

Defending Clients in the COVID-19 Environment: Survey Results from Private and Public Defense Counsel

A Joint Project Of:

Washington State Office of Public Defense

Washington Defender Association

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I am living with the constant fear of COVID infection because of things that I am required to do for my job. I struggle between that fear, and the fear of being found to have committed ineffective assistance of counsel if I try to keep myself safe. I am high risk for COVID morbidity due to my age and preexisting medical conditions, but I am self-employed so I cannot take medical leave and have no unemployment compensation if I am unable to do my job for medical reasons. Last week I took plea paperwork into the jail and then found out less than 24 hours later that the jail unit where my client was housed was placed on COVID lockdown. My client was not permitted to come to court for his plea, yet I was not warned of this prior to meeting with my client and passing paperwork in the attorney booth where the air flow from the jail is like a wind coming through the pass through slot. I fear for my safety and health and I fear for my clients' safety and health, and I feel unable to change any of this. I feel that defense attorneys and accused persons are considered disposable by the system.

-Defense Attorney Survey Respondent

Executive Summary

In December 2020, the Office of Public Defense, Washington Defender Association, and the Washington Association of Criminal Defense Lawyers surveyed public defense and private criminal defense attorneys on the impacts of COVID-19 on their practice and client representation. Defenders bring a unique and important perspective because they practice in a wide range of case types – criminal, juvenile offender, dependency, civil commitment, juvenile civil, appeals, and contempt of court. Defenders must develop and maintain trusting representational relationships with their clients, guided by constitutional mandates and rules of professional conduct, while their clients face obstacles such as poverty, mental illness, chemical dependency, and systemic racism and bias. Defense work is challenging in the best circumstances, and survey results show that COVID-19 makes their job harder. These results are consistent with national trends in public defense.¹

More than 300 attorneys responded to the survey, representing a diverse range of geography, legal specializations, and employment structures.

Key findings include:

1. Defense attorneys in many jurisdictions **cannot maintain safe and reliable confidential communication with their in-custody clients**. These limitations place defenders in a position of compromising their health and safety to maintain professional, ethical standards and their client’s constitutional right to counsel.
2. Defense attorneys are generally satisfied with how courts have conducted web-based hearings. However, confidential client communication continues to be a challenge when courts do not use “**breakout room**” features.
3. Communication with in-custody clients is most dire when interpreters are needed. **Technological and logistical limitations make interpreting either impossible or hazardous**.
4. **The increasing backlog of pending cases** reduces defenders’ ability to provide effective representation to all clients. Cases now take longer to resolve, particularly violent offenses. Attorneys require more time to work with clients and investigate facts, and the limited availability of community resources creates further delays (e.g., treatment, licensing, family support services.)
5. Speedy trial deadlines trigger negotiations and the prioritization of cases for trial. **In the absence of jury trials, persons accused of crimes cannot obtain mutually acceptable plea agreements or dismissals** and have little incentive to plea to an unfavorable plea deal. The lack of trials contributes to case backlogs.
6. Defenders request that judges, court administration, corrections, prosecution, and other justice partners include them in **local stakeholder discussions** about services in the

¹ [Public Defenders Speak Out about the Tolls of COVID-19](#), Rachel Stone, Law 360, Feb. 21, 2021.

COVID-19 environment and continued use of technology after the pandemic. The defense perspective will be particularly critical in the months ahead as filings increase and jury trials resume amidst the backlog from the past year.

Summary of Recommendations:

To facilitate confidential attorney-client communication:

- Courts and justice partners should inquire into conditions in local jails to assure a safe place for attorneys, their clients, and interpreters to confidentially meet with time enough to review discovery and work to advance cases; if facilities are unsafe or insufficient, help engage local stakeholders in conversations to find solutions;
- Defense attorneys should file writs or other actions when there is good cause to believe that jails, hospitals, or prisons are denying persons accused of crimes or otherwise unlawfully held the right to effective assistance of counsel;
- Counties should provide jails with equipment and technology so that in-custody individuals have easy, private, unrecorded phone and video access to their attorneys, including to attorneys' cell phones; publish processes for attorneys on how to efficiently and reliably communicate with their incarcerated clients during flexible business hours;
- Include breakout room features in remote hearings to ensure the right to confidential advice of counsel; when no breakout rooms are available, invest in alternate forms of communication and exercise patience as parties adapt;
- Enforce social distancing during in-person hearings and trials; invest in technology to assure confidential and distanced communication between counsel and their clients at trial;
- Provide private spaces outside the courtroom for defense counsel, their clients, and interpreters to meet confidentially and appropriately distanced; exercise patience for these necessary breaks because they will take more time.

To address time-saving efficiencies which reduce courthouse traffic:

- Consult with the defense bar when considering temporary rule changes or procedural changes to the administration of court calendars;
- Accept agreed ex parte orders to reduce in-court time;
- Allow counsel to sign for their clients and apply e-signatures;
- Employ e-filing systems and publish online the means for remote filings;
- Encourage the swift exchange of discovery and negotiated resolutions.

To address the backlog of criminal cases:

- Consult with local public defenders to understand the current composition of their caseloads and their capacity to provide effective representation;
- In jurisdictions where public defense attorneys are experiencing high caseloads, new appointments must be capped unless additional funding is made available for increased public defense staff or contractors; prosecutors should re-evaluate cases and plea offers to address backlogs, particularly in victimless crimes;
- Strict enforcement of speedy trial when jury trials resume;
- Resume jury trials and speedy trial rules, and include the defense community in logistical planning for safe and effective representation;
- Reduce the number of persons subjected to pretrial detention and restrict the issuance of warrants for failure to appear to reduce jail populations and prevent coerced pleas;
- Investment in diversions and restorative models of justice.

I. CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Effective communication is fundamental for effective and ethical client representation. The COVID-19 pandemic has a variety of challenges for defenders, but client communication is the area that has suffered the most. In the survey of defense attorneys statewide (see [Section VI](#) for demographics of survey respondents), impediments to client communication consistently emerged as an ongoing challenge.

In particular, survey results showed that defenders face communication barriers in multiple contexts: with incarcerated clients, during remote hearings, and while socially distanced in courtrooms.

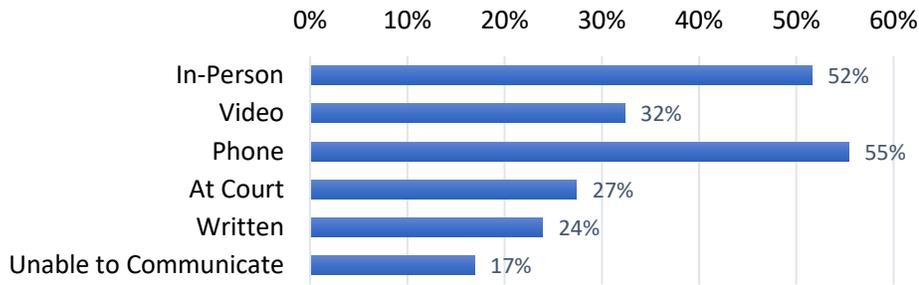
A. Communicating with Incarcerated Clients

Most defense attorneys represent clients who are incarcerated in jails or detention facilities, which significantly limits opportunities for communication in “normal times.” Ensuring this key component to representation is even more challenging in the COVID environment. Most facilities do not allow attorney visits when COVID outbreaks occur. In-person visits often occur in confined meeting rooms where social distancing is impossible, and online meetings and phone calls to attorneys’ homes or personal cell phones are not secure and may be recorded. One attorney summarized the multiple obstacles to communicating with clients in jail:

“Communication with in-custody clients has been greatly reduced. In-person visit hours have been reduced as has their opportunity to schedule them since the jail uses some of the meeting rooms as temporary holding cells for social distancing. It can be harder for our clients to get through the jail phone system since so many people are working from home. Video visits occur in the modules so I do not rely on them to review sensitive discovery, cases, etc. Reviewing video recorded discovery is impossible. Finally, the video system itself just did not seem to be created for being the main form of communication between attorneys and clients. Now that it is it can be hard to get through, get clients notified for visits, the system goes down, tech issues, etc. Client communication has suffered but particularly for in-custody clients.”

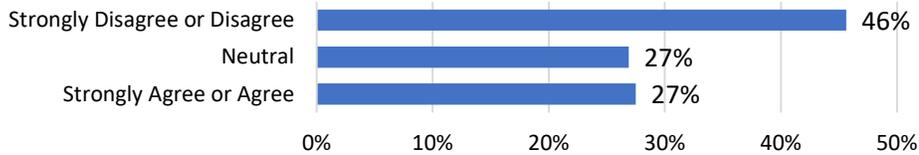
Survey respondents identified the different ways they communicate with their in-custody clients during COVID. More than one-half have met with clients in-person in the jails, and fewer than 60% have spoken by phone. (Figure 1.) A startling 17% of respondents indicated that they have simply been unable to communicate with in-custody clients.

