



## Ethically Representing Clients with Mental Disabilities

Presented by  
The Pierce County Minority Bar Association

Saturday, May 18, 2019  
OASIS OF HOPE CENTER  
1937 South "G" Street  
Tacoma, Washington 98405

Online Preregistration: [pcmbamcle@gmail.com](mailto:pcmbamcle@gmail.com)  
Onsite Registration from 11:15 am – 12:00 noon  
WSBA MCLE Credits: 3.00 Ethics, 1.00 Law and Legal Procedure  
Tuition: \$75.00

Time	Title/Presenter(s)
12:00-1:00	<b>Competency and Mental Defenses - Avoiding Ethical Pitfalls</b> Elizabeth Kelley, Attorney at Law and Bruce Duthie, Ph.D., ABPP
1:00-2:00	<b>Ethically and Effectively Using Mental Health as Mitigation</b> Cindy Arends Elsberry, WDA Felony Resource Attorney and Bruce Duthie, Ph.D., ABPP
2:00-2:15	Break
2:15-3:15	<b>Felony Mental Health Court in Pierce County Superior Court</b> Pierce County Superior Court Judge Frank Cuthbertson, Public Defense Counsel Jane Melby, DPA Karen Benson, Court Coordinator Matthew Cotton
3:15-4:15	<b>Buffering Burnout &amp; Fostering Attorney Well-Being</b> Cindy Arends Elsberry, Washington Defender Association Felony Resource Attorney

This CLE program objective is to build competence in attorneys representing clients with mental or intellectual disabilities who are navigating the criminal justice system.

***Competency and Mental Defenses - Avoiding Ethical Pitfalls***, (1.0 Ethics Credit)  
Elizabeth Kelly, Attorney at Law and Bruce Duthie, Ph. D., ABPP

Course Description:

A significant percentage of individuals charged with crimes have mental disabilities. Attorneys representing these individuals need to know when disabilities may render clients incompetent to stand trial, how to ethically raise questions of competency and how and when to investigate potential mental defenses to the charged crimes.

In this session attorneys will learn:

- How to recognize competency concerns and ethical limits on what information an attorney can share with the court or the court's expert evaluator (RPC 1.6(a));
- How to evaluate a case for potential mental defenses, including how and when to discuss possible defenses with the client and knowing when to bring in a forensic mental health expert to investigate.
- Tips for ensuring that a defense expert maintains client confidences throughout the representation (RPC 1.6(a));
- Who controls the decision to put forth a mental defense, (Scope of Representation, RPC 1.2(a));
- Strategies for building trust and rapport and tips for maintaining effective communication with clients with mental disabilities as required by RPC 1.4 and 1.14(a)

***Ethically and Effectively Using Mental Health as Sentencing Mitigation*** (1.0 Ethics Credit) Cindy Arends Elsberry, Washington Defender Association and Bruce Duthie, Ph.D., ABPP

Course Description:

In 2010, the Washington Supreme Court decided *St. v. ANJ*, a landmark case holding that counsel has a duty to investigate and analyze a case prior to settling a case, even in cases in which the client admits guilt. In many criminal cases, the issue is not what happened, but why it happened, and mitigation is the case strategy, theory and theme. Mitigating evidence is often very personal, private and in some instances involves privileged or protected information, such as mental health history, prior drug and alcohol abuse, history of treatment, or a client's past experiences of abuse, neglect or interpersonal violence. Through exploring and sharing compelling mitigation evidence, attorneys can diminish the consequences for the client and improve case outcomes. This CLE will cover some ethical issues that arise when investigating mitigating evidence in criminal cases, including a discussion of the following issues and RPCs:

- RPC 1.2 –The client controls the goals of litigation –Who decides if mitigation is the theme and strategy in the case and what mitigation evidence to pursue? Who decides whether to share mitigation evidence with the prosecutor, judge or jury?
- RPC 1.6 – Confidentiality of information – Attorneys must keep information learned in the course of representation confidential unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Prior to sharing information, must defense attorneys have the client’s informed consent?
- RPC 1.14 Client with Diminished Capacity- Lawyers have a duty to maintain a normal client lawyer relationship, even when the client’s capacity for decision making is impaired because of age or mental impairment. In some instances lawyers can take protective action. In some cases the client’s diminished functioning is the mitigating factor
- RPC 3.1 -Meritorious claims and contentions – Criminal defense attorney may so defend the proceedings ...as to require that every element of the case be established. Does this include an obligation to investigate the mitigating circumstances involved in the incident?

