WASHINGTON DEFENDER ASSOCIATION
STANDARDS FOR PUBLIC DEFENSE SERVICES

Objectives and minimum requirements for providing legal representation to poor persons accused of crimes or facing juvenile, dependency, or civil commitment proceedings in Washington State.

Introduction

These Standards represent the efforts of the Washington Defender Association to address the problems of providing legal representation to poor persons accused of crimes, or facing Juvenile or Civil Commitment proceedings. Drawing on the practical experience of defense attorneys around the state and on existing national standards which set forth the objectives and minimum requirements for public defender and assigned counsel programs, the Standards are intended to help government establish public defense systems which operate efficiently and meet the constitutional requirements for effective assistance of counsel.

Public agencies and officials responsible for administering public defense programs should view these standards as a practical document, one which provides a means of evaluating existing programs and of setting priorities and goals to improve future ones. The Standards are not based on a conception of the ideal public defense system; rather, they represent the minimum acceptable qualities of a workable and efficient public defense program.

There are many different approaches to providing public defense services in Washington and there have been substantial questions about the adequacy of service in some counties. These standards are designed to ensure that all accused persons receive effective assistance of counsel, regardless of the place or system under which they may be tried. Effective assistance of counsel is a constitutional right, not a luxury to be provided only to a few.

These Standards originally were developed in 1984. In 1988, the State Indigent Defense Task Force was formed and prepared a report to the Legislature with the assistance of the Spangenberg Group. In 1989, the Washington Legislature passed a law requiring local governments to adopt standards for the delivery of public defense services, covering 16 areas. The law states: 'The standards endorsed by the Washington State Bar Association for the provision of public defense services may serve as guidelines to contracting authorities." **RCW 10.101.030.**

The Washington Defender Association prepared these amended standards and the Washington State Bar Association endorsed them in January, 1990. The Legislature has directed that local governments refer to the standards when setting local requirements. **RCW 10.101.030**. The WSBA Blue Ribbon Panel on Criminal Defense relied on the standards in developing its 2004 report, in which it concluded that “defendants in some Washington jurisdictions are poorly served, even

victimized, by those entrusted with protecting their civil rights." http://www.wsba.org/blueribbonreport.pdf. [1]

Also in 2004, the American Civil Liberties Union of Washington published "The Unfulfilled Promise of Gideon", in which it found that a majority of counties had no adopted standards and concluded that "The lack of meaningful standards and the failure of the state to monitor indigent defense services has resulted in a checkered system of legal defense with no guarantee that a person who is both poor and accused will get a fair trial." http://www.aclu-wa.org/library_files/Unfulfilled%20Promise%20of%20Gideon.pdf.

The Seattle Times published a series of articles, "An Unequal Defense, The Failed Promise of Justice for the Poor," in which it documented problems across the state. Among their findings were the following:

*In 2002, the caseload of one Cowlitz County public defender was 6½ times the WDA-WSBA standard.

*One lawyer was paid $21.08 per case in Toppenish (for 797 cases) and also defended indigents in Wapato (511 cases) and presided as a municipal-court judge in Sunnyside (3,963 cases) — and had a private practice.

* The primary defender contractor in Grant County handled 313 felony cases in 2002, more than double the standard.

The Washington Supreme Court disbarred that Grant County attorney and another one who practiced with him. Among the findings of the State Bar against the two attorneys were accepting fees from the family of an appointed client, giving erroneous advice on the right to appeal, misusing client funds, making false statements to a county clerk, and voluntarily maintaining an excessive caseload. See: *In re Discipline of Romero*, 152 Wn.2d 124, 129 (2004); *In re Earl*, 2004 Wash. LEXIS 329 (2004); http://www.wsba.org/media/publications/barnews/2004/aug-03-disciplinary.htm

In 2003, the ABA and the Washington State Bar published An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters. [2] Among the findings were the following:

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[1] The Washington Court of Appeals cited the standards favorably in addressing the need to appoint new counsel because the defender had an excessive case load. *Mt. Vernon v. Weston*, 68 Wn. App. 411, 844 P.2d 438 (1992).

[2] Available on line at: http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/wareport.pdf

*Some counties do not ever provide counsel at probable cause hearings, and, in some counties, young people go forward in a variety of hearings without the assistance of counsel.

*In many counties, motions and trials are rarely brought, independent investigation of cases is rare and only takes place in more serious cases, and defenders are not fully prepared for disposition hearings.
Assessment at 11.

In 2001, the *Seattle Post Intelligencer* published a series of articles called "Uncertain Justice", and concluded that "Washington State authorizes the death penalty, but does little to ensure that defendants are represented equally. Nearly a fifth of the men to face execution were represented by lawyers who had been, or were later, suspended or arrested."
http://seattlepi.nwsource.com/specials/deathpenalty/

The work of the new State Bar Committee on Public Defense and a coalition of bar and judicial and local government representatives resulted in an infusion of state money for public defense, to be distributed through the Office of Public Defense, and the passage in 2005 of legislation that ties continued funding to implementation of standards. To receive funding after one year, local governments must demonstrate either that they are complying with the WSBA-endorsed standards or that the funds received were "used to make appreciable demonstrable improvements in the delivery of public defense services." **RCW 10.101.060.**

The Washington State Bar Association and The Washington Defender Association have joined forces to support a revision and "updating" of the Washington Defender Standards. This current edition of the revised standards was developed in 2005-2006 and presented to the Washington State Bar Association Committee on Public Defense in 2006.

Much has changed since the standards were first adopted. Three areas of practice did not exist when the standards were published— "persistent offender", "status offenses", and "sexually violent predator" commitment cases. In addition, major changes in laws relating to the felony practice and experience implementing the standards require changes.

The Standards are focused on Washington practice. They refer to several national sources, most notably the American Bar Association *Standards for Criminal Justice* and the National Legal Aid and Defender Association *Standards for Defense Services*. The full text of relevant standards is provided in the appendix. All commentary on the standards was prepared by the Washington Defender Association, a non-profit organization representing more than 900 public defenders and assigned counsel in 30 Washington counties.

These standards were developed with the support of the Washington State Bar Association.

The Washington Defender Association is indebted to its past Executive Director, Lynn Thompson, who drafted the second amended standards and helped to present them to the State Bar before her resignation in 1989. [3]

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STANDARDS FOR PUBLIC DEFENSE SERVICES

STANDARD ONE: Compensation

Standard:

Public defense attorneys and staff should be compensated at a rate commensurate with their training and experience. To attract and retain qualified personnel, compensation and benefit levels should be comparable to those of attorneys and staff in prosecutorial offices in the area.

For assigned counsel, reasonable compensation should be provided. Compensation should reflect the time and labor required to be spent by the attorney and the degree of professional experience demanded by the case. Assigned counsel should be compensated for out-of-pocket expenses.

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[3] The bulk of the editing of these revised standards was done by Robert C. Boruchowitz. He had assistance from legal interns Kate de Zengotita, Brandon Buskey , Hallie Eads, and Tristia Bauman. WDA Past President Anne Daly and other members of the WDA Board contributed ideas, as did Rick Lichtenstadter, Tracy Lapps, Rob Wyman, Chris Jackson, Floris Mikkelsen, and Lisa Daugaard of The Defender Association, and Christie Hedman, Jonathan Moore and Ann Benson of WDA.

Contracts should provide for extraordinary compensation over and above the normal contract terms for cases which require an extraordinary amount of time and preparation, including, but not limited to, death penalty cases. Services which require extraordinary fees should be defined in the contract.

Attorneys who have a conflict of interest should not have to compensate the new, substituted attorney out of their own funds.

Flat fees, caps on compensation, and lump-sum contracts for trial attorneys are improper in death penalty cases. Private practice attorneys appointed in death penalty cases should be fully compensated for actual time and service performed at a reasonable hourly rate with no distinction between rates for services performed in court and out of court. Periodic billing and payment should be available. The hourly rate established for lead counsel in a particular case should be based on the circumstances of the case and the attorney being appointed, including the following factors: the anticipated time and labor required in the case, the complexity of the case, the skill and experience required to provide adequate legal representation, the attorney's overhead expenses, and the exclusion of other work by the attorney during the case. Under no circumstances should the hourly rate for lead counsel, whether private or public defender, appointed in a death penalty case be less than $125 per hour (in 2006 dollars).

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-2.4 and 5-3.1.

American Bar Association, **Guidelines for the Appointment and Performance in Death Penalty Cases**, 1988, Standard 10-1.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standards 13.7 and 13.11.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-4.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard III-10 and III-11.
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Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline No. 6.

Commentary:

In the WSBA Blue Ribbon Task Force survey, more than half of the superior court judges who responded “believe that defense attorneys are never, or only

sometimes, compensated commensurate with their training and experience and the time and labor required." Blue Ribbon report, at 11.

The ability to attract and retain qualified lawyers in criminal defense programs is extremely difficult when the compensation is inadequate. Many of the most skilled attorneys quickly move on, resulting in defender offices in which inexperienced attorneys handle the bulk of the cases. Lawyers who know they will not receive compensation which reflects the time and effort they have put into a case may fail to do all within their power to vigorously defend their client. The resulting cynicism of clients toward their attorneys or of the attorneys themselves toward the system can only undermine public confidence in the judicial system and the integrity of the fact-finding process. No other members of the criminal justice system are asked to work for patently inadequate wages, and yet public defense attorneys routinely represent clients at a fraction of the rate that private attorneys would receive.

The American Bar Association's **Standards for Criminal Justice** (5-3.1) suggests that defender salaries be "comparable to that provided their counterparts in the prosecutorial offices" so that the quality of the defense bar remains high and so that public defenders might have the same career opportunities as prosecutors.

Parity between public defense attorneys and staff and those in prosecutors' offices should not be limited to salary. Rather, the total compensation package, including medical, sick leave, insurance, and retirement benefits, should be equal. An attorney's "counterpart" in a prosecutor's office should be determined based upon professional experience and the type of case each lawyer is qualified to handle.

While defenders in some counties are paid on the prosecutor's salary scale and enjoy state retirement benefits, others are not, and assigned counsel often are paid far below reasonable rates. In King County, for example, assigned counsel in 2006 receive $50 per hour for felony and juvenile cases, $45 for misdemeanors, and $40 for dependency cases. At $45 per hour, a lawyer billing 1650 hours would earn $74,250. It is accepted in law practice that attorney salaries will be approximately one half of the total cost of the practice. [4]Gross revenue of $74,250 would leave the appointed counsel only $37,125 per year for salary and benefits. The 2006 salary scale for King County Prosecutors, which is being followed in great part by the local defenders, starts at $47,095 and goes to $77,150 at five years and $87,517 after ten years.

The Grant County settlement provided that the contract defenders have an average compensation in 2006 of at least $97,500, plus $350 per day of trial. If

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[4] See, e.g., Law Office Management & Administration Report, OVERHEAD GUIDELINES FOR HELP WITH 1997 PLANNING, Institute of Management & Administration, Inc. (November,1996)

the County establishes a defender office, the attorneys must receive salary and benefits comparable to their counterparts in the prosecutor's office. See, http://www.defensenet.org/GrantCountySettlement.pdf. The compensation is intended to cover the full costs of running a law office.

Recently, The Defender Association in Seattle won an order in superior court to increase its attorney fees in sex offender commitment cases to $82.65 per hour, with $46 per hour for investigator and paralegal time. [5]Those fees permit adequate funding at reasonable salaries for the staff.

Litigation in other states has resulted in findings that the fees paid to assigned counsel are inadequate. In *New York County Lawyers Association v. State*, 196 Misc.2d 761, 790, 763 N.Y.S.2d 397, 2003 N.Y. Slip Op. 23535 (2003), the court declared:

> that Defendant State of New York's failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total per case compensation has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions; ... and accordingly, it is ordered, ... that Defendant City of New York is directed to pay assigned counsel the interim rate of $90.00 an hour ....until modification of *County Law § 722-b* by the Legislature or further order of this court....

The state legislature later provided funding at a slightly lower rate.

One measure of whether compensation for defense attorneys is adequate is to compare the fees paid to assigned counsel, contract, or public defense attorneys to those paid to privately retained counsel in the same jurisdiction for performing the same type of work. The NLADA Guidelines note that compensation should reflect "the customary compensation in the community for similar services rendered by privately retained counsel to a non-indigent client or by government or other publicly-paid attorneys to a public client...."

Extraordinary compensation should be provided for those cases that demand exceptional amounts of time and labor, as well as an unusually high degree of professional ability. Counsel in death penalty cases have duties and functions significantly different than those of counsel in ordinary criminal cases. Death penalty cases now involve two "trials", the trial phase and the penalty proceeding at which the decision to take or spare the client's life is made. The length, complexity, and extreme pressure of death penalty representation must be reflected in the compensation.

Extraordinary compensation is also warranted in those cases in which unusually large numbers of counts have been filed against one defendant, or when the government has had several years to develop its case or has retained an

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[5] Copy of order available online at http://www.defender.org/judgelauorderjan202006.pdf

unusually high number of specified experts. Each of these situations is likely to produce exceptional amounts of evidence, much of it highly specialized, and will demand extraordinary amounts of attorney time.

These exceptional cases can seldom be predicted either by the attorney or the contracting authority and there is no reason why the financial burden of such cases should fall upon the defense attorney. Contracts which do not make some provision for such cases will discourage qualified attorneys from participating or will invite contract padding to protect the attorney against the unforeseen financially disastrous case.

It is important that attorneys who identify a conflict of interest not be required to pay conflicts counsel out of their own pocket or budget. **RCW 10.01.060** provides that for counties that receive state Office of Public Defense funds under that statute, ”The cost of providing counsel in cases where there is a conflict of interest shall not be borne by the attorney or agency who has the conflict.”

STANDARD TWO: Duties and Responsibilities of Counsel

Standard:

The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.1, 5-5.1 and 5-1.1.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standards 13.1.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard II-2.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-18.

American Bar Association, **American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases** http://www.abanet.org/deathpenalty/guidelines.pdf

Commentary:

Just as in other professions, law has rules of professional conduct and ethical canons governing the actions of its members. These rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. These rules include truthfulness in representation of matters before the court, the disclosure to clients of potential conflicts of interest, the confidentiality of all client communications, and many other matters.

In addition to these professional standards, the federal and state courts, in their rulings on criminal cases, have defined the constitutional obligation of the states to provide counsel to the accused and the level of legal assistance which that obligation entails. The Arizona Supreme Court in 1984 found an entire county public defense system unconstitutional because high attorney caseloads made effective assistance of counsel impossible. *Arizona v. Smith*, 681 P.2d 1374 (1984). The U.S. Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985), ruled that the state's failure to provide psychiatric experts to the defense deprived the defendant of a fair trial.

Convictions may be reversed, or an entire program may be held unconstitutional if the county or city, through its contracts with defense attorneys, does not ensure that legal and ethical obligations can be met. The recent settlement in litigation challenging the Grant County defender system is an example of what can occur when a local government does not meet its constitutional obligations. See, settlement order, *Best v. Grant County*, at http://www.defender.org/PDFofFinalSettlementAgreementSignedbyCounty_v1.pdf.

The role of the criminal defense attorney set forth in the **ABA Standards** is that of a "zealous advocate" whose "basic duty" is to "serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." It is inappropriate for the courts or contracting authorities to limit defense counsel's zeal in the pursuit of the client's interests unless the advocacy violates specific standards of professional conduct. The commentary on the standard notes that the adversary system "requires defense counsel's presence and zealous advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge."

Among the duties required of defense counsel in each case are investigation of the facts, research of relevant law, communication with the client, review of possible motions, review of plea alternatives, review of dispositional alternatives, trial preparation, and vigorous representation in court.

STANDARD THREE: Caseload Limits and Types of Cases

Standard:

The contract or other employment agreement or government budget 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. The caseload of public defense attorneys should 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.

