the court declined to find a due process violation in that case due to the unique challenges facing the hospital at that time and due to the fact that the delay in transport was ameliorated within one month. Weiss v. Thompson, 120 Wn. App. 402, 411, 85 P.3d 944 (2004). The court did note that this disposition did not mean that "ongoing, systematic problems could not be remedied by means of a habeas corpus petition, injunctive relief or such other relief as may be warranted." Id. at 413. The due process concerns noted in these restoration cases may also apply to cases where a client is in-custody awaiting transport for an inpatient evaluation since they are also pre-trial detainees with liberty interests in freedom from incarceration.

One way to challenge delays in transport to Western for either inpatient evaluation or restoration is through a show

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cause hearing under the Contempt Statute. The parties may submit to the court a criminal motion ordering that Western State transport the client and complete the evaluation or appear in court to show cause why that has not been done. RCW 7.21.020 authorizes courts to impose sanctions for contempt of court for failing to abide by a court order. If the evaluation is not completed by the date of the show cause hearing, an assistant attorney general will likely ap-

pear to argue against imposition of sanctions. Testimony

from Western staff may also occur at these hearings. Some

courts have imposed sanctions as a result of these hearings

Attorneys continue to bring show cause motions under the contempt statute and they are also starting to challenge these delays by filing motions for dismissal based on government misconduct under 8.3(b). Creative solutions will be necessary to solve the delay problems that have been years in the making. Lawsuits and legislation appear to be the next step in dealing with this issue.

#### Legislative Efforts to Address the Problem

and others have declined to do so.

In January 2011, the Washington Legislature debated SB 5114 in an effort to cut costs by eliminating some of the state hospitals' responsibilities on competency cases. SB 5114 sought to make some significant changes to RCW 10.77, including requiring one evaluator instead of two on all competency cases. In addition, the bill would have changed RCW 10.77 to require evaluations to be in the jail or in the community (out of custody at the hospital), taking away the option to have the evaluation done inpatient at the hospital. Significant changes to the restoration statutes included the elimination of all misdemeanor restoration, regardless of whether it was a serious offense under RCW 10.77.092. Instead, all cases would be evaluated by county mental health professionals for civil commitment. The bill also would have amended the civil commitment statute, RCW 71.05, to skip the shorter commitments preceding 90day commitments after the dismissal of a criminal case. The legislation also would have changed RCW 10.77 to allow an evaluating psychologist to work "in conjunction" with a developmental disabilities professional rather than the current language which requires a qualified developmental disabilities professional to conduct the evaluation.

Reaction to SB 5114 was mixed. Prosecutors expressed concern over the lack of misdemeanor restoration and the inability to refer dismissed serious misdemeanors to the state hospitals for civil commitment evaluations, largely because the hospitals civilly commit a higher proportion of defendants than the county mental health professionals. The Washington Defender Association and the Washington Association of Criminal Defense Lawyers generally supported

the intent of the bill and doing away with misdemeanor restoration. However, these groups expressed concern about taking away the option to send in-custody cases to the hospital and advocated for all evaluations of developmentally disabled defendants to be conducted by qualified developmental disabilities professionals. In addition, the defense position was that it is costly and unnecessary to extend the time to 90 days that incompetent misdemeanants may be committed. (Editor's note: The Criminal Law Section of the Washington State Bar Association voted by a supermajority to oppose the bill, and Chair Jennifer Grant testified in Olympia for that purpose.)

At the conclusion of the debate, the bill fell short and was not passed. However, it started realistic conversations between both sides of the debate on what compromises could be achieved with tightening budgetary constraints. It is likely that DSHS will continue to support bills like this one in order to decrease their responsibilities to the criminal justice system. In the meantime, however, defense attorneys keep pushing for show cause orders and 8.3(b) dismissals in order to make the point that DSHS has statutory duties toward the criminal justice system that must not be ignored. At some point, DSHS and the legislature will have to recognize that funding the state hospitals will be cheaper than monetary contempt findings and the potential costs of federal lawsuits.