***Felony Mental Health Court in Pierce County Superior Court*** (1.0 Law and Legal Credit)

Pierce County Superior Court Judge Frank Cuthbertson and Felony Mental Health Court Professionals: Jane Melby, Karen Benson, and Matthew Cotton

Course Description:

Several studies demonstrate that Mental Health Courts are effective at reducing the number of individuals with mental illness returning to the criminal justice system, but they are not available in all jurisdictions and these courts vary in practice within the State of Washington. Pierce County is one of the few places in Washington where a person with a serious and persistent mental illness who is charged with a felony crime can access a treatment-based problem solving court instead of having their case processed in the mainstream courts. In this session, Pierce County Judge Cuthbertson and the Felony Mental Health Court professionals will provide information on the legal practice and procedure involved with the Pierce County Superior Court Felony Mental Health Court, including an overview of how the court works, what kinds of cases qualify for mental health court, who is eligible to participate, what services and resources are available to participants, and the major differences between a mental health court and mainstream traditional courts.

## ***Buffering Burnout & Fostering Attorney Well-Being*** (1.0 Ethics Credit)

Cindy Arends Elsberry, Washington Defender Association

### Course Description:

Criminal defense attorneys and others legal professionals who work with clients who have suffered great hardship or trauma can find themselves significantly affected by their work. The impact can appear both on the job and outside of work in the personal realm. Sometimes lawyers develop mental health symptoms similar to those of the traumatized clients they serve, including depression, anxiety and PTSD. There are a number of terms used to describe this experience: burnout, secondary trauma, vicarious trauma, compassion fatigue, the cost of caring, or the trauma exposure response. These conditions all relate to the cumulative toll that results from working with traumatized individuals repeatedly over time.

Secondary trauma and burnout can lead to poor attorney performance and can even contribute to violations of the rules of professional conduct (RPCs). In this CLE, lawyers will learn about research studies and findings involving lawyers experiencing secondary trauma in the criminal defense practice area. This presentation will also cover coping skills for managing emotional well-being while working in a high stress environment serving individuals impacted by trauma. Attendees will learn strategies they can employ to reduce stress, observe and manage their emotional well-being, including knowing when to seek support and where to turn for resources when help is needed.

### **Presenter Biographies:**

**CINDY ARENDS ELSBERRY** is the Felony Resource Attorney for the Washington Defender Association (WDA). She has worked in public defense for more than 20 years and has a diverse background, having worked on all types of criminal cases, from low-level crimes to aggravated murder. She has experience with collaborative courts and mental competency hearings, and is death penalty certified. She also serves as the Death Penalty Resource Attorney for the Death Penalty Assistance Project at WDA. Before joining WDA in 2009, she worked as a staff attorney providing representation to indigent defense clients at the Associated Counsel for the Accused in Seattle for over 14 years. In her role at WDA, Cindy provides technical assistance to attorneys and develops resources for public defenders across the state. She is a frequent speaker at CLE presentations and has a special interest in the issues involved with representing youth in adult courts and clients with mental illness. She received her J.D. from the University of Washington School of Law.

**BRUCE DUTHIE** received his doctorate from Texas A&M University. He has over 40 years of experience doing forensic evaluations. He is a Diplomat with the American Board of Professional Psychology in Forensic Psychology. He is an adjunct professor at Antioch University where he taught Forensic Psychology and psychological evaluation. His forensic (psycho-legal) experience includes the following kinds of forensic evaluations: competency, sanity, personal injury, parental capacity juvenile assessment, and psycho-sexual assessment. Dr. Duthie also has extensive experience in group, individual, and family therapy. He specializes in the treatment of children and adolescents as well as patients with personality disorders. He currently practices in Western Washington.

