Report to the Washington Supreme Court on the Implementation of Standards for Indigent Defense

Pursuant to:
Washington Supreme Court Order Number 25700-A-1013

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Executive Summary

On December 10, 2012, the Washington Supreme Court ordered the Washington State Office of Public Defense (OPD) to prepare a report on the implementation of the Standards for Indigent Defense, including information on recent law changes, development of case weighting policies, an inventory of diversion programs, and an examination of the impacts of attorney experience on caseload capabilities. To gather this information, OPD conducted written surveys of public defense attorneys, court personnel, city and county administrators, and prosecutors, and interviewed 56 experienced public defense attorneys; reviewed national and state research; and accessed data from the Judicial Information System (JIS). Analysis of this information has led to the following conclusions:

Conclusion 1: Decreasing crime rates coupled with changes in prosecutorial charging practices have resulted in fewer criminal charge filings at all court levels. This helps lower public defense attorney caseloads.

Conclusion 2: Further reductions in case filings seem likely based on recent changes in statutes, court rules and local ordinances, and developments in case law. For some local jurisdictions, the decline in criminal filings might reasonably be expected to offset any potential need for additional public defense attorneys.

Conclusion 3: Diversion programs and practices are utilized to varying degrees by courts statewide, and in many circumstances reduce the workload for public defense attorneys.

Conclusion 4: The Rules of Professional Conduct and case law require defense attorneys to undertake specific activities when representing criminal defendants.

Conclusion 5: The number and types of public defense cases are not tracked on the statewide level or, in some jurisdictions, on the local level. A mandatory code for tracking the appointment of public defense attorneys for indigent defendants should be added to the Judicial Information System, and a misdemeanor tracking system should be developed.

Conclusion 6: Public defense attorneys and jurisdictions should have the option of counting the time of public defense attorneys who serve as first appearance or arraignment calendar attorneys by the number of calendar hours, rather than the number of defendants, even if the jurisdiction has not adopted a case weighting system.

Conclusion 7: Case weighting systems should be based on time studies of the amount of defense attorney time needed to provide effective representation. A handful of misdemeanor case weighting policies

have been developed by jurisdictions, but they have not had the resources necessary to conduct time studies.

Conclusion 8: Based on a review of legal literature as well as interviews with practicing attorneys, it is clear that attorney experience or inexperience may play a role in assessing a defense attorney's ability to effectively handle more or fewer cases, particularly with regard to the time necessary for case preparation.

Conclusion 9: Preparation of this report raised additional questions that may merit further attention.

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Introduction

The development of the Washington Supreme Court's Standards for Indigent Defense[1] (Standards) spans nearly 30 years. Public defense standards were first developed by the Washington Defender Association (WDA) in 1984. Those standards were then adopted by the Washington State Bar Association (WSBA) in 1985, and were amended by WSBA in 2007 and 2011. In 2010, the Washington Supreme Court adopted court rule amendments to CrR 3.1, CrRLJ 3.1, and JuCR 9.2, requiring that, to be appointed to represent an indigent person, counsel must certify compliance with "applicable Standards for Indigent Services to be approved by the Supreme Court." In 2012, based largely on the earlier standards, the Washington Supreme Court adopted its Standards and amendments to the Standards, with effective dates of October 1, 2012 and October 1, 2013.

The U.S. and Washington Constitutions guarantee each indigent defendant a public defense attorney who will provide effective assistance of counsel. The Standards development process reflects a growing concern about the quality of public defense in Washington's trial courts. As the Court commented in *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956 (2010), even though the *Gideon* case[2] has guaranteed defendants the right to counsel since 1963, efforts to carry out *Gideon's* promise still continue. During the past several years, both legal actions and investigative reports have found ineffective assistance of counsel in public defense cases in various courts. The Supreme Court adopted the Standards for Indigent Defense "to address certain basic elements of public defense practice related to the effective assistance of counsel." *Preamble, Standards for Indigent Defense.*

Following the initial attorney certification required by the court rules, the Court directed the Washington State Office of Public Defense (OPD) to provide information as to the implementation of the Standards throughout the state. OPD is a state agency whose mission is to "implement the constitutional right to counsel… ." OPD administers the state's Chapter 10.101 RCW program to distribute state funds to counties, as well as a number of cities, for improving public defense. OPD also provides public defense consulting services for jurisdictions and trainings for public defense attorneys.

After communicating with dozens of public defense attorneys and jurisdictions, OPD has advised the Court that there has been some confusion and inconsistent interpretation regarding various sections of the Standards.

On December 10, 2012, the Court entered an Order directing OPD to:

[1] CrR 3.1(d), JuCR 9.2(d) and CrRLJ 3.1(d) Washington Supreme Court Standards for Indigent Defense, adopted June, 2012. *See* Appendix B.
[2] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

> prepare a report on implementation of Standards and Attorney Certification…. (which) should include information on case weighting approaches; an inventory of common diversion programs; information on the potential impact of criminal law changes; and an analysis of the effects of attorney experience on caseload capability. (See Appendix A.)

This report was prepared in response to the Order. The first half of the report highlights external influences that are decreasing the number of cases requiring public defender appointment, including law changes and diversion programs. The second half of this report discusses how case counting and case weighting are being applied, OPD's findings regarding allocation of attorney time, and the effects of attorney experience on caseload capability. Before addressing these matters, this report provides a brief update on the implementation of certification, which began on October 1, 2012.

Certification Summary

In accordance with the Court's adoption of the Standards, the first attorney certification under CrR 3.1, CrRLJ 3.1, and JuCR 9.2 was scheduled for October 1, 2012. The rules establish that each attorney appointed or assigned to represent an indigent defendant or respondent in a criminal matter must file a certification of his or her qualifications quarterly with the court. As certification was a new and unique process, significant outreach to the courts and the attorneys was needed. OPD worked with local attorneys to put on six Continuing Legal Education programs (CLEs) on certification in various locations, WDA sponsored a webinar for attorneys, and the courts and OPD presented a webinar for judges and court personnel.[3] A number of participants expressed apprehension about the new certification process during each of these presentations.

The October 1, 2012, individual attorney certification included the Standards on basic public defense attorney requirements: general qualifications, accommodations for meeting with and communicating with clients, appropriate use of investigators, and a statement that the attorney should not accept an excessive workload.[4]

In December 2012, OPD contacted court administrators and county court clerks statewide by email to gauge their experience with the first round of certification. Ninety-one courts responded, representing 32 Superior Courts, 6 Juvenile Courts, 26 District Courts, and 27 Municipal Courts. The majority of the courts stated that the entities responsible for receiving and filing the quarterly certification documents are court administrators, county court clerks, or the county public defender offices. Most are filed in these offices and available to the public upon request, though some jurisdictions post the certifications publicly in court or on websites. When asked whether they faced issues with the certification process, 88% responded that they had not experienced any problems. Of those who did, the issues identified by them included more work for court staff, late submission of forms, and concerns about ambiguity of the Standards language. Of the 91 courts, only one attorney refused to certify, and only one court reported that proceedings were delayed because a defense attorney had not filed timely. A follow-up inquiry was sent in March 2013, and 37 court administrators and county clerks answered that certification continues to work well, with the exception of a few attorneys not filing in a timely manner.

[3] The webinar for judges and court personnel can be viewed at http://aoceccl.adobeconnect.com/p5qozahnvj0/.
[4] Certification of Compliance, CrR 3.1(d), JuCR 9.2(d) and CrRLJ 3.1(d) Standards for Indigent Defense. *See* Appendix B.

Section 1 – Current Reductions in Court Filings

I. Fewer Criminal Cases Require Appointment of a Public Defense Attorney

Conclusion 1: Decreasing crime rates coupled with changes in prosecutorial charging practices have resulted in fewer criminal charge filings at all court levels. This helps lower public defense attorney caseloads.

Recent years have been marked by external influences that play a role in the reduction of public defense attorney caseloads. One contributing factor is that crime rates in Washington, like national crime rates, have steadily decreased.[5] In addition, some prosecuting attorneys are making different decisions in identifying what kinds of cases will be filed in criminal court.[6] For example, in response to 2009 budget reductions, the King County Prosecutor's Office decided to file certain drug and property felony offenses as misdemeanors or gross misdemeanors in order to conserve resources for violent crimes.[7] Based on feedback from both prosecutors and defense attorneys, one offense commonly reduced is DWLS-3 (Driving While License Suspended in the Third Degree). In Skagit County approximately 85% of the DWLS-3 charges are amended to the infraction No Valid Operator's License. (More discussion on DWLS-3 charges and other diversion initiatives is located at page 14 of this report.)

Prosecutors' systematic reduction of certain offenses creates an impact on the number of cases qualifying for public defense representation. For example, the Pierce County Prosecuting Attorney Office files certain offenses as misdemeanors; however, when a defendant appears at the initial hearing, court staff is authorized to file "blanket motions" which reduce those offenses to civil infractions. This practice is used in the following situations in Pierce County:

- Defendants charged only with DWLS-3 may have the crime reduced to the civil traffic infraction of no valid operator's license on person when the basis of the suspension is one of an enumerated list of causes.

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[5] Query of Statewide Crimes per 1,000 Population from 1994 to 2011*, Uniform Crime Report Query, Statistical Analysis Center,* State of Washington Office of Financial Management-Criminal Justice, http://wa-state-ofm.us/UniformCrimeReport (click "statewide" under "county" drop down menu; click "County Detail" button; select 1994 to 2011 for date range under "Time Series" option; select "Crimes per 1,000 Population" option; click "Submit" button; then click "Graph 1" button on following page); Press Release, FBI Seattle Division, FBI Releases 2011 Crime Statistics for Washington State (Oct. 29, 2012), http://www.fbi.gov/seattle/press-releases/2012/fbi-releases-2011-crime-statistics-for-washington-state.

[6] Since 2008, during the recession, charging rate decreases may also have resulted in part in some jurisdictions from law enforcement and prosecutor staff budget cuts.

[7] Keith Ervin, *King County 2009 Budget Shortfall Rises to $90 million*, Seattle Times, Sep. 5, 2008, http://seattletimes.com/html/localnews/2008159764_kingbudget05m.html.

- Defendants charged only with unlawful recreational fishing in the second degree or unlawful taking of seaweed may have the crime reduced to the civil infraction of fishing and shellfish infraction-recreational fishing.
- Defendants charged only with failure to transfer title may have the crime reduced to the civil traffic infraction of causing or permitting vehicle to be unlawfully operated

The Judicial Information System (JIS) administered by the Washington Administrative Office of the Courts (AOC), is the primary information system for Washington Courts. JIS data for the calendar years of 2008 through 2012 demonstrate that Washington Courts at all levels are experiencing a general trend of decreased criminal case filings. During this timeframe the Courts of Limited Jurisdiction had an 18% decrease in misdemeanor filings, totaling approximately 50,000 criminal cases (Figure 1). Similarly, Superior Courts had a 13% criminal case decrease totaling approximately 5,000 criminal cases, and Juvenile Courts had a 36% decrease equaling some 6,000 offender matters (Figure 2).

Figure 1: **Misdemeanor Filings in WA Courts of Limited Jurisdiction, 2008 - 2012**

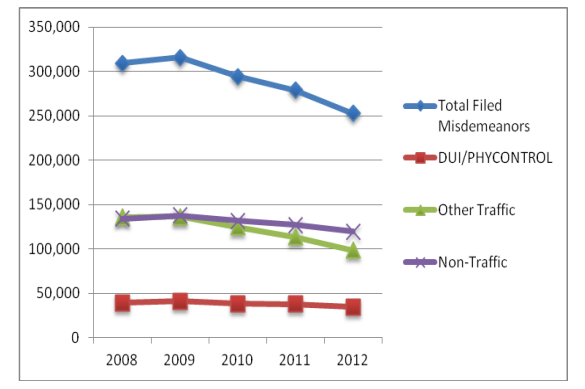
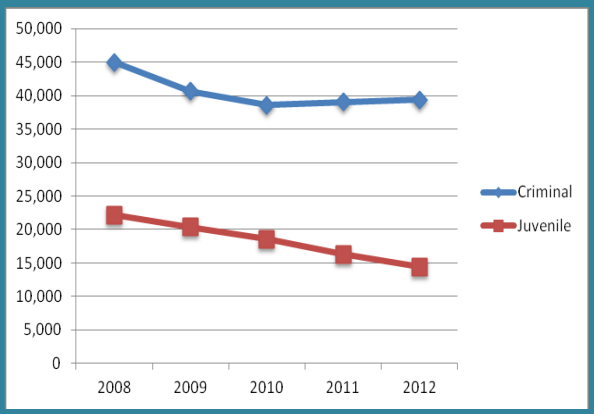


Figure 2 **Total Case Filings WA Superior Courts, 2008 - 2012**



Figures from these years, coupled with data on general crime rates, demonstrate that the reduction in case filings appears likely to persist. Decreased criminal case filings may be expected to continue to result in decreased caseloads for public defense attorneys. With the significant decline in misdemeanor charging, it appears that statewide, as many as 75 fewer FTE public defense attorneys are needed in 2013 than were needed in 2008.

