Lawyers in Misdemeanor First Appearances

Why counsel is required at first appearances; the impact of The Defender Initiative project in Washington; how responding to a letter can avoid a writ of mandamus.

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Defender Initiative's Misdemeanor Right to Counsel Project

To implement the right to counsel in misdemeanor courts in Washington State, and create a model for application in other states

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Minor Crimes, Massive Waste
The Terrible Toll of America’s Broken Misdemeanor Courts

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SEATTLE UNIVERSITY
SCHOOL OF LAW

National Association of Criminal Defense Lawyers
The explosive growth of misdemeanor cases is placing a staggering burden on America’s courts. Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented. As a result, constitutional obligations are left unmet and taxpayers’ money is wasted.

Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools.
These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.
Why Misdemeanors Matter

- **Huge Commitment of Resources When All Governments Are Struggling To Make Ends Meet.**

- **Fairness**—*Fundamental rights are being denied to millions of people in the places that should protect them the most.*

- **Perception of Justice**—Most people who actually go to a court go to these courts. Their respect for American justice is shattered when they experience the problems we describe in the report.
In re Michels

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. …Disregarding our most basic and important principles weakens the legal system as a whole. In light of this, we again find it necessary to reiterate that this court will not tolerate short cuts to due process. 150 Wn. 2d 159(2003).
Michels and Hammermaster (139 Wn.2d 211 (1999))

“...a judge has a duty to ensure that guilty pleas are knowingly, voluntarily, and intelligently made.”
Economic Penalties

Increasing fines, costs, and other fees have become staggering. Cumulative impact of all of the economic obligations a significant problem for most defendants.

“Courts have demonstrated an almost total disregard for the ability of the defendants to afford the amounts assessed.”

Criminal convictions diminish employment prospects and eligibility for housing and other benefits.

Collateral Consequences

- The collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly.

- These consequences can be quite grave. The defendant can be deported, denied employment, or denied access to a wide array of professional licenses. A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school. Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family. Fines, costs and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.

- ...” No criminal conviction should be regarded as minor or unimportant.”
High Volume—Courts Where Most People Go to Court

- United States: Estimated 8-10 million cases per year.

- “Courts of limited jurisdiction serve as the window to the judicial branch for many people who do not normally have contact with the judicial system.” *In re Michels*, Washington Supreme Court, 150 Wn.2d 159, 174, 75 P.3d 950, (2003)
Washington Courts

- 2008 Total Misdemeanor Court filings: 309,356
- DUI/Physical Control: 39,455
- Other Traffic Misdemeanors: 135,758
- DWLS 3 is in the range of 28% and 43% of all cases
- Non Traffic Misdemeanors: 134,143
- Jury Trials: 2955 (.0095%)
Why counsel is required at first appearances

- Accused persons generally cannot without help understand the elements of the charge, possible defenses, or the full nature of the consequences of a conviction.
- Accused persons generally cannot without help challenge a finding of probable cause.
- Accused persons generally cannot without help advocate effectively for personal recognizance release or reduced bail.
- Accused persons generally cannot without help advocate effectively for sentencing alternatives.
Because of all of the foregoing...

- Accused persons generally cannot without help make a valid decision about waiving counsel or waiving trial.

- The fairness of the proceedings and the integrity of the court are at risk.

Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases, n4 far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967), states:

"For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure."
This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See Brewer v. Williams, 430 U.S. 387, 398-399, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Michigan v. Jackson, 475 U.S. 625, 629, n. 3, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.
Requirements for Valid Waiver Colloquy


  .... the court should question the accused in a manner designed to reveal *understanding*, rather than framing questions that call for a simple “yes” or “no” response.
The court must make a thorough inquiry.

Chavis, supra, 644 P.2d 1202, 1205, 31 Wn. App. 784, 789,790:
But [a]n accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused’s comprehension of the offer and capacity to make the choice intelligently and understandably has been made....
RULE 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER (a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise. (b) Stage of Proceedings. (1) The right to a lawyer shall accrue as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest. (2) A lawyer shall be provided at every critical stage of the proceedings.
(2) The defendant shall not be required to plead to the complaint or the citation and notice until he or she shall have had a reasonable time to examine it and to consult with a lawyer, if requested.

(3) Advisement. At arraignment, unless the defendant appears with a lawyer, the court shall advise the defendant on the record: ... (ii) of the right to be represented by a lawyer at arraignment and to have an appointed lawyer for arraignment if the defendant cannot afford one.
4. The final issue that I wish to address is really the question you mention in your letter whether “modifications to the guilty plea form to ensure defendants are aware of all of the ramifications of entering a plea of guilty” might satisfy the concerns that the DMCJA raises in the first place. We do not agree that unrepresented defendants at arraignment calendars can get the advice and assistance they need by adding yet more or different language to an already long and complicated guilty plea form explained to them only by a judge sitting up on a bench in the courtroom. The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction (including immigration consequences, state-to-state travel restrictions, mandatory minimum penalties, loss of student loan benefits, right to bear a weapon, loss of professional licenses or security clearance, no contact orders with their loved ones, and more).
1968: UW Professor John M. Junker Wrote

[A] large majority of the [people] annually charged with non-traffic misdemeanors must, if they are financially unable to hire an attorney, face the bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system without the assistance of counsel. The misdemeanor prosecution is the “Appalachia” of the criminal justice system.
“[I]t’s easy for judges to let their frustration get the best of them and look for ways to move the calendar along.”