The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:

150 Felonies per attorney per year; or

Eight open “persistent offender” (life without the possibility of release) cases at a time; or

For the lead and second counsel on a capital case, one capital case at a time; or

300 Misdemeanor cases per attorney per year;* or

200 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

200 Juvenile Status Offenses per attorney per year; or

Four new “predator” commitment cases per attorney per year; or up to 12 open cases at a time; or

75 Contempt of Court cases per attorney per year; or

25 Appeals to appellate court hearing a case on the record and briefs per attorney per year; or

50 RALJ appeals from courts of limited jurisdiction to superior courts.

Defenders operating in specialty courts, such as mental health courts and drug treatment courts, should not accept caseloads in excess of their ability to provide effective individualized representation to each client.

* Misdemeanor Cases: At 300 cases per year, the defense lawyer would have approximately 5.5 hours per case. In some jurisdictions, the caseload distribution between simple misdemeanors and gross misdemeanors may permit defense

lawyers to handle as many as 400 cases per year. In some jurisdictions, prosecutorial policies such as post-filing diversion, willingness to negotiate resolution of large numbers of cases as non-criminal violations, and other alternative approaches might permit a defense lawyer to handle more than 300 cases. Local practice should ensure that when accused persons face the possibility of incarceration, their lawyers should have adequate time to investigate and present their cases effectively.

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. These standards are essential in assuring that quality and effective representation can be provided. It is recognized that, in very limited circumstances, factors affecting the case complexity, time, and effort of counsel may justify somewhat lower or higher actual caseloads, but only if the ability to provide quality and effective representation is not impaired. Such factors include, but are not limited to, concentrations of cases of a lower or higher complexity, specialty courts, access to clients in custody, docket congestion, mandatory minimum sentences, local prosecution charging and plea bargaining practices, and local judicial policies and procedures.

In public defense systems in which the attorney is appointed to a client's case prior to arraignment, consideration should be given to adjusting the numbers downward, recognizing that preparing for and appearing at arraignment require additional attorney time.

Application of Standards to Mixed Caseload:

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 proportionally to determine a full caseload. A lawyer who has two open persistent offender cases could receive three-quarters of a regular felony caseload, or nine new felony cases in a month while the persistent offender cases are open.

Definition of Case:

A case is defined by the Office of the Administrator for the Courts as “A filing of a document with the court naming a person as defendant or respondent.”

Use of Case Equivalents to Measure Felony Caseloads:

Because of the complexity of many felony cases, felony caseloads should be assessed by the workload required. A practical method is to measure the caseload in case credits or case equivalents. First degree Murder and Second Degree Murder cases should be allocated eight Felony case credits. Sex offenses that are included in RCW 9.94 A.712 and that can result in life sentences should be

allocated six Felony case credits.

Extraordinary Case Compensation:

Public defense attorneys and assigned counsel should be free to request extraordinary case credit or additional compensation when the work in a particular case requires an extraordinary amount of attorney hours.

Death Penalty or Potential Death Penalty Cases
The funding agreement or budget for a public defender agency should provide for caseload adjustment when a lawyer is appointed to a death penalty or potential death penalty case, so that the attorney may be able to devote the time and attention necessary to provide competent defense in the death penalty case. The caseload adjustment may involve hiring additional lawyers by the agency or a reduction in cases assigned to the agency.

Private Practice Should Be Limited:

In jurisdictions in which assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

Related and Source Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.2, 5-4.3. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. http://www.abanet.org/deathpenalty/guidelines.pdf

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.12.

American Bar Association, **American Bar Association Disciplinary Rule** 6-101.

American Bar Association, **American Bar Association Ten Principles of a Public Defense Delivery System**. See, http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf (2002).

American Bar Association, **ABA Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases** (□1996).

American Council of Chief Defenders, **The American Council of Chief Defenders Ethical Opinion 03-01**(2003).

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-I.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-6 and III-12.

National Legal Aid and Defender Association, **Model Contract for Public Defense Services** (2000), available on line at www.nlada.org/DMS/Documents/ 1025702469.09/Full%20volume.doc

NACC, **NACC Recommendations for Representation of Children in Abuse and Neglect Cases** (2001, available online at http://naccchildlaw.org/training/standards.html)

City of Seattle **Ordinance Number: 121501** (2004).

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 1.

Washington State Office of Public Defense, **Proposed Standards for Dependency and Termination Defense Attorneys** (1999), available online at http://www.opd.wa.gov/Publications/Dependency%20&%20Termination%20Reports/1999%20Cost%20of%20Defense%20Dep%20&%20Ter.pdf

Commentary:

Washington State has been among the leaders in setting caseload limits for attorneys. More than twenty years after WDA's standards were first adopted, many public defender and contract defense attorneys are still handling caseloads substantially above the levels recommended by the Washington Defender Association and endorsed by the state bar. Many cities and some counties are still using fixed-price contracts that contain no caseload limitations at all. [See, **The Empty Promise of an Equal Defense,** Seattle Times, April 6, 2004.] Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads, even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.

The American Bar Association's **Standards for Criminal Justice** call heavy caseloads "one of the most significant impediments to the furnishing of quality defense services for the poor" and note that lawyers with too many clients may not be able to carry out the basic responsibilities outlined in the Code of

Professional Responsibility. The Code admonishes an attorney not to accept "employment...when he is unable to render competent service" or to handle cases "without preparation adequate in the circumstances." The "Defense Function" section of the American Bar Association's **Standards** also urges attorneys not to accept more cases than they can reasonably discharge. Principle Five of the American Bar Association Ten Principles of a Public Defense Delivery System states: “Defense counsel’s workload is controlled to permit the rendering of quality representation.”

The American Council of Chief Defenders has issued an ethics opinion that chief defenders should refuse to accept cases which exceed their capacity to provide competent representation.

> A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency’s attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency’s attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.
> http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf

In addition to the risks of an innocent person being unjustly convicted and of accused persons receiving unequal treatment because they are too poor to retain private counsel, high caseloads have serious consequences to the integrity and efficiency of the judicial system. High caseloads result in correspondingly high turnover among public defenders; inexperienced defenders are less efficient, less able to move cases quickly through the system; and the number of cases which must be retried because of improper defense may increase. Finally, lawyers become vulnerable to malpractice lawsuits when they are unable to meet basic professional responsibilities. The government providing defender services may be sued for damages or injunctive relief. See, settlement order, *Best v. Grant County*, at http://www.defender.org/PDFofFinalSettlementAgreementSignedbyCounty_v1.pdf

Legal research, investigation and the timely presentation of motions become unattainable dreams to the attorney burdened with too many cases.
Other factors, often beyond defense counsel's control, affect the number of cases he or she may effectively dispatch. A prosecutor's refusal to accept plea negotiations, the seriousness and complexity of the types of cases being handled, and, for assigned counsel and some contract attorneys, the number of

privately retained cases being accepted, will reduce the total number of cases counsel can discharge.

If a lawyer is handling cases in more than one category, the standards should be applied proportionally to determine a full caseload. For example, an attorney could handle 75 felonies and 100 juvenile cases in one year.

If the caseload levels being contracted for approach the levels recommended in these standards, the attorney undertaking the work should not have a significant number of privately retained cases. The American Bar Association **Standards for Providing Defense Services** state that full-time defense attorneys "should be prohibited from engaging in the private practice of law." The commentary on this standard notes that when part-time defenders are used, clear standards for performance of duties, particularly as to limits on private practice, should be adopted.

The caseload levels recommended here follow closely those caseload guidelines specified by two national studies, the National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, and the National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts** (1984). They are also drawn from the standards approved in 1982 by the King County Bar Association following a Task Force study which found that in the absence of guidelines, public defender offices were being made to accept so many cases that clients' constitutional rights were seriously threatened.

The National Advisory Commission standard recommends 150 felonies per attorney per year and 400 misdemeanors, figures set in 1973, before the full impact of the U.S. Supreme Court's Argersinger decision was felt. Changes in Washington Law have resulted in substantially more misdemeanor jury trials with a corresponding increase in attorney time per case. For these reasons, we recommend 300 misdemeanors per attorney per year.

The City of Seattle, by ordinance, has limited defender attorneys to 380 misdemeanor cases per year. (See, http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CBOR&s1=114900.cbn.&Sect6=HITOFF&l=20&p=1&u=/~public/cbor2.htm&r=1&f=G.) The ordinance also codified by reference the ABA Ten Principles and supervisory standards.[6]

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[6] The Seattle City Council, at the request of defenders, passed Ordinance Number: 121501 on June 14, 2004. It restricts public defender contracts to non-profit providers, provides for a proposal review panel to advise the mayor on selection of the defenders, sets an attorney supervision ratio, adopts the ABA Ten Principles of a Public Defense Delivery System, and re-affirms the Council's previously determined per-attorney caseload ceiling of 380 misdemeanors per year. The panel "shall include community members with legal expertise as well as those who hold firm the interests of low-income communities."

Following is an excerpt of the ordinance:

While the Seattle standard is a welcome development, it still requires lawyers to work more hours than should be expected.

One measure of the reasonableness of these figures is to assess the amount of time an attorney would spend on a case under these standards. An accepted standard for attorneys is to work 1650 billable hours per year. [7]Even under the caseload standards recommended here, an attorney could only spend an average of 11 hours per case if he or she were to complete 150 felonies during a year. A "typical" jury trial can easily require 40 to 50 hours to bring to trial, and it is not uncommon for a complicated felony trial to consume several weeks of attorney time. Each jury trial, as well as each case which an attorney prepares for trial but is able to settle "on the courthouse steps", limits the time an attorney can devote to his or her remaining cases.
The situation is similar for misdemeanor attorneys. If the recommended standard of 300 cases per year were adopted, an attorney would be able to give roughly 5.5 hours to each case. The expanded right to jury trial for misdemeanor charges requires a substantial increase in preparation and litigation time.
Currently in Washington State, most full-time public defense attorneys are handling significantly more than these recommended levels and work upwards of 2000 hours each year.

In setting these recommended caseload levels, we assume the attorneys will have adequate supervision, investigative, paralegal, social work, and clerical support. Clearly, where these essential services are not available, maximum

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…. the City shall enter into agreements to provide indigent defense services only with nonprofit corporations formed for the express purpose of providing legal services to persons eligible for representation through a public defense program.

Section 2. The City hereby reaffirms the caseload standards established in the 1989 Budget Intent Statement. The 1989 Budget Intent Statement, the **American Bar Association's** Ten Principles of a Public Defense Delivery System and the provisions of Section 1 of this Ordinance shall collectively constitute "standards for public defense services" as that term is used in RCW 10.101.030 until such time as the City Council may by ordinance adjust those standards. Consistent with the 1989 Budget Intent Statement, City agreements with indigent public defense service providers shall require caseloads no higher than 380 cases per-attorney per-year. The City also affirms the Washington State Bar**-** endorsed supervision standard of one full-time supervisor for every ten staff lawyers.
http://clerk.ci.seattle.wa.us/~scripts/nphbrs.exe?s1=&s2=&s3=&s4=121501&s5=&Sect4=AND&l=20&Sect1=IMAGE&Sect2=THESON&Sect3=PLURON&Sect5=CBOR1&Sect6=HITOFF&d=CBOR&p=1&u=/~public/cbor1.htm&r=1&f=G

[7] A "workable" year is 52 weeks at 40 hours per week. Deducting 10 holidays, 12 sick days, 20 vacation days, 15 hours for required CLE training, 1.5 hours a week for office conferences and non-case specific office work, and seven hours a year for pro bono or volunteer committee work yields the 1650 hour billable year.

caseload levels should be set at lower levels. The limits may also have to be adjusted downward in rural areas where attorneys must travel great distances between courts.

If attorneys are appointed before arraignment, requiring their appearance at arraignment, these figures may need to be adjusted downward as well. When arraignment calendars are handled separately, by what is called in King County “calendar attorneys”, all of the work on the individual attorney's caseload occurs after arraignment. If the lawyer must also prepare for and cover the arraignment, that reduces the time available for the caseload itself.

Lawyers Must Be Aware of Immigration Implications

A major change since these standards were last published in 1990 has been the dramatic impact of immigration law changes on convicted persons. Many more offenses result in removal (deportation). Lawyers must be aware of their clients' immigration status, research the implications of it for their cases, and advise their clients of the consequences of a conviction. **8RCW 10.40.200** requires that before a guilty plea the defendant be advised of immigration consequences. There can be adverse consequences to dispositions that might lead to dismissal. There is a separate statutory definition of a conviction in the Immigration and Nationality Act that makes most deferred adjudications-- unless carefully crafted--- into convictions for immigration purposes, even after dismissal by a state court. 8 USC 1101(a)(48)(A)

The attorney has an obligation to pursue with the prosecutor and the court "immigration-safe" dispositions. Incorrect advice is ineffective assistance of counsel. 9Research into the immigration consequences takes time and expertise.

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[8] In reviewing a motion to withdraw a guilty plea because the defendant was not adequately advised of the immigration consequences of his plea, the New Mexico Supreme Court wrote:

> Defendant's attorney had an affirmative duty to determine his immigration status and provide him specific advice regarding the impact a guilty plea would have on his immigration status. A prima facie case of ineffective assistance of counsel is established by the appellate record; thus, we remand to the district court for an evidentiary hearing on Defendant's claim.

State v. Paredez, 136 N.M. 533, 535 (N.M. 2004)

[9] “If a defendant's attorney informs him or her that deportation will not be a consequence of a guilty plea when the guilty plea renders deportation a possibility, then the attorney's performance would be deficient. Also, when a defendant's guilty plea almost certainly will result in deportation, an attorney's advice to the client that he or she "could" or "might" be deported would be misleading and thus deficient.”

State v. Paredez, 136 N.M. 533, 538 (N.M. 2004)

The attorney also should be familiar with and be careful about the implications of the client admitting his/her country of origin on the record and be prepared for appropriate responses should the court or prosecutor inquire.[10] If an interpreter is needed to communicate with the client, additional time is required.

Dependency lawyers, and all lawyers representing juveniles, should be able to recognize a potential "Special Immigrant Juvenile (SIJS)" case. Undocumented, non-citizen juveniles have a path to legal residency under several circumstances. 8 USC 1101(a)(27)(J);
See, http://www.ilrc.org/resources/sijs/2005%20SIJS%20manual%20complete.pdf

Also, an undocumented non-citizen child under 21 abused by a U.S. citizen or lawful permanent resident parent, or a child (whether abused or not) of a parent who was abused by a U.S. citizen or permanent resident spouse, may be able to seek legal resident status through the immigration provisions of the "Violence Against Women Act" (VAWA). 8 USC 1154(a)(1)(A)(iii); (B)(iii); 8 USC 1229b(b)(2). Undocumented children who are victims of certain serious crimes, and are or have been helpful in the investigation or prosecution of those crimes, may be eligible for a visa called a "U-visa" that can lead to legal residency. 8 USC 1101(a)(15)(U)

If an undocumented minor has been a victim of "a severe form of trafficking in persons" they may be eligible for a visa called a "T-visa" 8 USC 1101(a)(15)(T)

Attorneys who work with juveniles should identify possible eligibility for these forms of relief, and make a referral to an agency that helps on such cases before the client in question loses eligibility.

The Defender Must Protect the Client's Rights

Increasingly, Washington courts have recognized the fundamental role of public defenders. In a case upholding a suspension of a district court judge who also acted as a contract public defender in the same court, without providing for substitute counsel, the Washington Supreme Court wrote about the responsibilities of defense counsel:

> A criminal defense attorney, whether appointed or retained, has a duty to zealously and diligently defend his or her client. This includes openly and honestly communicating with the client, investigating the circumstances surrounding the charges, filing motions, interviewing and subpoenaing witnesses, and preparing a defense. Most importantly, the attorney needs to make sure the client is properly advised of his or her rights when entering a plea of guilty. In doing this, the attorney needs to make sure that a plea is entered knowingly and voluntarily and that the defendant is aware of any

[10] See **RCW §Se 10.40.200**: "It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court."