It is important to note, however, that when less complex cases are no longer charged as crimes, the courts' and public defense attorneys' remaining cases may become more complex and difficult, so that caseloads require more skill and time, and in local jurisdictions limits may need to be adjusted downward to reflect this. (See the discussion on case weighting at p. 23.)

II. Recent Changes in the Law that Impact Court Filings

Conclusion 2: Further reductions in case filings seem likely based on recent changes in statutes, court rules and local ordinances, and developments in case law. For some local jurisdictions, the decline in criminal filings might reasonably be expected to offset any potential need for additional public defense attorneys.

In response to the Court's order to provide information on potential impacts of recent criminal law changes, OPD reviewed numerous state and local legislative changes, court rule amendments, and appellate court cases, with an emphasis on misdemeanor crimes. The most notable observations are highlighted below, and a more detailed list is located at Appendix D.

As noted in the previous section, the general decline in case filings statewide has occurred in all criminal case types -- adult felony and misdemeanor crimes, as well as juvenile offenses. It appears that recent criminal law changes could continue this trend, with as much as a 10% further reduction in the statewide number of criminal cases filed in Courts of Limited Jurisdiction. The following recent changes in the law appear likely to contribute to further reductions in filings.

It is estimated that after June 1, 2013, misdemeanor filings should decrease by 6% due to DWLS-3 changes by the 2012 Legislature.

- Engrossed Second Substitute Senate Bill 6284, adopted by the 2012 Legislature, eliminated driver's license suspension in the third degree (DWLS-3) when a driver fails to appear, respond, or comply with a citation for *non-moving* traffic violations.[8] The bill directed the state Department of Licensing (DOL) to amend administrative rules to define non-moving and moving violations. Because of the requirement for agency rulemaking, the effective date of the new law is delayed until June 1, 2013. The bill fiscal note prepared during the 2012 legislative session (prior to the rulemaking) estimated a reduction of 50% of the DWLS-3 cases or 47,495 cases filed per year, based on 2010 filings. However, following completion of the DOL rulemaking to define "non-moving violation," OPD reviewed license suspension data and estimates that only 20% of license suspensions involve what in the future will be defined as non-moving violations.[9] Based on this analysis, OPD estimates that this new law is likely to result in a 6% reduction in cases filed in Courts of Limited Jurisdiction.

- Washington voters in November 2012 approved Initiative Measure 502, An Act Relating to Marijuana, which decriminalizes adult possession of specified

[8] Laws of 2012, ch. 82 (E.S.S.B 6284).
[9] WAC 308-104-160 (as amended Mar. 4, 2013).

amounts of marijuana in various forms as well as possession of marijuana-related paraphernalia.[10] It is estimated that in 2012 approximately 4.1% of the Courts of Limited Jurisdiction cases filed included a marijuana possession or drug paraphernalia charge for people 21 years old or older. Other types of criminal cases where marijuana possession provided probable cause for investigation of other offenses also may be affected, but OPD is unable to estimate the impact.

In 2012, up to 4.1% of all criminal cases filed in courts of limited jurisdiction were possession of marijuana or drug paraphernalia for persons 21 years or older.

As of the writing of this report, it is not yet clear how the U.S. Attorney General will respond to the conflict between state and federal law regarding the decriminalization of marijuana. The Justice Department could take steps to attempt to block Washington's new marijuana laws from taking effect.

- The Court of Appeals in *State v. Jasper*, 158 Wash.App.518, 245 P.3d 228 (Div. I 2010), held that an affidavit from a legal custodian of driving records contained testimonial assertions for Confrontation Clause purposes, giving the defense a right to cross-examine the witness in person. As a result of the ruling, at least one county jurisdiction reports that it generally has stopped filing DWLS-3 charges because of the cost of bringing in a driving records custodian to testify. This has resulted in almost a 60% drop in DWLS-3 case filings in that county.

- The Washington Supreme Court amended criminal court rule CrRLJ 3.2, effective August 2012, to remove the option of "bail forfeiture" as a resolution to criminal cases. Prior to the amendment, approximately 3% of all criminal cases in Courts of Limited Jurisdiction were resolved by bail forfeiture. Of these, approximately 57% were Department of Fish and Wildlife charges. After the amendment became effective and bail forfeiture was no longer an option, three times as many Fish and Wildlife criminal cases were reduced to non-criminal infractions.

- Some cities are impacting court filings by ordinance changes. Several municipalities report recent ordinance amendments that decriminalize certain city code violations and reduce them to civil infractions with a monetary penalty.[11] One city decriminalized its residential rental housing license requirement, fireworks chapter, nuisances and public disturbance chapter, violations of which represented approximately 8.1% of the 2011 filed cases. Another city amended its animal control code, decriminalizing all sections with the exception of animal cruelty, which is still a misdemeanor. Another city decriminalized its sign code violations, reducing them to civil violations with a monetary penalty.

[10] Laws of 2013, ch. 3 (Initiative Measure No. 502, approved by voters Nov. 6, 2012).
[11] *See* Appendix D for a detailed list.

While the law changes referenced above likely will reduce case filings, at least one major case law development has led criminal defense attorneys to spend additional time advising individual clients about the potential consequences of conviction. The U.S. Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) and the Washington Supreme Court in *State v. Sandoval*, 171 Wn2d 163, 249 P 3d 1015 (2011), held that erroneous immigration advice is ineffective assistance of counsel. Counsel must now know or consult with an immigration attorney about potential immigration consequences and inform the defendant of the potential immigration consequences. This is impacting a significant number of criminal cases involving non-citizens. The state through OPD funds two staff immigration attorneys at WDA who provide consultation to public defense attorneys statewide to comply with *Padilla* and *Sandoval*. This program reduces the amount of time required by attorneys to do independent legal research on immigration consequences.

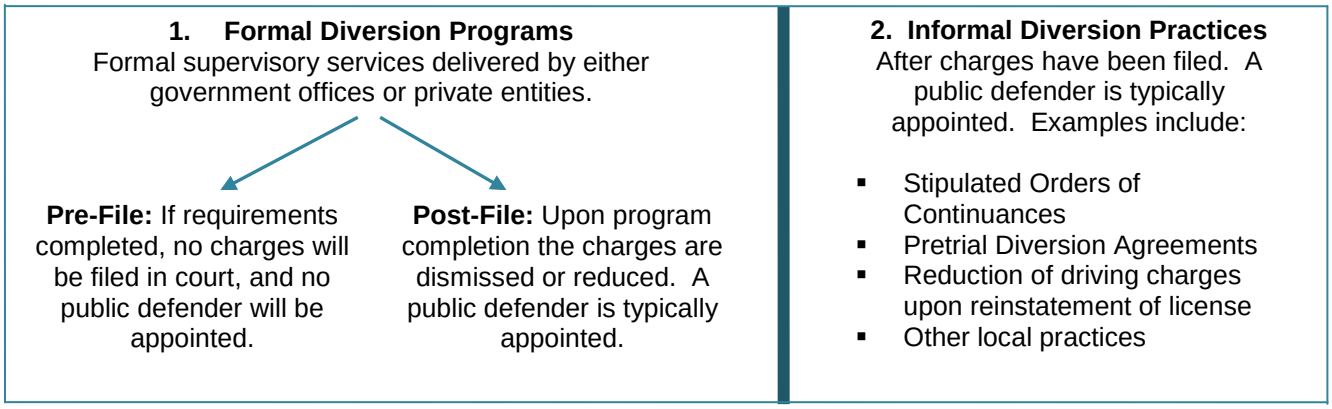
III. Diversion Programs

Conclusion 3: Diversion programs and practices are utilized to varying degrees by courts statewide, and in many circumstances reduce the workload for public defense attorneys.

III.A. Adult Criminal Diversion Overview[12]

The conventional manner of processing criminal cases requires significant investment by attorneys, judges, court staff, law enforcement, corrections and many others. Yet many cases charged each year arise from non-violent offenses and involve defendants with little or no criminal history. To protect public safety yet better economize scarce public resources, many prosecuting attorneys are turning to diversion programs and practices.[13]

Figure3: **Diversion Service Delivery in Washington Courts**



Washington judges, defense attorneys, and prosecutors have identified a wide array of programs and practices as "diversion."[14] However, case resolutions using diversion

[12] Diversion plays a prominent role in Juvenile Courts as counties are required to implement juvenile diversion programs per RCW 13.40.080. No such statutory requirement exists for adult diversion programs. For purposes of this report, only adult diversion programs will be addressed because such programs could reduce the number of cases being processed by courts, and therefore the number of cases to which public defense attorneys are appointed.

[13] Deferred prosecutions, regulated by RCW 10.05.010 are not included in this section because of (1) the narrow scope of cases to which they apply; and (2) the fact that the requirements call for active oversight by criminal defense attorneys, and therefore generally have little impact on the reduction of caseloads.
Therapeutic court cases share many characteristics with diversion programs. However, they are not categorized as diversion programs in this report because they involve intensive court system oversight and consume a large degree of court resources, while diversion program activities occur outside of the court.

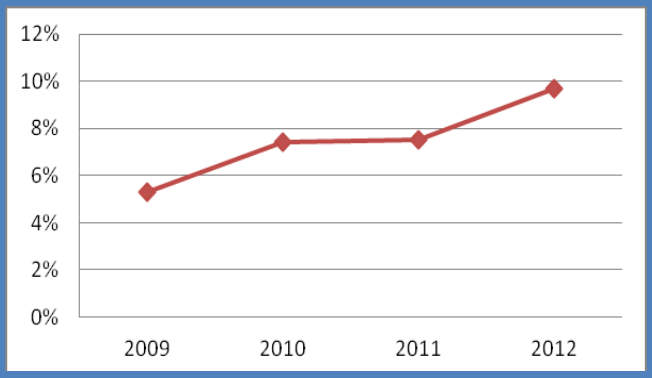
[14] For this report, OPD surveyed prosecutors, public defense attorneys, and court administrators about diversion programs. Responses showed that "diversion" is a term used to encompass practices ranging from formal programs with supervisory oversight, to informal reduction of misdemeanors to infractions.

appear to fall into two broad categories, in this report referred to as (1) formal diversion programs, and (2) informal diversion practices (Figure 3). Diversion programs and diversion practices vary from jurisdiction to jurisdiction. No descriptions or definitions of diversion included in this report are intended to represent diversion schemes statewide.

The JIS-Link Code Manual defines cases ending in "other deferral or diversion" as:

> The court orders or allows the parties to enter into a stipulated agreement, which imposes specific conditions on the DEF (defendant). Upon completion or adherence to the conditions, the court may dismiss or amend the charge, or the DEF may enter a plea of not guilty. This is known as a deferred finding, deferred sentence, agreed continuance, or court accepted diversion program.

Figure 4: **Washington Courts of Limited Jurisdiction, Percentage of Cases Ending in Final Judgment Categorized as "Other Deferral or Diversion."**



According to 2012 JIS data for Courts of Limited Jurisdiction, district and municipal courts have experienced a significant increase in cases that end in a final judgment categorized as "other deferral or diversion." The percentage of cases in this category has almost doubled from 5.3% in 2009 to 9.7% in 2012 (Figure 4).

National studies show that while diversion programs conserve significant time and resources among courts, attorneys and other court-related partners, diversion can also "positively impact the lives of participants through the avoidance of criminal conviction and the offering of social services to address criminogentic needs."[15] A diversion program survey conducted by the National Association of Pretrial Services Agencies found that while few programs track recidivism data, of those that do, recidivism rates were quite low: the median recidivism rates for participants for new felonies was 5%; for new misdemeanors was 12%; and for serious traffic offenses was 1%.[16]

A national study found that the median recidivism rate for successful felony diversion participants was 5%.

[15] Spurgeon Kennedy et al., National Association of Pretrial Services Agencies, *Promising Practices in Pretrial Diversion*, 9 (2006), www.pretrial.org/Docs/Documents/PromisingPracticeFinal.pdf.
[16] *Id.* at 16.

III.B. Formal Diversion Programs

In "pre-file formal diversion programs," eligible candidates are invited to participate before charges are filed in court. Upon successful completion no charges are filed. Because participation arises at this preliminary stage, indigent candidates are not entitled to public defense representation. In "post-file formal diversion programs" defendants are invited to participate after charges have been filed, and successful completion results in the dismissal or reduction of charges. The degree to which indigent candidates in post-file diversion are represented by public defense attorneys varies from jurisdiction to jurisdiction. In some locations, only minimal contact is made prior to starting a program, whereas in others a public defense attorney is appointed and is available throughout the defendant's progress in the program. For jurisdictions that case weight, these public defense representations may be weighted as little as one-third of a case under Standard 3.6(B)(v). Ongoing representation of such clients is less time-consuming than conventional cases because representation does not include trial preparation.

Representation in cases that can be resolved at an early stage by diversion, reduction to an infraction or other noncriminal disposition should be weighted as at least 1/3 of a case. Supreme Court Standards on Indigent Defense, 3.6(B)(v).

