

## **Council on Public Defense Report on Revisions to WSBA Standards of Public Defense**

### Executive Summary:

1. Washington's public defense system is in crisis. High caseloads and defense attorney attrition have stressed the criminal judicial system to the breaking point. With these problems in mind, the WSBA Council on Public Defense (CPD) has undertaken a comprehensive revision of the WSBA Standards for Indigent Defense Services ("WSBA Standards"). (pgs. 2-5)
2. Based on data and public responses gathered by the CPD, the CPD made significant revisions to the WSBA Standards in three primary areas:
  - a. Attorney Qualifications (pg. 5)
    - The WSBA Standards provide the required qualifications attorneys must meet prior to handling cases at various stages of difficulty.
    - Many of the defense attorneys who meet the qualifications to handle the most serious cases are resigning and there are not enough attorneys qualified under the current standards to take on those serious cases. The COVID-19 pandemic made matters worse by preventing attorneys from becoming trial-qualified while trials were put on hold.
    - The CPD's revisions to attorney qualification standards seek to balance providing a clearer and faster path for attorneys to become qualified to handle cases of increasing difficulty, while ensuring lawyers have the experience necessary to represent clients at those levels.
  - b. Support Staff Requirements (pgs. 5-8)
    - Support staff, such as social workers, investigators, and mitigation specialists, are an indispensable part of the public defense system.
    - At present, Washington's rules recommend that some types of support staff be available to public defenders, but do not require specific staffing ratios.
    - During listening sessions and in responses to surveys, Washington public defenders informed CPD that mandating specific staffing levels was necessary and would assist with encouraging funders to provide for those services.
    - The revised WSBA Standards phase in requirements that agencies maintain specific support staff ratios.
  - c. Caseload Standards (pgs. 8-17)
    - Individuals accused of crimes have a Constitutional right to adequate defense. This means that an attorney must have the time necessary to thoroughly investigate a client's case and to communicate with the client.
    - Changes in the types of evidence used in criminal cases and research on caseload standards have made clear that Washington's standards are outdated and do not permit attorneys to fulfill their Constitutional and ethical obligations to their clients.
    - The proposed revisions phase in reduced caseloads and are urgently needed to bring Washington into compliance with public defense requirements.

## **I. Introduction**

Public defense in Washington is facing a crisis of attrition and an inability to recruit staff brought about by excessive workloads and poor compensation. Repeatedly, law students in Washington report that they do not want to enter public defense because of the volume of work with little staff support and low salaries. Attorneys are resigning from the public defense profession in droves because they cannot continue the work given the volume of cases. Moreover, defendants in criminal prosecutions have a Constitutional right to representation by counsel and that representation must be meaningful. Not only do untenable caseloads create a personal career crisis for dedicated public defender civil servants, but they create a Constitutional crisis where there are insufficient numbers of public defense lawyers to represent the accused.

This crisis is not a distant fear. These proposed revisions are prompted by an unignorable shift in workloads and working conditions in public defense nationwide that has brought public defense to a very public crisis. Post-COVID, some Washington jurisdictions have experienced a surge in criminal case filings and have been unable to appoint qualified defenders to represent the accused. In other jurisdictions, public defense lawyers may be within caseload limits, but the exponential increase in the time required to review the large volumes of electronic and technical discovery generated in each case demonstrates that the current caseload standards are outdated.

The current caseload standards put public defenders in an unsustainable position where they simply lack the time and resources necessary to provide Constitutionally adequate defense to their clients. Moreover, the deprivation of the Sixth Amendment right to counsel for the accused can result in dismissal of cases or, worse, the monthslong pretrial detention of the innocent accused while awaiting appointment of an attorney.

Defenders in Washington recognize that high caseloads and the low level of staff support prevent them from meeting their ethical obligation to efficiently respond to their clients and opposing counsel and investigate cases. These conditions have made for dreadful working conditions and Washington's public defenders are rapidly leaving the profession. In a three-month span, the King County Department of Public Defense lost ten Class A qualified lawyers and eighteen total lawyers requiring the transfer of 700 cases from departing attorneys to other staff. Benton and Franklin Counties were unable to recruit enough attorneys to represent charged defendants such that the accused sat in jails for months waiting for a lawyer for an arraignment.

Washington is not alone in this crisis. Nationally, jurisdictions have arrived at this point due to decades of insufficient funding for public defense lawyers and other essential staff and functions. For example, Oregon is facing a public and political reckoning brought about by years of understaffing public defense. In Washington, the problem is exacerbated by the minimal investment in public defense provided by the State. Moreover, the diverse and decentralized delivery of public defense in Washington presents significant challenges to ensuring that the quality of representation does not vary by geography. Given this backdrop, informed standards that reflect the current demands of public defense are necessary to meet the Constitutional and ethical requirements to provide competent defense to individuals facing criminal prosecution.

The revised WSBA Standards represent two years of work by a diverse cohort of law professors, public and private defense attorneys, public defense administrators, prosecutors, judges, formerly incarcerated

people, and public defense investigators. In addition, the revisions are a product of years of feedback from Washington’s public defense practitioners, prosecutors, judges, community members, and others involved in the public defense system. WSBA’s Council on Public Defense (CPD) heard from more than 300 public defense practitioners, who overwhelmingly supported the proposed revisions. For too long, there has been no light at the end of the tunnel for public defenders and no relief in sight. While this crisis was not created overnight and will take time to correct, the CPD believes the adoption of the proposed WBA Standards will begin to remedy the crisis and bring Washington’s statewide public defense delivery system into alignment with Constitutional standards.

## **II. Washington Supreme Court Request for Revisions**

In January 2022, the Council on Public Defense began its review of the WSBA Standards for Indigent Defense Services by convening public defense lawyers, investigators, and administrators; directors of Washington’s public defense agencies; and law professors with expertise in criminal defense to discuss responses to increased caseloads. Simultaneously, a team of researchers with the RAND Corporation, the National Center for State Courts, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, and public defense expert Attorney Stephen F. Hanlon began a nationwide examination of public defense caseload standards. In September 2023, this team published the National Public Defense Workload Study, setting forth their findings that the caseload standards used by the majority of jurisdictions—including Washington—were far too high to allow defense attorneys to provide Constitutionally adequate representation.