> rights he or she is giving up. ….It is the job of a public defender to protect the rights of his or her clients, just as it is the responsibility of the judge to see that justice is carried out.
>
> *In re Michels*, 150 Wn.2d 159, 169, 75 P.3d 950 (2003), cert. Denied, *Michels v. Wa Comm'n* on Judicial Conduct, 157 L. Ed. 2D 900 (2004).

The Court also emphasized that "Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided." [citing in footnote 2 **RCW 10.101.030**.] *In re Michels*, 150 Wn.2d 159, 174.

Changes in Felony Practice

Much has changed in the felony practice since these standards were endorsed by the Washington State Bar in 1990. The mix of cases has become more serious. For example, in King County in 1992, assault filings were 9.01% of superior court criminal filings. In 2005, assault cases were 13.17 % of all filings. Drug case filings fell from 33.6% to 31% in the same period.
1.
2. There have been major increases in both the number of and punishment for sex offense charges. For example, in King County in 2002, there were 442 sex crime filings. In 2004, there were 544. At the same time, the punishment for serious sex offenses has increased dramatically, with potential life sentences for a number of crimes. **RCW 9.94A.712**. In fiscal year 2005, there were 264 life sentences under "712". See, http://www.sgc.wa.gov/PUBS/Statistical_Summaries/Statistical_Summary_2005.pdf.

For example, second degree rape is a class A felony. **RCW 9A.44.050**. The standard range for that offense for a first offender is 78-102 months. [See, http://www.sgc.wa.gov/PUBS/Interactive/Sentencing_Form.asp?pid=937169.] In 1990, the standard range was 51-68 months. [Sentencing Guidelines Commission Implementation Manual, 1990.]
Many cases now involve potential life sentences. Because of that, sex offenses that are covered by 9.94A.712 are more complicated and should be counted as more than one case.

Also, the legislature has decided that in certain violent offense prosecutions, juveniles 16 or older must be tried in adult court. **RCW 13.04.030**.
3.
Another significant change is the advance in technology that has aided "cold case" investigation and prosecution of cases years after the offense. The King County Prosecutor obtained funding to establish a cold case unit to investigate and prosecute homicides from as long as 40 years ago. [11]

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[11] See news release at : http://www.metrokc.gov/proatty/news/2005/coldcasepr.htm

4. Because of the changes in the practice, it makes sense to review how the150 case standard is implemented. Historically, the idea has been that some simple cases balance some complex ones with the bulk of cases falling in an average range. This concept has been seriously challenged by the changes discussed above. There are differences among counties in their mix of cases, and because of that it makes sense to retain the 150 standard, with flexibility concerning how many "case credits" would be allocated to certain types of cases. In addition to the sex offense categories, murder first degree and murder second degree cases typically take much longer time than the bulk of other cases, averaging 100 hours in a number of counties. King County historically has given multiple credits for homicide cases. This standard provides that a first or second degree murder case should be counted as eight felony credits and that sex offenses that can result in life sentences should be counted as six felony credits.

Because it is not possible in advance to predict how difficult a particular case will be, the standard also contemplates that defense attorneys will be able to request extraordinary case credit or additional compensation if the work requires more than 100 hours of attorney time. This permits discretion in each county to assess the impact of the mix of cases in that county, and provides that each county would recognize when a significant number of complex cases requires that the attorneys receive additional case credit for certain cases. In the event that a defender or assigned counsel were handling a large number of homicide or sex offense cases subject to life sentences, that lawyer could not handle 150 felony cases, but would be able to handle 150 felony case credits as calculated under this standard. The standard contemplates that a defender could handle approximately 19 first and second degree murder cases per year if those cases average about 90 hours per case. When cases require more than 100 hours, additional case credits (resulting in additional compensation) will prevent lawyers from suffering excessive caseloads.

The recent class action settlement in *Best v. Grant County* provides that felony defenders not exceed 150 case equivalents per year. The agreement provides that in extraordinary cases there be one case equivalent for every 15 hours spent on the case. Extraordinary cases include persistent offender cases, aggravated homicide cases, and fraud cases involving more than five counts or a claimed loss over $250,000, See, http://www.defensenet.org/GrantCountySettlement.pdf.

5.

Many jurisdictions have recognized that there should be a distinction in compensation between homicide cases and other felonies. For example, Massachusetts recently raised bar advocates' hourly pay to $50 from $37.50 for District Court and family law cases; to $60 from $46.50 for non-homicide Superior Court cases; and to $100 from $61.50 for murder cases. See, http://www.bristolcpcs.org/MLW20050808.html.

Felony acquittals by reason of insanity can produce periodic mentally ill offender review hearings, and defenders should be adequately compensated for that work.

It is recognized that very limited circumstances may warrant a higher caseload. For example, an attorney assigned a non-trial caseload consisting solely of clients screened for and initially considered a candidate for acceptance in a specialty court (see page 41), can handle more than 150 cases per year.

Some large defender offices are able to divide their attorney staff into trial and non-trial units to respond to initiatives aimed to reach early resolution of cases. In such situations, an attorney assigned to cases in which a client has indicated a desire for early negotiated resolution and in which an initial assessment of the case suggests that the likelihood of trial is remote can handle more than 150 cases per year. When offices divide their staff in such a way, there need to be procedures in place allowing for early substitution of the non-trial attorney with an attorney who can, when investigation and further assessment result in a decision to prepare for trial, provide necessary resources. Attorneys who have a trial-intensive practice in that kind of division of labor should have a caseload significantly lower than 150 per year.

Persistent Offender

This standard applies to the defense of "persistent offender" cases, known colloquially as "two strikes" and "three strikes" cases. A conviction under the Persistent Offender Accountability Act (POAA) results in a mandatory minimum "term of total confinement for life without the possibility of release."[12]

The Ninth Circuit has held that "as a matter of law, a sentence of life without the possibility of parole is significantly different from a sentence of life with the possibility of parole…." *Grisby v. Blodgett*, 130 F.3d 365, 369-370 (9th Cir., 1997) [citation omitted].

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[12] Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by **RCW 10.95.030** for the crime of aggravated murder in the first degree, sentenced to death. In addition, no offender subject to this section may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as defined under **RCW 9.94A.728** (1), (2), (3), (4), (6), (8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers, except: (1) In the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

Rev. Code Wash. (ARCW) § 9.94A.570

The Legislature has made clear that persistent offenders may not be released even for medical care.

"The legislature does intend to clarify that persistent offenders are not eligible for extraordinary medical placement." Rev. Code Wash. (ARCW) § 9.94A.015

The nature of the penalty was mentioned in a recent Washington court of appeals decision that reversed an assault conviction and a persistent offender finding because of ineffective assistance of counsel. In *State v. DeLavergne*, 2004 Wash. App. LEXIS 1186, 121 Wn. App. 1074 (2004) (unpublished), the court noted that, "The trial court also said that "the stakes [were] too high . . . to be silent" regarding DeLavergne receiving ineffective assistance of counsel. III RP at 202." Using a similar analysis as that used in capital cases, in which "death is different"[13], defense counsel can argue for more resources in life without parole cases. [14]

In *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990) Judge Noonan, granting a stay of execution, noted that "As the Constitution stands, the federal courts are committed to a process in which speed is sacrificed to thoughtful examination, and rough and ready justice for heinous crimes has been replaced by deliberate examination and dispassionate review." A similar deliberate approach is needed in persistent offender cases.[15]

This caseload standard is stated in terms of open cases, rather than cases per year, because the unique complexities and challenges of persistent offender cases make it difficult to estimate how long a given case will take to complete, and the average case takes at least several months. In a recent review of ten closed cases in King County, the average attorney time was197.42 hours. The cases ranged from 89.1 hours to 551.4 hours.

An attorney should not handle more than eight open persistent offender cases at a time. Attorneys who have more than four open persistent offender cases, particularly if they also have other cases, should have co-counsel on every case.

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[13] *Furman v. Georgia*, 408 U.S. 238, 306 (1972), Stewart, J., concurring: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." See also, *Schiro v. Farley*, 510 U.S. 222, 238 (U.S., 1994).

[14] The Alabama Court of Criminal Appeals upheld a trial court's finding of ineffective assistance in a habitual offender case in which the defendant claimed he had never been told by his lawyer of a plea offer:

> We cannot disagree with the court's conclusion that "there is a great probability that had this [case] been handled appropriately, the petitioner would not be serving a life sentence," given that the State in its plea bargain offered a 15-year sentence, split so that Hamlet would serve 3 years in exchange for Hamlet's forgoing a trial and entering a guilty plea to a lesser-included charge.

State v. Hamlet, State v. Hamlet, 913 So. 2d 493, 499 (Ala. Crim. App. 2005)

[15] ABA Standard 4-1.2(c) states that '[s]ince the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.' ABA Standards for Criminal Justice, Prosecution Function and Defense Function 120 (3d ed. 1993).") Extraordinary effort is required in life without parole cases as well.

These cases demand more of a defense attorney than other felonies do, not only because the stakes are so high, but also because of the volume of work they entail. For this reason, and because of the emotional toll these cases can take, defenders should work in pairs on “two strikes” and “three strikes” cases whenever possible. Partners assist each other with the workload and provide empathy and support for one another in the face of great responsibility.

When there is a large enough number of persistent offender cases in a given defender office or county, it is preferable for the defense attorney to focus his/her practice on those cases and not to handle other types of cases. If a defense attorney has a number of other felony cases with frequent court appearances, it can be difficult to allocate the necessary time to the persistent offender cases. Not every county has a volume of persistent offender cases sufficient to support a full-time attorney or unit of attorneys. Each open persistent offender case should be considered one-eighth of a full caseload.

In its 2005 public defense contracts, King County took a “presumptive case credit” approach. Each persistent offender case was considered equivalent to eight felony cases. If the attorney time on the case exceeded 97 hours, the defender office was eligible for additional compensation under the County’s extraordinary case credit system. If the attorney time were less than 96.8 hours, then case credits were reduced.[16] This approach provided the defenders the resources they needed while providing flexibility in the event that the case takes less attorney time. In 2006, King County returned to an hourly billing system for persistent offender cases, with one case credit for every 12.1 hours of attorney time.

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[16] The provision stated:

> 8 case credits upon assignment. If the attorney time when the case is closed is less than 96.8 hours, the Agency will be debited credits at a ratio of 12.1 hrs to 1 credit (e.g. 12.1 hrs or less, Agency is debited 7 credits; 12.2 hrs to 24.2 hrs, Agency is debited 6 credits). If the attorney time in the case exceeds 97 hours, the Agency is eligible for additional case credit according to the Extraordinary Cases section of this Attachment I. The Agency shall report monthly to OPD the total attorney time in each persistent offender case. It is understood that the Agency director or the director's designee will review the status of all pending persistent offender cases in the Agency at least monthly and will discuss the cases with the attorneys representing the clients. Such review will include the status of investigation, preparation and presentation of mitigation packages, legal and factual issues in the case, the client's physical and mental status, and any plea bargaining offers.

The extraordinary cases section states that the case shall be given extra credits if the nature of the case requires such extra credits, based upon a written application from the Agency for additional credits and negotiation between OPD and the Agency. Factors entering into the awarding of extra credits include, but are not limited to: amount and complexity of evidence; complexity of legal issues; number of defendants; and, actual length of trial. The Agency application must be specific about the work to be done, the estimated length of time to perform the work, and the personnel that will be assigned to perform the work.

A defense attorney in a “two strikes” or “three strikes” case must, of course, defend his/her client against the current charge. This requires, in terms of both factual investigation and legal research, as much time and energy as it does in a comparable “regular” felony case. Additionally, attorneys should raise appropriate challenges to the POAA sentencing scheme.

A defender in this context also needs to review and pursue any possible challenges to the prior “strikes” against the client. See, e.g., *State v. Hern*, 111 Wn. App. 649, 656 (2002): because of the application of a “wash-out” provision, a prior conviction could not be followed; that conviction cannot count as a strike.[17] Defenders should also thoroughly explore any other possible challenges to the prior convictions as “strikes,” and should raise these as appropriate. For example, if there were constitutional deficiencies in the prior conviction, such as absence of counsel, ineffective assistance of counsel, or misidentification issues, counsel should challenge the validity of those convictions and their status as “strikes” on that ground. See, *State v. Delgado*,148 Wn.2d 723, 725 (2003): prior convictions (strikes) which were not specifically listed when the defendant was tried and sentenced for his current offense did not count as “strikes”.

As in the death penalty context, “effective “mitigation” work can be central to an effective defense in “two strikes” and “three strikes” cases. Thorough investigation of mental heath issues, victims’ attitudes about punishment, and a comprehensive understanding of the client’s medical, social, family, and medical histories can be extremely valuable to an effective persistent offender defense.

Counsel needs to take the time to play an active role in investigation and to work closely with the expert(s) and social worker who evaluate the material gathered by investigation. See, *In re Brett, supra*. See also, *Rompilla v. Beard*, 545 U.S. ___ (2005), reversing a death sentence for ineffective assistance of counsel because the defense counsel did not look in a court file to find mitigating evidence. The Court relied on ABA Standards.

Defense attorneys have found that prosecutors will be more open to equitable arguments of fairness and proportionality when comprehensive mitigation evidence is put forth.[18] Mitigation evidence can also be useful in raising defenses against the current charge, such as incompetency, insanity, or absence of mens rea. Coming to the negotiation table with as much mitigating evidence as possible is, therefore, of paramount importance for persistent offender clients. [19]

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[17] See, *State v. Carpenter*, 117 Wn. App. 673 (2003).

[18] Not all county prosecutors are open to mitigation presentation. Nevertheless, defense attorneys should offer it, and the practice which has become standard in some places can become accepted in others.

[19] In a capital case, the Ninth Circuit recognized that in prior Supreme Court and Ninth Circuit cases concerning the failure to admit mitigating evidence, the performances of the attorneys were found to be reasonable only where they had made rational tactical evaluations. *Mak v. Blodgett*, 970 F 2d 614, 618 (1992). “Mak’s counsel made no such

Defenders must review whether the prior conviction can be counted as a "strike" in calculating the offender score or as a predicate “strike”.[20]
Because the goal in these cases is often settlement, rather than trial, counsel should prepare challenges to each potential “strike” before the settlement negotiations.

If the defendant’s previous conviction(s) were imposed under the laws of another state or under federal law, to count as “strikes” they must be comparable to “most serious offenses”[21] or to serious sex offenses[22] under Washington law in the “three

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tactical evaluation, and no risk would have been incurred by presenting the proffered evidence.” *Id*.

[20] The scope of the statute is broad, and counsel must be familiar with all of its elements:

"Persistent offender" is an offender who:

(a) (i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

(b) (i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

Rev. Code Wash. (ARCW) § 9.94A.030

[21] RCW §9.94A.030(28)
[22] RCW §9.94A.030(32)(b)

strikes" and "two strikes contexts," respectively. There are often arguments that can be made against the "comparability" of out-of-state or federal laws. For example, if the foreign statute does not require proof of an element of the offense which the parallel Washington law does, or if the conduct would not have violated the Washington law for some other reason, the defense attorney should argue that the conviction should not count as a "strike" because the offenses are not "comparable."[23] There may be issues regarding the underlying out of state conviction which make it invalid for use as a "strike", including whether the jury found the required elements beyond a reasonable doubt. [24] It can take considerable time to develop information about out-of-state convictions.

It also is possible to raise a comparability challenge to a Washington conviction under a statute that has been repealed, if the elements of the new statute defining the offense are not the same.

Additionally, if the defendant was a juvenile at the time of the first offense, and the adult court did not have jurisdiction over the case or proper declination procedures were not followed, the prior conviction should be excluded.

