



BENTON COUNTY

OFFICE OF PUBLIC DEFENSE

September 27, 2024

Washington State Supreme Court
Rules Committee
PO Box 40929
Olympia, WA 98504-0929

RE: Public Defense Standards Proposed Rule Changes

Washington State Supreme Court,

Thank you for considering these comments regarding the Revised Washington State Bar Association Standards for Indigent Defense Services (“Rule Changes”).

We ask that you reject the Proposed Changes as proposed for many practical reasons, but most importantly for the fundamental reason that, as proposed, the Rule Changes will have a significant detrimental and potentially irreversible impact on the delivery of public defense services in our community. This will occur in the following ways:

- It will demand significant increases in funding from yet unidentified sources;
- It will demand significant increases in actual available attorneys that presently do not exist;
- It will reduce the number of private partners willing to take public clients on contract; and,
- It will impose an artificial cap on prosecution of criminal offenses.

Funding

Presuming no changes in our community’s public client caseload, the proposed Rule Changes will effectively require a three-fold increase in the number of attorneys needed. This is not a statistic unique to Benton County: it is a mathematical problem of proportion for every county no matter the projected or historic community caseload. If the proposed Rule Changes are adopted, by July of 2027, every community in Washington State will need to have two additional attorneys per every one attorney presently needed in order to meet the reduced case of 47 felony points, and 120 misdemeanor points.

Tripling the state’s criminal defense attorney population within three years is unrealistic. Setting that point aside for the moment, even assuming for the sake of argument that those human resources can be found, attracted, or trained—there is the cost of providing a competitive salary (or contract) to obtain those individuals.

It is reckless to presume that a question of funding is not for the Supreme Court to consider in reviewing these proposed Rule Changes. This was a position of some of the members of the WSBA Board of Governors during their public consideration of these Rule Changes on March 8, 2024; that their duty was to consider only the “ethics” of the state of public defense services, and not the practicalities embedded therein. This was a false choice, as the practicalities of public defense services are intrinsic to the ethics of public defense. Indeed, the practicalities of ethical public defense was the impetus for the proposed Rule Changes and this entire statewide discussion. It is irresponsibly avoiding the central



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problem these proposed Rule Changes seek to address for another decision maker to be unconcerned with necessary questions here, especially those as crucial such as yet unidentified funding sources.

Actual Available Attorneys

We cannot simply train enough new attorneys to meet the demands of the proposed Rule Changes. Overnight in July of 2025, there will need to be more LWOP qualified attorneys, more Sex Offense qualified attorneys, and etcetera on down the line. This problem will be repeated in 2026, and again in 2027.

Yes, the Rule Changes provide for more “relaxed” qualifications for most levels of case categories, however it does not in-and-of-itself generate new attorneys. Rather those new qualifications will simply re-classify present attorneys who will leave a void behind in their prior offense level.

Yes, there are a few changes to admission rules that aspire to provide additional pathways to practice as an attorney in the State of Washington. However, if we momentarily set aside the proposed reduction in caseloads, Benton County does not believe that these new pathways will be able to meet that growing void that this reclassification of attorneys will create. Now reintroduce on top of this problem the proposed cuts in caseloads, and the problems are again exacerbated year over year.

In all this, there is no guarantee—to either individual clients or to county insurers and risk pools—that new attorneys admitted to practice under the new alternative pathways will be as competent and effective as a defense attorney who has gone through the rigor of formal legal education and testing. And yet, even the addition of these untested new attorneys still may not be enough to meet the demands of the proposed Rule Changes.

Contracted Defense Services

With the adoption of the Rule Changes, as proposed, there will be a reduction in private practitioners willing to take public clients.

In reviewing “Standard Thirteen: Limitations on Private Practice,” there does not seem to be anything of significant concern—it reads similarly to prior versions in that private attorneys providing public defense services should limit their proportion of private clients consistent with their proportion of public clients. However, this obscures the mathematical problem that will confront private practitioners: should they take even one public client following adoption of these proposed Rule Changes. At that point then their entire practice (private and public) will then be tied to the reduction in caseloads year-over-year.

Put another way, just like the three-fold increase in the number of attorneys needed, the financial reality for a private practitioner will be that the opportunity cost for taking any public client is worsened threefold—they will not be able to take as many private cases, where their margins and revenue are greatest. For example, an attorney that makes a living and provides for overhead and employee payroll by taking a 50% public caseload and a 50% private caseload in 2024 can do so across 150 felony cases. While the 50/50 proportion remains the same, in 2025, their private caseload potential drops from 75 to 55. In 2026, this will drop to 45. Again in 2027, down to just over 23 cases. That’s the same payroll, same office supplies, rent, expenses, etc., now covered by over just a couple dozen cases.



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Proportional contracts are vital to the delivery of public defense services in that they provide availability of conflict counsel, provide additional counsel when case filings rise, and provide stability against turnover of defense counsel. When the caseloads are cut, Benton County believes that it, and many other counties will see private contractors leave their contracts for purely private caseloads.

Artificial Cap on Prosecutions

Criminal prosecution is a vital response to community challenges and needs. Of course, it is a means of collecting controversies into an ordered, upright, and just manner, where the rights of defendants and victims shall be honored. It is also an important means of providing crucial substance use disorder and mental health resources to those in the most desperate need at the time of their greatest desperation. Many of those cases where crucial resources are provided are of the lower level of offenses that often do not involve individual victims. Cases impacting individual victims are often a high level of offense and therefore a priority for prosecution and community healing.

The proposed and relatively sudden reduction of caseloads for public defense attorneys will force a triage upon prosecutors to select cases to file or not file, and that triage must break in favor of those more serious offenses. Besides the public safety risks that this may have for any community, this triage in response to an artificial cap on prosecutions will result in caseloads consisting only of the most serious offenses, leaving little else for younger attorneys to take on and gain experience—on both sides of the courtroom.

Conclusion

It is the position of Benton County that the proposed Rule Changes will result in significant and potentially irreversible harm, that they are a reckless response to a difficult problem, and that their adoption for the sake of staking out an ethical position is itself an unethical approach to a very real and costly problem. We would ask for the Supreme Court's support for legislation that would provide prior and ongoing funding for these goals, and to reconsider the proposed Rule Changes and the very short timeline they provide to solve a very longstanding problem.

From: [OFFICE RECEPTIONIST, CLERK](#)
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Subject: FW: Public Defender Caseloads Comment Letter - Benton County Office of Public Defense
Date: Friday, September 27, 2024 3:32:24 PM
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[image002.png](#)
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[Benton OPD to SC Letter RE Public Defense Rule Changes \(003\).pdf](#)

From: Jerrod MacPherson <Jerrod.MacPherson@co.benton.wa.us>
Sent: Friday, September 27, 2024 3:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Washington State Supreme Court –

Please find attached a comment letter from the Benton County OPD regarding the Public Defense Caseload Standards under consideration for reduction.

Thank you!



Jerrod MacPherson
County Administrator
Benton County
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