



October 31, 2024

Clerk of the Washington Supreme Court
By email to supreme@courts.wa.gov

Dear Clerk and Justices:

I am writing to respond to some of the comments opposing the proposed Defender standards and to highlight ways that they can be implemented. As I and others have written, the changes in practice since the Court adopted the existing court rule on standards and the research resulting in the National Public Defense Workload Study make clear that Washington needs much lower caseload limits. I helped develop the new standards and I know how much work and thought were invested in them by a diverse group of experienced lawyers and staff.

It is often said that crisis presents opportunity. The Washington State Bar Standards and recommendation to the Court provide an opportunity to respond to the well documented crisis in public defense.

I would like to emphasize four points as the Court considers the comments it has received. These are in addition to asking the Court to recognize the absolute necessity of reducing the workload limits.

First, it is possible to implement the Standards.

Second, the Standards present an opportunity while adding public defense staff to make a parallel investment in diversion such as LEAD and its recognized navigator program.

Third, it is important to remember that the adults and children represented by public defense providers are disproportionately people of color and nearly all struggling in poverty. Relieving the workload pressure on their lawyers will help the lawyers to alleviate the impact of that disproportionality.

Fourth, there is no need for a new state-specific study in Washington on caseload standards.

Implementation is Possible

Opponents of the Standards claim that there is not enough money to hire more lawyers and there are not enough lawyers to fill the new positions. The first argument is not unlike arguments made about *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Yet Washington's local governments have provided public defense counsel to eligible people and they complied with the Court's rule. They developed diversion programs and increased their budgets.

But the resources of local governments are vastly different across the state. And increased state funding is needed to provide effective public defense services. The State of Michigan is an example of how locally based public defense can improve dramatically with state funding. Michigan distributed \$173,928,393.06 to local systems for public defense in Fiscal Year 2023.¹ Michigan's population of slightly more than 10 million compares to Washington's slightly more than 8 million people.² If Washington's legislature provided 80 per cent of Michigan's state funding for public defense, the resulting \$138 million would make a huge difference in local governments' ability to recruit and retain defenders. I understand that the Washington Office of Public Defense is requesting a major increase in funding for local governments. This Court could convene a meeting of key stakeholders to discuss how the state could increase its investment in public defense.

There is a possibility of federal funding for states that implement standards. The Equal Defense Act, HR 3758, was introduced by Rep. Bonamici.³ Washington stakeholders could advocate for that support.

The recommended phase-in of the standards over a three-year period would allow local governments to work with the legislature to increase available funding and to develop more robust alternatives to prosecution. Some jurisdictions already are close to the levels that would be required in the first year of implementation.

As has been emphasized in other comments, lower workloads would result in more new lawyers wanting to be defenders and more existing lawyers staying in the field. Based on my experience and my discussions with colleagues around the country, adoption of the new standards would attract experienced defenders from other states to want to work in Washington. And some of the defenders who left public defense would return.

¹ Michigan 2023 Indigent Defense Commission Annual Report, p. 12, available at <https://michiganidc.gov/wp-content/uploads/2024/02/2023-Annual-Impact-Report-Final.pdf>, last checked October 30, 2024.

² Washington state tops 8 million residents in 2024, Washington Office of Financial Management, available at <https://ofm.wa.gov/about/news/2024/06/washington-state-tops-8-million-residents-2024>, last checked October 30, 2024; Michigan population by county, available at <https://sfa.senate.michigan.gov/economics/michiganpopulationbycounty.pdf>, last checked October 30, 2024.

³ <https://www.congress.gov/bill/118th-congress/house-bill/3758/text?s=1&r=1&q=%7B%22search%22%3A%22equal+defense+act%22%7D>, last checked October 30, 2024.

It is important to recognize that while there would be new costs in implementing the standards, there are heavy costs now that are borne by the defenders and their staff, their clients and their families, when public defense providers are not able to give their clients the representation they need. Those costs are so heavy that the legal system is breaking down because defenders are leaving the field.

Increased Diversion Can Reduce the Demand for Defense Services

Washington does not need to re-invent the wheel to establish effective diversion programs. LEAD (Law Enforcement Assisted Diversion, Let Everyone Advance with Dignity) builds “a community-based alternative to jail and prosecution for people whose unlawful behavior stems from unmet needs related to substance use, mental health challenges, or extreme poverty.”⁴ A 2019 study concluded that “LEAD was associated with statistically significant reductions in criminal justice and legal system utilization and associated costs and represents a promising alternative to the criminal justice system for repeated, low-level drug and prostitution offenders.”⁵

The Washington Legislature already provides funds for LEAD programs. RCW 71.24.589. The Court could, in announcing a revised Court rule adopting the new Standards, refer to the success of LEAD and support a convening to address expansion of LEAD programs across the state.