In recognition of the mounting public defense crisis, in October 2023, the Justices of the Washington Supreme Court also requested that the CPD specifically address caseload standards. The Justices, cognizant of the shortage of lawyers and the consequences to the criminal legal system, requested updated caseload standards by November 2023. As this would be a significant undertaking, the CPD asked for and was granted additional time to develop standards to Washington law and to gather feedback from public defense professionals. This report details the CPD’s process, the data considered, and the reasoning for the proposed revisions.

## **III. Public Engagement in Revision Process**

### *a. Listening Sessions*

The CPD sought to engage the public and, in particular, members of the public defense community at each stage of the revisions process. In January 2022, the CPD held a listening session with public defense lawyers and administrators to discuss staff shortages. At that session, the CPD also heard from public defenders about developments in digital discovery, such as video footage and phone call recordings and the overwhelming amount of time required to review that discovery.

While developing recommendations to revisions of the Standards, the CPD requested feedback on the revisions during additional listening sessions. Sessions held in October 2023, December 2023, and February 2024, specifically addressed revisions to support staff requirements and attorney qualifications.

One additional listening session, held in January 2024, sought input from director-level administrators of public defense offices. The CPD heard from Directors about the funding and implementation impacts of the proposed revisions. A second January 2024 session with King County and Whatcom County attorneys addressed case classifications similar to those used in the NPDWS study discussed below.

*b. Public Education*

The CPD organized two continuing legal education sessions which focused specifically on the updated caseload standards proposed in the National Public Defender Workload Study (NPDWS). In April 2023, at the annual Washington Defender Association (WDA) Defender Conference, Professor Robert Boruchowitz led a CLE detailing the NPDWS study that was underway at that time. In December 2023, CPD Chairperson and Director of the Snohomish County Office of Public Defense Jason Schwartz conducted a CLE on public defense ethical standards and the NPDWS caseload standards at a second WDA-sponsored event. In addition to providing information to Washington attorneys about the updated standards for public defense caseloads, these CLEs were an opportunity for attendees to share their thoughts on the standards and the state of Washington public defense more generally. Many attorneys at these sessions voiced their frustration with Washington's high caseloads.

*c. Surveys*

To begin with, a 2023 study conducted by the Washington State Office of Public Defense (OPD) asked former public defenders in Washington about their reason for leaving the profession.<sup>1</sup> Low pay and high caseloads were the top reasons respondents cited for leaving<sup>2</sup>

In February 2024, CPD sought input from attorneys, administrators, and support staff practicing in the area of criminal defense through a survey. The survey presented respondents with the proposed revisions to support staff requirements, attorney qualifications, and the NPDWS caseload recommendations and asked respondents to provide feedback on the proposals. The survey was widely disseminated to individuals working in public defense, including to all members of the Washington Defender Association.

In total, 322 people submitted answers to the survey, although not all respondents answered every question. Of those individuals, nearly three-quarters (72%) were employed by federal, city, county, or non-profit defense agencies, with the remainder coming from private public defense contract attorneys (11%) and solo practitioners (13%). Similarly, close to three-quarters (74%) of respondents were attorneys. The remainder were social workers, mitigation experts, or social services providers (5%); investigators (5%); supervisors (4%); and directors or others in lead management roles (3%).

The survey responses to the proposed updates to the WSBA Standards were overwhelmingly positive. This report discusses the responses to specific proposed revisions in more detail below. However, overall, when asked to compare the proposed revisions to the current standards, 92% of survey respondents reported that the proposed revisions reflected the standards needed to meet their legal and ethical obligations to their clients better than the current standards.

*d. CPD Composition and Meetings*

Lastly, the CPD itself is made up of a diverse group of individuals who work or have worked in the criminal legal system. For example, members of the CPD include law professors, Washington Supreme Court Justices, public defenders, and prosecuting attorneys. These members' knowledge and experience was invaluable to the CPD during this revision process.

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<sup>1</sup> See OPD Memorandum to Justices of the Washington State Supreme Court, 3 (Nov. 27, 2023).

<sup>2</sup> *Id.*

CPD meetings are advertised on the WSBA website and are open to the public. There was a noticeable increase in attendance and participation of non-Council attorneys during discussions of the standards revisions. In addition, CPD members received many emails and phone calls from public defense practitioners who added input to the revision process. Those communications were taken into consideration by the CPD.

#### **IV. Revisions to Attorney Qualifications Standards**

The Indigent Defense Standards provide the required qualifications attorneys must meet prior to handling cases at various stages of difficulty. For instance, to represent a client charged with an adult Class A felony, the current Standards require an attorney to have a minimum of two years' experience as a prosecutor or public defender and have handled a significant portion of three trials in felony cases.<sup>3</sup>

Revisions to these standards are needed because the standards as currently drafted do not reflect the types of experience actually available to attorneys and are contributing to the shortage of public defense lawyers. There has been a significant attrition of attorneys qualified to represent clients in the most serious cases throughout the State. The COVID-19 pandemic only served to make the shortage worse because attorneys were unable to gain the trial experience required for higher levels of representation while trials were on hold. The lack of attorneys qualified for higher levels of representation under the Standards contributes to the vicious cycle of high caseloads and further attrition.

The CPD's goal, therefore, was to balance the need for a clearer and faster path for attorneys to become qualified to handle cases of increasing difficulty, while also ensuring defense lawyers have the experience necessary to represent clients at those levels. If lawyers can more easily become qualified to represent the accused in more serious cases, the pool of attorneys available to take such cases will grow, relieving the shortages that lead to underrepresentation for defendants.

The revisions also reflect changes in practice and the need for additional or alternative training and supervision to supplement trial experience. Many of the current standards require extensive trial experience. While such experience is invaluable, trials are increasingly less common and, therefore, the experience is difficult to acquire. For this reason, the revised standards place a greater emphasis on acquiring experience through training and other in-court practice.

Practitioners have indicated that the revised qualifications remain sufficient to provide attorneys with the necessary experience to defend clients at each level. The February 2024 survey asked if the proposed revisions to attorney qualifications reflected the qualifications needed to effectively represent client charged with each category of offense. 67% of respondents answered "yes" with respect to qualifications for misdemeanor cases and 62% answered "yes" for qualifications for felony cases.