III.B.1. Publicly Administered Formal Diversion Programs

Diversion programs and practices are delivered in different ways, and some jurisdictions have taken the step of developing and implementing in-house formal diversion programs at the local level. A list of sample programs can be found in Appendix E.

Pre-File Formal Diversion Programs: Pre-file diversion programs range from misdemeanor to felony levels. King County's LEAD (Law Enforcement Assisted Diversion) is a collaboration of various stakeholders "motivated by a shared dissatisfaction with the outcomes and costs of traditional drug law enforcement."[17] In Snohomish County, individuals are eligible to participate in the TAP (Therapeutic Alternatives to Prosecution) program when felony offenses are directly related to drug or alcohol dependency, or mental illness. The City of Bellevue's Probation Division administers a formal pre-filing diversion program for low level first time offenders charged with 3rd degree theft, shoplifting or leaving a child unattended. The Whitman County Prosecutor's Office is planning to launch a pre-file formal diversion program later in 2013 for the charges of Minor in Possession and Possession

A prosecutor interviewed for this report noted that diversion is an opportunity to identify first-time offenders whose behavior can be corrected. "Success with a diversion program typically indicates that the person is less likely to reoffend in the future."

[17] Law Enforcement Assisted Diversion, *Frequently Asked Questions,* http://leadkingcounty.org/about/#faq.

of Marijuana with the goals of more efficient use of public services, increased education on alcohol/drug use, and reduction in recidivism.

Post-File Formal Diversion Programs: Post-file diversion program participation begins after a person has been charged with a criminal offense and is entitled to appointed counsel if indigent. The Clark County Prosecuting Attorney's Office has administered post-file diversion programs for approximately 40 years. The felony and domestic violence diversion programs have approximately a 70% successful completion rate, and the office launched a new misdemeanor program in 2012. The Franklin County Prosecuting Attorney Office's post-file diversion program also extends from misdemeanors to felonies.

Drivers License Reinstatement Programs: Pre- and post-file driver's license reinstatement programs are very similar to formal diversion programs, but typically require only that the defendant take the steps necessary to reinstate a driver's license suspended for failure to pay or appear in court on a traffic infraction. In the meantime, however, the court releases the hold on the license, and charges are reduced or dismissed for successful participants.

III.B.2. Privately Administered Formal Diversion Programs

At least two private agencies partner with Washington prosecutors to deliver formal diversion services. Friendship Diversion is a 501(c)(3) non-profit organization based in Olympia which has provided pre-file and post-file diversion services to Washington courts since the late 1960s. Between 1998 and 2011, Friendship Diversion collected $3,643,778 in victim restitution, and $436,024 in court fees. Furthermore, its rate of program completion demonstrates that a substantial number of cases are being handled without conventional court processing. Figure 5 shows the number of successfully completed pre-file and post-file formal diversion program participants in 2011 and 2012.

Figure 5: **Friendship Diversion Successful Program Completions 2011 - 2012**

Diversion Type	Jurisdictions	Cases Completed in 2011 and 2012	Successful Completion Rate
Pre-File	Thurston, Jefferson, Grant, Clallam	572 Misdemeanors	70.3%
Post-File	Thurston, Clallam, Jefferson	1,534 Misdemeanors and Felonies	78.4%

BounceBack has provided pre-file diversion services to Washington prosecutors since 2011 for persons accused of unlawful issuance of a bank check. BounceBack works directly with the check writer to obtain restitution for the full amount of the check and provide training. Successful completion of the program commonly results in charges not being filed. According to the Spokane County Prosecuting Attorney's Office, in 2011 merchant restitution through BounceBack was $47,462.

While some jurisdictions have found privately administered diversion programs to be procedurally efficient for the courts, others have concluded that the participation fees may be too high for some indigent defendants or that the court itself should be the appropriate institution to oversee diversion programs.

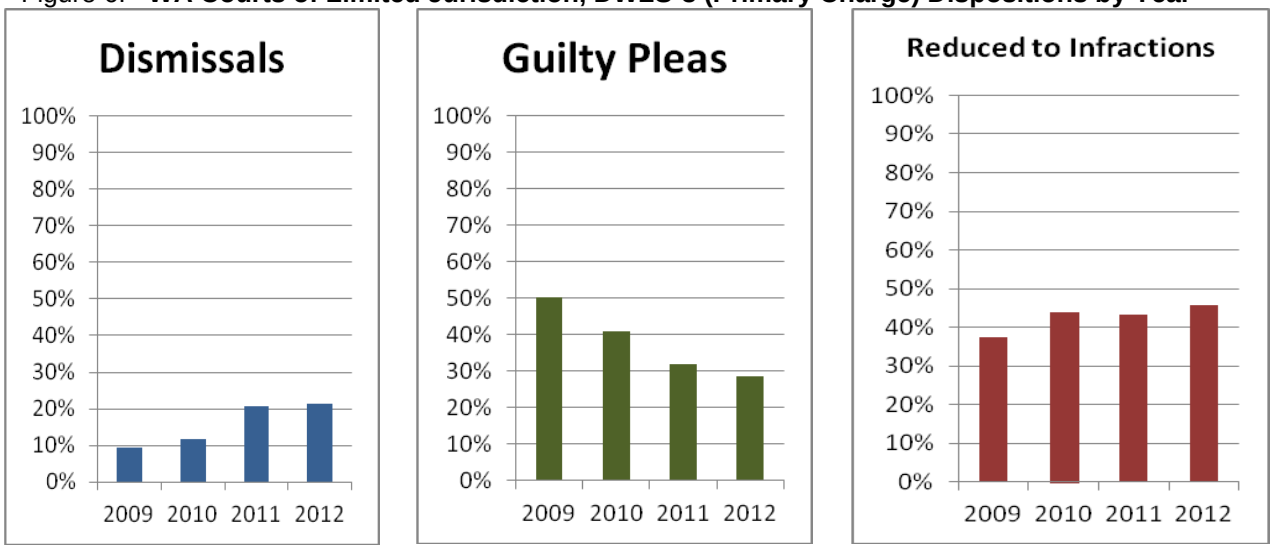
III.C. Informal Diversion Practices

For purposes of this report, "informal diversion practices" refers to alternatives offered by prosecutors in the negotiation of cases which share many of the same attributes of formal diversion programs. Upon completion of prescribed requirements, a defendant's charges will be reduced or dismissed. However, unlike formal diversion programs, informal diversion practices typically do not include oversight or supervision. The impact of informal diversion practices on public defense caseloads varies greatly, as some diversion agreements require the client to complete few activities, while others require active oversight to track a client's progress.

Informal diversion practices are employed in most courts. They most commonly are available for the charge of DWLS-3, as well as other misdemeanor traffic offenses. These practices play an important role in the caseloads of public defense attorneys. According to JIS data, DWLS-3 charges comprised approximately 30% of all cases filed in Courts of Limited Jurisdiction in both 2011 and 2012. Of the 36 prosecutors who responded to an OPD survey regarding charging practices, 24 stated that they regularly reduce or dismiss DWLS-3 charges. Most stated that they reduce or dismiss the offense upon demonstration of a reinstated driver's license, while some automatically reduce the crime to an infraction regardless of the license status.

These reports are further confirmed by data from JIS showing a trend in the resolutions of DWLS-3 charges. Between 2009 and 2012, the dismissal rate has increased from 9.3% to 21.5%. Conversely, the rate of guilty pleas has decreased from 50.2% to 28.5%. Finally, the rate of DWLS-3 charges being amended to infractions has increased from 37.3% to 45.7% (Figure 6).

Figure 6: **WA Courts of Limited Jurisdiction, DWLS-3 (Primary Charge) Dispositions by Year**



In other misdemeanors or other more serious offenses, prosecutors utilize Stipulated Orders of Continuance, or, as they are sometimes referred to, "Pretrial Diversion Agreements." These agreements are offered to defendants after charges have been filed. The defendant is typically expected to stipulate to the facts as presented in a police report, relinquish certain trial rights, and complete a prescribed set of requirements, including the payment of fees, fines, and/or restitution. Successful completion results in dismissal or reduction of the charges, and failure to complete the requirements results in the case being returned to court for standard processing. Many prosecutors offer these agreements on a case-by-case basis, depending on the various aspects of the facts and the defendant's criminal history. However, others like Kitsap County have outlined criteria that apply in determining eligibility for such agreements.[18]

[18] Russell D. Hauge, Kitsap County Prosecuting Attorney, *Mission Statement and Standards and Guidelines* 14-15 (rev. May 7, 2007), www.kitsapgov.com/pros/StandardsGuidelines2007.pdf.

IV. Misdemeanor Caseloads: How Attorneys Spend their Time

Conclusion 4: The Rules of Professional Conduct and case law require defense attorneys to undertake specific activities when representing criminal defendants.

Constitutionally effective public defense requires sufficient time to carry out representation properly. Defense attorneys representing indigent defendants in misdemeanor cases spend their time on three primary categories of activities. The amount of time defense attorneys must spend on these activities determines the amount of workload they can properly handle. Over the past years, there have been persistent concerns that a number of public defense attorneys have been forced to disregard some mandatory representation activities due to their high caseloads.

The value of appropriate caseload levels was demonstrated in 2006-2007, when two misdemeanor courts implemented the WSBA Standards for Indigent Defense Services[19] during an OPD pilot program. A main feature of the program was the reduction of attorney caseloads, from 600-800 per attorney before the pilots to 400 under the pilots.[20] Dr. Bill Luchansky, a professional evaluator specializing in criminal justice and social research, evaluated the pilot programs. He analyzed more than 6,000 contemporaneous attorney time records to group case tasks reported by each pilot program attorney into three main types of activities:

- ***Client Communication Time.*** This includes in-office interviews and other communications with clients. Interview data from the original, pre-pilot defense attorneys showed client communication was quite limited when their caseloads were high before the pilot programs.
- ***Court Time.*** This includes all court representation activities.
- ***Case Preparation Time.*** Preparation time includes research, analysis, investigation, preparation for court, as well as many other activities. The evaluator's interview data from the original defense attorneys showed very limited case preparation before the pilot programs, when caseloads were high.

Dr. Luchansky reports that in both the courts, a substantial percentage of time was spent by the attorneys in each of these three activity areas. Attorneys in the two courts reported time they spent on representation activities, averaging as follows:

[19] Adopted by the WSBA in 1985, and amended in 2007 and 2011. These earlier standards are similar, but not identical, to the Supreme Court Standards for Indigent Defense.

[20] Pilot programs to implement indigent defense standards were established in Thurston County District Court, Bellingham Municipal Court, and Grant County Juvenile Court in 2006. For a description of the pilot programs, see Appendix F: for the pilot program evaluation, see www.opd.wa.gov/Reports/TrialLevelServices/1006_PilotProject.pdf.

- ***Client communication time*** ranged from 24% in Bellingham to 33% in Thurston
- ***Court time*** ranged from 44% in Bellingham to 26% in Thurston.
- ***Case preparation time*** ranged from 32% in Bellingham to 41% in Thurston.[21]

What is mandatory in carrying out public defense case activities is based on requirements set forth in the Rules of Professional Conduct (RPC) and case law, which establish the tasks necessary for adequate public defense representation. These public defense activities are also discussed in the WSBA Performance Guidelines for Criminal Defense Representation.[22] A summary of the factors involved in each of the three time and activity areas follows.

IV.A. Court Time

In each jurisdiction, court time is relatively fixed in the sense that attorneys usually have little, if any, control over their court appearance schedules. However, court calendars and schedules vary widely from court to court. For example, some courts have one or more therapeutic courts that may be held every week or bi-weekly; others are convened only a few days a week or month; and others are convened four or five, or even six days a week. Attorneys' other representation activities-- client communication and case preparation tasks-- must fit around their court schedules.

IV.B. Client Communication

As established by the RPCs and case law, and discussed in the WSBA Performance Guidelines for Criminal Defense Representation, client communication requirements are significant. Client communication RPCs include the following:

- RPC 1.0(e) defines 'informed consent' as the client's agreement as to how to proceed in the case after "adequate information and explanation" from his or her attorney.
- RPC 1.4 requires the attorney to promptly inform the client of information pertaining to his or her informed consent, consult with the client about his or her objectives on an ongoing basis, keep the client informed, and promptly answer the client's requests for information.
- RPC 2.1 requires the attorney to give the client candid advice regarding the client's situation.

[21] The percentages for the OPD juvenile court pilot project's time records were client communication time at 29%, court time at 37%, and case preparation time at 34%.

[22] The WSBA Performance Guidelines for Criminal Defense Representation (approved June 3, 2011), described as a guide to professional conduct and performance, are available at www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Performance%20Guidelines%20for%20Criminal%20Defense%20Representation%20060311.ashx.