Figure 1: Ways in Which Defenders Communicate with In-Custody Clients (n=343)



In addition to asking attorneys *how* they communicated with in-custody clients, the survey took a deeper dive by questioning whether attorneys could *sufficiently* communicate with their in-custody clients. Forty-six percent of survey respondents reported that jail accommodations are insufficient for safe and private communication. Of the responding attorneys who represent clients charged with felonies, the figure was 56%.

Figure 2: COVID-Related Modifications in Jails Allow Attorneys to Sufficiently Communicate with In-Custody Clients (n=331)



Survey respondents shared open-ended comments about communicating with in-custody clients, and their responses provide greater detail and context. Attorneys described the inability to communicate mainly with their in-custody clients, either because of lack of access to technology, failure to secure interpreters, or a fear of infection.

Sample Comments on Communicating with Incarcerated Clients	
Positive Examples	Concerning Comments
<ul style="list-style-type: none"> Almost all of my in custody clients got released 	<ul style="list-style-type: none"> I usually have to do in person visits in order to communicate privately and effectively. Jail does not allow phone calls or virtual contact, only in-person, even during the stay at home order Terrible video reception, attorney cannot set up times to call client at jail. Lockdown times are preventing clients from calling during business hours The biggest problem is that forms of communication, other than in-person visits, are unreliable. We cannot always count on being available when our clients call us, and the jail will no longer facilitate scheduled phone visits with clients. Similarly, video visitation gives rise to technology issues, or clients not being advised that they have a visit scheduled by the jail. As

	<p>explained in other comments, communication with clients before hearings is also impacted by changes in operations by various court actors</p> <ul style="list-style-type: none"> • The video conferencing that is available to us cuts off automatically at 15 minutes which is inadequate to cover what needs to be covered.
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The barriers to communicating with in-custody clients compound when clients require interpreters. In-person visits are unworkable in most locations, as the visiting rooms do not have sufficient space for safely social distancing three people. Telephonic interpretation is also untenable for many in-person jail meetings because attorneys and clients are separated by Plexiglas and speaking through in-house telephones, which is inaudible to a telephonic interpreter.

Telephonic interpretation for attorney-client phone calls is also limited, as many jails do not permit three-way calling. Furthermore, phone conversations with in-custody clients rarely can be scheduled in advance. Therefore, the only way to communicate through an interpreter is to find one at a moment's notice when a client calls the attorney.

As described by one respondent, "The biggest [challenge] is the lack of interpreters. It is impossible to communicate with in-custody non-English speaking clients." Procedures must be carved out for safe, confidential meetings between interpreters, attorneys, and their limited English proficient or deaf and hard-of-hearing in-custody clients.

Defense attorneys hope that other institutions such as jails, prosecuting attorneys, and courts recognize the communication limitations with in-custody clients due to COVID-19. Collaborative, multi-organizational problem-solving approaches are needed at the local level to identify and remedy obstacles.

**Survey Recommendations:
Communicating with In-Custody Clients:**

Local stakeholders (including jails, judges, defense counsel, interpreters, and others) should collaborate to identify current logistical barriers to representation, and develop solutions. Examples include:

- Ensure easy, private, unrecorded phone and video access for attorney communications, including to attorneys' cell phones;
- Develop policies for flexible visiting hours for attorney-client in-person or telephonic meetings;
- Install a closed-circuit, unrecorded, virtual meeting space for attorney-client meetings;
- Identify methods for attorneys to deliver documents to clients, and/or obtaining clients' signatures without the attorneys having to physically enter jail facilities; and
- Prioritize safe, confidential, and reliable ways for incarcerated persons to communicate with counsel through interpreters.

B. Communication during Remote Hearings

Defense attorneys must have the opportunity to communicate with their clients during hearings confidentially. Last-minute changes, issues, and questions arise during court hearings, prompting attorneys to have confidential side communications with their clients. This opportunity is significantly limited in the remote setting, where attorneys and their clients appear from separate locations.

Remote hearings occur in a variety of configurations, and the survey asked defense attorneys about confidential communication in three settings: (1) where the attorney appears remotely, but the client is physically in the courtroom; (2) the client appears remotely, but the attorney is physically in the courtroom; or (3) the client and the attorney appear remotely from different physical locations.

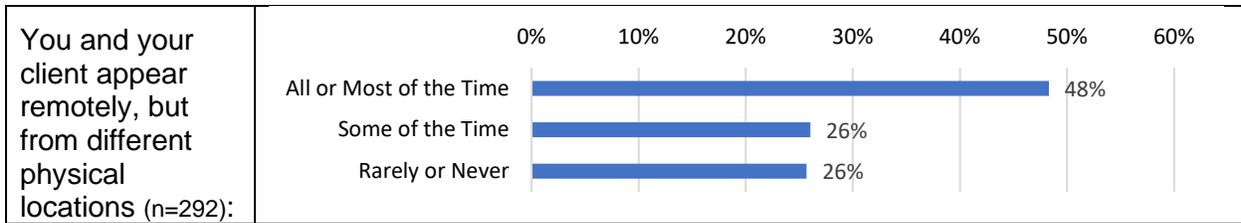
The survey results show that the ability to communicate confidentially varies among these three settings.

Communication is least effective when attorneys appear remotely and the clients are physically in the courtroom. More than 50% of respondents indicated that they rarely or never have effective, confidential communication in such circumstances. However, that figure dropped to 25% for situations where both the attorney and the client appear remotely from different locations.

The best configuration is when the attorneys and their clients are on equal footing by both appearing remotely instead of a mixture where one is in the courtroom and the other is remote.

Figure 3: Effectiveness of Confidential Communication with Clients during Remote Hearings





Mixed Experiences in Accessing Breakout Rooms: “Breakout rooms” are a common feature in some web meeting platforms that allow selected individuals to meet privately, away from other participants. Many courts use breakout rooms to accommodate the need for confidential attorney-client meetings as they arise during online hearings. The Washington Supreme Court has made this kind of feature mandatory for all remote hearings. Yet, survey results demonstrated that not all courts either use web platforms that include the functionality or permit its use. Attorneys described different experiences for confidential communication with clients during virtual hearings:

Sample Quotes – Breakout Rooms	
Positive Examples	Concerning Comments
<ul style="list-style-type: none"> We have used Zoom. There is a function for a confidential breakout room and so we are able to discuss issues there if necessary and I've not received any push back from the court. Using breakout rooms on Zoom is easy and very efficient. If we both appear remotely, there are breakout rooms. If one of us is remote, you can sometimes text with your client during the hearing or even step away from counsel table to make a quick call to the client to answer questions. But largely, we are unable to answer confidential questions unless we are either both in the courtroom or neither are in the courtroom. 	<ul style="list-style-type: none"> The judge I practiced in front of rarely allowed me to have breakout rooms with clients during arraignments once the calendar started. When either party is appearing remotely, in order to communicate confidentially the Court must pause the proceedings. Sometimes there is implicit and even explicit pressure from the bench to have breaks for communication be quick and infrequent. I don't. I speak with all my clients before court. If issues arise, I continue the case or set it down to call my client.

Other Communication Strategies: In some instances, attorneys have devised other methods for confidential communication during online hearings when they and their clients appear from different remote locations. Several indicated that they **text message** with their out-of-custody clients during remote hearings. “It has actually been beneficial because my client and I can text during hearings and I can actually explain things as things are being said.”

Some speak privately to clients on a **separate phone line**. When private communication is needed during a hearing, the attorney and client mute their computer microphones and carry out the conversation via telephone.

While texting and separate phone lines have been effective in certain circumstances, they are **less accessible when defenders represent Deaf or Limited English Proficient clients**. Texting is only possible with clients who communicate in written English, and separate phone calls do not work with clients who are Deaf or when foreign language interpreters attend hearings telephonically. Alternatively, attorneys gave positive feedback on utilizing court interpreters for private communications in web conference breakout rooms.

Survey Recommendations: Confidential Client Communication during Remote Hearings

Use breakout rooms to assure the right to confidential advice of counsel; when no breakout rooms are available, invest in alternate forms of communication and exercise patience as parties adapt.

C. Safe Communication in the Courtroom

Defense attorneys are at high risk of transmission because of the physical proximity to clients inherent in their job.

For example, defense attorneys sit at the counsel table with clients at their side and conduct whispered side conversations outside of earshot of others. Carrying out the defense function in a confidential manner but six feet away is impossible when others are present. As a result, defense attorneys often ignore COVID precautions and remain near their clients. As explained by one survey respondent, “I do not consistently social distance from my clients when we are both in the courtroom, or courthouse, because I do not feel like I can have private conversations while doing so. I also have to review paperwork with clients and am not able to do so while social distancing.”