#### **V. Revisions to Support Staff Requirements**

The CPD has also proposed revisions to the sections of the WSBA Standards addressing the recommended ratio of support staff to attorneys. At present, Washington's WSBA Standards, Court Rules, and other practice guidance provide few requirements with respect to the support staff necessary for

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<sup>3</sup> See WSBA Standards for Indigent Defense Services, Standard 14.2.A, available at [https://wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/standards-for-indigent-defense-services-approved-by-bog-revised-september-2021.pdf?sfvrsn=b40d17f1\\_4](https://wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/standards-for-indigent-defense-services-approved-by-bog-revised-september-2021.pdf?sfvrsn=b40d17f1_4).

agencies to provide public defense services. The current WSBA Standards recommend, but do not require, that public defense offices employ a minimum of one investigator and legal assistant for every four attorneys.<sup>4</sup> The Supreme Court Standards for Indigent Defense merely state that “[p]ublic defense attorneys shall use investigation services as appropriate,”<sup>5</sup> and Washington provides no guidance on the appropriate ratio of social workers or mitigation specialists.

The present WSBA and Court Standards do not fully reflect the important role support staff play in ensuring defendants receive adequate representation. Defendants are entitled to meaningful defense. “To receive this representation, clients must be provided attorneys who have the basic tools of an adequate defense. Necessarily, this includes adequate staff to support the work of the lawyer.”<sup>6</sup> Support staff—which may encompass social workers, legal assistants, investigators, and mitigation specialists—benefit the public defense system by providing skills that attorneys may not possess and by freeing up attorney time for tasks that require the particularized skill set of a lawyer. For example, client interviews may be conducted by a social worker while the attorney performs legal research and appears in court. Especially with the increase in digital records, such as video footage from police body cameras, support staff are an indispensable resource for attorneys who have limited time to review such evidence on their own.<sup>7</sup>

The early involvement of investigators, mitigation specialists, and social workers can also lead to earlier resolution of cases and more appropriate sentencing, benefiting the health of the entire criminal legal system. For instance, “[t]he earlier an investigator can uncover facts that exculpate a client, the sooner the prosecution can determine that pursuing the case is not the best use of its resources. Similarly, the sooner a client is presented with facts that inculpate him or her, the earlier the client can make an informed decision about the wisdom of a plea.”<sup>8</sup> Similarly, “social workers can very often provide important assistance in advocating for alternatives to incarceration, by identifying substance-abuse problems, informing the court about the client’s relevant history, and locating possible treatment programs that address the client’s needs. By identifying clients for whom placement in a program is appropriate, [the public defense agency] not only benefits individual clients, but also decreases the heavy costs borne by the state associated with incarceration.”<sup>9</sup> Access to investigators is also crucial because of the evidence admissibility challenges that can arise when an attorney both defends a case and gathers evidence.<sup>10</sup>

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<sup>4</sup> WSBA Standards for Indigent Defense, Standard 6.1.

<sup>5</sup> CrR 3.1, Standard 6.1.

<sup>6</sup> National Association for Public Defense, *Policy Statement on Public Defense Staffing*, 1 (May 2020) (available at [chrome-extension://efaidnbnmnnibpcajpcgiclfndmkaj/https://publicdefenders.us/app/uploads/2023/10/NAPD\\_Policy-Statement-on-Public-Defense-Staffing.pdf](chrome-extension://efaidnbnmnnibpcajpcgiclfndmkaj/https://publicdefenders.us/app/uploads/2023/10/NAPD_Policy-Statement-on-Public-Defense-Staffing.pdf)).

<sup>7</sup> See *Id.*, at 10 (The need for support staff for defense attorneys is even more crucial due to “[r]ecent changes in police and prosecution practices, including the widespread use of police video camera recordings” which “have increased the need for investigator and paralegal assistance for defender lawyers.”)

<sup>8</sup> Legal Aid Society, *Analysis of Time and Resources Necessary for an Effective Defense*, 3 (Aug. 29, 2014), available at <https://www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/IDOO%20FY%2012-13%20Report,%20Addendum%20and%20Appendix.pdf>.

<sup>9</sup> *Id.* at, 32.

<sup>10</sup> See, e.g., ABA Model Rule of Professional Conduct 3.7: Lawyer as Witness: “A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.”

Given the importance of adequate support staff to providing the Constitutionally-required standard of representation, the CPD's proposed revisions to the WSBA Standards would require public defense agencies to provide a minimum of one full-time mitigation specialist or social worker for every three full-time attorneys and one full-time legal assistant or paralegal for every four full-time attorneys.<sup>11</sup> The revised Standards also require, rather than recommend, that agencies employ one investigator for every three attorneys.<sup>12</sup>

Agencies would be required to implement these support staff ratios by no later than July 3, 2028, but must make meaningful progress towards these requirements prior to that date.<sup>13</sup> Revisions to the caseload standards discussed in more detail below will necessitate changes to attorney staffing levels in most jurisdictions over the next three years. Because support staff levels are based on the number of defense attorneys at an agency, the revised Standards allow for public defense providers to come into compliance with support staff ratios within one year following full adoption of the revised caseload standards. This is intended to allow jurisdictions to better plan for funding such positions.

These proposed ratios are in line with the recommendations of rigorous studies of public defense staffing and staffing ratios adopted by other states. First, in 2020, the National Association of Public Defenders recommended that public defense providers should provide one investigator and mental health professional, typically a social worker, for every three attorneys, and one paralegal and administrative assistant for every four attorneys.<sup>14</sup>

Likewise, a study by New York's Legal Aid Society (LAS) and the law firm Davis, Polk, & Wardwell, LLP, recommended public defense agencies employ one social worker and one investigator for every three attorneys based on a comprehensive analysis of support staff needs in cases assigned to public defenders.<sup>15</sup> The study concluded that insufficient support staff levels were "inconsistent with the reality of the criminal justice system today."<sup>16</sup>

To determine the level of support staff that would meet Constitutional requirements, the LAS study convened two task forces of investigators, social workers, and attorneys.<sup>17</sup> The task forces identified the proportion of cases assigned to the public defense agency that would require investigative or social work services, and estimated the amount of time support staff would require to perform those services.<sup>18</sup> The task forces erred on the side of conservatively estimating these case times.<sup>19</sup> The task forces then calculated the total number of support staff needed by dividing the total investigative and social work case

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<sup>11</sup> Proposed WSBA Standards of Indigent Defense Services, Standards 4.B, 7.C.

<sup>12</sup> *Id.*, Standard 6.B.

<sup>13</sup> *Id.*, Standards 4.B, 6.B, 7.C.

<sup>14</sup> National Association for Public Defense, *Policy Statement on Public Defense Staffing*, 1 (May 2020) (available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://publicdefenders.us/app/uploads/2023/10/NAPD\\_Policy-Statement-on-Public-Defense-Staffing.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://publicdefenders.us/app/uploads/2023/10/NAPD_Policy-Statement-on-Public-Defense-Staffing.pdf)).