In *State v. ANJ,* 168 Wn.2d 91, 98, 225 P.3d 956 (2010), the Supreme Court made it clear that public defense attorneys must engage in adequate communication with their clients. The Court said that the attorney's communication with his 12-year-old client charged with child molestation and his family was less than minimal. (The attorney's estimates of his total meeting time with A.N.J. "ranged between 55 and 90 minutes." *Id.* at 107 n.7.)

In concluding that the attorney provided insufficient communication, the Court found "the limited time he spent with his client before the plea, the fact he did not return A.N.J.'s parents' phone calls, the limited time he spent with A.N.J. to go over the statement on plea"…*id.* at 117 all were part of cumulative evidence that A.N.J. did not understand the nature of the charge and was misinformed regarding the consequences of his plea and therefore entitled to withdraw it.

The WSBA Performance Guidelines for Criminal Defense Representation outline a large variety of communications that public defense attorneys should conduct with their clients.[23] In contrast to these client communication obligations, the original public defense attorneys who practiced in Bellingham and Thurston with high caseloads before the pilot program told the evaluator that they:

> … frequently were unable to meet with clients in a timely manner. Initial meetings often took place just a few minutes before or at the pre-trial hearing… Defense attorneys did not have set office hours, making it more challenging to connect either in person or by phone with clients. OPD Pilot Project Evaluation, *supra* note 17, at 4.

This pattern of deficient client communication is not unusual in Washington, as attested to in many comments submitted to the Supreme Court when the Standards were being

[23] The Supreme Court commented in *A.N.J.,* at 110, that professional standards may be considered by a court, along with other evidence, in evaluating whether counsel is providing effective representation. The WSBA *Performance Guidelines for Criminal Defense Representation* include, among others, the following communication requirements:

- If the client is in custody prior to trial, conduct pretrial release interviews to acquire detailed information from the client concerning release, and provide the client with case information;
- Conduct an early interview that will begin building a relationship of trust and confidence. The interview should: include a discussion of the attorney-client and confidentiality privileges, inform the client of his or her rights, and inquire into citizenship status and follow-up questions;
- Fulfill the duty to keep the client informed of case developments, and promptly answer requests for information;
- As the case progresses, discuss the overall defense strategy and whether to go to trial, plead guilty, waive a jury trial, and testify;
- Keep the client informed of plea negotiations and the advantages and disadvantages of offers, as well as results of investigation and the attorney's analysis of the case;
- Ensure that a client who is considering making a guilty plea understands the nature of the charge and consequences of the plea and enters the plea intelligently and voluntarily;
- Maintain contact with the client before sentencing, and discuss sentencing requirements and consequences;
- Inform the client of his or her right to appeal and discussing the factors to consider and the procedure that will be followed.

considered. The results of the pilot programs indicate that when operating under the Standards, it can be expected that public defense attorneys should spend from about one-quarter to one-third of their time communicating with their clients. This supports the myriad of matters that must be discussed with each client as required by the RPCs, the *A.N.J. case,* and the WSBA performance guidelines.

IV.C Case Preparation

The RPCs, case law, and WSBA Performance Guidelines for Criminal Defense Representation establish significant case preparation requirements for public defense attorneys. Requirements include the following:

- RPC 1.1 establishes that competent representation requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- RPC 1.3 establishes that a lawyer must exercise reasonable diligence and promptness in representing a client. Comment 1 says that "A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf." Comment 2 says that "(a) lawyer's work load must be controlled so that each matter can be handled competently."
- RPC 3.1, which puts a good-faith limitation on attorneys arguing civil matters, establishes that a lawyer's representation in criminal matters is not similarly limited. The rule says that criminal defense attorneys may defend the proceeding as to require that every element of the case be established. Comment 2 says that "(w)hat is required of lawyers…is that they inform themselves about the facts of their clients' cases and the applicable law…" Comment 3 says that criminal defense lawyers' duties to their client are even higher than other lawyers: "(t)he lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by the Rule."
- *See also* CrR 3.1(f) and CrRLJ 3.1(f), which establish that attorneys representing indigent defendants who need "investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court."

In *State v. A.N.J.*, the Court examined case preparation requirements that were not met by the public defense attorney. One was his failure to know the law regarding sealing of the charges. By affidavit, the attorney admitted this, and admitted he did not bother to research the law. *Id.* at 103 n.8.

Another case preparation deficiency discussed by the Court was the public defense attorney's failure to evaluate the State's evidence in the case. The attorney admitted that he "simply reviewed the police reports." *Id.* at 103 n.8. The Court concluded that

reviewing the police reports is insufficient; "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *Id.* at 109. In other words, reviewing police reports alone is insufficient case preparation.[24]

In addition, the Court held that the public defense attorney "must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *Id.* at 111-112.

While the Court said a full investigation is not required in every case and depends on the facts of each case, it quoted the American Bar Association Standards for Criminal Justice, which state that "(d)efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts…the investigation should include efforts to secure information in the possession of the prosecution and law enforcement authority." *Id.* at 111 n.13.[25]

The Court emphasized that the public defense attorney's duty to conduct an investigation exists regardless of whether the defendant has admitted guilt, even to the attorney, discussing the fact that false confessions are well-documented. *Id. at 110.* The Court also discussed public defense attorneys' obligation to obtain experts in some cases. "Depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant." *Id*. at 112.

The WSBA Performance Guidelines for Criminal Defense Representation lay out many case preparation activities that public defense attorneys must undertake to ensure proper representation of the client.[26] The three mandatory attorney activity categories

[24] In *A.N.J.,* the Court found that the public defense attorney acknowledged that not only did he fail to obtain an investigator, he "did not talk to the investigating officers himself and had not used an investigator during the contract period." *Id.* at 104.

[25] ABA Standard 4-4.1(a), *available at* www.abanet.org/crimjust/standards.

[26] To provide adequate representation, the WSBA guidelines call for a defense attorney to:

- Have knowledge of CrR 3.2 and CrRLJ 3.2 regarding pre-trial release;
- Be familiar with the elements of offenses alleged and the law of the jurisdiction for establishing probable cause;
- Have knowledge of relevant statutes and case law regarding the elements of the offense(s) and defenses that may be available, and any defects in the charging documents;
- Inquire into and analyze evidence relevant to the case including the prosecutor's evidence and additional evidence that might support possible defenses;
- Obtain information using the jurisdiction's discovery procedures and informal discovery if available;
- Develop and continually reassess a theory of the case;
- After taking the steps outlined above, and after discussing all aspects of the case with the client, and after receiving the client's consent, enter into plea discussions with the prosecutor if appropriate;
- Be familiar with the variety of benefits the client might obtain from a negotiated plea, and concessions the client might offer to the prosecutor;
- Be familiar with the various types of pleas, the advantages and disadvantages of each;
- Be aware of non-citizen clients' constitutional rights to accurate immigration consequences of convictions, and when and how to obtain this information;

must be given sufficient attorney time in each individual case. And, as established in Standard 3.2, "The caseload of public defense attorneys shall allow each lawyer the time and effort necessary to ensure effective representation." As stated in Standard 3.2, "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."

- Be knowledgeable of any collateral consequences to conviction for the charges, and ensure the client is aware of them;
- Prepare for and conduct jury trials by preparing a trial notebook, preparing for voir dire, preparing an opening statement, making appropriate objections, preparing and conducting cross-examination, and preparing a closing statement;
- File appropriate motions seeking pretrial release, a change of venue or continuance, suppression of evidence, etc.; make strategic and tactical decisions such as what witnesses to call, what evidence should be introduced, etc;
- Craft statements of the facts and legal criteria supporting release and any conditions of release;
- Know the facts of the case by thoroughly interviewing the client;
- Have knowledge of the elements of the alleged offenses;
- Conduct independent investigation even if client has admitted guilt;
- Decide which witnesses to interview and interview them;
- Make efforts to secure information in the possession of the prosecution or law enforcement, including police reports;
- Obtain an investigator, as needed on a case by case basis;
- Obtain expert services when necessary for an adequate defense;
- Carry out other necessary case tasks.

V. Caseload Assessment: Case Counting and Case Weighting

Conclusion 5: The number and type of public defense cases are not tracked on the statewide level or, in some jurisdictions, on the local level. A mandatory code for tracking the appointment of public defense attorneys for indigent defendants should be added to the Judicial Information System, and a misdemeanor tracking system should be developed.

Conclusion 6: Public defense attorneys and jurisdictions should have the option of counting the time of public defense attorneys who serve as first appearance or arraignment calendar attorneys by the number of calendar hours, rather than the number of defendants, even if the jurisdiction has not adopted a case weighting system.

Conclusion 7: Case weighting systems should be based on time studies of the amount of defense attorney time needed to provide effective representation. A few misdemeanor case weighting policies have been developed recently by local jurisdictions, but without time studies, which require significant resources.

The Supreme Court's December 10, 2012 Order directed OPD to "include information on case weighting approaches." The Supreme Court Standards for Indigent Defense allow local jurisdictions to develop and employ case weighting systems in their implementation of the per-attorney caseload limits established in the Standards.

Washington State appears to be unique in adopting numerical caseload limits by statewide court rule to provide continuity in indigent defense representation. Because each court is operated independently, for the most part each jurisdiction administers its own public defense system. In general, these operate in isolation from each other with respect to structure, attorney caseloads, compensation rates, and other local practices.

Standard 3.4 of the Supreme Court Standards for Indigent Defense sets out maximum attorney caseload limits for various types of criminal cases.

> The caseload of a full-time public defense attorney or assigned counsel should not exceed … 150 Felonies per attorney per year; or 300 misdemeanor cases per attorney per year, or in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or 250 Juvenile Offender cases per attorney per year…

Numerical caseload limits prevent excessive caseloads. Since 2006, when OPD began administering the state's public defense improvement program under Chapter 10.101 RCW, the counties in general have either maintained appropriate felony and juvenile caseload limits, or have steadily worked toward significantly attaining them. For this reason, public defense caseloads in the Superior Courts appear to be, for the most part, appropriately limited.[27]

However, some misdemeanor public defense attorneys routinely have been appointed to, and have accepted, 800 or 1,000 cases yearly, sometimes in multiple courts.[28] It is understood nationally that overly high caseloads such as these preclude competent and diligent representation.[29] The Court adopted the caseload limits after an extensive public process considering dozens of comments, both pro and con, regarding the need for numerical caseload limits in the Standards. Sixty-nine percent of the public defense attorneys who responded to OPD's online survey said they currently meet the Standards. The remaining attorneys reported that their current caseloads either were not within the Standards, or that they did not know the status of their caseloads.

Sixty-nine percent of polled public defense attorneys reported that they currently meet the caseload Standards.

V.A. Case Counting – Statewide System Improvements Are Needed

An accurate and timely count of criminal cases assigned to public defense attorneys currently is not available in the JIS system. Many local jurisdictions have difficulty ascertaining the precise number of public defense cases assigned and handled yearly in their courts, because JIS does not record whether a case involves an indigent defendant. Many attorneys also lack a reliable method for tracking the number of public defense cases to which they are appointed. With the October 1, 2013 addition of the numerical caseload limits to the Certification process, being able to accurately count public defense cases will be critically important for attorneys, local public defense administrators and the trial courts. Currently some trial courts and local jurisdictions attempt to estimate the number of public defense cases, or rely on the defense attorneys to report that information. However, these methods can be cumbersome, imprecise and inconsistent from court to court.

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[27] However, in some courts, attorneys with Superior Court public defense contracts also have private practices, and until the new Standards Certification requirement became effective in October 2012, there has been little data regarding the size of these and their impacts on attorney time. A further look at this issue may become appropriate as more is learned about the effects of private practice on public defense caseloads.

[28] OPD Status Report for 2010**,** www.opd.wa.gov/Reports/TrialLevelServices/2010_PublicDefenseStatusReport.pdf

[29] Norman Lefstein, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Securing Reasonable Caseloads Ethics and Law in Public Defense 56 (American Bar Association ed., 2011) *Available at* www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

An accurate JIS count of Superior Court public defense cases could be achieved by adding a mandatory docket code.

For Superior Courts, an accurate JIS count of public defense cases could be achieved by adding a mandatory docket code for Orders Appointing Attorneys. Courts and local jurisdictions could then efficiently identify indigent defense cases in these courts. Courts of Limited Jurisdiction also encounter problems counting public defense cases as well as tracking post-conviction hearings, such as probation violation hearings. However, acceptable methods of accessing limited jurisdiction case counting information may already be available. Several court administrators have suggested ways to track public defense cases using existing JIS codes and creating a special query. A statewide protocol would be helpful to ensure consistency among the dozens of Courts of Limited Jurisdiction.

V.B. Case Weighting

Though the felony and juvenile offender caseload limits included in the Supreme Court Standards have generally been positively received, the misdemeanor caseload limits have engendered controversy and uncertainty among attorneys as well as local public defense administrators. Consequently, this section will concentrate on issues related to implementation of misdemeanor caseload limits. The misdemeanor caseload standard is unique in presenting alternative caseload limits depending on whether the local jurisdiction has adopted a case weighting system. The Standard requires a per-attorney annual caseload limit of 400 cases without case weighting or 300 cases if case weighting is adopted.

