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COMMUNITY VOICES

The Washington Supreme Court Should Adopt Revised Standards to Address the Crisis in Public Defense

By Robert C. Boruchowitz

Washington State, including King County, is facing a crisis in public defense. Experienced lawyers are leaving the practice because of the overwhelming caseload. In some counties, accused persons are waiting weeks without a lawyer.[1] Many new law graduates who are interested in public defense are not even applying for open positions because they know that the workload is so high and in many parts of the state, the compensation is so low. The criminal legal system is on the verge of collapse.

But there is an opportunity for significant change. The Washington State Bar Association Board of Governors recently adopted revised Standards for Indigent Defense calling for a three-year phase-in with significantly reduced caseloads.[2] The BOG recommended that the Washington Supreme Court adopt these Standards, and the Court has held two public hearings and received more than 700 written comments on whether to amend existing court rules on standards.

The Superior Court Judges Association representative told the Court that SCJA supports recommending phase one of the recommendations, because defenders and their clients need relief immediately" but proposes delaying phases two and three to collect more information.[3]

While the Standards address a variety of elements of effective representation, including qualifications for complex cases and the need for adequate support staff and fair compensation, the ones that have engendered the most comments are those that would reduce significantly the caseload limits for defender attorneys. Current court rules adopted in 2012[4] set maximum annual per attorney caseloads as follows:

> 150 Felonies or 300 Misdemeanor cases … or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or
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> 250 Juvenile Offender cases or 250 Civil Commitment cases or
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> 80 open Juvenile Dependency cases per attorney;
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> Or 36 Appeals to an appellate court hearing a case on the record and briefs per attorney per year.

The new standards, informed by two years of work by the WSBA Council on Public Defense and a National Public Defense Workload Study published by the RAND Corporation[5], which itself was informed by 17 workload studies from around the country, set a three-year phase-in that would limit caseloads using a case credit system that by July 2027 would require that "each full-time felony attorney shall be assigned cases constituting no more than 47 felony case credits and each full-time misdemeanor attorney shall be assigned cases constituting no more than 120 misdemeanor case credits." The first reduction, by July 2, 2025, would limit lawyers to no more than 110 felony case credits or 280 misdemeanor case credits.

There also is a new interim appellate standard of 25 appeals per year.[6]

Under this case credit system, a case with a life without parole (LWOP) sentence would constitute eight credits, a non-LWOP murder case would equal seven credits, and a felony with the lowest possible felony sentence would equal one credit.

Those supporting the new limits cite the increased complexity in the practice since the current court rules were adopted and the resulting crushing burden on defenders. They emphasize the racial disparity in defender clients and that many clients have been victims themselves. They cite the Court's 2020 call to the bench and bar to address race bias in the legal system.[7]

The opponents cite the expected increased cost of hiring more staff, the lack of local government resources to meet that cost, the shortage of attorneys in rural areas, and in a handful of cases, a claim that there is no need to reduce the caseload. Some have called for a delay for a Washington specific workload study. The Washington Office of Public Defense, while supporting a study of the structure of funding for public defense, reports that a statewide workload study is not possible because of the decentralized nature of public defense in Washington.

Some local officials said they could not meet the standards without significant state funding. King County Executive Dow Constantine told the Court that defender standards were policy choices to be addressed by the legislature and local governments. He recommended more resources to reduce harm.[8]

The Washington Defender Association supports the WSBA recommendations and calls for state funding for 50 per cent of the cost of public defense.

One city prosecutor criticized the

national study in part because she said there were no persons on the study with Washington experience.[9] In fact, three of the 33 lawyers on the study group had Washington public defense experience as well as experience in other states.[10]

A sample of the comments to the Court from defenders gives a sense of the unsustainable current caseload limits.[11]

One lawyer wrote that under the current standards, "we are asking lawyers to make the decision: prioritize myself, my family and my mental health or prioritize an important and necessary job in spite of detriment to body and mind."

A defender with more than 20 years of experience wrote: "Public defenders are one of society's primary bulwarks against racism and injustice, but the work itself is grinding, relentless, and at times traumatizing."

A King County defender reported that he has 50 open felony cases, in which two clients face life without parole sentences, six face indeterminate life sentences, and 30 face ten years or more in prison. He wrote, "Many will give up their right to trial because it will take years before I am prepared, and they are too poor to afford bail in the meantime. Many will plead guilty to crimes they did not commit."

Two attorneys reported that they "represented a client who was acquitted of murder after waiting four years for his trial. This client was forced to wait in jail for the pendency of their case because it took four years to prepare the case for trial, due to work required on other cases and attorney attrition."

Another lawyer said she has to triage her cases, and "A justice system characterized by triaging cases of the accused denies efficient, equal, and accurate justice to everyone involved—not just the accused, but victims, witnesses, and their families and communities."