<sup>15</sup> Legal Aid Society, *Analysis of Time and Resources Necessary for an Effective Defense* (Aug. 29, 2014), available at <https://www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/IDOOC%20FY%2012-13%20Report,%20Addendum%20and%20Appendix.pdf>.

<sup>16</sup> *Id.*, at 8.

<sup>17</sup> *Id.*, at 10.

<sup>18</sup> *Id.*, at 12-16, 34-59.

<sup>19</sup> *Id.*, at 16, 29, 37.

time required for all cases assigned to the agency by the total number of cases a single investigator or social worker is capable of handling in one year.<sup>20</sup> Based on these calculations, the LAS Study concluded the public defense agency would need one investigator for every 2.9 attorneys and one social worker for every 2.6 attorneys to meet the needs of the agency.<sup>21</sup>

The ratios proposed by the CPD also closely track standards adopted in several other states. At the time of the LAS study, Colorado, Connecticut, New Hampshire, New Jersey, and Vermont maintained a ratio of at least one investigator for every four attorneys.<sup>22</sup> Indiana's Indigent Defense Guidelines go even farther and consider offices that do not employ one secretary/paralegal, paralegal investigator, *and* one other litigation support staff position for every four attorneys (total of 0.75 support staff for every one attorney) to have inadequate staff and generally prohibits such offices from taking on a full caseload.<sup>23</sup>

Lastly, when asked in the February 2024 CPD survey to comment on increasing the proportion of support staff to public defenders, Washington practitioners overwhelmingly approved of the updated Standards (91% and 88% for investigators and social worker/mitigation experts, respectively). These responses indicate there is a pressing, unfulfilled need for additional support staff for Washington's public defenders.

## **VI. Revisions to Caseload Capacity Standards**

Perhaps the most consistent concern raised by attorneys during the CPD's review of Washington's Indigent Defense Standards was that the maximum caseloads permitted under the current standards were far too high. When public defenders are overburdened, defendants do not receive the representation guaranteed to them by the United States and Washington Constitutions. Due in part to the untenable position in which these high caseloads place public defenders, many attorneys are leaving the profession, which only leaves more cases for the attorneys remaining. For those attorneys who remain in public defense, caseload standards that do not reflect the actual time necessary to effectively represent a client put those attorneys at risk of violating their ethical duties to their clients.

### *a. Constitutional and Ethical Obligations of Public Defense Attorneys*

The right to an attorney for those subject to criminal prosecution has been a fundamental tenet of our justice system since the formation of this country. This protection is enshrined in the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>24</sup> Similarly, the Washington Constitution states that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."<sup>25</sup>

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<sup>20</sup> *Id.*, at pg. 30, Ex. 7.

<sup>21</sup> *Id.*, at pgs. 931, 60.

<sup>22</sup> *Id.*, at pg. 8.

<sup>23</sup> Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases, Standard J, Table 2 (June 14, 2023) (available at <https://www.in.gov/publicdefender/files/Commission-Standards-2-current-as-of-Aug-25,-2023.pdf>).

<sup>24</sup> U.S. Const. Amend. VI.

<sup>25</sup> Wash. Const. Art. I, § 22; *see also State v. A.N.J.*, 225 P.3d 956, 959 (Wash. 2010) ("The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.").



Moreover, the U.S. Supreme Court made clear in *Strickland v. Washington*, 446 U.S. 668 (1984), that even if a defendant is represented by an attorney, that representation does not meet Constitutional standards unless it is adequate and meaningful.<sup>26</sup> As one Washington judge has explained,

If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent, would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed.<sup>27</sup>

A number of ethics opinions and standards elaborate on what it means to provide adequate meaningful defense. The WSBA Performance Guidelines for Criminal Defense Representation, for example, require "conscientious, ardent, and quality representation . . . at all stages of the criminal process"<sup>28</sup> Among many other responsibilities, the WSBA Guidelines direct defense attorneys to communicate regularly with clients;<sup>29</sup> and "conduct an independent investigation regardless of the client's admissions or statements to the lawyer of facts constituting guilt."<sup>30</sup> Substantial investigation and evaluation of evidence is required of defense attorneys even in cases that will not result in a trial. Prior to considering a plea deal, the WSBA Guidelines also direct that "[u]nder no circumstances should defense counsel recommend to a client acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."<sup>31</sup>

Excessively high caseloads, however, interfere with defense attorneys' ability to provide the required level of representation. The Washington Defender Association's comments to the 2007 version of the Washington caseload standards hold true today: "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."<sup>32</sup>

Perhaps due to the persistent problem of excessive caseloads, defense attorneys are required by multiple ethical standards to ensure they do not take on more clients than they have time to represent. In any representation, Washington Rule of Professional Conduct (RPC) 1.1 requires a lawyer to "provide competent representation to a client." Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>33</sup> Similarly, RPC 1.3 requires

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<sup>26</sup> *Strickland v. Washington*, 446 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, . . . is not enough to satisfy the constitutional command.")

<sup>27</sup> *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013) (citing *United States v. Cronin*, 466 U.S. at 658-60, *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

<sup>28</sup> WSBA Performance Guidelines for Criminal Defense Representation, Guideline 1.1 (2020).

<sup>29</sup> *Id.*, Guideline 1.4.

<sup>30</sup> *Id.*, Guideline 4.1

<sup>31</sup> *Id.*, Guideline 6.1(c).

<sup>32</sup> Washington Defender Association Comments to Standards for Public Defense Services, at 13 (available at [https://defensenet.org/wp-content/uploads/2017/12/Final-2007-WDA-Standards-with-Commentary\\_18.12.06.pdf](https://defensenet.org/wp-content/uploads/2017/12/Final-2007-WDA-Standards-with-Commentary_18.12.06.pdf).)