#### Tips on Reducing Competency Evaluation Delays

- 1. In-custody (jail) evaluations avoid long wait times for transport to hospitals. If possible, order an in-jail evaluation.
- 2. If a defendant fails to show up for an evaluation, sign a court order retracting the evaluation and let the hospital know an evaluation is no longer pending. This reduces delays by making sure that the hospital's list of pending evaluations is current and they aren't needlessly attempting to schedule evaluations.
- 3. Be sure to note on the order if specialists like interpreters or developmental disability specialists are required. Be sure to know your court's procedures on how the hospital gets an interpreter and follow that procedure as early as possible. Some courts require defense to secure and set up the interpreter, while in King County courts, the doctors contact court interpreter services directly.
- 4. Waive the two evaluator rule on basic cases. This reduces wait time, because a single doctor can see a client much sooner than the client would be seen waiting for two doctors to conduct an evaluation.
- 5. Rely on older evaluations if they are consistent with the defendant's current presentation. Many (continued next page)

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defendants are "frequent fliers." If an evaluation is ordered and the defendant returns on a new charge one or two months later, there may be no need to order another evaluation and you may be able to rely on the evaluation you already have.

6. Defense attorneys should consult the WDA brief bank for show cause and 8.3(b) briefing.

### Seattle Municipal Court Offers First Veterans Treatment Court in King County; Fifth in the State

By Jennifer Grant – Assistant City Attorney, City of Seattle

Washington state has a growing veteran population. There are approximately 623,000 veterans in Washington state (the 8th state in terms of highest concentration of veterans in the population) with 143,000 in King County. In fact, Joint Base Lewis-McChord, the largest military installation on the West Coast of the United States, has deployed more than 70,000 service members in the last ten years in support of Operation Noble Eagle, Operation Enduring Freedom and Operation Iraqi Freedom. Service members, including Active Duty, Reserve and National Guard, have seen longer deployments as well as multiple deployments. It is expected that 1,000 veterans will return to King County each year.

Advances in medicine and military equipment mean soldiers are more likely to survive their injuries, especially those sustained from improvised explosive devices. The lingering Traumatic Brain Injury (TBI) and Post Traumatic Stress Disorder (PTSD) present many challenges for veterans as they attempt to reintegrate into civilian society. Many Veterans return with PTSD and do not seek the critical services they may need to address their mental health or substance abuse issues. This often results with increased interactions with the criminal justice system.

Since Buffalo City Court Judge Robert Russell presided over the nation's first veterans court docket in January of 2008, approximately 80 Veterans Treatment Courts have formed across the country. Judge Russell created the specialty court after he noticed an increased number of veterans on the court's mental health and drug court calendars and that the veteran defendants reacted positively to the two court employees who had served in the military.

Until very recently, Seattle Municipal Court (SMC) did not have sufficient coordination with outside agencies to provide comprehensive services to Veteran defendants. The Seattle Municipal Veterans Treatment Court (SMVTC) was the product of collaboration among the SMC, the Seattle City Attorney's Office, the Associated Counsel for the Accused, the King County Department of Community and Human Services, the Washington State Department of Veterans Affairs, and the U.S. Department of Veterans Affairs aimed at addressing the unmet needs of Veterans in SMC.

On September 20, 2011, SMC followed Thurston County, Clark County, Pierce County and Snohomish County, to become the fifth court in Washington state and the first in King County to hold a specialized calendar for veterans involved in the criminal justice system. SMVTC is a voluntary court-monitored therapeutic program tailored to address the mental health and/or substance abuse issues of the veteran defendant. Defendants are held accountable with sentences based on the severity of the crime and defendant's history but, similar to mental health court and drug court, with a specific focus on rehabilitation rather than punishment. In addition to addressing addiction and mental illness, the therapeutic court model enlists a coordinated community response to address other issues, such as homelessness, unemployment and depression.

The court is voluntary, meaning defendants must seek entry on their own accord. Defendants who wish to be considered for the program must sign releases of information and apply through the court liaison. To date, nine (9) defendants have been calendared in Seattle Veterans Treatment Court. Seven of the nine have opted into the program, even though it means probation conditions will be more stringent and court appearances more frequent.

Through the combination of structured support provided by the court, health care and other social services provided by Washington state and U.S. Departments of Veterans Affairs, the City expects to see a reduction in recidivism. For more information about the Seattle Veterans Treatment Court see <a href="http://www.seattle.gov/courts/vtc/vtc.htm">http://www.seattle.gov/courts/vtc/vtc.htm</a>.

# Representing a Juvenile and the Ethics of Third-Party Payment for the Client's Representation

By John Strait - Professor of Law, Seattle University

A common ethics issue which affects both public defense and private representation of juveniles is how to cope with the parent and/or guardian of your juvenile client. Separately, for retained cases, how should you set up the attorney-client relationship in a manner which complies with the Washington Rules of Professional Conduct?