Public defense administrators in 43 cities and 15 counties responded to a January online survey about case weighting that was conducted in developing this report. Of the local jurisdictions that responded, 42% indicated that they had not yet decided whether to adopt case weighting policies as authorized by the Supreme Court Standards. Twenty-nine percent said they had decided not to engage in case weighting and 29% said they either had already adopted a case weighting policy or were in the process of developing a case weighting policy.

V.B.1. Un-weighted Caseloads – 400 Misdemeanor Cases per Year

The Standards define a misdemeanor case as a document filed with the court naming a person as a defendant, which may include multiple charges arising from the same incident.[30] In general each of these is counted as one case. In jurisdictions that do not adopt a case weighting system the 400 case yearly limit applies. A review of public defense contracts from around the state shows that numerous counties and cities and their public defense attorneys count each case to which an attorney is appointed as one full case.

[30] Standard 3.3.

Standard 3.3 establishes that certain matters that traditionally may not be defined as a case must nevertheless be counted in an attorney's caseload:

> The following types of cases fall within the intended scope of the caseload limits … and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

During WSBA Council on Public Defense (CPD) discussions[31] on misdemeanor caseload limits, there was general agreement that public defense attorneys serving as first appearance or arraignment calendar attorneys should be able to have their *time* counted, rather than have each defendant on the calendar counted as a case. It was pointed out that a first appearance attorney might represent 30 or more defendants on each first appearance calendar. The Council decided that an appropriate alternative method of calculating a calendar attorney's time is to count the hours the attorney spends on these calendars during a year, and subtract that from the attorney's total yearly time available.[32] This was expressed in Standard 3.6(B)(iv), which says that

> Cases on a criminal or offender first appearance or arraignment docket where the attorney is designated, appointed, or contracted to represent groups of clients on that docket without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal). In such circumstances, consideration should be given to adjusting the caseload limits appropriately…

The calendar time provision was thought to be appropriately applied to un-weighted caseloads as well as case weighted caseloads. However, presently, this provision appears only in the case weighting section of the Standards. Clarification of the applicability of calendar time would assist local jurisdictions and attorneys in interpreting and implementing the Standards.

V.B.2. Weighted Caseloads – 300 Misdemeanor Cases per Year

The Standards authorize public defense attorneys to accept cases under case weighting systems that have been developed and published by the government entity responsible for administering public defense in the local court. Under the misdemeanor caseload limit, public defense attorneys can carry a yearly caseload totaling 300

[31] In September 2010, the Supreme Court requested that the WSBA Committee on Public Defense (now the Council on Public Defense) submit comments in regard to the Standards.
[32] However, Standard 3.4 establishes that guilty pleas on first appearance or arraignment dockets must be counted separately as one full case, as they are presumed to be rare and require "careful evaluation of the evidence and the law, as well as thorough communication with clients."

weighted cases. Case weighting must be developed in accordance with the Standards, and must:

> A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assess and documents the workload involved;
>
> B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;
>
> C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;
>
> D. be periodically reviewed and updated to reflect current workloads; and
>
> E. be filed with the State of Washington Office of Public Defense.[33]

"I am a retired public defender and have worked in a state where we did not initially weight the cases, but were working on doing so. It made a huge difference in distributing and shifting the workload to create a fairer system."
- Solo Practice Attorney responding to OPD survey.

Case weighting systems quantify how much attorney work is required for each representation. They take into account an attorney's court time, case preparation time, and client communication time, as discussed in Section IV, Misdemeanor Caseloads: How Attorneys Spend Their Time. Proper handling of various representation types is determined through a careful case weighting system development process. Standards 3.5 and 3.6 set the methods for establishing weighted caseloads. Standard 3.5 provides that a case weighting system must:

> … recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved… Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

V.B.3. Many Jurisdictions Lack Resources to Conduct Time Studies

A review of case weighting literature reveals that a properly developed case weighting system is based on a time or workload study conducted over an extended period.[34] Such studies were conducted for the 2006-2007 OPD pilot projects in Bellingham Municipal Court and Thurston County District Court (See Appendix F), and by the

[33] Standard 3.5.
[34] Lefstein, *supra* note 25, at 142-146.

Spangenberg Group in King County in 2010.[35] These jurisdictions adjusted attorney caseloads based on the time studies and have maintained caseload limits.

Pursuant to Standard 3.5, OPD has received 10 adopted or proposed misdemeanor case weighting policies from local jurisdictions since August 2012. None appear to have been based on a time study, but rather on individuals' or groups' estimates as to how long representation should take for various types of cases. Many of the resulting case weighting policies or proposals tend to weight a large number of case types downward to one-third or one-half, but weight few if any case types upward to more than one. These policies also do not appear to document the workload involved in the various case types.

> *"Weighting may be more advantageous from a client's perspective, but only if it results in better representation by making more time available for each client. If weighting is just another way to get the same result, or if the county/city uses it to increase workloads above the numeric limitation, then it will not be a good idea."*
> *- Public Defense Attorney responding to OPD survey*

Developing a misdemeanor case weighting system without utilizing a legitimate time study could lead to the outcome prohibited by Standard 3.5(C), namely institutionalizing systems or practices that fail to ensure quality representation. Unfortunately, time studies typically are conducted by specialty consulting firms and usually are expensive and complex, which may discourage many local jurisdictions from pursuing time studies. A statewide misdemeanor time study might be one approach to leverage resources and assist local jurisdictions that wish to implement case weighting systems consistent with the Standards.[36]

A statewide time study could utilize a sample of existing public defense attorney time records from jurisdictions that require time-keeping and from conflict public defense attorneys who bill on an hourly basis. Several resources nationally could provide consultation on a formal or informal basis. Any case weighting system based on such a time study would also have to provide the opportunity for local practice variations, and models for these could be developed as part of the study. It is apparent that many jurisdictions would benefit from having the ability to choose between an appropriately developed case weighted model of 300 cases, or an un-weighted case model of 400 cases.

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[35] Lefstein, *supra* at 149.

[36] It is interesting to note that the Washington State Administrative Office of the Courts for many years has used time metrics and a workload analysis (also known as a weighted caseload analysis) to objectively predict how many judicial officers and staff are necessary for efficient and effective operations at each trial court in the state. *See "*Caseloads of the Courts of Washington," www.courts.wa.gov/caseload.

VI. Time that is Necessary for Representation: The Impact of Experience on Caseload Limits

Conclusion 8: Based on a review of legal literature as well as interviews with practicing attorneys, it is clear that attorney experience or inexperience may play a role in assessing a defense attorney's ability to effectively handle more or fewer cases, particularly with regard to the time necessary for case preparation.

The December 10, 2012 Supreme Court Order directed OPD to examine the impacts of an attorney's level of experience on the attorney's ability to handle cases. For most case types, requirements for the amount of experience an attorney must have to handle specific types of cases are set forth in Standard 14. The Standard was adopted by the Court in 2012, and commencing October 1, 2013, will be part of the Attorney Certification by
public defense counsel under CrR 3.1,CrRLJ 3.1, and JuCR 9.2.

Standard 14.1 sets out general qualifications, and Standard 14.2 sets out "(a)ttorneys' qualifications according to severity or type of case." Explicit amounts of attorney experience are enumerated for death penalty representation; Class A felony representation; Class B violent offense felony representation; adult sex offender representation; Class B and C felonies and probation or parole revocation; persistent offender representation; Class A juvenile representation; Classes B and C juvenile representation; juvenile sex offense representation; juvenile status offenses representation; dependency and termination representation; civil commitment representation; sex offender civil commitment representation; contempt of court representation; specialty court representation; appellate representation; and RALJ appeal representation.

Misdemeanor representation is the sole case type for which there are no experience requirements. Standard 14.2(K) merely establishes that "(e)ach attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1" (the general qualifications section). In addition, Standard 14 does not require that inexperienced misdemeanor attorneys be supervised. In contrast, juvenile offender attorneys must have served for at least one year in a criminal practice and/or be supervised by experienced attorneys, and appointed felony attorneys must have at least one to two years of experience with trials and be supervised, or have co-counsel, for trials.

Because a requisite experience level is prescribed for an attorney's appointment to all other types of cases, misdemeanor representation stands alone in terms of the impacts of experience on caseload capability. In Washington, misdemeanor representation is

provided by attorneys with experience levels ranging from zero years to 30 years or more.

Standard 3.3 states that "(t)he experience of a particular attorney is a factor in the composition of cases in the attorney's caseload." The WSBA CPD suggested that this sentence be included in the Standards using the meaning of the word 'composition' to be "the act of putting together elements (cases) to form a whole (caseload)."[37] The CPD intended the sentence to mean that experienced attorneys could be assigned more complex cases than inexperienced attorneys. However, some jurisdictions have interpreted this sentence as authorizing experienced attorneys to have higher or much higher caseloads than the established limits. This ambiguity could be addressed in any clarifications to the Standards.

Legal scholars have concluded that an attorney's ability should be taken into account in standards.[38] Having significant experience can make a difference in an attorney's ability to be productive,[39] and it is appropriate to consider the level of attorney experience in defining caseload limits.[40] Therefore, OPD concentrated its efforts on examining the impacts of experience on the caseload capabilities of attorneys representing misdemeanor defendants.

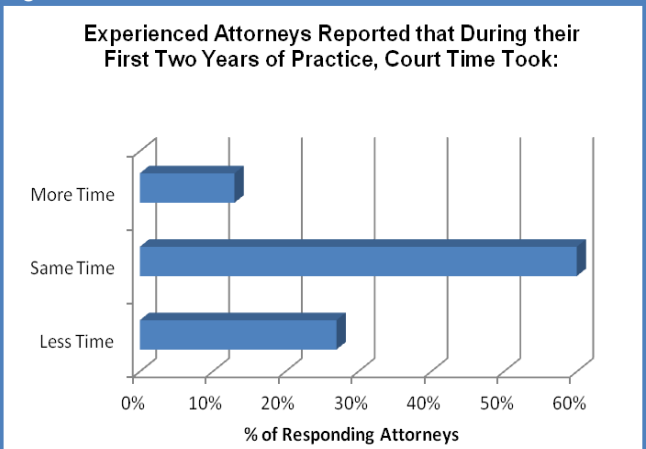
VI.A. Attorney Interviews: What is the Role of Experience?

OPD conducted interviews with 56 experienced public defense attorneys from 20 jurisdictions to obtain their opinions as to how experience affects the amount of time they spend carrying out the three primary activities - client communication, case preparation, and court time.[41] Most of these interviews were conducted in person, while some were done by phone. Approximately half of the attorneys were employed at county, city, and non-profit public defense agencies, while approximately half were public defense contractors. These attorneys had begun their practices as misdemeanor attorneys. By the time of their interviews, they had been representing misdemeanor clients for three years to 10 or more years. Many had mixed caseloads; others solely represented adult misdemeanor clients.

[37] Webster's II, *New College Dictionary,* p.995.
[38] John Elgin, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES (Apr. 5, 2009), http://www.nytimes.com/2009/04/06/nyregion/06defenders.html?_r=0.
[39] David S. Abrams & Albert H. Yoon, *Understanding High Skill Worker Productivity Using Random Case Assignment in a Public Defender's Office* (Nov. 2007), 3rd Annual Conference On Empirical Legal Studies, Cornell U. L. Sch., *available at* http://ssrn.com/abstract=1121006.
[40] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis,* 57 Hastings L.J. 1031, 1125 (2006).
[41] OPD conducted in-person interviews in the City of Bellingham, Cowlitz County, Clark County, Kittitas County, Mason County, the City of Spokane, Spokane County, Thurston County, Whatcom County and the City of Yakima. Telephone interviews were held with attorneys in the Cities of Olympia and Cheney, and Clallam, Columbia, King, Kitsap, Okanagan, Walla Walla and Whitman counties.

The attorneys' opinions provide a look at how this group perceives their own individual practices have changed as they have become more experienced. The attorneys were asked to state the amount of time they spend on the three primary activities in their early practice years, as compared to today.[42]

Figure 7: **Court Time**

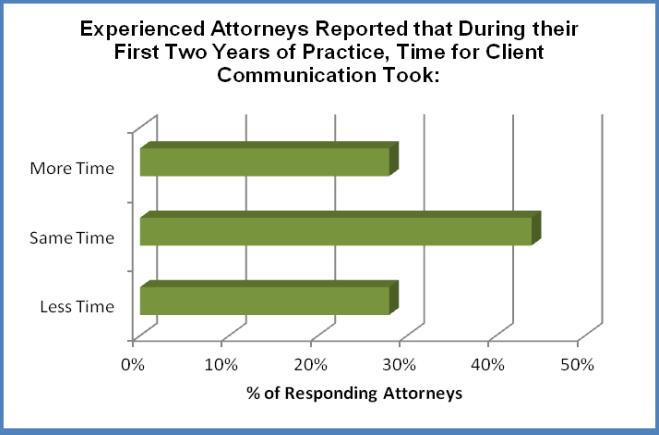


This chart shows that the largest percentage of attorneys who were interviewed reported spending the same amount of time in court now as compared to their first two years of practice.

