

TALKING POINTS MEMO FOR DEFENDERS ON COURT RULE STANDARDS

The Washington Defender encourages all public defenders and their staff to comment on the currently pending court rule proposal to adopt revised public defense caseload standards. All comments are welcome, including comments from the public as well as current or former clients.

Supporters of the new rules in providing comments to the Court can refer to their own experiences. Some of the most compelling stories are those that demonstrate the impact of excessive caseloads on defenders and their clients.

In addition, comments can address the following points:

- The revised Standards are a necessary response to the crises facing public defense.
- Survey after survey shows that not as many new attorneys are entering the public defense field because the workload is too high, compensation is too low, and adequate support is not available. For the same reasons, attorneys, many with decades of experience, are leaving at increasingly high rates. The revised Standards lower workloads and require reasonable compensation for all public defense providers.¹
- Ethical requirements² and changes in criminal law, forensics, and technology since the 1973 national caseload standards were adopted make public defense workloads under the Court's current rule standards clearly indefensible, as now demonstrably evidenced by the 2023 NPDWS.³
- Under the current workload limits, 400 misdemeanors a year means that a lawyer has less than five hours per case to meet with the client, review discovery, investigate the facts and research the law, negotiate with the prosecutor, and prepare for and conduct court hearings. Filing and arguing motions, going to trial, and preparing pre-sentencing memoranda are impossible for more than a tiny percentage of a lawyer's clients with that volume of cases. The heavy workload affects their support staff as well.
- Under the current workload limits, 150 felony cases per year means that a lawyer has less than 11 hours per case. One major trial of a homicide case can take more than a month of attorney time and wreak havoc on the rest of that lawyer's clients.
- The current standards are applied differently across the state, resulting in justice by geography as some public defense providers have lower workloads than others and greater support staff than others. Implementing these standards will lead to more equitable provision of public defense in the 39 counties and hundreds of cities.
- The new standards will lead to increases in professional support staff, including investigators and social workers, to provide effective representation.
- The new standards provide changes in qualifications requirements that will facilitate lawyers being able to represent clients in the most serious cases.

¹ "WA's public defender system is breaking down, communities reeling", Seattle Times, February 25, 2024. <https://www.seattletimes.com/seattle-news/politics/was-public-defender-system-is-breaking-down-communities-reeling/>

² ABA Formal Opinion 06-441 Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation at: <https://www.americanbar.org/products/ecd/chapter/220003/>

³ National Public Defense Workload Study, https://www.rand.org/pubs/research_reports/RRA2559-1.html.

The proposed standards are extensive, and we encourage you to read and seriously consider them *and the WSBA Cover Memo* prior to commenting. We also offer the following pages to our colleagues as a primer on the history of the standards and the process that led us to the Court Rule Proposal.

Lastly, each of you know best how modern public defense workloads affect you and your client. We encourage each of you to speak candidly to the Court about what your work looks like now and how it might change under the Standards. As you need no reminding, these changes are intended to assure that the accused has access to qualified lawyers with the time and resources to be an advocate for them. Your work as a public defender is invaluable to justice and invaluable to the support and continued health of our clients. We know that our clients' voices will likely be the ones most silenced in this process. Where ethically possible and appropriate, please encourage their responses and their stories.

The proposed rule is here.

https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedDetails&proposedId=2198

Here is the WSBA Cover Memo.

https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=6163

Here's how you comment:

Comments may be sent to the following addresses: P.O. Box 40929, Olympia, WA 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail may not exceed 1500 words. **Please consider commenting by the deadline of Oct 31, 2024.**

Please also consider attending the virtual feedback sessions the Washington Supreme Court will hold. The first session will be held on September 25th from 9:00 to noon. The second hearing will be held after the October 31st deadline for submission of written comments, at a date and time to be determined.

Background

By a vote of 12-1, the WSBA Board of Governors (BOG) approved revisions to the WSBA Standards for Indigent Defense Services, including critical reductions in attorney workload limits and mandated increases to support staff requirements. The revisions are the result of more than two years' work by the WSBA's Council on Public Defense (CPD). By the same vote, the BOG also approved the newly revised WSBA Standards be forwarded to the Washington Supreme Court for consideration of amendments to the Court's Standards for Indigent Defense court rules (CrR 3.1, CrRLJ 3.1 and JuCr 9.2).

The new workload limits are based on the CPD's work, including input from attorneys and offices in Washington that provide public defense legal representation, and a years-long study

and report by a coalition of national organizations and professionals⁴, the National Public Defense Workload Study (NPDWS).⁵

The NPDWS addresses decades long criticism of the 1973 National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards) maximum annual caseloads of 150 felonies, 400 misdemeanors and 200 juvenile cases. Those 1973 NAC Standards served as the primary basis for the current court rule workload standards (150 felonies, 400/300 misdemeanors and 250 juvenile offender cases). “As early as 1978, a study noted that ‘one is hard put to imagine carefully investigating every case, as is required by [prevailing standards of criminal defense practice], if the lawyers are handling 150 felony cases per year, or 400 misdemeanors per year.’”⁶

While there is some disagreement about how quickly the new workload standards can be attained and much concern about cost, there is little disagreement that the existing workloads across the state are far too high and that the WSBA and NPDWS standards are based on rigorous study of public defense cases by experts and vetted with the support of outside auditors. There is widespread recognition that the changes in practice (extensive body/dash cam video, delays at psychiatric hospitals, higher incidence of serious cases, etc.) have resulted in making it impossible to provide consistently effective representation for clients at the number of cases per lawyer that seemed reasonable before developments such as body-worn cameras and the increasing use of forensic evidence. There is widespread agreement that compensation and benefits for public defense providers need to be at levels comparable to those in prosecution and other opposing party offices in the geographical area.⁷ And, there is widespread agreement that strong legal support staff, investigation, and social work resources are necessary to support effective representation and provide efficiencies to the courts and funding sources.