- “We are able to keep ourselves distant from other court actors (prosecutors, lower bench, the judge), but confidential communication during a hearing typically requires getting within whispering distance of our clients.”
- “There have been no protections put in place for defense counsel and clients. We speak, face-to-face, as we always did.”

For more on safe attorney-client communication, see [Section IV.E on Jury Trials](#).

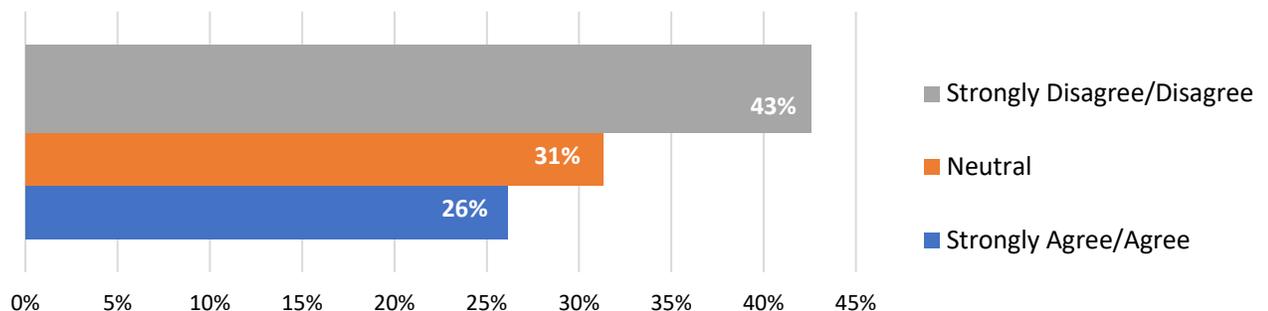
Survey Recommendation: Confidential Courtroom Communication

Judges should enforce social distancing during in-person hearings; invest in technology to assure confidential and distanced communication between counsel and their client trial; exercise patience for breaks for client communication outside the courtroom.

D. Clients Requiring Interpreters

As previously discussed in this report, communication with clients who require interpreters has been more limited during COVID. Another barrier revealed in the survey is reduced access to interpreters. Only 26% of respondents report that interpreters are “as available” as they were pre-COVID. This was also a consistent theme among the comments, with one commenter noting that interpreter clients have “suffered the most.” Very few interpreters appear in person for in-person events, whether held in jails, courtrooms, client meetings, or witness interviews. Another respondent referred to the situation facing those needing interpreters as “atrocious.”

Figure 4: Interpreters are as Accessible as They Were Prior to COVID-19 (n=329)

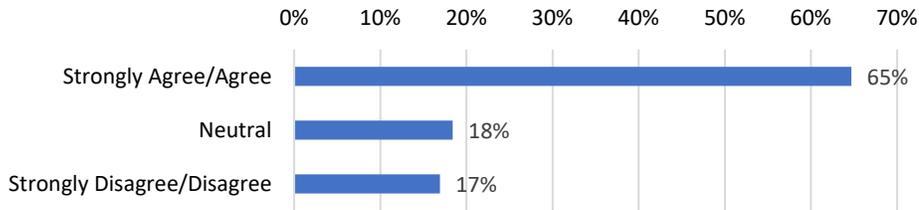


E. Communication Challenges with Out-of-Custody Clients

In addition to the previously described scenarios, attorneys also report complications and delays with communicating with out-of-custody clients. Over 65% of respondents also say that communicating with out-of-custody clients has been more difficult because of COVID. Commenters noted that access to technology among houseless populations or those in rural areas without access to wifi makes client communications challenging and time-consuming. Attorneys reported an increased number of contacts with their clients. Coordinating court dates and agreed orders between their clients and opposing counsel is more time-consuming during COVID. Many defense attorneys are solo practitioners without administrative support to communicate with clients about new court dates or orders. Attorneys noted that COVID has

made it impossible to meet with and discuss the case at court during remote hearings, particularly in courts of limited jurisdiction. Attorneys have placed greater emphasis on pretrial communication with their out-of-custody clients. Much of this occurs in person. These efforts are often complicated by office closures and lack of sufficient means to socially distance with an out-of-custody client while discussing the case and reviewing discovery. Attorneys noted the real challenge in reviewing discovery is while communicating over the phone or videoconferencing. The inability to review discovery has led to delays in some cases.

Figure 5: COVID Makes Communication with Out-of-Custody Clients More Difficult



II. CASELOADS & EFFECTIVE ASSISTANCE OF COUNSEL

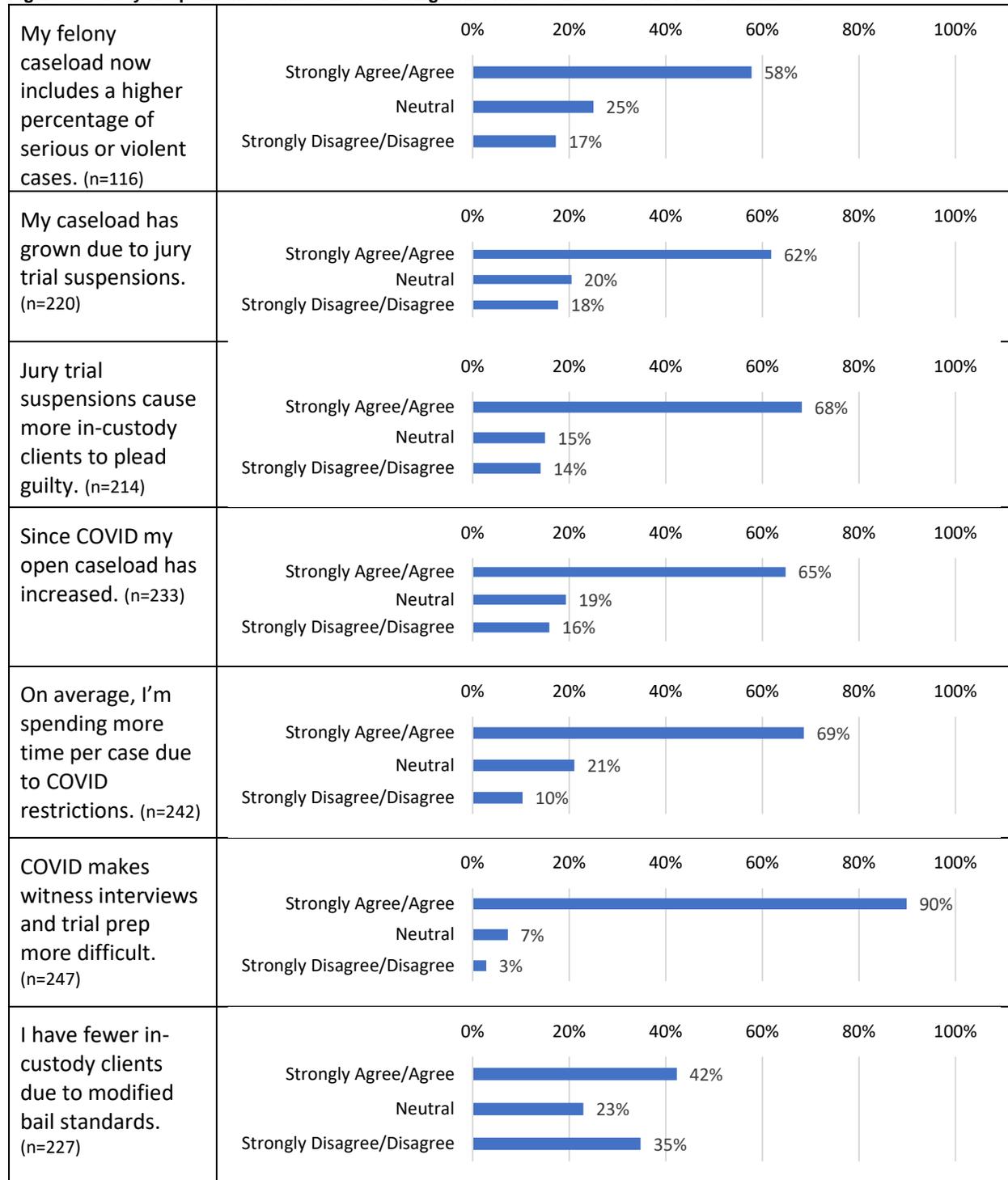
The COVID-related backlog of criminal and juvenile cases in the courts uniquely impacts defense attorneys. The Washington Supreme Court has promulgated public defense caseload limitations to ensure that each appointed attorney gives clients the time and effort necessary to ensure effective representation.² The survey asked respondents how COVID impacted their caseloads, and defense attorneys overwhelmingly answered that their caseloads have grown. Based on survey responses and comments, defense attorneys confirmed that during COVID, “everything takes more time.”