— then Judge Michael Spearman, King County, Washington, speaking at an ABA hearing on public defense.
Washington Courts Problems

- "Waiver" of counsel—you cannot do a thorough inquiry in 60 seconds.
- Unrepresented defendants talking with prosecutors without valid waiver of counsel.
- Guilty pleas by unrepresented defendants who do not understand the disadvantages of proceeding pro se or the direct and collateral consequences of the plea.
No attorneys, prosecutor or defense, at arraignment

Court gives defendants contact information for prosecutor’s office after telling people who say they want to go pro se and plead guilty that they might want to see if they can sort it out with the prosecutor.

“I understand you are going to talk to the prosecutor first, but here is the paperwork to apply for a public defender if you like.”
Lynnwood Municipal Court

High volume—132 defendants on out of custody calendar

“Waivers” of counsel and submissions on police reports and sentencing in two to four minutes, after receiving brief consultation and advice from contract defenders.
had any questions. The vast majority of defendants in that court appear without counsel. There was no inquiry, however, into whether the defendant knew of and wished to waive their right to counsel at that hearing and no colloquy was entered into regarding the elements and penalties of the crime charged, nor the fundamental rights being waived.

2. Respondent agrees she violated the above canons by engaging in a pattern and practice of failing to properly advise criminal defendants of their constitutional rights at arraignment and probation review hearings; failing to conduct
RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;…
Marijuana in Washington

In 2007, Washington law enforcement agencies reported 11,553 incidents involving people 18 years of age and older in which misdemeanor marijuana possession was the most serious offense. Washington courts entered 3,638 misdemeanor marijuana convictions and imposed approximately 16,183 days in jail. At a statewide average cost of $334 per arrest, $757 per conviction and $60.71 per jail day, Washington spent approximately $7.6 million in direct costs for misdemeanor possession of marijuana.
Lower Kittitas District Court Cases

29 cases total on a single day
41% Driving with license suspended
21% Minor in possession of alcohol
38% Other
Excessive Sentences

例——十天监禁和$350罚款
因持有大麻
“Bail Forfeitures”

- $124 and up to get rid of DWLS 3
- But they count as convictions
Due to the high volume of these types of cases and the lack of prosecution staffing to handle them, the Kitsap County Prosecutor’s Office makes a bail forfeiture offer pursuant to CrRLJ 3.2(o)(3) of $250 if the defendant does not have a valid driver’s license at arraignment. If the defendant has a valid license, the prosecution’s offer is to amend the criminal charge to no driver’s license on person, RCW 46.20.017, and a $124 civil infraction penalty. See the Kitsap County Prosecutor’s Office District and Municipal Court Plea Negotiation Standards at http://www.kitsapgov.com/pros, at page 29. Defendants often seek and are granted a continuance of the arraignment so that they can attempt to obtain a valid driver’s license.

This bail forfeiture fast-track “triage” process permits the Prosecutor’s Office to focus on more serious criminal offenses with the resources provided. The Prosecutor’s Office does not open a file on these cases, nor does it review the defendant’s criminal history prior to making the bail forfeiture offer.

Virtually all such defendants accept the bail forfeiture offer at arraignment, and make arrangements with the court staff to make payments on the assessed amount or pay the amount through community service. Most defendants choose to not speak with standby defense counsel, and accept the bail forfeit offer.
Racial Disparity

- The crisis in America’s public defense system has a much more acute impact on communities of color. The dramatic underfunding and lack of oversight of America’s indigent defense services, described at length above, has placed people of color in a second class status in the American criminal justice system.

- *The Terrible Toll of America’s Broken Misdemeanor Courts, p. 47*
Zeidman: Manhattan Criminal Court “filled with exhausted people of color waiting for the experience to end.”

Washington state patrol 2003: People of color searched 2.5 times as often as whites; whites found with contraband more often.