<sup>33</sup> RPC 1.1.

an attorney to “act with reasonable diligence and promptness in representing a client” and the commentary to the rule states that “[a] lawyer’s work load must be controlled so that each matter can be handled competently.” RPC 1.7, which addresses conflicts of interest, also prohibits attorneys from representing clients where “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” The ABA has concluded that assignment of more cases to an attorney than that person is capable of handling, “create[s] a concurrent conflict of interest as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.”<sup>34</sup>

With respect to criminal cases specifically, the Court Standards mandate that “the caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.”<sup>35</sup> The WSBA Standards of Indigent Defense likewise require the same standard of caseload management.<sup>36</sup>

The ABA’s practice standards likewise warn against high caseloads. For instance, the ABA Criminal Justice Standards state that “[n]either defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.”<sup>37</sup> In circumstances where acceptance of a case will prevent a lawyer from fulfilling his or her obligations to that client or another client, the ABA’s Criminal Justice Standards require the lawyer to refuse the case.<sup>38</sup> The ABA instructs courts “not [to] require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.”<sup>39</sup>

Similarly, the ABA’s *Ten Principles of a Public Defense Delivery System*, states that workload standards “should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately, but national workload standards should never be exceeded.”<sup>40</sup>

It is abundantly clear from caselaw and ethical rules, that if caseload standards require attorneys to take on excessive caseloads, those standards violate the Constitutional guarantee of effective representation of counsel and put attorneys at risk of violating their professional duties.

#### *a. Current Standards*

With respect to felony and misdemeanor cases, the current Washington Indigent Defense Standards permit attorneys to take on caseloads of up to 150 felony cases; 300 misdemeanor cases if the jurisdiction

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<sup>34</sup> ABA, *Ten Principles of a Public Defense Delivery System*, Principle 3: Control of Workloads, n. 1 (Aug. 23, 2023).

<sup>35</sup> CrRLJ 3.1, CrRLJ 3.1, JuCR 9.2, and CCR 2.1 Stds, Standard 3.2.

<sup>36</sup> WSBA Standards for Indigent Defense Services, Standard 3.2.

<sup>37</sup> ABA, Criminal Justice Standard 5-5.3(a).

<sup>38</sup> ABA, Criminal Justice Standard 5-5.3(b).

<sup>39</sup> ABA, Criminal Justice Standard 5-5.3(b).

<sup>40</sup> ABA, *Ten Principles of a Public Defense Delivery System*, Principle 3: Control of Workloads (Aug. 23, 2023).

employs case weighting and, if not, 400 misdemeanor cases; and 250 juvenile court offender cases.<sup>41</sup> At the time they were adopted, the Washington caseload standards constituted a watershed in public defense practice in Washington and helped move Washington to a more uniform defense practice across the state. However, it is now apparent these caseload standards are based on outdated, widely criticized standards, and do not account for the actual time necessary to provide Constitutionally adequate defense.

In 1984, the WSBA Board of Governors first adopted caseload standards very similar to the ones that are still in place today.<sup>42</sup> These standards were primarily based on caseload guidelines recommended by a 1973 study published by the National Advisory Commission on Criminal Justice Standards and Goals (NAC)<sup>43</sup> and the 1984 Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts published by the National Legal Aid and Defender Association (NLADA).<sup>44</sup> The present standards for felony, misdemeanor, and juvenile caseloads are essentially unchanged from those adopted in 1984.

Although widely adopted by jurisdictions across the country, the 1973 NAC standards upon which Washington's standards are based have been criticized as unworkable and lacking evidence-based foundations almost since the day they were proposed.<sup>45</sup> As the authors of the 2023 National Public Defense Workload Study (NPDWS) note, a 1978 NLADA study of public defense systems in the United States stated of the NAC standards that "one is hard put to imagine carefully investigating every case, as is required by American Bar Association Standards Relating to the Defense Function, if the lawyers are handling 150 felony cases per year, or 400 misdemeanors per year."<sup>46</sup>

Indeed, the most significant problem with the NAC—and by extension, Washington—standards is that they vastly underestimate the time necessary to provide Constitutionally adequate defense. Under Washington's current standards, even if an attorney were to devote forty hours every week of the year to case time with no holidays, no vacation time, and no sick leave, that attorney handling a full felony caseload of 150 cases would have just 13.9 hours to spend on each case—less than two working days. An

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<sup>41</sup> WSBA Standards of Indigent Defense Services, Standard 3.4; *see also* CrRLJ 3.1, CrRLJ 3.1, JuCR 9.2, CCR 2.1, Standard 3.s4.

<sup>42</sup> *See* WSBA Board of Governors Sept. 11, 1984 Meeting Minutes, 10.

<sup>43</sup> The NAC caseload standards recommended that defense attorney caseloads not exceed 150 felonies, 400 misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 appeals per year. These standards were later incorporated into standards provided by other organizations such as NLADA and the ABA. *See* Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee, Stephen F. Hanlon, *National Public Defense Workload Study Research Report*, 15-17 (Sept. 2023).

<sup>44</sup> *See* WSBA Board of Governors Sept. 11, 1984 Meeting Public Materials, pg. G-1; *see also* WSBA Board of Governors Jan. 12-13 1990 Meeting Public Materials, pgs. R-17 ("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).").

<sup>45</sup> Based on a review of the manner in which the NAC devised their recommendations, the NPDWS report concluded that "the empirical foundations of the NAC caseload standards are not compelling ones." *See* Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee, Stephen F. Hanlon, *National Public Defense Workload Study Research Report*, 22 (Sept. 2023).

<sup>46</sup> *See* Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee, Stephen F. Hanlon, *National Public Defense Workload Study Research Report*, 20 (Sept. 2023) (quoting Shelvin Singer, Beth Lynch, and Karen Smith, *Indigent Defense Systems Analysis (IDSA)*, National Legal Aid and Defender Association, 1978, p. 52).

attorney handling a full weighted caseload of 300 misdemeanors would have just seven hours to spend on each case, and only 5.2 hours for an unweighted caseload of 400 misdemeanors.

The current standards clearly do not reflect public defense realities. Few, if any, felony cases are capable of resolution in 13.9 hours. This distance between the current caseload standards and reality has only grown as the demands of public defense practice have significantly increased since the NAC and Washington standards were crafted. Criminal defense practice, especially for those who qualify for appointment of a public defender, has become more time consuming. Beyond connecting clients to social workers and public health workers, the complexity of forensic and digital discovery has altered the demands on public defenders' time. The use of dash- and body-cam footage, cell tower data, cell phone data, advances in understandings of mental health and youth development all increase the amount of pretrial investigation required of today's public defenders. As detailed above, such comprehensive investigation and evaluation of evidence is required of public defenders. The NAC standards on which Washington's are based "reflect a criminal justice system that no longer exists and professional responsibilities that have since been greatly expanded."<sup>47</sup> Under the current caseload standards, it is simply inconceivable that a public defense lawyer with a caseload at maximum capacity could provide the kind of defense contemplated by the Supreme Court in *Strickland v. Washington*.