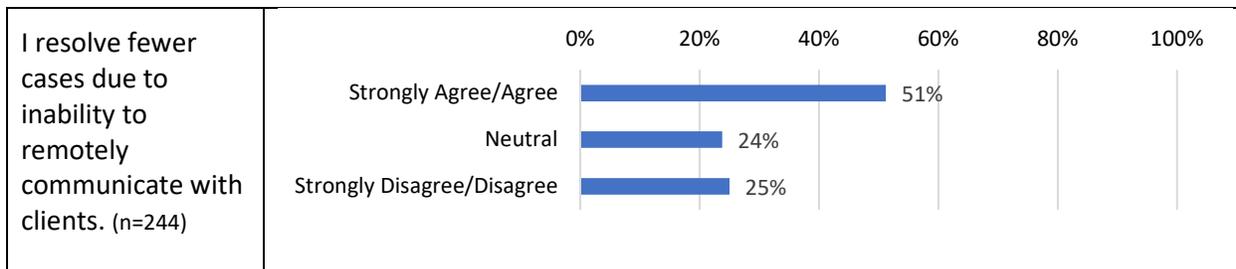
Findings included:

- 69% are spending more time per case during COVID.
- 90% report that COVID makes witness interviews and trial preparation more difficult.
- 65% of respondents’ open caseloads have grown during COVID.
- 58% of respondents with felony caseloads have a higher percentage of serious or violent cases.
- 68% reported that in-custody clients are more likely during COVID to plead guilty.

² [Superior Court Criminal Rule 3.1 Standards](#); [Criminal Rule for Courts of Limited Jurisdiction 3.1 Standards](#); [Juvenile Court Rule 9.2 Standards](#); and [Superior Court Mental Proceedings Rule 2.1 Standards](#).

Figure 5: Survey Respondents Ranked the Following Items in the Current COVID-19 Environment:





Attorneys indicated in the survey that current cases are taking more time than usual. There was a consistent connection between the time it takes to resolve a case and the time it takes to overcome technology barriers, in and out of jails, to communicate with clients. (See Section 1.A Communicating with Incarcerated Clients and Section 1.D.) Lack of access to technology among clients prevents attorneys from reviewing discovery with their clients unless they meet in person. Defense counsel are now responsible for negotiating court dates with their clients and prosecutors, which takes additional time. In jurisdictions where judges require wet signatures, defense counsel must physically meet with their clients to obtain signatures.

“Indigent clients can't get anything done. Bad cell service, limited Wi-Fi, lack of technology, lack of transportation to get to my office. Can't get written signatures on forms. Clients who don't appear frequently are required to get their signatures notarized and that's difficult or costly. DOL just needs to open or let everyone have a free-for-all on the highway. How can people reinstate when they can't get an appointment for a month? And then they need seven other things they didn't tell them about. Lack of community service sites isn't helpful.”

“Slow case resolution is more about not having jury trials than lack of client communication.”

In addition to cases requiring more time, caseloads, particularly in felony practice, tend to accumulate during COVID. Respondents commented that jury and speedy trial suspensions impact the criminal case backlog because it strips their clients of the only ability to resolve a case when the plea offer is not accepted. When a person accused of a crime asserts the right to trial, counsel for both parties are compelled to review the evidence and prepare the case. The prosecutorial review and preparation of trial generates a re-evaluation of the provable facts and law and often results in a new plea offer. Commenters noted that updated prosecutorial charging standards have been effective in resolving cases and addressing the backlog in the jurisdictions where prosecutors have made changes. Commenters note that prosecutors must “be bold” in negotiating victim crimes and violent offenses.

Sample Quotes from Survey Respondents on Case Backlog	
Positive Examples	Concerning Comments
<ul style="list-style-type: none"> On normal docket days, it seems like more people actually show up for court remotely than they would if they had to appear in person. 	<ul style="list-style-type: none"> Negotiating cases with prosecutors is virtually non-existent. It is extremely risky to do guilty pleas if we can get an offer. We are required to meet with clients in person and at

<ul style="list-style-type: none"> • <i>Since COVID, I take additional time to explain Zoom to my clients and request telephonic appearances. I am also providing notice to my clients of future hearings when the court does not.</i> • <i>I have fewer cases, but because I have refused new appointments. Other assigned counsel and in-house counsel seem swamped.</i> 	<p><i>short distances in the jail and in court during pleas and sentencings</i></p> <ul style="list-style-type: none"> • <i>Lack of jury trials results in less favorable offers from some prosecutors and therefore some cases don't resolve as quickly that might otherwise resolve.</i> • <i>We have a huge problem (since day 1 of COVID) speaking to in-custody clients in jail. The jail has not worked with defense on better methods to get us to meet with clients safely AND get them paperwork that is needed for pleas.</i>
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Survey Recommendations: Strategies to Reduce Growing Caseloads

Accept agreed ex parte orders to reduce in-court time; allow counsel to sign for their clients and apply e-signatures; strict enforcement of speedy trial when jury trials resume; cap the number of arraignments to encourage prioritization of criminal cases; prosecutors should re-evaluate plea offers to address backlogs, particularly in victimless crimes.

III. IMPACT OF JURY AND SPEEDY TRIAL SUSPENSION

To pursue safe court operations statewide during the COVID pandemic, the Washington Supreme Court issued a series of COVID-related orders that suspended speedy trial rules and prohibited jury trials for many months.³ Respondents were asked to comment on the impact of these jury and speedy trial suspensions on their clients and caseloads.

Figure 6: Speedy Trial Suspensions Cause More In-Custody Defendants to Plead Guilty (n=222)

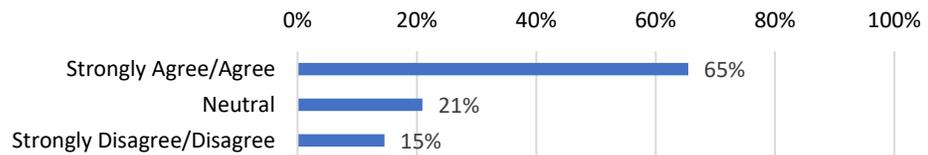
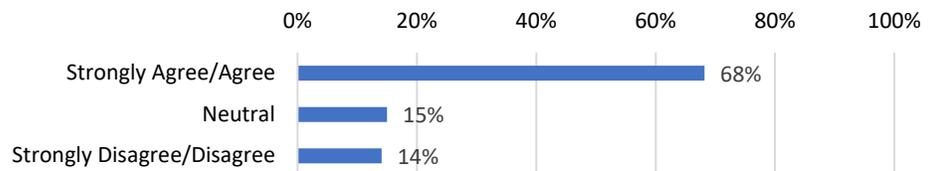


Figure 7: Jury Trial Suspensions Cause More In-Custody Defendants to Plead Guilty (n=214):



Sixty-five percent of respondents indicated that speedy trial suspensions are causing their in-custody clients to plead guilty to get out of jail, and 68% indicated that jury trial suspensions cause more clients to plead guilty. The coercive impact of pretrial incarceration on the plea process is well studied, as is the disproportionate detention of Black, Indigenous, other persons of color, immigrants, persons with disabilities or trauma, and indigent and houseless persons.⁴ Factoring these well-documented features of the criminal legal system, there is reason to be concerned about the impact of pretrial detention and speedy/jury trial suspensions on traditionally marginalized and underrepresented persons and communities.

This data above is consistent with the comments of respondents. One commentator noted that “[t]he suspension of speedy trial and trials has led to multiple clients pleading guilty in order to get out of custody or just finally end their cases. Further, the prosecutors have said they do not

³ <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19Orders>

⁴ <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>; <https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky,%2520Douglas.pdf?sequence=1>; <https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/>; <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201>; <https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal>; <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>; https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1000&context=jclc_online; <https://www2.stetson.edu/advocacy-journal/plea-bargaining-a-practice-of-convenience-or-a-line-crossing-system-of-coercion/>.

see a need to negotiate when it's not like we can set a case for trial if our clients do not like their PGAC offer.”

Commentators also noted the relationship between the suspension of jury trials and speedy trial and the backlog of pending cases. Among respondents practicing in Adult Superior Court 58% of practitioners noted that violent offenses, which are less likely to resolve in a negotiated plea represents a higher percentage of their open caseloads during COVID.

Many respondents practicing in dependency proceedings commented that parents are negatively impacted by suspending trials and other pretrial due processes.

“In-custody clients are facing a totally different situation than they were pre-COVID. Not only do they have to worry about infection spreading throughout the jail, in many cases their best option for resolution, and best chance of removing themselves from COVID risk, is unavailable. Without trials clients are forced to choose between continued COVID exposure and the moving target that is their constitutional right to a speedy and public jury trial.”

