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Dealing with Seattle's Paid Sick and Safe Leave Ordinance

By Laura Morse and Katheryn Bradley

The wait for the Seattle Paid Sick and Safe Leave Ordinance, which went into effect September 1, is over.

The City of Seattle, through the Seattle Office for Civil Rights (SOCR), spent nine months after Mayor Mike McGinn signed the Ordinance to gather public comments and adopt final administrative rules implementing paid sick and safe leave for employees working in Seattle. Indeed, the SOCR's proposed rules generated substantial comments from the employer community.

The SOCR responded to these comments by making significant changes before adopting final rules on June 29. On the eve of the effective date, many employers were still scrambling to decipher the complicated Ordinance and understand the final administrative rules. The City's "Frequently Asked Questions" publication has continued to evolve even after adoption of the "final" rules.

Based on our experience over the last few months presenting seminars to employers to assist them in preparing for compliance, we have put together the following pointers for counsel advising employers.

Getting the Word out — Notice to Employees. Employers must ensure that their affected (and potentially affected) employees get notice of the Ordinance. One way — and a highly recommended way — is for the employer to update its written sick leave or paid time off (PTO) policy and circulate it to all employees.

Employers may also display the poster that SOCR created, which is located on its website. SOCR also prepared a draft letter that employers may distribute to their employees. An employer would also be wise to get signed acknowledgement forms from affected employees, just as with any other new policy rollout.

Nuts and Bolts: Some of the Basics and the Not-So-Basics. The Ordinance is

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State Supreme Court Issues Historic Order on Defender Standards

KCBA Planted Seed with 1982 Guidelines

By Robert C. Boruchowitz

The Washington Supreme Court issued an historic order on June 15, requiring public defenders to certify that they meet certain standards, including caseload limits and experience qualifications. This will have a major impact on thousands of people who cannot afford to hire their own lawyers.

The King County Bar Association helped to plant a seed that led to that order, as 30 years ago this summer the then Seattle-King County Bar Association published "Guidelines for Accreditation of Defender Agencies."

The Guidelines were the product of a blue-ribbon Indigent Defense Services Task Force that was formed in the wake of a 1981 study by the National Legal Aid and Defender Association that found that Seattle's Municipal Court dispensed "supermarket justice" in its arraignment calendars. Newsweek reported on the court in 1982 under the headline, "Is Free Legal Aid Too Cheap?" and stated:

> Court officials inform defendants of their rights over loudspeakers. "The need to 'process cases' has clearly taken precedence over the obligation to [dispense] justice," concluded the report.

The KCBA set caseload limits and experience qualification requirements, and made recommendations for courts and prosecutors. These standards, including a per-lawyer, per-year limit of 300 misdemeanor cases, became the foundation for the later-developed Washington Defender Association (WDA) standards and the Washington State Bar Association standards, elements of which the Supreme Court has now adopted.

The acceptance of standards continued to evolve after the KCBA beginning. The WDA first published standards in 1984 and the WSBA Board of Governors endorsed them, as it did amended standards in 1990 and 2006.

The Legislature in 1989 passed RCW ch. 10.101, which required local governments to develop standards. The

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2013 MLK Luncheon to Feature Professor Michelle Alexander

By Karen Murray

The King County Bar Association, along with the KCBA's Rev. Dr. Martin Luther King, Jr. Celebration Committee and University of Washington School of Law Dean Kellye Testy, are honored to announce that Prof. Michelle Alexander will be the keynote speaker for KCBA's Annual Rev. Dr. Martin Luther King, Jr. Celebration Luncheon on January 18, 2013, from noon to 1 p.m. at the Downtown Sheraton Hotel in Seattle.

Alexander, the New York Times best-selling author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, is a highly acclaimed civil rights lawyer and legal scholar. She currently holds a joint appointment at the Kirwan Institute for the Study of Race and Ethnicity and the Moritz College of Law at The Ohio State University. Alexander previously was an associate professor of law at Stanford Law School, where she directed the civil rights clinics.

In 2005, Alexander won a Soros Justice Fellowship, which supported the writing of *The New Jim Crow* — her first book — published in 2010. Her book takes a harsh look at how the criminal justice system maintains the status quo by targeting people of color and the very poor. Alexander takes the reader on a journey that is often reminiscent of the pre-civil rights era, and at the end of that journey he or she is left wondering, "Have things really changed or have they simply remained the same?"

As a stellar visionary, Alexander leaves the reader with hope that change is not only a possibility, but a forthcoming reality. When injustices become so blatant that mankind can

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DEFENDER STANDARDS

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current version of that law states: "The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards."

The Seattle City Council first endorsed a 380-case annual limit for Municipal Court defenders in 1987 (Council Resolution 27696). In 2004, Seattle became the first city in the nation to pass an ordinance limiting caseloads and in the process also approved the American Bar Association Ten Principles of a Public Defense Delivery System as the city's standards (Ordinance No. 121501)**.** The Ten Principles call for independence of the defense function, controlled workloads, parity of resources with the prosecution, and matching experience, training and ability to the complexity of the case, among other requirements.

The WSBA established a Blue Ribbon Panel on Public Defense in 2003 that produced a report documenting the crisis in much of the state in which defenders were overwhelmed without adequate resources. It found: "The lack of enforceable standards, especially caseload standards, jeopardizes the ability of even the most dedicated defenders to provide adequate representation." The panel recommended a court rule to implement standards.

In 2010, the Washington Supreme Court decided *State v. ANJ* in which it set aside a 12-year-old child's guilty plea to a sex offense when it found that "because of ineffective assistance of counsel, A.N.J. was misinformed of the consequences of his plea and was not adequately informed of the nature of the charge against him." In the process the Court noted:

> While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.