Defense attorneys in persistent offender cases should meet with their clients at least once a week. It is often difficult for people to understand and to come to grips with the fact that they are facing the possibility of a life sentence for an offense that would normally entail far less serious consequences. It can also be a challenge for clients to understand that this sentence is mandatory, and that a plea to a lesser offense might be the best option for them under the circumstances. Furthermore, when a client comes to understand the sentence s/he may face, it is a huge

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[23] See*, State v. Bunting*, 115 Wn. App. 135, 140-43 (2003), *State v. Freeburg*, 120 Wn. App. 192, 1987-99 (2004), Review denied by *Wash. v. Scott Freeburg*, 2004 Wash. LEXIS 760 (Wash., Nov. 3, 2004); *State v. Payne*, 117 Wn. App. 99; 69 P.3d 889; (2003), Review denied by *State v. Payne*, 150 Wn.2d 1028, 82 P.3d 242 (2004).

[24] See, *State v. Ortega*, 120 Wn. App. 165, 171-172 (2004), review granted in part and remanded, 154 Wn.2d 1031, 119 P.3d 852 (2005), exceptional sentence vacated, *State v. Ortega*, 131 Wn. App. 591, 593 (2006):

> Apprendi, 530 U.S. at 490, holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Life without possibility of parole is a penalty beyond the statutory maximum of life for first degree child molestation. Former RCW 9A.20.021(1)(a) (1982); RCW 9A.44.083. Consequently, if Apprendi applies to the determination of the underlying facts of a prior conviction, any facts relating to the Texas conviction that could have been used by the trial court to compare the Texas crime with Washington crimes must have been determined by the Texas jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490; *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001).

emotional weight to bear, and defense attorneys should offer their clients as much support as they can.

Finally, defense attorneys must prepare for negotiation by researching possible alternative charges, and discussing these options with their clients. Armed with mitigation material and challenges to the previous and current "strikes," attorneys can be successful in convincing prosecutors to agree to a lesser charge, sometimes for a greater sentence than normally accompanies the lesser charge, but for significantly less than a life sentence without the possibility of parole. A number of cases which began as persistent offender cases have resulted in pleas to less serious felony or misdemeanor charges, and some have been dismissed following intensive defense work.

Capital Cases

As soon as counsel is appointed to a capital case, their other work must be reduced drastically as soon as possible. Counsel should not try to work on more than one capital case at one time. SPRC 2 prohibits counsel working on more than one capital case. "Both counsel at trial must....not be presently serving as appointed counsel in another active trial level death penalty case."

Workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards. This should specifically include the ability of counsel to devote full time effort to the case as circumstances will require. Counsel must not accept new case assignments that will interfere with this ability after accepting a capital case. See **ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases** (Revised 2004), Guideline 6.1 and 10.3.

Work must begin immediately on preparing a mitigation package for consideration by the prosecutor in making the death notice decision. See, *Personal Restraint of Brett*, 142 Wn.2d 868 (2001). See also, **ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases**: "The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses..., decisions about the need for expert evaluations...,motion practice, and plea negotiations." 31 Hofstra Law Review 913 at 1023 (2003). Under the statute, the death notice decision must be made within 30 days unless the time is extended.[25] If counsel try to do what is needed on a capital case while maintaining a significant practice of other cases, the representation on the capital case will be threatened.

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[25] "The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. " Rev. Code Wash. (ARCW) § 10.95.040.

This standard assumes that counsel will be reasonably paid. In King County, the defender contracts provide that there will be two full-time counsel and a full-time investigator as long as the case is potentially capital. But some counties pay as little as $70 per hour for capital defense. [26]This makes it difficult for counsel to shut down the rest of his or her practice, both because the rate is so low and because there are some months when there is less activity in the capital case, whether because of delay for interlocutory appeal or for other reasons. In a capital case that is open for a year or longer, it makes sense for counsel to be able to accept a short trial or other short-term work, as long as the capital case remains the highest priority in the practice. This is more possible in a defender office or in a practice in which counsel has partners or associates to help with case coverage. Allowing a lawyer to "tune up" trial skills in a short case in effect is maintaining training, perhaps somewhat similar to a pilot flying training hours.

The federal court appointment rate is $163 per hour, with $92 per hour for travel time. See, http://www.nmcourt.fed.us/web/DCDOCS/files/CJA/CJARates.htm. This rate recognizes the difficulty of the work as well as the expertise required, and cushions the impact of having to reduce significantly the rest of a private practice. It makes possible the attention to the capital case that is required.

Capital defense can require thousands of attorney hours. A study of federal capital trials from 1990-1997 found that the average attorney hours of cases that went to trial was 1889, [27] The tasks include extensive investigation about the client's history and development of expert witnesses. As the Washington Supreme Court wrote:

> When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly.
>
> *Personal Restraint of Brett*, 142 Wn.2d 868, 880 (2001).

The British Columbia government recently paid what it called "a collapse fee" of $245,000 to defense lawyers who handled a long-duration and complicated homicide case resulting from the Air India terrorism case. The case lasted nearly two years. According to the Globe and Mail, the government said that "The payment reflects a recognition that lawyers involved in the Air-India trial would

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[26] $70 an hour for a 1650 billable hour year yields a gross revenue of $115,500, allowing approximately $57,750 for salary. This is well below the five year salary of $77,150 paid to King County defenders and prosecutors.

[27] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, (Rev.Edition,2003) at 40. Available at: http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf. More than 3300 hours are needed to complete federal and state post-conviction proceedings. Id., at 41.

require some time to find clients and resume their legal practice after concentrating solely on one case." Globe and Mail, March 20, 2006.

Misdemeanors

As the state supreme court has noted, "For most citizens, appearing as witnesses, spectators, or defendants in municipal court is their only contact with the judicial system." *In re Hammermaster*, 139 Wn.2d 211, 235 (1999). Defenders must provide effective representation in these courts as well as in superior courts.

The emphasis in recent years on seeking more severe sentences for drunk driving cases and on prosecuting domestic violence cases has increased the complexity and seriousness of many misdemeanor cases. These cases frequently involve expert testimony and a need to explore sentencing alternatives that require assessments of the client's willingness and ability to pursue treatment.

Changes in the law in 1998 regarding competency in misdemeanor cases also require careful attention. (2SSB 6214, RCW 10.77.090) Cases that formerly would have been dismissed now involve sending the client to a state hospital for competency restoration and remain open for months. The reduction in funding for community mental health services has affected the number of mentally ill clients who become entangled in criminal courts.

It is recognized that very limited circumstances may warrant a higher caseload. For example, in some courts bail forfeitures are used to resolve cases quickly with minimal consequences for the clients. A defender in a court with a significant percentage of cases resolved as bail forfeitures can handle more cases, but only if the bail forfeiture practice continues. [28]

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[28] The practice from court to court varies considerably in courts of limited jurisdiction. For example, for the first two months of 2006, there were 166 bail forfeitures in "non-traffic misdemeanors" in King County District Court, but none in Seattle Municipal Court, the highest volume court in the state. In the King County District Court, there were 344 guilty findings in the same period, and in Seattle Municipal, 783. [There were 2 not guilty findings in King County District and 19 in Seattle Municipal.] In Spokane District Court, there were 196 guilty and 30 bail forfeitures; in Spokane Municipal, 334 guilty and 45 bail forfeitures. In another high volume court, Tacoma Municipal, there were 533 guilty findings, only 3 bail forfeitures, and six acquittals. In some low volume courts, the percentage of bail forfeitures is much higher. In Jefferson County District Court, there were 16 guilty findings and 13 bail forfeitures. Statewide, there were 11,929 guilty findings and 1150 bail forfeitures and 120 acquittals. See, Caseload Reports at www.Courts.wa.gov.

Examples of the extreme variation include Ritzville District Court, which for the same time period had 8 guilty findings, 6 bail forfeitures, no acquittals, and 31 charges dismissed in the category of "other traffic misdemeanors". Federal Way Municipal Court had 56 guilty findings, 46 bail forfeitures, no acquittals, and 58 charges dismissed. Many courts, including Tacoma Municipal and Seattle Municipal, had no bail forfeitures in this category. Statewide, there were 8102 guilty findings, 1000 bail forfeitures, 14 acquittals, and 6180 charges dismissed in "other traffic misdemeanors". Id.

Even for an expedited proceeding, the attorney needs to confer with the client and the prosecutor, review the record, and conduct the court hearing, all of which can take at least an hour depending on the court. Because the bulk of the cases will still require full review and preparation and often multiple court hearings, the attorney should not handle significantly more than 300 cases.

Probation Reviews

Probation reviews, called "show cause hearings" in some courts, can be as time-consuming as many new charge prosecutions, particularly if the prosecutor chooses to proceed on a probation revocation rather than file a new charge. When these reviews are contested, they result in evidentiary hearings that can last several hours.

Often, defendants receive longer jail sentences on a probation revocation than they do on the original conviction. Caseload measures should take these local practices into account. Some systems count probation reviews as a full case, and others discount them, for example, awarding less than a case credit for a review. The system used should ensure that the attorneys have enough time to prepare the cases, whether probation reviews or new charges.

It is critical, however, that the defender ensure "that there are no written admissions of guilt by the defendant to the charged offense", to avoid immigration problems. See, Immigration and Washington State Criminal Law, p.110 (2005).

Also, bail forfeitures appear on criminal history. And they can be interpreted differently. DSHS defines a bail forfeiture as follows: "**Bail Forfeiture** - The money which the defendant posted at the time of arrest is lost to the defendant when the defendant does not comply with the directions of a court requiring defendant's attendance at a criminal action or proceeding and does not otherwise make himself/herself accountable to the courts. A bail forfeiture finding is not a charge of guilty or not guilty – it is a way to clear the case from the court system." Background Check Guidebook, at: http://www1.dshs.wa.gov/msa/bccu/bccu-gb-printable.htm.

The Court Administrator's JIS-Link Code Manual has this explanation for its Bail Forfeiture code: "DEF is found guilty of a criminal charge and allowed to forfeit bail pursuant to CrRLJ 3.2(m). Note: This code is entered by the system when full payment is receipted on RCP with a Tran Type of BF (Bail Forfeiture)." At: http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=clj_manual&file=findjudg .

The Washington State Patrol states on its web site: "Local criminal justice agencies are required by law to submit felony and gross misdemeanor arrest and disposition information to the State Patrol, where it is included in a CHRI data base. **...**Certified criminal justice agencies may request and receive unrestricted CHRI from the Identification and Criminal History Section for criminal justice purposes." http://www.wsp.wa.gov/crime/crimhist.htm#glossary

Misdemeanor Convictions Can Result in Deportation

Some attorneys perceive that misdemeanor cases are simple, with minimal consequences. While this can be true of some first offense property offenses, even minor charges can result in immigration consequences for non-citizen defendants, and collateral consequences, including loss of a job or revocation of probation in other courts, can be severe. With seemingly minor offenses, the lack of"seriousness" of the offense may not prevent it from being used to support removal from the country, as even a “minor” offense can be considered a"crime involving moral turpitude" or an "aggravated felony”.

The New Mexico Supreme Court noted that:

> Deportation can often be the harshest consequence of a non-citizen criminal defendant's guilty plea, so that "in many misdemeanor and low-level felony cases . . . [he or she] is usually much more concerned about immigration consequences than about the term of imprisonment." Jennifer Welch, Comment, Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively, 92 Cal. L. Rev. 541, 545 (2004). The American Bar Association has recognized as much by stating that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." ABA Standards for Criminal Justice: Guilty Pleas § 14-3.2 cmt., at 127 (3d ed. 1999). Therefore, under the ABA Standards for Criminal Justice, "defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." Id. § 14-3.2(f).

The Court held that “criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain.” *State v. Paredez*, 136 N.M. 533, 539 (N.M. 2004).

An example of a category of cases that can appear simple but in fact demand much work is driving with a suspended license in the third degree (DWLS 3). The recent re-enactment of a DWLS 3 law has resulted in many prosecutions of a crime that some lawyers and judges find to be easily resolved. But the reality is that most DWLS 3 cases have significant legal and factual issues.

In approximately half of DWLS 3 cases, there is a viable motion to suppress. Either there is a factual issue about whether there was probable cause to believe that the accused committed an infraction (e.g., did the client roll through a stop sign); or the officer has a mis-impression about what constitutes an infraction (e.g., believing that a cracked windshield or cracked taillight is a violation per se); or there arguably was a pretext stop. Investigation is often required, including visiting the scene,

taking photos, and interviewing the officer. The attorney needs to conduct legal research and move for discovery (e.g., to learn what else the officer was doing prior to and after the stop, to shed light on the possible pretext issue).[29]

There remain due process issues in DWLS 3 cases. The Washington Supreme Court has held that persons who failed to resolve minor traffic tickets, thereby causing an automatic license suspension, cannot have their license suspended by the Department without first having an opportunity for a hearing on the matter. *Redmond v. Moore*, 151 Wn.2d 664, at 677 (2004). The legislature passed a statute to address this issue, but issues remain on the process provided by the Department of Licensing.

There may be notice issues depending on the address to which the DOL sends information about a hearing.

There also is a double jeopardy argument in cases in which the client's car has been impounded before prosecution. If counsel can develop a factual record that DWLS 3 impoundment was being used in fact as a surrogate for criminal prosecution, and to punish and deter, this argument would be available.

Misdemeanor convictions can be the predicate for felony prosecutions. In 2006, the legislature passed HB 3317, making a fifth DUI in ten years a felony punishable by up to five years in prison. Misdemeanor convictions for violations of “no contact orders” can also be the predicate for a felony offense that without the prior convictions would be a misdemeanor. Rev. Code Wash. (ARCW) § 26.50.110(5).

The mix of cases varies by court. Across the state, domestic violence cases can constitute between 9 and 18 per cent of the caseload. DUI cases vary from between 10 and 25 per cent of the caseload. Each locality should review the mix of cases and adjust the case standard downward if the practice warrants it.

At 300 cases per year, a lawyer would have an average of 5.5 hours per case. Every case that goes to trial, consuming perhaps a day and a half of court time and at least a full day of preparation, reduces the time available for the rest of the cases. In some courts, a high percentage of cases are dismissed on the day of trial, requiring the lawyers to invest many hours in preparing cases that do not go to trial.

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[29] In one Seattle DWLS 3 case, the officer said he stopped the defendant because the officer, driving by on "routine patrol", claimed to recognize the defendant from a DUI arrest two years earlier of which the officer was aware, although he had not made the DUI arrest. The officer said that he ran the defendant's name on the computer on the theory that the DUI likely had led to suspension. Finding that it had, he stopped the car and arrested the defendant. The defense attorney subpoenaed records on the rest of the officer's shift and learned that the client's license had been checked in the computer 30 minutes before the stop. The case was dismissed.

There have been effective efforts in some courts to divert driving or other cases into special programs or courts. This has the benefit of removing some cases from more formal proceedings. The result can be that the remaining cases are more complicated. The 300 case standard, which was first adopted by the WDA in 1984 and by the King County Bar Association in 1982, remains appropriate today.

Many public defense programs count a new case when a client returns after being on bench warrant status for some months. Local practice should recognize when the case has been suspended so long that re-opening it requires work comparable to that of a new case.

Changes in Juvenile Practice

"Juvenile defenders are in a unique position not only to protect children's rights, but also to create positive outcomes in their lives." Assessment of Access, supra, at 9.

Unless juvenile defenders have enough time, training, and resources, it is not likely that they can either protect their clients' rights or create positive outcomes for them. The juvenile standard of 200 cases per attorney per year would allow a lawyer approximately 8 hours per case.