A lawyer with 20 years of experience wrote of "the soul crushing caseload" of defenders across the state and added:

> We are losing competent and experienced attorneys in droves due to the unmanageable caseloads we are expected to carry. …. A work/life balance is unattainable. Cases are not able to be heard in a timely manner because of the lack of available and sufficiently trained attorneys to handle those cases. The current system is ripe for error which only makes it more costly on the back end when dealing with appellate issues that arise from those errors. Most importantly, the current system is unjust to the people we are tasked with defending who languish in custody, lives on hold waiting for their cases to be heard.

One lawyer wrote:

> My law degree did not teach me the language I needed to describe the lived in day-to-day world endured by public defenders. I found those words in therapy books: "gaslighting," "trauma bond," "toxicity," "trauma," "guilt," and "shame." There may even be a common diagnosis for current and former public defenders; "complex post-traumatic stress disorder."

Another lawyer wrote:

> … it is nearly impossible for the roles of parent and public defender to coexist. … I am … deeply devoted to this work. However, to protect my health, my family, and my moral compass, I will not continue to operate under these conditions. …. I have a case so voluminous that the discovery was placed onto a specially purchased external hard drive because my computer could not store all the discovery. To represent my clients effectively, I must review all these materials and speak to all these witnesses to ensure that nothing is overlooked. ... This situation is untenable.

A lawyer with 20 years' experience wrote: "At some point, I will reach the same conclusion as many of my former colleagues: I can no longer practice in public defense while claiming to honor my ethical obligations to my clients."

A lawyer with three years' experience who had been an intern in the DC Defender office, where caseloads were one-third of what he has now, wrote:

> Society is better off when we excel at our jobs, and we can only achieve our maximum potential if caseload standards catch up to modern times and leave behind the antiquated ideas of what indigent defense once was.

An attorney with seven years' experience wrote:

> I have no doubt the revised standards will be expensive to implement. Unfortunately, our society has decided to try to prosecute its way around addiction, mental illness, and poverty. There are many costs to that strategy, and this is simply one of them.

A King County attorney quit after 26 years as a public defender because of the untenable caseload. They wrote:

> I was absolutely convinced that the unrelenting strain, stress, and long hours would take my life if I stayed doing that work. …I knew if I remained a public defender I would eventually suffer the heart attack, stroke, or aneurysm that, along with suicide, I have watched claim the life of so many of my colleagues. Seeing my own death on the horizon if I didn't change course was shocking and is why I left public defense.

Another lawyer described having had a stroke and a miscarriage while working as a defender.

A county commissioner wrote about the costs of increasing attorneys:

> While there is no doubt that reform is needed in reshaping the process of appointing and paying for indigent defense attorneys, there is also no doubt that the counties, regardless of size and location, are incapable of providing and paying for indigent defense as required of the states by the U.S. Constitution's 6th amendment.

Some judges and prosecutors oppose the new standards. Some prosecutors have said there would be vigilante justice if they cannot prosecute cases because of a lack of defender attorneys.

In a Seattle Times op-ed, two King County judges admitted: "Current caseload standards are outdated and do not account for the complexities of today's criminal cases with video, DNA and social media evidence." But they opposed the standards and called for delay for a task force, review of state funding, and review of prosecutor filing practices.[12]

Six judges from Spokane, Pierce, and King Counties wrote to support the standards but with a one-year delay in full implementation. They wrote:

> The discussion concerning the proposed standards should not pit the constitutional right to public defense against public safety; the two are, in fact, interlocking pieces of a constitutional justice system. …Experienced public defenders, including those qualified for Class A felony defense, conclude that they cannot provide sufficient representation carrying as

many cases as they have. They resign as a matter of ethics and self-care, no longer willing to prop up a deficient approach to public defense. Over time, with continued attrition, a level of crisis results that is detrimental not just to public defenders but to all participants. [13]

A federal judge from Spokane wrote: People cannot be represented to the level required by the Constitution when their lawyers do not have enough time and resources …. The case levels for public defense in state court does not leave enough time for proper analysis and handling of individual criminal cases …. The case load for federal defenders is well below the state level and the quality of representation reflects the case loads of the respective courts.

Lisa Daugaard, co-director of Purpose Dignity Action which concentrates exclusively on developing, implementing and supporting community-based public safety initiatives, including pre-booking diversion programs around the state aligned with the LEAD model, wrote:

> We urge that the state proceed on both paths simultaneously—building the pre-booking diversion framework to scale, while implementing revised indigent defense standards over time. Creating a void, where there is no meaningful response to impactful law violations, is unwise from a public policy standpoint, but creating a real, robust, well-regarded alternative to criminal charges absolutely is possible if these programs can be scaled. I hope your forthcoming orders and guidance will embrace the existing pre-booking diversion framework and acknowledge that it needs investment in order to contain the budget impact of the revised standards as far as possible.

