Commentary of Malia Brink, Policy Director, and Cynthia G. Lee, Empirical Policy Attorney
Deason Criminal Justice Reform Center
Dedman School of Law
Southern Methodist University

The Deason Criminal Justice Reform Center at the Southern Methodist University Dedman School of Law (the Deason Center) recommends that the Court adopt the amendments to the public defense attorney workload standards proposed by the Washington State Bar Association Board of Governors to the Standards for Criminal Justice Services (CrR 3.1 Stds/CrRLJ 3.1 Stds/JuCR 9.2 Stds).

The practice of public defense has changed significantly since the Court adopted the existing Washington State caseload standards and public defenders face ever-increasing demands including:

- A significant upsurge in discovery materials – particularly video and digital evidence;
- The expansion and importance of forensic science evidence;
- The increase in the need for mental health evaluations and other forms of competence and mitigation evidence; and
- The expansion of specialty dockets, problem-solving courts, and diversion programs.

The existing caseload standards simply do not afford attorneys sufficient time to provide their clients with effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and the Washington Constitution.[1] Instead, they force lawyers to engage in triage. They must focus on the next trial or court hearing and, by necessity, skip critical steps in properly evaluating the case and advising their clients. They may even pursue resolutions without having completed the necessary legal and factual investigation required by national practice standards.[2]

Washington counties have already faced litigation over the failure to provide constitutionally adequate public defense services. The failure to appropriately limit caseloads places localities and the state at risk of further litigation. Washington is currently experiencing a shortage of public defenders. Limiting caseloads to allow attorneys to effectively represent their clients should help to attract and retain qualified public defenders to meet this urgent need.

Washington has always been a national leader in developing and implementing standards for public defense. The state should continue its leadership by adopting the proposed workload standards for public defense attorneys.

About the Deason Criminal Justice Reform Center

The Deason Center is a nonpartisan center for criminal justice research and advocacy. The Center focuses on the Sixth Amendment right to counsel, the operation of rural criminal legal systems, representation at first appearance, and the use of prosecutorial charging discretion. Launched in 2017, the Deason Center conducts, supports, and publishes research with sensible recommendations for criminal justice reform. It also educates about criminal justice issues and advocates for the implementation of best practices.

Deason Center faculty and staff are nationally recognized experts on public defense workloads and practice standards. Malia Brink and Cynthia G. Lee are co-authors of the National Public Defense Workload Study (NPDWS), which serves as the basis for the proposed workload standards. Ms. Brink was also a member of the committee that drafted the revisions to the ABA *Ten Principles of a Public Defense Delivery System* in 2023. As counsel to the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defense (SCLAID), Ms. Brink played a key role in developing state-specific workload standards for public defenders in five states.[3]

In her previous position as a Principal Court Research Associate at the National Center for State Courts, Ms. Lee served as project director or project manager on workload assessments for trial-level and appellate public defenders in three states and participated in more than 20 other state-level workload assessments for judges, court staff, and prosecutors.

Dramatic changes in public defense practice necessitate updated caseload standards

Washington's current public defender caseload limits of 150 felonies or 300-400 misdemeanors[4] per attorney per year are derived from the standards described in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC). In the half-century since the NAC standards were published, major changes in technology and criminal practice have led to increased demands on public defense providers.

Police body cameras and dash cameras, public cameras such as traffic cameras, and private cameras such as doorbell cameras and business security cameras provide hours of footage of incidents and police response. Similarly, new types of digital evidence, including cell phone location data, text messages, and social media, are available for both clients and witnesses. Such information can be an important source of location information and should be checked in most cases to verify any potential alibis or evaluate potential defenses. These types of critical evidence are now routinely part of discovery and investigation even in simple misdemeanor cases.

For clients and witnesses who are incarcerated, telephone calls are often recorded. Prosecutors regularly turn over all call recordings as part of discovery, which a defense attorney must review to understand what, if anything, the client or witness has said about a case to friends, family, or others. Defense attorneys are ethically obligated to review all of this new evidence as part of their investigation of the facts of the case.[5]

Major advances in forensic science such as DNA, as well as the increased use of experts in fields of debatable reliability such as toolmarks, bite marks, tire marks, accident reconstruction,

and blood spatter, require defense attorneys to engage experts to weigh the prosecution's evidence and to challenge methodologies or results that may be unreliable or biased. Similarly, defense lawyers increasingly need to request mental health evaluations or consult with experts to address competency issues, eligibility for specialty dockets and courts, as well as mitigation.

The growing volume and complexity of evidence is just one cause of the increasing time burden on public defenders. Defense attorneys also report that the need to understand and address issues of mental health, substance abuse, cognitive disabilities, and other influences on brain development (e.g., traumatic brain injuries, youthful adult brain development, and toxin exposure) is growing across all types of cases, including low-level misdemeanors. Further, the proliferation of diversion pathways, which often have complex eligibility criteria or requirements, as well as therapeutic court programs such as drug courts, veterans' courts, and DUI courts also increase demands on attorney time.