In juvenile, the cases have become more serious as well. For example, in 1996 in King County, 36.3 % of juvenile filings in King County were felony cases. In 2004, it was 37.6 %. In 2005, this increased sharply to 40.2%. This change in the mix of cases supports a reduction in the juvenile caseload standard, to reflect the greater complexity of the work and the increased risk of longer incarceration for the clients.

As the MacArthur Foundation has noted, "The way in which young people are treated in the criminal justice system often is at odds with research findings about how and when humans develop mature moral, psychological, and cognitive capacities." [30]

Representing juveniles can be more challenging than representing adults, and their lack of maturity presents both practical difficulties and opportunities for legal defenses. The U.S. Supreme Court, in finding that the death penalty cannot be applied to juveniles, emphasized the differences between children and adults:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological

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30 http://www.macfound.org/site/c.lkLXJ8MQKrH/b.943477/k.9538/Domestic_Grantmaking__Juvenile_Justice.htm. The foundation notes also the significant racial disparity in juvenile court. "Youth of color make up one-third of all youth in America, but two-thirds of youth in juvenile detention facilities." Id.

studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." Johnson, supra, at 367, 125 L. Ed. 2d 290, 113 S. Ct. 2658; see also Eddings, supra, at 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, infra.

Roper v. Simmons, 543 U.S. 551, 564 (U.S. 2005).

The Court also noted: “The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).” 543 U.S. 551, 570.

Juvenile brains are not yet fully developed. [31]

Juvenile defense attorneys must be prepared for competency hearings for young clients, knowing the law and obtaining expert testimony when necessary. Washington law provides:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

Rev. Code Wash. (ARCW) § 9A.04.050

In addition, counsel needs to be familiar with the law on declination of juvenile court jurisdiction, and be prepared to obtain expert testimony in those cases. RCW 13.40.110. In a recent homicide, the prosecution pursued a decline for a 13 year old boy. [32] In a recent seven month period in King County, the prosecution filed

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[31] See, e.g., Thompson, “Adolescent Minds Are Blind to Consequences”, Los Angeles Times, April 9, 2001: “Adolescent decision-making bears little resemblance to the mental operation that adults and adult courts treat as typical”. *See also*, “ It is now quite clear that the brain undergoes a tremendous amount of development during the teen years, including a major remodeling of the frontal lobes, which are involved in planning, decision-making, impulse control and language.” White, Helping Adolescents Make the most of their changing brains.” http://www.duke.edu/~amwhite/Adolescence/teenbrainfactsheet.pdf .

[32] See, “Police: 13-year-old plotted to kill grandmother in her sleep”, Seattle PI, March 24, 2006.

decline petitions on a 13 year old, a 14 year old, and a 15 year old in three different homicide cases.

Under Washington adult sentencing law, "All felony dispositions in juvenile court must be counted as criminal history for purposes of adult sentencing, except under the general "wash-out" provisions that apply to adult offenses." See, Adult Sentencing Manual 2005, page I-16. Accordingly, counsel for juveniles need to be concerned about the nature of any conviction offense and how it might be used to punish the client in the future.[33]

Many juvenile courts rely on commissioners to supplement or replace elected judges. This can result in defense attorneys devoting considerable work to revision motions to seek reversal by a judge of a commissioner's order. The defenders need time to prepare those motions and the briefs that support them.

Status Offenses ("Becca")

The types of "status offenses" contemplated here are those commonly known in Washington as "Becca" cases, where the court has declared, or threatens to declare, a child a "truant," under RCW § 28.225, or an "At-Risk Youth," or "Child in Need of Services" under RCW §13.32A. [34] The recent report, *Washington; An Assessment of Access to Counsel and Representation in Juvenile Offender Matters,* explains that "the absence of standards to govern and guide the work of the defense attorney in Becca court may lead to many…failings."[35] The *Washington Assessment* suggested that there is a need for standards for caseload limits, attorney qualifications, and the basic requirements of a status offender practice.[36]

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[33] "A juvenile record is increasingly becoming an impediment to employment. The U.S. military considers juvenile records when recruiting, and more job applications explicitly ask about juvenile offenses or broadly ask about arrests, which may include juvenile acts." "The Role of Specialty Mental Health Courts in Meeting the Needs of Juvenile Offenders" (2004), available at http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/juvenilemhcourts.htm#_ftnref32

[34] "Traditionally, status offenses were those behaviors that were law violations only if committed by a person of juvenile status." "Offenders in Juvenile Court, 1997," Juvenile Justice Bulletin, October, 2000, at: http://www.ncjrs.org/html/ojjdp/jjbul2000_10_3/page6.html. As the law has evolved, contempt proceedings have been used to provide detention as a response to these juvenile behaviors. While being a child in need of services is not an "offense", it is a status, and the term "status offense" will be used herein.

[35] American Bar Association Juvenile Justice Center, *Washington; An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters*, Oct. 2003 (hereinafter, *Washington Assessment*),at 75.

[36] *See Id*. at 74-75.

The right to counsel in these cases inheres at different stages of the proceedings for each of the three types of status "offenses:"

Truancy: Because they are considered civil in nature, and because the "liberty interest" at stake has been found insignificant,[37] the truant or allegedly truant child has no right to counsel unless and until a contempt action is filed against him.[38] Even after the right to counsel inheres, however, many children reportedly waive that right.[39] According to a fiscal note prepared in the 2005 legislature for HB 1531, which would have limited waivers of counsel for juveniles, it is estimated that in Snohomish County, 65-75 juveniles per week have truancy contempt proceedings without counsel. http://www.ofm.wa.gov/fns/showPackage.asp?RecordID=pdfs/2005/p9955.pdf

At-Risk Youth: Children against whom an At-Risk Youth petition is filed, usually by their parents, have a statutory right to counsel beginning when the petition is filed.[40]

Children in Need of Services: "CHINS" petitions also entail a statutory right to counsel as soon as the petition is filed.[41] Because the child is often the party who files a CHINS petition, the parents, if indigent, are entitled to counsel as well.[42]

1) Particular Duties of "Becca" Counsel

In both the "At-Risk Youth" and "Children in Need of Services" contexts there are a number of different hearings at which counsel must be present and prepared to advocate. These include, but are not limited to, initial fact-finding hearings, disposition hearings, review hearings, and contempt hearings.

Although it is true that there is no right to counsel in pre-contempt truancy hearings, that fact presents a number of challenges, and more work, for the truancy attorney when s/he is eventually appointed. In order to represent effectively, counsel has to address the numerous problems that may have been created by the client's lack of representation in earlier proceedings. For example, before filing a truancy petition, the complaining school district is required by statute to

> take steps to eliminate or reduce the child's absences. These steps shall include, where appropriate, adjusting the child's school program or school or course assignment, providing more individualized or

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37 *See Perkins v. State*, 93 Wn. App. 590, review denied sub nom. *In re Truancy of Perkins*, 138 Wn. 2d 1003 (1999).

38 RCW §28A.225.090(4).

39 *See* Robert C. Boruchowitz, *The Right to Counsel: Every Accused Person's Right*, Washington Bar Association Bar News, Jan. 2004, http://wsba.org/media/publications/barnews/2004/jan-04-boruchowitz.htm.

40 RCW §13.32A.192(1)(c).

41 RCW §13.32A.160(1)(c).

42 RCW §13.32A.160(1)(b).

> remedial instruction, providing appropriate vocational courses or work experience, referring the child to a community truancy board, if available, requiring the child to attend an alternative school or program, or assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school. [43]

When a school fails to take these steps, the problem often goes un-addressed at the initial truancy hearing because there is no attorney present to raise the issue. It then becomes the duty of the subsequently appointed counsel to discover and argue the failure after the fact.[44] Additionally, the truancy defender should find out whether the client waived any earlier hearings, which is reportedly a common occurrence.[45] If there was a waiver, counsel should consider raising a possible claim that the child was, or that all children necessarily are, incompetent to waive the hearing.

Another issue for counsel to address is potential racial disparity in truancy contempt filings. In at least one major school district, defenders found that there was significant racial disparity in the cases and that children of immigrant families were disproportionately involved in truancy prosecutions.

Although "Becca" children *do* have a right to counsel in all three types of cases, counties report that children often waive this right.[46] This creates a situation in which counsel, in order to provide genuinely effective representation, must address both the results of the proceedings in which counsel was waived and the legality of waiver itself. Although Washington law allows a juvenile to waive the right to counsel, this runs "contrary to the IJA/ABA Standards,"[47] and lawyers should work to insure the availability of counsel. Children need counsel not only because they need to consult with an attorney in order to understand the potential consequences of their waiver,[48] but also because they are potentially, either per se or in particular cases, incapable of making a "knowing and voluntary" waiver at all. The presence of counsel is essential to any determination of a proper waiver.[49] The *Washington Assessment* concludes: "The participation of counsel on behalf of youth in Juvenile

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43 RCW §28A.225.020 (1)(c).

44 Shortly after the implementation of the "Becca" law, lawyers at The Defender Association in Seattle argued that there should be a right to counsel at initial truancy hearings. Then Superior Court Judge and now state Supreme Court Justice Bobbe Bridge disagreed, and said that counsel could raise at a contempt hearing some of the issues related to the original petition. *In re P S*., No 95-7-01650-1, April 23, 1996. The court found: "…once the Court takes jurisdiction of a truancy matter, the District is not freed from providing continuing interventions, to mitigate PS' truancy. That it is at the contempt hearing that the issue of whether PS' violation of the original court order of truancy is willful in light of all the circumstances will be considered."

45 *Washington Assessment* at 71.

46 *Id*. at 72.

47 *Id*. at 28.

48 *See Fiscal and Policy Notice*, MD. SB 163 (2004).

49 *See Fiscal and Policy Notice*, MD. SB 163 (2004).

Court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of the proceedings."[50]

Contempt hearings are not simply fora for remedying the problems of prior proceedings – they present a number of complexities and potential consequences of their own. Children in contempt hearings face detention for up to seven days, not including weekends and holidays, although there is the risk that commissioners will jail children "indefinitely," as they did as recently as 1999.[51] Counsel must ensure that the court limit detention according to the legal limits of remedial sanctions[52] and that all such sanctions contain a purge clause.[53] Furthermore, if the purge conditions are unrealistic for a particular child – for example, a lengthy essay assignment for a child with learning disabilities – the attorney will need to raise the claim that the client does not, as the law requires, carry "the keys of his prison in his own pocket."[54] Counsel may also need to argue the validity of the court order that was allegedly disobeyed, whether the alleged act of disobedience took place, and the burden of proof for the contempt determination.[55] Counsel need to be ready to seek interlocutory appellate review when the trial court improperly imposes punitive contempt.[56]

2) Counsel's Role in "Becca" Cases

Effective representation in truancy, "At-Risk Youth," and "Children in Need of Services" cases may require numerous hearings and significant litigation, and the role of defense counsel in these cases is complex and sometimes misunderstood.

As in any criminal case, the primary function of defense counsel in "Becca" cases must be to advocate thoroughly and zealously on behalf of the client. But in these quasi-criminal proceedings defense attorneys often find themselves playing a number of roles in addition to that of the traditional legal advocate. "There is significant confusion over the role of the attorney" in these cases. "Some attorneys see their role as pure litigator, working to advise the child of his or her rights, present them with options, and ensure that court rules and statutes are followed,"[57] whereas "other attorneys believe that in order to be successful as defense counsel in Becca cases, you must have some understanding of the client's social history

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50 *Washington Assessment* at 26. citing IJA/ABA. *Juvenile Justice Standards*, Standards relating to Pretrial Court Proceedings, summary of part 5.1. (1996).

51 Catherine Cheney and Anne Kysar, *The Becca Bill: Is the Cure Worse than the Disease?*, Washington Bar Association Bar News, April 1999, at 4, www.wsba.org/media/publications/barnews/archives/1999/apr-99-becca.htm.

52 RCW §7.21.030, State v. ALH, 116 Wn. App. 158 (2003).

53 *Id.*

54 In Re M.B., 101 Wn. App. 425, at 439 (2000).

55 RCW §28A.225.090(2) (2004), Cheney and Kysar, *supra*, at 4.

56 See, In re E.T., No. 54776-3-I, Washington Court of Appeals, September 1, 2004, available at www.defender.org.

57 *Washington Assessment* at 69.

and family dynamics before you can adequately represent them."[58] To work effectively on behalf of a child in this context, however, counsel must be able both to address the facts alleged in the petition, and to advocate for alternatives. To do this, counsel must have insight into their clients' particular needs as well as a thorough understanding of the social services available in their communities such as after-school programs, drug treatment, and family and individual counseling. Sufficient training is required both to teach attorneys about their unique role in these cases and about the social conditions that create the particular problems that bring "Becca" children to them in the first place. The *Washington Assessment* recommended that there be, in the context of Juvenile Offender cases, a broad spectrum of training for attorneys representing children. This training includes use of experts, mental health issues, and appropriate treatment options.[59]

The *Washington Assessment* pointed out that effective social work advocacy can help to develop dispositional alternatives.[60] Defenders who do not have social workers available to help them, either on staff or by court appointment, should seek those resources. Defense attorneys need, on some occasions, to incorporate into their practice certain social work skills and functions to assist their clients. In some counties, there are resources in court proceedings, including DSHS social workers, available to assist families. In other counties, the attorney for the youth is the only professional available to help the child or the family. In those cases, attorney caseloads must be lower. Additionally, the more difficulty a child or family has obtaining treatment, the more likely it is that the child will violate a court order. Caseload levels must therefore be reduced if necessary to accommodate the varying availabilities of resources both for training attorneys and providing services to children and families.[61]

It is also the case that often, if not usually, there are no other lawyers in the courtroom in truancy cases. This can add burdens to the defense attorney, both because there is no legal professional on the other side with whom to negotiate, and because the court may ask the defense attorney to assist in explaining things to the family.

A "Becca" attorney should be familiar with state and federal education law,and advocate for the client in that framework as well. For example, the Washington

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58 *Id.*

59 "Juvenile defenders should encourage development of expertise through initial and ongoing training on all of, but not limited to, the following topics: attorney/client relationship and the role of the defense attorney in Washington's juvenile justice system, the importance of investigation and how effectively use an investigator, pre-trial motions practice, use of experts, capacity and competency hearings, legal standards, child development, mental health issues, learning disabilities, negotiations, time and case management, case planning, racial disproportionality, effective sentencing advocacy, child development [sic], mental health problems, mental/emotional disabilities, and appropriate treatment options." *Washington Assessment* at 59, Recommendation 2.

60 *See Washington Assessment* at 59, Recommendation 4.

61 *Washington Assessment* at 69-76.

State Constitution makes it the "paramount duty of the state to make ample provision for the education of all children residing within its borders."[62] It is important, especially in the truancy context, for lawyers to raise any failures on the part of the school district to fulfill this constitutional duty. The Washington Supreme Court has held that this right "would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the marketplace of ideas."[63] A constitutional mandate so protective of the right to a genuinely meaningful education cannot be overlooked when counsel is called upon to address a school district's failures in a truancy case. Along the same lines, a "Becca" attorney should also consider the best way to advocate for the client in hearings or appeals of school suspensions or expulsions under statutory and administrative law.[64]

A certain amount of school hearing advocacy is assumed in this caseload standard. In individual cases, or in school districts with many suspensions, it is possible that the caseload would have to be less than this standard, to make sure that counsel has adequate time to represent the child. A standard of 200 cases means that the attorney has slightly more than eight hours per case. Providing effective representation to a child in a CHINS or ARY proceeding may well require helping the child in a school administrative hearing. In such cases, particularly if there are several court hearings on the CHINS or ARY petition, the attorney time can easily exceed 20 hours.

There are a number of other factors that contribute to the need for lower caseloads for "Becca" attorneys. If a client is a teenager, for example, it make take counsel extra time to develop a rapport with the client that will allow the kind of communication and trust that is necessary for effective legal representation. Similarly, in areas where "Becca" children disproportionately come from immigrant or refugee families, language and cultural barriers may take significant time to surmount. In both of these situations, the additional work on the part of defense counsel is not dispensable, and caseloads must adjust to allow it.