*b. 2023 National Public Defense Workload Study*

With so many public defenders around the country facing unsustainable caseloads under NAC-based standards, a collaborative team from the RAND Corporation, the National Center for State Courts, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, and Attorney Stephen F. Hanlon, undertook a thorough examination of public defense caseload standards. The goal of this study was to give public defense agencies realistic estimates of the time necessary to provide adequate representation to defendants in criminal proceedings and to give jurisdictions a tool to craft reasonable caseloads and estimate staffing needs. The results of this research, the National Public Defense Workload Study (NPDWS), were published on September 12, 2023.

To arrive at updated caseload standards, the NPDWS researchers analyzed seventeen prior state-level public defense workload studies from 2005 to 2022. The researchers also employed quantitative research techniques with a panel of thirty-three expert criminal defense attorneys to reach a consensus on the number of hours required to provide effective defense in several categories of cases. Participants in the expert panel reviewed the seventeen prior workload studies, the applicable professional and ethical standards, and other caseload research before arriving at their results.<sup>48</sup> The expert panel participants were instructed to estimate the average attorney time necessary to provide representation in eleven categories of cases, assuming access to support staff. The results of this research are reproduced in the table below:<sup>49</sup>

Case Type	Case Type Description	NPDWS Average Case Time (in hours)	Average Case Time Under Current WA
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<sup>47</sup> *Id.*, at 32.

<sup>48</sup> *Id.*, at 69-71.

<sup>49</sup> *Id.*, at 59, 85.

			<b>Standards (in hours)</b>
Felony-High-Life Without Parole (LWOP)	Felonies with possible sentences of LWOP	286.0	13.9
Felony-High-Murder	Non-LWOP felonies involving the intentional killing of a person	248.0	
Felony-High-Sex	Non-LWOP felonies involving serious sex offenses	167.0	
Felony-High-Other	Non-LWOP felonies (including DUIs resulting in death) other than charges falling into the high felony categories for murder or serious sex offenses	99.0	
Felony-Mid	Felonies (including DUIs resulting in death) including serious property crimes, serious drug distribution crimes, and less serious violent crimes	57.0	
Felony-Low	Felonies (including DUIs resulting in death) including less serious property crimes, less serious drug felonies, and minor crimes of violence	35.0	
DUI-High	Repeat DUIs, serious DUIs, and DUIs causing nonfatal injuries (can be a felony or a misdemeanor)	33.0	N/A
DUI-Low	First or successive DUIs (typically misdemeanors)	19.0	N/A
Misdemeanor-High	Serious misdemeanors (other than DUIs) involving enhanceable misdemeanors (such as misdemeanors triggering repeat offender sentencing), sex misdemeanors, or violent misdemeanors	22.3	5.2
Misdemeanor-Low	Less serious misdemeanors (other than DUIs or those falling into the high misdemeanor category)	13.8	
Probation and Parole Violations	Probation or parole violations derived from either felony or misdemeanor offenses	13.5	N/A

Clearly, the estimates of the time necessary to adequately defend most case types are significantly higher than the current Washington standards. The NPDWS estimates more accurately reflect the time required to provide a Constitutionally acceptable level of representation for defendants in criminal case. In the February 2023 CPD survey of Washington public defense professionals, respondents were presented with the NPDWS caseload time estimates. Seventy-three percent of survey respondents agreed that the NPDWS caseload standards for felony-type cases better reflected the actual time necessary to meet their legal and ethical obligations to their clients, and sixty-nine percent agreed that the NPDWS standards for misdemeanor-type cases were a better reflection of actual case times.

Apart from more realistic estimates of case times, the NPDWS standards have other benefits. To begin with, the NPDWS standards are based on a defensible methodology. In addition, unlike the NAC-based caseload standards which simply categorized cases as either felonies or misdemeanors, the NPDWS standards categorize cases by severity with estimates of case times for each category. This more granular case breakdown better reflects the variability in time required for cases of differing complexity.

Given the improvement the NPDWS case time estimates provided over the current Washington standards, the study estimates were the primary basis for the CPD's proposed revisions to the current caseload standards.

*c. Revised Standards*

To convert the NPDWS estimated case times into useable caseload standards for Washington public defenders, the CPD first calculated the estimated annual case time available to public defense attorneys. Next the CPD mapped Washington criminal offense types onto the NPDWS case categorizations. Based on the hours required to handle each type of case, the CPD then calculated the relative weight of each case type and assigned "case credits" to the case types that corresponded to their weight. Lastly, using the calculated annual case time available to public defense attorneys, the CPD calculated the maximum number of case credits an attorney could be expected to handle per year.

*i. Calculation of total annual case-related time*

The first step to arrive at appropriate case weights was to calculate the number of hours per year that a typical public defense attorney has to devote to case time. For the sake of simplicity, the NPDWS report assumed 2,080 hours of casework-specific time for each attorney per year.<sup>50</sup> The report, however, explicitly states that this is not a realistic assumption of the number of case-time hours an attorney has each year.<sup>51</sup> Public defense attorneys do not spend their entire working day on case time. The assumption of 2,080 hours of case-specific work time fails to include holidays, vacation time, sick leave, training time, and time spent on non-case work. Rather, the NPDWS report explains that devising caseload standards requires a "jurisdiction-dependent decision" as to the number of case-related hours available to public defense attorneys on an annual basis.<sup>52</sup>

Consequently, the CPD does not recommend caseload standards based on the 2,080 case hours per year used in the NPDWS report, but rather undertook its own calculation of the case-related time available to Washington public defense attorneys. Based on information received from public defense offices around the state, the CPD estimated that the average public defense attorney would receive eleven holidays, twenty-two vacation days,<sup>53</sup> and twelve sick leave days<sup>54</sup> per year. In addition, Washington attorneys are required to complete fifteen hours of mandatory professional continuing legal education every year.<sup>55</sup> The CPD also assumed conservatively that attorneys would spend one hour per week on non-case specific work, such as meetings or administrative tasks. Given these estimations, the CPD calculated that public defense attorneys would spend 427 hours per year on non-case-related work. Subtracting this non-case time from the total 2,080 yearly work hours available to a full-time employee, the CPD calculated

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<sup>50</sup> *Id.*, at 98-99.