In addition, there still is some low-hanging fruit in efforts to reduce the demand for public defense services. For example, while Seattle and King County and Snohomish County mostly do not prosecute criminally driving while license suspended in the third degree, which is primarily a crime of poverty, City of Mukilteo defenders reported on October 1, 2024, having 55 DWLS 3 cases out of a caseload of 135. The Vancouver Defenders reported having received 265 DWLS 3 cases from January 1, 2024, to October 17, 2024. For Vancouver, under the current court rule limit, that is approximately a full lawyer caseload that could be reallocated.

There are other cases that routinely result in dismissal after the accused person completes some classes or engages in treatment or completes a minor condition imposed in a community court. In Vancouver, that includes “unlawful camping” and “storage violation” cases. Providing these persons with services without charging them with a crime could avoid having to provide counsel for them and consuming valuable court time. And it could help them avoid re-arrest.

Reducing Defenders’ Workload Can Address Racial Disproportionality

In its June 4, 2020, Letter to the Judiciary and the Legal Community, the Court wrote, “we can administer justice and support court rules in a way that brings greater racial justice to our system

⁴ LEAD Support Bureau website, available at <https://leadbureau.org>, last checked October 30, 2024.

⁵ “Seattle’s law enforcement assisted diversion (LEAD): program effects on criminal justice and legal system utilization and costs”, Journal of Experimental Criminology (2019) 15:201–211, available at https://leadbureau.org/wp-content/uploads/2023/08/2019-LEAD-Eval_HaRRT-Peer-Reviewed.pdf, last checked October 30, 2024.

as a whole.” The American Bar Association’s Ten Principles of a Public Defense Delivery System (2023), Principle 10, states in part: “Public Defense Providers are in a unique position to identify and challenge unlawful or harmful conditions adversely impacting their clients.”⁶ Washington’s Performance Guidelines for Criminal Defense Representation (as amended 2020), Guideline 1.3 (d)⁷, state in part:

Counsel has a duty to identify and address systemic and individual race bias that may affect the client. ... Counsel should consider using empirical data to advocate for clients in pre-trial release hearings, motion practice, trial, and sentencing and any other hearings.

When defense counsel are overwhelmed and struggling to be ready for court appearances, they are not readily able to address race bias and to obtain and use empirical data in motion practice or otherwise. When they have time because their caseload is reasonable, they can meet the duty identified in the Guidelines. Adopting the court rule on standards proposed by the WSBA can bring greater racial justice to the courts.

There Is No Need for A New Workload Study

The Washington Council on Public Defense spent about two years working on the new standards passed by the WSBA Board of Governors. They were informed by the National Public Defense Workload Study and the 17 studies that preceded it. Together they have hundreds of years of public defense experience. I asked Steve Hanlon, one of the authors of the NPDWS, about the idea of a Washington-specific study. He replied, “I believe you have already adequately taken into consideration state and local conditions when you mapped your criminal code into the NPDWS Case Types.”

Conclusion

This Court has been a national leader, including in addressing racial justice and in supporting constitutionally required public defense. In *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956, 960 (2010), the Court relied on the WSBA Standards as a guide to determining effective assistance of counsel. It did so recognizing that “...in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.” The Court should recognize now that while the existing court rule limiting caseloads helped to improve public defense in response to its recognition in 2010, it needs to amend the rule now as recommended by the WSBA.

Adopting the court rules on standards proposed by the WSBA will strengthen and bring greater fairness to the legal system. It is possible to implement the rules, and the Court can assist in that process by convening discussions about diversion and funding options.

⁶ Available at

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-princ-pd-web.pdf, last checked October 30, 2024.

⁷ Available at https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-criminal-defense-rep-sept-2020-final.pdf?sfvrsn=3fae0bf1_0, last checked October 30, 2024.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Boruchowitz". The signature is fluid and cursive, with the first name "Robert" and last name "Boruchowitz" clearly distinguishable.

Robert C. Boruchowitz WSBA 4563
Professor from Practice