In *ANJ*, the appointed lawyer himself testified that "he spent as little as 55 minutes with A.N.J. before the plea hearing, did no independent investigation, did not carefully review the plea agreement, and consulted with no experts."

In determining that the boy did not receive effective assistance of counsel, the Court wrote:

> While we do not adopt the WDA *Standards for Public Defense Services*, we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel.

This was the third published appellate reference to standards in Washington. In 1992, the Court of Appeals in *Mt. Vernon v. Weston* referred to the WSBA standards in deciding that a trial judge had abused his discretion in not allowing a defender to withdraw from an appeal, in part because the judge failed "to consider the undisputed evidence of the high caseloads of the public defenders."

In 2003, the Supreme Court referred to the standards in upholding the suspension of a judge in *In re Michels*. The judge had accepted guilty pleas from defendants whom he had represented as a public defender, in effect having dual roles as judge and lawyer in the same cases. The Court wrote, referencing the standards in RCW § 10.101.030:

> The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided.

After *Michels* and *ANJ,* it was a logical next step for the Supreme Court to announce court rules that would require defenders to certify that they comply with standards. Former Justice Richard Sanders, in his concurrence in *ANJ*, urged that the judiciary "take a more proactive role to facilitate the appointment of effective counsel for indigent criminal defendants. Here the appointed attorney was obviously out of compliance with the standards endorsed by the Washington State Bar Association referenced in RCW 10.101.030."

The Supreme Court in 2010 issued court rules for felony, misdemeanor and juvenile offender cases, requiring:

> Before appointing a lawyer for the indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.

The Court postponed the implementation date of the rules and the WSBA Council on Public Defense, the successor to the blue-ribbon task force, worked for more than a year to develop recommendations to the Board of Governors and the Supreme Court on which standards should be part of the certification.

The Supreme Court order of June 15 requires:

> For criminal and juvenile offender cases, 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.

As of September 1, lawyers will have to comply with the following standard:

> *Standard 3.2*. The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

Of course, the existing Rule of Professional Conduct 1.1 has a similar requirement: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Standard 3.2 emphasizes the importance of not accepting workloads that interfere with the rendering of quality representation. It is worth noting that the ABA Ten Principles have the same concept: "Defense counsel's workload is controlled to permit the rendering of quality representation."

Defenders and local governments have another year before numerical caseload limits take effect. At that point, defenders and assigned counsel should not exceed 150 felonies, 400 misdemeanors, 250 juvenile offender cases, 250 civil commitment cases or 36 appeals to an appellate court per attorney per year, or 80 open juvenile dependency cases. An attorney could work on one active death penalty case at a time plus a limited number of non-death-penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of Standard 3.2.

Chief Justice Barbara Madsen has noted in an article for the judges in "Full Court Press" that a year from now lawyers will have to include in their certifications that "I *should* not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4."

It seems so elementary that lawyers should only work on cases for which their training and experience qualify them, and that they should not take more cases than they can handle. Yet as the Court pointed out in *ANJ*, sometimes those concepts are not followed in practice. The rule and the standards will make it much more likely that the thousands of accused people who rely on appointed counsel will be able to count on having prepared and skilled lawyers to represent them.

Chief Justice Madsen noted that only some of the standards are required for certification and that to the extent the Court adopted other standards, those "offer further guidance for addressing the critical assistance of counsel issues identified in *State v. ANJ.*"

In Seattle and King County, defender contracts for many years have required caseload limits and experience levels appropriate to the types of cases. King County now employs a case-weighting system for felony cases designed to provide adequate resources for the defenders.

But as the state Office of Public Defense has pointed out in its annual status report, numerous other jurisdictions allow excessive caseloads, with one municipal court contract attorney handling 1,700 cases per year.

Having a strong defender program can make a tremendous difference, both for the individual clients and for the system as a whole. In his book *Criminal Violence, Criminal Justice*, Charles Silberman referred to Seattle as setting the standard for criminal defense, noting the use of investigators, social workers, an appeals section and senior lawyers to consult on difficult questions of law or strategy.

In 2002, four former KCBA presidents wrote an op-ed in the Seattle Post-Intelligencer, saying:

> Our defender system is filled with dedicated people who provide effective representation to thousands of clients a year. They do it with limited resources and in a cost-conscious way. And for more than 32 years, they have been among the very best in the country.

The Defender Association, the oldest of King County's nonprofit defender offices, was singled out in a 2003 law review article, along with the Public Defender Service of the District of Columbia, as having "earned reputations within the defense community for innovative and client-centered representation." TDA has established a Racial Disparity Project, which has developed innovative alternatives to traditional prosecution. It also is home to the Death Penalty Assistance Center, which provides training and technical assistance to lawyers throughout the state.

In addition to caseload limits for the lawyers, one of the major reasons for the high level of defender representation is the multiple-office, nonprofit structure, which permits both flexibility and creativity that a single government office is not always able to provide. In addition, committed public officials in both the city and the county, including City Councilmember Nick Licata and County Councilmember Larry Gossett have for many years supported effective and fair representation for people who cannot afford their own lawyers.

The WSBA standards say in part: "The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards." Seattle and King County should continue their commitment to their strong defender programs as the new rule takes effect. Other governments whose defenders have excessive caseloads, and lack experience and training need to implement changes to meet the standards.

Forty years after the U.S. Supreme Court decision in *Argersinger v. Hamlin*, making clear that the right to counsel applies to state misdemeanor cases, some of the worst practices and the most-excessive caseloads are in misdemeanor courts. The Washington Supreme Court's order on standards should provide the impetus for those courts to meet their obligations. ■

Robert C. Boruchowitz is professor from practice and director of The Defender Initiative at Seattle University School of Law. He is a member of the WSBA Council on Public Defense. A shorter version of this article was published in The Seattle Times.