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Although it should be obvious that the client is the juvenile regardless of age in juvenile court criminal proceedings (See In re Gault, 387 U.S. 1 (1967) and In re Winship, 397 U.S. 358 (1970), it is understandable why this legal truism nevertheless does not meet with an enthusiastic endorsement by a parent or guardian who is being told that the attorney-client relationship is with the juvenile, not with parent or guardian. It is still more difficult for a parent who is paying for retained representation for her child to understand that she is not the client and that the child is the only client. By the time you explain to the parent or guardian that she cannot participate in her child's communications with the attorney because of the attorney-client privilege and the obligations under Washington Rule of Professional Conduct 1.6(a) to protect the confidentiality of the child's information, a defense lawyer has often thoroughly upset the parent or guardian who understandably feels that they should be heavily involved in what is occurring to their child or ward.

It is precisely for these reasons that complying with the Washington Rules of Professional Conduct (WRPC) and good lawyering mandate a written fee agreement and/or explanation, whether for a court-appointed case, or for a retained case. The written explanation signed by the child client and the parent and/or guardian as well as the attorney should be a minimum practice requirement.

Under WRPC 1.6(a), all information acquired during the representation of a client for the purposes of representation is considered confidential information and subject to the restrictions of release of WRPC 1.6. Allowing a third party, such as the parent or guardian, to sit in on attorney-client communications not only violates WRPC 1.6(a), but also voids the attorney-client privilege under ER 501 and RCW 5.60.060(2). Although parents or guardians often claim that they are best able to assist the lawyer in communicating with the child client, not only is this often not true (Were you as candid when your parents were listening and an unpleasant subject was under discussion about your behavior as you were when your parents were not in the room?) but even if it were, it would not change the ethical obligation of confidentiality and the simple legal fact that there is no parent-child privilege in Washington state. There is no protection of any information the parent learns from the attorney or from the child client to prevent either voluntary disclosure on the part of the parent or guardian to the authorities or others, or compelled witness testimony

To fulfill your obligation under WRPC 1.6(a) Protection of Client Confidential Information, WRPC 1.4 Adequate Communication Between the Attorney and the Client, and

for the client to make the decisions necessary to the representation under WRPC 1.2, the inclusion of the parent or guardian has potentially violated these rules if the parent or guardian reveals or is compelled to reveal the information they overhear or are told by the attorney.

Although the above analysis applies to all representations of juveniles in juvenile court criminal proceedings or other state-initiated juvenile proceedings where the child has a right to counsel regardless of whether the attorney is retained or appointed, there are additional ethical responsibilities for lawyers who are retained to represent a juvenile client. In most situations, it will be the parent or guardian who retains the attorney to defend or represent the juvenile in the proceeding. Washington Rule of Professional Conduct 1.8(f) provides that:

A lawyer shall not accept compensation for representing a client from one other than the client unless: 1) The client gives informed consent; 2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and 3) Information relating to representation of a client is protected as required by Rule 1.6.

Washington Rule of Professional Conduct 5.4(c), Professional Independence of a Lawyer, requires: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

In order to fully comply with these rules, the parent or guardian must agree that her payment of the attorney's fees does not give her a right to control the representation, share confidential information belonging to the client, and that she is entitled, in effect, only to information necessary for billing which should not contain WRPC 1.6(a) covered information relating to the representation. The client must give informed consent to the third-party payor relationship.

As a practical matter, this means that a written fee agreement is necessary when representing a child and being paid by a parent, guardian, or other third party. The agreement should be in writing, should specifically include the conditions of WRPC 1.8(f) as further explained in Comments 11 and 12 and should be signed by the third-party payor and the juvenile client as well as the attorney. The contract should never be set up as a joint representation of both the juvenile and the third-party payor, is very likely to be a conflict of interest between the interests of the parent, guardian, or payor and the interests of the juvenile client in the proceeding. For example, parents often are subject to collateral financial liability for a tort or restitution arising out of a juvenile conviction. That is, of course, a directly adverse interest under WRPC 1.7(a)(1) to the interests of the juvenile in deciding whether to plead (continued next page)

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and whether to stipulate to guilt and/or proceed to a fact finding trial and defend. Similarly, parental interest in having their child accept responsibility for their bad judgment and/or mistakes, is directly adverse to the juvenile's right to assert their innocence under *Winship*.