Seattle Times: “In 2000, about 35 percent of the suspended-license drivers whose cars were impounded because they failed to respond to traffic infractions were black, while the city's population was just 8 percent black.”
NACDL Board Resolution

➢ *Therefore, be it resolved that:*

➢ The NACDL opposes the unconstitutional denial of counsel and the uninformed waiver of counsel in misdemeanor prosecutions;

➢ The NACDL urges the states to adequately fund their misdemeanor indigent defense systems;

➢ The NACDL will continue to support the rights of the accused by supporting the adequate funding for indigent defense and limited caseloads, training and oversight for indigent defenders;

➢ The NACDL supports the decriminalization of minor misdemeanor offenses and driving offenses;

➢ The NACDL supports the use of *diversionary programs* that occur pre-prosecution, result in the dismissal of all charges upon completion program, and do not impact the prosecution of the case if not completed;

➢ The NACDL supports the use of programs to assist in addressing drug and other addictions without the oversight of the criminal justice system or the use of criminal charges as a coercive measure;
NACDL Recommendations

- Provide counsel for any defendant facing the possibility of incarceration.
Recommendation

Divert misdemeanors that do not impact public safety to penalties that are less costly to taxpayers.
Recommendation

- Reduce pressure on defendants to plead guilty, particularly at first appearance.
Recommendation

- Enforce ethical obligations of all participants in misdemeanor adjudications.
Recommendation

- Provide public defenders with the resources necessary to represent their clients effectively.
There is good news in Washington, too.

- WSBA-endorsed standards—caseload limits, experience, supervision, training, investigation
- City of Seattle law on caseload limits—380 per lawyer per year, supervision, incorporating ABA Ten Principles; attorneys at arraignment
- Benton County contract—360 per year cap
- In King County and Spokane, re-licensing and diversion programs allow drivers who have been suspended to pay their fines through community service. An evaluation of the King County program found that it dramatically decreased the number of driving-while-suspended cases and provided a net benefit to the government.
ABA Ten Principles of a Public Defense Delivery System

3 -- Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.
The City hereby reaffirms the caseload standards established in the 1989 Budget Intent Statement. The 1989 Budget Intent Statement, the American Bar Association's Ten Principles of a Public Defense Delivery System and the provisions of Section 1 of this Ordinance shall collectively constitute "standards for public defense services" as that term is used in RCW 10.101.030 until such time as the City Council may by ordinance adjust those standards. Consistent with the 1989 Budget Intent Statement, City agreements with indigent public defense service providers shall require caseloads no higher than 380 cases per-attorney per-year. The City also affirms the Washington State Bar-endorsed supervision standard of one full-time supervisor for every ten staff lawyers.
J: Ms F today the Charge is Possession/ consumption of alcohol by a minor

Ms F: Yeah

J: Understanding the charge

Ms F: Yes

J: you’re being recorded

Ms F: OK

J: that’s why you’ve got to kind of speak up ...at least at this stage you would like to see at your arraignment talking with the prosecutor about a recommendation.

Ms F-is that recommended?

Judge: Is that what you want to do?

Ms F: I...

J: ok, you checked guilty and that’s usually what happens

Ms F: OK then I ...
J: Ok. He makes a recommendation, if you don’t like it all you have to do is say I think I want to talk to an attorney.

Ms F: Ok

J: You’re not going to be penalized for it.

If you are uncomfortable altogether then I can check not guilty, you can go about either hiring an attorney or asking for one from the court,

Ms. F: then I’ll talk to the prosecutor

J: Prosecutor?

F: yeah

J: ok

J: did you understand the waiver of attorney what it said, basically what I just told you?

Ms F: Yeah

J: ok. Then shortly you will talk with the prosecutor, he’ll call your name in a few minutes.

19 minutes 19 seconds case ends (1 minute 22 seconds)
For the record this is Municipal Court in and for the City of Pasco on the _____
day of __________, 20__.

You are here because you have been charged with a crime, or a violation of your
probation, and it is necessary for you to plead GUILTY or NOT GUILTY.
Before you make that decision, you should understand your rights.

You have certain rights, and by entering a plea of guilty, you will be giving up
these following rights:

1. You have the right to a speedy and public trial by an impartial jury.

2. You have the right to be represented by an attorney. If you are charged with a
crime that carries a jail sentence, and you cannot afford to pay for an attorney,
one will be appointed for you. If you plead guilty, are found guilty or are placed
in a deferred program, you may be required to repay the costs of your attorney. If
you desire an appointed attorney you must fill out a financial affidavit to apply
for an attorney from the Court.
...the criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about the realities of American criminal justice. Only a reappraisal of the importance of what transpires in that court by defender agencies and efforts consistent with that reappraisal can provide some improvement.
As presently constituted, our courts do not even have the appearance that justice is dispensed within them.

…it is time for all of us working in defender agencies to turn our energies, forcefully and immediately, towards improvement of the criminal court process and towards the effective representation of persons faced with short terms of imprisonment but for whom the criminal process may prove far more traumatic.
It is not enough for us to shuffle our feet into the courts, go through two-minute arraignments and seven minute trials, and go home at night calling ourselves attorneys.
Defender Initiative Plan

- Identify courts that do not provide counsel at arraignment
- Urge them to do so
- If necessary, take legal action
- Education—bar, bench, public