Changes as these often seem drastic after years of stagnated funding or growth, but as we watch our colleagues abandon the profession and the cases get transferred among attorneys, we must acknowledge that there is a great deal of work to be done to assure that defendants and

⁴ RAND Corporation, National Center for State Courts, American Bar Association Standing Committee on Legal Aid and Indigent Defense, and Law Office of Lawyer Hanlon

⁵ https://www.rand.org/pubs/research_reports/RRA2559-1.html

⁶ Footnote 4: NPDWS, p. viii. See also, NPDWS, pp. 20-22, including Footnote 87: “A detailed critique of the NAC standards’ development can be found in Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, American Bar Association, 2011, pp. 43–49. Lefstein later explicitly recommended that “[p]ublic defender agencies and programs that furnish private lawyers to provide indigent defense representation should not rely” on the NAC standards (Norman Lefstein, *Executive Summary and Recommendations: Securing Reasonable Caseloads—Ethics and Law in Public Defense*, American Bar Association, 2012, p. 34). He also noted that “the Missouri State Auditor recently rejected as invalid the Missouri State Public Defender’s caseload crisis protocol based substantially on caseload numbers recommended by the NAC” (Lefstein, 2012, p. 35). For more information about the State Auditor’s decision, see Thomas A. Schweich, *Missouri State Public Defender*, October 2012, pp. 11–21.”

⁷ Standard One WSBA Standards for Indigent Defense Services [Revised March 8, 2024], pp. 4-6.

respondents are getting lawyers with the time and professional resources to provide effective assistance. Our changes also must reflect the varying needs of jurisdictions around the State. We know there is justice by geography and one way our professionals can solve that problem is to implement statewide standards so that every accused person, regardless of geography, can be assured the same access to qualified, competent, and capable legal counsel in a timely manner. For these reasons, the WSBA BOG approved these standards for public defense trial practice.

Public defense attorneys, investigators, social workers, and other providers, and their allies, can submit comments about the proposed rules. As the CPD wrote:

Public defense in Washington is facing a crisis of attrition and an inability to recruit staff brought about by excessive workloads and poor compensation. Attorneys are resigning from the public defense profession in droves because they cannot continue the work given the volume of cases....

The revisions to the WSBA Standards focus on three areas: (1) Support staff requirements, (2) attorney qualifications, and (3) caseload standards.

The CPD proposes full implementation of the workload standards by July 2027 and the support staff ratios by July 2028.

- **Defenders and their allies also can work with the Washington Defender Association to ensure there is increased state funding for local public defense.**

Everyone knows someone who has been charged with a crime, and everyone is entitled to an effective lawyer. About one-third of Americans have a criminal record.⁸ When public defense is inadequate, respect for the integrity of the courts is diminished.

As the U.S. Supreme Court wrote in *Gideon v. Wainwright*,

...there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

The CPD acknowledges the concern that the workload standards require more attorneys for existing case volumes. Part of that increase can be ameliorated by increasing diversion for non-violent cases, many of which involve persons who need mental health treatment, substance use treatment, and housing. While the Supreme Court cannot order the implementation of diversion programs or the provision of social services, it can encourage them. As the U.S. Supreme Court stated in *Argersinger v. Hamlin*, “One partial solution to the problem of minor offenses may well be to remove them from the court system.”⁹

⁸ Criminal Records and Reentry Toolkit, National Conference of State Legislatures (2023), <https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit#:~:text=Approximately%2077%20million%20Americans%2C%20or,housing%2C%20and%20higher%20education%20opportunities>

⁹ *Argersinger v. Hamlin*, 407 U.S. 25, 38 & n.9 (1972).

When the *Argersinger* Court made clear that there is a right to counsel for misdemeanors, there was concern that there were not enough lawyers. The Court emphasized the number of new lawyers expected every year, saying there were more than enough. Washington's three law schools are expected to produce about 600 new graduates a year. Oregon, Idaho, California and many more schools produce thousands more. With reasonable workloads and compensation, we can expect attorneys from across the country will seek employment, contracts or case assignments in Washington. And many new Washington state law graduates, who currently avoid public defense because of low compensation and excessive workloads, will enter public defense practice.

Implementation of the new Standards will require more funding. While the Washington Supreme Court cannot order the State legislature and local governments to increase public defense funding, the Court has recognized the Legislature's responsibility to provide an adequate funding structure.¹⁰

In some places, accused persons are on waiting lists for lawyers because the existing public defense attorneys cannot take any more cases. Implementing the new standards will make clear that public defense budgets must be addressed, by the State and local jurisdictions, to provide for more lawyers.

¹⁰ "The State plainly has a duty to provide indigent public defense services...." Davison v. State, 196 Wn.2d 285, 293, 466 P.3d 231, 236 (2020), as amended on denial of reconsideration (Oct. 20, 2020). The Court also wrote: "...the State bears responsibility to enact a statutory scheme under which local governments can adequately fund and administer a system of indigent public defense...." Davison v. State, 196 Wn.2d 285, 289.