These changes – and their prevalence and impact on different case types – drove the considerations of increased time needed during the development of the National Public Defense Workload Standards.[6] Adopting these standards would not only recognize the reality and importance of these developments but also reflect a commitment by Washington courts to support modern and comprehensive public defense practices in the state.

Reduced caseloads are necessary to ensure effective defense

Given the burgeoning demands on public defense providers, attorneys cannot provide effective defense representation to 150 felony or 300 misdemeanor clients per year. With 1,650 hours available to work on cases annually, an attorney with 150 felony cases would have an average of only 11 hours to devote to each case - less than two full working days. This would be true whether the case was a relatively low-level felony involving only property damage or a more significant sexual assault or murder case. In 11 hours, no attorney could conduct the level of investigation needed to identify possible defenses or witnesses, no less actually review the relevant discovery and speak to witnesses.

Similarly, a misdemeanor attorney meeting the standard of 300 cases per year would have only 5.5 hours to spend on each case. This is barely sufficient time to meet with a client, attempt to address pretrial conditions/release, negotiate with the prosecutor, address a potential offer, and enter a plea. And this attorney would have forgone any independent case investigation and any evaluation of alternative programs or sentencing.

In other words, the existing standards force attorneys to triage cases, focusing on the next trial or court hearing and too often skipping critical steps in properly defending a case. Attorneys lack the time to fully investigate a case, engage in motion practice, understand their client's social history, or investigate alternative dispositions. They often are not able to conduct the early factual investigation and advocacy that can dramatically shape the final resolution. For example, they cannot quickly attempt to verify a possible alibi before ATM or store video evidence is overwritten, nor can they advocate for treatment, competency evaluation, or referral to specialty court.

Realizing that their attorneys are overburdened, some clients feel pressured to accept plea offers merely to resolve the case and get on with their lives. Cases that should be dismissed for insufficient evidence linger in the system. In short, attorneys with excessive caseloads are inefficient and get inappropriate case resolutions that erode the public's trust in the justice system's ability to do justice.

In addition to overloading attorneys with too many cases, the existing Washington State caseload standards fail to make critical distinctions in case complexity. As noted above, the current Washington standards treat all felonies as identical. As a result, an attorney could be assigned 150 serious felonies – such as homicides and violent sexual offenses - per year. Nobody would contend that any lawyer assigned 150 serious felony cases could effectively defend all of their clients.

The proposed standards include separate weights for six levels of felonies and two levels of misdemeanors. Under these standards, a murder case is appropriately allocated seven times as much time as a low-level felony. These distinctions will significantly improve calculations of attorney workload and much more accurately reflect the demands of the assigned cases.

Failing to appropriately limit caseloads creates the risk of further future litigation

Several Washington counties have already been sued over the failure to provide constitutionally adequate public defense, largely because of excessive caseloads. In 2013, a United States District Court found that the cities of Mt. Vernon and Burlington had deprived indigent people facing misdemeanor criminal charges of the fundamental right to counsel.[7] And just weeks ago, the ACLU filed a class-action lawsuit against Yakima County.[8]

Without state action to set appropriate caseload limits for public defenders, ideally coupled with funding to assist counties in meeting the new standards, more of these suits will inevitably be filed against localities with excessive public defense caseloads. The experience in other states suggests that there is a high probability of litigation against Washington over the failure to establish adequate caseload standards. In 2014, the ACLU settled *Hurrell-Harring v. State of New York*. The settlement required New York to develop and enforce new workload standards for five upstate New York counties, where public defenders had been accepting as many as 700 cases per year.[9] Similarly, the 2020 consent decree in *Davis v. Nevada* required the state to establish caseload standards for public defenders.[10]

A primary purpose of the National Public Defense Workload Study was to help states and localities quantify public defense needs to avoid such crises. The Washington State Bar Association has diligently considered how best to adapt these standards to Washington State, and the standards proposed reflect this important work.

Updated caseload standards will help to end public defense shortages

Far from exacerbating lawyer shortage issues, lower caseload limits are critical to alleviating Washington's current challenges in recruiting and retaining public defense attorneys. Public defenders are mission-driven. They enter the field of public defense because they want to help poor people accused of crimes. These attorneys want and need the time and resources to

represent their clients in accordance with professional standards and constitutional requirements. They do not want to be cogs in a system processing their clients into prison or probation, or to risk discipline for failure to meet ethical standards.[11] Washington's commitment to ensuring quality public defense through the adoption of updated workload standards, coupled with the critical commitment of funds and support to help localities meet those standards, will help attract qualified and motivated attorneys to the practice of public defense. More manageable caseloads will also assist in the retention of experienced attorneys by lessening the inevitable burnout of trying to handle an unreasonable number of cases.

The proposed revisions recognize that feasibility requires a gradual implementation of the new standards. Public defense providers will require time to compile caseload data and to recruit and train the additional attorneys and staff required to comply with the standards. This is consistent with the approach taken by New Mexico,[12] Oregon,[13] and the Michigan appellate defender system,[14] all of which developed multi-year plans to phase in new caseload standards (five years, six years, and three years, respectively).