“I already had a high percentage of violent and serious cases. Most of my clients have remained in jail.”

Commentators explained their concerns:

- *“Termination of Parental Rights trials need to stop as DCYF cannot effectively provide services to parents or visits and the court lets it be blamed on COVID but still terminates rights.”*
- *“Cease filing of termination petitions and proceeding on termination trials for at least 6 months once the vaccination is available and things have gone back to ‘normal.’ Our courts are deciding motions on pleadings alone without oral argument despite our many requests to do otherwise, and then we are just told they are granted or denied without explanation ... even when they were heard on shortened time. This has to stop. Attorneys and clients should not be forced to trial via Zoom at ANY time, whether for Fact Findings or Termination Trials.”*

Sample Quotes from Survey Respondents on Trial Suspension

- *Consider keeping speedy trial intact and urging prosecutors to only file what they are able to safely try. When this is over they will likely be within statute of limitations for most offenses. Simply filing and continuing them out puts my colleagues way over caseload limits and they are steadily increasing because nothing can get resolved. It would be better to dismiss cases w/o prejudice and refile in a year when the cases can go to trial.*
- *Courts need to restrict filings from prosecutors. After the initial shut down in the Spring, filings have steadily increased and, from what I can tell, are essentially back at pre-pandemic levels. The prosecutor’s office is not the entity that has to bear the brunt of this, and so they have no incentive whatsoever to slow down their filings. They will continue to file as many cases as they want unless the local courts or the Supreme Court imposes some restriction on their discretion to do so. So far, the conversation has been, “how can we keep things operating as normal, but still provide marginal safety to everyone.” The notion of achieving “normal” court operations right now is insane and it needs to be abandoned.*

Survey Recommendations for Overcoming Impacts from Speedy and Jury Trial Suspensions:

Find safe ways of conducting jury trials; reduce the number of persons subjected to pretrial detention; restrict the issuance of warrants for pretrial detention; encourage the swift exchange of discovery and negotiated resolutions; investment in diversions and restorative models of justice; restrict calendar size to limit the number of arraignments/new cases.

IV. LITIGATING IN THE COVID ENVIRONMENT

Survey respondents answered several questions about the changes in courthouses in response to COVID.

Respondents overwhelmingly respond that video conferenced pretrial hearings and the use of ex parte orders are effective, improve access to justice, and reduce wasted time in court for counsel and their clients. One commentator noted that “accepting agreed orders ex-parte has simplified case management and reduced in-person hearings greatly.” Respondents from jurisdictions without videoconferencing strongly advocate for assistance in expanding a consistent statewide system.

While remote hearings have been largely lauded, respondents caution that remote hearings without access to breakout rooms imperil the right to the advice of counsel. Respondents in jurisdictions without remote hearings were critical of judicial attempts to proceed with video conferenced hearings without allowing lawyers to have real-time confidential communications with their clients. (See [Section I.B.](#) of this report for more details on confidential communication during remote hearings.)

A. Agreed Ex Parte Orders

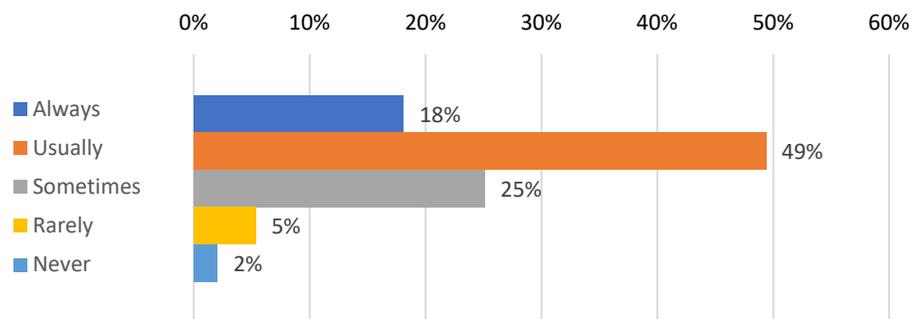
The survey asked respondents whether their courts accept agreed ex parte orders. To reduce foot traffic in the courthouse and prevent exposure of litigants and legal staff, many courts have encouraged parties to provide agreed orders in advance of a hearing for a judge’s signature, eliminating the need for anyone to enter the court on routine matters. An overwhelming 96% of survey respondents indicated that their courts do accept ex parte orders. As one respondent stated, “This has resulted in a lot more work for public defenders, but it has decreased the foot traffic in the courthouse, reduced the number of hearings, and improved access to justice for those who can move their case without attending court.”

Survey Recommendation for Agreed Ex Parte Orders
Encourage pretrial communication by counsel to submit agreed ex parte orders; continue to allow defense counsel to sign for their clients; continue to allow e-signatures; continue to allow e-filing.

B. Issuance of Bench Warrants

After the start of the pandemic, the Washington Supreme Court issued various orders⁵ regarding court functions to ensure safe continuity of essential operations. A significant area addressed by these orders was imposing limitations on the issuance of bench warrants when people failed to appear for court. As shown in Figure 8, 67% percent of survey respondents indicated that their courts usually or always complied with those orders. A small minority indicated that their courts had not. Several respondents commented that the reduction in warrants was largely attributable to cases where prosecutors did not request warrants. One commentator recommended that the court publish a definition of “violent crime” and “administration of justice” to assure equal application of criminal Rule 3.2.

Figure 8: Courts’ Compliance with WA Supreme Court’s Emergency Order Relating to Issuance of Bench Warrants (n=243)



Survey Recommendations on Issuing Bench Warrants:

Strict application of CrR/LJ 3.4 and CrR/LJ 3.2 when considering warrants; delayed issuance of warrants for FTA during COVID pandemic; reduced reliance on bail and warrants as a tool to manage court dockets.

⁵ <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19Orders>

C. Remote Hearings

Since the beginning of the COVID-19 pandemic, courts statewide have transitioned many or all of their hearings to an online format, reducing the number of people in the courtroom. Persons charged with crimes and their attorneys sometimes appear remotely from community settings such as their homes, offices, or other locations, and sometimes appear remotely from detention facilities.

Remote appearance tends to happen in one of two manners: web-based meeting platforms or telephonically. Approximately one-half of survey participants indicated that they appear by web video. Twelve percent attend only telephonically, 30% appear by web or phone, and seven percent indicated that they do not attend remotely, but their clients do.