Several Washington counties have branches of the TeamChild program, which provides representation for children who need assistance with education, health care, and housing issues. See, http://www.teamchild.org/overview.html. Attorneys in counties with TeamChild offices should refer children to them as appropriate.

Dependency

Defender dependency practice includes representing both children and adults in abuse and neglect proceedings. See JuCR 9.2. The standard calls for 80 open cases at a time. It is expected that a caseload of 40 new dependency clients per

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62 WASH. CONST. art. IX, §1.

63 Seattle School Dist. v. State, 90 Wn.2d 476, at 518 (1978).

64 *See* RCW § 28A.305.160, WAC 180-40-310.

year will produce an ongoing caseload of approximately 80 open cases, as dependency cases tend to stay open about two years. With 80 open cases, a lawyer can spend an average of slightly more than 20 hours a year per client. As with all the standards, this one assumes that the lawyer will have social work assistance on staff or otherwise available. Under this standard, a termination petition should be counted as a new petition, as it is separate from the original dependency petition. Also, as in juvenile offender practice, dependency attorneys often have to prepare revision motions from decisions by commissioners.

As stated clearly in the *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001, available on line at: http://naccchildlaw.org/training/standards.html):

> every child subject to a child protection proceeding must be provided an independent, competent, and zealous attorney, trained in the law of child protection and the art of trial advocacy, with adequate time and resources to handle the case.

Dependency and termination cases can be among the most serious that defenders handle. As the state supreme court has written:

> The interest of a parent in the custody and control of his minor child has long been recognized by this court as a sacred right. *In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974). ....A corollary interest which has perhaps not received as much attention is that of the child in having the affection and care of his parents. .... In *In re Day*, 189 Wash. 368, 381-82, 65 P.2d 1049 (1937), we said:
>
> > As has been repeatedly stated, in cases where the superior court has jurisdiction to determine the custody of a child, the welfare of the child is the paramount consideration. It is also true that the right of a parent is always given great weight, and that, as was said by Judge Dunbar, speaking for the court in the case of *State v. Rasch*, 24 Wash. 332, 64 Pac. 531 [1901],
> >
> > "It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent."
> >
> > Mere temporal or social advantages weigh little as against the right of a parent, and the ties of blood should not be interfered with or the right of the parent abridged, save for the most powerful reasons.

The defender in dependency cases must be familiar with mental health and substance abuse experts and be able to present and cross examine expert testimony. Issues relating to the Indian Child Welfare Act can be critical. Recent efforts to make review hearings more substantive and to have meaningful

parenting planning hearings require more intensive work by defenders and careful attention to caseload and workload limits.[65]

Dependency cases often involve multiple attorneys and caseworkers, as well as mental health experts. Defense attorneys rely heavily on their own social worker to provide initial case assessments and often to prepare reports and testify in court. Dependency trials can take many days and require significant preparation. Termination trials, in which the parent's right to the care, custody, companionship, and control of the child is at stake, are among the most serious that an attorney can have.

"Terminating parental rights is one of the severest of state actions and implicates fundamental interests."*In re Welfare of J.M.*, 130 Wn. App. 912, 921 (2005), citation omitted. The Court in *J.M.* reversed a termination because

> a mother's lawyer stipulated to the admission of relevant but highly damaging written reports by non-testifying experts. The reports all came into court by way of witnesses who were not experts in the relevant fields and could not be cross-examined as to the substance of the reports. This was not effective representation.
>
> *In re Welfare of J.M.*, 130 Wn. App. 912, 915 .

"Parents have a fundamental right to the care and custody of their children, and a trial court asked to interfere with that right should employ great care. *In re Welfare of H.S.*, 94 Wash. App. 511, 530, 973 P.2d 474 (1999), cert. denied, 529 U.S. 1108 (2000)." *Hanel v. Dep't. of Soc. & Health Servs. (In re J.H.),* 2002 Wash. App. LEXIS 1685 (2002).

The U.S. Supreme Court has emphasized that the "parents and the child share an interest in avoiding erroneous termination." *Santosky v. Kramer*, 455 U.S. 745, 765 (1982).

Lawyers for both parents and children must have reasonable caseloads, appropriate training, and adequate resources just as lawyers in criminal cases must have.

The ABA Center on Children and The Law recently published a study that included recommendations for dependency courts. See, Parental Substance Abuse, Child Protection and ASFA: Implications for Policy Makers and Practitioners (2005), http://www.abanet.org/child/executive_summary.pdf
The study concluded that "most cases involve parents who are substance abusers." This is consistent with the evaluation of the Washington OPD evaluation of its parent representation program, that between 55 and 76% of the clients had

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[65] See, Washington CIP Re-Assessment, King County Juvenile Court Project Site Report (2005), recommending longer court hearings.

substance abuse issues. Defense attorneys need to be prepared to address the issues related to substance abuse.[66]

Accepting forty new clients per year can generate a multitude of hearings, including the initial shelter care hearing, a dependency trial, a permanency planning hearing, and reviews. This standard allows for approximately 41 hours attorney time on average per client. It requires that the attorney have significant assistance from social workers and experts.

Specialty Courts

Specialty courts, sometimes called “problem-solving courts”, include drug courts, mental health courts, community courts, and others. Defender workloads should be such that they can advocate zealously for their clients. The National Legal Aid and Defender Association has published the Ten Tenets of Fair and Effective Problem Solving Courts. Tenet 10 states:

> 10. Nothing in the problem solving court policies or procedures should compromise counsel' s ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.

The attorney work load in a specialty court should allow the attorney enough time to advocate effectively and to protect the clients' rights in a setting that can discourage assertion of rights because of the “team” model. As emphasized in “Ethical Considerations for Judges and Attorneys in Drug Court,” National Drug Court Institute (2001): “Even if the client admits a history of alcohol and other drug use (AOD) and is eager to enter treatment, the lawyer still has a duty to investigate the charges pending against the client and determine the client's full range of legal defenses to those charges.... Whenever drug court enrollment requires irrevocable waivers of legal rights before counsel has an opportunity to make an adequate investigation and assessment of a client's case, counsel should not advise clients to enroll.” at 32,33. Available at: http://www.ndci.org/publications/ethicalconsiderations.pdf.

Civil Commitment Cases

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[66] Improving Parents' Representation in Dependency Cases: a Washington State Pilot Program Evaluation, at 6. http://72.14.203.104/search?q=cache:yMMAxsFzzqYJ:www.opd.wa.gov/Publications/Dependency%2520%26%2520Termination%2520Reports/watabriefcolorfinal%255B1%255D.pdf+length+of+dependency+cases&hl=en&gl=us&ct=clnk&cd=3&ie=UTF-8

Commitment cases under **RCW 71.05** require a fast turn-around, as the initial hearings occur within 72 hours of the detention of the client. The lawyer has to go to see the client, often in a hospital some distance from the court and from the lawyer's office. When court hearings take the bulk of the day, going to see the client easily can go into the evening. After the 14 day hearing, if the client is committed, the attorney has to prepare for a possible 90 day hearing, and to explore less restrictive alternative possibilities. The attorney has to consider and prepare for possible 180 day commitment hearings. In addition, there can be review hearings and revocation hearings. In some cases, attorneys must prepare and conduct jury trials.

Attorneys in the commitment practice must be familiar with psychiatric medications and must keep track of the client's hospital chart. They must work with social workers, either on their staff or appointed as experts, to develop less restrictive alternatives. "The Legislature has emphasized the importance of less restrictive treatment and has, in fact, directed the court to consider less restrictive treatment at each stage of involuntary commitment proceedings." *Villanueva v. J.S. (In re J.S.),* 124 Wn.2d 689, 698 (1994).

Because a client normally has a hearing within 72 hours of being detained, an attorney usually has 24-48 hours to prepare for the 14 day - hearing. Prior to seeing the client the attorney should have reviewed the petition and witness statements and reviewed the client's medical chart. The initial interview with the client should include discussion of the following:

- Attorney-client confidentiality and role of attorney;
- Right to refuse medications 24 hours before court, and other rights regarding medication;
- Right to argue before the court that the client is a good faith volunteer patient;
- More restrictive versus less restrictive orders;
- Possible financial liability;
- Right to remain silent and have counsel present when meeting with court evaluator;
- Review of out patient services, funding and housing.

Before the hearing the attorney should consider possible pretrial motions (e.g., the emergency detention was unlawful because the danger was not imminent, the petition was filed improperly, hearing not held within 72 hours etc.), contact any out patient providers to arrange a less restrictive alternative, and interview the witnesses.

For the 90, 180 and revocation hearings the attorney needs to determine whether expert witnesses are needed. This would include a psychiatrist for an independent evaluation and a social worker to help arrange a less restrictive alternative. An attorney in civil commitments should be hiring experts frequently in order to provide effective representation in these hearings. For jury trials, counsel should provide jury instructions and a trial memorandum.

As in other types of proceedings, attorneys often have to prepare revision motions from decisions by commissioners.

This standard also applies to chemical dependency prosecutions under **RCW 70.96B.050.**

Sex Offender Commitment Cases

The cases contemplated in this portion of the standard are those defined by, and punishable under, **RCW §71.09**. Because these cases are complex, involve thousands of pages of discovery, require extensive expert testimony, and frequently have long trials and years of subsequent proceedings, the number of new cases an attorney can accept per year is quite limited. Best practice contemplates that there will be a two-attorney defense team, as in capital cases, because of the scope of work required. Attorneys who receive four new cases per year and who remain in the practice for three years easily could have a dozen open cases, with four month-long jury trials per year and at least eight complicated review hearings per year.

Representing clients who are charged with being, or who have been convicted as, "sexually violent predators" is complex and difficult. These cases can be extremely time-consuming both during any given stage of the proceedings and over the months and years of continuing representation these cases sometimes demand. Because the state continues to produce evidence about the client while the client is detained at the Special Commitment Center, there is a continuing stream of daily logs as well as of forensic reports that must be monitored. Trial can easily require between 1000 and 2000 hours of attorney time, and reviews can demand hundreds of hours.

Attorneys typically receive these cases in one of two postures, both of which involve petitions alleging that the respondent is a "sexually violent predator" as defined by **§71.09.020(16).** Either the respondent is due to be released from "total confinement" and the government is filing the petition under **RCW §71.09.030(1), (2), (3),** or **(4),** or the state is alleging that a client who has been released from total confinement has committed a "recent overt act," as defined by **RCW §71.09.020(10)**, and is filing the petition under **RCW §71.09.030(5)**. The initial hearing occurs quickly, and the amount of information about the client, often covering decades, can be in the thousands of pages.

<u>The Commitment Trial</u>

In preparing to defend the client against the allegation that s/he is a "sexually violent predator", the attorney should explore arguments on all elements of the claim, including whether the predicate conviction is invalid or inadequate to meet the statutory requirement, whether the client has a "personality disorder or mental

abnormality,"[67] and whether the client is "more likely than not" to "engage in predatory acts of sexual violence if not confined in a secure facility."[68] In petitions under **RCW §71.09.030(5)**, the attorney must also challenge the alleged "recent overt act." Preparation for these trials can be extremely time-consuming.

1) The attorney needs to locate and hire expert(s) to evaluate the client and testify at trial. Expertise in this field is rare, and it is often necessary to hire an expert from out of state. Once experts are secured, the attorney needs to obtain funding to pay for the services, send them discovery, arrange for them to meet with the client, and work closely with them in preparing the case for trial. The attorney also needs to prepare to depose and cross-examine the government's expert(s), and this requires gaining a working understanding of relevant science and research regarding medical and psychological diagnoses and risk-assessment.

2) The attorney needs to play an integral role in the investigation for "sexually violent predator" trials. Discovery in these cases can be thousands of pages long, and the attorney needs to read through it carefully in order to decide what information needs to be located, and which people in the client's life will bring the most valuable evidence. Because these trials involve prior convictions, the people who need to be interviewed are often far away and difficult to locate.

3) The attorney needs to meet regularly with the client. Respondents are almost always deposed in these cases, and depositions cover both the client's past history as well as his/her current situation, including treatment, behavior, etc. The attorney needs to review this process with the client and discuss all of the grounds the deposition will cover, as well as the trial itself. If the client is located at a significant distance from the attorney the journey itself can be time-consuming.

4) The attorney needs to learn about the Special Commitment Center or other facility in which the client is detained. To advocate effectively, counsel has to understand what the client's treatment program is designed to do, how it functions, and how the client has fared in it.

5) The attorney should work to find potential housing and treatment for the client if he/she were to be granted an unconditional release. Although there is no requirement that such services be procured for the purposes of the commitment trial, the judge or jury will often be more amenable to release if this sort of information is presented.

<u>Continuing Representation</u>

If the client is found to be a "sexually violent predator" and is subsequently committed, either by stipulation or at trial, the attorney must prepare for the "review" which takes place a year later.[69] In that review, there will be a consideration of

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67 RCW §71.09.020(16).
68 RCW §71.09.020(16).
69 RCW §71.09.070.

whether or not the client's condition has changed such that s/he is no longer a "sexually violent predator," and therefore should be given an "unconditional release,"[70] or whether a "less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community."[71]

Finding a "less restrictive alternative" is a challenging process. If the client does not have family that can constantly and adequately supervise and secure him/her,[72] the attorney must search for other housing arrangements that will do the same, and residential organizations are often reluctant to accept these clients. The attorney must also find a "treatment provider" for the client, which also can be difficult. Often such providers refuse to treat former "sexually violent predators".

If a "less restrictive alternative" is granted, the attorney must continue to represent the client at the annual review hearings that follow. At each hearing the attorney must be prepared to advocate for appropriate privileges or new freedoms the client may be prepared to handle. If the client is arrested for any alleged new incidents during his "less restrictive alternative" placement, the attorney must defend his client against these charges and/or advocate for appropriate modifications of the client's conditions of supervision and security.

Contempt of Court Cases

In the last 15 years, the number of contempt of court cases pursuant to **RCW 26.09.160** (Failure to comply with decree or temporary injunction) has skyrocketed. The cases can be initiated by the prosecutor or a private party, and they can produce a number of reviews. In King County, the experience has been that one case can generate nine review hearings. That means that 75 new cases can produce 675 hearings in one year.

As these cases can last several years, there will be ongoing cases in addition to the 75 new cases. These ongoing cases will also generate 3-6 hearings each year. A full-time attorney exclusively practicing in the Contempt of court area should not have more than 125 open files (75 new cases and 50 ongoing cases). 125 open files will generate approximately 800 hearings each year. In addition to these hearings, there will be revision motions that an attorney will need to prepare. On average, each case will generate 2-3 revision motions during its lifetime. In addition to 800 hearings per year, an attorney can also expect to draft an average of 45 revision hearing motions. Lastly, attorneys are expected to handle returns on warrants. These hearings typically occur on the next court day and there is little notice or time to prepare. An attorney with 125 open files can expect to have up to 50 returned on warrant hearings scattered throughout the year, in addition to the

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70 *Id.*

71 *Id.*

72 RCW §71.09.092.

review and revision hearings, bringing the total amount of scheduled hearings close to 900 in any given year.

Cases brought by private parties can involve more court time and preparation, and the caseload standard should be adjusted to reflect the nature of the practice in each county.

Appeals

The 25 case per year standard was accepted by a Federal District Court.

> ...this Court finds, that the assignment of significantly more than 25 cases of average complexity to one attorney in a single calendar year would create an unacceptably high risk that the attorney would be unable to brief the cases competently within a reasonable period of time.
>
> United States ex rel. Green v. Washington, 917 F. Supp. 1238, 1250 (D. Ill. 1996).