A majority of the experienced attorneys answering the question felt that court time takes about the same amount of time in their schedule as it did when they were beginning practice (Figure 7). A significant minority feel that more court time is required now than when they were beginning practice. A few experienced attorneys said they spend less time in court.

The amount of time a public defense attorney is scheduled to be in court is largely outside of the attorney's control, as the court sets calendars. Therefore, the amount of court time required for representation does not appear to vary with experience. It is assumed that other factors beside experience have changed court time in a minority of jurisdictions.

Figure 8: **Client Communication Time**



This chart shows that the largest percentage of attorneys who were interviewed reported spending the same amount of time on client communication now as compared to their first two years of practice.

The amount of time experienced attorneys report spending on client communication is roughly split between the same amount, more time, and less time compared to their first two years of practice (Figure 8). Examination of the RPCs, the

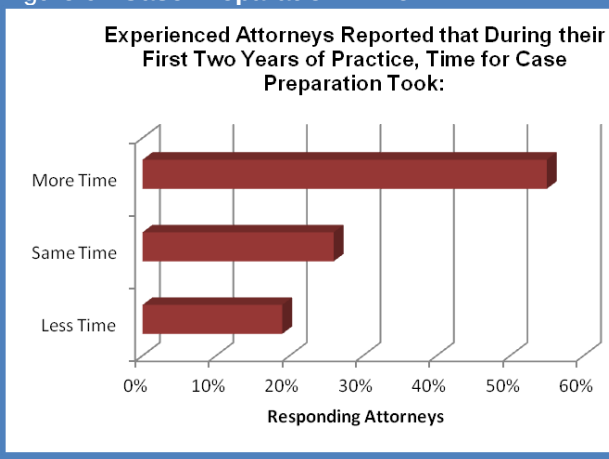
[42] Rankings were calculated for attorneys with 3 to 30 years of public defense experience. Attorneys with fewer than two years experience were interviewed as well, but their interviews are not included in this section.

A.N.J. case and the WSBA Performance Guidelines for Criminal Defense Representation indicate that communication requirements are fairly fixed, rather than up to the attorney's discretion. It appears that the amount of time it takes an attorney to effectively communicate with clients is largely a matter of style, and does not clearly correlate with the attorney's experience level.

A majority of the experienced attorneys report spending less time on case preparation than they did during their first two years of misdemeanor representation. (Figure 9.) A minority report spending the same amount of time, and a smaller minority report spending more time. Adequate case preparation is mandatory, as made clear in the RPCs, the *A.N.J.* case, and the WSBA Performance Guidelines for Criminal Defense. Primary ways for inexperienced attorneys to be able to achieve adequate case preparation is to spend preliminary time on research, observation, and, if available, through supervision or mentoring. After the inexperienced attorney ascertains what to do through these outside sources of information, he or she then carries out the necessary representation activities.

On the other hand, a primary way for experienced attorneys to be able to achieve adequate case preparation is to draw on their familiarity with local practices, knowledge of the law and of the steps that must be taken, etc., and then to carefully carry out the necessary representation activities. While research, observation, and consultation require *inexperienced* attorneys to spend additional preliminary time, *experienced* attorneys spend little preliminary time drawing on their experience.

Figure 9: **Case Preparation Time**



This chart shows that the largest percentage of attorneys who were interviewed reported spending more time on case preparation during their first two years of practice.

Therefore, it appears that an attorney's lack of experience level has some impact on the attorney's case preparation ability.[43] Some unsupervised, inexperienced attorneys who participated in the OPD interviews expressed a need for mentoring.

[43] This lack of efficient preparation skills is recognized in the APR Rule 9 intern model. Law school interns are required to have attorney supervisors to support them, and, under the Standards, are restricted to a yearly caseload of 25% of a misdemeanor caseload. These clear requirements for Rule 9 interns imply that caution should be exercised in allowing inexperienced, unsupervised attorneys who are recent bar admittees, or new to the practice of criminal law, to have full misdemeanor caseloads.

On the other hand, the majority of experienced attorneys who were interviewed felt their grasp of representation issues, developed over years of experience, allows them to *efficiently analyze* their cases. For example, a number of experienced attorneys commented that they can now spot issues more quickly, can spend less time on routine research, and know their court's culture. However, though they can plan what to do more readily, they of course still must spend significant hours *carrying out* the case preparation activities.

It appears that the real impacts of this factor might be that additional time is needed for inexperienced attorneys to competently handle misdemeanor cases, and, relatively speaking, that experienced attorneys are somewhat more efficient in executing some preliminary aspects of case preparation. Further study is needed to quantify the impacts of experience on an attorney's appropriate caseload.

VII. Questions for Further Consideration

Conclusion 9: Preparation of this report raised additional questions that may merit further attention.

OPD staff spoke with many public defense attorneys, prosecutors, and city/county administrators. Below is a listing of questions commonly expressed by these individuals in regards to implementation of the Standards, and may be topics worthy of future research.

1. Are there resources to help local jurisdictions develop a case weighting policy?
2. Are there limitations on the variables that can be used to develop a case weighting policy?
3. Can the implementation date be changed to January 1, 2014 instead of October 1, 2013 because of the timing with contract start dates?
4. Is there flexibility in exceeding the caseload numbers? Attorneys are concerned that doing so, even slightly, may be grounds for an ethics violation.
5. Will a standard report be developed using JIS information for attorneys and courts to help track assigned public defense cases?
6. Will there be an electronic case management tool available to help attorneys track their cases?
7. Will there be ongoing monitoring and collection of information from jurisdictions regarding questions, issues, and unforeseen consequences?
8. The Standards caseloads appear to be based on a 40 hour work week model. Should it be pro-rated to attorneys that choose to work more or fewer hours weekly?
9. Can calendars other than arraignment and preliminary appearance be counted as hours? Many courts designate specific calendars for probation violations, DWLS-3 charges, bench warrants, review hearings, and legal financial obligations.
10. When a client is in-custody on a misdemeanor offense and wants to plead guilty at arraignment in order to be released, should that count as one case?
11. Must probation violation hearings count as 1 case if a local jurisdiction does not elect to do case weighting?
12. How can solo practitioners receive the requisite supervision to qualify for felony cases?
13. When certification as to caseloads begins on October 1, 2013, do attorneys need to include the number of cases opened prior to that date? Or is it just prospective?
14. Defense attorneys do not have direct access to DOL records, but having such access could better economize attorney time on traffic cases. Can such access be granted, as it currently is for prosecutors?

Appendix A - Supreme Court Order 25700-A-1013

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE STANDARDS)
FOR INDIGENT DEFENSE IMPLEMENTATION)
OF CrR 3.1(d), JuCR 9.2(d) and CrRLJ 3.1(d))
)

ORDER

No. 25700-A- 1013

WHEREAS, the Washington Supreme Court has adopted Rules CrR 3.1, CrRLJ 3.1, and JuCR 9.2 requiring public defense attorneys to certify that they comply with certain Standards for Indigent Defense adopted by the Court, including Standard 3.4, Caseload Limits, and

WHEREAS, the Washington State Office of Public Defense has received certain implementation policies interpreting Standard 3.4 in ways that may indicate a potential need for further clarification of the Court's Standards;

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 DEC 10 P 3:23
RONALD R. CARPENTER
CLERK

Now, therefore, it is hereby

ORDERED:

That the director of the Washington State Office of Public Defense, a judicial branch agency, prepare a report on implementation of Standards and Attorney Certification and submit it to the Supreme Court by March 15, 2013. The report should include information on case-weighting approaches; an inventory of common diversion programs; information on the potential impact of recent criminal law changes; and an analysis of the effects of attorney experience on caseload capability.

DATED at Olympia, Washington this 10th day of December, 2012.

For the Court

Madsen, C.J.
Chief Justice

653/3

Appendix B - Standards for Indigent Defense

STANDARDS FOR INDIGENT DEFENSE

[New]

Preamble

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in *State v. A.N.J.*, 168 Wash.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

Standard 1. Compensation

[Reserved.]

Standard 2. Duties and Responsibilities of Counsel

[Reserved.]

Standard 3. Caseload Limits and Types of Cases

Standard 3.1. The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

Standard 3.1 adopted effective October 1, 2012

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.

Standard 3.2 adopted effective October 1, 2012

Standard 3.3. General Considerations. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of cases in the attorney's caseload.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in Standard 3.4 and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

Definition of case. A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

Standard 3.3 adopted effective October 1, 2012

Standard 3.4. Caseload Limits. The caseload of a full-time public defense attorney or assigned counsel should not exceed the following:

150 Felonies per attorney per year; or

300 Misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or

250 Juvenile Offender cases per attorney per year; or

80 open Juvenile Dependency cases per attorney; or

250 Civil Commitment cases per attorney per year; or

1 Active Death Penalty trial court 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; or

36 Appeals to an appellate court hearing a case on the record and briefs per attorney per year. (The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)

Full time Rule 9 interns who have not graduated from law school may not have caseloads that exceed twenty-five percent (25%) of the caseload limits established for full-time attorneys.

Standard 3.4 adopted effective October 1, 2013.

Standard 3.5. Case Counting. Attorneys may not engage in a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A weighting system must:

A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;

B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;

D. be periodically reviewed and updated to reflect current workloads; and

E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

Notwithstanding any case weighting system, resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case.

Standard 3.5 adopted effective October 1, 2012

Standard 3.6. Case Weighting. The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.

A. Case Weighting Upward. Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers, and/or expenditures of time and resources should be weighted upward and counted as more than one case.

B. Case Weighting Downward. Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.

i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited

appearances for a specific purpose (not including representations of multiple cases on routine dockets).

ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions, representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Noncomplex sentence violations should be weighted as at least 1/3 of a case.

iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client's participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.

iv. Cases on a criminal or offender first appearance or arraignment docket where the attorney is designated, appointed, or contracted to represent groups of clients on that docket without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal). In such circumstances, consideration should be given to adjusting the caseload limits appropriately, recognizing that case weighting must reflect that attorney workload includes the time needed for appropriate client contact and preparation as well as the appearance time spent on such dockets.

v. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

Standard 3.6 adopted effective October 1, 2012

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Defense Function std. 4-1.2 (3d ed. 1993)

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES std. 5-4.3 (3d ed. 1992)

AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003)

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*)

Am. Council of Chief Defenders, *Statement on Caseloads and Workloads* (Aug. 24, 2007)

ABA House of Delegates, *Eight Guidelines of Public Defense Related to Excessive Caseloads* (Aug. 2009)

TASK FORCE ON COURTS, NAT'L ADVISORY COMM'N ON CRIMINAL STANDARDS & GOALS, COURTS std. 13.12 (1973)

MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101.

ABA House of Delegates, *The Ten Principles of a Public Defense Delivery System* (Feb. 2002)

ABA House of Delegates, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 1996)

Nat'l Legal Aid & Defender Ass'n, Am. Council of Chief Defenders, Ethical Opinion 03-01 (2003).

Nat'l Legal Aid & Defender Ass'n, *Standards for Defender Services* std. IV-1 (1976)

Nat'l Legal Aid & Defender Ass'n, *Model Contract for Public Defense Services* (2000)

Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)

Seattle Ordinance 121501 (June 14, 2004)

Indigent Defense Servs. Task Force, Seattle-King County Bar Ass'n, *Guidelines for Accreditation of Defender Agencies* Guideline 1 (1982)

Wash. State Office of Pub. Defense, *Parents Representation Program Standards of Representation* (2009)

BUREAU OF JUDICIAL ASSISTANCE, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERIES NO. 4, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (NCJ 185632)

Standard 4. Responsibility of Expert Witnesses

[Reserved.]

Standard 5. Administrative Costs

Standard 5.1. [Reserved.]

Standard 5.2.

A. Contracts for public defense services should provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel; telephones; law library, including electronic legal research; financial accounting; case management systems; computers and software; office space and supplies; training; meeting the reporting requirements imposed by these standards; and other costs necessarily incurred in the day-to-day management of the contract.

B. Public defense attorneys shall have (1) access to an office that accommodates confidential meetings with clients and (2) a postal address, and adequate telephone services to ensure prompt response to client contact.

Standard 5.2 adopted effective October 1, 2012

Standard 6. Investigators

Standard 6.1. Public defense attorneys shall use investigation services as appropriate.

Standard 6.1 adopted effective October 1, 2012

Standards 7-12

[Reserved.]

Standard 13. Limitations on Private Practice

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard 13 adopted effective October 1, 2012

Standard 14. Qualifications of Attorneys

Standard 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

C. Be familiar with the Washington Rules of Professional Conduct; and

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; and

E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

Standard 14.1 adopted effective October 1, 2012

Standard 14.2. Attorneys' qualifications according to severity or type of case[44]:

[44] Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.