Although a child-client could give consent to share information with a parent or guardian under WRPC 1.6(a), before a lawyer representing a juvenile advises such a course of conduct, the lawyer must consider the risks of sharing that information as described in the first portion of this article and then counsel the client adequately as to the wisdom of doing so. The lawyer should also consider the risk that once the confidential information is disclosed to the parent, guardian, or third-party payor that there is nothing to stop that parent, guardian, or third-party payor from taking that information directly to the authorities if they choose. Generally speaking, allowing the third-party payor to sit in or share the confidential information is unwise and may be a serious mistake.

If, despite the risks of involving the third-party payor in the case, you believe that the third-party payor can facilitate communication with the client and therefore the risks of inclusion are worth it, the lawyer should have a specific written agreement with the third-party payor, parent, or guardian that she is acting as a communication assistant to the attorney. This puts the attorney in the best position to later argue that the third-party payor is subject to the same restrictions as a paralegal or investigator working with the attorney and covered by the attorney-client privilege as well as WRPC 1.6. This would at least provide the basis for a motion to strike and/or exclude a third-party payor's testimony or to prevent them from attempting to take the information to the authorities. It should also prevent the prosecution from attempting to subpoena the third-party payor for their testimonial knowledge arising from the attorney-client communication. The agreement should be in writing and the agreement should specifically identify the confidentiality obligations of the attorney-client privilege, the work-product privilege, and WRPC 1.6(a) confidentiality. Lawyer, client, and payor should all sign the agreement.

# Seattle Community Court: "A Non-Traditional Approach to Address Traditional Problems"

By Tuere Sala - Assistant City Attorney, City of Seattle

Seattle Municipal Court launched Seattle Community Court (SCC) on March 3, 2005, initially addressing low-level chronic offenders in the Downtown Core and Pioneer Square neighborhoods. In March of 2007, SCC was expanded citywide and became the 26th community court in the United States – there are currently community courts established in Australia, Canada, and the United Kingdom. Community courts take a different approach to chronic social, human and legal problems that are resistant to conventional solutions by holding low-level offenders accountable and providing opportunities for them to give back to the communities impacted by their unlawful conduct. The problem-solving approach of community courts recognizes that individuals, as well as communities, can be victims of crime.

SCC serves "chronic public system users": defendants who repeatedly commit low-level crimes, fail to comply with sanctions, fail to appear for court hearings, and use jail days when effective rehabilitation may be available through alternative strategies. The impetus behind the development of the court was the necessity to slow down the recidivism rates of low-risk, quality-of-life crime offenders through the criminal justice system. The repetitive process of arrest, imposition of jail sentences and release without ever addressing the underlying reasons for the arrest had the effect of creating a costly recycling system that ultimately had no deterrent effect upon the offenders and diminished overall public trust in the criminal justice system. Rather than relying on lengthy and costly jail sentences, SCC defendants are mandated to perform various hours of community service (between sixteen (16) and forty-eight (48) hours, at designated community sites) and make social services linkages with community-based and public agencies to address the underlying issues causing their repeated criminal behavior.

Unlike therapeutic courts, such as a drug court or mental health court, community courts are problem-solving courts. They are designed around whatever problem is most prevalent in the court's particular jurisdiction. They address everything from civil ordinance violations, such as drinking in public, housing complaints and land use violations, to criminal charges for both misdemeanor and felony crimes. Although the courts vary in the charges and defendants they prosecute, all community courts share five common principals, which are (1) that the court hold defendants accountable for their unlawful conduct; (2) that defendants are provided immediate access to services to

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address "quality of life" issues – i.e., unlawful behavior or acts that arise out of basic survival needs and conduct that interferes with another's ability to live in quiet enjoyment; (3) that penalties for noncompliance be swift but not punitive; (4) that a team approach provides the most effective support for defendants; and (5) that internal and external collaboration is the key to a successful program.

Like most community courts, SCC is a highly structured court system both in its sanctions and case procedures. Entrance into the court is voluntary. Defendant must choose to have their case adjudicated through SCC at their initial arraignment hearing and must first resolve other jurisdictional holds or conflicts before an assessment is completed and entry into they are allowed to enter. At their first SCC appearance, defendants are offered immediate access to specific social services identified through a needs/risk assessment performed by probation. Entering defendants agree to comply with the court's mandates within a very limited jurisdiction.