Washington should continue to lead by adopting the proposed revisions to its caseload standards

Public defense providers must limit caseloads to comply with the ethical obligations of competence and diligence.[15] Those limits must reflect the number of cases an attorney can reasonably and effectively handle. Washington State is not alone in looking to the National Public Defense Workload Study to establish appropriate caseload limits for public defenders. Earlier this month, the Oregon Public Defense Commission voted to adopt the NPDWS standards as part of its *Six-Year Plan to Reduce Representation Deficiency*.[16] Other jurisdictions have begun to use the NPDWS standards to identify attorney shortages and seek necessary resources.[17] Washington has always been a national leader in adopting standards to ensure the equal treatment of poor people involved in its criminal justice system. The Washington Supreme Court rules and its statement on racial justice have been models for the rest of the country. Adopting the proposed revised caseload standards is the logical next step in ensuring a fair criminal legal system.

[1] Wa. Const. art. I, § 22

[2] See, e.g., Standard 4-41(a), ABA Criminal Justice Standards on the Defense Function ("Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges."); Standard 4-4.1(c) ("Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the

criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise."); Standard 4-6.1(b), ABA Criminal Justice Standards on the Defense Function (2017)("In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.").

[3] The New Mexico Project (ABA 2022); The Oregon Project (ABA 2022); The Indiana Project (ABA 2020); The Rhode Island Project (ABA 2017); The Colorado Project (ABA 2017).

[4] The limit of 400 misdemeanor cases per attorney per year applies in jurisdictions that have not adopted a case-weighting system.

[5] Standard 4-6.1(b), ABA Criminal Justice Standards on the Defense Function (2017)("In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.").

[6] Nicolas M. Pace, Malia N. Brink, Cynthia G. Lee & Stephen F. Hanlon, National Public Defense Workload Study (2003), at 104-107.

[7] *Wilbur v. City of Mount Vernon*, No. C11-100RSL, U.S.D.C.-W.D.Wash. (Dec 4, 2003).

[8] ACLU of Washington sues Yakima County for failing to appoint attorneys to indigent people charged with crimes in Yakima County Superior Court (October 1, 2024).

[9] Editorial Board, A Rare Victory for Public Defense, New York Times (Oct 26, 2024)

[10] Settlement Consent Judgment, *Davis v. Nevada* August 11, 2020); see also Nevada Department of Indigent Defense Services, Compliance Reports.

[11] See *In re Karl William Hinkebein* (Mo. Sup. Ct. 2017)(finding a public defender failed to represent his clients diligently).

[12] The New Mexico Public Defense System 5-Year Plan to Reduce Representation Deficiency (2023)

[13] Six-Year Plan to Reduce Representation Deficiency (Oregon Public Defense Commission 2024).

[14] Cynthia G. Lee, Erika J. Bailey Stevens & Breanna Bell, Michigan State Appellate Defender Office Workload Assessment (2024), at 24.

[15] Rule 1.1 and Rule 1.3 ABA Model Rules of Professional Conduct (2024)(The Commentary to Rule 1.3 states "A lawyer's work load must be controlled so that each matter can be handled competently."); Formal Opinion 06-441, American Bar Association Standing Committee on Ethics and Professional Responsibility ("The Rules provide no exception for lawyers who represent indigent persons charged with crimes"); see also Principle 3, ABA Ten Principles of a Public Defense Delivery System (2023); Standard 4-1.8, ABA Criminal Justice Standards on the Defense Function (2017).

[16] Six-Year Plan to Reduce Representation Deficiency (adopted by the Oregon Public Defense Commission, October 2024).

[17] See, e.g., Maryland Office of the Public Defender, 2023 Annual Report; Paul Heaton, Gideon's Promise Versus Gideon's Reality: Resource Shortfalls in Pennsylvania Public Defense (May 2024).

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: Comments on Public Defense Standards
Date:	Thursday, October 31, 2024 4:22:01 PM
Attachments:	Deason Center comments on WA Workload Standards - FINAL.pdf

---

From: Brink, Malia <maliab@mail.smu.edu>
Sent: Thursday, October 31, 2024 4:06 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Skiles, Blane <bskiles@mail.smu.edu>; Metzger, Pamela <pmetzger@mail.smu.edu>; Lee, Cynthia <cynthialee@mail.smu.edu>
Subject: Comments on Public Defense Standards

Attached please find the Comments of the Deason Criminal Justice Reform Center in support of lowering the maximum caseloads for public defense attorneys. If you have any questions or concerns, please do not hesitate to contact me.

Thank you for the opportunity to submit comments.

MALIA N. BRINK (she/her)
POLICY DIRECTOR

Deason Criminal Justice Reform Center
SMU Dedman School of Law
P.O Box 750116 | Dallas, TX 75275
214-768-7013 | maliab@smu.edu
deasoncenter.smu.edu | @smulawdeason