<sup>51</sup> *Id.*, at 33, n. 124 ("The 2,080 annual hours assumption is extremely conservative; it does not account for time not spent working during normal business hours (such as legal holidays, vacation time, sick leave, and other absences) or for work time spent on non-case related activities (such as travel time, training time, administrative time, and supervisory time). If such adjustments were made to the 2,080 hours assumption, additional public defense attorneys would be required in the examples shown here.")

<sup>52</sup> *Id.*, at 33, 98-99.

<sup>53</sup> At an accrual rate of 14.67 hours per month.

<sup>54</sup> At an accrual rate of 8 hours per month.

<sup>55</sup> APR 11.

1,653 as the total number of case-related hours available to public defense attorneys each year. The CPD has rounded that number to 1,650 to simplify calculations based on this number.

1,650 case-related hours aligns with prior Washington standards and is in keeping, or more conservative, than standards employed in other states. The WSBA Standards for Indigent Defense Services have long been based on the assumption that public defense attorneys spend at most 1,650 hours per year on case time.<sup>56</sup> A recent study of Kansas public defenders' caseloads also estimates that non-supervisory public defenders in the state have approximately 1,480 hours per year to devote to case-related activities.<sup>57</sup> Massachusetts likewise caps billable hours for appointed counsel at 1,650 hours and generally prohibits attorneys from accepting new appointments in nonhomicide cases if they have already billed 1,350 hours that year.<sup>58</sup>

#### ii. Applying NPDWS case categories to Washington law

Next, CPD largely adopted the case categories used in the NPDWS report, and categorized Washington criminal charges according to the modified case categories. Some case types identified by the NPDWS do not track seamlessly to Washington's criminal legal system. Therefore, to make the caseload standards usable for Washington practitioners, CPD mapped Washington offenses to the case types in the NPDWS. The CPD consulted with lawyers, public defense agency directors and administrators, and law professors from around the State to make recommendations about how to best correspond Washington-specific offenses to the NPDWS case type categories. In making categorization recommendations, the focus was on the amount of attorney hours required to defend certain types of cases.

In a few instances, the CPD chose to deviate from the NPDWS guidelines. First, CPD sought to simplify the standards by merging categories with similar time expectations. Specifically, CPD subsumed offenses that would be included in the NPDWS DUI-High and DUI-Low categories into the appropriate Felony-Mid, Felony-Low, or Misdemeanor-High cases according to the severity of the charge. Second, the CPD opted to not use the Probation Violation Case Type. In general, the NPDWS report overestimates the amount of time necessary to handle probation violation cases in Washington due to unique state and local circumstances that make our probation violation hearings different than other jurisdictions. This is in keeping with the NPDWS findings that there are significant differences across states in the procedures and complexity for representing clients in parole and probation violation cases.<sup>59</sup>

The resulting recommendations about how to categorize many commonly charged Washington offenses are included in Appendix B of the revised Standards. Appendix B will allow attorneys to appropriately identify the type into which their cases fall and assign the appropriate credits to each case.

#### iii. Calculating relative case weights and case credits

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<sup>56</sup> See WSBA Board of Governor Jan. 12-13 1990 Meeting Public Materials, Comment to Standard 3 of WSBA Standards of Indigent Defense Services, pg. R-17 ("An accepted national standard for attorneys is to work 1650 billable hours per year.")

<sup>57</sup> Kansas State Board of Indigents' Defense Services, *Kansas Public Defense Workloads Report, Part One: Criminal Defense in Crisis*, 30 (Dec. 2023).

<sup>58</sup> See Mass. Gen. Laws Ann. Ch. 211D, § 11(a).

<sup>59</sup> See Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee, Stephen F. Hanlon, *National Public Defense Workload Study Research Report*, 84 (Sept. 2023).

Using the NPDWS estimates for the number of hours required to handle each of the types of cases, the CPD next calculated the relative weight of each case type and assigned “case credits” to the felony case types and misdemeanor case types that corresponded to their weight. Here, the least time-consuming felony and misdemeanor case types within the broader felony and misdemeanor categories were assigned one case credit each:

Case Type	NPDWS Average Case Time (in hours)	Case Credits
Felony-Low	35.0	1 felony case credit
Misdemeanor-Low	13.8	1 misdemeanor case credit

Using the NPDWS average case time for the baseline Felony-Low and Misdemeanor-Low case types, the more time-intensive case types were assigned more case credits within the felony and misdemeanor groupings. The number of credits for more complex cases was calculated relative to the Felony-Low and Misdemeanor-Low case types. For example:

$$286.0 \text{ (case Time for Felony-High-LWOP)} \div 35.0 \text{ (case time for Felony-Low)} = 8.17 \text{ felony credits}$$

Or

$$22.3 \text{ (case time for Misdemeanor-High)} \div 13.8 \text{ (case time for Misdemeanor-Low)} = 1.62 \text{ misdemeanor credits}$$

In other words, one Felony-High-LWOP case is equivalent in terms of time demands to 8.17 Felony-Low cases. Performing this calculation on all case types resulted in the following case credits, rounded to the nearest 0.5:

Case Type	NPDWS Average Case Time (in hours)	Case Credits
Felony-High-LWOP	286.0	8
Felony-High-Murder	248.0	7
Felony-High-Sex	167.0	5
Felony-High	99.0	3
Felony-Mid	57.0	1.5
Felony-Low	35.0	1
Misdemeanor-High	22.3	1.5
Misdemeanor-Low	13.8	1

Using this system, an attorney assigned to a new case would be awarded the number of credits assigned to that case type and could calculate when they had reached the maximum allowable annual case credits.

Lastly, using the calculated annual case time available to public defense attorneys, the CPD calculated the maximum number of case credits an attorney could be expected to handle per year. Again taking Felony-Low and Misdemeanor-Low cases as the baseline, the maximum number of case credits an



attorney can be expected to take on in one year was calculated by dividing the 1,650 annual case time hours calculated above by the average case time for Felony-Low and Misdemeanor-Low case:

$$1,650 \text{ available case time hours} \div 35.0 \text{ (case time for Felony-Low)} = 47.14 \text{ case credits}$$

$$1,650 \text{ available case time hours} \div 13.8 \text{ (case time for Misdemeanor-Low)} = 119.57 \text{ case credits}$$

Put differently, assuming an attorney has 1,650 hours available each year to devote to case work, the attorney has space to take on felony cases worth up to 47.14 case credits or misdemeanor cases worth up to 119.57 case credits. Based on these calculations, the CPD has recommended maximum caseloads of 47 felony case credits and 120 misdemeanor case credits per year.