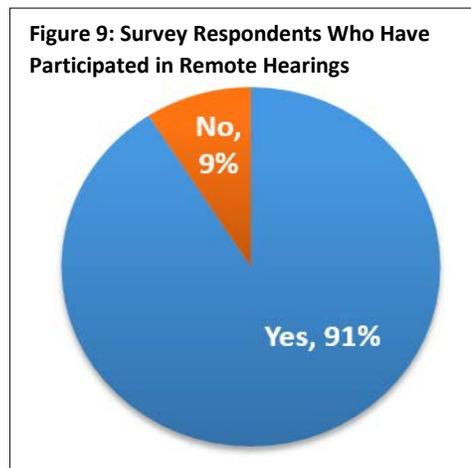
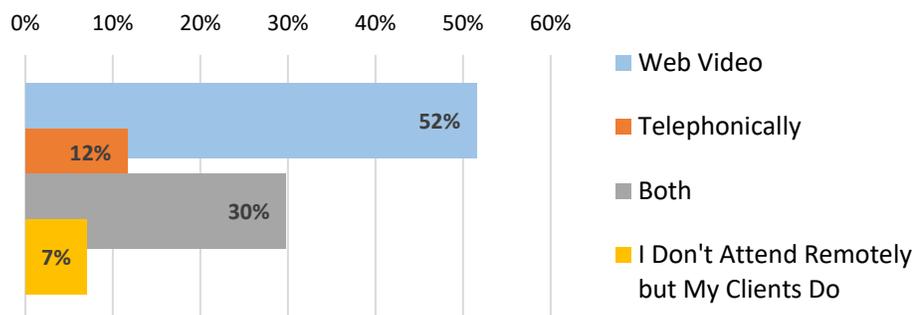
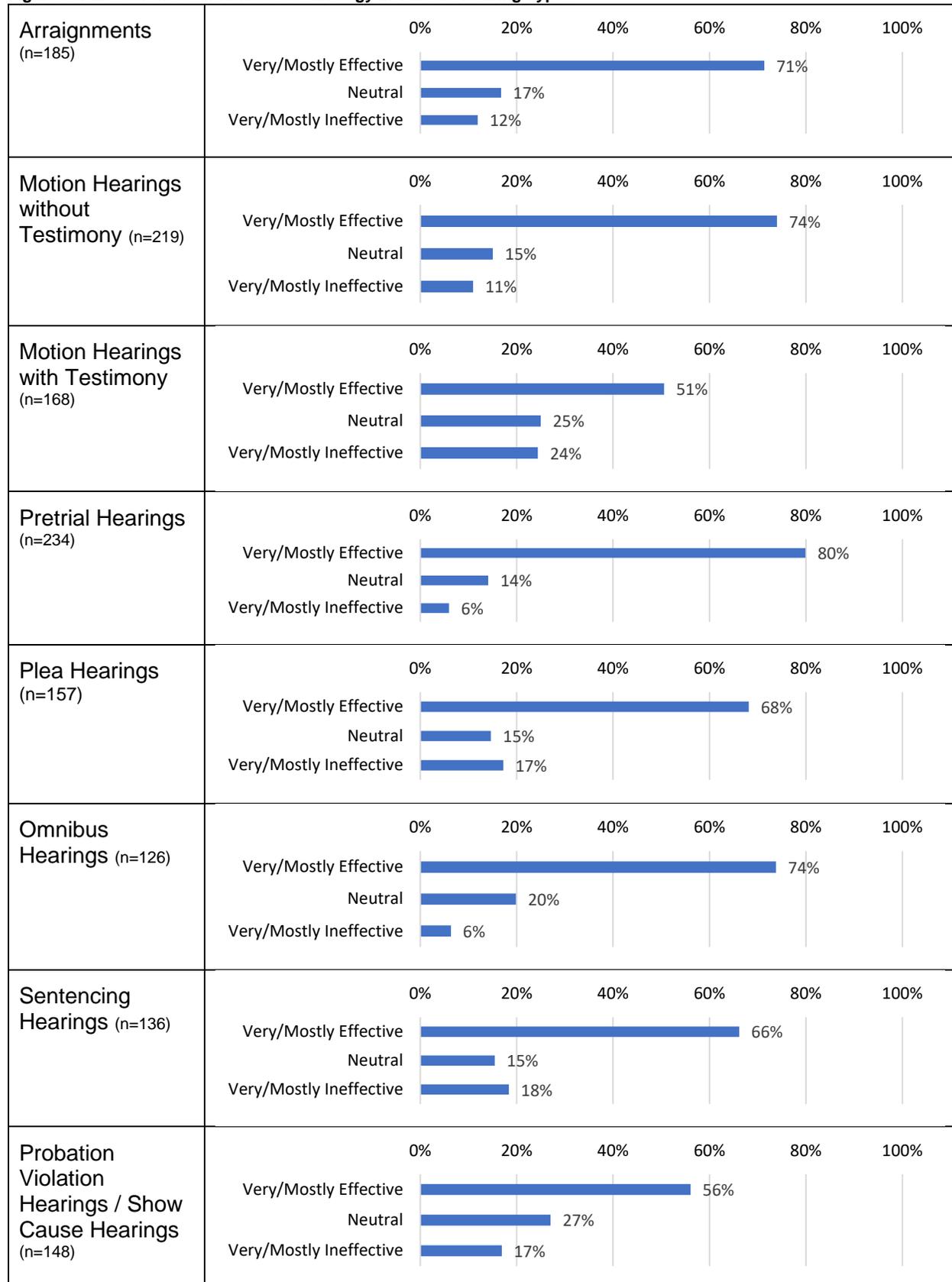


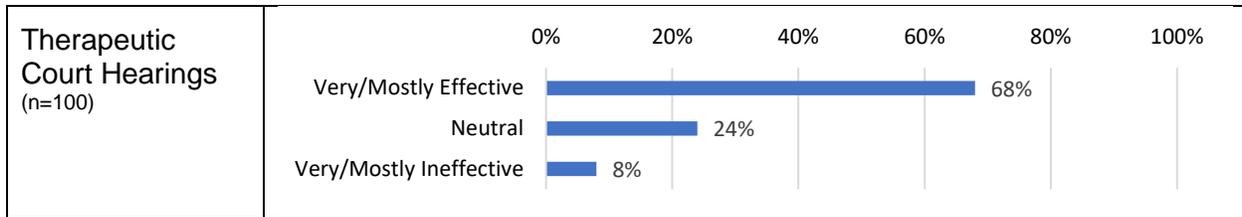
Figure 10: How Survey Respondents Attend Remote Hearings



Survey respondents who had attended remote hearings were asked to reflect upon different hearing types, and indicate the effectiveness of remote technology in assuring clients' Constitutional and legal rights. As seen in Figure 11, a significant majority of respondents indicated that remote technology is either very effective or mostly effective in the listed hearing types. (Note Jury Trials are addressed later in this report). However, the comments submitted by respondents also illuminated some concerning themes across multiple jurisdictions.

Figure 11: Effectiveness of Remote Technology in Various Hearing Types





While the above figures illustrate an overall satisfaction with remote hearings, the respondents' comments provided a greater insight to concerns not addressed within the specific questions.

Concerning Themes that Emerged through Survey Comments:

- 1. Client Communication and Client Control:** Many respondents commented on the difficulty of communicating confidentially with their clients immediately before and during remote hearings. More on confidential communication is addressed in [Section 1.B](#). Additionally, attorneys commented on the difficulty of advising clients about the need to remain silent when the proceedings are confusing or frustrating. During in-person hearings, attorneys can play a vital role in helping to reassure their clients, but attorneys have significantly less ability to do this when appearing remotely.
- 2. Less Persuasiveness with the Bench:** Several defense attorneys indicated that remote appearance impedes their effectiveness in advocating for clients. Attorneys perceive that they achieve better results in motion and sentencing hearings when they appear in person with the judge⁶. This problem is particularly troubling to some attorneys who simultaneously care for young children at home due to school closures and lack the flexibility to appear in court physically.

"At motion hearings... I find myself analyzing whether to be IN court with the Judge or in the jail courtroom with my client because with many judges being in-person does make a difference! Knowing and realizing this cause great concern over any trial or hearing with testimony over video. If a Judge I practice before regularly perceives me differently in person & on video, there is no possible way a defendant gets a fair trial with a witness, victim, or jury not in person, in the same room, with both the Judge and the defendant."

⁶ Camille Gourdet et al., "Court Appearances in Criminal Proceedings through Telepresence" RAND (2020); Alicia Bannon & Janna Adelstein, "The Impact of Video Proceedings on Fairness and Access to Justice in Court" The Brennan Center. September 10, 2020. Available at: <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court#:~:text=A%202019%20report%20from%20the.and%20thus%20argue%20one's%20case>; Shari Meaghan Annett, "To Be Physically Present or Not to Be Physically Present: The Use of Videoconferences during Felony Proceedings," Boston College Law Review 60 (December 2, 2019): 165–79; Ingrid V. Eagly, "Remote Adjudication in Immigration," Northwestern University Law Review 109 (2015): 934; Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," Journal of Criminal Law and Criminology 100 (2010): 877-878, 900; Mike L. Bridenback, Study of State Trial Courts Use of Remote Technology, National Association for Presiding Judges and Court Executive Officers, 2016, 12. Available at: <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>; Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant." Tulane Law Review 78, no. 4 (March 2004): 1089-1168.

Sample Quotes – Remote Hearings	
Positive Examples	Concerning Comments
<p><i>I have done three dependency trials and they went pretty well. But in all of those cases, my clients had access to good technology, wifi and were fairly high functioning. My clients facing termination trial don't usually fit those categories.</i></p> <p><i>I have been extremely happy with the way virtual court has worked. Initially they only did telephonic remote hearings, which was very challenging (but better than being in person), but the webex/Zoom hearings are great.</i></p> <p><i>All ITA trials are conducted remotely with defense attorney and client in different places. This lessens the amount of communication between attorney and client during the hearing, but the court will allow breaks to talk if needed, so generally this way of conducting hearings has been "mostly effective"</i></p>	<p><i>Our courts have refused/failed to provide the means to view or share documents that are generated at the hearing. Instead the court (usually accurately, but sometimes not) describes the document to the parties and hard or digital copies are subsequently obtained (usually on the next day).</i></p> <p><i>Calendars with interpreters are nearly impossible.</i></p> <p><i>I asked to appear via video service (WebEx) for health reasons and was told by the court administrator that I needed to obtain a court order to do this. I had attempted to attend hearings in person, but the judge was unmasked and required parties to be unmasked during their hearings. There was no ability to physically distance at counsel tables and this felt very unsafe to me.</i></p> <p><i>I think clients have a lesser understanding of the court proceedings they participate in when they appear remotely.</i></p>

Several defense attorneys noted that some jurisdictions or judges are reluctant to use remote videoconferencing for pretrial hearings. Respondents expressed hope that all courts would adopt remote videoconferencing for pretrial hearings. Defense attorneys practicing in multiple jurisdictions suggested that Washington Courts adopt a uniform platform and model for accessing remote hearings; learning a new system and process in each court is a challenge for practitioners and clients.

