

I write in support of the Washington State Bar Association's (WSBA) suggested amendments to the Washington Supreme Court's Standards for Indigent Defense, including the ambitious three-year implementation timeline.<sup>1</sup> I offer this letter as an informal rebuttal to the minority of comments in opposition to the proposed Supreme Court Standards.

The majority of the almost 450 comments support the proposed changes to the Standards. The comments from public defenders illustrate the need for immediate reforms to caseload standards for public defenders and their clients. I do not plan to repeat those sentiments in this comment but note those conditions are pressing and real. Without immediate action, public defense will fall into deeper crisis.

These Standards have sparked a conversation in our State unlike any other that public defense has experienced. Statewide, we have seen citizens, legislators, judges, local elected officials, and public defenders meet to discuss a path towards a more just criminal legal system. This proposal has been the subject of significant local, state, and national attention; it goes without saying that a new generation of public defenders are looking to this Court to lead the state in providing public defense caseloads that resolve the workload ethical conflicts that have long saddled our public defenders.

Public defense workloads remain a persistent, though not solitary, problem facing public defense in Washington. Poor individual compensation, lack of benefits, lack of access to administrative staff and other experts, and insufficient leadership and mentorship continue to plague public defense and impede our ability to be truly effective for clients. Adding to these unacceptable conditions facing lawyers is a deficit of data about public defense cases, anemic state funding, and an insufficient system for assuring compliance with the Standards. The remedies to the challenges facing public defense are beyond this Court's authority to resolve. I take this opportunity to discuss those challenges in the context of the proposed changes to public defense caseloads.

I would like to reply to four themes that appear frequently in the comments to the Court's rule.

1. Study - We do not need additional studies of public defense caseloads, but welcome studies about future staffing, funding, and a balanced legal system as we begin implementation.
2. Statewide Standards – Statewide standards are required for public defense to operate effectively
3. Lawyer Shortage - The perceived lawyer shortage should not deter implementation of the Supreme Court Caseloads
4. Funding - Codifying public defense caseload standards will assist efforts to secure funding

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<sup>1</sup> I serve on the WSBA Council on Public Defense which developed the revised WSBA Standards proposed for this Court's adoption. I am also the Director of the Office of Public Defense in Snohomish County. This comment is submitted solely on my own behalf, not on behalf of the Council or Snohomish County. This comment is not intended to delay the Court's adoption of the WSBA's suggested amendments to Standards 3 and 14.

## 1. Study

Further study about public defense caseloads is not needed. The proposed Standards reflect the work of national and Washington experts in public defense. There is little reason to believe that another study is necessary or will provide different results. The assertion that the RAND study needs further application to Washington law assumes that Washington is exceptional to the other seventeen states or that the CPD failed in its task to adapt the Standards to Washington.

The WSBA Proposal adopted the RAND study to Washington Law and was multidisciplinary in its approach.

Many comments request additional studies to determine whether the RAND report is applicable to Washington law, question the methodology, and debate the merits of statewide applicability.

The proposed Standards represent the work of national and statewide experts in public defense. The proposed Standards are based on 17 statewide studies of public defense workloads published by 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. 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. Some have criticized the lack of inclusion of judges or prosecutors as participants, but such criticism misses the essential premise of the study is to articulate *public defense needs*; other system stakeholders have their own processes for addressing their staffing needs. Participants in the RAND expert panel reviewed the seventeen prior workload studies, the applicable professional and ethical standards, and other caseload research before arriving at their results.<sup>2</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 study categorized cases by type and assigned average time to completion.

The NPDWS study represents the first study and report on public defense caseloads. 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>3</sup> The current standards are not only not evidence-based, but also do not reflect the time needed to complete cases. Indeed, the most significant problem with the NAC—and by extension,

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<sup>2</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. 69-71).

<sup>3</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).

Washington—standards is that they vastly underestimate the time necessary to provide Constitutionally adequate defense.