Washington does not need to reinvent the wheel to establish effective diversion programs. An evaluation of LEAD (Law Enforcement Assisted Diversion, Let Everyone Advance with Dignity) found that it led to reduced costs and "represents a promising alternative to the criminal justice system for repeated, low-level drug and prostitution offenders."5

The Washington Legislature already provides funds for LEAD programs. RCW 71.24.589. The Court could, in announcing a revised rule adopting the new Standards, refer to the success of LEAD and support a convening to address expansion of LEAD programs across the state.

The Washington Association of Prosecuting Attorney (WAPA) told the Court that it supports increased capacity for defenders. But it opposes the standards and wants a statewide study to evaluate each community's needs and the available resources.

WAPA acknowledged that "There are long-term goals that would also reduce the demand on the criminal justice system, including addressing the root causes of crime, such as poverty, lack of access to education and increased access to mental healthcare."

There is no real argument that the existing standards are outdated and need to be changed. And the elements of effective representation are the same whether a case is in Seattle or Ellensburg. After two years of study by the Council on Public Defense, the WSBA has recommended the needed changes, informed by 17 state studies and a national study. The Court should adopt the WSBA recommendations and the Legislature should invest both in more public defense and in programs such as LEAD that address the root causes of crime. Then there will be fewer cases needing defenders and more lawyers and staff who want to be defenders.

Some opponents have argued that no reduction from the 400 misdemeanor per lawyer annual case limit is needed. I have studied misdemeanor public defense for more than 20 years and I know that lawyers who have caseloads closer to those recommended by the WSBA can represent their clients far more effectively than those who have less than five hours per client at 400. The defenders in the City of Edmonds have a caseload of about 280 per year, and while they need more resources and more time, I have seen them more effectively raising legal issues and advocating more comprehensively for clients than defenders with 400 cases are able to do.

According to the Office of Financial Management, "The state's current operating budget for the 2023–25 biennium (from all fund sources) is $147 billion."[14] There has to be room for increasing funding to local governments for public defense expenses.

In a New York Times Magazine article about reading the Talmud, the author concluded that the reading helps keep him grounded in his values, while reminding him that, even in the most profound crises, it's possible to imagine new ways of being, new political structures, new models of coexistence and mutual support.[15]

We have the opportunity now for that kind of re-imagining, to step forward into a more fair and honest legal system. ■

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[1] *See, e.g.*, "ACLU of Washington sues Yakima County to release inmates who can't get public defenders", Spokesman Review, October 1, 2024, available at https://www.spokesman.com/stories/2024/oct/01/aclu-of-washington-sues-yakima-county-to-release-i/.

[2] Standards available at https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/wsba-indigent-defense-standards-as-approved-by-bog-2024.03.08.pdf?sfvrsn=3c831ff1_5.

[3] The recording of the November 13, 2024, Supreme Court hearing is available at https://tvw.org/video/washington-state-supreme-court-hearing-on-indigent-defense-standards-2024111068/.

[4] "State Supreme Court Issues Historic Order on Defender Standards", *Bar Bulletin*, September 2012, available at https://law.seattleu.edu/media/school-of-law/documents/faculty/publications/boruchowitz/BoruchowitzArticleKCBAstandards.pdf.

[5] National Public Defense Workload Study (2023), available at https://www.rand.org/pubs/research_reports/RRA2559-1.html. The study was a joint project by RAND, the American Bar Association, the National Center for State Courts, and veteran lawyer Steve Hanlon, who had conducted several of the studies considered by the NPDWS. See, "New National Study Can Be a Catalyst for Transformational Change in Public Defense and the Criminal Legal System", *Bar Bulletin*, October 2023, available at https://law.seattleu.edu/media/school-of-law/documents/faculty/publications/boruchowitz/king-county-bar-bulletin-10-2023.

[6] WSBA Board of Governors Meeting Materials, BOARD OF GOVERNORS MEETING

September 6-7, 2024, at 525 et seq.

https://www.wsba.org/docs/default-source/about-wsba/governance/board-of-governors-2023-2024/sept-2024/2024-sept-6-7-board-of-governors-meeting-materials-restricted.pdf#page=525

[7] The proposed amendments and comments about them are available on the court's website at https://www.courts.wa.gov/court_rules/.

[8] For this and other oral comments to the Court, **see** fn. 3 supra.

[9] *Id*.

[10] *See* fn. 5, supra.

[11] *See* fn. 7, supra.

[12] "Plan to cut WA public defender caseloads would have profound consequences", *Seattle Times*, September 12, 2024, available at https://www.seattletimes.com/opinion/plan-to-cut-wa-public-defender-caseloads-would-have-profound-consequences/.

[13] For this and other written comments, *see* fn.7 supra.

[14] A Guide to the Washington State Budget Process, available at https://ofm.wa.gov/sites/default/files/public/publications/WaStateBudgetProcessGuide.pdf

[15] Michael David Lucas, "Reading the Talmud", New York Times, October 13, 2024, available at https://www.nytimes.com/2024/10/08/magazine/talmud-rabbis.html.