Most SCC defendants have previously fallen through the cracks or gone through the criminal court process "unseen." In SCC, however, defendants are expected to be "seen" and "heard" so that support can be tailored to meet their particular needs. This is accomplished through several select engagement tools such as the SCC judge's courtroom interaction with defendants; support with completing the court's mandate from both the defense and probation; and the use of many volunteers to motivate and/or encourage defendants to connect or reconnect with the many social service agencies available to assist them.

The SCC Transitions Program is a perfect example of how this works. Last summer, the court noticed an increase in the number of young female defendants ages 18 to 24 charged with prostitution. After doing some investigation, it became clear that these women had unique issues impacting their lifestyle decisions that were not being addressed through the normal SCC structure. The court contacted agencies within the Seattle area that already worked specifically with this population and within six months collaborated with them to provide community service opportunities tailored around the specific needs of this group. More importantly, the agencies were able to provide wrap-around social service contacts, establish a long-term support link and help inspire the women to see the existence of alternative opportunities.

This type of innovative and forward-thinking process is made possible due to the continued engagement by the court into the circumstances behind criminal behavior. In fact, the entire community court structure is predicated upon the goal of creating the best opportunity to have a meaningful and positive impact upon a defendant's conduct and possibly his or her life.

(Editor's Note: Tuere Sala has twenty years' experience as a prosecutor. She has been employed with the City of Seattle for ten years and is currently the Community Court Prosecutor for Seattle Community Court. If you have questions or need additional information, she can be contacted at tuere.sala@seattle.gov. For more information about community courts in general, contact the Center for Court Innovation, http://www.courtinnovation.org.)

# Drug Diversion in Washington State and the Role of the Department of Health's Pharmacist Investigators

By Grant Chester – Chief Pharmacist Investigator, Office of Investigations and Inspections, Washington Department of Health

Pharmacist investigators from the Department of Health's Office of Investigation and Inspection, within the Health Services Quality Assurance Division, are responsible for investigating administrative and criminal violations of the laws and rules relating to firms (a total of 2,001 firms – e.g., Drug Animal Control/Humane Society Registration) and health care professionals (a total of 27,422 persons – e.g., pharmacy technicians) licensed by the Board of Pharmacy (Board). The office also assists local, state and federal enforcement organizations that investigate violations of laws and rules related to drugs, precursor chemicals and poisons (RCW 18.64.009).

While our efforts are generally devoted to purely administrative law, many of the cases we investigate contain allegations of drug diversion. This article focuses on drug diversion and the most common schemes we encounter in our investigations. These schemes include: drug theft, prescription forgery, subterfuge and an activity known as "smurfing." This article also discusses how the Board treats health care professionals and some changes, including new programs we are instituting in 2011 which will serve as tools to assist in curtailing some forms of drug diversion.

#### **Drug Theft**

Drug theft is accomplished by a person unlawfully taking a drug from the pharmacy or other facility licensed to keep scheduled drugs on site. This can range from a person's robbing or burglarizing a pharmacy or other health care facility to an employee's taking a few tablets or \$250,000 worth of drugs. This article focuses on employee theft.

To provide some background, federal law requires each Drug Enforcement Agency (DEA) registrant (phar-

macy, wholesaler, individual practitioner) that possesses controlled substances to perform a biennial inventory and maintain records of all controlled substances received and dispensed for 2 years. See 21CFR1304 and Title 21 Code of Federal Regulations § 1304. In addition, Washington requires hospitals to keep a perpetual inventory of schedule II controlled substances. WAC 246-873-080. Extended care facilities are required to maintain a perpetual inventory of all schedule II and III controlled substances. WAC 246-865-060. The hospital and extended care facility laws essentially provide for more control over inventory of these scheduled drugs because of greater access by employees in these twenty four hour operations. Our experience in investigating drug diversion in these facilities is that the thefts have been primarily for personal use.

In addition to thefts uncovered through the perpetual inventory process, some pharmacies will notice, usually within 24-48 hours, if schedule II controlled substances (Percocet®, methadone, and Oxycontin®) are missing. This notice occurs because the pharmacies secure these drugs in a locked drawer or cabinet within the pharmacy due to the high abuse potential. This limits the access and availability to these scheduled drugs. Some pharmacies disperse their controlled substances throughout the pharmacy stock within the prescription area, which is also allowed by federal law, and thefts generally go undetected for longer periods of time.