The WSBA Counsel on Public Defense's (CPD) work on the Standards, particularly Appendix B, is the exact work that would need to be accomplished for a statewide study, according to Steve Hanlon, one of the authors of the NPDWS. The CPD's work was far more interdisciplinary and informed than the RAND approach. The CPD convened public defense lawyers, investigators, prosecutors, judges, and administrators; directors of Washington's public defense agencies; and law professors with expertise in criminal defense to discuss responses to increased caseloads. 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.

In February 2024, CPD sought input from attorneys, administrators, and support staff practicing in 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. 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 consistent with the RAND study. 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.

The last reason to avoid a study about caseloads is that there is insufficient consistent data to study. The states that conducted RAND studies relied on consistently reported data about public defense work. These studies were conducted in state-run public defense systems with centralized reporting. Washington has no statewide data to study. We don't know how many cases are assigned to public defenders statewide. We don't know how many full-time public defenders there are statewide. The lack of data makes a statewide study impossible in the immediate future. Systems would have to be developed and implemented to collect data before we could conduct a study, which would take years to complete. We don't have years to fix the problems that are impacting public defense today.

### Support for Studying the Costs of Implementation and Funding

Other comments propose studying the costs of implementation prior to beginning implementation. Great efforts have been made by local public defenders, OPD, and the State Association of Counties to assess costs of the proposed change in Standards. While I have no objection to further study of costs and means to fund implementation<sup>4</sup>, these studies should not delay implementation of the Standards. Public defenders are leaving the profession at alarming rates; many are staying in the profession because they believe the proposed Standards will be implemented and provide caseload relief. Delaying implementation will create additional uncertainty for public defenders and deter future retention. The Office of Public Defense has proposed implementing the Standards and conducting a mid-implementation study of staffing: this makes some sense, particularly given the concerns by local jurisdictions. But it should not delay implementation.

The proposed Standards are designed to be flexible. Appendix B was created with the insight and support of public defenders statewide. It is meant to reflect the time needed to effectively represent cases of each type. It assumes that as the law and workloads change, Appendix B will be routinely amended to reflect caseload changes. In practice, this means that if jurisdictions encourage public defenders to track billable hours, they could report their findings and lobby the CPD to amend the Appendix to reflect actual time worked. Allowing the WSBA to annually amend Appendix B with local data will, ideally, prevent the need for future overhauls to public defense caseloads.

### Support for Studying Data Collection and Public Defense Delivery Systems

The Court should ask the BJA, AOC, OPD, WSBA, and other Stakeholders to convene a workgroup to determine how better to track indigent defense cases. This could be accomplished through new reporting in JIS, through more detailed public defense attorney certifications pursuant to CrR 3.1, CrRLJ 3.1, or JuCr 9.2, or other methods. But we need to begin the conversation of how to get reliable data about public defense cases, public defense workloads, and number of public defenders.<sup>5</sup>

## **2. Statewide Standards**

Some commentators have suggested that some jurisdictions are exceptional and should be exempt from statewide standards. “Local practices ... are not relevant in evaluating the Sixth Amendment standard, which is a constitutional standard and not a regional standard.” *In re Brett*, 142 Wn.2d 868 (2001). There is no reason to believe that DUI practice in Yakima should take 8 hours less per case than it would in Asotin or Mason Co. Deviations from county to county are assumed in the average hours assigned to each case type in the NPDWS: this is the function of

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<sup>4</sup> See the alternate suggestions offered by the Washington State Office of Public Defense.

<sup>5</sup> I encourage the Court to review the Comments of Ann Christian and Eileen Farley, as well as the comments of OPD, and the Thurston Co Board of Commissioners for other suggestions.

using an average. A statewide standard prevents public defense lawyers from leaving jobs to other jurisdictions with more advantageous standards. A statewide standard also creates a floor and insulates public defense counsel and firms from the kinds of contracted caseload negotiated in Skagit Co that formed the facts for Wilbur v. City of Mt. Vernon, 989 F.Supp.2d 1122 (2013).