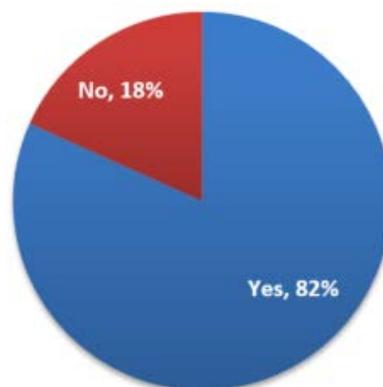
Survey Recommendations for Future Use of Remote Hearings:

Continue to offer the option to appear remotely through web platforms; use web platforms that allow for telephonic participation instead of hearings where all participants engage by telephone; allow short breaks to allow attorneys to communicate confidentially as needed with their clients.

D. In-Person Hearings

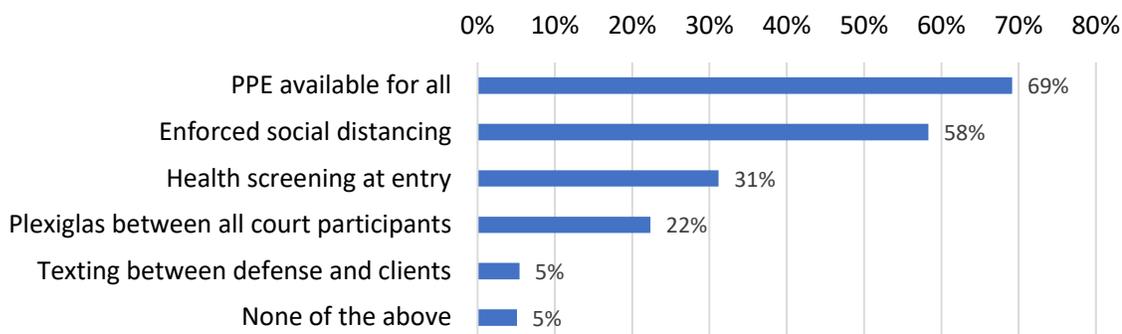
A clear majority of public defense attorneys have been physically present in courtrooms since the COVID pandemic began. Out of 361 survey respondents, 295 indicated that they have been physically present in court. Responses to a variety of questions throughout the survey illustrated different reasons for attorneys appearing in person. One common theme was that while attorneys sometimes are invited to appear remotely, they still appear in person because their clients are required to do so because clients lack technology, are in custody or are ordered by the court to appear in person.

Figure 12: Physical Presence in Courthouses since COVID Began (n=361)



The survey asked attorneys what COVID safety measures are consistently enforced during in-person hearings. The majority of courts were using and enforcing the use of personal protective equipment (PPE). Still, more than 30% of respondents answered that PPE is not available for participants, and more than 20% responded that judges and court staff do not consistently use PPE. Only 58% reported that social distancing was enforced.

Figure 13: COVID Safety Measures Consistently Enforced During In-Person Hearings (n=295)



Increased Risks Inherent to Defense Representation: As described in [Section 1.C.](#) of this report, defense attorneys are uniquely situated to be at high risk of transmission because of the physical proximity to clients that is inherent in their jobs. Whether seated together at counsel table, meeting in jail facilities, or having side whispered conversations during hearings, attorneys and their clients are physically close. Moreover, when attorneys represent limited English proficient or Deaf clients, interpreters must also enter this close sphere. Consequently, courts' compliance with health standards has been particularly concerning to the defense community.

Risks Outside of Courtrooms: Several respondents commented that while judges and court staff enforce social distancing, mask-wearing, and other safeguards in the courtroom, they face greater risks in ancillary environments. As described by one survey respondent, "No one

assures that masks are worn at all times in the courthouse. Anti-maskers are sometimes called out in court by judges who notice them, but they roam the hallways freely with no masks.”

Survey respondents noted the lack of consistent mask wearing by corrections officers when outside of courtrooms:

- “Corrections deputies wear PPE in court but often they do not wear it outside of court.”
- “I have seen security staff at court entrances take off their masks all the time. I’ve seen security staff pull down their masks to ask people about COVID exposure and take off their masks when no one is coming into the court but people are still nearby and exiting the court.”
- “Jail staff are NOT always wearing appropriate PPE.”

Survey Recommendations for In-Person Hearings:

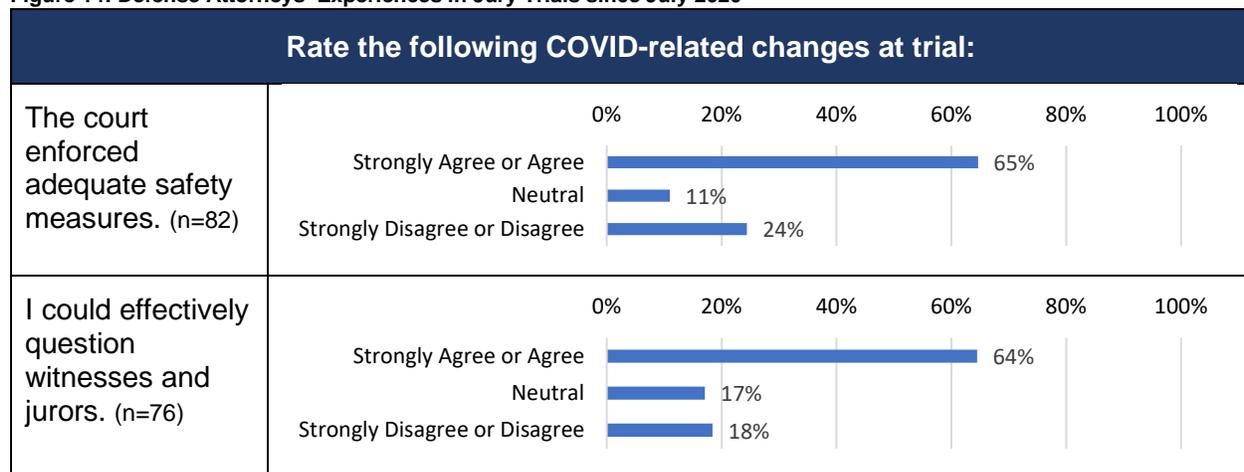
Continue to follow public health and safety guidelines in the courtroom and in the hallway outside the courtrooms; continue to make PPE available; provide private spaces for defense counsel, their clients, and interpreters to meet confidentially and appropriately distanced; take breaks during hearings for counsel to meet with their clients for confidential conversation.