Most pharmacy thefts are by staff (pharmacy assistant, pharmacy technician, pharmacist intern, or the pharmacist) just taking the drug off the shelf or shorting a prescription and putting them in their pocket, purse, etc. Some examples of diversion have included:

1. A pharmacist diverted Duragesic® (fentanyl) patches, a schedule II pain reliever for serious pain, by taking the patches out of the box, resealing the box, and dispensing the empty box to the patient. Notably, the patches do not weigh much and there was a great deal of patient information inside the box. It was difficult to tell the patches had been removed. After several patients complained of not having enough patches or not having any patches, we checked all of the packages in the pharmacy that had not been dispensed and discovered they had been tampered with. Next, we went over the times the prescriptions had been filled and narrowed it down to one pharmacist and were able to summarily suspend his pharmacist license. Since product tampering was involved, we contacted the federal Food and Drug Administration (FDA) Office

- of Criminal Investigation (OCI) and assisted it with developing a federal case.
- 2. A pharmacist used his small independent pharmacy to fill Internet prescriptions, primarily for generic Vicodin®. We discovered this, explained the violations to the pharmacist, and he agreed to stop. A couple of years later we discovered that he had started filling internet prescriptions again on a larger scale. He became the top purchaser of generic Vicodin in Washington state. We involved the DEA and local police jurisdictions and were successful in revoking his pharmacist license, the pharmacy license, and surrendering the DEA registration. This also lead to a fine for the wholesaler who provided the generic Vicodin in the amount of \$3.5 million for not reporting suspicious activity.
- 3. A pharmacy technician working for a major medical center in northwest Washington was responsible for ordering supplies for the pharmacy. Over a period of two years, he went from theft of a small amount of insulin that he would sell online to theft of over \$250,000 worth of insulin, which he in turn sold to a wholesaler in Florida. This is another case in which we worked with the FDA OCI, and nation-wide thirty-four (34) people were arrested and the pharmacy technician lost his license.
- 4. An obstetrics nurse in a rural hospital was diverting controlled substances for her personal use by withdrawing the drug from a vial and replacing it with sterile water. The hospital pharmacist reported unusual behavior by the nurse to the pharmacist investigators; we investigated and were able to determine that injectable drugs under control of the nurse had been tampered with using a refractometer. We worked the case with the FDA OCI and Nursing Commission Quality Assurance investigators. FDA prosecuted the case federally and the nurse received a multi-year sentence. During the investigation, it was discovered the nurse had tampered with medications in Oregon and Colorado before moving to Washington.

Some of the problems we encounter in pharmacies (retail and hospital) include difficulty in identifying the perpetrator early on. Because many of the drugs are so inexpensive, the losses are not discovered until a large amount has been taken or the perpetrator has become obviously impaired. Another problem is that, in many instances, the facility does not want negative publicity about its employees. Usually the amount of drugs stolen is small and the cost of prosecuting the individual responsible is disproportionate. Many reports of controlled substance losses indicate the losses are written off as "unknown" because the cost of the drug is minimal. (continued next page)

Another trend we have seen is that a pharmacy employee will steal a high-dollar, high-demand legend drug (Viagra®, Cialis®, Levitra®, Zyrtec®) and then trade these drugs for the drugs he or she likes to abuse.

#### **Prescription Forgery**

This is the most common way for the public to obtain illegal prescription drugs and is sometimes used by health care professionals. The two most common ways are: 1) to steal blank prescriptions from a practitioner, hospital, and/or clinic or 2) to phone in fake prescriptions. There are, however, a number of variations on how these forgeries occur.

Forgery on stolen prescription pads is a pattern of activity prevalent in the Seattle and Spokane areas and along the I-5 and I-90 corridors. On July 1, 2010, a law was enacted that required the use of tamper-evident prescription pads with a state seal. RCW 18.64.500. Even then, forgers have been able to obtain several reams of the new blanks from unsuspecting clinics. The forgers then obtain a practitioner's address and DEA registration and a throwaway cell phone. Once they have this information, they will print their own prescriptions – and if the pharmacy calls the number on the prescription to check on the prescription they get the forger's cell phone. Recently, these prescriptions have often been for large amounts of the schedule II controlled substances methadone, Dilaudid®, and Oxycodone. These operations are usually on a large scale and well-organized.