The only way standards work is if they are universally applicable. Exceptions to the state caseload Supreme Court or WSBA Standards should not be entertained.

### **3. Lawyer Shortage.**

I encourage the Court to implement the proposed Standards as soon as possible, despite voiced concerns for the shortage of lawyers. These concerns are real but exaggerated.

Worries about attorney shortage existed when the Court originally adopted CrR 3.1. A 2011 Justice Policy Institute reported that only 27% of counties in the United States reported having enough public defenders.<sup>6</sup> There is currently a shortage of lawyers in Yakima County resulting in unrepresented defendants. Attorney shortage is not a new thing to public defenders and should not deter this court. Public defense Directors and managers have spent years working around shortages and will do so again.<sup>7</sup> Compliance with the WSBA Standards would decrease caseloads, increase compensation, and lure new public defenders to the practice. If we wait for a surplus of lawyers willing to take poor pay in rural areas with excessive caseloads, we may be waiting a long time.

#### **Lawyer shortage due to poor compensation and high caseload**

Many jurisdictions comment about the inability to recruit new public defenders and discourage this Court to delay implementation because of a shortage of lawyers. There is not a shortage of lawyers; there are a shortage of lawyers willing to accept long hours at low wages without benefits. Large Seattle firms are successfully recruiting new graduates with competitive salaries that take into consideration current market conditions. Average hourly rate for criminal defense practice is close to \$500/hour, while some jurisdictions are paying \$300-\$400/case. These jurisdictions cannot recruit, largely due to non-competitive salary structures in conjunction with other factors, often caseloads.

The WSBA Standards address support services, training, supervision, workloads, salary and contract provisions that are critical to ensuring the availability of public defense attorneys and execution of the state's constitutional mandate to provide effective representation to those who qualify. Current and former public defenders who responded to a 2022 OPD job satisfaction survey indicated that caseloads and low pay and poor benefits are the primary reasons attorneys leave the practice. The proposed Standards before this Court attempt to address the problem of caseloads. This Court has little authority to address the conditions that result in poor pay, but the

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<sup>6</sup> System Overload: The Costs of Under-Resourcing Public Defense. Justice Policy Institute. July 2011.

<sup>7</sup> See Comments from The Washington Defender Association.

WSBA Standards attempt to resolve this problem. Revised Court rules mandating reduced caseloads, in conjunction with compliance with the new WSBA standards, will increase salary structures and should increase the number of applicants to the profession. In this sense, the proposed Standards are the solution to the lawyer shortage.

In the end, concerns about the number of lawyers should not impact an assessment of the number of hours that are needed by lawyers to complete public defense cases. The Standards reflect a value unrelated to the supply-side concern of the job market. The Standards themselves should not be evaluated on available resources; this was the failure of the NAC standards.

#### **4. Funding**

The area of greatest concern expressed in the Comments is the lack of funding for public defense. These concerns are real, and solutions must be found. But the lack of immediate solutions should not deter this Court from passing these Standards. In fact, codifying these Standards in the Court rule will give strong voice to the need for State funding to local public defense. It has already done so.

This Court could add its powerful voice to the choir of others who see the need for reform. The stronger our collective voice, the greater pressure it puts on the Legislature to act to fund essential, constitutionally mandated services. Were the Court to reject these Standards or the aggressive implementation timeline, the momentum towards reform would likely die with it.

Since the WSBA proposed these Standards, several Stakeholders have convened to discuss short and long-term methods for increasing state investment. I have personally met with individual prosecutors, judges, county councilmembers, city public defense administrators, representative from each branch of state government, and presented to over 7 professional organizations. Many are working State legislation in 2025 around public defense expenses and delivery.