#### iv. Implementation

While there is pressing need to implement these standards immediately, the CPD recognizes that the revisions to caseload standards will put additional demands on jurisdictions for funding and staffing. Therefore, the CPD has recommended a multi-year implementation to allow local jurisdictions time to plan for these additional costs and spread costs over multiple years. The proposed caseload revisions would first go into effect in July 2025, allowing jurisdictions approximately one year to seek any additional funding they may need and hire additional staff, if necessary. The revised caseload standards would then be phased in gradually over the course of the following three years. Beginning July 2025, attorney caseloads should not exceed 110 felony cases or 280 misdemeanor case credits. Beginning July 2026, caseloads should not exceed 90 felony case credits or 225 misdemeanor case credits, and beginning July 2027, the revised caseload standards would come into full effect, with caseloads of no more than 47 felony case credits or 120 misdemeanor case credits.<sup>60</sup> The CPD, Washington Defender Association, and Washington State Office of Public Defense will be publishing calculators to assist jurisdictions with determining their staffing needs based on the number of cases assigned in those jurisdictions.

### VII. Future Work

#### a. Funding

CPD understands that adoption of the proposed revised standards, while a first step to alleviating some problems, will place additional pressures on an already stressed public defense system. Adequate funding is a longstanding problem for public defense in Washington. In acknowledgement of this, CPD is recommending phased implementation of the costliest revisions. CPD is well aware, however, that pulling Washington's public defense system out of crisis will require far more than the adoption of improved caseload standards and support staff requirements. Rather, truly addressing this crisis will require legislative action to increase state funding for public defense and policies that decrease the demand for public defense services. The CPD encourages the Courts and other public defense organizations to engage with legislators and local funders to increase funding of public defense services. Jurisdictions should also be encouraged to defray some of the costs by engaging in conversations around pre-charging diversion and other alternatives to traditional prosecution. For example, Seattle-based LEAD is a nationwide leader in providing social services to those interacting with law enforcement in a way that can avoid the cost of prosecution.

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<sup>60</sup> WSBA Proposed Standards For Indigent Defense Services, Standard 3.O.

Nonetheless, public defense in Washington is in crisis now and steps towards resolving this crisis cannot wait. It is clear that updates to the WSBA and Court Standards, particularly with respect to caseload standards, are required by the U.S and Washington Constitutions and by public defenders' ethical duties to their clients. The recent changes in client needs, evidentiary demands, and the time required to represent defendants highlights just how out far current standards—both in Washington and across the nation—have deviated from the Constitutional standard of adequate defense. Moreover, public defense agencies are struggling to retain staff due to excessive caseloads and inadequate support. Leaving these problems unaddressed will only lead Washington's public defense system deeper into crisis and will likely result in greater costs to implement solutions in the future.<sup>61</sup>

The CPD's role in public defense and the WSBA and Court Standards for Indigent Defense are only one piece of a complex public defense delivery system. Fixing the entire public defense system may not be within the scope of the WSBA Board of Governors or Washington Supreme Court alone, but adopting more realistic, workable standards for Washington's public defenders is a concrete step the Board and Court can take to start addressing the problem. As Justice Richard Sanders stated in concurrence in *State v. A.N.J.*, 225 P.3d 956, 959 (Wash. 2010):

The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and the case dismissed. It is not up to the judiciary to tax or appropriate funds; these are legislative decisions. However, it *is* up to the judiciary to facilitate a fair proceeding with effective appointed counsel if there is to be one.

Without significant changes in the way Washington funds public defense, the proposed revisions to the Standards will undoubtedly create hardship for public defense administrators, at least in the short term. It is the CPD's hope that these revisions provide a tool for administrators to advocate for additional funding. Regardless, the imperatives of the federal and state Constitutions require that Washington's public defense system recognize the realities of public defense. Adoption of the proposed revised standards is a crucial first step of many more steps that must come to ensure Washington has a well-functioning public defense system that better serves its clients and staff.

*b. Caseload Standards for Additional Case Types*

Several types of cases handled by appointed counsel in Washington were not covered by the NPDWS research. These include criminal appellate cases, Family Defense cases, and Involuntary Treatment Act cases. At present, revisions to the appellate caseload standards are under consideration by the Washington Appellate Project and OPD. Revisions to caseload standards for Family Defense cases and Involuntary Treatment Act cases requires additional data and research that was outside the scope of the current Standards revisions. CPD intends to examine standards for these types of cases in the coming year. For the sole purpose of providing guidance to practitioners in the meantime, the current caseload standards have been maintained until revised standards can be adopted.

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<sup>61</sup> For instance, because the national consensus on acceptable caseload standards has been shifting to significantly reduced caseloads, failing to adapt Washington's standards to the realities of current case demands runs the risk of creating additional litigation challenging the current standards. Already, Washington is facing a lawsuit by the Washington State Association of Counties challenging the lack of funding by the state for public defense.

*c. Enforcement of the Standards*

In the October 2023 request for caseload revisions, the Washington Supreme Court also asked the CPD to comment on an updated method to enforce the court rules and indigent defense standards. At present, the primary enforcement mechanism is the requirement that attorneys sign a certification that they are in compliance with the Supreme Court Standards for Indigent Defense.<sup>62</sup>

A closer study of mechanisms to enforce the indigent defense standards is needed. However, such study is beyond the capacity of the CPD at the moment. It is possible that undertaking will require the involvement of stakeholders beyond those represented on the CPD, such as the Office of Public Defense, the Washington courts, and local and state legislators. The CPD plans to convene a workgroup to provide recommendations for proceeding with an evaluation of enforcement mechanisms.

**VIII. Conclusion**

CPD's revision of the WSBA Standards of Indigent Defense has been a vast undertaking. Changes in the demands of public defense cases in recent years have made clear that revisions to the WSBA Standards of Indigent Defense Services are necessary to stem the flood of defense attorneys leaving the profession and to ensure clients receive the excellent representation to which they are entitled. These changes cannot wait. In our adversary system of justice, well-functioning public defense services are essential to the health of the criminal adjudication system. The CPD encourages the WSBA Board of Governors to adopt the proposed revisions and for the Washington Supreme Court to consider adapting the Court Standards of Indigent Defense to reflect the changes to the WSBA Standards.

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<sup>62</sup> See Washington Supreme Court Standards for Indigent Defense, Certification of Compliance.