Phoning in fraudulent prescriptions is also common. A person will call a pharmacy pretending to be an agent of the prescriber. The caller will have the prescriber's name, address, phone number, and DEA registration. They will typically phone in a prescription for smaller amounts of schedule III or IV controlled substances such as generic Vicodin®, Norco®, and/or Xanax®, etc. Then the patient or friend of the patient will pick up the prescription. Phone fraud, however, is usually a smaller scale operation involving a family or a few friends.

There are other patterns of forgery activity. "Paper hanging" is a term used to describe another form of prescription forgery. "Paper hanging" occurs when a person obtains a legitimate prescription from a practitioner and then adds a second or third prescription to the same piece of paper; of course, in those cases, the practitioner has not authorized the additions. A common practice for a pharmacist who is diverting drugs is to create phony telephone prescriptions for a patient, fill the prescriptions, bill the patient's insurance or pay cash, then take the drugs for his or her use. Patients also have a similar scam in which a patient or friend of the patient will drop off a prescription (usually a controlled substance) and make arrangement for someone else to pick

up the prescription. Then the patient will claim that he did not authorize the other person to pick up the prescription and demand the prescription be filled again.

#### Subterfuge

Many people abusing drugs, especially with insurance for medication reimbursement, will visit multiple practitioners to obtain drugs. Typically, they will tell each prescriber the same story and obtain a prescription for the drug. Then they will fill these prescriptions at different pharmacies. Some will use the identity of individuals they know who have insurance and impersonate them at the practitioner's office. When the insurance refuses a prescription they will typically pay cash. Some examples:

- A person has insurance with her current employer, an L&I claim with a previous employer and insurance through her spouse. She will try to bill one prescription of Vicodin through each of the insurance companies, use different practitioners and pharmacies for each insurance company, and obtain three times as many controlled substances as each prescriber thought was being prescribed.
- 2. Another variation is when a person obtains a copy of the yellow pages with a listing of the dentists in the area in practice groups. In the early evening he will start calling the dentists' offices and find out the name of the on-call dentists. Then he will state he is a patient of the dentist not on call, has an abscess, and request a prescription for an antibiotic and a pain reliever. He will ask each dentist to call the prescription in to a different pharmacy. Usually the dentist will call in an antibiotic prescription and #10 to #20 tablets of a pain reliever (Tylenol #3® or Vicodin). He will then go to the pharmacy and tell the pharmacist he still has some of the antibiotics and only needs the pain medications.

Another scheme of subterfuge occurs when pharmacists offer to take back prescription medications. Pharmacies are never allowed to take back controlled substances and are allowed to take back other drugs only in rare, well-defined instances. WAC 246-869-130. We had an instance where a pharmacist let it be known in his local community that he was collecting drugs for overseas missions. Many of his patients would bring prescription drugs they no longer needed to the pharmacist. The pharmacist, who worked for a chain retail pharmacy, then put the drugs back in the pharmacy's stock. Consequently, his pharmacy was one of the more profitable pharmacies in the chain and he was selected pharmacist manager of the year on a number of occasions. (This pharmacist was also committing billing fraud by charging his patients excessive amounts and pocketing the difference.) When a complaint was received related to (continued next page)

billing, the pharmacy for which he worked started monitoring the cameras inside the pharmacy and discovered the rest of his scheme. We involved the local police, the DEA, FDA and Internal Revenue Service (IRS). The pharmacist lost his personal license, over \$700,000 in his company retirement account, and is still working out issues with the IRS. The company for which he worked settled with the federal government for \$500,000 for failure to adequately supervise the pharmacist. As an aside, this pharmacist was not taking any drugs; he was converting them to cash.

#### "Smurfing"

"Smurfing" is a term associated with methamphetamine manufacturers. Due to the state and federal restriction on the sale of ephedrine-, pseudoephedrine- and phenylpropanolamine-containing products in 2007, it is difficult to obtain the quantities needed for large batches. A common practice for methamphetamine manufacturers is therefore to pay people who have a driver's license five dollars for each package of pseudoephedrine they are able to purchase. The manufacturers will usually drive the "employees" around to as many different pharmacies as possible so they can purchase the maximum amount of pseudoephedrine at each pharmacy.