Given the work required—reading the record, reviewing the court file, talking with trial counsel, communicating with the client, preparing opening and reply briefs, and preparing for and conducting oral argument, as well as possible post-decision motions, 25 cases is a reasonable limit. At a 1650 hour billable year, that is only 66 hours per case. This standard assumes a mix of cases that would include several with shorter records. If the caseload includes a number of long trial records or cases that present constitutional issues of first impression, this rate of work, requiring the completion of two appeals per month, is challenging.

To maintain the 25 case-limit, defense attorneys need adequate per case compensation. The current rates paid for most felony appeals in Washington would provide less than $65,000 per year per full time appellate attorney. This is not adequate, and it forces defenders to exceed the caseload standard.

The standard provides for a maximum of 50 RALJ appeals for misdemeanor cases from district and municipal courts to superior court. The standard is higher than for appeals to the appellate court, recognizing that often the records are shorter than, for example, adult felony cases, and often the issues are less complex. These cases do require review of the record, sometimes actually listening to hours of recorded court proceedings, as well as research and writing and oral argument. At this rate, a lawyer has to complete a full appeal each week if the lawyer takes only two weeks vacation per year. Again, without adequate compensation, it is not possible to hold to this ceiling. A writ of habeas corpus or a writ of certiorari taken from district court to the superior court should be counted as a separate RALJ case.

STANDARD FOUR: Responsibility for Expert Witnesses

Standard:

Reasonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided. Expert witness fees should be maintained and allocated from funds separate from those provided for defender services. Requests for expert witness fees under Court Rule 3.1 f should be made through an ex parte motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-1.4.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV 2d, 3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1983, Standard III-8d.

National Advisory Commission, **Task Force on Courts**, 1973, Standard 13.14.

Commentary:

The availability to the defense of funds for expert witnesses varies greatly from county to county and is often significantly less than the funds available to the prosecution.

Many attorneys contracting for public defense services must pay for expert witnesses crucial to the defense case out of the money they receive for their legal representation. This creates a conflict of interest for attorneys who must choose between their own income and retaining an expert for the defendant.

The ABA **Standards for Providing Defense Services** state that the legal representation plan "should provide for investigatory, expert, and other services necessary to quality legal representation." These services are required not only for an effective defense at trial, but also for "effective participation at every stage of the criminal proceeding." The NLADA **Guidelines** warn against contracts creating conflicts of interest between the defense attorney and the client. "Expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not substantially decrease the contractor's income or compensation."

The Washington Supreme Court has emphasized the importance of using experts in investigating and defending cases.

> Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

Personal Restraint of Brett, 142 Wn.2d 868 ,881 (2001),citing, *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied,* 527 U.S. 1049, 119 S. Ct. 2414, 144 L. Ed. 2D 811 (1999).

In many jurisdictions, defense attorneys must seek court approval for defense experts. This is often done in open court, where the prosecutor is allowed to comment on the appropriateness of the request. The NLADA **Standards for Defense Services** require that funds be provided to defender programs for the "confidential employment of experts and specialists" which may be of assistance to the defense.

In some jurisdictions in Washington, judges have budget line items for defense services which are inadequate to meet the reasonable requests of defense counsel. The approval of expert funds in one case should not deprive another defendant of his or her ability to mount an effective defense. In other jurisdictions only those experts who have been approved by the prosecuting attorney are available to the defense. This severely compromises the defense's ability to present independent evidence and to seek out those experts who will most effectively represent the client's best interests.

STANDARD FIVE: Administrative costs

Standard:

Contracts for public defense services shall 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. Public defense attorneys should have an office that accommodates confidential meetings with clients and receipt of mail, and adequate telephone services to ensure prompt response to client contact.

Related Standards:

American Bar Association, **Standards for Criminal Justice, Providing Defense Services**.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, (1976), Guideline 3.4.

National Legal Aid and Defender Association, **Standards for Defender Services**, 1976 I-3, IV 2a-e, IV 5.

Commentary:

The amount of compensation paid to public defense or contract attorneys must not only cover the amount of time the attorney devotes to a case, but also those expenses necessary to support the attorney's public defense practice. The prosecutors and courts, as branches of local government, have operating budgets that permit the efficient organization and delivery of their legal services. The defense should have facilities, equipment and resources no less than those provided to prosecuting attorneys and judges.

Including these funds in the contracting agreement helps to assure that administrative and business management functions will be performed effectively and on a timely basis. Conversely, the failure to provide these essential funds could lead to poor administrative practices and erratic case management. The NLADA Standards note that the state "has the responsibility to insure adequate funding of defender offices and appointed counsel programs."

STANDARD SIX: Investigators

Standard:

Public defender offices, assigned counsel, and private law firms holding public defense contracts should employ investigators with investigation training and experience. A minimum of one investigator should be employed for every four attorneys.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-4.1 and 5-1.14.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.14.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-9.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 8.

Commentary:

Criminal investigation is an essential element of criminal defense; indeed, the failure to provide adequate pre-trial investigation may be grounds for a finding of ineffective assistance of counsel. All too often it is neglected because attorneys lack the time to conduct their own investigation of the facts of a case or because their office does not employ an investigator.

Investigation is essential to effective representation. The Washington Court of Appeals reversed a conviction because the lawyer did not investigate the case.

> In our opinion, the failure of counsel to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena them, and failure to inform the court of the substance of their testimony, both at the time of argument on the motion for continuance and for a new trial, were omissions which no reasonably competent counsel would have committed.
>
> *State v. Jury,* 19 Wn. App. 256, 263 (1978).

If the defense attorney must personally conduct factual investigations, the financial costs to the system are likely to be greater. When an attorney personally interviews witnesses, the attorney may be placed in the untenable position of withdrawing from the case in order to take the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously made.

When the defense conducts an independent investigation of the facts, the results can be dramatic -- missing witnesses may be brought to the attention of the police, new evidence may be uncovered, and an innocent person may be cleared of charges. In nationally publicized cases, citizens have been wrongfully convicted and imprisoned because the defense did not adequately investigate the circumstances surrounding the case against the client.

Effective pre-trial investigation may benefit the criminal justice system by eliciting information which makes a costly courtroom confrontation unnecessary.

STANDARD SEVEN: Support Services

Standard:

The legal representation plan should provide for adequate numbers of investigators, secretaries, word processing staff, paralegals, social work staff, mental health professionals and other support services, including computer system staff and network administrators. These professionals are essential to ensure the effective performance of defense counsel during trial preparation, in the preparation of dispositional plans, and at sentencing.

1. Legal Assistants - At least one full-time legal assistant should be employed for every four attorneys. Fewer legal assistants may be necessary, however, if the agency has access to word processing staff, or other additional staff performing clerical work. Defenders should have a combination of technology and personnel that will meet their needs.
2. Social Work Staff - Social work staff should be available to assist in developing release, treatment, and dispositional alternatives.
3. Mental Health Professionals - Each agency should have access to mental health professionals to perform mental health evaluations.
4. Investigation staff should be available as provided in Standard Six.

5. Each agency or attorney providing public defense services should have access to adequate and competent interpreters to facilitate communication with non-English speaking and hearing-impaired clients for attorneys, investigators, social workers, and administrative staff.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-8.1 and 5-1.4.

National Advisory Committee on Criminal Justice Standards and Goals, **Task Force on Courts**, Standard 13.14.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard IV-3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-8.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 7.

Commentary:

An effective defense cannot be undertaken without adequate support staff services. These services include not only those needed for trial preparation, but also those required for effective defense participation in every phase of the defense. Although many lawyers now use their own computers to prepare letters, motions, declarations, and memoranda, others rely on legal assistants or word processing staff with legal training. Social service personnel are necessary to defense counsel at the sentencing stage when the judge may consider a range of sentencing alternatives. The pre-sentence reports prepared by defense social workers may be decisive in the court's selection of the term of incarceration or use of alternatives to incarceration. Mental health professionals, in their evaluation and treatment recommendations for clients, also play an important part in the trial preparation and sentencing phase of a case. The defense at trial may be based on the accused's mental state at the time of an incident; the court's disposition at sentencing may turn on mitigating factors presented by a psychological evaluation. Social workers and mental health professionals can also play a key role in dependency and civil commitment cases.

STANDARD EIGHT: Reports of Attorney Activity

Standard:

The legal representation plan shall require that the defense attorney or office maintain a case-reporting and management information system which includes number and type of cases, attorney hours and disposition. This information shall be provided regularly to the Contracting Authority and shall also be made available to the Office of the Administrator of the Courts. Any such system shall be maintained independently from client files so as to disclose no privileged information.

A standardized voucher form shall be used by assigned counsel attorneys seeking payment upon completion of a case. For attorneys under contract, payment should be made monthly, or at times agreed to by the parties, without regard to the number of cases closed in the period.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-3.3. (b) xii, The Report to the Criminal Justice Section Council from the Criminal Justice Standards Committee, 1989.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984 Standard III-22.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Guideline 3.4, 4.1, and 5.2.

Commentary:

The ABA Standards for Providing Defense Services call for all contracts to provide for an appropriate system of case management and reporting. Unfortunately, the 1989 report to the legislature on defense services in Washington found that in many jurisdictions, there was no management information system in place for collecting and maintaining reliable data on costs, caseloads, and attorney activity.

Contracting authorities have an obligation to the public to show how its funds are being spent. Without standardized reports of attorney activities and uniform requests for payment, government has no way to review defense expenditures or to anticipate future costs. The attorneys under contract cannot be held accountable for their work if the oversight agency has no record of what has been done.

The maintenance of records of hours spent on a case, the costs incurred, and the amounts billed are standard business practices in the legal field. Defense attorneys receiving public funds likewise have a responsibility to maintain professional records and to be accountable to the funding agency.

Some attorneys may protest that keeping accurate time records will only take time away from clients; but these records can be of great value to the lawyer who wants to document caseload levels or present an argument for adequate funds. Defense attorneys may also be better able to anticipate workloads if they are able to calculate the average amount of time spent on a particular class of case. Case management and accounting functions are a part of any well-run legal practice.

The specification of regular payments to attorneys under contract is meant to assure them a steady income flow so they can meet regular and necessary business expenses. It is not intended to prohibit a payment system or schedule which reasonably assures the contracting authority that the conditions of the contract, which may include acceptance of a specific number of cases in a given time period, are being met.

STANDARD NINE: Training

Standard:

The legal representation plan shall require that attorneys providing public defense services participate in regular training programs on criminal defense law, including a minimum of seven hours of continuing legal education annually in areas relating to their public defense practice.

In offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held to inform them of office procedure and policy. All attorneys should be required to attend regular in-house training programs on developments in criminal law, criminal procedure and the forensic sciences.

Attorneys in civil commitment and dependency practices should attend training programs in these areas. Offices should also develop manuals to inform new attorneys of the rules and procedures of the courts within their jurisdiction.

Every attorney providing counsel to indigent accused should have the opportunity to attend courses that foster trial advocacy skills and to review professional publications and other media.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 5-1.4.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.16.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard V.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard III-17.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 3.

National Legal Aid and Defender Association, **Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases**, 1988, Standard 9.1.

Commentary:

The American Bar Association **Standards for Criminal Justice** (5-1.4) describes training programs as "crucial to the delivery of effective defense services." Criminal law is a complex and difficult legal area, and trial practice skills must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and loss of liberty.

Former Chief Justice Warren Burger estimated that fifty percent of trial lawyers in this country are so lacking in training that their incompetence contributes to the backlog of cases pending in our courts. Lawyers who are poorly prepared in trial techniques hamper the judicial system. Lack of precision in written documents, fumbling oral presentations, the inability to weed out useless motions and the lack of skill in selecting and focusing on key issues all contribute to costly bottlenecks in what should be an orderly and speedy process.

To meet the need for training, programs should be established for both beginning and advanced practitioners, and should emphasize substantive legal subjects as well as effective trial techniques. The National Legal Aid and Defender Association **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts** (III-15) urge that the training provided to defenders be no less than is provided to prosecutors and judges in their jurisdiction, and should include continuing legal education programs and the opportunity to review professional publications and tapes.

The American Bar Association Ten Principles of a Public Defense Delivery System, principle 9, requires that “Defense counsel is provided with and required to attend continuing legal education.” http://72.14.203.104/search?q=cache:-li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+aba+ten+principles&hl=en&gl=us&ct=clnk&cd=1&ie=UTF-8 ABA Ten Principle No. 6 states: “Defense counsel’s ability, training, and experience match the complexity of the case.”

The Federal system provides frequent and substantial training for federal defenders and Criminal Justice Act panel attorneys. The Office of Defender Services Training Branch was established by the Judicial Conference Committee on Defender Services to provide training and resource support to attorneys appointed under the Criminal Justice Act. See, http://www.fd.org/. The Training Branch also places training materials on line, and those are useful to state and local defenders as well. See, for example, materials at http://www.fd.org/pdf_lib/WinningStrategies_I_Tabs1to7.pdf. The Administrative Office of the U.S. Courts "planned and implemented or provided assistance and support for nearly 30 training events for federal defender staff and CJA panel attorneys in FY 2005." http://www.uscourts.gov/library/annualreport05_defenderservices.html

STANDARD TEN: Supervision

Standard:

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

Related Standards:

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.9.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contract**, 1984, Standard III-16.

Seattle-King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Guideline Number 4.

Commentary:

The most important function of supervisors is ensuring effective representation. Defender offices are not simply confederations of individual attorneys, but organizations whose effectiveness is measured, in part, by their ability to introduce young attorneys to the practice of criminal law. Many new defenders lack experience and need close supervision as they gain familiarity with specific courts and procedures and work toward developing effective trial advocacy skills. The mere granting of a law degree and admission to the bar do not automatically qualify a lawyer to represent a client in criminal matters.

Supervision is also essential to evaluate the performance of staff attorneys in order to make recommendations regarding promotions or termination and to help coordinate services and ensure that office policies are understood and followed.

The City of Seattle has approved this standard by ordinance. See, fn 6 above. The ABA Ten Principles, No. 10, state: “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.”

STANDARD ELEVEN: Monitoring and Evaluation of Attorneys

Standard:

The plan for provision of public defense services should establish a procedure for systematic monitoring and evaluation of attorney performance based upon publicized criteria. Supervision and evaluation efforts should include review of time and caseload records, review and inspection of transcripts, in-court observations, and periodic conferences.

Performance evaluations made by a supervising attorney should be supplemented by comments from judges, prosecutors, other defense lawyers and clients. Attorneys should be evaluated on their skill and effectiveness as criminal lawyers or as dependency or civil commitment advocates.

Related Standards:

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Standard III-16.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Recommendations 5.4 and 5.5.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.9.

Commentary:

Regular performance evaluations are important to assure the highest quality of public defender services and to give timely notice to attorneys whose performance can be improved.

Public defense attorneys, by the very necessity of protecting those charged with a crime, may be unpopular in the eyes of the police or courts in the exact proportion to their diligence in protecting clients' rights. For this reason, the evaluation of attorneys is most appropriately made by a supervising attorney with full

understanding of the constitutional role played by defense counsel in the justice system. Comments from a range of court personnel and professional colleagues who have seen the attorney in action should supplement regular review.

Many contracting authorities do not now provide for monitoring of the fulfillment of contractual responsibilities. In some jurisdictions, payment is made to public defense attorneys without even requiring attorneys to report the number of cases accepted or closed during that period. Contracting authorities should become familiar with the elements which constitute effective defense representation and should systematically review programs to determine whether public funds are being usefully spent.

ABA Principle 10 cited above contemplates that attorneys will be evaluated.

STANDARD TWELVE: Substitution of Counsel

Standard:

The attorney engaged by local government to provide public defense services should not sub-contract with another firm or attorney to provide representation and should remain directly involved in the provision of representation. If the contract is with a firm or office, the contracting authority should request the names and experience levels of those attorneys who will actually be providing the services, to ensure they meet minimum qualifications. The employment agreement shall address the procedures for continuing representation of clients upon the conclusion of the agreement. Alternate or conflict counsel should be available for substitution in conflict situations at no cost to the counsel declaring the conflict.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Standard 5-5.2.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.1.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-23.