**ELIZABETH KELLEY** is a criminal defense lawyer with a nationwide practice focused on representing people with mental disabilities. Elizabeth co-chairs the Criminal Justice Advisory Panel of The Arc's National Center on Criminal Justice and Disability. She is the editor of Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers published by the American Bar Association (ABA) in Fall, 2018 and Representing People with Autism Spectrum Disorder: A Practical Guide for Criminal Defense Lawyers which will be published by the ABA in 2019. She serves on the Editorial Board of the ABA's Criminal Justice Section Magazine and the Council of the ABA Criminal Justice Section. Elizabeth served three terms on the board of the National Association of Criminal Defense Lawyers (NACDL), chaired its Mental Health as well as Membership Committees, and is a Life Member. She served on the Problem-Solving Courts Task Force and Body Camera Task Force. She traveled to Liberia in 2009 and 2014 as part of a delegation sponsored by the U.N. Commission on Drugs and Crime and NACDL to train that country's criminal defense bar. Elizabeth lectures across the U.S. as well as abroad and provides legal commentary for radio and television. Her book reviews regularly appear in The Federal Lawyer. She completed her 200 hour Yoga certification, and is currently working on her 500 hour certification through Semperviva Studio in Vancouver, BC.

**JUDGE FRANK CUTHBERTSON** Pierce County Superior Court. He has been on the bench since March 2001. Judge Cuthbertson presides over the Mental Health Court in the Pierce County Superior Court. Judge Cuthbertson graduated from Duke University and Seattle University Law School. His career highlights include the 2014 Service to Diversity Award, Tacoma-Pierce County Bar Association, 2010 Judge of the Year, American Board of Trial Advocacy, and 2009 Washington State Mentors, Mentor of the Year. The Professional Affiliations and Committees include selection as the Criminal Division Presiding Judge, 2011, Juvenile Court Presiding Judge, 2006, Washington State Racial Disproportionality Advisory Committee, Superior Court Judges' Association, Family and Juvenile Law Committee, and the Washington Partnership Council on Juvenile Justice. His board and civic involvement include the Washington Court Appointed Special Advocate (CASA) Board, College Success Foundation, Mentor, American Red Cross, United Way Planning Committee, Models for Change (MfC) Judicial Advisory Committee, Pierce County Minority Bar Association, and the Legal Foundation of Washington.

**MATTHEW COTTON** is the felony mental health court coordinator for Pierce County Superior Court; he previously was a case manager at King County Drug Diversion Court, he has also worked as an individual & group therapist in community mental health agencies and has worked in crisis intervention. He has over 15 years of experience working in behavioral health treatment agencies and 12 years working with treatment courts. Matthew is a licensed mental health counselor in the state of Washington and is nationally certified as a master's addiction counselor. He received his Master of Arts, Counseling Psychology Degree at Boston College and received his Bachelor of Science Degree in Psychology at Endicott College.

**JANE MELBY** is the defense attorney in the Pierce County Superior Court Mental Health Court. She obtained her bachelor's degree from Evergreen State College and her law degree from the University of Utah. She has been an attorney for more than 20 years, most of that time spent as a public defender where she has represented clients in all levels of criminal court. She has represented clients in Felony Mental Health Court for about a year but as a public defender has represented many clients with mental illnesses. She is happy that at last defendants with mental illnesses have a court that is structured for them and their needs.

**KAREN BENSON** is a Deputy Prosecuting Attorney with the Pierce County Prosecutor's Office and the Pierce County Felony Mental Health Court Prosecutor. She received her Juris Doctorate from the University of Washington and her Bachelor of Science Degree in International Business from the Honors College at the University of Nevada, Las Vegas, Magna Cum Laude. Karen interned at the United States Attorney's Office for the Western District of Washington and began her career at the Pierce County Prosecutor's Office in 2007. She started her career doing research and analysis for the Identity Theft Unit; she has been a trial attorney in the Misdemeanor Division, the Domestic Violence Unit, the Juvenile Division and the Burglary Unit; she was the Pierce County Auto Theft Prosecutor assigned to the Auto-Theft Task Force; she was a charging deputy for the Drug Unit and the Juvenile Division; and she has worked with numerous Therapeutic Courts, including Juvenile Drug Court, Juvenile Chemical Disposition Alternatives, Felony Drug Court and Felony Mental Health Court. In her capacity as the Mental Health Court Prosecutor, Karen has attended the National Association of Drug Court Professionals Annual Conference, which includes a Mental Health Court track, and has attended local CLE's relating to Mental Health and the Criminal Justice System. Prior to her legal career Karen worked as an Operations Analyst for the Bill Gates Investment Group, inspiring her interest in public service.