The State Office of Public Defense has asked the legislature to quintuple the amount of passthrough money available to local jurisdictions for public defense work. This budget package, if passed, could cover the costs of the first year of implementation in most, if not all, jurisdictions. But continued work will need to be done to assure a long-term formula for public defense funding.

The proposed Standards have sparked conversations at the State and local level about funding that we must capitalize on; this can only be done by making the Standards part of the court rule in the near future.

#### **Investing in public defense can reduce other system costs.**

Public defense investments can reduce system costs and costs to defendants and victims.

There are five primary ways in which inadequate public defense systems can increase the number of people that are unnecessarily incarcerated, thereby increasing overall system costs: 1. more pretrial detention for people who do not need it; 2. increased pressure to plead guilty; 3. wrongful convictions and other errors; 4. excessive and inappropriate sentences that fail to take into account the unique circumstances of the case; and 5. increased barriers to successful reentry into the community. When incarceration increases, so do the costs to state and local jurisdictions. Investments in public defense can reduce these costs.

Investing in public defense also allows the State to pay for costs it is currently paying for in prison costs or externalizing to others. Currently, by underpaying and overworking public defenders, jurisdictions are forcing public defense lawyers to work longer hours without additional compensation. Every public defender who is working more than 14 hours on each felony case is, in essence, working for free and beyond the expectations of their funder, though certainly not their client. The costs are not only externalized to public defenders, but also to their clients and to prisons and jails, who house those defendant pre- and post-trial. By codifying these Standards in a court rule, the Court will make clear to the State that it, and not indigent persons or their lawyers, pay the cost of quality public defense.

The revised caseload standards will assure that criminal cases resolve in a timely manner, reducing court costs of lengthy litigation and providing more timely resolution for defendants and victims. The proposed Standards assumes that, when fully implemented, public defense attorneys will have the capacity to complete all of their assigned cases in a year. This aligns with the presumption that “90% of all criminal cases should be adjudicated within 4 months (120 days) of the date of filing the information, 98% within 6 months (180 days) of the date of filing the information, and 100% within 9 months (270 days) of the date of filing the information.”<sup>8</sup> These ambitious resolution deadlines from 1997 remain the focus of active discussion when addressing Courthouse COVID backlogs, and the proposed caseload standards would allow public defenders to meet these goals.

The proposed Standards would reduce downstream costs to jails and prisons and reduce delays in courtrooms statewide.

## **5. Conclusion**

The problems facing public defense in Washington are shared in every state and county in the United States. Seventeen States have adopted the RAND standards and are striving toward adoption to achieve the promise of Gideon v. Wainwright. I hope that Washington is the eighteenth state to adopt these caseload Standards.

We know from the Comments that law students across the Country are watching what this Court does as they consider future careers in public defense in our State. We know that legislators are looking to determine whether public defense will be an agenda item in 2025 or fall

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<sup>8</sup> ADVISORY CASE PROCESSING TIME STANDARDS FOR THE GENERAL AND LIMITED JURISDICTION TRIAL COURTS OF WASHINGTON STATE Board for Judicial Administration, Court Management Council. Sept. 1997

to the back-burner like prior years. Current public defenders struggling with caseloads or salary disparity look to this Court before considering leaving the profession. Most importantly, criminal defendants, who deserve effective and non-conflicted counsel, will be listening for this Court's commitment to equity, which it so powerfully stated in its open letter to the legal community after George Floyd's murder.

The WSBA proposed Standards reflect the thoughtful, deliberative, and multidisciplinary product of hundreds of state and national experts on public defense and Washington criminal law. By making these Standards part of our legal ecosystem soon, this Court will assure the future viability of the practice of public defense for future practitioners and their clients. Most importantly, it will assure that Washington is committed to fair and just legal outcomes and quality representation, regardless of income.

I greatly appreciate the amount of time, thought, and attention this Court has given to this issue. Please do not hesitate to contact me with any questions.

Regards,

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