Due to the nature of "smurfing," it is usually found in larger cities with multiple pharmacies, especially along the Oregon border. We believe many people from Oregon enter into Washington to "smurf," because Oregon made pseudoephedrine a prescription drug several years ago.

#### How the Board Handles Health Care Professionals

The Board is the disciplinary authority regarding health professionals licensed thereby. Board panels evaluate each drug case individually, and if the diversion is related to personal drug use and is not endangering the public at large, they will strongly encourage the individual to obtain assistance through the Washington Recovery Assistance Program for Pharmacy (WRAPP). If the person enters WRAPP, she may return to practice when approved by the program manager and she commits to five years of treatment. The investigative case is placed in "case in progress" status; this is our administrative version of drug court. If a person quits the program or the program throws her out, the case is reopened and processed for disciplinary action. Notably, if a person voluntarily (not under investigation) enters the WRAPP program, he signs a contract which requires mandatory reporting to the Board if he does not complete the five-year program for any reason.

If the Board panel determines that it is not a substanceabuse issue or that the substance abuse endangered the public, we work with the law enforcement agency(s) with jurisdiction.

#### Changes – New Programs

There are two new programs that will go into effect in 2011. One program is an electronic tracking system for precursor chemicals to combat "smurfing." The other is a prescription monitoring program for controlled substances. Information obtained by these new programs will be available to law enforcement pursuing criminal drug violation investigations.

#### Electronic Tracking of Precursor Chemicals in Over-the-Counter Drugs

Legislation enacted in 2010 will effectively put a stop to "smurfing." RCW 69.43.165. The law mandates the implementation of a real-time electronic stop-sale tracking system for the over-the-counter sales of products containing ephedrine, pseudoephedrine and phenylpropanolamine. The system will alert retailers of attempted purchases that exceed the legal limit, requiring them to decline the sale. The system will provide a secure means for tracking the purchaser's information. It eliminates the retailer's responsibility to maintain paper records for sales, with the exception in some sites that seek an exemption or must capture the purchaser's signature on paper. Access to this system is available to: (1) sellers; (2) individuals in regards to any products purchased by them; (3) licensing boards for their investigations; (4) law enforcement for bona fide specific investigations.

The law is consistent with recommendations made to the legislature by the Methamphetamine Work Group formed in 2007. The system will provide law enforcement with an effective tool to combat and protect the public and the environment from the consequences of methamphetamine. If you would like more information on this program please contact Doreen Beebe at (360) 236-4834.

#### **Prescription Monitoring Program**

Legislation in 2007 gave the Department of Health (the Department) authority to create a Prescription Monitoring Program (PMP). See RCW 70.225.010; RCW 70.225.020; RCW 70.225.225; RCW 70.225.030; RCW 70.225.040; RCW 70.225.050; RCW 70.225.060 and RCW 70.225.900. The program's purpose is to identify and stop prescription drug misuse by collecting dispensing records for schedule II, III, IV, and V drugs. The information collected is placed in one central database. Data collected includes information about the patient, prescription/drug, prescriber and dispenser. The program makes information available to healthcare providers, law enforcement agencies and other authorized entities. This information can help prevent prescription drug misuse and promote patient safety. Thirty-four (34) other states have an operational PMP including our border state (continued next page)

Idaho. Oregon is in the process of implementing their PMP program. In 2008, the Department suspended the program due to financial difficulties being faced by the state. The Department secured new funding in the fall of 2010 to restart the effort to implement the program.

The Department is currently working on developing rules for the program and finding a vendor to collect, store, and report the data. We plan to begin collecting data in October 2011 and having the system available to users in January 2012. If you would like more information on this program, please contact Chris Baumgartner at (360) 236-4806.

#### Conclusion

The Department of Health, the Board of Pharmacy and the Office of Investigation and Inspection are involved in every aspect of prescription drug diversion in Washington state. We are a recognized law enforcement agency and mutually cooperate with other law enforcement agencies. We routinely provide technical expertise and assistance regarding the laws pertaining to pharmaceuticals and pharmacy firms within our state. Please feel free to direct your inquiries to Grant Chester at *Grant.Chester@doh.wa.gov* or phone (360) 236-4817.

### **Editor's Note**

While all articles submitted require citations, most citations with the exception of those to specific statutes and cases are omitted for the purposes of this newsletter. However, if anyone wants to cite check and receive a list of full citations for an article, please do not hesitate to contact our editor, Chris Maryatt, at *chris@maryattlaw.com*.

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