A. Death Penalty Representation. Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. At least five years' criminal trial experience; and

iii. Have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

iv. Have served as lead or co-counsel in at least one aggravated homicide case; and

v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and

vi. Have completed at least one death penalty defense seminar within the previous two years; and

vii. Meet the requirements of SPRC 2.[45]

The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist, and an investigator. Psychiatrists, psychologists, and other experts and support personnel should be added as needed.

B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served two years as a prosecutor; or

b. has served two years as a public defender; or two years in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

45

SPRC 2
APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

C. Adult Felony Cases—Class B Violent Offense. Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.

i. The minimum requirements set forth in Section 1; and

ii. Either;

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. Adult Sex Offense Cases. Each attorney representing a client in an adult sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(C); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. Adult Felony Cases—All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each attorney representing a defendant accused of a Class B felony not defined in Section 2(C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. Persistent Offender (Life Without Possibility of Release) Representation. Each attorney acting as lead counsel in a "two strikes" or "three strikes" case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:

i. The minimum requirements set forth in Section 1;[46] and

ii. Have at least:

a. four years' criminal trial experience; and

[46] RCW 10.101.060(1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require "attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies."

b. one year's experience as a felony defense attorney; and

c. experience as lead counsel in at least one Class A felony trial; and

d. experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and

3. Expert witnesses; and

4. One year of appellate experience or demonstrated legal writing ability.

G. Juvenile Cases—Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone of record in five Class B and C felony trials; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. Juvenile Cases—Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice, and

iii. Has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases. Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(H); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

J. Juvenile Status Offenses Cases. Each attorney representing a client in a "Becca" matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Either:

a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to "status offense" cases; or

b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Attorneys handling termination hearings shall have six months' dependency experience or have significant experience in handling complex litigation.

iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.

iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and

iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:

a. served one year as a prosecutor; or

b. served one year as a public defender; or one year in a private civil commitment practice, and

c. been trial counsel in five civil commitment initial hearings; and

iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender "Predator" Commitment Cases. Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Have at least:

a. Three years' criminal trial experience; and

b. One year's experience as a felony defense attorney or one year's experience as a criminal appeals attorney; and

c. Experience as lead counsel in at least one felony trial; and

d. Experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses; and

3. Expert witnesses; and

e. Familiarity with the Civil Rules; and

f. One year of appellate experience or demonstrated legal writing ability.

Other counsel working on a sex offender commitment case should meet the minimum requirements in Section 1 and have either one year's experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

O. Contempt of Court Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.

P. Specialty Courts. Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and

iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

Standard 14.2 adopted effective October 1, 2012

Standard 14.3. Appellate Representation. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

A. The minimum requirements as outlined in Section 1; and

B. Either:

i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or

ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing, or other comparable work.

C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

RALJ Misdemeanor Appeals to Superior Court: Each attorney who is counsel alone for a case on appeal to the Superior Court from a court of limited jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing a RALJ appeal.

Standard 14.3 adopted effective October 1, 2012

Standard 14.4. Legal Interns.

A. Legal interns must meet the requirements set out in APR 9.

B. Legal interns shall receive training pursuant to APR 9, and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

Standard 14.4 adopted effective October 1, 2012

Standards 15-18

[Reserved.]

CERTIFICATION OF COMPLIANCE

[New]

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.

The certification must be in substantially the following form:

SEPARATE CERTIFICATION FORM

_____Court of Washington **for** _____	
State of Washington , Plaintiff vs. . Defendant	**No.** CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1/CrRLJ 3.1/JuCR 9.2

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigation services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective September 1, 2013: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Specific Qualifications: I meet the specific qualifications in Standard 14.2, Sections B-K. [Effective September 1, 2013.]

_____ _____

Defendant's Lawyer, WSBA No. Date

Appendix C - Methodology

In developing this report, OPD relied on four primary sources of information:

Interviews. The staff at OPD conducted face-to-face (44) and telephonic (12) interviews with public defense attorneys in 20 jurisdictions for purposes of studying the amount of time dedicated to specific case types, and the effect that experience has on the time needed to represent clients.

Surveys. OPD conducted four online surveys to gather data on topics addressed in this report.

1. Public defense attorneys were contacted via email using information provided by the Washington Defenders Association, and the Washington Association of Criminal Defense Lawyers. The questions asked of public defense attorneys included the topics of local diversion program, amount of time spent on therapeutic court cases versus traditional court cases, current caseload size, and case weighting. OPD received 189 responses.
2. County prosecutors were contacted individually via email using information provided by the Association of Washington Cities. Questions included topics of charging practices, diversion programs and case weighting. OPD received 13 responses.
3. City prosecutors were contacted via email using a list serve provided by the Association of Washington Cities. Questions addressed the topics of charging practices, decriminalization of local ordinances, diversion programs and case weighting. OPD received 30 responses.
4. County and city administrators were contacted via email using distribution lists assembled by OPD's RCW 10.101 funding program. Questions focused on the topic of case weighting policies. OPD received 46 responses.

Document Review: OPD gathered and reviewed a range of documents pertaining to the topics addressed in this report, including contract materials, website materials, government policies, and published information.

Electronic Court Data: Electronic records were reviewed including records from the Washington State Administrative Office of the Courts on cases filed in the adult courts, which included information on charges filed, filing and disposition dates; AOC Caseload Reports, containing aggregate data for each court in the state with information on cases filed, hearings held and dispositions, and data from Friendship Diversion provided on February 5, 2013.

Appendix D - Summary of Recent Criminal Law Changes Impacting Public Defense Representation

Bill Number	Effective Date	Brief Description of Change	Brief Description of Impact
SS6284	6/1/2013	Non-moving violations for which fines are not paid will not automatically suspend a driver's license.	Expected to reduce as much as 20% of the DWLS-3 cases after 2013.
Initiative Measure No. 502 (Laws of 2013, ch. 3)	12/6/2012	Act relating to marijuana - decriminalizes possession, by a person 21 years of age or older, of useable marijuana (1 ounce) or marijuana products. Decriminalizes drug paraphernalia section for marijuana.	May reduce the number of misdemeanor cases by as much as 4.1% (dependent on federal actions).
SSB 5168	7/22/2011	Reduces maximum sentences for gross misdemeanors by 1 day to 364 days.	Reduces impact of a gross misdemeanor conviction on immigration status and improves and simplifies plea bargaining.
SSB 5195	7/22/2011	Criminal charges may be required to be filed by the prosecuting attorney for certain violations under driving while license is suspended or revoked provisions so the prosecutor can make a determination of whether the case should be filed or diverted for a pre-charge diversion program.	May be helping reduce the number of DWLS-3 cases in jurisdictions with pre-charge diversions.

COURT RULE AMENDMENTS

Court Rule	Effective Date	Brief Description of Change	Brief Description of Impact
CrRLJ 3.2	7/1/2012	No longer authorizes bail forfeiture in criminal cases.	While in 2012 approximately 3% of the cases were resolved by bail forfeiture. Substantially more Fish & Wildlife charges and DWLS-3 charges were reduced to infractions after the amendment became effective.

CASE LAW CHANGES

Case	Brief Description of Change	Brief Description of Impact
State v Jasper, 158 Wash.App.518, 245 P.3d 228 (2010)	Div. I case - affidavit from a legal custodian of driving records contained testimonial assertions for Confrontation Clause purposes, requiring in-person attendance.	Some jurisdictions now automatically reduce DWLS-3 to an infraction or dismiss because of the cost of bringing in the witness. DWLS-3 cases declined almost 60% as a result in one jurisdiction.
State v Sandoval, 171 Wn.2d 163, 249 P 3d 1015 (2011)	Erroneous immigration advice is ineffective assistance, *Padilla v Kentucky*, 559 US 356, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010)	Counsel must know about potential immigration consequences or consult with an immigration attorney and inform non-citizen clients. 2010 Census show immigrants make-up 13.1% of state population.

EXAMPLES OF MUNICIPAL CODE CHANGES

Ordinance	Brief Description of Change	Brief Description of Impact
Sunnyside Chapter 5.02.070 - Residential Rental Housing License Requirement, Chapter 5.42-Fireworks, Chapter 9.34 - Nuisances and Chapter 9.60 - Public Disturbance	Penalty for violation of listed sections is a civil infraction instead of a misdemeanor.	In 2011 approximately 6.6% of the cases were disorderly conduct, 1.3% were unnecessary noise, and .2% were firework violations or a total of 8.1% of the cases
Chehalis Chapter 6.04 - Animal Control Code Sections 6.04.080, 6.04.100, 6.04.260, 6.04.300 and 6.04.320	Penalty for violation of any of these sections civil infraction instead of a misdemeanor.	In 2011 approximately 2% of the amended sections cases were filed as misdemeanors.
Sequim Chapter 18.58 - Sign Code	Penalty for violation of the Sign Code for the first offense is a civil infraction instead of a misdemeanor.	No cases found for a sign violation in data sample.

OTHER RECENT CRIMINAL LAW CHANGES
(No data available to predict impact)

Bill Number	Effective Date	Brief Description of Change
SSB 6135	6/7/2012	Numerous Fish & Wildlife Statute changes: *repealed RCW 77.12.310, RCW 77.15.140, RCW 77.15.220 and RCW 77.15.330* adds various wildlife and hunting provisions
SHB 2354	6/7/2012	Extends the statute of limitations from 3 to 6 years for the crime of trafficking in stolen property (motor vehicles and motor vehicle parts).

ESHB 2363	6/7/2012	Penalty for violation of a no-contact order issued during the pendency or following conviction of a charge of misdemeanor harassment increased from a simple to a gross misdemeanor.
ESHB 2570	6/7/2012	Amends theft offenses. Theft of metal wire from a public service company or consumer-owned utility constitutes theft in the first degree (class B felony) if the cost of damage exceeds $5,000 and theft in the second degree (class C felony) if the damage ranges from $750-$5,000.
SSB 6251	6/7/2012	Adds offense of advertising commercial sexual abuse of a minor to RCW 9.68A (class C felony)
HB 1983	6/7/2012	Prostitution and trafficking - requires sex offender registration for second and subsequent convictions of promoting prostitution in the first and second degree.
SHB 1145	7/22/2011	Establishes the crimes of mail theft and possession of stolen mail as class C felony offenses.
HB 1182	7/22/2011	Clarifies that each instance of an attempt to intimidate or tamper with a witness constitutes a separate violation for prosecution purposes.
SHB 1188	7/22/2011	Assault in the second degree includes assaulting another by suffocation; modifies offender scoring where the person has spent 10 years in the community without being convicted of a crime.
SHB 1243	7/22/2011	Creates the crime of maliciously killing or causing substantial bodily harm to another's livestock as a class C felony offense.
HB 1340	7/22/2011	Adds a new element to the crime of unlawful hunting of big game.
E2SHB 1789	7/22/2011 except sections 1-9 9./1/2011	DUI accountability - ignition interlock device changes. Allows counties to establish and operate DUI courts with established minimum requirements for participation in the program.
SB 5011	7/22/2011	Creates a new aggravating circumstance that permits the court to impose an exceptional sentence if an offense was intentionally committed because the defendant perceived the victim to be homeless.
SSB 5065	7/22/2011	Makes animal cruelty in the second degree a gross misdemeanor instead of a misdemeanor.
E2SSB 5073	7/22/2011	Establishes protections from criminal liability for health care professionals, qualifying patients, and designated providers for medical use of cannabis.
ESSB 5124	7/22/2011 except sections 53 and 58 effective 7/1/2013	Modifies crimes related to elections by mail provisions.
ESSB 5186	7/22/2011	Provides that a person who knowingly skis in a closed area is guilty of a misdemeanor.

SSB 5271	7/22/2011	Creates a new misdemeanor for a person who intentionally causes a vessel to sink, break up, or block a navigational channel.
SSB 5423	7/22/2011	Revises the standards for the reduction or waiver of interest on legal financial obligations (LFOs) imposed as part of a criminal judgment and sentence. Allows county clerks to issue orders to withhold and deliver any notices of debt to offenders for enforcement of past due LFOs.
SSB 5688	7/22/2011	Creates the felony crime of unlawful trade in shark fins.
ESSB 5748	7/22/2011	Creates a new misdemeanor for engaging in a cottage food operation without a valid permit or violating a provision of the new created chapter related to cottage food operation.
E2SHB 1206	7/22/2011	Expands the elements for the crime of harassment to include the harassment of a criminal justice participant who was performing his or her duties at the time of the offense.
SHB 1453	7/22/2011	Creates a class C felony for a person who engages in commercial shellfish operations after having his or her license denied, revoked, or suspended.
ESHB 1716	7/22/2011	Creates a gross misdemeanor offense for commission of certain illegal transactions, and makes a subsequent offense a class C felony.
HB 1794	7/22/2011	Makes assault of a judicial officer, court-related employee, or county clerk who was performing his or her duties at the time of the offense an Assault in the third degree offense.
ESSB 5021	7/22/2011	Adds criminal penalties (misdemeanor, gross misdemeanor, and class C felony) for violations of provisions of the election campaign disclosure requirements.
SSB 5204	7/22/2011	Allows juvenile court to relieve a juvenile from sex offender registration requirements, if judge grants juvenile's petition

Appendix E - Inventory of Diversion Programs

The following is an inventory of some of the diversion programs found among Washington State courts. The programs are divided into three sections: (1) pre-file formal diversion programs; (2) post-file formal diversion programs; and (3) driver's license reinstatement programs.

