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From: Jim Whisman <jimw552@gmail.com>
Sent: Thursday, October 31, 2024 2:58 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to Proposed Rules for Indigent Defense Standards

October 31, 2024

Dear Supreme Court Justices,

The question raised by the current proposed standards for indigent defense is not whether an accused is entitled to effective counsel. That is a given. Rather, the important question is whether (or to what extent) the existing deficiencies in the public defense system are caused by chronic underfunding, or whether (and to what extent) they are caused by other factors, including management and ideological choices. Justices Johnson and Gordon-McCloud asked at this Court's hearing on September 25, 2024, "What did the Washington State Bar Association ("the Bar") miss in their report and recommendation to adopt the proposed new standards?" This comment suggests a few points that have not been addressed in other commentary.

First and foremost, it appears that the Bar's process lacked deep input from a cross-section of interested parties. To address the burdens facing public defenders, the Washington State Bar Association's Council on Public Defense (CDC) convened a committee that consisted of "public defense lawyers, investigators, and administrators; directors of Washington's public defense agencies; and law professors with expertise in public defense..." https://www.wsba.org/docs/default-source/about-wsba/governance/board-of-governors-2023-2024/march-2024/board-of-governors-meeting-materials-march-7-8-2024.pdf?sfvrsn=e9ed1ff1_4 at p. 243. This is logical and necessary first step—lawyers in public defense are surely central to this inquiry.

But, given that the proposed standards would benefit primarily defenders and their clients, and would increase costs for prosecutors and courts, and would draw millions upon millions of dollars from very tight state and local budgets, it should be incumbent on the Bar and this Court to carefully assess the causes of the current difficulties in public defense. Misdiagnosis can lead to faulty treatment.

Assessment of the causes was insufficient in this process. For instance, the public defense systems in King County seemed to feature prominently in the Council of Public Defense recommendation. But King County has suffered from questionable management practices over the last decade. <https://kingcounty.gov/legacy/depts/auditor/auditor-reports/all-landing-pgs/2018/-/media/depts/auditor/new-web-docs/2018/public-defense-2018/dpd-report-2018.ashx?la=en&hash=E3DE6EFC792DDC0736545981AC616D26>. It is unclear whether or to what extent these management shortcomings continue to impact defenders and the delivery of services to clients. It seems the Bar was not even aware of this history. Since there was no independent examination of historical trends in funding public defense as compared to caseloads, there has been no critical assessment of causes. This question should be explored.

Some current public defense managers appear to follow, more than in the past, a “lawyering by checklist” approach to the practice of law. That approach demands lawyers turn over every stone in defending a client, regardless of whether, in the lawyer’s professional judgment, every task on the checklist is truly needed to reach a reasonable resolution of the client’s case. This managerial pressure burns out frontline lawyers. Limited professional discretion and the persistent need to meet unreasonable managerial demands kills morale.

It does not appear that the Bar considered the degree to which such factors contribute to burnout and attrition. The proposed standards should not be adopted until these concerns, and the myriad concerns expressed in other comments, are expressly considered.

None of these points is intended to diminish the genuine and heartfelt commentary from current practitioners. Prosecutors around the state operate under similar strained working conditions. But there is no simple remedy to these challenges, and the proposed standards – which devote millions of dollars to bolstering only one leg of a three-legged stool – are not the answer.

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