Commentary:

Problems have arisen in some Washington counties when local government contracts for defense services with one attorney only to have that attorney sub-contract part of the work to a second attorney whose credentials were not subject to public review.

In responding to government requests for proposals, prospective contract attorneys should include the names, education and criminal defense experience of all lawyers who will represent indigent clients under the contract. Firms should also meet the supervision and training provisions of these standards for all attorneys they employ.

When the defense contract ends and a new defense provider is chosen, provision must be made for those cases opened but not yet completed by the former contractor.

Both the ABA and NLADA standards emphasize the importance of continuous representation of clients. The ABA **Standards** state that "counsel initially provided should continue to represent the defendant throughout the trial court proceedings." The NLADA **Guidelines** note that local governments would be poorly served by a system in which a contractor could simply walk away from uncompleted cases at the end of the contract. The NLADA recommends that cases open at the termination of a contract be handled to completion by the attorney initially assigned. In turn, the contract needs to address the terms by which the attorney will be paid for these cases.

It may be more practical for attorneys under contract to seek court approval to transfer to the new contractor those cases for which no significant work has yet been undertaken. In these situations, the attorney transferring the cases must provide thorough and accurate information about the case to the new defense lawyer so the latter can become familiar with the pending deadlines and legal issues in the case.

STANDARD THIRTEEN: Limitations on Private Practice of Contract Attorneys

Standard:

Contracts for public defense representation with private attorneys or firms shall set limits on the amount of privately retained work which can be accepted by the contracting attorney. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, 4-1.2(d), 5-3.2.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.7.

National Legal Aid and Defender Association, **Standards for Defender Services**, Standard III-3 and IV-1.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Guideline III-6.

Commentary:

The potential for conflict of interest exists if public defense attorneys also maintain private law practices. Where part-time private practice is permitted, the attorneys may be tempted to increase their total income by devoting their energies to private practice at the expense of their non-paying clients.

Where rural settings or small caseloads make full-time public defense impractical, the contracting authority should set clear standards for the performance of duties and should limit the total number of cases assigned. The caseload limit should be based on the percentage of time the lawyer devotes to public defense. It is critical that there be clear limits on what a part-time public defender can do. [73]

STANDARD FOURTEEN: Qualifications of Attorneys

Standard:

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

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court;
B. and be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and
C. be familiar with the collateral consequences of a conviction, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and
D. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

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[73] An example of the kind of problems that can happen when lawyers in rural areas try to combine being a public defender with other practice is the case of the public defender who was a judge in one city and a pro tem judge in another city, in the same court in which he practiced as a defender. The state supreme court wrote that the judge's "choice to act in dual roles in the same court forced his low-income clients to choose between having representation or getting out of jail."In re Michels, 150 Wn.2d 159, 167 (2003). The Court suspended the pro tem judge and required training before he could sit again as a judge.

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

2. **Trial attorneys' qualifications according to severity or type of case:**

A. Death Penalty Representation. Each attorney acting as lead counsel in a death penalty case or an aggravated homicide case in 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 jury trial in which the death penalty was sought; and
v. have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases;
vi. have completed at least one death penalty defense seminar within the previous two years.
vii. Meet the requirements of SPRC 2.[74]

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[74] 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 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

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 staff attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

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

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

i. Minimum requirements set forth in section 1, and
ii. Either:
    a. has served one year as prosecutor; or
    b. has served one year as 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 Felony Cases - All other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each staff attorney representing a defendant accused of a Class B felony not defined in c above or a Class C felony, as defined in RCW

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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.

Available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=supsprc2.

9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. 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

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

E. 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; [75] and

ii. Have at least:

a. Four years criminal trial experience; and

b. One year 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.

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

i. Minimum requirements set forth in section 1, and

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[75] RCW 10.01.060 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.

ii. Either:
    a. has served one year as a prosecutor; or
    b. has served one year as a public defender; 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.

G. 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. 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
    c. as been trial counsel alone in five misdemeanor cases brought to a final resolution; and
iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

H. 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.

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

J. 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.

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

i. 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,

L. 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 experience as a felony defense attorney or one year 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 cases should meet the Minimum Requirements in Section 1 and have either one year experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

M. Contempt of Court Cases

Each attorney representing a respondent shall meet the following requirements:

i. Minimum requirements set forth in Section 1; and
ii. Each staff 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.

N. 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. 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.

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.
iii. 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.

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 an RALJ appeal.

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 Standard Nine, Training.

Related Standards:

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, Standard 13.15.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Public Defense Contracts**, 1984, Standard III-7.

National Legal Aid and Defender Association, **Standards for the Appointment and Performance of Counsel in Death Penalty Cases**, 1987, Standard 5.1.

Commentary:

Effective representation can only be provided by attorneys experienced in the type of case in which they appear. The standard assigns the most difficult cases to those attorneys with the most experience and skill in trial advocacy while at the same time establishing the method for less experienced attorneys to become qualified for more serious cases.

Inexperienced attorneys cannot only deprive their clients of their right to effective counsel, they also create problems for the criminal justice system itself. Inexperienced attorneys are less able to effectively negotiate with prosecutors, thus lengthening the time needed to resolve pre-trial issues. They are less efficient in bringing cases to resolution and may burden the court with irrelevant issues. The practice of criminal law has become highly specialized in recent years. Only attorneys who possess effective trial advocacy skills and have a thorough knowledge of substantive and procedural law can be expected to represent competently persons accused of crime. Less experienced attorneys benefit from training under the direction of more experienced attorneys, acquiring theoretical and practical knowledge before they assume sole responsibility for a criminal defense.

Persistent Offender Cases

The qualifications for defense attorneys representing “persistent offender” clients are more stringent than those for other felonies because the consequence of conviction is a mandatory sentence of life without the possibility of parole.

Defending a client in these circumstances requires the sort of technical skill and professional maturity that come only from experience. Developing "mitigation" material is crucial to effective defense work in persistent offender cases, in terms of defending against the current charge as well as challenging the prior "strikes." For this reason, it is important that counsel have experience with other cases involving mental health issues, as well as cases that used expert witnesses. Additionally, "two strikes" cases involve serious sexual offenses, so counsel should have experience in these types of cases as well. Considerable persuasive writing can be required, both in motion practice and in mitigation presentations, so good writing skills are essential. No other crime in Washington carries a mandatory sentence of life without any possibility of release other than aggravated murder. A robbery charge that can count as a final "strike" is not "simply" a robbery charge. The citizen vote that established this law called these offenses "the most serious". Defenders and the courts need to treat them that way.

Aside from the practical considerations of dealing with a case involving a possible life without parole sentence, there are due process considerations. While life without parole is not death, courts' analysis that "death is different" is analogous:

What process is due depends on the particular situation. In a recognition of death as an unusually severe punishment, the U.S. Supreme Court has required a heightened degree of scrutiny of procedural due process before the deliberate extinguishment of human life. *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972).

Harris by & Through Ramseyer v. Blodgett, 853 F. Supp. 1239, 1286 (D. Wash., 1994), Affirmed, *Harris by & Through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995).

While a life without parole sentence does not extinguish the person's rights or life, when the state is taking a person's liberty for life, due process requires extraordinary care. It makes sense that when there is no possibility of parole, courts and counsel implement that standard.

Status Offenses

Defense attorneys representing clients in "At-Risk Youth," Truancy, or "Children in Need of Services" matters should have the opportunity for in-court supervision and consultation regarding their cases before handling cases on their own. Lawyers working alone as assigned counsel or in offices without supervision available should obtain training specific to this type of practice before taking any "Becca" cases and should find experienced counsel who can serve as consultants in their ongoing practice.
See, *Washington Assessment, at 73-74,* http://www.wsba.org/jjstudy.pdf

Sex Offender Commitment Cases

As discussed above, these cases involve evidence of the entire life of the client and can result in indefinite incarceration. Lawyers need to be familiar not only with criminal practice but also with the civil rules and with actuarial predictions related to mental health issues. They need to be experienced trial lawyers as well as proficient in motions practice and able to seek interlocutory appellate review when appropriate.

Specialty Courts

Lawyers representing clients in mental health, drug diversion, “community” courts, or other alternative proceedings have to be experienced enough to be able to assess the offers being made to the clients and to assert their clients' rights in a system that may put higher value on cooperation and “the best interests of the client” than on the client's wishes. They need to be familiar with mental health and substance abuse issues as well as civil commitment laws and the full spectrum of sentencing options.

STANDARD FIFTEEN: Disposition of Client Complaints

Standard:

Each agency or firm or individual contract attorney providing public defense services shall have a method to respond promptly to client complaints. Complaints should first be directed to the attorney, firm or agency which provided representation. If the client feels that he or she has not received an adequate response, the contracting authority or public defense administrator should designate a person or agency to evaluate the legitimacy of complaints and to follow up meritorious ones. The complaining client should be informed as to the disposition of his or her complaint within one week.

Related Standards:

The American Bar Association, **Standards for Criminal Justice**, 4-5.1 and 4-5.2.

Commentary:

The nature of public defense work may give rise to client complaints about the attorney's handling of the case. Defendants are often in extreme circumstances, sometimes awaiting trial in jail; their employment and family lives have been severely disrupted, and their expectations of what legal counsel can accomplish may not be realistic.

It is essential that local governments develop a means to respond to client complaints promptly and to investigate and act on meritorious complaints. Many

complaints may be unfounded or minor, but clients deserve a respectful hearing and a prompt response. The follow up on client complaints may also alert contracting authorities to persistent problems with a particular attorney or firm or a problem in the system of delivering services.

Under the ABA Standards for Criminal Justice, defense attorneys have the professional obligation to keep clients advised at all stages of the legal proceeding. Unfortunately, the high level of caseloads handled by public defense attorneys often limits the frequency of attorney-client contacts. Studies on client satisfaction have shown that indigent clients can have a significant lack of trust in their attorneys, in large part because they were not kept fully informed about developments in their case. Local jurisdictions investigating client complaints need to be sensitive to the special nature of the attorney-client relationship and to be aware of the workload demands faced by public defense attorneys. Funding levels which permit adequate communication with clients will help reduce the number of complaints.

STANDARD SIXTEEN: Cause for Termination of Defender Services and Removal of Attorney

Standard:

Contracts for indigent defense services shall include the grounds for termination of the contract by the parties. Termination of a provider's contract should only be for good cause. Termination for good cause shall include the failure of the attorney to render adequate representation to clients; the willful disregard of the rights and best interests of the client; and the willful disregard of the standards herein addressed.

Removal by the court of counsel from representation normally should not occur over the objection of the attorney and the client.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Standard 5-1.3, 5-5.3.

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Defense Contracts**, 1984, Guideline III-5.

National Study Commission on Defense Services, **Guidelines for Legal Defense Systems in the United States**, 1976, Recommendations 2.12 and 2.14.

National Advisory Commission on Criminal Justice Standards and Goals, **Task Force on Courts**, 1973, Standard 13.8.

Commentary:

The intent of this standard is to assure public defense attorneys protection from arbitrary termination of contracts and from arbitrary removal from an individual case by a judicial officer. The adversarial and frequently high-profile nature of criminal defense work invites criticism and sometimes the inappropriate interference of politicians. The ABA standards say clearly that public defense lawyers "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice." Vigorous representation of an unpopular client is not grounds for discipline or removal.

Actions which do merit removal or termination of contracts could include the attorney's failure to protect client interests and to meet professional standards.

The NLADA Guidelines' commentary notes that the power to discipline attorneys for conduct or inaction in a single case lies with the state bar and the judiciary.

The ABA Ten Principles of a Public Defense Delivery System, Principle One, states: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”

STANDARD SEVENTEEN: Non-Discrimination

Standard:

Neither the Contracting Authority, in its selection of an attorney, firm or agency to provide public defense representation, nor the attorneys selected, in their hiring practices or in their representation of clients, shall discriminate on the grounds of race, color, religion, national origin, age, marital status, gender, sexual orientation or disability. Both the contracting authority and the contractor shall comply with all federal, state, and local non-discrimination requirements.

Related Standards:

American Bar Association, **Standards for Criminal Justice**, Providing Defense Services, Standard 5-3.1.

National Legal Aid and Defender Association, **Standards for Defender Services**, 1976, Standard III-8.

Commentary:

This standard addresses both the concern about non-discrimination in client representation and in the selection of public defenders and their staffs.

The American Bar Association standard emphasizes the importance of recruiting attorney candidates "from minority groups which are substantially represented in

the defender program's client populations." An office or attorney who is perceived as racially biased will not enjoy the confidence of clients or the courts.

Local governments and attorneys providing services must be sensitive to the potential for discrimination. All legal requirements on hiring and on the treatment of clients must be met.

STANDARD EIGHTEEN: Guidelines for Awarding Defense Contracts

Standard:

The county or city should award contracts for public defense services only after determining that the attorney or firm chosen can meet accepted professional standards. Under no circumstances should a contract be awarded on the basis of cost alone. Attorneys or firms bidding for contracts must demonstrate their ability to meet these standards.

Contracts should only be awarded to a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District Courts, Superior Court or Juvenile Court), or b) to a firm where at least one attorney has one year's trial experience.

City attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.

Related Standards:

National Legal Aid and Defender Association, **Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts**, 1984, Standard IV-3.

King County Bar Association Indigent Defense Services Task Force, **Guidelines for Accreditation of Defender Agencies**, 1982, Statement of Purpose.

Commentary:

Currently in Washington State, some counties award contracts for public defense on the basis of competitive bidding, without careful consideration of the quality of representation that will be provided by the contracting attorney or firm. Contracts which do not address the issues raised in these standards -- reasonable caseloads, adequate support staff and minimum experience levels, to name just three -- cannot be expected to deliver the effective representation mandated by the state and federal constitutions.

Government has a responsibility to contain costs for public defense programs, but cost alone is no guarantee of efficiency. Poorly organized, understaffed, short-term defender programs may be more costly in the long run and may open counties to lawsuits for their failure to ensure effective representation of indigent accused

citizens. Our legal system is based on the premise that justice will emerge from the clash between equal adversaries, but this ideal is little more than a pretense if one of the adversaries is denied all but the most meager resources. The vigorous representation to which all accused citizens are entitled simply cannot be purchased at a discount.

Local governments that make decisions to hire the least expensive attorneys without ensuring that they have the experience and the resources to provide effective representation will open themselves to liability. The settlement in Best v. Grant County (Kittitas County Superior Court, No. 04-2-00189-0, 2005), requires that the defenders be adequately compensated and also requires that the attorneys handling serious felonies be experienced. The County had to pay $500,000 in attorney's fees and costs and the order required an additional $100,000 per year if the County did not comply with the terms of the agreement. http://www.nlada.org/DMS/Documents/1131727759.89/SettlementAgreementGrantCountyWA.pdf.

See also, Miranda v. Clark County 319 F.3d 465, 466(9th Cir. 2003): the "head of a county public defender's office, as administrative head of an organization formed to represent criminal defendants, may be held accountable under 42 U.S.C. Section 1983 for a policy that leads to a denial of an individual's right to effective representation of counsel."

If the guarantee of effective counsel is to have any meaning, attorneys receiving contracts for public defense must have adequate experience. Although the minimum experience standards here, by themselves, cannot guarantee that the defendant will be adequately represented, they provide certain assurances that the counsel has developed fundamental abilities and knowledge as well as advocacy skills which will enable him or her to conduct the defense in a competent manner.

RCW 10.101.030 Standards for Public Defense services.
Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administration expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards endorsed by the Washington State Bar Association for the provision of public defense services may serve as guidelines to contracting authorities.
[1989 c 409 § 4.]