Pre-File Formal Diversion Programs

Offenses	Description	Location
Unlawful Issuance of Bank Checks	BounceBack is a private company that provides pre-file diversion services to prosecution offices, and all associated fees are paid by program participants. This check enforcement program is strictly limited to the offense of Unlawful Issuance of a Bank Check (UIBC), and has been used by Washington prosecutors since 2001. BounceBack works directly with the check writer to obtain restitution for the full amount of the check, as well as any bank charges incurred by the check recipient. Additionally, program participants are required to complete the Check Writer's Educational Course. Successful completion of the program commonly results in charges not being filed in court. While the program participation costs vary among jurisdictions, participants usually pay a $40 administrative fee per check submitted to the program, a $5 administrative fee for the prosecutor, and $145 for the class. According to the Spokane County Prosecuting Attorney's Office, in 2011 merchant restitution through the Bounceback program was $47,462. For more information, contact BounceBack at 1-800-830-5255 or go to www.bouncebk.com.	Adams Co. Clallam Co. Clark Co. Grant Co. Jefferson Co. Kitsap Co. Klickitat Co. Mason Co. Pierce Co. Spokane Co. Thurston Co. Walla Walla Co. Yakima Co.
Felony offenses directly related to drug/alcohol dependency, or mental illness.	In August 2012, the Snohomish County Prosecutor's Office implemented the Therapeutic Alternatives to Prosecution (TAP) pre-file felony diversion program. The authorization for implementation and framework of the program are embodied in Snohomish County Code 2.98. Participants are eligible only when felony offenses are directly related to drug or alcohol dependency, or mental illness. Participants are required to pay a $150 signing fee, a $300 evaluation fee, and a $50 monthly participation fee. The fees may be reduced or waived based on indigency, as determined by the TAP Fee Advisory Committee. To date the Snohomish TAP program has 93 participants; twenty-six with mental health issues, fifty-four with chemical dependency, and thirteen with co-occurring disorders. Thirty-two of the participants have demonstrated indigency and have had fees waived or reduced. It is anticipated that 40-50 participants will be referred monthly to TAP. For more information about the TAP program, contact the Snohomish County Prosecuting Attorney, Felony Division, (425) 388-3333.	Snohomish County

Low-Level Drug and Prostitution Crimes	In 2011 King County launched Law Enforcement Assisted Diversion (LEAD) as a pre-file (and pre-booking) diversion pilot program to respond to low-level drug and prostitution crimes. Law enforcement officers redirect eligible offenders to community-based services instead of jail and prosecution. The program's goals are to reduce recidivism rates by connecting offenders with resources to divert future criminal conduct, and preserve criminal justice resources for more serious or violent offenses. The program is currently funded by donors, and there is no cost to the county or the participants. An evaluation of the program's effectiveness will occur at the completion of its initial two years. For more information, go to http://leadkingcounty.org.	King County
3rd Degree Theft; Shoplifting; Leaving a Child Unattended	The City of Bellevue's Probation Division administers a pre-filing diversion program for low level first time offenders charged with 3rd degree theft, shoplifting or leaving a child unattended. A city probation officer supervises the participants for the duration of their involvement. Participants are arrested, but not booked. There is a police report stemming from the arrest, to which participants must stipulate, but no charges are filed in court. The prosecutor holds the arrest record and police report while the participant is in the program. If the participant successfully completes their diversion program, the arrest records and police report are destroyed and there is no public record of the arrest or an adjudication of guilt. Terms of the program vary depending on the type of offense and the individual. For all diversion participants, a $65 intake fee and $65 per month probation fee apply, though the fees may be reduced using a sliding scale. Of approximately 140 participants since 2011, only 2 have failed to comply with the terms of their supervision resulting in charges being filed. With recidivism defined as a new criminal conviction within the past 5 years, anywhere in the U.S., the recidivism rate for participants is less than 1%. For more information, contact City of Bellevue Probation at (425) 452-6956.	City of Bellevue
Wide Variety of Offenses	Friendship Diversion – See description in report. For more information, contact Barbara Miller at (360) 357-8021 or www.friendshipdiversion.org.	• Clallam County • Grant County • Thurston County • Kent • Port Angeles • Sequim

Post-File Formal Diversion Programs

Offenses	Description	Location
Non-Violent Felonies; Misdemeanors; Domestic Violence	The Franklin County Prosecuting Attorney offers a post-filing diversion for both non-violent felony and misdemeanor cases, including misdemeanor domestic violence. Defendants submit a statement in consultation with counsel that supports the elements of the crime with which they are charged. Upon successful completion of the diversion program, charges are dismissed. The Franklin County District Court Probation Department is responsible for the initial assessment and supervision of all defendants for both felony and misdemeanor charges in diversion, and coordinates any required treatment or evaluations. There are set eligibility requirements based on the defendant's criminal history, and the currently charged offense. The program enjoys a high rate of success with approximately 2-3 defendants terminated from the program each year. For more information contact: Franklin County Prosecuting Attorney: (509) 545-3543; Franklin County District Court Probation Department: (509) 545-3594.	Franklin County
Various Felony Offenses	The Clark County Prosecuting Attorney's Office's felony diversion program is designed for first time non-violent offenders, typically with restitution not exceeding $10,000. After having the opportunity to consult with counsel, defendants are required to sign written statements admitting guilt which can be used against them if they fail the program. The standard participation fee is $750, which can be paid in installments. Upon admission to the program, the prosecution files a Motion and Order for Stay of Proceedings. A Dismissal is filed upon successful program completion. In 2012, 166 defendants were referred to the program and 127 were accepted. Ninety-nine defendants successfully completed the program in 2012, though most began prior to 2012. For more information, contact the Clark County Diversion Program at (360) 397-2216.	Clark County
Misdemeanor Domestic Violence Charges	Participation in Clark County's Misdemeanor Domestic Violence diversion program is open to defendants charged with their first domestic violence offense, although some non-DV history is acceptable. The cost for program participation is $360. Like the felony program, participants must meet in-person with diversion counselors once per month. In 2012, 128 defendants were referred to the domestic violence program, and 92 were accepted. In that same year, 81 persons successfully completed the program. For more information, contact the Clark County Diversion Program at (360) 397-2216.	Clark County
Various Misdemeanor Offenses	Clark County's Misdemeanor Diversion Program, started in April 2012, is similar in structure to the other programs but requires less formal supervision. The standard program fee is $260, and restitution must be paid in full prior to charges being dismissed. Participants are required to report to program counselors ones per month by mail. Successful program completion results in dismissal of charges, and the typical length of program participation is one	Clark County

	year. Most first time misdemeanor offenses are eligible. Common offenses include MIP, Drug Paraphernalia, Reckless Driving, Hit and Run, Assault IV, Malicious Mischief II, Theft II, and DWLS-3. For more information, contact the Clark County Diversion Program at (360) 397-2216.	
Minor in Possession; Possession of Marijuana	The Whitman County Prosecutor's Office is in the planning stages of a formal pre-file diversion program for those accused of Minor in Possession and Possession of Marijuana. Eligible participants would receive a letter explaining the program as an alternative to court. Upon participation, the processing of the case would be put on hold. The participant would be expected to pay a fee, contribute community service hours, and attend an alcohol/drug informational class provided by a State-certified agency. It is expect that the program will be launched in the Spring. For more information about this program, contact Whitman County Prosecutor's Office at (509) 397-6250.	Whitman County
Wide Variety of Offenses	Friendship Diversion – See description in report. For more information, contact Barbara Miller at (360) 357-8021 or www.friendshipdiversion.org	• Grant County • Jefferson County • Mason County • Okanagan County • Spokane County • Thurston County • Kent • Port Angeles • Sequim

Driver's License Reinstatement Programs

Description	Location
The King County Prosecutors Office offers a pre-file Relicensing Program. Persons charged with DWLS-3 and No Valid Operator's License are invited to participate in the six month program which requires the payment of fees and/or community service, and obtaining a valid driver's license. Successful completion of the program results in charges not being filed at court. For more information about the program at the South Division call (206) 205-9200, and for more information about the program at the Burien Division call (206) 205-9200 or go to www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx.	King County
In Cowlitz County, the DWLS Reinstatement program is not administered by the prosecutor's office, but rather by District Court for charges arising from the County or any of its five municipalities. Participants develop a Reinstatement Plan which lists the requirements to reinstate a license, identifies how the tasks will be completed, and must be approved by the judge. The judge then sets the amount of time for completing the Plan, and defendants return to court showing either completion or their progress. Meanwhile, the license hold is lifted. Fines owed for reinstatement purposes can be paid via community service or work crew, except for the collection agency fee which is limited to 20%. Further, all interest on fines is cancelled if the participant makes payments.	Cowlitz County

Upon successful completion, the pending DWLS-3 charge will be amended to a traffic infraction of No Valid Operator's License in the Second Degree, with a $200 fine. The program is also available to persons who do not have pending DWLS charges, but need to get their license reinstated. For more information, contact Cowlitz County District Court (360) 577-3072 or go to www.co.cowlitz.wa.us/districtcourt/criminal.htm.	
The Seattle City Attorney's Office has post-filing driver's licensing reinstatement program through Seattle Municipal Court for defendants charged with DWLS-3 or NVOL, whose licenses have been suspended solely because of unpaid tickets. The program consists of offering defendants a repayment plan to satisfy these outstanding debts. Once a defendant has signed a repayment agreement, Seattle Municipal Court lifts the hold on their license, allowing the defendant to have their license reinstated. Defendants pay 20% of amount of their outstanding tickets and pay the rest over the next 6 months. For indigent defendants, a 10% down payment with smaller monthly payments is available. Indigent defendants may also perform community service in lieu of paying the full amount due. The prosecutor continues the case for 6 months, during which time the defendant must make all required payments to the Court and incur no new traffic violations or felonies. For more information, call (206) 684-5600 or www.seattle.gov/courts/comjust/relicensing.htm	City of Seattle
Friendship Diversion – See description in report. For more information, contact Barbara Miller at (360) 357-8021 or www.friendshipdiversion.org.	• Clallam County • Grant County • Jefferson County • Thurston County • Kent

Appendix F - Standards Pilot Program

In 2005, the Washington State legislature provided an appropriation to OPD to establish pilot projects in distressed public defense systems in multiple jurisdictions. The purpose was to analyze what would happen if the WSBA Standards For Indigent Defense Services were implemented in courts. At three courts' requests, pilot programs were initiated at Grant County Juvenile Court, Bellingham Municipal Court, and Thurston County District Court in 2006.

The two Courts of Limited Jurisdiction were concerned that, among other problems, their public defense attorneys' high caseloads were causing limited or delayed client contact and constrained pre-trial practices. To reduce caseloads, OPD added two public defense attorneys to Bellingham Municipal Court, which brought the caseload level of the court's five attorneys from 600 per year 400 per year. Three new public defense attorneys were added to Thurston County District Court, which reduced the per-attorney caseload from 800 per year to 400 or less per year.

The pilot program contracts required each attorney to fulfill key standards in addition to caseload reductions. Attorneys were required to be familiar with laws relevant to their practice area and with the RPCs, and to ensure that appropriate case investigation was conducted for each case, to maintain adequate client contact for each case, and to participate in criminal defense trainings.

The pilot program evaluator, Dr. Bill Luchansky, used various sources of data to analyze the effects of the pilots, including 40 interviews on-site, case disposition forms completed by each of the public defense attorneys, JIS records, case assignments records from the courts, and AOC's Caseload Reports.

Dr. Luchansky found that the implementation of the pilot projects caused far-reaching positive results in the three courts. In both the misdemeanor courts, legal representation was improved in several ways. Client communication improved substantially; interview data showed that the attorneys held substantive meetings with clients early on in the case, and attorneys visited clients in custody prior to court hearings. Interviewees, who included judges from each court as well as prosecutors and defense attorneys, agreed that after the caseloads were reduced, the attorneys spotted more issues, used more investigative resources, and filed higher-quality motions. Client satisfaction increased and client confusion decreased, according to the interviewees. There also were substantial improvements to the timeliness and quality of due process in the courts. Dr. Luchansky reports that

> (j)udges at the two misdemeanor sites were overwhelmingly favorable in their assessments of the pilot's impact in terms of improving the quality of defense and protecting clients' rights. In addition, judges at these sites felt

> the Pilot directly and positively affected them in carrying out their judicial functions. *Evaluation*, at 9.

AOC case records also showed that pilot program misdemeanor cases were resolved substantially more quickly than before its implementation. Other positive effects include an 11% decrease in filings in both courts, an increase in deferred prosecutions in Thurston County District Courts, and an increase in trials (from the extremely low level of 8 up to 28) in Bellingham Municipal Court.