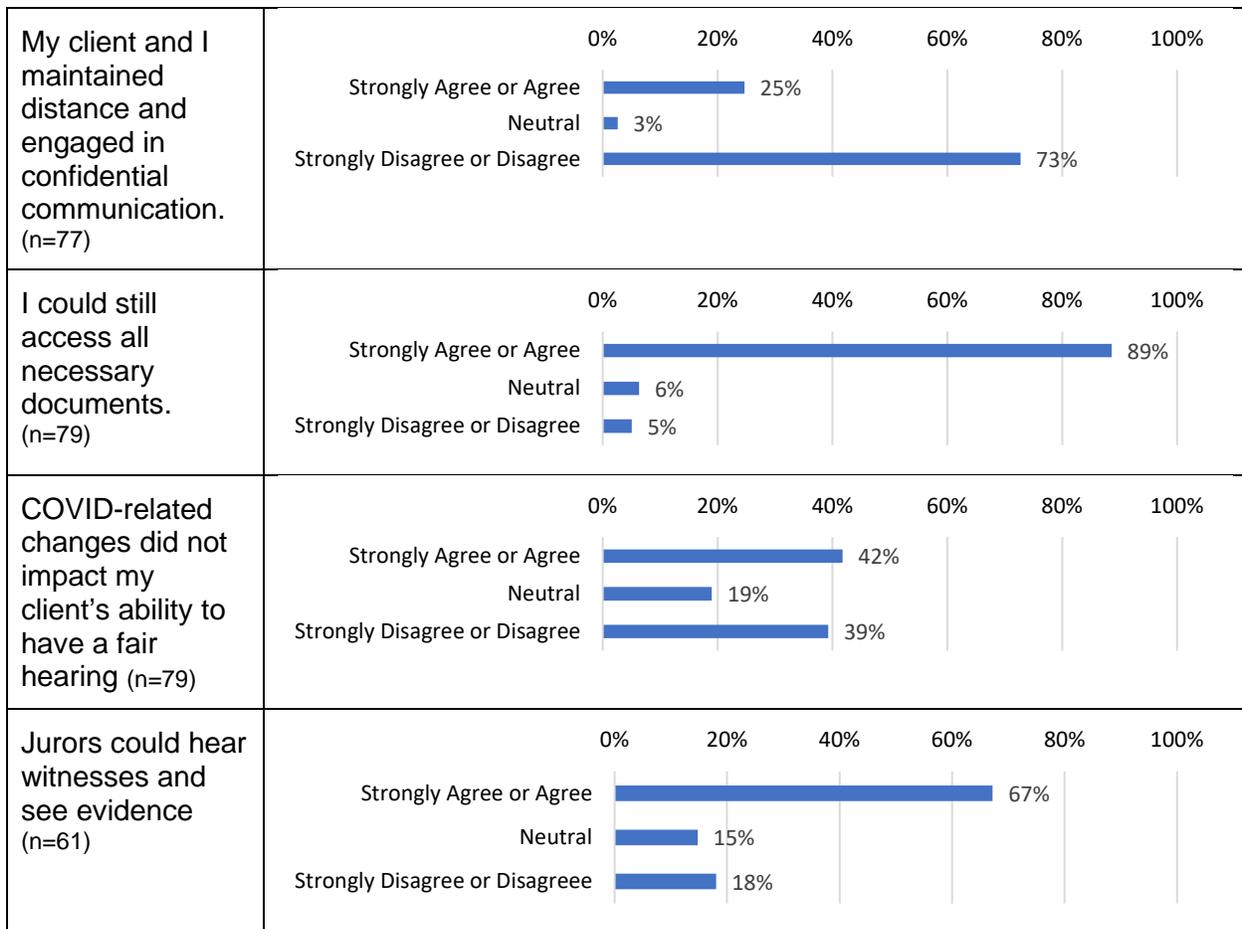
E. Jury Trials

Survey respondents representing 33 different jurisdictions reported participating in jury trials since July 2020. The majority of attorneys indicated positive outcomes in courts enforcing safety measures, effectively questioning witnesses and jurors, accessing necessary documents, and jurors’ ability to see all evidence. As seen elsewhere in survey results, the most substantial concerns were on confidentially communicating with clients while maintaining safe distances.

“My office successfully completed multiple trials without issue, so I do believe trials can start up safely again.”

Figure 14: Defense Attorneys’ Experiences in Jury Trials since July 2020





Client Communication: Attorneys commented on the difficulty of communicating with clients during trial while still maintaining social distance. As stated by one attorney, “There is simply no room for clients to sit even three feet apart at trial.” In some cases, attorneys and clients use technology to text message during trial for questions and brief explanations. However, such technology is not allowable for in-custody persons, despite the frequent COVID outbreaks in local jails. “I found it impossible to effectively socially distance and communicate with client in trial - client was in custody so was not able to have any access to tech so I couldn’t just text them.” Attorneys appreciate the work of courts to make trials safe for jurors, but feel frustrated when judges are not seeking or supporting solutions for safe communication strategies in trials and other in-person hearings.

Survey Recommendations for Jury Trials

Employ technology or methods to allow for social distanced and confidential communication between defense counsel and their clients (instant messaging, text messaging, conference rooms, etc.); continue successful efforts to assure safe and effective presentation of evidence and the law.

V. INCLUDING THE DEFENSE BAR IN IDENTIFYING SAFE AND FAIR STRATEGIES

The COVID-19 pandemic has forced judicial communities to make significant changes to their practices. Many aspects of client representation typically require attorneys to be near their clients and frequently in crowded rooms. In some jurisdictions, judges, court staff, defense counsel, prosecutors, and other stakeholders have worked collaboratively to design and implement new processes that comply with state safety guidance, ensure constitutional and statutory rights, and keep the flow of cases moving through the justice system.

Figure 15 – Has the Court in your Jurisdiction Included the Defense Bar in Discussions about Court Operations in the Pandemic?



The survey asked attorneys whether they have been involved in such local discussions about changes to court operations during the pandemic. The majority, 60%, said they were, and 25% were unsure. Among respondents who indicated that the defense bar had been included in such discussions, it appears that typically public defense management was invited to such meetings. Private defense counsel, on the other hand, had not been included in these conversations. Additionally, many commented that these meetings occurred early in the pandemic but have not continued. Many respondents also indicated that while they may be invited to meetings, the purpose was often to announce decisions on changes to practice after those decisions had been made. Many defense attorneys – public and private – wish to have a voice in stakeholder discussions to reflect on challenges and identify opportunities for improvements.

Sample Quotes – Stakeholder Impact on System Changes	
Positive Examples	Concerning Comments
<i>Last spring I was a supervisor. The presiding judge met with me, outlined protocols the court planned to implement. I made several suggestions based on issues my people were seeing and the court adopted all of our requests. The judges to whom I am assigned</i>	<i>Some effort was made after several months but safety measures are mostly geared toward protecting prosecutors, judges and court staff and defense attorneys are still greatly at risk.</i>

<p><i>have been very receptive to requests I've made to keep clients, court staff and myself safe.</i></p> <p><i>We have court operations meetings at least every two weeks to discuss issues affecting safe operations of the juvenile court. Defense counsel participates in these meetings.</i></p> <p><i>Our stakeholders (judges, clerks, corrections, court admin, prosecutor, defense) met in March and agreed to suspend jury trials. We have been meeting almost monthly since. The Court solicits input on Emergency Order drafts and the parties raise concerns for the group's consideration.</i></p>	<p><i>I have never once been included in a discussion. It is very frustrating. We hear of other counties holding meetings with stakeholders though and I think it would be very helpful.</i></p> <p><i>I occasionally get looped in on communications from our Court, but as a private defense attorney who is not in a public defender's office or on the court appointed panel, I often feel very in the dark about what is going on.</i></p>
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Survey Recommendations for Including Defense Counsel in Stakeholder Meetings

As courts consider changes to COVID-related practices and implement plans to address case backlogs, include private and public defense counsel in local discussions. They bring an invaluable and unique perspective on behalf of the work they do, and the greatest challenges that persons accused of crimes currently face. The defense bar is an integral part of court operations, and their contributions to strategy planning will help for smoother implementation of policies and procedures.

VI. SURVEY PROFILE

The attorney survey was designed with input from representatives of the Washington State Office of Public Defense, the Washington State Bar Association’s Council on Public Defense, the Washington Defender Association, and the Washington Association of Criminal Defense Lawyers. It was published to attorneys statewide on email listservs and newsletters. Respondents were given a window of December 10 – 18, 2020 to submit their responses.

Three hundred and ninety-six attorneys responded to the survey, and respondents represented a fair cross-section of Washington’s defense community. **Respondents practiced in various case types**, including felonies, misdemeanors, juveniles, dependencies, commitments, and appeals. As shown in Figure 16, most of the respondents represent persons accused of crimes in felony and misdemeanor/gross misdemeanor cases.

The respondents also reflected a **wide geographic diversity**. Attorneys practicing in county courts represent 34 counties statewide. Similarly, attorney respondents who represent persons in Municipal Courts work in a wide geographic range of cities statewide.

Figure 16 – Primary Practice Areas of Survey Respondents

Primary Case Type	Survey Respondents
Felonies	144
District/Municipal	114
Juvenile	33
Dependencies	63
Civil Commitment	14
Varied Case Types	10
Appeals	6
Management	4
Other	8
Total	396

Figure 16 - Counties of Practice of Survey Respondents



Figure 17 - Cities of Practice of Municipal Court Defense Attorney Respondents

- Battle Ground
- Bellingham
- Bremerton
- Buckley
- Burien
- Burlington
- East Wenatchee
- Everett
- Grandview
- Granger
- Issaquah
- Kent
- Longview
- Mercer Island
- Mount Vernon
- Mukilteo
- Olympia
- Seattle
- Selah
- Shelton
- Spokane
- Sunnyside
- Tukwila
- Yakima

The attorneys who responded to the survey represent clients in both public and private defense. **More than half of the respondents work exclusively in public defense,** and an additional 24% work *mostly* on public defense. Approximately 12% of respondents work exclusively or mostly in private defense.

The far majority of surveyed respondents work in the private sector. Only 37% work in public defense agencies (government offices or non-profit agencies dedicated exclusively to public defense). All other respondents are solo practice attorneys or work in smaller firms.

Figure 18 – Caseload Description of Survey Respondents

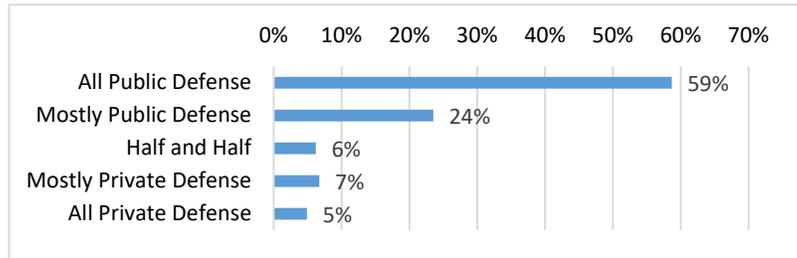


Figure 19 – Employment Structures of Survey Respondents

